SEPARATE OPINION OF JUDGE MAHIOU

[Translation]

Application for revision — Admissibility of the Application — Article 61 of the Statute of the Court — Notion of "fact" — Existence or non-existence of a new fact — Membership in the United Nations — Jurisdiction ratione personae, ratione materiae *and* ratione temporis *of the Court — Admission to the United Nations and consequences — Genocide Convention — Conduct of the Applicant — Fault of the Applicant*

1 While fully subscribing to the Court's concise reasoning and conclusions, I wish to enlarge on my agreement by briefly addressing several points, some of which are not raised in the Judgment, since the Court found that there was no new fact and that a ruling on these points, or for that matter on the other requirements under Article 61 of the Statute of the Court, would therefore be superfluous

Yugoslavia relies on three allegedly decisive "facts" to found its Application for revision of the Court's Judgment of 11 July 1996; it claims to have discovered in 2000 that it was not amenable to the jurisdiction of the Court at the date of the Judgment because

— it was not a Member of the United Nations,
— it was not a party to the Statute of the Court,
— it was not bound by Article IX of the Genocide Convention of 9 December 1948,
— and these facts were known neither to Yugoslavia nor to the Court

2 Without wishing at this stage to enter into a complex semantic debate on the notion of "fact" (see in particular the valuable comments by Mr. S. Torres Bernárdez, former Registrar of the Court, in "A propos de l'interprétation et de la revision des arrêts de la Cour internationale de Justice", *Mélanges en l'honneur de R Ago*, 1987, Vol III, pp 473-478) and simply proceeding from the basic definition given in all dictionaries, notably those of public international law, I note that a fact is an event which occurred, which took place at a given point in time. From this basic, common-sense definition a crucial element stands out the existence or objective reality of the fact, and hence the Court's ascertainment or finding that it did indeed happen, or that it occurred at an appropriate time such as to enable it to be invoked

3 Now, what can be said of the three "facts" relied upon by Yugoslavia? To begin with, the physical or objective reality of these three "facts" is not immediately apparent, nor has it come to light later In a manner of speaking, they are not raw facts whose existence and ascertainment are inescapable; rather, they are the product of a process of interpretation

and representation. They are invoked only as a result of the occurrence of a separate, subsequent, fact, this one indisputable: the decision on 1 November 2000 to admit Yugoslavia to the United Nations. In other words, from an established fact occurring in 2000 Yugoslavia infers by means of an intellectual construct that other "facts" did not exist in 1996 or that they were different in nature. But, although appearing logical, this retrospective intellectual construct proves unfounded, notably in relation to the requirements of Article 61 of the Statute of the Court. In reality, Yugoslavia in its reasoning relies on the admission decision in 2000 to advance an argument in the form of a syllogism: in order to be a party to the Statute of the Court, a State must be a Member of the United Nations; Yugoslavia was not a Member of the United Nations in 1996, hence, Yugoslavia was not a party to the Statute of the Court or amenable to its jurisdiction. However, if the syllogism is to hold, each of the premises must be true, if not, the syllogism is invalid.

4. While it is true that, subject to Article 35 of the Statute, a State must normally be a Member of the United Nations in order to be a party to the Statute of the Court, the second premise, that Yugoslavia was not a Member of the United Nations between 1992 and 1996, and the conclusion, i.e., that it was not amenable to the jurisdiction of the Court, remain to be proved. They beg the question, based as they are on the mere assumption that Yugoslavia's admission to the United Nations in 2000 means that it was not a Member before then, notably during the period between the seisin of the Court and the 1996 Judgment. But this assertion, arrived at by highly abstract reasoning on the basis of an *argumentum a contrario*, actually obscures the facts, namely the complexities and uncertainties affecting Yugoslavia's status during that period, as witnessed not only by the debates before the various United Nations organs, the statements by the United Nations Under-Secretary-General and the position of the Court, but also and above all by the conduct of Yugoslavia itself.

5. After having long interpreted these complexities and uncertainties as not precluding it from being a Member of the United Nations, Yugoslavia reinterprets and re-characterizes them, for purposes of its Application in 2001, as factors disproving its membership in the United Nations. But the facts are the same and, while still ambiguous, and therefore open to conflicting interpretations, they are unchanged. It has only been Yugoslavia's intellectual representation of the facts and its position which have changed, a change made with a view to seeking revision of the Judgment of 11 July 1996. Since the facts remain the same, it is clearly difficult to discern any new facts justifying an application for revision. A new representation of the same reality does not transform it into a new fact. As stated in the award rendered by the Franco-German Mixed Tribunal on 29 July 1927 in the *Baron de Neuflize* case

"revision is not warranted by criticism of a legal doctrine or by a different assessment of the facts, or even by both, but solely by a lack of information concerning the facts" (*Recueil des décisions des tribunaux arbitraux mixtes*, VII, p 632)

6 Moreover, assuming that the hypothetical "facts" resulting from inference and a new representation match the reality, are they "new" within the meaning of Article 61 of the Statute of the Court? Although it cites three "new facts", Yugoslavia's Application in effect is based essentially on a single, purportedly "new", "fact", inferred *a contrario* from its admission to the United Nations on 1 November 2000 namely, that it did not belong to the United Nations at the time of the Judgment This, it would appear, is the only "fact" — from which the other two are claimed to follow — that could serve as the basis for an application for revision Assuming further, as a working hypothesis, that this construct, which infers from a fact occurring in 2000 the existence — or rather non-existence — of a different fact in 1996, is accepted, was the discovery or awareness of it new? Ultimately, that is the question it is not the fact itself which is inherently or objectively new, it is the knowledge of that fact which must be new to the party relying upon it or to the Court which handed down the Judgment Is that the case here?

7 In respect of Yugoslavia, the debate as to whether or not it was a Member of the United Nations started immediately after its break-up, that debate grew even more heated after its declaration of 27 April 1992 that it continued the State and the international legal personality of the former Socialist Federal Republic of Yugoslavia The other States arising out of the former Yugoslavia sharply attacked that declaration on various, essentially political, grounds, notably and specifically in respect of membership in the United Nations They maintained that the new Yugoslavia must be on an equal footing with them, that it could not be the continuator State of the former Yugoslavia, of which they also were part, and that it should apply for membership and become a successor State on the same basis as them

8 The debate was taken up in the Security Council and the General Assembly, both of which refused to recognize automatic continuity, required an application for membership and suspended Yugoslavia's participation in the work of the General Assembly That was when the problem of membership in the United Nations entered a grey area, being insusceptible of clear resolution, as was confirmed by the Under-Secretary-General's letter of 29 September 1992 All the various positions taken, whatever their legal status and whatever actual or potential self-contradictions they might contain, are clear evidence not only that this fact is not new but that it had been of concern to Yugoslavia, to the other States resulting from its break-up and to the international community,

including the United Nations The United Nations put an end to one uncertainty when Yugoslavia finally decided to apply for membership as from 1 November 2000, Yugoslavia has effectively been a Member of the United Nations That is beyond doubt and clarifies one problem for the future but it does not resolve, and does not retroactively undo, the prior situation, namely the differences of opinion concerning Yugoslavia's status vis-à-vis the United Nations before its admission on 1 November 2000 True, the "complexity", "difficulties" or "inconsistencies" of the situation which was created at the time and persisted may be regrettable, but that situation did exist, and that remains the case today

9. Thus, between 1992 and 1996 the fact was perfectly well known to everyone, particularly to the party relying on it today, even though there may have been great uncertainty as to the exact solution to be applied to the problem raised. In any event, there were enough substantial, troublesome indices to alert Yugoslavia and to prompt it to reflect upon its position vis-a-vis the United Nations Under other circumstances, more favourable indeed to the Applicant in some respects, the Court has not hesitated to reject the contention that the fact relied upon was unknown and to draw inferences from the lack, or insufficiency, of diligence in becoming aware of the fact Thus, in the *Fisheries* case, in which the United Kingdom contended that it was unaware of an 1869 Norwegian Decree concerning the delimitation of the territorial sea, the Court stated "as a maritime Power traditionally concerned with the law of the sea and concerned particularly to defend the freedom of the seas, the United Kingdom could not have been ignorant of the Decree of 1869" (*I C J Reports 1951*, p 139) In another case, that 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)*, the Court was critical of Tunisia for having failed, in respect of the delimitation of a Libyan concession, to seek "to know the co-ordinates of the Concession, so as to establish the precise extent of the encroachment on what it regarded as Tunisian continental shelf" (*I C J Reports 1985*, p 205, para 24) Yet in the present case not only was the debate as to whether or not Yugoslavia was a Member of the United Nations no secret to anyone, it lay at the heart of international debate, engendering an uncertainty which at that time could only lead to further debate regarding Yugoslavia's international relations, including its status vis-à-vis the Statute of the Court and the Genocide Convention This is unlike the situation cited in the United States-Mexico claim in the *Shreck* case, where an arbitral award had been founded on the erroneous assumption that the claimant was a United States citizen when he was in fact a citizen of Mexico, the discovery of the true nationality was a new fact which had been unknown to the tribunal and which justified the request for reconsideration (see J B Moore, *History and Digest of the International Arbitrations to which the*

United States has been Party, 1898, Vol II, p 1357) The position here is different, more like that of the United Kingdom or Tunisia, Yugoslavia should have given more serious consideration during the proceedings to its conduct and, in particular, should have looked to the Court, at the appropriate time and in a more justifiable way, for a solution to the problem.

10 If the problem was thus clearly known to the party now seeking revision, it was in consequence also clear to the Court, once the Court had been called upon to rule on the request for the indication of provisional measures for purposes of its Order of 8 April 1993 Without at the time making an issue of this point, Yugoslavia admits — as is moreover recalled in its Application instituting proceedings — the "complexities" and "controversies" characterizing its position vis-à-vis the United Nations, nor did these escape the Court In adjudicating upon its jurisdiction and the admissibility of the Application, the Court was aware of all the potential issues of fact and law, but it considered it unnecessary in the circumstances, in order to make its ruling, to address the issue of Yugoslavia's status One of the recitals in the Court's Order is particularly revealing in this regard

> "Whereas, while the solution adopted is not free from legal difficulties, the question whether or not Yugoslavia is a Member of the United Nations and as such a party to the Statute of the Court is one which the Court does not need to determine definitively at the present stage of the proceedings" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I C J Reports 1993*, p 14, para 18)

11 If the Court, in its subsequent consideration of the case, was not required, and rightly so, to concern itself with the issue of membership in the United Nations, that was not only because Yugoslavia did not ask it to do so but also because Yugoslavia persisted in its position, maintaining the "uncertainties and dilemmas" (see Yugoslavia's Application of 24 April 2001, p 16), the "[c]ontroversies and dilemmas" (*ibid*, p 20), the "mixed signals" (*ibid*, p 24) and the "complexities and dilemmas" (*ibid*, p 26) to which it makes repeated reference in its Application for revision

12 Further, even after filing the Application for revision of the Judgment of 11 July 1996, Yugoslavia remained just as equivocal and self-contradictory in its conduct, for, at the same time as it was denying the Court's jurisdiction and claiming not to be bound by the Genocide Convention, it was, and still is, the Applicant in other cases before the Court Thus, in submitting and justifying the Applications of 29 April 1999 against ten NATO members (Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, the United Kingdom and the United

States of America) in the cases concerning *Legality of Use of Force*, Yugoslavia invokes the same bases of jurisdiction as those relied on by the Court in its 1996 Judgment, namely Yugoslavia's declaration recognizing the compulsory jurisdiction of the Court and Article IX of the Genocide Convention, and it was on those same bases that the Court made its Orders of 2 June 1999 on the requests for the indication of provisional measures Eight of these ten cases are still pending before the Court, while the other two Applications, against Spain and the United States, were dismissed on account of the specific reservations to the Genocide Convention made by those two States

13 Moreover, the scope and length of the debate over Yugoslavia's membership in the United Nations show that everyone was aware of this fact, even though views differed, as noted above, as to the exact way in which the problem should be resolved. These differences of opinion are the very evidence which makes it impossible to speak of a fact that was "new" and unknown to the party seeking revision and to the Court, which referred to it in its Order of 8 April 1993 and rendered its 1996 Judgment in full awareness of it, but without addressing it, because it had not been requested to do so and it was unnecessary for it to do so

14 In conclusion, without there being any need to raise the issue of *forum prorogatum* already debated in connection with the additional requests for the indication of provisional measures in 1993 (see in particular the separate opinion of Judge *ad hoc* Lauterpacht, *I C J Reports 1993*, pp 416-421) and with the preliminary objections in 1996, it is apparent that there is no new fact but simply a new presentation or characterization of the same reality by Yugoslavia, whose conduct has changed for the better — at which all should rejoice — without however effacing its earlier misconduct Even though the question of its status was pending before the United Nations throughout the duration of the proceedings before the Court, not only did Yugoslavia fail to seek ways and means to clarify the situation but it has continued to maintain the uncertainty, prolonging it up to the present day, as stated in paragraph 12 above Today's authorities in Yugoslavia were not the source of the misconduct, which is attributable to their predecessors, but that changes nothing in terms of responsibility, for the fault is one attributable to the State concerned, notwithstanding that there has been a change of régime and the beginnings of a change in legal policy

(Signed) Ahmed MAHIOU