INTERNATIONAL COURT OF JUSTICE

APPLICATION

INSTITUTING PROCEEDINGS

filed in the Registry of the Court
on 24 April 2001

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)

COUR INTERNATIONALE DE JUSTICE

REQUÊTE

INTRODUCTIVE D'INSTANCE

enregistrée au Greffe de la Cour
le 24 avril 2001

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)

2000
General List
No. 122

I. THE FEDERAL MINISTER FOR FOREIGN AFFAIRS OF THE FEDERAL REPUBLIC OF YUGOSLAVIA TO THE REGISTRAR OF THE INTERNATIONAL COURT OF JUSTICE

Belgrade, 24 April 2001.

I am pleased to inform you that Professor Tibor Varady, Chief Legal Advisor, Federal Ministry of Foreign Affairs, and Mr. Vladimir Djerić, Advisor to the Federal Minister for Foreign Affairs, have been appointed as Agents in the proceedings relating to the Application for Revision of the Judgment of 11 July 1996 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*.

(Signed) Goran SVILANOVIĆ.

II. THE AGENT OF THE FEDERAL REPUBLIC OF YUGOSLAVIA TO THE REGISTRAR OF THE INTERNATIONAL COURT OF JUSTICE

24 April 2001.

I have the honour to submit to the Court the Application for Revision of the Judgment of 11 July 1996 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*, dated 23 April 2001, as well as one volume of Annexes [1].

The Application is filed in accordance and within the time-limit set out in Article 61 of the Statute. In accordance with the respective Rules and practice of the Court, I submit a certified copy of the Application.

I am pleased to certify that the copies of the annexed documents are true copies of the originals.

(Signed) Professor Tibor VARADY,
Agent of the Federal Republic of Yugoslavia
before the International Court of Justice.

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[1] See footnote on page 58. *[Note by the Registry.]*

III. APPLICATION INSTITUTING PROCEEDINGS

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A. Short Summary of the Relief Sought and of the Ground for Relief

1. In its Judgment of 11 July 1996 in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, dealing with preliminary objections, the Court found that it had jurisdiction *ratione personae* over Yugoslavia on ground of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide. This ruling was explained in paragraph 17 of the Judgment. Paragraph 41 states that the Court was unable to uphold any additional basis of jurisdiction other than the one provided by Article IX of the said Convention.

In this Application the Government of the Federal Republic of Yugoslavia (hereinafter: "the FRY") argues that this honoured Court did not have and does not have jurisdiction over Yugoslavia in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (hereinafter: "*Bosnia-Herzegovina* v. *Yugoslavia*").

2. Applicant shall argue that this submission is admissible on the following ground:

> the facts and the circumstances of the case provide adequate foundation for an Application for Revision of the Judgment of 11 July 1996 on ground of Article 61 of the Statute of the Court.

3. Applicant shall argue that there are three clear and conclusive reasons which lead to the conclusion that this honoured Court has no jurisdiction over the FRY in the present case:

(a) The FRY was not a Member of the United Nations on 20 March 1993 when the Application of the Republic of Bosnia and Herzegovina was filed, or at any later moment until the Judgment of 11 July 1996 was rendered (nor was it a Member thereafter, until 1 November 2000);

(b) The FRY was not a State party to the Statute of this Court on 20 March 1993, or at any later date until the Judgment of 11 July 1996 was rendered (nor was it a Member thereafter, until 1 November 2000). Also, the FRY never submitted a declaration in pursuance to Article 35 of the Statute and in accordance with the resolution of the Security Council of 15 October 1946, which declaration could have represented a basis for jurisdiction over the FRY as a non-party to the Statute;

(c) The FRY was not a contracting party to the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter: "the Genocide Convention") on either 20 March 1993 or at any later moment until the rendering of the Judgment of 11 July 1996. (Nor has it been a Contracting State thereafter, until this date.) According 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. The FRY was not a Member of the United Nations until 1 November 2000, and it never received an invitation from the General Assembly to sign or accede. Furthermore, the FRY never accepted Article IX of the Genocide Convention. (The FRY did send a notification of accession on 8 March 2001, which has not yet become effective — and which makes a reservation to Article IX.)

B. Background and Sequence of the Relevant Facts

The Cessation of the SFRY, and Courses of Action Taken by Successor States in Order to Acquire or Confirm Statehood

4. During 1992 the Socialist Federal Republic of Yugoslavia (hereinafter: SFRY) ceased to exist. Former republics of the SFRY took different courses of action endeavouring to acquire or confirm statehood. The former Government of the FRY insisted on *continuity* and asserted that it continued the statehood and personality of the SFRY. Before 27 October 2000, the FRY did not seek admission to the United Nations, and did not give notifications of accession to treaties, neither did it give notifications of succession to the treaties ratified by the SFRY (as other successor States did). The FRY asserted instead that it was a Member of the United Nations automatically (continuing the membership of the SFRY), and suggested that it also continued treaty membership of the SFRY automatically. The former Government of the FRY stressed repeatedly that the FRY (consisting of Serbia and Montenegro) continued the statehood of the SFRY from which other republics had seceded.

5. This was first stated in a Declaration [1] sent to the General Assembly of the United Nations. This Declaration was adopted on 27 April 1992 at a joint session of the Assembly of the SFRY [2], the National Assembly of the Republic of Serbia, and the Assembly of Montenegro. In the text it was indicated that this was a Declaration of "the representatives of the people of the Republic of Serbia and the Republic of Montenegro" — at the end of the text, "the participants of the joint session" were identified as signatories. The opening sentence of this Declaration stresses that the citizens of Serbia and Montenegro expressed their common will "to stay in the common state of Yugoslavia". The underlying political idea which conditioned the opinions expressed in the Declaration was clearly the perception that Yugoslavia continued to exist, that the FRY was the same State as the SFRY, and continued the identity of the SFRY.

The purpose of the Declaration was to state the views of the participants on policy objectives. As stressed in the introductory part of the Declaration:

> "Remaining strictly committed to the peaceful resolution of the Yugoslav crisis, wish to state in this Declaration their views on the basic, immediate and lasting objectives of the policy of their common state, and its relations with the former Yugoslav Republics."

The first "view" stated was the one which was cited and relied upon by the Court in its Judgment of 11 July 1996:

> "The Federal Republic of Yugoslavia, continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the SFR of Yugoslavia assumed internationally."

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[1] See the text of the Declaration in Annex 1.

[2] At that time, it was contested whether the SFRY and its National Assembly still existed.

The Declaration was brought to the attention of the United Nations by a Note. The sender was identified as "Permanent Mission of the Socialist Federal Republic of Yugoslavia (Federal Republic of Yugoslavia)". The Note stresses that under the newly promulgated Constitution

> "[o]n the basis of the continuing personality of Yugoslavia and the legitimate decisions by Serbia and Montenegro to continue to live together in Yugoslavia, the Socialist Federal Republic of Yugoslavia is transformed into the Federal Republic of Yugoslavia, consisting of the Republic of Serbia and the Republic of Montenegro."

This Note considers the FRY to be a founding Member of the United Nations [3].

The postulate of continuity was consistently maintained and reiterated by the former Government of the FRY.

6. Other former republics of the SFRY adopted a different approach, seeking admission to the United Nations and to other international organizations *as new States*. The approach taken by Bosnia-Herzegovina, and by other former republics with the exception of Serbia and Montenegro, resulted in their United Nations membership. Bosnia-Herzegovina was admitted to the United Nations as a new Member on 22 May 1992 [4].

At the same time, these former republics — and specifically Bosnia-Herzegovina — contested the assertion that the FRY continued the membership of the SFRY in the United Nations and in other international organizations, and contested that the FRY sustained the international standing, rights and obligations of the SFRY on the assumption of continuity.

To cite an example, when the standing of the FRY became an issue in the General Assembly of the United Nations, in the debate which preceded General Assembly resolution 47/1 (1992), Mr. Šaćirbej, the Representative of Bosnia-Herzegovina stressed:

> "[t]he former Socialist Federal Republic of Yugoslavia has ceased to exist. Serbia and Montenegro are not legally entitled to succeed to the position of the former Socialist Federal Republic of Yugoslavia. This is applicable to this body as well as to other similar international organizations." [5]

The FRY's claim to continuity was consistently denied by other successor States of the former SFRY. To cite just one more example, on 28 October 1996, the Permanent Representatives of Bosnia-Herzegovina, Croatia, Macedonia and Slovenia wrote a letter to the Secretary-General, in which they once again challenged the concept of continuity and automatic succession of the FRY, and contested that the FRY could become a Member of the United Nations otherwise but by seeking admission as other successor States did. After referring to Security Council resolution 777/1992 of 19 September 1992, the Permanent Representatives asserted that:

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[3] Note dated 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations addressed to the Secretary-General, UN doc. A/46/915 (Annex 2).

[4] Security Council resolution 755 (1992) and General Assembly resolution 46/237 (Annex 3).

[5] UN doc. A/47/PV.7, at p. 156 (Annex 4).

"All states that have emerged from the dissolution of the former Socialist Federal Republic of Yugoslavia, which has ceased to exist are equal successor States. The Federal Republic of Yugoslavia (Serbia and Montenegro) also has to follow the procedure for admission of new Member States to the United Nations which would enable the Organization to make its judgment on whether the conditions set out in Article 4 of the Charter of the United Nations are met." [6]

International Responses to the FRY's Claim to Continuity

7. The claim of United Nations membership on the assumption of continuity advanced by Yugoslavia was met by a mixed response. On 19 September 1992, the Security Council adopted its resolution 777, in which it was stated:

"*Considering* that the State formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist,

Recalling in particular its resolution 757 (1992) which notes that 'the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted',

1. *Considers* 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 and that it shall not participate in the work of the General Assembly;

2. *Decides* to consider the matter again before the end of the main part of the forty-seventh session of the General Assembly." [7]

Security Council resolution 777 (1992) is obviously an argument against continuity, but not without some vagueness. (It recalls that Yugoslavia's continuity claim "has not generally been accepted", and decides that the matter will be considered again.)

Resolution 47/1 (1992) of the General Assembly of 22 September 1992 states that the General Assembly:

"Considers 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 decides that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly;

Takes note of the intention of the Security Council to consider the matter again before the end of the main part of the forty-seventh session of the General Assembly." [8]

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[6] UN doc. A/51/564-S/1996/885 (Annex 5).
[7] See the full text in Annex 6.
[8] See the full text in Annex 7.

This resolution represents again a strong argument against continuity. At the same time, however, not consistent with the logic of the basic position taken (the FRY will only become a Member after it applies and gets admitted), the consequence which is spelled out ("shall not participate in the work of the General Assembly") is limited; it is much more narrow than what would follow from the elementary fact that the FRY is simply not yet a Member of the United Nations. Some further uncertainty is created by taking note of the intention of the Security Council to reconsider the matter.

8. The uncertainties and dilemmas became even more pronounced in the light of further developments. On 29 April 1993 the General Assembly adopted resolution 47/229 in which the Assembly decided that "the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not participate in the work of the Economic and Social Council" [9]. This measure does not make much sense on the assumption that the FRY never was a Member of the United Nations; it looks more like the suspension of certain rights of a Member. (If the FRY were not a Member of the United Nations, it could *ipso facto* not participate in any of the United Nations organs.)

Some other measures and decisions gave (at least arguably) even some direct support to the contentions of the FRY — and added to the intricacy of the matter. In a letter of the Under-Secretary-General and Legal Counsel of the United Nations to the Permanent Representatives to the United Nations of Bosnia-Herzegovina and Croatia, it was stated in connection with General Assembly resolution 47/1 that:

> "On the other hand, the resolution neither terminates nor suspends Yugoslavia's membership in the Organization. Consequently the seat and nameplate remain as before, but in Assembly bodies representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot sit behind the sign 'Yugoslavia'. Yugoslav missions at United Nations Headquarters and offices may continue to function and may receive and circulate documents. At Headquarters, the Secretariat will continue to fly the flag of the old Yugoslavia as it is the last flag of Yugoslavia used by the Secretariat." [10] (This letter is reproduced in more detail in this Application in paragraph 15, presenting portions as they were cited by the Court in its Order of 8 April 1993.)

Furthermore, even after the adoption of Security Council resolution 777 and General Assembly resolution 47/1 (1992), the Secretary-General, as depositary of multilateral treaties, listed Yugoslavia without any footnotes or explanations [11]. One could possibly explain the reference to Yugoslavia in two ways — none of which explanation is really satisfactory. This could be a reference to the former SFRY, but this interpretation would be most difficult to reconcile with Security Council resolution 777 of 19 September 1992 in which it was clearly stated that *the SFRY ceased to exist.* In the understanding of the FRY,

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[9] See Annex 8.

[10] UN doc. A/47/485, Annex. See the full text of this letter in Annex 9.

[11] See e.g. the annual report from the year in which the Judgment was rendered, in "Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 1996", at p. 3, UN doc. ST/LEG/SER.E/15 (Annex 10).

the designation "Yugoslavia" had a different meaning, it was a reference to the FRY — but this understanding also encounters difficulties, since the General Assembly resolution 47/1 referred to above states 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".

What added to the confusion (and offered added support to the position taken by the FRY) was the fact that the list of conventions deposited with the Secretary-General of the United Nations in which there was a reference to "Yugoslavia" as a party included not only conventions regarding which treaty action was taken by the SFRY, but also conventions regarding which treaty action was taken after April 1992 by the FRY [12].

The complex and unresolved nature of the whole matter prompted initiatives to seek an advisory opinion from the Court, but no such request was ever submitted [13].

Membership Dues Paid to the United Nations

9. Another indication supporting the FRY's claim to continued membership (and creating dilemmas) could be found in the circumstance that membership dues were requested by the United Nations, and paid to the United Nations by the FRY. On 22 December 1997, for example, the General Assembly adopted resolution 52/215 on "Scale of assessments for the apportionment of the expenses of the United Nations". This resolution starts with the following introduction:

> "*Recognizing* the obligation of Member States under Article 17 of the Charter of the United Nations to bear the expenses of the Organization as apportioned by the General Assembly".

"Yugoslavia" was on the list of Member States among which apportionment was made. The contributions expected from Yugoslavia were: 0.060 for 1998, 0.034 for 1999, and 0.026 for 2000 [14]. The only practically possible addressee of this duty of paying membership contributions for 1998-2000 was the Federal Republic of Yugoslavia.

Furthermore, specific requests were sent to the representatives of the FRY for payment of membership dues [15], such dues were indeed paid by the FRY,

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[12] See Annex 11 — "List of Conventions deposited with the Secretary-General of the United Nations to which Yugoslavia is a signatory or participant", at pp. 1-4, shows those treaty actions which were identified by the Secretary-General as treaty actions of "Yugoslavia", and which were undertaken after the SFRY was dissolved and after the FRY was formed.

[13] For example, during the meeting of the General Assembly of 22 September 1992, Mr. Nyakyi suggested on behalf of the United Republic of Tanzania to refer the matter of the standing of the FRY to the International Court of Justice for an advisory opinion. See UN doc. A/47/PV.7, at p. 177 (Annex 12).

[14] See General Assembly resolution 52/215 — the text of this resolution is presented as Annex 13.

[15] See letters of the United Nations Secretary-General requesting membership dues in 1994, 1995, 1996, 1997, and 1998 (Annex 14).

and receipt vouchers were issued confirming payment made by the Government of the FRY [16].

The Issue of Continuity and the Membership of the FRY in Treaties

10. Controversies and dilemmas were extended to treaty membership of the FRY as well after April 1992. Bosnia-Herzegovina (together with Croatia and Slovenia) continuously argued that the FRY could not be regarded as a party to treaties because the FRY could not automatically continue the legal personality of the FRY, and because the FRY had not formally succeeded to the treaties. This logic extends to all treaties to which the SFRY was a party, and to which the FRY did not succeed or accede by a proper notification. The argument was raised in particular in connection with human rights treaties.

11. To give an illustration of the argument, in its *Aide Mémoire* of 14 January 1994, the Permanent Mission of Croatia to the United Nations stressed :

> "Since the so-called 'Federal Republic of Yugoslavia' (Serbia and Montenegro) has not notified the Secretary-General of its succession to the International Convention on the Elimination of All Forms of Racial Discrimination as one of the successor states of the former SFRY, it cannot be considered as one of the parties to the said convention. Therefore, as a non-party, the said delegation has no right to participate at the fifteenth meeting of the State Parties to the International Convention on the Elimination of All Forms of Racial Discrimination." [17]

12. As a result of such initiatives and actions, the FRY was barred from attending meetings of States parties to treaties. This pattern can be demonstrated on many examples. During the 18th Meeting of States parties to the International Covenant on Civil and Political Rights on 16 March 1994, according to the minutes of the Meeting, Mr. Šaćirbej moved on behalf of Bosnia-Herzegovina and proposed "[t]hat the State parties should decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should not participate in the work of the Meeting of the States parties to the Covenant" [18].

This proposal was supported by Mr. Türk, the representative of Slovenia, who argued that :

> "[t]he Federal Republic of Yugoslavia (Serbia and Montenegro) continued to assert the automatic continuity of the legal personality of the former Socialist Federal Republic of Yugoslavia, a State that had ceased to exist. This assertion had been disputed by the other successor States and by other members of the international community. Under the circumstances, the Federal Republic of Yugoslavia was attempting to take advantage of the international treaties and concerns of the international community for human rights to buttress its assertion of automatic continuity of the

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[16] See, for example, the receipt voucher confirming the payment made by the Government of the FRY in the amount of US$588 476 — value date 16 September 1998 (Annex 15).

[17] UN doc. CERD/SP/51, at p. 3 (Annex 16).

[18] UN doc. CCPR/SP/SR.18, at p. 3, para. 2 (Annex 17).

former Socialist Federal Republic of Yugoslavia. Slovenia believed that such an assertion should be rejected, and for that reason he would support the proposal of Bosnia and Herzegovina." [19]

Mr. Matešić, the representative of Croatia added that:

"If the Federal Republic of Yugoslavia (Serbia and Montenegro) wished to be considered a party to the Covenant, it must notify the Secretary-General, in his capacity as depositary of international treaties, of its succession as one of the successor States of the former Socialist Federal Republic of Yugoslavia. Currently it was not a party thereto, and thus had no right to participate in the Meeting." [20]

After these arguments, Bosnia-Herzegovina's proposal to exclude the FRY from the Meeting was adopted by 51 votes for, 1 against and 20 abstentions [21].

13. This sequence of arguments and events was repeated on a number of occasions. During the 19th Meeting of the States parties to the International Covenant on Civil and Political Rights, Mr. Mišić, the representative of Bosnia-Herzegovina, proposed that "the States Parties should decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should not participate in the work of the meeting of the States Parties to the Covenant" [22]. This proposal was endorsed and further explained by the representative of Croatia (Mr. Matešić) who stated that the FRY

"[h]ad not notified the Secretary-General, in his capacity as the depositary of international treaties, of its accession to the Covenant. That State, therefore, should not be allowed to participate in the meetings of State parties." [23]

The motion of Bosnia-Herzegovina was adopted, and the FRY was barred from participation [24]. Consistent with denial of membership, the FRY informed the Human Rights Committee that it would refuse to submit its fourth periodic report [25].

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[19] UN doc. CCPR/SP/SR.18, at p. 3, para. 3.
[20] *Ibid.*, at p. 6, para. 21.
[21] *Ibid.*, at p. 7, para. 23.
[22] UN doc. CCPR/SP/SR.19 (9 December 1994), at p. 3 (Annex 18).
[23] *Ibid.*, at p. 4.
The same argument was advanced by both Bosnia-Herzegovina and Croatia on other occasions as well. For example, in Croatia's *aide-mémoire* sent to be circulated at the 13th Meeting of the State Parties to the ICCPR, Croatia stressed:

"Since the Federal Republic of Yugoslavia (Serbia and Montenegro) has not notified the Secretary-General of its succession to the International Covenant on Civil and Political Rights as one of the successor States of the former Socialist Federal Republic of Yugoslavia, it cannot be considered to be a party to the said Covenant. Therefore, as a non-party, the said delegation has no right to participate in the thirteenth meeting of States parties to the International Covenant on Civil and Political Rights."

See UN doc. CCPR/SP/40, at p. 3 (Annex 19).
[24] UN doc. CCPR/SP/SR.19, at p. 8 (Annex 18).
[25] Report of the Human Rights Committee, UN doc. A/50/40, para. 53 (Annex 20).

The Issues of Continuity and of the Standing of the FRY in the United Nations and in International Treaties, as They Have Arisen before This Court

14. This Court was also confronted with the predicament of mixed signals when facing the issue of the membership of the FRY in the United Nations and the question as to whether it was a State party to the Statute of the Court and to the Genocide Convention. At the time when this Court rendered its Order regarding the Request for the Indication of Provisional Measures on 8 April 1993 — just as at the time of the Judgment of 11 July 1996 — it was common ground that the FRY did not seek acceptance to the membership of either the United Nations, or to the Statute, or to the Genocide Convention [26].

The FRY vigorously contested the jurisdiction of the Court, but did so on other grounds, without raising the issue of the FRY's membership and standing.

15. This Court had faced and recognized these issues in its Order of 8 April 1993 dealing with provisional measures. Since with respect to provisional measures there was no need to take a conclusive position, the Court introduced its considerations on jurisdiction by stating in paragraph 14:

> "Whereas on a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, ..."

The dilemmas regarding jurisdiction *ratione personae* were investigated in paragraph 15 of the Order. It was observed that the Application stated that both Bosnia-Herzegovina and the FRY were members of the United Nations and of the Statute, but added at the same time that continuity of the FRY with the SFRY (the assumption on which the FRY based its claim for membership) "has been vigorously contested by the entire international community".

In the following paragraphs the Court scrutinized various acts of the United Nations in order to clarify the question of (continued or other) membership of Yugoslavia in the United Nations and to the Statute. The persisting dilemma was convincingly mirrored in the letter of the Under-Secretary-General and Legal Counsel of the United Nations of 29 September 1992 addressed to the Permanent Representatives to the United Nations of Bosnia-Herzegovina and Croatia. Relevant parts of this letter cited in the Order read as follows:

> "While the General Assembly has stated unequivocally that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot automatically continue the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations and that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations, the only practical consequence that

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[26] The FRY did not apply for United Nations membership until 27 October 2000; on 8 March 2001 the FRY presented a Notification of Accession to the Convention on the Prevention and Punishment of the Crime of Genocide — with a reservation on Article IX (see Annex 28).

the resolution draws is that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not participate in the work of the General Assembly. It is clear, therefore, that representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) can no longer participate in the work of the General Assembly, its subsidiary organs, nor conferences and meetings convened by it.

On the other hand, the resolution neither terminates nor suspends Yugoslavia's membership in the Organization. Consequently, the seat and nameplate remain as before, but in Assembly bodies representatives of the Federal Republic of Yugoslavia cannot sit behind the sign 'Yugoslavia'. Yugoslav missions at the United Nations Headquarters and offices may continue to function and may receive and circulate documents. At Headquarters, the Secretariat will continue to fly the flag of the old Yugoslavia as it is the last flag of Yugoslavia used by the Secretariat. The resolution does not take away the right of Yugoslavia to participate in the work of organs other than Assembly bodies. The admission to the United Nations of a new Yugoslavia under Article 4 of the Charter will terminate the situation created by resolution 47/1." [27]

Considering the complex and rather controversial indications, the Court found it more appropriate not to adopt a conclusive position regarding the FRY's continued membership in the United Nations and standing as a party to the Statute, and formulated the following conclusion in paragraph 18 of the Order (following the citation from the letter of the Under-Secretary-General):

"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 proceedings." [28]

(In the following section, considering the option described in Article 35 of the Statute — and staying within the ambit of prima facie considerations — the Court investigated another possible basis for jurisdiction, and noted that

"whereas accordingly if Bosnia-Herzegovina and Yugoslavia are both parties to the Genocide Convention, disputes to which Article IX applies are in any event prima facie within the jurisdiction *ratione personae* of the Court") [29].

The Applicant believes that it is fair to say that given the quite unprecedented complexities and controversies regarding the issue of the membership of the FRY in international organizations and to international treaties, the Court was not in a position to conclude in its Order whether the membership (or the lack of membership) of the FRY in the United Nations and in relevant treaties, was an established fact.

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[27] UN doc. A/47/485 — as cited in paragraph 17 of the Court Order of 8 April 1993 (*I.C.J. Reports 1993*, 3 at pp. 13-14).
[28] Court Order of 8 April 1993 (*I.C.J. Reports 1993*, 3 at p. 14).
[29] *Ibid.*

16. In the Judgment of 11 July 1996, dealing with the issue of jurisdiction over the FRY *ratione personae* — and facing a situation which was still not clarified — the Court relied on the Declaration of the FRY Government in which the assumption of continuity was asserted. In paragraph 17 of the Judgment, the Court first established that the Genocide Convention was signed and ratified by the SFRY, and then established a link, adding that the FRY adopted a formal declaration on 27 April 1992 to the effect that:

> "The Federal Republic of Yugoslavia, continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all commitments that the Socialist Federal Republic of Yugoslavia assumed internationally." [30]

Following the same line of argument, the Court observes:

> "This intention thus expressed by Yugoslavia to remain bound by the international treaties to which the former Yugoslavia was a party was confirmed in an official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary General."

To this, a supporting observation was added: "The Court observes, furthermore, that it has not been contested that Yugoslavia was a party to the Genocide Convention." This observation was not developed further, and it was not posited as a possible independent basis of jurisdiction.

It may be true that the concept of continuity was never explicitly articulated by the Court itself, but it is also true that the Court relied exactly on declarations stressing the assumption of continuity in determining jurisdiction *ratione personae* over the FRY. It may not be crystal clear what impact the position of the Court has on the former FRY Government's claim regarding continuity; it is absolutely clear, however, that the hypothesis that the FRY was *not* a Member of the United Nations, and that it was *not* a Member State to the Statute or to the Genocide Convention, was not perceived and was not recognized as a fact by either the FRY or by the Court until and at the time when 11 July 1996 Judgment was rendered.

Continued Lack of Clarity and Continued Lack of Conclusive Facts regarding the Status of the FRY

17. Controversies and conflicting signals continued after the 11 July 1996 Judgment as well. To cite just one example, on 8 December 1999, three successor States of the SFRY (Bosnia-Herzegovina, Croatia, and Slovenia) joined by Jordan, Kuwait, Malaysia, Morocco, Qatar and Saudi Arabia, submitted a draft resolution with the endeavour to clarify the ambiguous position of the FRY in the sense of denying the proposition of continuity. The submitted proposal explains that "the abbreviated name 'Yugoslavia' as used by the United Nations, refers only to the former Socialist Federal Republic of Yugoslavia". According to this draft resolution, the General Assembly should declare that it

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[30] Citation from paragraph 17 of the 11 July 1996 Judgment (*I.C.J. Reports 1996*, 595 at p. 610).

"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 the 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]

Had the issue been settled one way or the other, it would have been easy to endorse or to discard this draft resolution which proposes to accept all consequences of the proposition that there was no continuity. Instead, the EU suggested that the States submitting the proposal should "refrain from tabling their draft resolution". In explaining this position, citing "serious legal and political difficulties", the EU submits that such a resolution "takes a piecemeal approach to the question that was on purpose suspended" [32].

Conclusive clarification was once again postponed.

Conclusive Clarification of the Standing of the FRY in the United Nations and in International Treaties

18. The consistent and repeated endeavours of the former Government of the FRY to gain access to the United Nations and to other international organizations, as well as to treaty membership on the assumption of continuity, remained by and large without success. There were some residual membership rights in the United Nations, there were continued references to "Yugoslavia" in various listings (which may have plausibly been interpreted in more than one way, including the interpretation that this was a reference to the FRY) [33]. In other words, the FRY's claim that it remained a member of international organizations and treaties "continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia" did receive some encouragement, there were some positive signals, but no conclusive acceptance. What followed were dilemmas and controversies around membership rights, but practically no assured membership rights proper.

In this situation, the new Government of Yugoslavia took the only remaining course of action. On 27 October 2000, President Koštunica addressed a letter to the Secretary-General requesting admission of the FRY to the membership of the United Nations [34]. In this letter President Koštunica refers to Security Council resolution 777 [35] which describes the lack of

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[31] See UN doc. A/54/L.62 (Annex 21).
[32] See the text of a non-paper circulated by the EU, in Annex 22.
[33] See paragraphs 8-9 above.
[34] See Annex 23.
[35] See Annex 6.

unanimity and certainty regarding the FRY's claim of continuity ("the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted"), and which resolution suggests that the FRY should apply for membership in the United Nations.

The course of action which the United Nations followed was that established by Article 4 of the United Nations Charter and by Article 134 of the Rules of Procedure of the General Assembly, provided for acceptance of *new Members*.

Following the procedure established by Article 4 of the United Nations Charter, the request of the FRY reached the Security Council Committee on the Admission of New Members, and this Committee recommended to the Security Council the adoption of a resolution which would recommend the admission of Yugoslavia [36]. Upon recommendation of the Security Council, the General Assembly decided on 1 November 2000 to admit the FRY to membership of the United Nations [37].

19. The decision of the General Assembly of 1 November 2000 finally dismissed the dilemmas and uncertainties, and put an end to the theory that the FRY may have been a Member of the United Nations before 1 November 2000 "continuing the State, international legal and political personality of the SFRY". A new fact took shape. The FRY became a new Member of the United Nations (clearly implying that it was not a Member earlier).

After the FRY was admitted as a new Member on 1 November 2000, the dilemmas have been resolved, and a period ended in which contradictory indications allowed different interpretations. It was not veiled anymore, but became an unequivocal fact that the FRY did not continue the personality of the SFRY, and was not a Member of the United Nations before 1 November 2000. According to the most recent (updated 18 December 2000) List of Member States published by the United Nations, "Yugoslavia" appears as a Member State, the date of admission indicated is 1 November 2000.

An explanatory note states:

> "The Socialist Federal Republic of Yugoslavia was an original Member of the United Nations, the Charter having been signed on its behalf on 26 June 1945 and ratified 19 October 1945, until its dissolution following the establishment and subsequent admission as new members of Bosnia and Herzegovina, Croatia, the Republic of Slovenia, The former Yugoslav Republic of Macedonia, and the Federal Republic of Yugoslavia.
>
> The Federal Republic of Yugoslavia was admitted as a Member of the United Nations by General Assembly resolution A/RES/55/12 of 1 November 2000." [38]

(The very same explanatory note is added after Bosnia-Herzegovina, Croatia, Slovenia and Macedonia.)

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[36] UN doc. S/2000/1051 (Annex 24).

[37] See Security Council resolution 1326 (2000) and General Assembly resolution 55/12 (Annex 25).

[38] See www.un.org/Overview/unmember.html (Annex 26).

20. Following admission, by a letter of the Legal Counsel of the United Nations of 8 December 2000 [39], the FRY was invited to decide whether or not to assume rights and obligations of the former SFRY in international treaties. In this letter, the Legal Counsel states:

> "It is the Legal Counsel's view that the Federal Republic of Yugoslavia should now undertake treaty actions, as appropriate, in relation to the treaties concerned, if its intention is to assume the relevant legal rights and obligations as a successor State."

Thus in December 2000 the FRY came to a position to choose whether to succeed and confirm, or whether not to succeed and not to confirm treaty actions of the former SFRY.

21. On 8 March 2001 as a new Member of the United Nations, the FRY sent to the Secretary-General of the United Nations a Notification of Accession to the Convention on the Prevention and Punishment of the Crime of Genocide in pursuance of Article XI of the said Convention [40]. This Notification includes a reservation on Article IX. The text of the Notification reads as follows:

> "NOTIFICATION OF ACCESSION TO THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE (1948)
>
> WHEREAS the Federal Republic of Yugoslavia had declared on April 27, 1992, that 'the Federal Republic of Yugoslavia, continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally',
>
> WHEREAS this contention of continuity also included the assumption that the Federal Republic of Yugoslavia continued the membership in the United Nations of the Socialist Federal Republic of Yugoslavia,
>
> WHEREAS the contention and assumption of continuity was eventually not accepted by the United Nations, nor was it accepted by other successor States of the Socialist Federal Republic of Yugoslavia, and thus it produced no effects,
>
> FURTHERMORE this situation became finally clarified on November 1, 2000 when the Federal Republic of Yugoslavia was accepted as a new member State of the United Nations,
>
> NOW it has been established that the Federal Republic of Yugoslavia has not succeeded on April 27, 1992, or on any later date, to treaty membership, rights and obligations of the Socialist Federal Republic of Yugoslavia in the Convention on the Prevention and Punishment of the Crime of Genocide on the assumption of continued membership in the United Nations and continued state, international

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[39] See Annex 27.
[40] See Annex 28.

legal and political personality of the Socialist Federal Republic of Yugoslavia,

THEREFORE, I am submitting on behalf of the Government of the Federal Republic of Yugoslavia this notification of accession to the Convention on the Prevention and Punishment of the Crime of Genocide, in pursuance of Article XI of the said Convention and with the following reservation on Article IX of the said Convention: 'The Federal Republic of Yugoslavia does not consider itself bound by Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, and, therefore, before any dispute to which the Federal Republic of Yugoslavia is a party may be validly submitted to the jurisdiction of the International Court of Justice under this Article, the specific and explicit consent of the FRY is required in each case.'

[Signed by Goran SVILANOVIĆ, Minister of Foreign Affairs.]"

In a note of 21 March 2001, the Secretary-General confirmed the receipt of the instrument of accession sent by the Government of the FRY. The note of the Secretary-General states:

"The above instrument was deposited with the Secretary-General on 12 March 2001, the date of this receipt.

Due note has been taken of the reservation contained in the instrument.

In accordance with Article XIII (3), the Convention will enter into force for Yugoslavia on the ninetieth day following the date of deposit of the instrument, i.e., on 10 June 2001." [41]

C. ADMISSIBILITY OF THE APPLICATION FOR REVISION OF THE JUDGMENT OF 11 JULY 1996, ON GROUND OF ARTICLE 61 OF THE STATUTE

22. Article 61 (1) of the Statute of the International Court of Justice states:

"(1) An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence."

The requirements of admissibility of an application for revision are, thus, the following:

(a) the application has to be based on a new fact of such a nature as to be a decisive factor, and

(b) this has to be a fact which was unknown to both the Court and to the party claiming revision at the time when the judgment was given.

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[41] See the full text of the Note of the Secretary-General in Annex 29.

C.1. New Fact "of such a nature to be a decisive factor"

23. The admission of the FRY to the United Nations as a new Member on 1 November 2000 is certainly a new fact. It can also be demonstrated, and the Applicant submits, that this new fact is of such a nature as to be a decisive factor regarding the question of jurisdiction *ratione personae* over the FRY.

After the FRY was admitted as a new Member on 1 November 2000, dilemmas concerning its standing have been resolved, and it has become an unequivocal fact that the FRY did not continue the personality of the SFRY, was not a Member of the United Nations before 1 November 2000, was not a State party to the Statute, and was not a State party to the Genocide Convention. Since membership in the United Nations, combined with the status of a party to the Statute and to the Genocide Convention (including its Article IX), represent the only basis on which jurisdiction over the FRY was assumed, and could be 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.

The 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. 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.

Applicant further 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. The FRY asserts that no alternative basis existed or could have existed. Theoretically, there are two bases which could serve as a precondition for the jurisdiction of the Court to be extended to a non-Member of the United Nations or a non-party to the Statute. These are set in Article 93 (2) of the United Nations Charter and in Article 35 (2) of the Statute respectively. The Applicant shall demonstrate that under the circumstances of the case it is absolutely clear that neither of these two grounds could have justified jurisdiction over the FRY.

The FRY has not become a party to the Statute on ground of Article 93 (2) of the United Nations Charter

24. It is generally understood that the International Court of Justice is open to the States which are parties to the Statute (Article 35 (1) of the Statute). Article 93 (1) of the United Nations Charter states that all Members of the United Nations are *ipso facto* parties to the Statute. Accordingly, States which are not Member States of the United Nations are not Member States to the Statute (or, at least not automatically). Article 93 (2) provides one possible way in which a non-Member of the United Nations may become a party to the Statute, and it also specifies the requisite conditions:

> "A State which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council."

It is uncontested that the FRY never applied to become a party to the Statute under Article 93 (2) of the Charter, and it is also uncontested that the Security Council and the General Assembly never had such a claim or initiative on their agenda. Accordingly, it is obvious that the FRY did not become a Member State of the Statute under Article 93 (2) of the United Nations Charter and jurisdiction could not have been asserted over the FRY by reliance on Article 93 (2).

Jurisdiction over the FRY could not have been established on ground of Article 35 (2) of the Statute

25. According to Article 35 (2):

> "The conditions under which the Court shall be open to other States [i.e. States which are not parties to the Statute] shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court."

This provision is quite clear. Access is in principle possible to a State which is not a party to the Statute, but only on conditions laid down by the Security Council, and subject to special provisions contained in treaties in force.

The Security Council laid down appropriate conditions and procedures in its resolution of 15 October 1946[42]. Section (1) of the resolution states:

> "The International Court of Justice shall be open to a State which is not a party to the Statute of the International Court of Justice, upon the following condition, namely, that such State shall previously have deposited with the Registrar of the Court a declaration by which it accepts the jurisdiction of the Court, in accordance with the Charter of the United Nations and with the terms and subject to the conditions of the Statute and Rules of the Court, and undertakes to comply in good faith with the decision or decisions of the Court and to accept all the obligations of a Member of the United Nations under Article 94 of the Charter."

The resolution specifies further that such a declaration may be particular (accepting the jurisdiction in one particular case) or general ("accepting the jurisdiction generally in respect of all disputes or of a particular class of disputes which have already arisen or which may arise in the future"). It is also added that a State when making a declaration in pursuance of the Security Council resolution of 15 October 1946 and under Article 35 (2) of the Statute, may also in accordance with Article 36 of the Statute recognize as compulsory the jurisdiction of the Court.

It is perfectly clear that Article 35 (2) and the Security Council resolution of 15 October 1946 only provides for *explicit* declarations as a vehicle through which the jurisdiction of the Court may be extended to a non-party to the Statute. Moreover, the content of such declarations is predetermined, and so is their form (submission to the Registrar). This means that only such party behaviour, i.e. such party declarations which are identified by the Security Council as a sufficient condition, may bring a party within the Court's scope of

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[42] See Annex 30.

authority. Other party conduct — like bringing a claim, defending or not defending a claim, submitting a counterclaim, raising or not raising an objection — are without consequence and cannot yield jurisdiction over a party who is not a party to the Statute.

The FRY never deposited with the Registrar of the Court any declaration within the meaning of Article 35 (2) of the Statute and complying with the 15 October 1946 Security Council resolution. No declaration whatsoever (complying or non-complying with the Security Council resolution) concerning jurisdiction over the FRY was deposited before the Judgment of 11 July was rendered.

26. On 25 April 1999, the former Government of the FRY submitted a declaration regarding jurisdiction. The text of the Declaration reads:

> "I hereby declare that the Government of the Federal Republic of Yugoslavia recognizes, in accordance with Article 36, paragraph 2, of the Statute of the International Court of Justice, as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, that is on condition of reciprocity, the jurisdiction of the said Court in all disputes arising or which may arise after the signature of the present Declaration, with regard to the situations or facts subsequent to this signature, except in cases where the parties have agreed or shall agree to have recourse to another procedure or another method of pacific settlement. The present Declaration does not apply to disputes relating to questions which, under international law, fall exclusively within the jurisdiction of the Federal Republic of Yugoslavia, as well as to territorial disputes.
>
> The aforesaid obligation is accepted until such time as notice may be given to terminate the acceptance." [43]

It is clear that this Declaration cannot be regarded as a declaration made within the meaning of Article 35 (2) and it cannot possibly have any bearing on this case for the following reasons:

(a) It is not a declaration made in pursuance of Article 35 (2) of the Statute and Security Council resolution of 15 October 1946. Instead of making a declaration as a State which is not a party to the Statute and wants to avail itself access to the Court, the former Government of the FRY purported to use an opportunity which is only open to parties to the Statute. The declaration was made under and with explicit reference to Article 36 (2) of the Statute on the assumption that the FRY was a party to the Statute.

(b) Supposing that the Declaration of 25 April 1999 produced effects, it could not have had effects on this case because of the terms of the Declaration itself. By its own terms the Declaration clearly restricts its application to disputes arising after the signature of the Declaration (which means after 25 April 1999), and to "situations and facts subsequent to this signature" (i.e. situations and facts emerging after 25 April 1999). Furthermore, the acceptance of jurisdiction in the Declaration is conditioned by reciprocity — and this requirement is not satisfied regarding Bosnia-Herzegovina.

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[43] See "Multilateral Treaties Deposited with the Secretary-General, Status as at 30 April 1999", at pp. 13 and 28, UN doc. ST/LEG/SER.E/17 (Annex 31).

27. To summarize: The Declaration of 25 April 1999 is not a declaration made under Article 35 (2) of the Statute in pursuance of which a non-party of the Statute could possibly invoke the jurisdiction of the Court. Whatever the nature of the Declaration is, it is without effects in the present case. Even if it had effects, these effects are clearly restricted by the terms of the Declaration itself to future disputes and future events, and it could not have any effects on the *Bosnia-Herzegovina* v. *Yugoslavia* case.

Even under a most extensive reading of Article 35 (2), considering the facts of this case, jurisdiction over the FRY cannot be established on ground of "special provisions contained in treaties in force"

28. In its Order of 8 April 1993 concerning the Request for the Indication of Provisional Measures, the Court mentions another conceivable basis on which jurisdiction could be assumed over a non-party to the Statute. In paragraph 19 of this Order after citing Article 35 (2) of the Statute, the Court took the following position:

> "whereas the Court therefore considers that proceedings may validly be instituted by a State against a State which is a party to such a special provision in a treaty in force, but is not a party to the Statute, and independently of the conditions laid down by the Security Council in its resolution 9 of 1946 ...".

The Court found that the compromissory clause of Article IX of the Genocide Convention could be regarded prima facie as a relevant "special provision contained in a treaty in force". Taking as a possible assumption that both Bosnia-Herzegovina and Yugoslavia could be[44] parties to the Genocide Convention including its Article IX, the Court concluded that "[d]isputes to which Article IX applies are in any event prima facie within the jurisdiction *ratione personae* of the Court".

This interpretation of Article 35 (2) could conceivably allow jurisdiction *ratione personae* over the FRY even without the FRY being a Member of the United Nations and a party to the Statute (assuming that the FRY could have become a Contracting Party of the Genocide Convention otherwise). One has to bear in mind, however, that the findings of the Court in its Order are *prima facie findings* and they are indicated as such, thus they are reviewable and they are not conclusive. Furthermore, the wording is not unconditional. Moreover, the FRY respectfully submits the contention that: *(a)* this interpretation goes beyond the meaning of Article 35 (2), and *(b)* even if this interpretation were the correct one, it cannot result in jurisdiction *ratione personae* over the FRY given the facts of the case.

29. The Applicant submits that a treaty provision cannot in itself provide for access to the Court to a non-Member of the Statute without such elementary conditions as those provided in Security Council resolution 9 of 1946. A

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[44] The language of the Court is:

> "whereas accordingly *if* [emphasis supplied] Bosnia-Herzegovina and Yugoslavia are both parties to the Genocide Convention, disputes to which Article IX applies are in any event prima facie within the jurisdiction *ratione personae* of the Court", *I.C.J. Reports 1993*, 3 at p. 14.

party which is not a Member of the United Nations and is not a party to the Statute is not bound, for example, by Article 94 (1) of the United Nations Charter which obliges each Member of the United Nations to comply with the decision of the Court in any case to which it is a party. It is exactly for these reasons that Security Council resolution 9 of 1946 specified the elements of a declaration which may result in jurisdiction over a non-party to the Statute [45]. Furthermore, the principle of equality of the parties is one of the most pervasive principles underlying procedure before any court. In order to safeguard this principle between States which are parties to the Statute and States which are not, Article 35 (2) stresses that the conditions laid down by the Security Council shall in no case place the parties in a position of inequality before the Court. It is evident that inequality would emerge if some parties to proceedings before the Court would not be bound by conditions which parties to the Statute already accepted. The International Court of Justice was established by the United Nations Charter "as the principal judicial organ of the United Nations" (Article 1 of the Statute). It can only adjudicate disputes involving States which are Member States of the United Nations, or States which have accepted conditions laid down by organs of the United Nations.

30. The reference to "special provisions of treaties in force" should be understood in the context of the drafting history of the Statute. A convincing explanation was provided by Sh. Rosenne. He recalls that Article 35 (2) of the Statute contains the same provision as the corresponding provision of the Permanent Court (with only one word changed in order to bring the English text in line with the French) [46]. Rosenne continues by observing that:

> "The expression in paragraph 2 of the Statute of the Permanent Court *subject to special provisions of treaties in force* apparently was intended to refer to the Peace Treaties after the First World War. They contained several provisions giving the Permanent Court jurisdiction over disputes arising from them, and they were in force before that Statute was adopted. Article 35, paragraph 2, made it possible for litigation to take place with the former enemy Powers despite the fact that at the time the Protocol was adopted, they were not qualified to become parties to that instrument. Accordingly, *'in force'* meant that the treaty had to be in force on the date of entry into force of the Statute of the Permanent Court (taken as 1 September 1921)." [47]

He reiterates the same point later in the text by stressing:

> "Since no change of substance was introduced in 1945, the words subject to the special provisions of treaties in force in the present Statute

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[45] In order to safeguard equality, the resolution makes it clear that that declaration of acceptance has to specify that it was made

> "in accordance with the Charter of the United Nations, and with the terms and subject to the conditions of the Statute and Rules of the Court, and undertakes to comply in good faith with the decision or decisions of the Court and to accept all the obligations of a Member of the United Nations under Article 94 of the Charter".

[46] Sh. Rosenne, *The Law and Practice of the International Court, 1920-1996*, Vol. II, at p. 628.

[47] Rosenne, *op. cit.*, at p. 629.

> should be interpreted as meaning treaties that were in force on the date when the Statute entered into force, that is 24 October 1945." [48]

That the phrase "treaties in force" was intended to have a limited meaning was also confirmed by Judges Anzilotti and Huber [49]. During the discussion on the Revision of the Rules of the Permanent Court (Eleventh Session, Twenty-Second Meeting), the record states that Anzilotti stressed:

> "[t]he peace treaties in certain cases imposed the Court's jurisdiction on the central States; in other cases these States had been given the right of themselves instituting proceedings before the Court. That being so, to allow the Council to impose other conditions would amount to modifying the peace treaties, which could not be done. The clause in question had in mind the peace treaties."

Anzilotti added that

> "[t]here is a reason which made it impossible to read the clause as covering everything except special agreements: for it would be difficult to understand why a privileged position should be accorded, for instance to Turkey and Russia, supposing that, tomorrow, they were to come before the Court under a treaty concluded between them" [50].

President Huber agreed with Anzilotti and stated that "[t]he exception stated in Article 35 could only be intended to cover situations provided for by the treaties of peace" [51].

31. Even if one were to adopt, for argument's sake, a broader interpretation of Article 35 (2), and even if jurisdiction could be assumed over a non-party to the Statute on ground of Article IX of the Genocide Convention only, this could not justify jurisdiction *ratione personae* over the FRY.

After 1 November 2000 it became clear that the FRY did not continue the SFRY's membership in the United Nations, and did not become party to the treaties which were ratified by the SFRY. Accordingly, the FRY did not continue the membership of the SFRY in the Genocide Convention either. Moreover, according to Article XI of the Genocide Convention, the FRY 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. The prohibition of genocide may very well be a principle which must not be disregarded by anyone, but this does not necessarily mean that the specific provisions of the Convention are automatically binding, and it certainly does not mean that the procedural stipulations of the Genocide Convention (like that of Article IX) are binding without specific acceptance.

The FRY expressed its intention to become a party to the Genocide Convention only in its Notification of Accession on ground of Article XI (3) of the Convention (which provides for new accessions). This did not happen before the 11 July 1996 Judgment was rendered; this happened on 8 March 2001. The documents of accession were received by the Secretary-General on

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[48] Rosenne, *op. cit.*, at p. 630.

[49] See *PCIJ, Series D (Acts and Documents concerning the Organization of the Court, No. 2 — Add.)*, at pp. 104-106.

[50] *PCIJ, Series D, No. 2 (Add.)*, at p. 105.

[51] *PCIJ, Series D, No. 2 (Add.)*, at p. 106.

12 March 2001. Due note has been taken of the reservation contained in the instrument of accession. The Secretary-General informed the FRY that the Convention will enter into force regarding the FRY on 10 June 2001.

Accession has no retroactive effect. Even if it had a retroactive effect, this cannot possibly encompass the compromissory clause in Article IX of the Genocide Convention, *because the FRY never accepted Article IX, and the FRY's accession did not encompass Article IX.* What the FRY did accept is the Genocide Convention without Article IX. In its Notification of Accession the FRY made an unequivocal reservation to Article IX. (There is a significant number of parties to the Genocide Convention which accepted the Convention with reservation on Article IX. Today — after some countries withdrew their reservation — Yugoslavia belongs to a group of 16 countries which made the reservation, and have maintained this reservation so far [52].) The reservation made by the FRY reads:

> "The Federal Republic of Yugoslavia does not consider itself bound by Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide and, therefore, before any dispute to which the Federal Republic of Yugoslavia is a party may validly be submitted to the jurisdiction of the International Court of Justice under this Article, the specific and explicit consent of the FRY is required in each case."

It clearly follows that even if one were to adopt an extensive interpretation of Article 35 (2) of the Statute including treaties which came to force after the adoption of the Statute, and even if Article IX of the Genocide Convention could be considered as one of such "special provisions contained in treaties in force", *the jurisdiction of the Court could not be based on this "special provision" because it was never accepted by the FRY.*

It follows that:

32. The fact that the FRY gained admission to the United Nations on 1 November 2000 as a new Member (instead of continuing the membership of the SFRY since April 1992) put the issue of jurisdiction *ratione personae* over Yugoslavia in an entirely different perspective and context. The assumption of the continued membership in the United Nations and continued status as party to the Genocide Convention, which came to expression in the Declaration of the former Government of the FRY, was critical, because there was no other assumption which could justify jurisdiction over the FRY *ratione personae.*

The new facts have brought conclusive clarification to the effect that:

(a) The FRY was not a Member of the United Nations before 1 November 2000.

(b) The FRY did not become a party to the Statute on ground of Article 93 (2), or on any other ground before the Judgment of 11 July 1996 was rendered, or at any later date before 1 November 2000.

(c) The FRY was not and is not a contracting party to the Genocide Convention. (It is expected to become a party on 10 June 2001 with a reservation to Article IX.)

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[52] Algeria, Argentina, Bahrain, Bangladesh, China, India, Malaysia, Morocco, Rwanda, Singapore, Spain, the United States of America, Venezuela, Viet Nam, Yemen — and the FRY.

Furthermore, the FRY did not become at any time subject to the jurisdiction of the Court on ground of Article 35 (2) of the Statute.

The assumption of a continued membership of the FRY and continued standing as a party to the Statute and to the Genocide Convention (continuing the membership and the standing of the SFRY) were the only assumptions on which jurisdiction ratione personae *over the FRY could have been based. A fact which gives decisive evidence of the reversal of this assumption is therefore clearly a decisive factor.*

C.2. Fact "unknown to the Court and to the party claiming revision at the time of the judgment"

33. The fact that the FRY was admitted to the United Nations as a new State on 1 November 2000 was obviously unknown to both the Court and to the Applicant at the time of the 1996 Judgment.

The Applicant believes that this is quite sufficient to confirm that this condition to the admissibility of the request for revision ("unknown to the Court and to the party claiming revision") was satisfied.

In our case, this new fact becomes relevant in the following way. There was a genuine dilemma as to whether the FRY did or did not continue the membership of the SFRY in the United Nations and the status of the SFRY as party to the Statute and to the Genocide Convention. This dilemma was resolved by the new fact of admission of the FRY to the United Nations as a new State, and by accession of the FRY to the Genocide Convention, again as a new State. The new fact — clearly unknown earlier — has become decisive because it confirmed a different resolution of the dilemma — not the one which served as an assumption in the Judgment.

34. For the sake of argument, the Applicant wants to demonstrate that the dilemma was a legitimate one, the position taken by the FRY regarding continuity with the SFRY was not a frivolous one, or one based on negligence. The FRY was consistent in asserting this position which was corroborated by some facts and circumstances, while it was challenged by some other facts and circumstances. All facts and circumstances relating to the issue of continuity were a matter of public record, equally accessible to the Court and to the parties. There are no facts or circumstances which the FRY would have, or could have, withheld, since the issue was that of the international recognition of the FRY's claim on continuity with the SFRY. The essence of the matter is that, before the status of the FRY was finally clarified, these facts and circumstances did allow different conclusions, and the possible solutions were — in the words of the Court — "not free from legal difficulties" [53].

35. The concept of continuity advanced by the former Government of the FRY proved to be wrong, but it was not implausible and it was not the product of some manipulation. To the contrary, since the FRY arduously contested the jurisdiction of the Court, it would have been in its interest to show that the FRY did not continue the membership of the SFRY in the United Nations and did not continue automatically to be a party to the Statute and to the Genocide Convention.

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[53] *Bosnia and Herzegovina* v. *Yugoslavia*, Request for the Indication of Provisional Measures, Order of the Court of 8 April 1993, para. 18.

The sequence of events proved that the assumption of continuity eventually failed. But it has to be said that it was a principled position which had at least some support in facts. The mixed signals coming from the United Nations and from the international community (see paragraphs 8-9) gave reasons to the FRY to persist and to expect that the inconsistencies will eventually be resolved in favour of the proposition of continuity. Yugoslavia maintained some limited participation in the work of the United Nations, the Yugoslav flag was kept in front of the United Nations Headquarters, Yugoslavia was still listed as a Member to treaties of which the Secretary General is a depositary. Interpreting the listing of "Yugoslavia" as a reference to the FRY (in spite of the fact that the General Assembly and the Security Council did not adopt the proposition of continuity), was certainly not less logical than the understanding that this reference continues the membership of a State which undeniably ceased to exist. Seeking of payment by the United Nations and actual payment of membership dues *by the FRY* could not have been discarded as a symbolic gesture towards the (non-existing) SFRY.

The expectations of the FRY were not met. But the dilemmas persisted until 1 November 2000 when it became clear the FRY became a new Member of the United Nations and that it was not a Member before. After the letter of the Legal Counsel of 8 December 2000 [54] it also became clear and confirmed that the FRY was not a Member of the treaties on ground of the fact that they were ratified by the SFRY, but could gain access to these treaties as a new State, by notifications of succession or accession.

D. Conclusion

36. Until the date of the 11 July 1996 Judgment, the FRY never declared, indeed never even suggested, that it would be bound by treaties otherwise than on the assumption of continuing the personality of the SFRY. As one of the successor States of the SFRY, the FRY had an option to join treaties by a notification of succession, but it did not do so. The FRY, like any other State, also had an option to join treaties by notifications of accession, but failed to do so.

37. On 1 November 2000, the FRY became a Member of the United Nations as a new State. Thereby, it also became a party to the Statute of the Court. On 8 March 2001 the FRY submitted to the Secretary-General a notification seeking accession to the Genocide Convention with reservation to Article IX. After years of conflicting signals from various actors and indications which never became conclusive, it became clear that the FRY did not continue the membership of the SFRY in the United Nations, neither did it continue the status of the SFRY as a State party to the Statute and as a State party to the Genocide Convention. Consequently, it also became clear that from the moment the FRY was constituted on 27 April 1992, until 1 November 2000, the FRY was not a Member of the United Nations, it was not a State party to the Statute, and until 8 March 2001 it did not accede to membership of the

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[54] See Annex 27.

Genocide Convention. (When it did submit a notification of accession, it did so without accepting Article IX.)

38. This sequence of changes is clearly demonstrated in official records. Until December 2000, official listings of the United Nations included Yugoslavia as an original Member, *with membership status since 24 October 1945, and without explaining whether the designation "Yugoslavia" was or was not a reference to the FRY.* This fact maybe did not compel, but it certainly allowed the interpretation according to which the designation "Yugoslavia" came to refer to the Federal Republic of Yugoslavia, rather than to the Socialist Federal Republic of Yugoslavia (which had ceased to exist). This interpretation — supported by some events, challenged by others — allowed conclusions according to which the FRY continued the membership of the SFRY in the United Nations, and that the FRY continued the status of the SFRY as a party to the Genocide Convention. This interpretation (or elements of this interpretation) formed the underlying assumption of the 11 July 1996 Judgment.

Today, according to the official listing of 8 December 2000, the designation ("Yugoslavia") is the same, *however "Yugoslavia" is listed as a Member since 1 November 2000 — and the explanatory note makes it clear that this is a reference to the FRY.* This is a new fact of such a nature to be a decisive factor, unknown to both the Court and to the Applicant at the time when the Judgment of 11 July 1996 was given. The issue of jurisdiction over Yugoslavia *ratione personae* is put into a wholly different perspective, and a revision of the Judgment has become compelling.

E. SUBMISSIONS

For the reasons advanced above the Federal Republic of Yugoslavia requests the Court to adjudge and declare that:

there is a new fact of such a character as to lay the case open to revision under Article 61 of the Statute of the Court.

Furthermore, Applicant is respectfully asking the Court to suspend proceedings regarding the merits of the case until a decision on this Application is rendered.

23 April 2001.

(Signed) Professor Tibor VARADY,
Agent of the Federal Republic
of Yugoslavia.

LIST OF ANNEXES [1]

Annex 1. UN doc. A/46/915, Annex II: Declaration adopted on 27 April 1992 at a joint session of the Assembly of the SFRY, the National Assembly of the Republic of Serbia, and the Assembly of Montenegro.

Annex 2. UN doc. A/46/915, Annex I: Note dated 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations addressed to the Secretary-General.

Annex 3. UN doc. S/RES/755 (1992): Security Council resolution 755 (1992); and UN doc A/RES/46/237: General Assembly resolution 46/237 (1992).

Annex 4. UN doc. A/47/PV.7: General Assembly, Provisional verbatim record of the 7th meeting, 22 September 1992.

Annex 5. UN doc. A/51/564-S/1996/885: Letter dated 28 October 1996 from the Permanent Representatives of Bosnia and Herzegovina, Croatia, the former Yugoslav Republic of Macedonia and Slovenia to the United Nations addressed to the Secretary-General.

Annex 6. UN doc. S/RES/777 (1992): Security Council resolution 777 (1992).

Annex 7. UN doc. A/RES/47/1: General Assembly resolution 47/1 (1992).

Annex 8. UN doc. A/RES/47/229: General Assembly resolution 47/229 (1993).

Annex 9. UN doc. A/47/485, Annex: Letter dated 29 September 1992 from the Under-Secretary-General, the Legal Counsel, addressed to the Permanent Representatives of Bosnia and Herzegovina and Croatia to the United Nations.

Annex 10. UN doc. ST/LEG/SER.E/15: "Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 1996".

Annex 11. "List of Conventions deposited with the Secretary-General of the United Nations to which Yugoslavia is a signatory or participant", from UN data base.

Annex 12. UN doc. A/47/PV.7: General Assembly, Provisional verbatim record of the 7th meeting, 22 September 1992.

Annex 13. UN doc. A/RES/52/215: General Assembly resolution 52/215 (1997).

Annex 14. Letters of the United Nations Secretary-General requesting membership dues in 1994, 1995, 1996, 1997, and 1998.

Annex 15. Receipt Voucher confirming the payment made by the Government of the FRY, value date 16 September 1998.

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[1] The Annexes will be published in two separate volumes, one containing the documents as submitted by Yugoslavia and the other containing the French versions or translations thereof. *[Note by the Registry.]*

Annex 16. UN doc. CERD/SP/51 : Note verbale dated 14 January 1994 from the Permanent Mission of the Republic of Croatia to the United Nations addressed to the Secretary-General.
Annex 17. UN doc. CCPR/SP/SR.18 : CCPR, Summary record of the 18th meeting, 16 March 1994.
Annex 18. UN doc. CCPR/SP/SR.19 : CCPR, Summary record of the 19th meeting, 8 September 1994.

Annex 19. UN doc. CCPR/SP/40 : Note verbale dated 15 March 1994 from the Permanent Mission of the Republic of Croatia to the United Nations addressed to the Secretary-General.
Annex 20. UN doc. A/50/40 : Report of the Human Rights Committee.

Annex 21. UN doc. A/54/L.62 : 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".
Annex 22. EU Non Paper relating to the Draft resolution contained in UN doc. A/54/L.62.
Annex 23. Letter dated 27 October 2000 from President Koštunica to the Secretary-General requesting admission of the FRY to the membership of the United Nations.
Annex 24. UN doc. S/2000/1051 : Report of the Committee on the Admission of New Members concerning the application of the Federal Republic of Yugoslavia for admission to membership in the United Nations.

Annex 25. UN doc. S/RES/1326 (2000) : Security Council resolution 1326 (2000) ; and UN doc. A/RES/55/12 : General Assembly resolution 55/12 (2000).
Annex 26. List of Member States of the United Nations, updated 18 December 2000.
Annex 27. Letter of the Legal Counsel of the United Nations dated 8 December 2000 and Non Paper on Admission of the Federal Republic of Yugoslavia to the United Nations on 1 November : Implications for Treaties Deposited with the Secretary-General.
Annex 28. Notification of Accession to the Convention on the Prevention and Punishment of the Crime of Genocide of the Federal Republic of Yugoslavia, dated 6 March 2001 and transmitted on 8 March 2001.
Annex 29. Note dated 21 March 2001 from the Secretary-General confirming the receipt of the instrument of accession sent by the Government of the FRY.
Annex 30. UN doc. S/RES/9 (1946) : Security Council resolution 9 (1946).

Annex 31. UN doc. ST/LEG/SER.E/17 : "Multilateral Treaties Deposited with the Secretary-General, Status as at 30 April 1999".