INTERNATIONAL COURT OF JUSTICE

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Summary
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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)***

Summary of the Judgment

On 24 April 2001, the Federal Republic of Yugoslavia (hereinafter referred to as the "FRY") instituted proceedings, whereby, referring to Article 61 of the Statute of the Court, it requested the Court to revise the Judgment delivered on 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 (I.C.J. Reports 1996 (II), p. 595).

Since the Court included upon the Bench no judge of the nationality of either of the Parties, the FRY chose Mr. Vojin Dimitrijević and Bosnia and Herzegovina Mr. Sead Hodžić to sit as judges ad hoc. After Mr. Hodžić had subsequently resigned from his duties, Bosnia and Herzegovina designated Mr. Ahmed Mahiou to sit in his stead.

Bosnia and Herzegovina filed its written observations on the admissibility of the FRY's Application within the time-limit fixed by the Court. The Court decided that a second round of written pleadings was not necessary. Public hearings were held on 4, 5, 6 and 7 November 2002.

At the oral proceedings, the following final submissions were presented by the Parties:

On behalf of the Government of the FRY,

at the hearing of 6 November 2002:

> "For the reasons advanced in its Application of 23 April 2001 and in its pleadings during the oral proceedings held from 4 to 7 November 2002, the Federal Republic of Yugoslavia respectfully requests the Court to adjudge and declare:
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> — that there are newly discovered facts of such a character as to lay the 11 July 1996 Judgment open to revision under Article 61 of the Statute of the Court; and
>
> — that the Application for Revision of the Federal Republic of Yugoslavia is therefore admissible."

On behalf of the Government of Bosnia and Herzegovina,

at the hearing of 7 November 2002:

> "In consideration of all that has been submitted by the representatives of Bosnia and Herzegovina in the written and oral stages of these proceedings, Bosnia and Herzegovina requests the Court to adjudge and declare that the Application for Revision of the Judgment of 11 July 1996, submitted by the Federal Republic of Yugoslavia on 23 April 2001, is not admissible."

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The Court notes that in its Application for revision of the 1996 Judgment, the FRY relies on Article 61 of the Statute, which provides for revision proceedings to open with a judgment of the Court declaring the application admissible on the grounds contemplated by the Statute; Article 99 of the Rules makes express provision for proceedings on the merits if, in its first judgment, the Court has declared the application admissible.

Thus, the Court points out, the Statute and the Rules of Court foresee a "two-stage procedure". The first stage of the procedure for a request for revision of the Court's judgment should be "limited to the question of admissibility of that request". Therefore, at the current stage of the proceedings the Court's decision is limited to the question whether the request satisfies the conditions contemplated by the Statute. Under Article 61 of the Statute, these conditions are as follows:

(a) the application should be based upon the "discovery" of a "fact";

(b) the fact, the discovery of which is relied on, must be "of such a nature as to be a decisive factor";

(c) the fact should have been "unknown" to the Court and to the party claiming revision when the judgment was given;

(d) ignorance of this fact must not be "due to negligence"; and

(e) the application for revision must be "made at latest within six months of the discovery of the new fact" and before ten years have elapsed from the date of the judgment.

The Court observes that an application for revision is admissible only if each of the conditions laid down in Article 61 is satisfied. If any one of them is not met, the application must be dismissed.

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The Court then begins by ascertaining whether there is here a "fact" which, although in existence at the date of its Judgment of 11 July 1996, was at that time unknown both to the FRY and to the Court.

In this regard, it notes that in its Application for revision of the Court's Judgment of 11 July 1996, the FRY contended the following:

> "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.
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> 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 . . .
>
> 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."

The Court points out that in its oral pleadings, the FRY did not invoke its admission to the United Nations in November 2000 as a decisive "new fact", within the meaning of Article 61 of the Statute, capable of founding its request for revision of the 1996 Judgment. The FRY claimed that this admission "as a new Member" as well as the Legal Counsel's letter of 8 December 2000 inviting it, according to the FRY, "to take treaty actions if it wished to become a party to treaties to which the former Yugoslavia was a party" were

> "events which . . . revealed the following two decisive facts:
>
> (1) the FRY was not a party to the Statute at the time of the Judgment; and
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> (2) the FRY did not remain bound by Article IX of the Genocide Convention continuing the personality of the former Yugoslavia".

The Court observes that it is on the basis of these two "facts" that, in its oral argument, the FRY ultimately founded its request for revision. The FRY further stressed at the hearings that these "newly discovered facts" had not occurred subsequently to the Judgment of 1996. In this regard, the FRY stated that "the FRY never argued or contemplated that the newly discovered fact would or could have a retroactive effect".

For its part, Bosnia and Herzegovina maintained the following:

> "there is no 'new fact' capable of 'laying the case open' to revision pursuant to Article 61, paragraph 2, of the Court's Statute: neither the admission of Yugoslavia to the United Nations which the applicant State presents as a fact of this kind, or in any event as being the source of such a fact, nor its allegedly new situation vis-à-vis the Genocide Convention . . . constitute facts of that kind".

In short, Bosnia and Herzegovina submitted that what the FRY referred to as "facts" were "the consequences . . . of a fact, which is and can only be the admission of Yugoslavia to the United Nations in 2000". It stated that "Article 61 of the Statute of the Court . . . requires that the fact was 'when the judgment was given, unknown to the Court and also to the party claiming revision'" and that "this implies that . . . the fact in question actually did exist 'when the judgment was given'". According to Bosnia and Herzegovina, the FRY "is regarding its own change of position [as to its continuation of the personality of the SFRY] (and the ensuing consequences) as a new fact". Bosnia and Herzegovina concluded that the "new fact" invoked by the FRY "is

subsequent to the Judgment whose revision is sought". It noted that the alleged new fact could have "no retroactive or retrospective effect".

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With a view to providing the context for the contentions of the FRY, the Court then recounts the background to the case:

In the early 1990s the SFRY, made up of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia, began to break up. On 25 June 1991 Croatia and Slovenia both declared independence, followed by Macedonia on 17 September 1991 and Bosnia and Herzegovina on 6 March 1992. On 22 May 1992, Bosnia and Herzegovina, Croatia and Slovenia were admitted as Members to the United Nations; as was the former Yugoslav Republic of Macedonia on 8 April 1993.

On 27 April 1992 the "participants of the joint session of the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro" adopted a declaration. Expressing the will of the citizens of their respective Republics to stay in the common state of Yugoslavia, they stated that:

> "1. 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,
>
> . . . . . .
>
> Remaining bound by all obligations to international organizations and institutions whose member it is . . ."

An official Note of the same date from the Permanent Mission of Yugoslavia to the United Nations stated inter alia

> "Strictly respecting the continuity of the international personality of Yugoslavia, the Federal Republic of Yugoslavia shall continue to fulfil all the rights conferred to, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia." (United Nations doc. A/46/915. Ann. I.)

On 22 September 1992 the General Assembly adopted resolution 47/1, whereby, upon the recommendation contained in Security Council resolution 777 of 19 September 1992, it considered "that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore 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".

On 29 September 1992, in response to a letter from the Permanent Representatives of Bosnia-Herzegovina and Croatia requesting certain clarifications, the Under-Secretary-General and Legal Counsel of the United Nations addressed a letter to them, in which he stated that the "considered view of the United Nations Secretariat regarding the practical consequences of the adoption by the General Assembly of resolution 47/1" was 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 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 (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. 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." (United Nations doc. A/47/485; emphasis added in the original.)

On 29 April 1993, the General Assembly, upon the recommendation contained in Security Council resolution 821 (1993) (couched in terms similar to those of Security Council resolution 777 (1992)), adopted resolution 47/229 in which it decided that "the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not participate in the work of the Economic and Social Council".

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The Court recalls that between the adoption of General Assembly resolution 47/1 of 22 September 1992 and the admission of the FRY to the United Nations on 1 November 2000, the legal position of the FRY remained complex. As examples thereof, the Court cites several changes to the English text of certain relevant paragraphs of the "Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties", prepared by the Treaty Section of the Office of Legal Affairs, which was published at the beginning of 1996 (those changes were directly incorporated into the French text of the Summary published in 1997); it also referred to the letters sent by the Permanent Representatives of Bosnia and Herzegovina, Croatia, Slovenia and the former Yugoslav Republic of Macedonia which questioned the validity of the deposit of the declaration recognizing the compulsory jurisdiction of the International Court of Justice by the FRY dated 25 April 1999, and which set out their "permanent objection to the groundless assertion of the Federal Republic of Yugoslavia (Serbia and Montenegro), which has also been repudiated by the international community, that it represents the continuity of our common predecessor, and thereby continues to enjoy its status in international organizations and treaties".

The Court adds to the above account of the FRY's special situation that existed between September 1992 and November 2000, certain details concerning the United Nations membership dues and rates of assessment set for the FRY during that same period.

The Court then recalls that on 27 October 2000, Mr. Koštunica, the newly elected President of the FRY, sent a letter to the Secretary-General requesting admission of the FRY to membership in the United Nations; and that, on 1 November 2000, the General Assembly, upon the recommendation of the Security Council, adopted resolution 55/12, by which it decided to admit the Federal Republic of Yugoslavia to membership in the United Nations.

The Court observes that the admission of the FRY to membership of the United Nations on 1 November 2000 put an end to Yugoslavia's sui generis position within the United Nations. It notes that, on 8 December 2000, the Under-Secretary-General, the Legal Counsel, sent a letter to the Minister for Foreign Affairs of the FRY, reading in pertinent parts:

> "Following [the admission of the Federal Republic of Yugoslavia to the United Nations on 1 November 2000], a review was undertaken of the multilateral treaties deposited with the Secretary-General, in relation to many of which the former Socialist Federal Republic of Yugoslavia (the SFRY) and the Federal Republic of Yugoslavia (FRY) had undertaken a range of treaty actions . . .
>
> 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." (Letter by the Legal Counsel of the United Nations, Application of Yugoslavia, Ann. 27.)

The Court further notes that at the beginning of March 2001, a notification of accession to the Genocide Convention by the FRY was deposited with the Secretary-General of the United Nations; and that, on 15 March 2001, the Secretary-General, acting in his capacity as depositary, issued a Depositary Notification (C.N.164.2001.TREATIES-1), indicating that the accession of the FRY to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide "was effected on 12 March 2001" and that the Convention would "enter into force for the FRY on 10 June 2001".

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The Court, in order to complete the contextual background, also recalls the proceedings leading up to the delivery of the Judgment of 11 July 1996, as well as the passages in that Judgment relevant to the present proceedings.

It refers to its Order dated 8 April 1993, by which it indicated certain provisional measures with a view to the protection of rights under the Genocide Convention. It recalls that in this Order the Court, referring to Security Council resolution 777 (1992), General Assembly resolution 47/1 and the Legal Counsel's letter of 29 September 1992, stated inter alia that, "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"; and that it concluded that "Article IX of the Genocide Convention, to which both Bosnia-Herzegovina and Yugoslavia are parties, thus appears to the Court to afford a basis on which the jurisdiction of the Court might be founded to the extent that the subject-matter of the dispute relates to 'the interpretation, application or fulfilment' of the Convention, including disputes 'relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III' of the Convention." The Court further refers to its second Order on provisional measures, of 13 September 1993, by which it

confirmed that it had prima facie jurisdiction in the case on the basis of Article IX of the Genocide Convention.

It finally observes that, in its Judgment of 11 July 1996, on the preliminary objections raised by the FRY, it came to the conclusion that both Parties were bound by the Convention when the Application was filed. In the operative part of its Judgment the Court, having rejected the preliminary objections raised by the FRY, found that "on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, it has jurisdiction to adjudicate upon the dispute" and that "the Application filed by the Republic of Bosnia and Herzegovina on 20 March 1993 is admissible".

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In order to examine whether the FRY relies on facts which fall within the terms of Article 61 of the Statute, the Court observes first that, under the terms of paragraph 1 of that Article, an application for revision of a judgment may be made only when it is "based upon the discovery" of some fact which, "when the judgment was given", was unknown. These are the characteristics which the "new" fact referred to in paragraph 2 of that Article must possess. Thus both paragraphs refer to a fact existing at the time when the judgment was given and discovered subsequently. A fact which occurs several years after a judgment has been given is not a "new" fact within the meaning of Article 61; this remains the case irrespective of the legal consequences that such a fact may have.

The Court points out that, in the present case, the admission of the FRY to the United Nations occurred on 1 November 2000, well after the 1996 Judgment. It concludes accordingly that that admission cannot be regarded as a new fact, within the meaning of Article 61, capable of founding a request for revision of that Judgment.

The Court goes on to note that, in the final version of its argument, the FRY claims that its admission to the United Nations and the Legal Counsel's letter of 8 December 2000 simply "revealed" two facts which had existed in 1996 but had been unknown at the time: that it was not then a party to the Statute of the Court and that it was not bound by the Genocide Convention. The Court finds that, in advancing this argument, the FRY does not rely on facts that existed in 1996. In reality, it bases its Application for revision on the legal consequences which it seeks to draw from facts subsequent to the Judgment which it is asking to have revised. Those consequences, even supposing them to be established, cannot be regarded as facts within the meaning of Article 61. The Court finds that the FRY's argument cannot accordingly be upheld.

The Court furthermore notes that the admission of the FRY to membership of the United Nations took place more than four years after the Judgment which it is seeking to have revised. At the time when that Judgment was given, the situation obtaining was that created by General Assembly resolution 47/1. In this regard the Court observes that the difficulties which arose regarding the FRY's status between the adoption of that resolution and its admission to the United Nations on 1 November 2000 resulted from the fact that, although the FRY's claim to continue the international legal personality of the Former Yugoslavia was not "generally accepted" (see Security Council resolution 777 of 19 September 1992), the precise consequences of this situation were determined on a case-by-case basis (for example, non-participation in the work of the General Assembly and ECOSOC). Resolution 47/1 did not inter alia affect the FRY's right to appear before the Court or to be a party to a dispute before the Court under the conditions laid down by the Statute. Nor did it affect the position of the FRY in relation to the Genocide Convention. To "terminate the situation created by resolution 47/1", the FRY had to submit a request for admission

to the United Nations as had been done by the other Republics composing the SFRY. The Court points out that all these elements were known to the Court and to the FRY at the time when the Judgment was given. Nevertheless, what remained unknown in July 1996 was if and when the FRY would apply for membership in the United Nations and if and when that application would be accepted, thus terminating the situation created by General Assembly resolution 47/1.

The Court emphasizes that General Assembly resolution 55/12 of 1 November 2000 cannot have changed retroactively the sui generis position which the FRY found itself in vis-à-vis the United Nations over the period 1992 to 2000, or its position in relation to the Statute of the Court and the Genocide Convention. Furthermore, the letter of the Legal Counsel of the United Nations dated 8 December 2000 cannot have affected the FRY's position in relation to treaties. The Court also observes that, in any event, the said letter did not contain an invitation to the FRY to accede to the relevant conventions, but rather to "undertake treaty actions, as appropriate, . . . as a successor State".

The Court concludes from the foregoing that it has not been established that the request of the FRY is based upon the discovery of "some fact" which was "when the judgment was given, unknown to the Court and also to the party claiming revision". It finds that one of the conditions for the admissibility of an application for revision prescribed by paragraph 1 of Article 61 of the Statute has therefore not been satisfied. The Court finally indicates that it therefore does not need to address the issue of whether the other requirements of Article 61 of the Statute for the admissibility of the FRY's Application have been satisfied.

The full text of the operative paragraph (para. 75) reads as follows:

"For these reasons,

THE COURT,

By ten votes to three,

Finds that the Application submitted by the Federal Republic of Yugoslavia for revision, under Article 61 of the Statute of the Court, of the Judgment given by the Court on 11 July 1996, is inadmissible.

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Ranjeva, Herczegh, Koroma, Parra-Aranguren, Al-Khasawneh, Buergenthal, Elaraby; Judge ad hoc Mahiou;

AGAINST: Judges Vereshchetin, Rezek; Judge ad hoc Dimitrijević."

Separate opinion of Judge Koroma

Judge Koroma, referring to the need to elucidate Article 61 and the rather scant jurisprudence on revision, points out that the revision procedure is essentially about newly discovered facts or arguments and not a legal challenge, as such, to the conclusion reached earlier by the Court based on the facts as then known, although the outcome of the challenge may have an effect on the Judgment.

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

It is against this background that Judge Koroma has difficulty with some conclusions reached in the Judgment. The Court, he observes, without defining what in its opinion will be considered a "new" fact within the meaning of Article 61, stated that if the fact occurred several years after a judgment, this is not a new fact within the meaning of Article 61, irrespective of its legal consequences. In Judge Koroma's view, this is, as a position of law, correct as far as it goes; but the issue the Court has to determine involves the question as to whether or not Yugoslavia was a Member of the United Nations before 1 November 2000.

He recalls that the Court relied for the basis of its Judgment in 1996 on the FRY's declaration of 22 April 1992 that it remained bound by those treaties to which the former Socialist Federal Republic of Yugoslavia had been a party, and the Court assumed for this purpose that the FRY was a Member of the United Nations. Unless such assumption was made, the FRY's declaration alone should not and could not legally have been sufficient to serve as a basis for recognition of the FRY as a party to the Genocide Convention — the sole basis on which the Court founded its jurisdiction. Accordingly, the FRY's admission to membership of the United Nations on 1 November 2000 suggests that it was not a Member of the United Nations in 1996 and thus was not a party to the Genocide Convention; therefore, the basis of the Court's jurisdiction no longer exists. Unfortunately, the Court chose not to address these critical issues, which were raised in the Application and in the hearings, but rather stated that the consequences which the FRY sought to draw from the facts which occurred in 2000 even if established, "cannot be regarded as facts within the meaning of Article 61" (paragraph 69 of the Judgment). Far from the consequences not being established, it was because of the FRY's admission to membership of the United Nations that it acceded to the Genocide Convention in March 2001, after having received a letter from the Legal Counsel of the United Nations asking it to undertake any necessary treaty formalities in its capacity as successor State. In Judge Koroma's opinion, it is incontestable that, as the FRY stated in its Application, "[t]he admission of the FRY to the United Nations as a new Member clears ambiguities and sheds a different light on the issue of the membership of the FRY in the United Nations, in the Statute and in the Genocide Convention."

Judge Koroma grants that the issues raised by this case are not easy of solution, but fears that the answers provided beg the question and cannot withstand scrutiny. In his view, when an application for revision is submitted under Article 61 and where fresh facts have emerged and are of such importance as to warrant revising the earlier decision or conclusion, the Court should be willing to carry out such a procedure. Such an application is not to be regarded as impugning the Court's earlier legal decision as such, as that decision was based on the facts as then known. He is of the view that the admission of the FRY to membership of the United Nations in November 2000 does have legal implications for the Judgment reached by the Court on this matter in July 1996.

In Judge Koroma's opinion, the Court's jurisdiction could have been founded on more legally secure grounds.

Dissenting opinion of Judge Vereshchetin

Judge Vereshchetin is of the view that the starting point of the Court's reasoning in the present Judgment should have been the question, lying at the core of the dispute between the Parties, as to whether or not the assumption that Yugoslavia was a Member of the United Nations at the time of the 1996 Judgment was necessary, and therefore "of such a nature as to be a decisive factor" (within the meaning of Art. 61, para. 1, of the Statute), for the Court's finding on its jurisdiction.

Having arrived at the conclusion that such an assumption was necessary since, "otherwise, it is inconceivable how the Court could have recognized the continuing participation of Yugoslavia in the Genocide Convention while the essential pre-condition of such participation [the membership of the United Nations] had ceased to exist", Judge Vereshchetin proceeds to examine whether United Nations membership status may fall within the legal notion of "fact" and if so, whether an assumption of such a fact later proved to be wrong can serve as a ground for revising a judgment, provided all other requirements of Article 61 of the Statute are satisfied.

Giving affirmative answers to both questions, Judge Vereshchetin further opines that Yugoslavia has shown that its non-membership of the United Nations was unknown to Yugoslavia and the Court when the Judgment was delivered and that such ignorance was not due to Yugoslavia's negligence.

"From the legal point of view", continues Judge Vereshchetin, "it cannot be denied that the fact of Yugoslavia's non-membership in the United Nations at the time of the 1996 Judgment could not have been established before the decision of the General Assembly on 1 November 2000, by which decision Yugoslavia was admitted as a new Member of the United Nations. This decision was taken pursuant to the recommendation of the Committee on the Admission of New Members and the recommendation of the Security Council. Like all other States which had formed the past Socialist Federal Republic of Yugoslavia, the new Yugoslavia is now listed in the official documents of the United Nations as a Member from the time of its admission, and not from the time when the former Yugoslavia became a Member of the United Nations.

On the other hand, the assumption of Yugoslavia's membership in the United Nations at the time of the Court's Judgment on its jurisdiction cannot be sustained after 1 November 2000. Residual elements of the membership of the former Yugoslavia, not denied to the new Yugoslavia after 1992, cannot frustrate this conclusion. Otherwise, we have to presume that the rules of elementary logic and common sense are not applicable to this case, and a State that already was a Member of an organization and whose membership had neither ceased nor was suspended at a certain time, can again be admitted to the same organization as a new Member, but with a different initial date of its membership. However", in the view of Judge Vereshchetin, "this is exactly what flows from the Judgment's holding that 'it has not been established that the request of the FRY is based upon the discovery of 'some fact' which was 'when the judgment was given, unknown to the Court and also to the party claiming revision' (para. 72 of the Judgment)."

In the concluding part of his opinion, Judge Vereshchetin says that, in his view, the request for revision of the Court's Judgment on its jurisdiction satisfies all the conditions contemplated by Article 61 of the Statute and therefore the Application of Yugoslavia is admissible and the Judgment of the Court of 11 July 1996 should have been laid open for revision. "Such a procedural decision would not have prejudged the ultimate result of the revision. A fortiori, it could not have been seen as a condoning of the behaviour of either side in the bloody conflict on the territory of the former Yugoslavia."

Declaration by Judge Rezek

Judge Rezek considers the Application for revision to be admissible. In his view, the Court's assertion in the Judgment of 11 July 1996 of jurisdiction over the Respondent, resulting from a misreading of the factual situation, should now be re-examined. Otherwise, he would have proposed denying in limine the Application for revision but for a reason diametrically opposed to those relied upon by the majority: the Federal Republic of Yugoslavia, one of the newest Members of the United Nations, is not the entity considered by the Court to be the Respondent in the Judgment of 11 July 1996. Accordingly, the new Yugoslavia does not have standing to seek revision. It is not a party to the dispute submitted to the Court by Bosnia and Herzegovina. It will be for the Court to decide at the appropriate time whether that dispute is extant in the absence of the Respondent.

Dissenting opinion of Judge Dimitrijević

Judge Dimitrijević believes that the two principal lines of reasoning of the majority are flawed, namely, (a) the attempt to dispose of the case by restrictively interpreting the meaning of the term "fact" as used in Article 61 of the Statute, and (b) the choice of only one interpretation of the legal situation which obtained on 11 July 1996 when the Judgment 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 was delivered. The proposition that the Federal Republic of Yugoslavia (FRY) was a continuator of the former Socialist Federal Republic of Yugoslavia (SFRY) was treated by the Court in 1996 as a fact (as is done by the majority in the present case); the admission of the FRY as a new Member to the United Nations on 1 November 2000 revealed that this fact had not existed at any time.

In the opinion of Judge Dimitrijević, the meaning of the term "fact" cannot be reduced to an event or an object existing in physical reality: a fact in law is part of legal reality. Being or not being a member of an international organization or a party to an international treaty is a legal fact. In Article 61, paragraph 1, of the Statute, reference is made to a fact which existed at the time when the Judgment was given, but was unknown to the Court and to the party claiming revision, whilst paragraph 2 requires the Court expressly to record the existence of the "new fact" in order to declare on application for revision admissible. This implies a new understanding, as a result of the realization, after the judgment was delivered, that the "old" fact, which had been taken as existing at the time of the judgment, had never actually existed. Contrary to what the majority holds, the FRY does not rely "on the legal consequences which it seeks to draw from facts subsequent to the [1996] Judgment" (Judgment, para. 69), but claims that the fact on which the Court relied in its 1996 Judgment did not exist. The non-existence of a fact is as much a factual question as its existence.

In its Order of 8 April 1993 on the request for the indication of provisional measures in the case of Bosnia and Herzegovina v. Yugoslavia, the Court found that it had prima facie jurisdiction on the basis of Article IX of the Genocide Convention in conjunction with Article 35, paragraph 2, of the Statute and observed that the solution adopted was "not free from legal difficulties" (I.C.J. Reports 1993, p. 14, para. 18) and that "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" (ibid.; emphasis added). In its 1996 Judgment on the preliminary objections, the Court again did not find it necessary to determine definitively whether or not the FRY was a Member of the United Nations and a party to the Statute of the Court.

For Judge Dimitrijević it remains unclear to which "Yugoslavia" the Court referred as being party to the Genocide Convention. In failing to indicate that the FRY was bound by the obligations of the SFRY as a successor State, the Court must have assumed that there was continuity between

the SFRY and the FRY and that the latter was a Member of the United Nations. These determinations were findings on facts. They were made by the Court in spite of admitted "legal difficulties", which were known to the Court in the form of possible options on how to decide on the presence of certain facts, as disclosed in a series of ambiguous or controversial decisions of States and various organs of the United Nations and other international organizations, such as Security Council resolution 757 (1992), which noted that the claim by the FRY "to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted" (United Nations doc. S/RES/757 (1992)), its resolution 777 (1992) finding that the SFRY had ceased to exist and recommending to the General Assembly to decide that the FRY "should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly" (United Nations doc. S/RES/777 (1992)), followed by the General Assembly resolution 47/1, which stated that the FRY "cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations" (United Nations doc. A/RES/47/1 (1992)), and decided that the FRY "should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly" (ibid.). After deciding, seven months later, that the FRY should not participate in the work of the Economic and Social Council either, the General Assembly adopted resolution 48/88, urging "Member States and the Secretariat in fulfilling the spirit of that resolution, to end the de facto working status of Serbia and Montenegro" (United Nations doc. A/RES/48/88, para. 19; emphasis added). How the addressees of this resolution acted must have been known to the Court.

The examples quoted in this regard by Judge Dimitrijević begin with the opinions of the Arbitration Commission established as an advisory body by the Peace Conference on Yugoslavia (the "Badinter Commission"). It found in July 1992 that the SFRY no longer existed and that "none of the successor states may thereupon claim for itself alone the membership rights previously enjoyed by the former SFRY" (Opinion 9, reproduced in International Legal Materials, 1992), and that the FRY was "a new state which cannot be considered the sole successor to the SFRY" (Opinion 10, reproduced in International Legal Materials, 1992). The European Community and its Member States, or the majority of other Members of the United Nations, have never accepted the automatic continuity of the FRY. On the other hand, there were statements by representatives of some other States, which supported the claim to continuity of the then government of the FRY. A third group of States stated that they failed to discern the basis in law of the resolutions of the United Nations principal organs on Yugoslavia, and in particular any reference to the provisions of the United Nations Charter governing membership.

The finding of the Court in 1996 "that it has not been contested that Yugoslavia was a party to the Genocide Convention" must, in the view of Judge Dimitrijević, now be seen in a different light. Bosnia and Herzegovina has been one of those States which have most vigorously contested the identity between the SFRY and the FRY, except only in relation to a specific case before the Court.

Judge Dimitrijević does not believe that the opinions of the legal services of the United Nations Secretariat overcame the inconsistencies and ambiguities of the decisions of the United Nations organs, especially of General Assembly resolution 47/1. All the actors at the time must have been aware that "Yugoslavia" in this particular and important context could have been taken as a short reference both to the SFRY and the FRY. What then, asks Judge Dimitrijević, is the difference between "old Yugoslavia" and "new Yugoslavia", referred to in the opinions? What was believed would happen to the old State once the new State was admitted to the United Nations? It can even be concluded that some actors kept alive the fiction that a phantom State existed, which was neither the SFRY nor the FRY, or that it was presumed that the SFRY had gone on existing. Paradoxically, the fanciful theory of the further existence of "Yugoslavia" seems to correspond best to the situation described by one writer as "limited survival after death . . . of the former Yugoslavia at the United Nations" (T. Treves, "The Expansion of the World Community

and Membership of the United Nations", The Finnish Yearbook of International Law, Vol. VI (1995), p. 278).

The United Nations Under-Secretary-General opined in 1992 that resolution 47/1 did not "take away the right of Yugoslavia to participate in the work of organs other than Assembly bodies" (United Nations doc. A/47/485). The implied "right" of the FRY to participate in other United Nations organs and to use the International Court of Justice, which is one of the main arguments of the majority in support of the jurisdiction of the Court in 1996, was in the eyes of Judge Dimitrijević very weak, because, seven months later, participation in the work of ECOSOC was denied by the General Assembly without adducing any further legal reasons. How could the Court then have concluded that the "right" of the FRY to appear before the Court was any stronger? If the measures against the FRY were very restricted and not decisive for the very important matter of the status of a State in the United Nations, was not the prescribed "admission to the United Nations of a new Yugoslavia under Article 4" too potent a remedy? Measures directed against the FRY could simply have been rescinded. If the membership of the FRY was not terminated, why did that State have to apply to be admitted as a new Member?

Judge Dimitrijević believes that the answer lay in the punitive nature of those measures. The FRY was at that time the target of gradually increasing restrictions aimed at reducing the limited scope in which it was allowed to play the role of "Yugoslavia" in the United Nations. The FRY was offered the prospect that it would receive better treatment if the competent United Nations organs become satisfied that the objections to the political conduct of the FRY no longer existed. One way of testing this was the procedure of admission under Article 4 of the United Nations Charter, which offered the opportunity to examine whether the FRY was "peace-loving" and "able and willing" to carry out the obligations contained in that Article. In the process, the repeated assertions that the SFRY had ceased to exist were conveniently forgotten and the fiction of its virtual existence prolonged. If the SFRY still survived under the name of "Yugoslavia", the conclusion could be drawn that the Judgment of 11 July 1996 did not concern the FRY but the still existing SFRY. When the FRY was finally admitted to the United Nations it became clear that the pragmatic temporary solution could not resolve the confusion in regard to the suggested admission to membership of the United Nations of a new State while pretending that it was at the same time an old State, the readmission of a State that had not previously been excluded from membership, the reconfirmation of a State's existing membership, etc.

Judge Dimitrijević concedes that there was a claim of the FRY to continuity. However, the decisive element was whether other States recognized this claim. The decision on continuity of States is one of the decentralized acts of the international community, similar to that on the recognition of States. In all cases of disintegration of a State, the general response has depended primarily on the attitude of the other States which emerged on the territory of the former State. If there was agreement, other members of the international community would generally follow suit. In the case of the SFRY there was no agreement. The continuation of the SFRY by the FRY was not a matter to be decided only by the FRY, or exclusively by the FRY and other successor States of the SFRY, but it remained in the hands of other actors. By admitting the FRY to the United Nations, the Security Council and the General Assembly finally determined the outcome of the debate which had shown that SFRY-FRY continuity had been an assumption or perception shared by some other international actors but not widely supported. If the FRY's claim was not "generally accepted" in 1992, it could have been accepted later, say in 1996, but the Court failed then to prove universal acceptance. It could not have proven it in 1996 or for the whole period between 11 July 1996 and 1 November 2000, when it finally became clear that general acceptance had not materialized.

That the FRY was not the sole continuator, but one of the successors of the SFRY, became established as a fact existing since the very creation of the FRY; the "fact" that the FRY was a continuator of the SFRY has not existed at any time. In its 1996 Judgment the Court espoused one of the existing views, rejected by the majority of States, including Bosnia and Herzegovina. The

majority in the Court in the present case treats this view as the only known fact at the time. Judge Dimitrijević is convinced that later events demonstrated that reality differed from the "facts" which were relied on to establish the Court's jurisdiction in 1996.

Even if none of the interpretations advanced above are accepted, Judge Dimitrijević is sure that the follow-up to the relevant Security Council and General Assembly resolutions was known to the Court in 1996, and that it must have realized that this was inconclusive. The situation in 1996 had not developed to the degree that it allowed a final determination that the Court had jurisdiction on the basis of continuity. In view of the consistent opposition of Bosnia and Herzegovina to the claim of the FRY to continuity, the Court should have examined its jurisdiction proprio motu and not have been satisfied by the fact that Bosnia and Herzegovina did not dispute that jurisdiction in this particular case. The jurisdiction of the Court cannot be imposed on a State without its consent, which cannot be presumed and should be carefully examined and narrowly interpreted. The "sui generis position which the FRY found itself in vis-à-vis the United Nations over the period 1992 to 2000" (Judgment, para. 71), as the majority describes the status of the FRY, was, in the eyes of Judge Dimitrijević, insufficient to establish jurisdiction. The majority concedes that it was not known in 1996 whether the FRY would apply for membership in the United Nations and whether it would be admitted, but it still bases the whole argument on the curious assumption that the admission of a State as a Member of the United Nations does not necessarily result in the logical conclusion that it had not been a Member prior to admission. If for some reasons there is an exception to the rule, it must be strictly construed and unequivocally proven, which has not been done in this case.

According to Article 61, paragraph 2, of the Statute, the purpose of a judgment opening the proceedings for revision is limited to the initial determination of the existence of a new fact and of its nature. In the view of Judge Dimitrijević the Judgment in this case should have enabled the Court to go more deeply into the matter of its jurisdiction on the basis of facts that existed in July 1996, but acquired their real meaning only on 1 November 2000. Opening the proceedings for revision would not have precluded a possible finding that the facts were such as to enable the Court to entertain jurisdiction. Declaring the Application for revision inadmissible only by reference to the literal meaning of the word "fact" misses a serious opportunity to decide on important matters relating to the jurisdiction of the Court. Admittedly, there could have been other bases for the jurisdiction of the Court, but the Court dismissed them in the 1996 Judgment. They could have been examined had the case been opened for revision.

Separate opinion of Judge Mahiou

Judge Mahiou observes that, to found its Application for the revision of the 11 July 1996 Judgment, Yugoslavia relies on the fact that at the time of the Judgment it was not a Member of the United Nations, was not a party to the Statute of the Court and was not bound by the Genocide Convention, contending that this was a new fact and that it was discovered on 1 November 2000 when Yugoslavia was admitted to membership in the United Nations, thereby revealing that it had not previously been a Member. However, this claim cannot be established in terms of Article 61 of the Court's Statute because, while the admission of Yugoslavia in 2000 is certainly a new fact, this fact occurred after the Judgment and cannot therefore affect the previous situation. Further, the issue of Yugoslavia's legal status was being discussed before the various organs of the United Nations and was thus a fact known to everyone, in particular to Yugoslavia and to the Court, which thus rendered its Judgment with full knowledge of the facts. Lastly, the undertakings, statements and conduct of Yugoslavia show that it did nothing to clarify the situation, and this continues to be the case, as shown by the fact that it remains the Applicant in eight cases before the Court against members of NATO, concerning the legality of the use of force, precisely founding its claims on its declaration of acceptance of the compulsory jurisdiction of the Court and on the Genocide Convention.