International Court of Justice — Jurisdiction — Finality of judgments — Revision — Statute of the International Court of Justice, Article 61 — Requirement of newly discovered facts — Whether facts must have existed at the time of the judgment in respect of which revision sought — Subsequent facts — Federal Republic of Yugoslavia ("FRY") — 1996 Judgment upholding jurisdiction under the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 — Subsequent admission of FRY as Member State of the United Nations — Whether implying FRY was not party to Statute or Genocide Convention at time of 1996 Judgment — Whether new facts within the meaning of Article 61

State succession — Succession and continuity of States — Socialist Federal Republic of Yugoslavia — Whether FRY the continuation of the former Yugoslavia — Membership of the United Nations — Participation in treaties — Convention on the Prevention and Punishment of the Crime of Genocide, 1948

International Organizations — United Nations — Membership — Yugoslavia — Status of Yugoslavia between 1992 and 2000 — Whether Member of the United Nations — Whether party to the Statute of the International Court of Justice — Whether bound by Convention on the Prevention and Punishment of the Crime of Genocide, 1948

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)*

(Yugoslavia *v.* Bosnia and Herzegovina)[1]

[1] The Federal Republic of Yugoslavia was represented by Mr Tibor Varady, *Agent*; Mr Vladimir Djerić, *Co-Agent*; Professor Andreas Zimmermann, *Counsel and Advocate*; Mr Ian Brownlie QC, *Adviser*; and Mr Dejan Ukropina, Mr Robin Geiss, Mr Marko Mićanović, Mr Slavoljub Carić and Mr Miodrag Pančeski, *Assistants*.

Bosnia and Herzegovina was represented by Mr Sakib Softić, *Agent*; Mr Phon van den Biesen, *Deputy Agent*; Professor Alain Pellet, *Counsel and Advocate*; and Mr Antoine Ollivier and Mr Wim Muller, *Counsel*.

International Court of Justice. 3 *February* 2003[2]

(Guillaume, *President*; Shi, *Vice-President*; Ranjeva, Herczegh, Koroma, Vereshchetin, Parra-Aranguren, Rezek, Al-Khasawneh, Buergenthal and Elaraby, *Judges*; Dimitrijević[3] and Mahiou,[4] *Judges ad hoc*)

SUMMARY: *The facts*:—In 1993, Bosnia and Herzegovina brought proceedings against the Federal Republic of Yugoslavia (the "FRY") alleging violations of the Convention on the Prevention and Punishment of the Crime of Genocide, 1948. The Court issued two Orders regarding the indication of provisional measures of protection.[5] On 11 July 1996, it gave a Judgment rejecting preliminary objections raised by the FRY and upholding its jurisdiction.[6] On 17 December 1997, the Court gave an Order regarding the admissibility of counter-claims submitted by the FRY.[7]

The FRY brought an Application for revision of the Judgment on Preliminary Objections, relying on Article 61 of the Statute of the Court.[8] The FRY maintained that a "fact of such a nature as to be a decisive factor" had been discovered which rendered revision of the 1996 Judgment necessary. On 1 November 2000, the FRY was admitted as a Member State of the United Nations. On 8 December 2000, the Legal Counsel of the United Nations wrote to the Government of the FRY 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". The FRY maintained that its admission to the United Nations and the Legal Counsel's letter were events which revealed that the FRY had not been a party to the Statute of the Court at the time of the 1996 Judgment and that it "did not remain bound by Article IX of the Genocide Convention continuing the personality of the former Yugoslavia".

Both the FRY and Bosnia and Herzegovina were composed of territories which had formed parts of the Socialist Federal Republic of Yugoslavia (the "SFRY"), a federal State which had comprised six republics and two autonomous regions. Beginning in 1991, the SFRY underwent a process of dissolution, during which four republics (Bosnia and Herzegovina, Croatia, Macedonia and Slovenia) declared themselves independent, while the two remaining republics (Serbia and Montenegro) constituted themselves as a federation under the name of the FRY.[9] Between its constitution in 1992 and

[2] See also the Orders and Judgments reported at 95 ILR 1 and 115 ILR 1. The Judgments of the Court in *Legality of Use of Force (Federal Republic of Yugoslavia* v. *Belgium)* and nine related cases will be reported in volume 157 of the *International Law Reports*.

[3] Appointed by the Federal Republic of Yugoslavia.

[4] Appointed by Bosnia and Herzegovina. [5] 95 ILR 1. [6] 115 ILR 1.

[7] 115 ILR 1. The FRY withdrew the counter-claims in 2001.

[8] The text of Article 61 is reproduced in paragraph 14 of the present Judgment.

[9] The FRY was subsequently known as the "Federal Republic of Yugoslavia (Serbia and Montenegro)" and later as "Serbia and Montenegro". Montenegro became independent in 2006.

2000, the FRY maintained that it continued the legal personality of the SFRY and that it was, therefore, a party to the United Nations Charter and the Statute of the Court, as well as to the Genocide Convention, on that basis. The FRY's claim to be the continuation of the former Yugoslavia was not generally accepted and its status within the United Nations was a matter of doubt for many years. Following a change of government, however, the FRY applied for admission to the United Nations and became a party to the United Nations Charter and the Statute of the Court on its admission to the United Nations in November 2000.[10] On 12 March 2001, the FRY deposited with the United Nations Secretary-General a notification of accession to the Genocide Convention to take effect on 10 June 2001.

Bosnia and Herzegovina contended that the Application was not admissible, since it did not meet the conditions laid down by Article 61. In particular, Bosnia and Herzegovina argued that, in order to meet the conditions of Article 61, the fact in question had to have been in existence at the time of the judgment whose revision was sought and to have been unknown both to the Court and to the party seeking revision. According to Bosnia and Herzegovina, the FRY had not shown the existence of such a fact but was merely relying on a new perception of facts which were known in 1996.

Held (by ten votes to three, Judges Vereshchetin and Rezek and Judge ad hoc Dimitrijević dissenting):—The Application was inadmissible.

(1) Under Article 61 of the Statute, an application for revision of a judgment could be made only when it was based upon the discovery of a fact which, when the judgment was given, was unknown. It followed that the fact in question had to have been in existence at the date of the judgment; a fact which occurred after the judgment was given was not a new fact of the kind contemplated by Article 61. The admission of the FRY to the United Nations in 2000 was not, therefore, a fact upon which an application might be made for the revision of a judgment given in 1996 (paras. 67-8).

(2) The present Application was not based upon facts which existed in 1996 but were then unknown but rather upon legal consequences said to result from facts subsequent to the 1996 Judgment. At the time when the 1996 Judgment was given, the status of the FRY was a matter of controversy: the FRY's claim to be the continuation of the former Yugoslavia was not generally accepted but the precise consequences of that situation were determined on a case-by-case basis. Resolution 47/1 of the United Nations General Assembly[11] did not affect the right of the FRY to be a party to proceedings before the Court or its position in relation to the Genocide Convention. The only fact which was not known in 1996 was whether, and if so when, the FRY would terminate this situation by applying for membership of the United Nations. Neither the admission of the FRY to the United Nations in 2000 nor the letter from the Legal Counsel

[10] For the Court's discussion of the background, see paras. 24-32 of the Judgment.
[11] See para. 29 of the Judgment.

could retrospectively alter the *sui generis* position in which the FRY found itself prior to November 2000 (paras. 69-72).

(3) The Court was not required to consider whether the other requirements of Article 61 had been met (para. 73).

Separate Opinion of Judge Koroma: The revision procedure was concerned with newly discovered facts and not a legal challenge to the conclusions reached in an earlier judgment. The Judgment should have considered whether the admission of the FRY to the United Nations shed a different light on whether the FRY had been a Member of the United Nations and, thus, a party to the Statute and whether it was a party to the Genocide Convention in 1996 (pp. 29-33).

Dissenting Opinion of Judge Vereshchetin: The assumption that the FRY was a Member of the United Nations was a prerequisite for the Court's finding, in the 1996 Judgment, that it had jurisdiction under the Genocide Convention. The FRY's admission to the United Nations in 2000 was a fact which demonstrated that the assumption had been wrong. Given the uncertain status of the FRY within the United Nations between 1992 and 2000, the fact that it was not a Member during that period was one which was not, and could not have been, known either to the Court or to the FRY in 1996. That fact should have been treated by the Court as a new fact within the meaning of Article 61 of the Statute (pp. 33-45).

Declaration of Judge Rezek: The jurisdiction of the Court was founded upon consent. It was clear that the FRY had not consented to the jurisdiction of the Court, because it was now clear that it had not been a Member of the United Nations nor, therefore, a party to the Genocide Convention, at the time of the 1996 Judgment (pp. 45-6).

Dissenting Opinion of Judge ad hoc Dimitrijević: The Judgment adopted too narrow an understanding of the concept of a "fact". The question whether or not a State was a party to a treaty was a fact. In seeking revision of the 1996 Judgment, the FRY was not seeking to rely upon legal consequences drawn from facts subsequent to that Judgment but to prove that the fact upon which the Court relied in 1996 did not exist. The fact that the FRY was not a Member of the United Nations, a party to the Statute or a party to the Genocide Convention was unknown and could not have been known to the Court and to the FRY in 1996 (pp. 46-63).

Separate Opinion of Judge ad hoc Mahiou: A fact was an event which occurred at a given point in time. What the FRY sought to rely upon was that it had not been a Member of the United Nations, a party to the Statute or a party to the Genocide Convention in 1996 and that these "facts" were not known to it at the time. Those were not, however, "facts" in the normal sense but the product of a process of interpretation of facts, invoked as a result of the undoubted fact that in 2000 the FRY was admitted to the United Nations. At the time of

the 1996 Judgment, the FRY considered itself to be a Member of the United Nations, a party to the Statute and a party to the Genocide Convention. The facts had not changed, only the FRY's characterization of them (pp. 63-9).

The Judgment of the Court and the Separate Opinions, Dissenting Opinions and Declaration are set out as follows:

The following is the text of the Judgment of the Court:

[9] 1. On 24 April 2001, the Federal Republic of Yugoslavia (hereinafter referred to as the "FRY") filed in the Registry of the Court an Application dated 23 April 2001 instituting proceedings, whereby, referring to Article 61 of the Statute of the Court, it requested the Court to revise the Judgment delivered by it 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* (*ICJ Reports 1996 (II)*, p. 595).

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was forthwith communicated by the Registrar of the Court to Bosnia and Herzegovina, and in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. By letters of 26 April 2001, the Registrar informed the Parties that the Court had fixed 30 September 2001 as the time-limit for the filing by Bosnia and Herzegovina of its written observations on the admissibility of the Application contemplated by Article 99, paragraph 2, of the Rules of Court.

4. Pursuant to Article 53, paragraph 1, of the Rules of Court, a request by the Republic of Croatia for the pleadings and annexed documents to be made available to it was granted on 6 August 2001 after the views of the Parties had been ascertained.

5. By a letter of 2 August 2001, the Agent of Bosnia and Herzegovina requested the Court to extend to 1 December 2001 the time-limit for the filing by his Government of its written observations. By a letter of 17 August 2001, the Agent of the FRY informed the Court that his

Government did not object to this time-limit being thus extended. By letters of 21 August 2001, the First Secretary of the Court in charge of Information Matters, acting Registrar, informed the Parties that the President had extended to 3 December 2001 the time-limit for the filing by Bosnia and Herzegovina of its written observations.

6. On 3 December 2001, within the time-limit thus extended, Bosnia and Herzegovina filed in the Registry its written observations on the admissibility of the FRY's Application.

7. By a letter of 26 December 2001, the Agent of the FRY, referring to Article 99, paragraph 3, of the Rules of Court, requested the Court to afford the Parties a further opportunity of presenting their views in written form on the admissibility of the Application. By a letter of 21 January 2002, the Agent of Bosnia and Herzegovina informed the Court that his Government was not in favour of a second round of written pleadings.

[10] By a letter of 1 March 2002, the Registrar informed the Parties of the Court's decision that a second round of written pleadings was not necessary.

8. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise the right conferred by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case; the FRY chose Mr Vojin Dimitrijević and Bosnia and Herzegovina chose Mr Sead Hodžić. By a letter dated 9 April 2002 and received in the Registry on 6 May 2002, Mr Hodžić informed the Court that he wished to resign from his duties; Bosnia and Herzegovina designated Mr Ahmed Mahiou to sit in his stead.

9. After ascertaining the views of the Parties, the Court decided, pursuant to Article 53, paragraph 2, of the Rules of Court, that copies of the written observations of Bosnia and Herzegovina and the documents annexed thereto should be made accessible to the public on the opening of the oral proceedings.

10. Public hearings were held on 4, 5, 6 and 7 November 2002, during which the Court heard the oral arguments and replies of:

For the FRY:	Mr Tibor Varady, Mr Vladimir Djerić, Mr Andreas Zimmermann.
For Bosnia and Herzegovina:	Mr Sakib Softić, Mr Phon van den Biesen, Mr Alain Pellet.

11. In its Application, the following requests were made by the FRY:

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.

12. In its written observations, the following submission was made by Bosnia and Herzegovina:

In consideration of the foregoing, the Government of 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.

13. 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*:

– 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

[11] – 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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* *

14. In its Application for revision of the 1996 Judgment the FRY relies on Article 61 of the Statute, which provides as follows:

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.

2. The proceedings for revision shall be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

3. The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.

4. The application for revision must be made at latest within six months of the discovery of the new fact.

5. No application for revision may be made after the lapse of ten years from the date of the judgment.

15. Article 61 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 Statute and the Rules of Court foresee a "two-stage procedure" (*Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, ICJ Reports 1985*, p. 197, para. 8). 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" (*ibid.*, para. 10).

16. Therefore, at this stage 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";
[12] (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.

17. 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.

The Court will begin 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.

* *

18. In this regard, 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.
>
> 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 FRY further stated that, according to the official listing of 8 December 2000, "*Yugoslavia*" had been listed as a Member of the United Nations since 1 November 2000 and that "*the explanatory note makes it clear that this is a reference to the FRY*. The FRY concluded that "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".

19. 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 **[13]** 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
> (2) the FRY did not remain bound by Article IX of the Genocide Convention continuing the personality of the former Yugoslavia.

It is on the basis of these two "facts" that, in its oral argument, the FRY ultimately founded its request for revision.

20. 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 states that "the FRY never argued or contemplated that the newly discovered fact would or could have a retroactive effect".

21. For its part, Bosnia and Herzegovina maintains 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.

22. In short, Bosnia and Herzegovina submits that what the FRY refers to as "facts" are "the consequences of a fact, which is and can only be the admission of Yugoslavia to the United Nations in 2000". It states 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 (and the ensuing consequences) as a new fact". Bosnia and Herzegovina concludes that this " 'new fact' . . . is subsequent to the Judgment whose revision is sought". It notes that the alleged new fact can have "no retroactive or retrospective effect".

23. Bosnia and Herzegovina further adds that the FRY is merely relying on a "new 'perception' of the facts of 1993 in the light of those which took place in 2000 and 2001". Bosnia and Herzegovina submits that a "perception" is not a fact and that "in any event, the 'perception' of Yugoslavia's new situation with respect both to the United Nations and **[14]** to the 1948 [Genocide] Convention, occurred subsequently to the Judgment under challenge".

* *

24. Before turning to the examination of the "facts" which the FRY has relied upon in its pleadings in order to justify the revision of the 1996 Judgment, the Court will recount the background to the case with a view to providing the context for the contentions of the FRY.

*

25. In the early 1990s the SFRY, made up of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia, began to