

# Revision Proceedings before the International Court of Justice

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## I. Introduction

On 3 February 2003, for the second time only in the history of the International Court of Justice, a judgment on an application for revision was handed down in the Case concerning the *Application of the Convention for the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*<sup>1</sup>. For the sake of universal peace it is the fundamental purpose of the International Court of Justice to ascertain and to administer justice<sup>2</sup>. Nevertheless, the history of jurisprudence evidences that independent of how advanced a legal system may be, a miscarriage of justice always remains possible<sup>3</sup>. Accordingly, by virtue of the necessity to bring decisions in harmony with justice, revision proceedings were already applied in ancient times and the importance of the right of revision on the international level has been emphatically stated in the past<sup>4</sup>. However, in light of the remarkably low number of application for revision cases which have dealt with in the past, revision proceedings can be regarded as a rather neglected form of proceedings<sup>5</sup>. Throughout its entire history, the Permanent Court of Justice was not faced with a single application for revision of one of its own judgments<sup>6</sup>. Quite si-

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<sup>1</sup> *Application for Revision* Case, Judgment of 3 February 2003, with regard to the Application for Revision of the Judgment of 11 July 1996 in the Case concerning the *Application of the Convention for the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections; [http://www.icjci.org/icjwww/idoctet/iybh/iybhjudgment/iybh\\_ijudgment\\_20030203.PDF](http://www.icjci.org/icjwww/idoctet/iybh/iybhjudgment/iybh_ijudgment_20030203.PDF).

<sup>2</sup> See the speech of the American delegate Holls at the Hague Peace Conference, cited in: J.B. Scott, *The Hague Peace Conference*, Vol. I, 81.

<sup>3</sup> Conférence Internationale de la Paix 1899, Sommaire Général, Procès-Verbaux, Troisième Commission, Cinquième Séance, 35 et seq.

<sup>4</sup> Report of the Advisory Committee of Jurists, Procès-Verbaux, 744, where it is stated that "The right of revision is a very important right [...]." With regard to the application of revision proceedings in ancient times see E. Ruggiero, *L'arbitrato pubblico in relazione col privato presso i Romani*, 241, who refers to legal disputes in the year 185 BC, see also C. Philippson, *The International Law and Custom of Ancient Greece and Rome*, 160, who refers to revision proceedings with regard to a legal dispute between Carthago and Massinissa.

<sup>5</sup> See also Separate Opinion of Judge Koroma, *Application for Revision* Case (note 1), para. 1.

<sup>6</sup> G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. IV, 201; J. H. Ralston, *The Law and Procedure of International Tribunals*, 209; however, in two of its Advisory Opinions the PCIJ, although only implicitly, dealt with the requirements for revision, see Advisory Opinion No. 8 Advisory Opinion of The Delimitation of Jaworzina, 1924,

milarly, until recently, its successor, the International Court of Justice has only once delivered a judgment with regard to revision, unanimously finding inadmissible the request for revision brought forward by Tunisia<sup>7</sup>.

In comparison, currently the application of Article 61 of the Statute seems to undergo an almost inflationary development<sup>8</sup>. On 24 April 2001, the Federal Republic of Yugoslavia (FRY) filed an application for revision of the Judgment, delivered by the International Court of Justice on 11 July 1996, in the Case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*. Additionally, on 10 September 2002, the Republic of El Salvador submitted an application for revision of the Judgment delivered on 11 September 1992 in the Case concerning the *Land, Island and Maritime Frontier Dispute*<sup>9</sup>. In the absence of precedents, the Yugoslav application for revision, to which the Court has now delivered its judgment<sup>10</sup>, for the first time revealed a number of practical problems entailed in Article 61 of the Court's Statute. It is in this context that Judge Korošma in his Separate Opinion emphasized the importance that "[...] the Court should clarify the meaning of Article 61 of the Statute [...] on those few occasions when the opportunity arises"<sup>11</sup>.

## II. Background of the *Application for Revision Case*<sup>12</sup>

On 20 March 1993, Bosnia and Herzegovina instituted proceedings against the Federal Republic of Yugoslavia alleging that Yugoslavia had committed, and still continued to commit, violations of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter: "the Genocide Convention")<sup>13</sup>. In its application, Bosnia and Herzegovina *inter alia* invoked Article IX of the Genocide

Ser. B/No. 8 and Advisory Opinion on the Question of the Monastery of Saint-Naoum, 1924, Ser. B/No. 9.

<sup>7</sup> ICJ Rep. 1985, 189.

<sup>8</sup> According to Schwarzenberger (note 6), 686, fn. 58, the Namibia Advisory Opinion (1971) has arguably been intended to be a *de facto* revision of the Court's 1966 Judgment.

<sup>9</sup> Application for Revision of the Judgment of 11 July 1996 in the Case Concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, 24 April 2001 (*Bosnia and Herzegovina v. Yugoslavia*); Application for Revision of the Judgment of 11 September 1992 in the Case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening)*, (*El Salvador v. Honduras*).

<sup>10</sup> *Application for Revision Case* (note 1).

<sup>11</sup> Separate Opinion of Judge Korošma, *Application for Revision Case* (note 1), para. 1.

<sup>12</sup> See generally M. Craven, The Genocide Case, BYIL (1997), 127; and by the same author, The Bosnia Case Revisited and the "New" Yugoslavia, LJIL 15 (2002), 323; M. Weller, The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia, AJIL 86 (1992), 569.

<sup>13</sup> Application of the Republic of Bosnia and Herzegovina, 20 March 1993 with regard to the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia, Serbia and Montenegro*); the FRY, in its counter-memorial filed on 22 July 1997, submitted counter-claims requesting the Court to adjudge and declare that "Bosnia and Herzegovina [was] responsible for the acts of genocide committed against the Serbs in Bosnia and Herzegovina" and that it "had the obligation to punish the persons held responsible" for these acts.

Convention as the basis for the Court's jurisdiction<sup>14</sup>. Additionally, soon after it had filed its application, Bosnia and Herzegovina submitted a request for the indication of provisional measures in accordance with Article 41 of Court's Statute to which the Court responded by an order of 8 April 1993, in which it indicated provisional measures with regard to the protection of rights under the Genocide Convention<sup>15</sup>. In September 1993 the Court reaffirmed the provisional measures indicated in April<sup>16</sup>.

At the time, as is well known, the membership of the Federal Republic of Yugoslavia in the United Nations was highly controversial<sup>17</sup>. The FRY took the position that it was the continuator of the former Socialist Federal Republic of Yugoslavia (hereinafter the SFRY), thereby not having been expelled or suspended from the United Nations and continuing to be a member of the United Nations. On the contrary, all other Yugoslav republics, among them Bosnia and Herzegovina, took the position that the former SFRY ceased to exist in 1992, and that all the emergent republics, as successor states, had to apply anew for membership in the United Nations<sup>18</sup>. In light of the legal dilemma the Court in its 1993 order took the view that the position adopted by the United Nations, "is not free from legal difficulties"<sup>19</sup>.

Despite the then still ongoing debate, the Court on 11 June 1996 decided on a series of preliminary objections raised by Yugoslavia and found that the case was admissible and that, ruling out all other additional bases of jurisdiction invoked by Bosnia and Herzegovina, it had jurisdiction by virtue of Article IX of the Genocide Convention<sup>20</sup>. Establishing its jurisdiction *ratione personae*, the Court relied on a formal declaration, adopted on 27 April 1992 on behalf of the FRY which read:

"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."<sup>21</sup>

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However, in an Order of 10 September 2001, the Court placed on record the withdrawal by Yugoslavia of its counter-claims.

<sup>14</sup> 9 December 1948, UN Treaty Series, Vol. 78, 277.

<sup>15</sup> ICJ Rep. 1993, 3.

<sup>16</sup> ICJ Rep. 1993, 325; subsequently on 16 March 1999, the FRY, following the bombing of Belgrade, instituted proceedings against the member states of NATO, see *Legality of Use of Force (Yugoslavia v. Belgium)*, (*Yugoslavia v. Canada*); (*Yugoslavia v. France*), (*Yugoslavia v. Germany*); (*Yugoslavia v. Italy*), (*Yugoslavia v. Netherlands*); (*Yugoslavia v. Portugal*); (*Yugoslavia v. Spain*); (*Yugoslavia v. United Kingdom*), (*Yugoslavia v. United States of America*), see also Orders of 2 June 1999, ICJ Rep. 1999, 124 et seq.

<sup>17</sup> See Craven (note 12), 127 (131 et seq.).

<sup>18</sup> See, e.g., Y.Z. Blum, UN Membership of the "New" Yugoslavia: Continuity or Break?, *AJIL* Vol. 86 (1992), 830; M.C. Wood, Participation of Former Yugoslav States in the United Nations and in Multilateral Treaties, *YUNL* Vol. 1 (1997), A. Zimmermann, *Staatennachfolge in völkerrechtliche Verträge*, 303 et seq.

<sup>19</sup> ICJ Rep. 1993, 3, para. 18.

<sup>20</sup> ICJ Rep. 1996, 595, para. 41.

<sup>21</sup> UN Doc. A/46/915/Ann. II. According to ICJ Rep. 1996, 610, para. 17; the FRY's intention to remain bound by the international treaties to which the former Yugoslavia was a party, was also con-

On 27 October 2000, Yugoslav President Kostunica, referring to Security Council Resolution 777, addressed a letter to the Secretary-General of the United Nations requesting admission of the FRY as a member of the United Nations under Article 4 of the Charter. Upon recommendation of the Security Council, the General Assembly on 1 November 2000 decided this request in the affirmative<sup>22</sup>. Following admission, by a letter of the Legal Counsel of the United Nations of 8 December 2000, the FRY was invited to decide, whether or not to assume rights and obligations of the former SFRY to international treaties. Subsequently, on 8 March 2001 the FRY, in pursuance of Article XI of the Genocide Convention, sent to the Secretary-General a notification of accession to said Convention, which included a reservation with regard to Article IX. Following these events, on 24 April 2001 the FRY filed its application for revision of the judgment, rendered on 11 June 1996. The FRY invoked that its new admission to the United Nations had revealed as a fact that at the time of the judgment, the FRY had not been a member of the United Nations, nor a State party to the Statute of the Court, and that it had neither been a contracting party to the Genocide Convention<sup>23</sup>.

### III. History of Article 61 of the Statute

In the absence of significant juridical precedents with regard to Article 61 of the Statute, one has to resort to general methods of interpretation in order to shed light on its requirements. Therefore it is first of all worth taking note of the history of revision proceedings on the international level.

The text of Article 61 of the Statute of the International Court of Justice, as it stands today, originates from a compromise; adopted at the Hague Conventions on the Pacific Settlement of Disputes<sup>24</sup>. Already in 1898, Article 13 of the Italian-Argentinean Arbitration Treaty contained a revision clause which was repeatedly referred to at the Hague Conference of 1899. During said Conference the American delegation, notwithstanding a persistent minority represented *inter alia* by the Rus-

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firmed in an official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary-General.

<sup>22</sup> S/RES/1326 (2000) and GA/RES/55/12.

<sup>23</sup> Application for Revision of the Judgment of 11 June 1996, 8, para. 3; according to Article XI of the Genocide Convention, the Convention 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; such invitation had not been submitted to the FRY.

<sup>24</sup> According to D.V. Sandifer, *Evidence Before International Tribunals*, 404, throughout the history of international jurisprudence, the denotation of revision, rehearing, cassation and appeal has often times been used in an interchangeable and synonymous sense. Furthermore, the meaning of revision and its relation to appeal varies from one system of municipal law to another, and according to Schwarzenberger (note 6), *International Law*, Vol. IV, 683, Fn. 36, the concept of revision is probably as manifold as law systems all over the world are. This unclarity is also exemplified by the German translation "Nachprüfung" of Articles 55, 83 of the Hague Conventions and today's translation of Article 61 of the Court's Statute "Wiederaufnahme des Verfahrens", see H. Lammassch, *Die Rechtskraft Internationaler Schiedssprüche*, 155.

sian delegate Martens<sup>25</sup>, successfully insisted on the incorporation of a provision for revision of an arbitral award in the Convention<sup>26</sup>. Aptly quoting Abraham Lincoln's famous phrase that "nothing is settled until it is settled right", the American delegate emphasised that under particular circumstances the principle of finality of international awards and judgments has to give way to overriding considerations of equity. He emphatically disagreed with the Russian delegate's repeated objections that "[...] il serait absolument fâcheux et malheureux qu'une sentence arbitrale, prononcée dûment par un tribunal international, puisse être renversée par une nouvelle sentence"<sup>27</sup>.

Henceforth, Article 55 of the Hague Peace Convention was adopted in 1899 and in 1907, notwithstanding a still opposing minority, the article remained unchanged<sup>28</sup>. Article 61 of the Statute of the Permanent Court of International Justice, following up upon a draft of the 1920 Committee of Jurists<sup>29</sup>, substantially coincided with Articles 55 and 83 of the Hague Peace Conventions and only entailed some minor changes in the wording of the article<sup>30</sup>. While the original articles of the Pacific Settlement Convention did not fix a time-limit and left it to the discretion of the parties to reserve in the compromis the right to demand revision, Article 61 of the Statute of the PCIJ added that revision proceedings could be instituted without a prior agreement or compromise, that the ignorance of the fact's existence must not have been due to negligence, and it included an absolute time-limit of ten years after the rendering of the judgment to be revised<sup>31</sup>.

Since then, Article 61 of both the Statute of the PCIJ as well as of the ICJ has remained unchanged and makes provision for a revision of a judgment when:

[i]t 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<sup>32</sup>.

<sup>25</sup> Russian Proposal of 1907, at: The Proceedings of the Hague Peace Conferences, Conference of 1907, Vol. II, Annex 11, 869, 870.

<sup>26</sup> Instructions to the International Conference at The Hague, 1899, Annex B, Section 7, in: J.B. Scott, The Hague Peace Conferences, Vol. II, 16.

<sup>27</sup> See the speeches of the Russian delegate de Martens and the American delegate Holls, at: Conférence Internationale de la Paix 1899, Sommaire Général, Procès-Verbaux, Troisième Commission, Cinquième Séance, 34 et seq.; see also the American proposal, *ibid.*, 242; Holls, The Peace Conferences, 257; H. Wehberg, Kommentar zu dem Haager Abkommen betreffend die friedliche Erledigung internationaler Streitigkeiten vom 18. Oktober 1907, 144 et seq; E. Zoller, Observations Sur La Révision Et L'Interprétation Des Sentences Arbitrales, *Annuaire Français de Droit Int.* 1978, 327 (330).

<sup>28</sup> J.B. Scott, The Hague Peace Conference, Vol. I, 301. See also generally H. Lammassch, Die Rechtskraft Internationaler Schiedssprüche, 150, 151.

<sup>29</sup> Minutes of the 1920 Committee of Jurists, 91-93; generally see M.O. Hudson, The Permanent Court of Justice, 208.

<sup>30</sup> Records of the First Assembly Committees, I, 375, 499, 536.

<sup>31</sup> J.B. Scott, The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists, Report and Commentary, 130; Hudson (note 29), 208, 209.

<sup>32</sup> See also Article 41 of the Statute of the European Court of Justice and Art. 42 of the EAEC-Statute which have a similar wording. It is however noteworthy that still in 1953, when the draft articles on arbitration procedure were discussed, some governments (India and the United Kingdom)

## IV. General Questions and Problems

Before turning to the specific requirements of Article 61 of the Statute, the concept of revision itself has to be brought in line with the fundamental principles entailed in the Statute, i.e. the finality of the Court's judgments and the principle of *res judicata*.

### 1. Finality and the Principle of *res judicata*

The concept of revision adversely affects the principle of *res judicata* and is thereby capable of impairing the stability of jural relations<sup>33</sup>. The way in which Article 61 is couched in the Statute today already emphasizes its exceptional nature<sup>34</sup>. Accordingly, it follows from the outset that the requirements of Article 61 of the Statute have to be interpreted rather restrictively<sup>35</sup>. It is primarily for this reason that during the Hague Conferences, the incorporation of a revision clause was so highly controversial. This is vividly evidenced through the apprehensions the Russian delegate repeatedly pointed out in the course of the Conference being based on his belief in the absolute primacy of the principle of *res judicata*<sup>36</sup>.

Today, Article 60 of the Court's Statute emphasizes the general principle that the Court's judgments are final and without appeal and, given the combined effect of Articles 59, 60 and 61 of the Statute, its judgments are *res judicata*<sup>37</sup>. Although Article 60 of the Statute allows for the interpretation of a judgment, it is evident that interpretation cannot go beyond the limits of the original judgment, i.e. it cannot consider new facts arising or becoming known after the principal judgment<sup>38</sup>. In order for Article 61 of the Statute, as an exception to the principle of *res judicata*, to be applicable, the findings to be revised must fall within the scope of the *res judicata* created by the original judgment. It follows, that a fundamental change of circumstances occurring after the judgment to be revised has been submitted, for example the disappearance of an island attributed to one of the parties in the origi-

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were opposed to the inclusion of a revision clause see A/CN.4/68, Nos 4 and 8 or A/2456, Annex I, Nos 5 and 9.

<sup>33</sup> Sh. Rosenne, *The Law and Practice of the ICJ*, Vol. III, 1671.

<sup>34</sup> *Ibid.*, 1671.

<sup>35</sup> With regard to the revision procedure on the European level, generally see K.P.E. Lasok, *The European Court of Justice, Practice and Procedure*, 514; generally instructive is also the *Bellintani* Case 116/78 [1980] ECR 23 Case T-4/89.

<sup>36</sup> Conférence Internationale de la Paix 1899, *Sommaire Général, Procès-Verbaux, Troisième Commission, Cinquième Séance*, 35, de Martens *inter alia* stated that: "La grande utilité de l'arbitrage réside en ce fait que du moment où la sentence arbitrale a été dûment prononcée, tout est fini [...]".

<sup>37</sup> Rosenne (note 33), 1655.

<sup>38</sup> *Ibid.*, 1670; quite similar to the rather rare invocation of Article 61, the ICJ has only dealt with three cases concerning the interpretation of a judgment, see the *Asylum* Case, ICJ Rep. 1950, 266; the *Application for Revision and Interpretation of the 1982 Judgment concerning the Continental Shelf between Tunisia and Libya*, ICJ Rep. 1985, 192 and lately the Case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, ICJ Rep. 1999, 30.

nal judgment, would not be encompassed by the principle of *res judicata*. Therefore such assertion could not lead to revision within the meaning of Article 61 of the ICJ's Statute.

## 2. Revision of a Judgment on Preliminary Objections

The application of the FRY is unique in the sense that, contrary to the *Tunisian Case* and the application submitted by El Salvador, revision is sought of a judgment not on the merits, but on preliminary objections concerning the Court's jurisdiction. In conformity with the *jus aequum* character of the relations between the Court and the parties, a judgment on jurisdiction could arguably be regarded as only being of a declaratory nature, and as therefore not being final within the meaning of Article 60 of the Statute of the Court<sup>39</sup>. If this were the case, the Court could return to the issue of jurisdiction at any time during the proceedings upon initiative as well as *proprio motu* even after a judgment on jurisdiction has been rendered. Accordingly, a party would not be required to seek revision thereof under the stringent requirements of Article 61 of the Statute<sup>40</sup>.

It is noteworthy that in the *South-West Africa Case*, the Court held that "[...] it found it unnecessary to pronounce on issues such as whether a decision on a preliminary objection constitutes a *res judicata*, whether it ranks as a 'decision' for the purposes of Article 59 of the Court's Statute or as 'final' within the meaning of article 60"<sup>41</sup>. Furthermore, the structure of Article 61 itself seems to support this understanding, as it allows the Court in paragraph 3 to require previous compliance with the terms of the principal judgment, and this provision would arguably be rendered meaningless, if it was to be extended to a judgment on jurisdiction, as it is difficult to imagine how a state should be required to comply with such a judgment. It has to be noted that this particular paragraph was incorporated into the revision provision primarily with the intention to prevent misuse of revision proceedings as a delaying strategy<sup>42</sup>. It may therefore be argued, that its wording may not be used to circumvent the fundamental decision entailed in Article 60, even more since this article does not differentiate between judgments on jurisdiction and judgments on the merits and according to which the Court's judgments are final and without appeal.

Indeed, in the *Corfu Channel Case*, after the judgment on the merits, which left the question of compensation open for later consideration, had been delivered, Albania challenged the jurisdiction of the court<sup>43</sup>. However, in its judgment on the

<sup>39</sup> Dissenting Opinion of Judge Dimitrijevic, *Application for Revision Case* (note 1), para. 55: "the Court should have examined its jurisdiction *proprio motu* [...]". See also Certain German Interest in Polish Upper Silesia, Dissenting Opinion, Rostoworoski, PCIJ Rep. Ser. A/No. 7, 88.

<sup>40</sup> See the Appeal Relating to the Jurisdiction of the ICAO Council (*India v. Pakistan*), ICJ Rep. 45 (1972), at 52, para. 13; Schwarzenberger (note 6), at 511.

<sup>41</sup> ICJ Rep. 1966, 37, para. 59.

<sup>42</sup> Minutes of the 1920 Committee of Jurists, 744, 745. See also generally Scott (note 31), 130.

assessment of the amount of compensation of 15 December 1949, the Court stated, stressing Article 60 of the Statute, that jurisdiction had been established by its judgment of 9 April 1949, and that the matter therefore was *res judicata* and no longer under discussion<sup>44</sup>. Although the Court did not specifically endeavour into this question in the present case it seems that it followed this argumentation, since – without putting into question the 1996 judgment’s *res judicata* – the Court simply applied Article 61 of the Statute.

## V. The Requirements of Article 61

Having thus considered the question of what kind of decisions may be subject to revision, it remains to be seen what are the specific requirements of such a revision as contained in Article 61 of the Court’s Statute.

### 1. Discovery of a Fact

Article 61 of the Statute first of all requires the applicant to demonstrate the discovery of a fact. Newly discovered facts have been an accepted ground for revision since the 1899 Peace Conference<sup>45</sup>. Only for reasons of clarification was the original wording of the Hague Conventions, i.e. “fact or document”, later on limited to “fact” in the Statute of the PCIJ. It was agreed that the discovery of a document was included in the notion of “fact”<sup>46</sup>. Likewise, on the European level, case law seems to suggest that the discovered fact does not need to be the primary fact, but that it may also constitute evidence of a primary fact<sup>47</sup>.

During the Hague Conferences examples for what could qualify as a fact in the sense of the revision provision, such as “[...] une nouvelle carte ou un nouveau document d’une authenticité incontestable”, were given<sup>48</sup>. When in the context of the dispute over the American north-eastern border, a new map was discovered in 1905 after the judgment had been rendered, the example given at the Hague Conference did not only prove to be a very practical one, but also to be the typical ground on which revision is sought. It seems legitimate to say that since then, terri-

<sup>43</sup> ICJ Rep. 1949, 9 April 1949.

<sup>44</sup> ICJ Rep. 1949, 248 (*United Kingdom v. Albania*) / Assessment of Amount of Compensation, 15 December 1949. This is also implied through the judgment in the Case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, ICJ Rep. 1999, 39, para.16.

<sup>45</sup> M. Reisman, Nullity and Revision, 425.

<sup>46</sup> Documents concerning the action taken by the Council of the League of Nations, 139; but see also the Advisory Opinion on the Question of the Monastery of Saint-Naoum, Ser. B/No. 9, 22.

<sup>47</sup> See Case 56/70 *Fonderie Acciaierie Giovanni Mandelli v. Commission* and Case 37/71 *Rev Jarmet v. Commission*, the facts relied on were in reality further evidence to support an issue of fact in the earlier proceedings, cited by Lasok (note 35), 518.

<sup>48</sup> Speech of the American delegate, at Conférence Internationale de la Paix 1899, Sommaire Général, Procès-Verbaux, Troisième Commission, Cinquième Séance, 36 et seq.



torial disputes have been established as the somewhat characteristic kind of revision cases<sup>49</sup>.

Concordantly, the facts on which the respective applications for revision were based by Tunisia<sup>50</sup> and by El Salvador<sup>51</sup> refer to boundary disputes. The former brought forward the discovery of a resolution of the Libyan Council of Ministers, which allegedly determined the “real course” of the north-western boundary of a petroleum concession granted by Libya<sup>52</sup>. El Salvador in turn based its application on modern scientific evidence which allegedly proves a so-called “avulsion”, likewise determining a certain boundary, as the relevant fact<sup>53</sup>. In its judgment in the *Tunisian Case*, the Court did not elaborate on the question whether this resolution constituted a fact, but rather saw this requirement readily fulfilled<sup>54</sup>.

In light of these precedents, the application of the FRY, seeking revision of a judgment on preliminary objections with regard to the Court’s jurisdiction, from the outset bears a somewhat special connotation. In its application, the admission to the United Nations as a new Member on 1 November 2000 was referred to as the relevant fact<sup>55</sup>. However, during the oral pleadings, it was specified on behalf of the FRY that admission to the United Nations did not constitute the pertinent fact, rather this factual event only revealed the relevant facts which subsequently were identified as: “[...] that the FRY was not a party to the Statute at the time of the judgment and that the FRY did not remain bound by the Genocide Convention continuing the personality of the former Yugoslavia”<sup>56</sup>. In view of the Court, it is on the basis of these two “facts” on which the FRY ultimately founded its request for revision<sup>57</sup>. Bosnia and Herzegovina contended that not being bound by the Genocide Convention nor being a member of the Court’s Statute were merely legal conclusions retroactively drawn from the FRY’s admission to the United Nations, and it thus vehemently contested that the allegedly newly discovered “facts” relied on by the FRY, could amount to facts within the scope of Article 61 of the Statute<sup>58</sup>.

<sup>49</sup> See Lammach (note 24), 152.

<sup>50</sup> ICJ Rep. 1985, 195, para. 6.

<sup>51</sup> Application for Revision of the Judgment delivered on 11 September 1992 in the Case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras/Nicaragua intervening)*.

<sup>52</sup> ICJ Rep. 1985, 195, para. 6.

<sup>53</sup> Note 51.

<sup>54</sup> ICJ Rep. 1985, 198, para. 11 et seq.

<sup>55</sup> Application for Revision of the Judgment delivered on 11 July 1996 in the Case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, 38, para. 23.

<sup>56</sup> CR 2002/42, 17, para. 2.2. (Varady)

<sup>57</sup> Application for Revision Case (note 1), 6, para. 19.

<sup>58</sup> CR 2002/43, 10, para. 4 et seq. (Pellet). The conclusions the FRY drew from its admission to the United Nations were far from being unlikely conclusions but they were allowedly debatable (Cf. CR/2002/41, 30, para. 7 (Pellet)). It is also worth noting that in the *Bellintani Case*, the Court of First Instance held that the establishment of only a possible classification of a given situation does not suffice to be a new fact, *Bellintani Case* 116/78 [1980] ECR 23 Case T-4/89, 27.

Already during the Hague Conferences, the delegates had been aware of the difficulties related to the definition of what constitutes a fact, which is evidenced by the statement of van Karnebeek, vice president of the Conference's Bureau, who said: "On parle de 'fait nouveau': mais rien n'est plus difficile à définir [...]"<sup>59</sup>; as well as through the déclaration of the Italian delegate Nigra, who stated: "L'expression de 'fait nouveau' exerce une influence décisive n'est pas assez précise et ne définit pas suffisamment les cas de révision"<sup>60</sup>.

Still today, the distinction between matters of law and matters of fact is a problem common to all legal systems. The assumption that facts are crystallike phenomena which could be discovered in a static form has to be rejected, as a clear cut distinction is not possible<sup>61</sup>. Questions of fact and law are often intertwined, and even if a particular fact can be identified, in a legal context it is inseparable from the question of law<sup>62</sup>. Nevertheless, the legal understanding of the wording of any given provision always has to be seen in relation to the legal regime in which it is found<sup>63</sup>. With regard to Article 61 of the Statute, the explicit exclusion of any form of appeal in Article 60 of the Statute sets a narrow limit for the interpretation of the word "fact". The Franco-German Mixed Arbitral Tribunal in its opinion in the Case of *Heim and Chamant v. État Allemande* held that revision was not meant to create in an indirect manner "a second trial"<sup>64</sup>. It has also been emphasized that revision is not a form of rehearing permitting the parties to question the legal reasoning upon which the award was based<sup>65</sup>. Although an essential juridical error and subsequently a manifest error have been repeatedly discussed as a sufficient ground for revision<sup>66</sup>, today it seems to be unanimously accepted that a mere error

<sup>59</sup> Conférence Internationale de la Paix 1899, Sommaire Général, Procès-Verbaux, Troisième Commission, Cinquième Séance Conférence Internationale de la Paix 1899, 40.

<sup>60</sup> Ibid., 35; Nigra pointed out that Article 13 of the Italian-Argentinian Arbitration Treaty limited the grounds for revision to two cases: "Si la sentence a été prononcée sur un document faux ou erroné; Si la sentence, en tout ou en partie, a été la conséquence d'une erreur positive ou négative de fait, résultant des actes ou documents de la cause".

<sup>61</sup> R. Bilder, The Fact/Law Distinction in International Adjudication, in: R. B. Lillich (ed.), *Fact Finding before International Tribunals*, 95 et seq.; see also Reisman (note 45), 426.

<sup>62</sup> The Franco-German Mixed Arbitral Tribunal in the *Heim and Chamant* Case (1922) held that "[...] the notion of fact ought not to be put in absolute opposition to that of law which are not always easily distinguishable the one from the other, but it should be understood in a more liberal sense", 3 Recueil des décisions des Tribunaux Arbitraux Mixtes, 50, at 55; see also Reisman (note 45), 425, 426, according to whom "one of the most fascinating philosophical assumptions of the law is the existence of facts".

<sup>63</sup> See also Dissenting Opinion of Judge Dimitrijevic, *Application for Revision* Case (note 1), para. 6: "Whether in the context of revision or in another context, the concept of 'fact' has never been reduced to physical evidence or documents. International tribunals have also come to the conclusion that the meaning of 'fact' depends on the context and that it must not be construed narrowly", see the references there.

<sup>64</sup> Franco-German Mixed Arbitral Tribunal, *Heim and Chamant* Case (1922), 3 Recueil des décisions des Tribunaux Arbitraux Mixtes, 50, at 54.

<sup>65</sup> Yugoslav-German Mixed Arbitral Tribunal, *Epoux Ventense (Germany) v. Yugoslavia* (1923), 7 Recueil des décisions des Tribunaux Arbitraux Mixtes, 79; See also Separate Opinion of Judge Korošćak, *Application for Revision* Case (note 1), para. 2.

in law is no sufficient ground for an application leading to revision<sup>67</sup>. If an international judicial decision could be disputed simply on the ground of an erroneous legal appreciation, appeal which not only the Hague Conventions, but also the Statute both of the PCIJ as well as that of its successor made it their object to avert, would be the general rule<sup>68</sup>.

The strictest sense in which Article 61 could be interpreted is that only events which are open to empirical scrutiny, as for example a map documenting a certain boundary, amount to facts. On the other hand, in a legal sense it could also be argued that every issue which is open to juridical proof constitutes a fact in the sense of said provision. Neither the question of statehood nor the question whether a state has become a party to a treaty could be empirically proven without taking recourse to certain legal criteria. Accordingly Judge Vereshchetin in his dissenting opinion, referring to several definitions of the word fact, stated that "[...] it would be a natural interpretation of the meaning of the term 'fact' that it includes a State's status in an organization"<sup>69</sup>.

In any case, provided revision proceedings are applicable with regard to judgments on jurisdiction, the kind of "facts" which could possibly be discovered after the judgment has been rendered, will be quite different from the facts which may later on occur in the context of a boundary dispute. If the procedural right in Article 61 of the Statute is meant to be applicable with regard to judgments on jurisdiction the provision includes no reservation whatsoever in this regard. However, a too strict understanding of what constitutes a fact would exclude the sheer possibility of ever revising a judgment on jurisdiction<sup>70</sup>. Said judgments typically deal with questions contained in Articles 35, 36 of the Statute, i.e. legal questions. It follows that if the wording "fact" was to be understood in its narrowest meaning, Ar-

<sup>66</sup> The wording "essential error" originated from a text voted by the International Law Institute in 1876, see Sandifer (note 24), 423; see the decision of the Trail Smelter Arbitration Tribunal, in M. Whiteman, Digest of International Law, Vol. 12, which found that "the proper criterion lies in a distinction not between essential errors in law and other errors, but between manifest errors [...] such as would be committed by a tribunal that would overlook a relevant treaty or base its decision on an agreement admittedly terminated, and other errors in law", 1130, at 1136.

<sup>67</sup> Ibid, 1135; also at the Hague Peace Conference of 1899, the question arose whether the discovery of fraud was embraced within the concept of a "new fact", Proceedings of the Hague Peace Conferences, The Conference of 1899, 753, at Whiteman, ibid., 1129.

<sup>68</sup> In the *Baron de Neuflize v. Disconto Gesellschaft* Case, the Franco-German Mixed Arbitral Tribunal held that "[...] in order to justify revision it is not enough that there has taken place an error on a point of law or in the appreciation of a fact, or in both. It is only lack of knowledge on the part of the judge and of one of the parties of a material and decisive fact which may in law give rise to the revision of a judgment", 7 Recueil des décisions des Tribunaux Arbitraux Mixtes, 629.

<sup>69</sup> Dissenting Opinion of Judge Vereshchetin, *Application for Revision* Case (note 1), para. 10. Judge Vereshchetin also concluded that statehood and being a party to a treaty constitute facts and he notes "that the Russian text of Article 61 of the Statute uses the word 'circumstances' in place of the word 'fact' used in the English text".

<sup>70</sup> See also Dissenting Opinion of Judge Dimitrijevic, *Application for Revision* Case (note 1), para. 10: "Article 61 of the Statute does not distinguish between various kinds of judgments. For this simple reason, the notion of 'fact' relied upon in Article 61 should be broad enough to accommodate various types of facts which serve as a basis for all legal conclusions."

ticle 61 of the Statute would be rendered meaningless with regard to jurisdictional issues, thereby denying one of the parties a procedural right laid down in the Statute. Therefore, at least in the context of the revision of judgments on jurisdictional matters, a somewhat broader understanding of what constitutes a relevant fact seems allowable. In this regard Judge Dimitrijevic in his dissenting opinion rightly held that “[a] legal fact, a fact in law, is something that legally exists, that belongs to legal reality as a product of legal rules”<sup>71</sup>.

It follows, that the question whether the FRY was a member of the United Nations or not and *ipso facto* a party to the Statute of the Court or not, and finally whether it did or did not remain bound by the Genocide Convention are factual questions<sup>72</sup>. In this regard it is noteworthy that the requirement of the discovery of a fact is also fulfilled if a fact’s non-existence is discovered<sup>73</sup>.

The judgment is not entirely clear about whether the Court, which refers to the alleged facts as “legal consequences” respectively consequences which “[...] cannot be regarded as facts within the meaning of Article 61” does indeed not regard them to be facts because in the Judgment it is also stated, that: “[...] the FRY does not rely on facts that existed in 1996”<sup>74</sup>.

## 2. Existence of the Fact Prior to the Judgment to Be Revised having Rendered

Apart from the problem of what materially qualifies as a fact in the sense of Article 61 of the Statute, with regard to the Yugoslav application it was also questionable, whether the connected requirement of the discovery of said fact had been met. The Franco-Bulgarian Mixed Arbitral Tribunal in 1929 held that: “[...] the use of the word ‘discovery’ implies unquestionably the existence of the fact, which was unknown to the Tribunal, at the time when it gave the decision [...]”<sup>75</sup>. In this regard, it is also quite telling, that in 1920 the Advisory Committee of Jurists decided to drop the – possibly confusing – “new” with respect to facts in the first paragraph of Article 61 of the Statute of the Permanent Court<sup>76</sup>, and it seems to be established jurisprudence that the fact must have existed before the sentence was rendered<sup>77</sup>. Furthermore, evidence of a new fact, which has come into existence only after the

<sup>71</sup> Ibid. para. 3.

<sup>72</sup> Ibid.

<sup>73</sup> Dissenting Opinion of Judge Dimitrijevic, ICJ *Application for Revision* Case (note 1), para. 11.

<sup>74</sup> *Application for Revision* Case (note 1), 22, para. 69 (emphasis added).

<sup>75</sup> Franco-Bulgarian Mixed Arbitral Tribunal, *Battus* Case (1929), 9 Recueil des décisions Tribunaux Arbitraux Mixtes, 284, at 286, (Translation).

<sup>76</sup> Documents, League of Nations, 139.

<sup>77</sup> Minutes of the Advisory Committee of Jurists, 93; however, in the PCIJ Advisory Opinion on the Question of the Monastery of Saint-Naoum, Ser. B/No. 9, 22, the Court differentiated between new facts and facts unknown at the time of the judgment and seemed to qualify both as relevant facts capable of triggering revision.

decision, is inadmissible as a ground for revision<sup>78</sup>. Additionally, the very structure of Article 61 of the Statute presupposes this understanding, because if the fact had not existed at the time the judgment was rendered, the ignorance of it could from the outset in no case be due to negligence, which would be contrary to the assumption entailed in Article 61 that ignorance may in fact be due to negligence<sup>79</sup>.

It follows, that the original assertion that the admittance of the FRY to the United Nations in November 2000, having occurred four years after the judgment to be revised was rendered, could not be qualified as the relevant fact. Accordingly, the Court held in its judgment that “[a] fact which occurs several years after a judgment has been given is not a ‘new’ fact within the meaning of Article 61 [...]”<sup>80</sup>, and concluded that “[...] admission [to the United Nations] cannot be regarded as a new fact [...]”<sup>81</sup>. On the contrary, the Tunisian application relied on a map which had already existed when the original judgment was delivered, but which had only been discovered thereafter<sup>82</sup>.

However, the admittance of the FRY to the United Nations as a new member allegedly had revealed two additional facts and the Court had to answer the question<sup>83</sup>, whether these consequences<sup>84</sup>, arguably qualifying as facts in the material sense of the word, fall within the range of Article 61 of the Statute. In this regard, the Court in its judgment rather briefly declares that “[...] the FRY does not rely on facts that existed in 1996”<sup>85</sup>, and that the application for revision is based “[...] on the legal consequences which it [the FRY] seeks to draw from facts subsequent to the Judgment which it is asking to have revised”<sup>86</sup>. However, the crucial question, i.e. why the alleged facts constitute mere legal consequences instead of facts existing at the relevant time, is left unexplained.

In his dissenting opinion, Judge Dimitrijevic points out that the FRY “seeks to prove that the fact on which the Court relied in its 1996 Judgment did not ex-

<sup>78</sup> Franco-Bulgarian Mixed Arbitral Tribunal, *Battus* Case (1929), 9 Recueil des décisions Tribunaux Arbitraux Mixtes, 284, at 286; Franco-German Mixed Arbitral Tribunal, *Creange* Case (1924), 5 Recueil des décisions Tribunaux Arbitraux Mixtes, 114, at 116; Franco-German Mixed Arbitral Tribunal, *Guillaume Krichel* Case (1928), 8 Recueil des décisions Tribunaux Arbitraux Mixtes, 764, at 765; Franco-German Mixed Arbitral Tribunal, *Otzenberger* Case (1929), 9 Recueil des décisions Tribunaux Arbitraux Mixtes, 272, at 274; Ch. Meurer, *Die Haager Friedenskonferenz*, 365. See also Case 267/80 *Rev Risiera Modenese Srl v. Council, Commission and Birra Peroni SpA* (1985), ECR 3499, 3504, para. 10; *Bellintani* Case 116/78 (1980), ECR 23 Case T-4/89.

<sup>79</sup> Observations of Libya on the Application submitted by Tunisia for Revision and Interpretation of the Judgment of 24 February 1982, 60, para. 31.

<sup>80</sup> *Application for Revision* Case (note 1), 22, para. 67.

<sup>81</sup> *Ibid.*, para. 68. See however the Dissenting Opinion of Judge Vereshchetin, who concludes that “The fact is, Yugoslavia was not a Member of the United Nations in 1996. This fact constitutes ‘the new fact’ for the purposes of Article 61 of the Statue”, *ibid.* para. 28.

<sup>82</sup> ICJ Rep. 1985, 195.

<sup>83</sup> CR/2002/42, 17, para. 2.2. (*Varady*).

<sup>84</sup> Bosnia and Herzegovina argued that if these consequences were the only possible ones a legal vacuum (CR/2002/43, 12, para. 11 (*Pellet*)) or a period of lawlessness (CR 2002/41, 25-26, paras 36-39 (*van Biesen*)) with harmful consequences for all concerned would have been created.

<sup>85</sup> *Application for Revision* Case (note 1), 22, para. 69.

<sup>86</sup> *Ibid.*

ist<sup>87</sup> and indeed, it seems plausible to argue that admission as a new member reveals that prior to that event no membership existed<sup>88</sup>. It is notable, that the Court without endeavouring into the question why the FRY's invocations would be mere legal consequences instead of non existing facts averts this conclusion by qualifying the membership situation of the FRY vis-à-vis the United Nations as a membership *sui generis*<sup>89</sup>. This however, is a question of the fact's decisiveness, which indeed cannot preclude a fact form falling within the timeframe of Article 61 of the Statute<sup>90</sup>.

Nevertheless, it seems logical that if the belated factual event, i.e. admittance to the United Nations as a new member, does not fall within the chronological order entailed in this provision, it may be contradictory to revert to its legal consequences, be they facts or not, which were only brought to light and clarified through said event. The chronological order implied by Article 61 of the Statute makes it abundantly clear that the emergence of a new situation in view of which the Court would have judged differently is not in itself a ground for revision. Only in the exceptional case that an existing fact was for some reason not known at the time of the judgment, this miscarriage of justice may be healed through the medium of revision.

From the Court's line of argumentation in the present case, it follows that admission to the United Nations cannot be equated with for example the discovery of a map. On the contrary, in light of the judgment new admission cannot likewise be treated as the vehicle through which the primary fact, i.e. not having been a member to the United Nations *ex ante*, was revealed. However, the answer why new admission does not feature the same consequences as e.g. the discovery of a map, in other words why it does not have the capacity to reveal the underlying primary fact, is left open in the judgment.

It can only be deduced from the judgment that from the Court's point of view such an equation of new admission and the discovery of a map would blur the vision on the fact that still the map had been in existence all the time, whereas admission to the United Nations is a first time factual event, not only revealing but arguably for the first time creating certain legal consequences.

In this regard, the El Salvadorian application and the application of the FRY feature some similarities, because the "avulsion" referred to by El Salvador could likewise not be proven at the time of the original judgment, but only afterwards through newly developed scientific methods<sup>91</sup>. In this connection, in the Case *Rev. Ferrandi v. Commission the European Court of Justice* considered medical reports made after the contested judgment had been rendered as the relevant facts<sup>92</sup>, and it

<sup>87</sup> Dissenting Opinion of Judge Dimitrijevic, *Application for Revision Case* (note 1), para. 11.

<sup>88</sup> *Ibid.*, para. 49.

<sup>89</sup> Cf. *Application for Revision Case* (note 1), para. 69.

<sup>90</sup> *Ibid.*, para. 71.

<sup>91</sup> Application for Revision of the Judgment of 11 September 1992 in the Case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening)* (*El Salvador v. Honduras*).

has been induced therefrom, that where the discovered fact constitutes evidence of a primary fact, it can be used as the basis for an application for revision even if it came into existence after the principal judgment<sup>92</sup>. However, these reports related to the applicant's medical condition at the time of the judgment, i.e. primary facts already in existence before the delivery of the judgment and similarly, the "avulsion" [i.e. the primary fact] alleged by El Salvador, although not provable at the time, had already been in existence at the time of the original judgment. On the contrary, in view of the Court's argumentation in the current case, the admission to the United Nations has to be regarded as establishing the "primary fact", i.e. not having been a member of the United Nations *ex ante*, as a retroactive consequence.

Indeed it is true that retroactive consequences cannot be regarded as facts falling within the scope of Article 61 of the ICJ's Statute. The requirement of the existence of the "newly discovered fact" is the most important one because its precise identification affects all subsequent requirements of Article 61 of the Statute. Even if a retroactive consequence qualified as a fact, and even if the conclusions derived from it were the only possible conclusions, they would not have been in existence at the time of the judgment. Thus following, they could not possibly have been known by the Court nor by the party seeking revision, and this ignorance could not possibly have been due to negligence. However, Article 61 of the Statute clearly presupposes that the relevant facts could have been known and if they had not been, that this ignorance could have been due to negligence.

It follows, that if retroactive legal effects were to be encompassed by Article 61 of the Statute, its deliberately and most reasonably stringent requirements could be rendered meaningless. In view of Article 61's exceptional character and its capacity to disapply the fundamental concept of *res judicata*, it would be contrary to the underlying principle of the peaceful and lasting settlement of disputes, if retroactive effects were to be allowed as an applicable ground for revision.

Nevertheless, the Court does not explain the crucial question why not being a member of the United Nations, revealed through new admission to the United Nations, constitutes such a retroactive consequence instead of a relevant fact. It is noteworthy that in order to deliver its judgment the Court did not have to raise this question at all because in light of the now established *sui generis* membership situation, the fact would in any case have lacked the required decisiveness. Since the Court did raise the question it seems unfortunate that in view of possible revision applications in the future it did not take advantage of the opportunity to deliver an applicable distinction between mere retroactive consequences and facts falling within the scope of Article 61 of the ICJ's Statute.

<sup>92</sup> Case C-403/85 *Rev Ferrandi v. Commission* (1991) ECR I-1215, 1220, para.12; the application was declared inadmissible because the time-limit had evidently not been observed.

<sup>93</sup> Lasok (note 35), 519.

### 3. Decisive Factor

According to Article 61, paragraph 1, of the Statute, the fact must be of such a nature as to constitute a decisive factor. This is the case if, had the fact been known at the time, the prior judgment would have been materially different<sup>94</sup>. Consequently, in revision proceedings, it is the task of the Court to place the newly discovered fact alongside the facts of the case earlier assessed and to determine whether such new fact materially modifies their significance and the conclusions drawn from them<sup>95</sup>. Decisiveness is not established if the discovered fact was only an additional factor which the court did not consider at the time<sup>96</sup>, nor if the Court could have been more specific had it been known<sup>97</sup>, nor if it only reaffirms a fact already known at the time of the judgement<sup>98</sup>. The burden of proof of a fact's decisiveness lies on the applicant, and it can only be established in light of the parameters set up by the judgment to be revised<sup>99</sup>.

For this reason, the respective applicants in the *Tunisia* Case as well as in the present case pointed out at length the findings of the Court in its original judgment. If the *ratio decidendi* of the first judgment is the relevant criterion, decisiveness should be quite easy to establish if the court has exclusively based its findings on a particular fact, the non-existence of which only subsequently becomes known.

Indeed, if it was true, as the FRY argued, that the 1996 judgment was solely based on the finding that: "[...] the Court was open to the FRY only on the basis that it assumed the FRY to be a member of the United Nations and *ipso facto* a party to the Statute of the Court, that it continued the personality of the former Yugoslavia and that it thus remained bound by the Genocide Convention"<sup>100</sup>, it would have been most probable that the fact that the FRY was not a Member of the United Nations in 1996, revealed through its admission in November 2000, as well as the according conclusion that it was neither a party to the Statute of the Court nor to the Genocide Convention, would have materially altered the 1996 judgment and would thus have been a decisive factor<sup>101</sup>. Whilst the Court did not have to elaborate on the question of the fact's decisiveness, it nevertheless empha-

<sup>94</sup> Franco-German Mixed Arbitral Tribunal, *Heim and Chamant* Case (1922), 3 Recueil des décisions des Tribunaux Arbitraux Mixtes, 50, at 55; Belgian-German Mixed Arbitral Tribunal, *La Suédoise* Case (1924), 4 Recueil des décisions des Tribunaux Arbitraux Mixtes, 315, at 316. See also Case 116/78 *Rev Bellintani v. Commission* (1980) ECR 23; Case 107/79 *Rev Schuerer v. Commission* (1983), ECR 3805, 3808, para. 7.

<sup>95</sup> (*Baron de Neuflize (France) v. Diskontogesellschaft et al. (Germany)*), Franco-German Mixed Arbitral Tribunal 1927, 7 Recueil des décisions des Tribunaux Arbitraux Mixtes, 629; Iran-United States Claims Tribunal, Decision No. DEC 118-148-1, 28 Dec. 1993, at 20. For this reason, in its judgment the Court pointed out at length the factual situation in 1996, see *Application for Revision* Case (note 1), 6-21, paras 18-64.

<sup>96</sup> Case 40/71 *Riches-Parise v. Commission* (1972) ECR 73; Case 37/71 *Rev Jamet v. Commission* (1972) ECR 295.

<sup>97</sup> ICJ Rep. 1985, 213, para. 39.

<sup>98</sup> Case 56/75 *Rev Elz v. Commission* (1977) ECR 1617, 1620, para. 5 et seq.

<sup>99</sup> *Rosenne* (note 33), 1670.

<sup>100</sup> CR/2002/40, 39, paras 3.13, 3.14 (*Varady*).



sized 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, [...]”<sup>102</sup>. Following this line of argumentation, new admission to the United Nations could not have affected the situation prevailing in 1996 and would thus not have materially altered the Court’s findings at that time.

Apart from these substantive problems, arising in the context of the establishment of decisiveness, there were quite some uncertainties among the parties as to what belongs to the merits stage of the proceedings and what had to be argued within the context of the admission of the application for revision<sup>103</sup>. In the absence of any precedent, it remained quite unclear how far the Court has to go into the question of a fact’s decisiveness at the first stage of the proceedings and what remains to be decided in the second phase<sup>104</sup>. The Statute expressly provides in Article 61, paragraph 2, of the Statute, that the procedure commences with a judgment of the Court, recording the existence of a 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<sup>105</sup>. Thus, the Statute seems to preclude the possibility to deliver the decision on admissibility at the same time as the judgment on the merits of the application<sup>106</sup>. However, contrary to Article 100 of the Rules of Procedure of the Court of Justice of the European Communities, neither the Statute nor the Rules of the ICJ expressly state that the decision on admissibility is not to prejudice the decision on the merits<sup>107</sup>.

<sup>101</sup> Cf. CR/2002/40, 36, para. 3.2. (*Varady*). Although in 1996 the Court could possibly have based its jurisdiction on other grounds than the ones the FRY took as axiomatic in its application. Cf. Dissenting Opinion of Judge Dimitrijević, *Application for Revision Case* (note 1), para. 57. However, the Court did not expressly rely on any other such ground, i.e. it did not rely on Article 93, paragraph 2, of the Charter nor did it rely on Article 35, paragraph 2, of the Statute of the Court cf. CR/2002/40, 39, para. 3.13. (*Varady*), nor did the Court resort to any alternative justification linking the FRY to Art IX of the Genocide Convention other than that it remained bound by said convention in the continuation of the former SFRY, see ICJ Rep. 1996, 610, para. 17.

<sup>102</sup> *Application for Revision Case* (note 1), para. 71.

<sup>103</sup> CR/2002/40, 39, para. 3.14. (*Varady*); CR/2002/42, 33, para. 4.4 (*Zimmermann*).

<sup>104</sup> ICJ Rep. 1985, 192, at 247 (*Bastid*, Sep. Op); CR/2002/41, 44, para. 43 (*Pellet*).

<sup>105</sup> *Application for Revision Case* (note 1), 5, para. 15; ICJ Rep. 1985, 197, para. 8. The Rules of Procedure of some of the Mixed Arbitral Tribunals, however, did not prescribe such a two stage procedure but left the procedure of revision entirely to be regulated by the tribunal, see e.g. Romanian-German Mixed Arbitral Tribunal, 1 Recueil des décisions des Tribunaux Arbitraux Mixtes, 939-948; Franco-Turkish Mixed Arbitral Tribunal, 5 Recueil des décisions des Tribunaux Arbitraux Mixtes, 984-993.

<sup>106</sup> See also Article 99, paragraph 4, of the Rules of the Court which reads: “If the Court finds that the application is admissible it shall fix time-limits for such further proceedings on the merits of the application as, after ascertaining the views of the parties, it considers necessary”. According to Article 127, paragraph 2, of the Rules of Procedure of the Court of First Instance of the European Communities “Without prejudice to its decision on the substance, [...], give its decision on the admissibility of the application”. According to paragraph 3 “If the Court of First Instance finds the application admissible, it shall proceed to consider the substance of the application [...]”. See also Dissenting Opinion of Judge Vereshchetin, *Application for Revision Case* (note 1), para. 28, who notes that “Such a procedural decision would not have prejudged the ultimate result of the revision”.

If, as the wording of Article 61 of the Statute seems to imply, the Court already had to adjudge at the first stage of the proceedings that the fact is of such a nature that it would have materially altered the prior judgment, i.e. that it would constitute a decisive factor, it is questionable what would then be left to be decided at the second stage of the proceedings, provided for in Article 61, paragraph 2, of the Statute<sup>108</sup>. So far no case has ever proceeded to this second stage of proceedings and consequently, there is no authority in light of which an analysis of the correct procedure would be possible. However, whilst the silence of the Statute and the Rules could be interpreted as leaving the Court a wide range of discretion in this regard, in the light of the exceptional nature of the revision proceedings, it seems more plausible that the system of two stages is strictly to be abided by. This suggests that at this first stage of the proceedings, the scope of the Court's enquiry into the admissibility is limited to finding out if a fact exists and whether it is of such a nature as to be capable of altering the prior judgment, but not whether it does in substance do so<sup>109</sup>.

This would also provide for an adequate standard of proof which could reasonably be imposed on the applicant, because in such a case, it would be sufficient for the applicant to establish before the Court the plausible possibility that the fact, if known at the time of the judgment, would have altered the findings of the Court. In any other case, the applicant would be obliged to provide that the Court beyond doubt would have decided differently, which would mean, requiring the impossible.

If on such basis, the application is found to be admissible, the Court is still not prevented by its decision on admissibility from later finding that the fact lacked such decisive character<sup>110</sup>. In its judgment in the *Tunisian Case*, the Court went so far to conclude that its reasoning was "wholly unaffected by the evidence now produced" and that the discovered fact "would not have changed" its prior decision<sup>111</sup>. However, this does not contradict the aforementioned line of argumentation, because the Court had already declared the application for revision inadmissible on other grounds and only in the exercise of its "freedom to select the ground upon which it will base its judgment", it decided to also deal with the aspect of decisiveness before turning to the request for interpretation<sup>112</sup>.

It is also questionable whether the Court, once the case is opened for revision, is bound by its legal reasoning in the principal judgment in the context of which the

<sup>107</sup> See Lasok (note 35), 522.

<sup>108</sup> See also CR/2002/41, 45, para. 46 (*Pellet*).

<sup>109</sup> In this regard, see also Rule 80, paragraph 1, of the Rules of the European Court of Human Rights which reads: "A party may, in the event of the discovery of a fact which might by its nature have a decisive influence [...]" (emphasis added); see also *Bellintani Case* 116/78 (1980) ECR 23 Case T-4/89, 27, para. 2.

<sup>110</sup> Dissenting Opinion of Judge Dimitrijevic, *Application for Revision Case* (note 1), para. 57; Dissenting Opinion of Judge Vereshchetin, *ibid.*, para. 28. See also Lasok (note 35), 522.

<sup>111</sup> ICJ Rep. 1985, 213, para. 38.

<sup>112</sup> ICJ Rep. 1958, 62; cited at ICJ Rep. 1985, 207, para. 29.

discovered fact has to be implemented or if it may refer to reasons not mentioned in its prior judgment. Indeed, Judge Dimitrijevic considered that “[...] there could have been other bases for the jurisdiction of the Court [...]. They could have been examined had the case been opened for revision”<sup>113</sup>.

#### 4. Knowledge of the Newly Discovered Fact

Although the Court did not have to endeavour into any of the further requirements of Article 61 of the Statute, the arguments of the applicant as well as of the respondent raised important questions in this regard. Article 61 of the Statute requires that the fact was, “[w]hen the judgment was given, unknown to the Court, and also to the party claiming revision, [...], and that such ignorance was not due to negligence”. This latter part was not included in Articles 55 and 83 of the Hague Conventions but only later on introduced by the Committee of Jurists into the Statute of the PCIJ<sup>114</sup>. In the absence of authority, one must assume that this part exclusively refers to the party claiming revision<sup>115</sup> and that the applicant is required to prove its previous ignorance of the new fact adduced<sup>116</sup>.

##### a) Standard of Knowledge

In the *Tunisia* Case the Court held that the Court must be taken to be aware of every fact established by the material before it, whether or not it expressly refers to such fact in its judgment<sup>117</sup>. Also, a party cannot argue that it was unaware of a fact which was set forth in the pleadings of its opponent, or in a document annexed<sup>118</sup>. It follows that the condition of ignorance is not satisfied if the fact in question has been referred to in any manner, or simply known, even if not expressly referred to, in the course of the proceedings.<sup>119</sup> If the applicant has knowledge of the facts relied on, he remains bound by the *res judicata* of the original judgment<sup>120</sup>. The relevant moment in time is when the judgment was given<sup>121</sup>.

<sup>113</sup> Dissenting Opinion of Judge Dimitrijevic, *Application for Revision* Case (note 1), para. 57. See also Separate Opinion of Judge Koroma, *ibid.*, para. 11 et seq.

<sup>114</sup> Procès-Verbaux, Proceedings of the Committee, 744.

<sup>115</sup> See Rule 80, paragraph 1, of the Rules of European Court of Human Rights in which the according part reads as follows “was unknown to the Court and could not reasonably have been known to that party”. See also CR/2002/41, 29, para. 48 (*van Biesen*).

<sup>116</sup> Franco-German Mixed Arbitral Tribunal, *de Tairac* Case (1929), 9 Recueil des Décisions des Tribunaux Arbitraux Mixtes, 492, at 494.

<sup>117</sup> ICJ Rep. 1985, 203, para. 19.

<sup>118</sup> *Ibid.*

<sup>119</sup> Case 116/78 Rev *Bellintani v. Commission* (1980) ECR 23, 26, para. 2.

<sup>120</sup> See also the *Polypropylene Cases* Case T-4/89 Rev *BASF v. Commission* (1992) ECR II-1591; Case T-8/89 Rev *DSM NV. v. Commission* (1992) ECR II-2399; Case T-14/89 Rev *Montecatini SpA v. Commission* (1992) ECR II-2409.

Accordingly, the FRY had to show that, in 1996, neither the Court nor the FRY were aware of the allegedly “newly discovered facts”, i.e. that it was unknown to both that the FRY did not remain bound by the Genocide Convention and that it had not, at the time, been a member of the Court’s Statute<sup>122</sup>. Bosnia and Herzegovina, however, contested that the Court already in its Order of 8 April 1993 had raised the membership issue and had considered that “the solution adopted was not free from legal difficulties”<sup>123</sup>. Furthermore, Bosnia and Herzegovina brought forward that the Court had been aware of the fact that the situation created by resolution 47/1 could be terminated in the future but albeit based its *prima facie* jurisdiction as well as its definitive jurisdiction on Article IX of the Genocide Convention<sup>124</sup>.

Evidently, the FRY had at all relevant times been fully aware of the then ongoing debate about its status as continuator of the former SFRY and about its membership situation, during which debate many states took the position that the FRY should apply for United Nations membership<sup>125</sup>. However, neither the Court nor the FRY could have possibly known the exact future outcome of the debate nor could they have known when it would be resolved<sup>126</sup>. In this regard, Judge Dimitrijevic held that the relevant fact “was unknown in its totality”<sup>127</sup>. It follows that simply awareness of the debate in itself could not have qualified as relevant “knowledge”.

However, if seen in the light of the Court’s findings, the absence of knowledge is due to the immanent peculiarity of this revision proceeding, being based on “facts” which were only retroactively revealed through admittance to the United Nations. Accordingly, in the Court’s view there would not even have been the abstract possibility to know of their existence. It is already for this reason that the Court ruled out that the alleged facts constitute facts within the meaning of Article 61 of the Statute, i.e. because they did not exist at the time of the judgment<sup>128</sup>. Nevertheless, the Court also deals with the requirement of knowledge stating that “[a]ll these elements were known to the Court and to the FRY at the time when the Judgment was given”<sup>129</sup> and “[...] what remained unknown in July 1996 was if and when the FRY would apply for membership in the United Nations”<sup>130</sup>.

<sup>121</sup> CR/2002/40, 56, para. 6.3; see also Belgian-German Mixed Arbitral Tribunal, *Betz Case* (1929), 9 Recueil des décisions des Tribunaux Arbitraux Mixtes, 654, at 655.

<sup>122</sup> CR/2002/40, 41, paras 4.1 et seq. (*Varady*).

<sup>123</sup> ICJ Rep. 1993, 14, paras 14-18, in para. 18 the Court states that “the solution adopted is not free from legal difficulties”.

<sup>124</sup> ICJ Rep. 1993, 16, para. 26; ICJ Rep. 1993, 338, para. 25; ICJ Rep. 1996, 595, para. 41; see also the Court’s Orders of 1999 delivered in the NATO cases.

<sup>125</sup> Written Observations Bosnia and Herzegovina, 25-26, paras 3.7, 3.9; CR/2002/41, 33, para. 9 (*Pellet*).

<sup>126</sup> Dissenting Opinion Judge Vereshchetin, paras 13 et seq.; Dissenting Opinion, Judge Dimitrijevic, paras 12 et seq.

<sup>127</sup> Dissenting Opinion, Judge Dimitrijevic, para. 12.

<sup>128</sup> *Application for Revision Case* (note 1), 22, para. 69.

<sup>129</sup> *Ibid.*, 23, para. 70.

## b) Attribution of Knowledge

Furthermore, in order to establish that the fact was unknown to the applicant, the question has to be answered whose knowledge is attributable to the applicant State<sup>131</sup>. In the absence of any authority with regard to this requirement, in analogy to Article 4 of the ILC Draft Articles on State Responsibility only the knowledge of State organs should be considered as knowledge of the State<sup>132</sup>.

## c) Standard of Negligence

The requirement of “ignorance not due to negligence” raises the question what kind of indicia a State is obliged to react to and what efforts it has to undertake in this regard, if it wants to observe due diligence<sup>133</sup>. In the *Tunisia Case*, the relevant fact, i.e. the Resolution of the Council of Ministers, had been published prior to the judgment in the Libyan Official Gazette<sup>134</sup>. The Court held that “[...] the reasonable and appropriate course of action to be taken by Tunisia, would have been to seek to know the co-ordinates of the Concession” and that Tunisia had failed to prove why it would have been impossible for it to seek this information, nor had it proven that it had attempted to do so<sup>135</sup>. With regard to the standard of diligence, the Court stated that “[...] normal diligence would require that, when sending a delegation to negotiate a continental shelf delimitation [...], a State should first try to learn the exact co-ordinates of the other party’s concession”<sup>136</sup>. In the end, the Court rejected Tunisia’s application for revision, because it found that the boundary co-ordinates were obtainable by Tunisia and that it was in Tunisia’s own interest to ascertain them<sup>137</sup>.

In view of the exceptional character of revision proceedings, capable of disapplying the principle of *res judicata*, a high standard is to be applied in this regard, requiring the applicant to undertake every effort to obtain the documents in ques-

<sup>130</sup> Ibid.

<sup>131</sup> With regard to the attribution of knowledge, see generally the *Corfu Channel Case*, ICJ Rep. 1949, 17-22, paras 1, 2.

<sup>132</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the ILC Fifty-third session, GAOR, Fifty-sixth session No. 10 (A/56/10); CR/2002/40, 62, para. 7.2. (*Varady*), where Article 4 of the ILC Draft Articles was applied in the context of the discovery of the fact in order to establish that the time-limit had been observed and that Mr. Kostunica’s acts and knowledge were not attributable to the FRY, because at the relevant time, he acted as a private person; see also CR/2002/41, 28, para. 46 (*van Biesen*).

<sup>133</sup> In Rule 80, paragraph 1, of the Rules of European Court of Human Rights, the applicable standard of diligence is somewhat more specified as “[...] could not reasonably have been known to that party, [...]”.

<sup>134</sup> ICJ Rep. 1985, 205, para. 24.

<sup>135</sup> Ibid., 206, paras 25, 27.

<sup>136</sup> Ibid.

<sup>137</sup> ICJ Rep. 1985, 206-207, para 28.

tion. If careful preparation of the case would have avoided the situation from the beginning, the applicant is barred to take recourse to revision<sup>138</sup>.

Basing itself on the judgment in the *Tunisian Case*, the FRY argued that negligence could only be established if “[...] two factors combined together yielded this result”, i.e. if the newly discovered facts had been obtainable at the time and if it had been in the applicant’s own interest to ascertain them<sup>139</sup>. The applicant then went on to argue that the fact, that the FRY did not continue the personality and treaty obligations of the former SFRY was neither obtainable at the time of the judgment, nor that it had been in the FRY’s own interest to ascertain them<sup>140</sup>. Whereas Bosnia and Herzegovina contested that the new situation was solely due to a change of policy on the side of the FRY and that the newly discovered fact was directly connected to the FRY’s own decision to act or not to act in a specific way<sup>141</sup>, the FRY contended that it was not the FRY who should or could have established the true facts<sup>142</sup>. In reliance on a letter from the Legal Counsel of 29 September 1992, which stated that: “[...] resolution [General Assembly resolution 47/1] neither terminates nor suspends Yugoslavia’s membership in the Organization”<sup>143</sup>, and also referring to an explanation of the Depositary with regard to the then ensuing situation<sup>144</sup>, the FRY argued that the competent authorities had failed to clarify the situation<sup>145</sup>. Bosnia and Herzegovina objected that the ambiguous membership issue could have been easily resolved, if the FRY had applied for United Nations membership, as had already been recommended to the FRY by all other, former Republics of Yugoslavia, the Security Council and the General Assembly in September 1992<sup>146</sup>. Bosnia and Herzegovina argued that, by not reacting to the repeated pleas of the United Nations’ organs to submit an application for membership over a period of eight years, the FRY was negligent<sup>147</sup>.

The standard of negligence which the Court applied in the *Tunisian Case* is not directly conferrable to the present case. Whereas in the former case the fact had been objectively obtainable, in the latter case at the time of the 1996 judgment, it was not. Again, this is due to the peculiarity of the present case, i.e. that the fact, that the FRY had not been a member of the United Nations at the relevant time,

<sup>138</sup> Lasok (note 35), 518; see also Bin Cheng who states “Thus, it may be said that where a party has all the time it desires to prepare a case before submission, the non-discovery of some essential fact gives rise to at least a presumption of negligence”, General Principles, 368.

<sup>139</sup> CR/2002/40, 56, para. 6.5. (*Varady*).

<sup>140</sup> Ibid.

<sup>141</sup> CR/2002/41, 27, paras 45 et seq.

<sup>142</sup> CR/2002/40, 59, para. 6.13. (*Varady*).

<sup>143</sup> CR/2002/40, 58, para. 6.12. (*Varady*).

<sup>144</sup> Multilateral Treaties Deposited with the Secretary-General, Historical Information, at: <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/historicalinfo.asp>

<sup>145</sup> CR/2002/40, 59, para. 6.13. et seq. (*Varady*).

<sup>146</sup> CR/2002/41, 29, para. 49 (*van Biesen*).

<sup>147</sup> Written Observations of Bosnia and Herzegovina, 26, para. 3.11.; *Pellet* CR/2002/41 32-33, paras 6 et seq.; see also Resolutions 777 (1992) of 19 September 1992 and 821 (1993) of 28 April 1993 of the Security Council and Resolution 47/1 of 19 September 1992, cited by numerous subsequent resolutions, or 48/88 of 20 December 1993, of the General Assembly.

has only been revealed retroactively. Article 61 of the Statute does not require the applicant to establish a fact for the first time, but only imposes the duty to investigate and to undertake every reasonable effort to obtain precise knowledge of an already existing fact.

#### d) Distinction Between the Document and Its Content

With regard to the discovery of a map or document in a boundary dispute, the somewhat typical revision case, it is questionable whether “knowledge” in Article 61 of the Statute refers to knowledge of the existence of such a document or to knowledge of its material content<sup>148</sup>. In the latter case, the sole knowledge of a document’s existence at the time of the judgment would not suffice to preclude revision. Still, applying a high standard of diligence, the applicant would be required to undertake every effort to obtain the document and to learn of its contents.

It is however hard to see, how the applicant should evaluate a document’s possible decisiveness without knowing its material content. In its *Monastery of Saint Naoum* Advisory Opinion, the PCIJ held that fresh documents do not in themselves amount to fresh facts, but that it depended on their content whether they constituted evidence of facts previously unknown<sup>149</sup>. From these findings, it follows that the relevant knowledge would have to refer to the content of the documents.

If however, “knowledge” refers to the material content, the applicant, while knowing of the existence of a document, could subsequently heal its mistake of not having appreciated its significance at the time of the original judgment through revision, which would be contrary to the principle of good faith<sup>150</sup>. In the end, in the practice of the Court, a distinction between knowledge of the document and knowledge of its contents seems to be almost impossible to prove<sup>151</sup>. It may be for this reason that the Court in the *Tunisian Case* vaguely concluded in this context that “[...] the concession boundary co-ordinates were obtainable by Tunisia and that for this reason ignorance of a new fact not due to negligence was lacking”<sup>152</sup>. Similarly, the European Court of Justice in the *Mandelli Case* rejected an application for revision because the applicant knew of the existence of an audit report at the time of the judgment and nothing had prevented it from getting hold of it during the earlier proceedings or from asking the Court to exercise its powers to call for its production<sup>153</sup>.

<sup>148</sup> Cf. Case 1/60 *FERAM v. High Authority* (1960) ECR 165. In this case, the Court seems to have drawn a distinction between knowledge of the existence of the documents in question and knowledge of their contents, see Lasok (note 35), 518.

<sup>149</sup> PCIJ, Advisory Opinion on the Question of the Monastery of Saint-Naoum, Ser. B/No. 9, 22.

<sup>150</sup> CR/2002/41, 36, para. 22 (*Pellet*).

<sup>151</sup> Cf. Lasok (note 35), 518.

<sup>152</sup> ICJ Rep. 1985, 207, para. 28.

<sup>153</sup> Case 56/70 *Fonderie Acciaierie Giovanni Mandelli v. Commission* (1971) ECR 1.

### e) Applicability of Concepts of Estoppel, Acquiescence and Good Faith in Revision Proceedings

For many years, the FRY maintained and reiterated the postulate of continuity<sup>154</sup>. Furthermore, the FRY had repeatedly expressed its intention to remain bound by the terms of the Genocide Convention<sup>155</sup>. On this basis, Bosnia and Herzegovina argued that apart from its legal status, according to general principles of international law, particularly acquiescence and estoppel, the FRY was bound by its own prior statements<sup>156</sup>.

It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations<sup>157</sup>. Not only had the FRY expressed its intention to abide by all the commitments that the SFRY was formerly bound to, but it had also not objected to the Court basing its jurisdiction on Article IX of the Genocide Convention in 1993 as well as in 1996<sup>158</sup>. Furthermore, the FRY brought forward counterclaims against Bosnia and Herzegovina as well as applications against NATO States unconditionally invoking this Article as the basis for the Court's jurisdiction<sup>159</sup>. Bosnia and Herzegovina contended that it had relied on this conduct, that it had taken this position into account in its own legal arguments and that therefore the conditions for estoppel were fulfilled<sup>160</sup>. It argued that, as a consequence, the FRY would now be barred from bringing forward not to be bound by the Genocide Convention as a "newly discovered fact".

Estoppel may be inferred from the conduct of a State which not only clearly and consistently evinced acceptance by that State of a particular regime, but also has caused another State or States, in reliance on such conduct, to detrimentally change position<sup>161</sup>. Without endeavouring into the differentiation between the difference of acquiescence and estoppel<sup>162</sup>, it has to be assumed for the sake of argument that despite the contradictory and ambiguous behaviour of different United Nations' organs, the relevant confidence could still be built up on the side of Bosnia and

<sup>154</sup> See *Application for Revision* (note 1), 4-6, paras 5, 4.

<sup>155</sup> E.g. CR/93/12, 25 (*Boyle*).

<sup>156</sup> Written Observations of Bosnia and Herzegovina, 37, para. 4.13. With regard to estoppel, see *ibid.*, para. 4.15.; with regard to acquiescence, see *ibid.*, 34, para. 4.4.

<sup>157</sup> *Nuclear Tests Cases*, ICJ Rep. 1974, 267, para. 43; *ibid.* 472, para. 46; PCIJ, Ser. A/B, No. 53, 68-69.

<sup>158</sup> CR 93/13, 16 (*Rosenne*); CR/2002/41 15 para. 10 (*van Biesen*).

<sup>159</sup> CR/2002/41, 15, para. 20 (*van Biesen*).

<sup>160</sup> Written Observations of Bosnia and Herzegovina, 37, para. 4.15.

<sup>161</sup> ICJ Rep. 1969, 26; ICJ Rep. 1962, 6; D.W. Bowett, *Estoppel before International Tribunals and its Relation to Acquiescence*, 33 BYIL (1975), 176; H.W.A. Thirlway, *Law and Procedure*, 29; I. Sinclair, *Estoppel and Acquiescence*, in: A.V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the ICJ*, 104; J.R.G. Weeramantry, *Estoppel and the Preclusive Effects of Inconsistent Statements and Conduct: The Practice of the Iran-United States Claims Tribunal*, in: NYIL 1996, 113-141; B. Shaw, *International Law*, 350 et seq.; ICJ Rep. 1990, 92, 118 (*El Salvador-Honduras Land, Island and Maritime Frontier Case*).

<sup>162</sup> Shaw (note 161), 350 et seq.



Herzegovina. However, even presuming that having to alter one's legal argumentation in a case before the Court and being faced with an application for revision, could be regarded as a relevant detriment, it is still questionable if Article 61 of the Statute leaves room for applying such general concepts of international law. In this context, the FRY argued that the requirements of Article 61 of the Statute, especially "ignorance not due to negligence", are meant to be exhaustive, thereby precluding the applicability of more general principles of international law<sup>163</sup>. Thereby the FRY interpreted Article 61 of the Statute as a procedural *lex specialis*, which itself identifies a specific situation of *venire contra factum proprium non valet*<sup>164</sup>.

While the revision provisions of the Hague Conventions left it to the discretion of the parties to agree upon revision, Article 61 of the Statute prescribes the possibility for an application of revision independently of any such prior agreement. In the light of the historical development of today's revision provision, first of all it could be induced that Article 61 of the Statute as a purely procedural norm, not leaving its application to the discretion of the parties, cannot be disposed of by the parties, neither by treaty – the strongest form of consent – nor by way of more informal concepts such as estoppel. Secondly, it follows from the very existence of Article 61 of the Statute, that within the time-limit of ten years, each party has to anticipate the possibility of being faced with an application for revision from its counterpart. Article 94, paragraph 1, of the United Nations' Charter obliges states to comply with the decisions of the International Court of Justice in any case to which it is a party. Especially with regard to revision proceedings, Article 61, paragraph 3, of the Statute *expressis verbis* allows the Court to require compliance with its prior judgment before it admits proceedings for revision. Thus, a state, in compliance with such a judgment would by a provision of the Charter of which the Statute according to Article 92 of the Charter forms an integral part, be required to align its conduct accordingly. If however, e.g. after a period of nine years, a decisive fact was to be discovered, despite of its prior compliance with the findings of the Court, the state would still be entitled to apply for revision. Invoking the principle of estoppel in this context would clearly contradict the very concept of revision.

## 5. Time-Limit (Article 61 Paragraphs 4 and 5 of the Statute)

Since the discovery of a new fact may take place at any time, a conflict arises between the interest in the finality of the award and the interest in achieving justice<sup>165</sup>. Although heavily debated at the Hague Conferences, the revision provisions of the Hague Conventions of 1899 and 1907 contained no time limit for the exercise of the right of revision<sup>166</sup>. The parties were free to provide for revision and

<sup>163</sup> CR/2002/40, 48, para. 5.12. (Zimmermann).

<sup>164</sup> Ibid., para. 5.14. (Zimmermann).

<sup>165</sup> Commentary of the Secretariat on Article 29 of the ILC's 1953 draft convention on arbitral procedure, in: M. Whitemann, *Digest of International Law*, Vol. 12, 1128.

they were likewise free to determine the time frame within which they wished to allow the revision of an award<sup>167</sup>. In the *Pious Fund of the Californias and the North Atlantic Coast Fisheries Case*, the period during which revision could be resorted to, only amounted to respectively eight and five days from the announcement of the award. The Pact of Bogotá, 30 April 1948, in contrast prescribed a period of one year after the notification of the award<sup>168</sup>. The Committee of Jurists, having considered the three to six months limit discussed in 1907 to be too short and the period mentioned in Article 13 of the Arbitration Treaty between Italy and Argentina in 1907, which allowed for revision at any time before the execution of the sentence, as too vague, ultimately decided on a limit of ten years<sup>169</sup>. Likewise, the present article contains an absolute time-limit of ten years in paragraph 5 and prescribes a relative time-limit in paragraph 4 according to which “[...] the application for revision must be made within six months of the discovery of the new fact”<sup>170</sup>.

Since the “discovery” of a fact goes hand in hand with the “knowledge” of that fact, the question of knowledge also affects the determination of the observance of the time limit entailed in Article 61 paragraph 4 and 5 of the Statute<sup>171</sup>. It is noteworthy, that the records reveal no discussion of what might constitute a discovery or at what point the time limit begins<sup>172</sup>. Already during the Hague Conference, the Italian delegate Buscatti expressed his fear that this formula might lead to difficulties, since the discovery of the new fact constituted a very indefinite point of departure<sup>173</sup>. Thus, the relative time-limit became a highly flexible instrument to be used at the discretion of the Court<sup>174</sup>.

<sup>166</sup> Conférence Internationale de la Paix 1899, Sommaire Général, Procès-Verbaux, Troisième Commission, Onzième Séance Conférence Internationale de la paix 1899, 154 et seq.; whereas Holls proposed six months (p. 154), van Karnebeek found six months to be too short (p. 155), and v. Martens proposed three months (p. 159).

<sup>167</sup> Art. 55 para. 4 of the Hague Convention (1907), see also Meurer (note 78), 363.

<sup>168</sup> Commentary of the Secretariat on Article 29 of the ILC's 1953 draft convention on arbitral procedure, cited in: Whitemann, Digest of Int. Law, Vol. 12, 1128; with regard to the Mixed Arbitral Tribunals, out of a total of 34 Rules of Procedure published in the T.A.M., a majority of 18 fixed the time-limit at one year from the notification of the decision, see Bin Cheng, General Principles, 369, fn. 16.

<sup>169</sup> Advisory Committee of Jurists, Procès-Verbaux, 744.

<sup>170</sup> According to Article 98 of the Rules of Procedure of the Court of Justice of the European Communities: “An application for revision of a judgment shall be made within three months of the date on which the facts on which the application is based came to the applicant's knowledge.” According to Article 125 of the Rules of Procedure of the Court of First Instance of the European Communities “[...] an application for revision of a judgment shall be made within three months [...]”.

<sup>171</sup> Observations of Socialist People's Libyan Arab Jamahiriya on the Application submitted by Tunisia for Revision and Interpretation of the Judgment of 24 February 1982, 60, para. 31.

<sup>172</sup> See also Rule 80, para. 1, of the Rules of European Court of Human Rights, according to which “[...] a party may request the Court, within a period of six months after that party acquired knowledge of the fact, to revise that judgment”. According to Article 125 of the Rules of Procedure of the Court of First Instance of the European Communities “[...] an application for revision of a judgment shall be made within three months of the date on which the facts on which the application is based came to the applicant's knowledge”. (emphasis added).

This vagueness also became apparent in the present case. The *Application for Revision* was submitted on 23 April 2001, which implies that for the application to be admissible, the discovery had to have taken place after 23 October 2000. The letter of President Kostunica requesting admission to the United Nations was sent on 27 October 2000. Bosnia and Herzegovina however argued that it was “entirely unlikely that the ‘discovery’ took place [only] on the same date or, for that matter, only in the few days before the 27 October”<sup>175</sup>. In its oral pleadings, it emphasized that presidential candidate Kostunica already in his program dated September 2000 as well as in a speech he delivered on 1 September 2000 referred to the need to become a member of the United Nations<sup>176</sup>. Bosnia and Herzegovina thus contended that the discovery of the alleged facts took place before 23 October 2000 and that the application having been submitted on 23 April 2001, for this reason alone was inadmissible<sup>177</sup>. However, if the debate over the FRY’s membership did not constitute relevant knowledge, than only the definite admission resolved the legal dilemmas. The mere application for admission did not change the situation because in light of the prior controversies, it could not be foreseen in which way the application would be dealt with by the responsible United Nations’ organs. The judgment seems to support this line of argumentation, because the Court expressly states that it remained unknown “[...] when that application would be accepted”<sup>178</sup>. Thus, the FRY’s argumentation in that regard seems to have been approved by the Court because only the decision of the General Assembly of 1 November 2000 to accept the FRY as a new member clarified the situation and thereby led to the discovery of the relevant facts<sup>179</sup>.

## VI. Final Conclusions

The Application for Revision of the 1996 judgment on the Application of the Genocide Convention and the corresponding judgment have revealed a number of problems entailed in the formerly neglected provision of Article 61 of the Statute. Evidently, the Court’s argumentation in the present judgment cannot solely be reduced to the legal difficulties entailed in Article 61 of the Statute, but it also has to be seen in the broader context of proceedings in which the FRY is currently involved and which are to a large degree interrelated<sup>180</sup>. In light of the fact that today

<sup>173</sup> Documents, League of Nations, 139.

<sup>174</sup> M. Reisman, Nullity and Revision, 47.

<sup>175</sup> Written Observations Bosnia and Herzegovina, 28, para. 3.16.

<sup>176</sup> Ibid., para. 3.17.

<sup>177</sup> CR/2002/41, 24, paras 44 et seq. (*van Biesen*).

<sup>178</sup> *Application for Revision* Case (note 1), 23, para. 70.

<sup>179</sup> CR/2002/40, 62, para. 7.5. (*Varady*).

<sup>180</sup> Croatia has directed allegations against the FRY concerning responsibility for the commission of acts of genocide; Application by the Republic of Croatia instituting Proceedings against the Federal Republic of Yugoslavia with regard to the application of the Convention on the Prevention and Punishment of the Crime of Genocide, 2 July 1999. The FRY has instituted proceedings against member

the Court is faced with an increasing number of cases, it is not entirely unlikely that it will be in the future again be faced with revision proceedings<sup>181</sup>.

Article 61 of the Statue by its wording is full of what Article 32 of the Vienna Convention on the Law of Treaties would regard as obscurities or ambiguities, and in the absence of precedents it thus leaves the Court with a great measure of discretion. This discretion of course is narrowed down in light of the primacy of the finality of the Court's judgments and the principle of *res judicata*. However, let it not become an exceedingly restricted form of proceeding, it has to be kept in mind that revision nevertheless is a procedural right – the invocation of which cannot be regarded as a delaying strategy<sup>182</sup> – expressly laid down in the Court's Statute. It seems that in light of the rather infrequent invocation of revision proceedings before the International Court of Justice in the past, revision still bears the connotation of being a somewhat awkward form of proceeding on the international level and the very briefness of the judgment now delivered also seems to hint in this direction. It is notable, however, that Judge K o r o m a held in his separate opinion that "[...] to dismiss the FRY's admission to membership of the United Nations in November 2000 and its legal consequences as simply a fact occurring several years after the Judgment is a distortion and too superficial"<sup>183</sup>. Likewise, Judge D i m i t r i j e v i c held that "[D]eclaring 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 International Court of Justice"<sup>184</sup>.

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states of NATO following the bombing of Belgrade, *Legality of Use of Force (Yugoslavia v. Belgium)*, (*Yugoslavia v. Canada*); (*Yugoslavia v. France*), (*Yugoslavia v. Germany*); (*Yugoslavia v. Italy*), (*Yugoslavia v. Netherlands*); (*Yugoslavia v. Portugal*); (*Yugoslavia v. Spain*); (*Yugoslavia v. United Kingdom*), (*Yugoslavia v. United States of America*); see also Orders of 2 June 1999, ICJ Rep. 1999, 124 et seq.

<sup>181</sup> El Salvador's application at least hints towards such a development.

<sup>182</sup> CR/2002/41, 8, para. 1.

<sup>183</sup> Separate Opinion of Judge K o r o m a, ICJ Rep. 2002, para. 9.

<sup>184</sup> Dissenting Opinion of Judge Dimitrijevic, *Application for Revision Case* (note 1), para. 53.