CASE NOTES

CASE CONCERNING APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE APPLICATION FOR REVISION OF THE JUDGMENT OF 11 JULY 1996 *(Yugoslavia v Bosnia and Herzegovina)*

I. INTRODUCTION

On 3 February 2003, the International Court of Justice delivered its majority judgment rejecting the application of the former Federal Republic of Yugoslavia (FRY), now known as Serbia and Montenegro (Yugoslavia), to revise the Court's judgment of 11 July 1996 on preliminary objections that it raised in *Case Concerning Application of the Convention on the Prevention of the Crime of Genocide*.[1] Although the judgment itself is short in comparison to other recent judgments of the Court, it is by no means less controversial or difficult in formulation.

The application was based on Article 61 of the Court's Statute,[2] the second time the Court had to consider such a request in its history.[3] It

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[1] Bosnia and Herzegovina v Yugoslavia [1996] 2 International Court of Justice Reports 595 (Original Case).

[2] Article 61 provides:

1. An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.
2. The proceedings for revision shall be opened by a judgment of the Court expressly recording the existence of the new fact, recognising that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.
3. The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.
4. The application for revision must be made at latest within six months of the discovery of the new fact.
5. No application for revision may be made after the lapse of ten years from the date of the judgment.

[3] See also Application for Revision and Interpretation of the Judgment of 24 February 1982 in Case Concerning the Continental Shelf (Tunisia v Libya) [1985] International Court of Justice Reports 197.

noted that this provision required a "two-stage procedure". The first stage was "limited to the question of admissibility of that request" whereas the second involved a consideration of the request's merits.[4]

II. ORIGINAL JUDGMENT

On 20 March 1993, Bosnia and Herzegovina instituted proceedings in the Court claiming FRY had violated the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). The application specifically invoked Article IX of the Convention to found the Court's jurisdiction, which provides:

> Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

On 29 August 1950, FRY (including Bosnia and Herzegovina as part of FRY) had ratified the Genocide Convention without reservations.[5] On 27 April 1992, Yugoslavia wrote to the United Nations Secretary-General stating that it, "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". Similarly, Bosnia and Herzegovina deposited a Notice of Succession with the Secretary-General on 29 December 1992 with the effect of succeeding to the obligations under that Convention.

Yugoslavia contended in its preliminary objections that Bosnia and Herzegovina could not file the proceedings since it could not succeed to the Genocide Convention. Further, both states did not recognise each other as sovereign states when the proceedings were filed. The Court found that even if Bosnia and Herzegovina's Notice of Succession was actually an instrument of accession, the accession had come into force

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[4] Judgment of the Court para 15.

[5] Yugoslavia comprised Serbia and Montenegro and is now referred to by the names of these two constituent parts. The other constituent parts of FRY were Croatia, Macedonia and Slovenia.

only a matter of days after the filing. As the two states now recognised each other, and Bosnia and Herzegovina had become party to the Genocide Convention shortly after the filing, the Court held *per curium* that it would not penalise that state for procedural defects that it could remedy easily by filing a fresh application.[6]

In relation to Yugoslavia, the Court found that that state had expressed an intention to be bound by the Genocide Convention by its note of 27 April 1992. The Court also found that Yugoslavia had not denied that it was a party to the Convention.[7] Consequently, the Court found that it was a party to the Convention when Bosnia and Herzegovina filed the application on 20 March 1993.

III. BACKGROUND FACTS

The Court established that for an application under Article 61 of the Statute to be successful the following conditions should be satisfied:

(a) the application should be based upon the "discovery" of a "fact";
(b) the fact, the discovery of which is relied on, should be "of such a nature as to be a decisive factor";
(c) the fact should have been "unknown" to the Court and to the party claiming revision when the judgment was given;
(d) ignorance of this fact should not be "due to negligence"; and
(e) the application for revision should be made "at least within six months of the discovery of the new fact" and before ten years have elapsed from the date of the judgment.

The "facts" Yugoslavia contended were that it was not a party to the Court's Statute and it did not remain bound by the Genocide Convention by continuing the legal personality of FRY. This was because on 19 September 1992 the Security Council had adopted Resolution 777 (1992) stating that Yugoslavia could not automatically continue FRY's membership. The General Assembly made the same finding on 22 September 1992 in Resolution 47/1 and a year later FRY was excluded from the workings and meetings of United Nations organs.

[6] Original Case at 611.
[7] Ibid 610.

On 27 October 2000, the new Yugoslavia applied successfully for United Nations membership resulting in admission on 1 November 2000. As recommended by the Legal Counsel on 8 December 2000, it filed a notification of accession to the Genocide Convention with the Secretary-General of the United Nations in March 2001. Accordingly, the Secretary-General noted in the Depositary Notification of 15 March 2001 that the Genocide Convention would enter into force for Yugoslavia on 10 June 2001. Subsequently, Croatia, Sweden and Bosnia and Herzegovina all made objections to the Secretary-General on the basis that the Genocide Convention bound Yugoslavia as successor to FRY.

IV. CLAIMED BASIS FOR REVISION

In its application for revision Yugoslavia contended that given its admission to United Nations membership in November 2000 and the Legal Counsel's subsequent request in December 2000 to take steps to accede to multilateral treaties, two decisive facts were revealed:

(a) Yugoslavia was not a party to the Court's Statute at the time of the judgment on 11 July 1996; and
(b) Yugoslavia did not remain bound in 1993 or 1996 by Article IX of the Genocide Convention as a successor state to FRY.[8]

Article XI of the Genocide Convention provides that it "may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid. Instruments of accession shall be deposited with the Secretary-General of the United Nations". Consequently, as Yugoslavia was not a member of the United Nations at the time of the judgment and the General Assembly had not extended an invitation to it, Yugoslavia could not arguably be deemed a party to the Genocide Convention in June 1996. Further, this fact existed at the time of judgment in June 1996 but was not "revealed" to Yugoslavia until 2000.

V. MAJORITY JUDGMENT

The majority of the Court rejected the application for revision because the "revelation" of the two facts existing at the time of the judgment as

[8] Judgment of the Court para 19.

claimed by Yugoslavia amounted to "legal consequences" arising from facts subsequent to the judgment.[9] In other words, the Court deemed Yugoslavia's non-membership of the Court's Statute and of the Genocide Convention to be "legal consequences" arising from the events of 2000 instead of being "facts" in their own right.[10] As a result, they did not qualify as "facts" that existed at the time of the judgment for the purposes of Article 61 of the Court's Statute that could sustain the application.

The Court noted that General Assembly Resolution 47/1 had created the situation that Yugoslavia found itself in at the time of the judgment.[11] However, the resolution in itself could not affect Yugoslavia's position under the Court's Statute or the Genocide Convention.[12] This was because the precise consequences of the situation were determined on a case-by-case basis such as by the General Assembly and the Economic and Social Council.[13] In any event, the elements arising from Resolution 47/1 were known at the time of the judgment and "what remained unknown in July 1996 was if and when [Yugoslavia] would apply for membership in the United Nations and if and when that application would be accepted".[14]

The Court also noted that the Legal Counsel's letter of December 2000 referred to by Yugoslavia had invited it not to accede to the relevant multilateral treaties but to "undertake treaty actions, as appropriate...as a successor State" instead.[15] The Court did not specify what effect this might have when determining Yugoslavia's contentions. However, it could be argued that this was an indication that the contention that Yugoslavia was not a party to the Genocide Convention might not be sustainable. This was particularly so in light of the objections Croatia and Sweden raised in 2001 regarding Yugoslavia's "accession" to the Genocide Convention.

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[9] The majority comprised Guillaume P, Shi V-P, Ranjeva, Herczegh, Koroma, Parra-Aranguren, Al-Khasawneh, Buergenthal and Elaraby JJ, and Mahiou J ad hoc; Koroma J and Mahiou J ad hoc delivered separate opinions (see below).
[10] Judgment of the Court para 69.
[11] Ibid para 70.
[12] Ibid.
[13] Ibid.
[14] Ibid.
[15] Ibid para 71.

Finally, since the Court in *Tunisia v Libya* had previously held that it was unnecessary to consider the other conditions that Article 61 imposed as long as the Court was satisfied that one of the conditions had not been met.[16] In the present case, the Court therefore decided against considering the other conditions because it had found a decisive "fact" existing at the time of the judgment, albeit unknown to both the Court and the applicant at the time.[17]

VI. SEPARATE MAJORITY OPINIONS

(a) Judge Koroma

Judge Koroma delivered a separate judgment that raised several notable criticisms of the main judgment even though he was a member of the majority in the present case. He began by finding that the distinction between a "fact" and a "legal consequence" was a "distortion and too superficial".[18] In the Original Case, the Court had assumed that Yugoslavia was a United Nations member, an assumption without which it could not and should not be party to the Genocide Convention relying solely on its unilateral declaration.[19] The assumption having found to be untrue by its admission as a new United Nations member in 2000 and its subsequent "action" concerning the Genocide Convention, the Court's jurisdiction in the main proceedings no longer existed.[20]

Judge Koroma also noted the inconsistency in the Court's observation that the situation would be terminated if and when Yugoslavia submitted a request for United Nations *admission.*[21] He also observed that the approval for the membership application, if it was submitted in 1996, was not entirely without doubt.[22] He expressed that Yugoslavia's admission as a *new* member "sheds a different light" on the issue of its membership of the United Nations and the Genocide Convention at the time of the original judgment. In spite of this, he did not dissent from

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[16] Tunisia v Libya at 207.
[17] Judgment of the Court para 72.
[18] Separate Judgment of Judge Koroma para 9.
[19] Ibid.
[20] Ibid.
[21] Ibid.
[22] Ibid.

the majority decision in rejecting Yugoslavia's request for revision.[23] Further, it was unclear from the judgment why he had done so especially when he had strong reservations on the Court's majority judgment.

(b) Judge Vereshchetin

In his dissenting opinion, Judge Vereshchetin found that the Court should have assumed that Yugoslavia was a United Nations member because "it is inconceivable how the Court, even in the absence of a challenge, could recognise the continuing participation of Yugoslavia in the Convention while the essential precondition of such participation had ceased to exist".[24] In an interesting observation he stated that arguably Yugoslavia need not continue as a United Nations member as a pre-condition for accession to the Genocide Convention as long as the precondition was met at the time of its accession. However, this applied only where the state "remains identical and retains the legal personality of its predecessor".[25]

Judge Vereshchetin also noted that since it was clear that United Nations membership was a *sine qua non* condition for the Court's determination on the issue of jurisdiction *ratione personae*, it should be considered a "decisive factor" within the meaning of Article 61.[26] Considering various definitions of "fact" both in common usage in the English language and its meaning in legal principles of evidence, he held that the discovery of a wrongful assumption by the Court made in a judgment was a legitimate ground for revision under Article 61.[27]

To satisfy the other conditions under Article 61, Judge Vereshchetin pointed to the ambiguities in Yugoslavia's United Nations membership status as the basis for the assertion that its non-membership was a fact unknown to the Court at the time.[28] This argument is particularly persuasive in light of the Secretariat's "considered view" in making a

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[23] Ibid.
[24] Dissenting opinion of Vereshchetin J para 5.
[25] Ibid para 6.
[26] Ibid para 8.
[27] Ibid para 10.
[28] Ibid para 14.

distinction between *participation* by Yugoslavia in the activities of the United Nations and its *membership* thereof.

On the requirement that the party seeking revision should not have acted negligently, Judge Vereshchetin stated that "Yugoslavia cannot be blamed for its long-lasting attempts to assert its status as the continuator of the former Yugoslavia, for a state cannot be faulted for trying to pursue its national interests...unless in doing so it violates the rules and principles of international law".[29] In his opinion, since all the conditions required under Article 61 were satisfied, Yugoslavia's request for revision should have been admitted.

(c) Judge Rezek

In his declaration, Judge Rezek held that the request for revision was admissible.[30] However, he also noted that the Court might have rejected the request for revision based on the possible and interesting effect of Yugoslavia's admission to the United Nations in 2000. For Yugoslavia to be a "new" member of the United Nations in 2000, it could not have been the entity considered by the Court as the respondent in its judgment of 11 July 1996.[31] Accordingly, the "new" Yugoslavia had no standing to seek a revision of the Original Case and the Court would have to decide later what was to become of the proceedings brought by Bosnia and Herzegovina in the absence of the original respondent.[32]

VII. CONCLUDING REMARKS

It is clear from the criticisms and observations of Judges Koroma and Vereshchetin that the Court's principal judgment was not entirely without difficulties. In particular, as Judge Koroma suggested, consistency could arguably be found wanting in the Court asserting both in 1996 and in the present judgment that the situation *sui generis* of Yugoslavia's United Nations membership could be "terminated" by its membership application, while at the same time making an implicit assumption that Yugoslavia was a United Nations member and a party

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[29] Ibid para 25.
[30] Declaration of Rezek J para 2.
[31] Ibid para 5.
[32] Ibid para 6.

to the Genocide Convention.[33] However, if this inconsistency were to be recognised, then it must also be said that the Court clearly recognised in 1996 that Yugoslavia's membership status in the United Nations was questionable. Consequently, if this were correct, it might not be considered a fact unknown at the time to both the Court and the party seeking revision.

If the issues in the present case could be confined and restricted to one single question, namely, whether it was a ground for revision if the Court's original decision was based decisively on a factual assumption found later to be incorrect, then Judge Vereshchetin's dissenting judgment would be highly persuasive in disposing of the issue. Assuming for the moment that United Nations membership was a crucial assumption forming the basis for the original judgment, it would be difficult to see how a later discovery of its wrongfulness at the time of the judgment could be considered a later "fact" or its "legal consequences" could be divorced from the "fact" itself.

On the issue raised by Judge Rezek, it is difficult to determine what relevant entity would have been the respondent in the original judgment of 1996 if it were not FRY. Regardless of the degree of recognition given to the "new" Yugoslavia, in the absence of any retained territory, political organisation, diplomatic representation or even a government-in-exile, there should have been no suggestion that the former or "old" Yugoslavia was anything other than extinguished. Otherwise, the membership of the "old" Yugoslavia in the United Nations would remain. Further, the status of the Genocide Convention and the subject of reciprocal bilateral recognition would not have been issues in the original judgment, as they clearly were.

Given the difficulties raised, perhaps the Court should have disposed of the issues somewhat differently. In this case, the crucial assumption did not revolve around Yugoslavia's United Nations membership. Instead, it revolved around Yugoslavia being party to the Genocide Convention at the time of the original judgment. Referring to the specific language of Article XI of that Convention, it appears clear that it was not necessary for a state party to remain a member of the United Nations at all times, but that the state must be a United Nations member at the

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[33] Separate Judgment of Koroma J para 9.

time it acceded to the Genocide Convention. Consequently, the question has two aspects. First, it was not about Yugoslavia being a United Nations member in 1996. Secondly, it was about Yugoslavia being a United Nations member in 1992 when it sought to accede to the Genocide Convention as a successor state of the "old" Yugoslavia, and whether such accession was valid.

The distinction made by the Secretariat of the United Nations and by some of the relevant states between *participation* of and *membership* of the United Nations for Yugoslavia between 1992 and 2000 meant that Yugoslavia's "membership" was unaffected by General Assembly Resolution 47/1. Although there was really no necessity for such a distinction to be made, the fact that it was made meant that Yugoslavia could be considered a member of the United Nations. Accordingly, Yugoslavia's note to the Secretary-General as depositary under the Genocide Convention could have the effect of a valid accession.

If the foregoing were correct, then Yugoslavia's admission to United Nations membership in 2000 would not have changed its status as a party to the Genocide Convention. As a result, there would have been no "fact" at the time of the judgment that would have justified the request for revision.

Contrary to Yugoslavia's contention, its admission to the United Nations in 2000 should not have any retrospective determinative effect. If it were considered as a member but deprived of its participatory rights, which seemed to be the position adopted by the Court and Secretariat in simplistic terms, its subsequent admission could not have changed its status between 1992 and 2000. This is so considering particularly that both the Court and Secretariat had foreshadowed a membership application to be necessary to "terminate" the "situation". Further, none of the documents except for Judge Koroma's separate judgment referred to its admission as a *new* United Nations member.

Therefore, it is again apparent that the issue was whether Yugoslavia's accession to the Genocide Convention through its general note to the Secretary-General in 1993 could be deemed valid. If it were invalid for any reason, then Yugoslavia would not be considered party to the Genocide Convention regardless of its United Nations membership status. As Judge Vereshchetin suggested to some extent, the Court

would not have been able to assert its jurisdiction in the Original Case if it had concluded that Yugoslavia was not a party to the Genocide Convention. Since it can hardly be demonstrated that the manner of Yugoslavia's purported accession to the Genocide Convention in 1992 was unknown to the Court in 1996, as specific reference had been made to this, there is again no "fact" unknown to the Court at the time that fulfilled the requirements of Article 61.

If the above analysis is incorrect, then it is clear that Judge Vereshchetin was correct in asserting that such a "fact", unknown at the time to both Yugoslavia and the Court and in the absence of any negligence by Yugoslavia, would constitute a ground for revision under Article 61.

However, as Yugoslavia's future admission to the United Nations had been foreshadowed and, indeed, encouraged by both the Secretariat and the Court before and in the judgment in the Original Case in 1996, it is difficult to see how such a "fact" or circumstances arising from such a fact would have been unknown to Yugoslavia or the Court at the time. In other words, the fact that the Court had noted in its original judgment that Yugoslavia *needed* to apply for United Nations membership meant that the effects could not have been unknown to the Court. Accordingly, the request for revision under Article 61 should fail again and, clearly, these arguments and propositions would have produced the same result as the majority of the Court had done in the present case.

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