INTERNATIONAL COURT OF JUSTICE

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Press Release
Unofficial

No. 2007/8
26 February 2007

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)

The Court affirms that it has jurisdiction to deal with the case

The Court finds that Serbia has violated its obligation under the Genocide Convention to prevent genocide in Srebrenica and that it has also violated its obligations under the Convention by having failed fully to co-operate with the International Criminal Tribunal for the former Yugoslavia (ICTY)

THE HAGUE, 26 February 2007. The International Court of Justice (ICJ), principal judicial organ of the United Nations, today rendered its Judgment in the case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro).

In its Judgment, which is final, binding and without appeal, the Court

"(1) by ten votes to five,

Rejects the objections contained in the final submissions made by the Respondent to the effect that the Court has no jurisdiction; and affirms that it has jurisdiction, on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, to adjudicate upon the dispute brought before it on 20 March 1993 by the Republic of Bosnia and Herzegovina;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna; Judge ad hoc Mahiou;

AGAINST: Judges Ranjeva, Shi, Koroma, Skotnikov; Judge ad hoc Kreća;

(2) by thirteen votes to two,

Finds that Serbia has not committed genocide, through its organs or persons whose acts engage its responsibility under customary international law, in violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

IN FAVOUR: President Higgins; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Kreća;

AGAINST: Vice-President Al-Khasawneh; Judge ad hoc Mahiou;

(3) by thirteen votes to two,

Finds that Serbia has not conspired to commit genocide, nor incited the commission of genocide, in violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

IN FAVOUR: President Higgins; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Kreća;

AGAINST: Vice-President Al-Khasawneh; Judge ad hoc Mahiou;

(4) by eleven votes to four,

Finds that Serbia has not been complicit in genocide, in violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

IN FAVOUR: President Higgins; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Sepúlveda-Amor, Skotnikov; Judge ad hoc Kreća;

AGAINST: Vice-President Al-Khasawneh; Judges Keith, Bennouna; Judge ad hoc Mahiou;

(5) by twelve votes to three,

Finds that Serbia has violated the obligation to prevent genocide, under the Convention on the Prevention and Punishment of the Crime of Genocide, in respect of the genocide that occurred in Srebrenica in July 1995;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Owada, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna; Judge ad hoc Mahiou;

AGAINST: Judges Tomka, Skotnikov; Judge ad hoc Kreća;

(6) by fourteen votes to one,

Finds that Serbia has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by having failed to transfer Ratko Mladić, indicted for genocide and complicity in genocide, for trial by the International Criminal Tribunal for the former Yugoslavia, and thus having failed fully to co-operate with that Tribunal;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Mahiou;

AGAINST: Judge ad hoc Kreća;

(7) by thirteen votes to two,

Finds that Serbia has violated its obligation to comply with the provisional measures ordered by the Court on 8 April and 13 September 1993 in this case, inasmuch as it failed to take all measures within its power to prevent genocide in Srebrenica in July 1995;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna; Judge ad hoc Mahiou;

AGAINST: Judge Skotnikov; Judge ad hoc Kreća;

(8) by fourteen votes to one,

Decides that Serbia shall immediately take effective steps to ensure full compliance with its obligation under the Convention on the Prevention and Punishment of the Crime of Genocide to punish acts of genocide as defined by Article II of the Convention, or any of the other acts proscribed by Article III of the Convention, and to transfer individuals accused of genocide or any of those other acts for trial by the International Criminal Tribunal for the former Yugoslavia, and to co-operate fully with that Tribunal;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Mahiou;

AGAINST: Judge ad hoc Kreća;

(9) by thirteen votes to two,

Finds that, as regards the breaches by Serbia of the obligations referred to in subparagraphs (5) and (7) above, the Court's findings in those paragraphs constitute appropriate satisfaction, and that the case is not one in which an order for payment of compensation, or, in respect of the violation referred to in subparagraph (5), a direction to provide assurances and guarantees of non-repetition, would be appropriate.

IN FAVOUR: President Higgins; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Kreća;

AGAINST: Vice-President Al-Khasawneh; Judge ad hoc Mahiou."

History of the proceedings

The whole procedural history of the case may be found in Press Release No. 2006/9 of 27 February 2006.

Reasoning of the Court

— Identification of the respondent party

The proceedings were instituted against the Federal Republic of Yugoslavia (later "Serbia and Montenegro"), which then consisted of the two Republics of Serbia and Montenegro. Since Montenegro became an independent State on 3 June 2006, the Court first needs to identify the Respondent in the current proceedings. Having considered the views of Bosnia and Herzegovina, the Republic of Serbia and the Republic of Montenegro, it concludes that the Republic of Serbia is at the date of the present Judgment the only Respondent. It however recalls that any responsibility for past events determined in its Judgment involved at the relevant time the State of Serbia and Montenegro.

— The Court's jurisdiction

The Court examines the jurisdictional objection raised by the Respondent in its 2001 Initiative, in which it claimed that its admission to the United Nations in 2000 had shown that it had not been a Member of the United Nations from 1992 to 2000 and that it was thus not a party to the Statute of the Court when the case was filed in 1993.

After consideration of the Parties' arguments, the Court recalls that it had already decided that it had jurisdiction in the present case in its Judgment on preliminary objections of 11 July 1996, and finds that this decision constituted res judicata, i.e. was not open to

re-examination except by way of revision under Article 61 of the Statute. The Court notes that the Respondent already applied for revision of the 1996 Judgment in 2001 and that this Application was dismissed by the Court in a Judgment of 3 February 2003. The Court accordingly affirms its jurisdiction to adjudicate upon the dispute.

— The applicable law

The Court goes on to address the issue of the applicable law and notes that its jurisdiction in the case is based solely on Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 ("the Genocide Convention"). This means that the Court has power to rule on alleged breaches of obligations imposed by the Genocide Convention, but not on breaches of other obligations under international law, such as those protecting human rights in armed conflict, even if these breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values.

The Respondent argued that "the Genocide Convention does not provide for the responsibility of States for acts of genocide". After examination of all the relevant articles of the Convention, the Court finds that the obligation on States to prevent genocide under Article I of the Convention necessarily implies a prohibition against States themselves committing genocide, and that, if an organ of the State, or a person or group whose acts are attributable to the State, commits an act of genocide or a related act enumerated in Article III of the Convention, the international responsibility of the State is incurred. The Court observes in that respect that States can be held responsible for genocide or for complicity in genocide, even if no individual has previously been convicted of the crime by a competent court.

Reviewing other legal requirements of the Convention, the Court observes that for particular acts to be qualified as genocide, they must be accompanied by the intent to destroy the protected group, in whole or in part, as such. It stresses the difference between genocide and "ethnic cleansing": while "ethnic cleansing" can be carried out by the displacement of a group of persons from a specific area, genocide is defined by the above-mentioned specific intent to destroy the group or part of it. The Court considers that the targeted group must be defined by particular positive characteristics — national, ethnical, racial or religious — and not by the lack of them. It therefore rejects the negative definition of the group advanced by the Applicant as the "non-Serb" population, and concludes that, for the purposes of the case, the group must be defined as the "Bosnian Muslims" in view of the very limited reference by the Applicant to other non-Serb groups.

— Questions of proof

With respect to the burden of proof, the Court reiterates that the Applicant must establish its case and that any party stating a fact must establish it.

Concerning the standard of proof, the Court requires that allegations that the crime of genocide or related acts enumerated in Article III of the Convention have been committed must be proved by evidence that is fully conclusive. As far as breaches of the obligation to prevent genocide and to punish and extradite perpetrators are concerned, the Court requires proof at a high level of certainty appropriate to the seriousness of the allegation.

With regard to the method of proof, the Court indicates that it will make its own determinations of fact based on the evidence presented, while accepting relevant findings of fact of the International Criminal Tribunal for the former Yugoslavia (ICTY) at trial as highly persuasive. It will also give a certain weight to a statement of agreed facts and a sentencing judgment of the ICTY following a guilty plea. The Court also comments on a number of other sources of evidence and outlines the criteria upon which the value of these sources will be assessed. It notes that the report of the United Nations Secretary-General entitled "The Fall of Srebrenica" has considerable authority.

— The facts invoked by the Applicant

Before turning to the allegations of fact advanced by Bosnia and Herzegovina, the Court briefly outlines the background of the case relating to the break-up of the Socialist Federal Republic of Yugoslavia (SFRY) and defines the different entities involved in the events complained of. The Court then examines the links between the Government of the Federal Republic of Yugoslavia (FRY) and the authorities of the Republika Srpska (which was the self-proclaimed "Republic of the Serb People of Bosnia and Herzegovina"). The Court finds that the FRY made its considerable military and financial support available to the Republika Srpska and that, had it withdrawn that support, this would have greatly constrained the options available to the Republika Srpska authorities.

The Court then sets out to examine the facts alleged by Bosnia and Herzegovina in order to decide: (1) whether the alleged atrocities occurred and, if established, (2) whether the facts establish the existence of an intent, on the part of the perpetrators, to destroy in whole or part the group of the Bosnian Muslims.

The Court makes long and detailed findings of fact on the alleged atrocities which are grouped according to the categories of prohibited acts described in Article II of the Genocide Convention.

With respect to "killing members of the protected group" (Article II (a) of the Convention), the Court finds that it is established by overwhelming evidence that massive killings throughout Bosnia and Herzegovina were perpetrated during the conflict. However, the Court is not convinced that those killings were accompanied by the specific intent on the part of the perpetrators to destroy, in whole or in part, the group of Bosnian Muslims. It acknowledges that the killings may amount to war crimes and crimes against humanity, but that it has no jurisdiction to determine whether this is so.

The Court turns to the massacre at Srebrenica and carefully examines the evidence regarding that event, including the fact that the ICTY found in the Krstić and Blagojević cases that Bosnian Serb forces killed over 7,000 Bosnian Muslim men following the takeover of Srebrenica in July 1995. The Court concludes that both killings and acts causing serious bodily or mental harm occurred. The Court finds that the Main Staff of the VRS (the army of the Republika Srpska) had the necessary specific intent to destroy in part the group of Bosnian Muslims (specifically the Bosnian Muslims of Srebrenica) and that accordingly acts of genocide were committed by the VRS in or around Srebrenica from about 13 July 1995.

The Court then proceeds to examine evidence of acts "causing serious bodily or mental harm to members of the protected group" (Article II (b) of the Convention). It finds that the Bosnian Muslims were systematically victims of massive mistreatment, beatings, rape and torture causing serious bodily and mental harm during the conflict. However, it finds that the specific intent to destroy the protected group is not conclusively established.

The Court then examines alleged acts of "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" (Article II (c) of the Convention). It finds that there is conclusive evidence that the alleged acts were committed, but that the necessary specific intent is not established.

With respect to Articles II (d) and (e) of the Convention — "imposing measures to prevent births within the protected group" and "forcibly transferring children of the protected group to another group" —, the Court cannot find that the evidence is sufficient to establish that such acts occurred.

The Court then finds that the Applicant has not demonstrated any overall plan to commit genocide on the basis of the 1992 Strategic Goals issued by the authorities of the Republika Srpska. It also rejects Bosnia and Herzegovina's claim that the very pattern of the atrocities committed over many communities, over a lengthy period, focussed on Bosnian Muslims, can demonstrate the necessary specific intent to destroy the group in whole or in part.

— The question of responsibility for events at Srebrenica under Article III, paragraph (a), of the Convention

Having concluded that acts of genocide were committed at Srebrenica by the army of the Republika Srpska, the Court turns to the question of whether the Respondent was legally responsible for these acts. In the light of the information available to it, the Court finds that the acts of those who committed genocide at Srebrenica cannot be attributed to the Respondent under the rules of international law of State responsibility. In particular, the Court concludes, judging on the basis of the materials before it, that the acts of genocide cannot be attributed to the Respondent as having been committed by persons or entities ranking as organs of the Respondent. The Court also finds that it has not been established that those massacres were committed on the instructions, or under the direction of the Respondent nor that the Respondent exercised effective control over the operations in the course of which the massacres were committed.

— The question of responsibility under paragraphs (b) to (e) of Article III of the Convention

The Court notes that the acts enumerated in paragraphs (b) to (d) of Article III are not relevant in the present case. With respect to paragraph (e) (complicity in genocide), the Court notes that there is little doubt that the atrocities in Srebrenica were committed, at least in part, with the resources which the perpetrators possessed as a result of the general policy of aid and assistance by the FRY. However, one of the very specific conditions for the legal responsibility of the Respondent is not fulfilled since it has not been conclusively established that, at the crucial time, the FRY supplied aid to the perpetrators of the genocide in full awareness that the aid supplied would be used to commit genocide.

— The question of responsibility for breach of the obligations to prevent and punish genocide (Article I of the Convention)

With respect to the obligation to prevent genocide, the Court states inter alia that the obligation is one of conduct and not one of result: responsibility is not incurred simply because genocide occurs but rather if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. The Court also notes that a State can be held responsible only if a genocide was actually committed, and that thus it will consider the Respondent's conduct only in connection with the Srebrenica massacres. Finally, it is sufficient that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed.

The Court observes that the FRY was in a position of influence over the Bosnian Serbs who devised and implemented the genocide in Srebrenica, owing to the strength of the political, military and financial links between the FRY on the one hand and the Republika Srpska and the VRS on the other. The Court further recalls that although it has not found that the information available to the Belgrade authorities indicated, as a matter of certainty, that genocide was imminent, they could hardly have been unaware of the serious risk of it. In the view of the Court, the Yugoslav federal

authorities should have made the best efforts within their power to try and prevent the tragic events then taking shape, whose scale might have been surmised. Yet the Respondent has not shown that it took any initiative to prevent what happened, or any action on its part to avert the atrocities which were committed.

The Court concludes that the Respondent did nothing to prevent the Srebrenica massacres and that it thus violated its obligation to prevent genocide in such a manner as to engage its international responsibility under Article I of the Genocide Convention.

Regarding the obligation to punish perpetrators of genocide, the Court states that under Article VI of the Convention, States have an obligation to co-operate with "such international penal tribunal as may have jurisdiction" in the relevant matter, and considers that the ICTY constitutes such an international penal tribunal. The Court further observes that there is plentiful, and mutually corroborative, information suggesting that General Mladić, indicted by the ICTY for genocide, as one of those principally responsible for the Srebrenica massacres, was on the territory of the Respondent at least on several occasions and for substantial periods during the last few years and is still there now, without the Serb authorities doing what they could and can reasonably do to ascertain exactly where he is living and arrest him.

The Court thus finds that it is sufficiently established that the Respondent failed in its duty to co-operate fully with the ICTY. It concludes that this failure constitutes a violation by the Respondent of its duties under Article VI of the Genocide Convention.

— The question of responsibility for breach of the Court's Orders indicating provisional measures

Finally, the Court finds that in respect of the massacres at Srebrenica in July 1995, the Respondent failed to fulfil the obligations indicated in the Court's Order of 8 April 1993 and reaffirmed in its Order of 13 September 1993 to take all measures within its power to prevent commission of the crime of genocide and to ensure that any organizations and persons which may be subject to its influence do not commit any acts of genocide.

— The question of reparation

Having made its findings, the Court turns to Bosnia and Herzegovina's request for reparation. With respect to the violation of the obligation to prevent genocide, the Court finds that, since it has not been shown that the genocide at Srebrenica would in fact have been averted if the Respondent had attempted to prevent it, financial compensation for the failure to prevent the genocide at Srebrenica is not the appropriate form of reparation. The Court considers that the most appropriate form of satisfaction would be a declaration in the operative clause of the Judgment that the Respondent has failed to comply with the obligation to prevent the crime of genocide.

As for the violation of the obligation to punish acts of genocide, the Court finds that a declaration in the operative clause that the Respondent is in breach of the Convention and that it has outstanding obligations as regards the transfer to the ICTY of persons accused of genocide would be appropriate satisfaction.

Finally, with regard to the breach of the Court's Orders indicating provisional measures, the Court decides to include in the operative clause a declaration that the Respondent has failed to comply with the Court's Orders indicating provisional measures.

Composition of the Court

The Court was composed as follows: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judges ad hoc Mahiou, Kreća; Registrar Couvreur.

Vice-President Al-Khasawneh appends a dissenting opinion to the Judgment of the Court; Judges Ranjeva, Shi and Koroma append a joint dissenting opinion; Judge Ranjeva appends a separate opinion; Judges Shi and Koroma append a joint declaration; Judges Owada and Tomka append separate opinions; Judges Keith, Bennouna and Skotnikov append declarations; Judge ad hoc Mahiou appends a dissenting opinion; Judge ad hoc Kreća appends a separate opinion.

A summary of the Judgment appears in the document "Summary No. 2007/2", to which summaries of the declarations and opinions are annexed. In addition, the press release, the summary and the full text of the Judgment can be found on the Court's website **(www.icj-cij.org)**.

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