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

Statement to the Press by H.E. Judge Rosalyn Higgins, President of the International Court of Justice

26 February 2007

Ladies and Gentlemen,

Thank you for attending. My purpose is to try to explain, in readily understandable language, some of the legal matters in this highly complex case. I am also very mindful of how important it is, in reporting this case, that the Press have really understood what we have said and relay it correctly.

This is the first legal case in which allegations of genocide have been made by one State against another. The International Court of Justice has been acutely sensitive to the responsibilities that have fallen on it. The Court — as it always does — has meticulously applied the law to each and every one of the issues before it. These judicial considerations have led, in the event, to mixed findings so far as the Parties are concerned. That does not mean, of course, that the Court has been seeking a political compromise, still less any predetermined outcome.

I begin with two particular comments.

First, although the hearings in this case were on the merits, Serbia and Montenegro had advanced contentions to the effect that, even though the Court had in an earlier Judgment found it *did* have jurisdiction to hear the substance of this case, more recent events relating to changes in Serbia and Montenegro's status called this into question. The Court found that the earlier Judgment in favour of its jurisdiction still stood: it was *res judicata*. When we say this decision constitutes *res judicata*, we mean that it is final and binding on the parties. The International Court of Justice *can* take account of new developments, but only through a formal request for revision. In fact, such a request had been made previously by the Respondent, and rejected by the Court in a Judgment of 3 February 2003.

Second, a short time after the close of the oral hearings in May 2006, Montenegro declared its independence based on the results of a referendum. This raised the question of who is now the Respondent party in the case. The Court has answered by saying that at the date of this Judgment, Serbia was the only Respondent. However, the Court notes that any responsibility for *past* events involved at the relevant time the composite State of Serbia and Montenegro. Bear this explanation in mind when you hear me refer to "the Respondent".

As you are aware, the jurisdiction of the International Court of Justice is based on consent. States may consent generally to the Court's jurisdiction by submitting a declaration under Article 36, paragraph 2, of the Court's Statute. States can come to the Court by agreement, *ad hoc*. States may also consent by becoming parties to any of the 300 treaties that refer to the Court in relation to the settlement of disputes arising from their application or interpretation. In this case, the Court's jurisdiction is solely based on Article IX of the Genocide Convention. This means that the Court has no authority to rule on alleged breaches of obligations under international law other than genocide, as defined by the Genocide Convention. This is important to understand because in this case we were confronted with substantial evidence of events in Bosnia and Herzegovina that may amount to war crimes or crimes against humanity — but we had no jurisdiction to make findings in that regard. We have been concerned *only* with genocide — and, I may add, genocide in the legal sense of that term, not in the broad use of that term that is sometimes made.

This was an extremely fact-intensive case. The hearings lasted for two-and-half-months, witnesses were examined and cross-examined, and the Parties each submitted thousands of pages of documentary evidence. About one third of the Judgment is devoted to analysing this evidence and making detailed findings as to whether alleged atrocities occurred and, if so, whether there was the specific intent on the part of the perpetrators to destroy in whole or in part the protected group, identified by the Court as the Bosnian Muslims. It is this specific intent, or *dolus specialis*, that distinguishes genocide from other crimes. In this case, it was not enough for the Applicant to show that, for example, deliberate unlawful killings of Bosnian Muslims occurred. Something more was required — proof that the killings were committed with the intent to destroy the group to which the victims belonged.

Given the exceptional gravity of the crime of genocide, the Court required that the allegations be proved by evidence that is "fully conclusive". We made our own determinations of fact based on the evidence before us, but we also greatly benefited from the findings of fact that had been made by the International Criminal Tribunal for the former Yugoslavia (ICTY) when it was dealing with accused individuals.

The Court has found it conclusively established that massive killings and acts causing serious bodily or mental harm were perpetrated in specific areas and in detention camps throughout Bosnia and Herzegovina. We also found that there was deliberate infliction of terrible conditions of life. In many cases, Bosnian Muslims were the victims of these acts. However — with one exception which I shall return to — the evidence did not show that these terrible acts were accompanied by the specific intent to destroy the group that is required for proof of genocide.

The Applicant had argued that the specific intent could be inferred from the pattern of atrocities. The Court could not accept this. The specific intent has to be convincingly shown by reference to particular circumstances; a pattern of conduct will only be accepted as evidence of its existence if genocide is the *only* possible explanation for the conduct concerned.

However, there was an important exception to these findings. The Court found that there was conclusive evidence that killings and acts causing serious bodily or mental harm targeting the Bosnian Muslims took place in Srebrenica in July 1995. These acts were directed by the Main Staff of the VRS (the army of the Republika Srpska) who possessed the specific intent required for genocide.

Having determined that genocide was committed at Srebrenica, the next step was for the Court to decide whether the Respondent was legally responsible for the acts of the VRS. If the VRS was an organ of Serbia and Montenegro (as that country was then called), then in law the Respondent would be responsible for the VRS' actions. The Respondent would also be responsible in law if the VRS was acting on the instructions of, or under the direction or control of, the Respondent. In the light of the information available to it, the Court has found that it was not established that the massacres at Srebrenica were committed by organs of the Respondent. It has also 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 those massacres were perpetrated. This is the test in international law. In fact, all indications are that the decision to kill the adult male population of the Bosnian Muslim community in Srebrenica was taken by some members of the VRS Main Staff, without instructions from or effective control by the FRY.

I would like to say a few words at this juncture on the paramilitary unit called the "Scorpions". During the oral proceedings the Applicant presented a video to the Court showing the execution by paramilitaries of six Bosnian Muslims, in Trnovo, an area near Srebrenica, in July 1995. This video had previously been shown on Serbian television and during the Milošević trial at the ICTY. In addition to this video, other evidence was submitted to the Court by the Applicant alleging that the Respondent was responsible for the acts of the "Scorpions". The Court

has systematically assessed all the information brought to its notice. The Court can only make decisions on the basis of materials before it. And, on the basis of these materials, the Court has been unable to find that the Respondent was responsible for the acts of the "Scorpions" in Trnovo in mid-1995.

Let me say something about the question of complicity in the Genocide Convention. The Court had to consider whether the Respondent provided the means to enable or facilitate the events in Srebrenica in full awareness that the aid supplied would be used to commit genocide. It is clear that the Respondent supplied quite substantial aid of a political, military and financial nature to the Republika Srpska and the VRS, long before the tragic events of Srebrenica, and the aid continued during those events. But a crucial condition for complicity was not fulfilled, namely, the Court did not have conclusive proof that authorities of the Respondent, when providing this aid, were fully aware that the VRS had the specific intent characterizing genocide.

It is not so easy to grasp the distinction in law between complicity in genocide and the breach of the duty to prevent genocide. Let me try to explain in a few words. The Court did find it conclusively proven that the FRY leadership, and President Milošević above all, *were* fully aware of the climate of deep-seated hatred which reigned between the Bosnian Serbs and the Muslims in the Srebrenica region, and that massacres there were likely to occur. They may not have had knowledge of the specific intent to commit genocide, but it must have been clear that there was a *serious risk of genocide* in Srebrenica. This factor is important because it activates the obligation to prevent genocide, which is enshrined in Article I of the Genocide Convention.

Let me make clear that the legal issue is not whether, had the Respondent made use of the strong links it had with the Republika Srpska and the VRS, the genocide would have been averted. The legal issue is whether the Respondent took all the measures which were within its power to prevent the genocide.

The Court has found that the Respondent could, and should, have acted to prevent the genocide, but did not. The Respondent did nothing to prevent the Srebrenica massacres despite the political, military and financial links between its authorities and the Republika Srpska and the VRS. It therefore violated the obligation in the Genocide Convention to prevent genocide.

There is one further obligation that I will explain, which is the obligation to punish genocide. Article VI of the Genocide Convention requires that persons charged with genocide or any other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by an international penal tribunal. In this case, the genocide occurred in Srebrenica, which is outside the Respondent's territory. Therefore, the Respondent cannot be held responsible for not having tried before its national courts those accused of having participated in the Srebrenica genocide. The relevant question, then, is whether the Respondent fulfilled its obligation to co-operate with the ICTY by arresting and handing over to the Tribunal any persons accused of genocide as a result of the Srebrenica genocide and finding themselves on its territory.

The Court has not failed to notice the plentiful, and mutually corroborative, information suggesting that General Mladić, indicted by the ICTY for as one of those principally responsible for the genocide in Srebrenica, was on the territory of the Respondent at least on several occasions and for substantial periods during the last few years and may still be there now, without the Serb authorities doing what they could and can reasonably do to identify his location and arrest him. The Court has found that the Respondent failed in its duty to co-operate fully with the ICTY and therefore has violated the obligation to punish genocide.

As the Court has not found the Respondent itself committed, or was responsible for, the genocide at Srebrenica, the issue of massive reparations for that does not arise. So far as the violation of the obligation to prevent genocide, the Court has found — as the Applicant in fact

suggested — that a declaration of the Court is itself the appropriate satisfaction. As to the breach of its obligation to punish genocide, the Court has determined that this is a continuing breach. We have therefore made a declaration that Serbia shall immediately take effective steps to ensure full compliance with this obligation and to transfer individuals accused of genocide for trial by the ICTY, and to co-operate fully with that Tribunal.

I hope that this Statement has assisted you in your work. Thank you for your attention.