

ICJ DECISION ON SREBRENICA GENOCIDE DOES LITTLE FOR VICTIMS BUT MAY ADVANCE THE RULE OF LAW

The U.N.'s International Court of Justice (Court or ICJ) recently acquitted the Serbian government of complicity in the 1995 massacre of 8,000 Muslim Bosnians in Srebrenica. The judgment evoked bitter disappointment from victims and victims' families, to whom it denied both closure and the possibility of reparations from the Serbian government. However, the judgment confirms principles of international law that may have a deterring impact on the future commission of genocide. This was the Court's first case brought under the Convention on the Prevention and Punishment of the Crime of Genocide (Convention). The Court held that Serbia had violated the Convention by not preventing the killing, and by failing to produce former government officials that have been indicted for genocide and other war crimes by the International Criminal Tribunal for the former Yugoslavia (ICTY).

While it accepted that genocide had occurred at Srebrenica, the Court did not find that Serbia, "through its organs or persons whose acts engage its responsibility under customary international law," had committed, conspired to commit, incited the commission of, or been complicit in the commission of genocide. In short, the prosecution failed to prove that Serb General Ratko Mladic was acting as an official organ of the Serbian state when he directed the genocide at Srebrenica. Although Serbia's links with Mladic and the Bosnian-Serb troops who committed the massacre were close and firmly established, the 11-judge majority did not find this to be sufficient proof of the intent required to convict Serbia of complicity in the genocide. Four of the 15 judges dissented from the majority finding.

Though the majority did not find Serbia complicit in the massacre at Srebrenica, it did find that the massacre was foreseeable, and that Serbia therefore violated the Convention by failing to prevent it. In other words, Serbia "could and should" have stopped genocide. A 14-vote majority found a second violation of the Convention in Serbia's failure to hand over Mladic. In response, the Court ordered that

Serbia "shall immediately take effective steps to ensure full compliance with its obligation under [the Convention, and] transfer individuals accused of genocide ... for trial by the International Criminal Tribunal for the former Yugoslavia."

The decision concludes ten months of deliberation and 14 years of trial. Bosnia filed the case in 1993 — disturbingly, prior to the Srebrenica massacre — to raise already-existing claims under the Convention. It was the first instance of a state being charged with genocide, and the first time that the ICJ had arbitrated a dispute arising under the Convention, which was signed in 1948 following the Nazi Holocaust. As such, the decision has both immediate and far-reaching implications.

Most immediately, however, the judgment means that affected Bosnians have yet to receive the symbolic closure of this bloody chapter in their lives. The Serbian government will not have to pay reparations to victims' families.

In acquitting Serbia of complicity in the Srebrenica genocide, the ICJ rejected the doctrine of vicarious liability that might otherwise apply because of the military assistance the Bosnian-Serbs received from Belgrade. The ICJ has insisted that unless Belgrade gave "direct orders" for particular operations, or unless the Bosnian-Serbs were "completely dependent" on Belgrade, there is no liability at all. Critics of the decision note that this is inconsistent with prevailing theories of tort law, under which responsibility for wrongdoing can be shared. It is also inconsistent with the international doctrine of command responsibility, which holds military officers responsible for the actions of subordinates under their command. The fact that the massacre was directed by Serbian General Mladic suggests that responsibility would transfer under either liability theory.

Prominent international lawyer Antonio Cassese noted the Court's acceptance that "the Serbian government was paying salaries to Mladic and his colleagues, as well as providing financial and military assistance." This evidence should have been enough to establish complicity, argued Cassese, even without proof that Serbian officials sent specific

instructions ordering the genocide. Another writer suggests that the requisite intent should have been inferred from the pattern of ethnic killings beginning in the early 1990s.

The ICJ judgment is also striking because, while it finds the mass murder of almost 8,000 Bosnian Muslim males at Srebrenica was an act of genocide, it does not reach the same conclusion for the widespread ethnic cleansing carried out by the Bosnian Serbs, mainly in 1992, when tens of thousands were killed and up to two million were displaced. This limits the genocide charges that can effectively be brought against Bosnian-Serb military leaders to those relating to the Srebrenica massacre.

David Scheffer, former U.S. Ambassador-at-Large for War Crimes Issues, highlighted the judgment's implications for advancing the rule of law and human rights. He noted that the decision "confirms that all states have an obligation" to take action against people accused of genocide, "and part of that is apprehending them." The decision also confirms that genocide and other egregious crimes occurred, and that the Serbian government's involvement was in violation of the Genocide Convention. While not the verdict for which victims were waiting, these findings hopefully offer some measure of vindication by recognizing the substantial agency of the Serbian government in the commission of the atrocities, and by faulting the government for inaction.

Next to the violent and irreparable horrors of genocide, long trials and highly technical verdicts like the nearly two-hundred page judgment in this case seem agonizingly inadequate. If something constructive is to be derived from the Court's decision, it is that the ability to hold governments accountable for complicity or failure to prevent genocide may help to deter the kind of governmental support that allows genocide to occur on such a large scale. The decision must also serve as a guide for future prosecutions of state sponsored genocide under the Convention.

U.N. DEMAND FOR ACCOUNTABILITY IN THE PHILIPPINES NEEDS MORE

The U.N. has pressured the Philippine government to address a rash of extrajudicial

killings that are alleged to have been conducted by the military since 2001. The killings are allegedly political, and have targeted non-combatant, left-wing civic leaders, activists and journalists. According to local human rights group Karapatan, the death toll as of this writing exceeds 800. While the government has earmarked 99 courts to deal with the cases, the prognosis for effective adjudication is not strong without a vigorous prosecution.

U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions Philip Alston reported that the extrajudicial killings are “convincingly attributed” to the government’s armed forces, and have taken place in a climate of virtual impunity for the perpetrators and vulnerability for witnesses. “The present message,” reports Alston, “is that if you want to preserve your life expectancy, don’t act as a witness.” In addition, the number of killings has flared because the government has abandoned reconciliation attempts for counterinsurgency strategies that target left wing groups with military force.

A government sponsored commission, led by former Philippine Supreme Court judge Jose Melo, made findings consistent with the U.N. report, and local civic groups and jour-

nalists corroborated allegations that an overzealous and under-disciplined military is responsible for the killings. What the U.N. report has done, according to local journalist Raul Palangan, is to mainstream the debate on extrajudicial killings: “no longer can the killings be dismissed as the wild rantings of a rabid Left.” The U.N. attention has taken the debate away from the political arena and given it an independent, normative footing as a human rights issue in the eyes of the world.

While president Arroyo has expressed concern, by far the most significant commitment to addressing the problem has been the Supreme Court’s order 25-2007. This order designates 99 courts as special tribunals to try the killings, sets a rigorous trial schedule, and prioritizes the prosecution of these crimes. Such action is consistent with Chief Justice Puno’s observation that the extrajudicial taking of life is the ultimate violation of human rights and constitutes a brazen assault on the rule of law. The government commission has recommended that the Court hold military commanders responsible for killings committed by subordinates under the doctrine of command responsibility.

In contrast to the judicial response, the army has denied the allegations as “the

enemy’s propaganda,” and claims the U.N. report fails to recognize the severity of the communist insurgency threat that led to the killings. Roman Catholic Archbishop Oscar Cruz wrote in his blog that he expects only a “ceremonial prosecution” of a limited number of soldiers implicated in the killings.

Reflecting these concerns is the fact that the Philippine Justice Department has so far shown lackluster performance in bringing prosecutions. Justice Secretary Raul Gonzalez has joined the army in criticizing the U.N. report, and, according to the Philippine Daily Inquirer, has directed hostility at parties seeking to open investigations into the killings. The special tribunals will be useless if cases are not filed, and if the prosecutorial arm of the Justice Department is not mobilized to pursue the opportunity for expedited prosecution. Thus far, the prosecution has not taken action consistent with the Supreme Court’s order allowing aggressive prosecution of the extrajudicial killings. The U.N. and the government commission have helped to make justice available — they should go further to ensure that justice prevails. *HRB*

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