Bosnia and Herzegovina vs. Serbia and Montenegro

Application of the convention on the prevention and punishment of the crime genocide.

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1. Introduction

The notorious massacre in July 1995—now universally referred to simply as ‘Srebrenica’—took place in the Srebrenica region in eastern Bosnia and Herzegovina. The municipality of Srebrenica, which is merely a few kilometers from Bosnia’s border with Serbia, consisted of approximately 35,000 people in 1991 – more than two-thirds of whom were Bosnian Muslims.

The atrocities, which took place in Srebrenica, were part of a plan to create an ethnically homogenous region in Bosnia. Bosnian Serb forces took part in killings, deportation and rapes of Bosnian Muslims as part of a process of ‘ethnic cleansing’. The Srebrenica enclave was of strategic importance in order to consolidate a single geographical entity over which they could maintain political control. Control of the region was seen important in securing the territorial integrity of the political entity of Republika Srpska – the self-proclaimed Serbian republic in Bosnia.

On 16 April 1993, the UN Security Council “[c] concerned by the pattern of hostilities by Bosnian Serb paramilitary units against towns and villages in eastern Bosnia” and by the practice of the so-called “ethnic-cleansing” in the region, demanded that Srebrenica and its surroundings be treated by all parties in the conflict as a “safe area”. Some 600 lightly armed Dutch peacekeepers were deployed on an ill-fated mission to the enclave to ensure that it remained free from armed attack. Nestled in the far east of the country, the township increasingly became a refuge for Bosniak civilians from nearby areas as Bosnian Serb forces obtained greater control over surrounding townships.

From 6 to 8 July 1995, Bosnian Serb forces laid siege to the Srebrenica enclave. As the army units – under the command of General Mladić – began shelling the township, the Dutch Commander Colonel Karremans called the UN Headquarters in Sarajevo for close air support. This was initially denied. Although a subsequent request for NATO air-support was granted, owing to a bureaucratic error resulting in delays, none was forthcoming. On 11 July, Bosnian Serb troops entered Srebrenica – opposed neither from the air nor by the hapless Dutch Battalion (Dutchbat) forces on the ground. Bosnian Serb paramilitaries proceeded to separate all Bosnian Muslim military aged males from the women. Buses were arranged to transport the women and small children of Srebrenica to Bosnian Muslim territory in the east of Bosnia. The men were horded onto separate buses, purportedly to be taken to away for “interrogation for suspected war crimes”. On 13 July 1995 and the days following, some 8,000 Bosnian Muslim males between 12 and 77 were killed by the Army of Republika Srpska (VRS), under the command of General Ratko Mladić, as well as by Bosnian Serb paramilitaries. As the President of the self-proclaimed Bosnian Serb Republic, Radovan Karadžić was the Supreme Commander of the armed forces at the time.

The failure to protect what was supposedly an internationally protected ‘safe haven’ haunts the United Nations and the Dutchbat forces that were sent to protect the enclave to this day.
2. International Criminal Tribunal for the former Yugoslavia (ICTY)

Under Resolution 827 (1993) the UN Security Council established the ICTY to try those responsible for violations of international humanitarian law, including genocide, on the territory of the former Yugoslavia. Radovan Karadžić and Ratko Mladić are two of several high-level indictees who have been accused of atrocities associated with the 1995 massacre before the ICTY in The Hague. The tribunal has prosecuted several individuals who were involved in the acts of the Srebrenica attack or the atrocities leading to the attack such as Drazan Erdemović, Dragan Obrenović, Radislav Krstić and Naser Orić etc. Furthermore the ICTY has indicted Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin and Vinko Pandurević for genocide in Srebrenica together with several counts of crimes against humanity and violations of the laws or customs of war. Milan Gvero and Radivoje Miletic have been indicted for murder, persecutions, forcible transfer and deportation, again in relation to the events at Srebrenica between July and November 1995.
3. Bosnia's claim

In March 1993 Bosnia filed a case against Serbia (later Serbia and Montenegro) claiming that the Serbian state was directly involved in insinuating and aiding the Srebrenica genocide of the Bosniak Muslims. Bosnia claims that the state of Serbia was direct contributor to the genocide because of their role in perpetuating anti-Bosniak sentiment. Furthermore, Bosnian lawyers, such as one Mr. Van der Bissen, provide high level evidence proving that Serbian officers were directly involved in capturing, torturing and murdering the men of Srebrenica. According to them, the Serbian government not only caused the genocide but also failed to hinder it from happening. According the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, a state must do everything in its power to prevent genocide from taking place. Moreover, a state is obliged to punish those who carried out the genocide—such as general Mladić— but Serbia failed to do so. Bosnia hopes that the courts will apply the “overall control rule” as established in the case against Mr. Duško Tadić, a Bosnian Serb politician who was convicted of war crimes by the ICTY and sentenced to 20 years imprisonment in 1997. The overall control rule states that a State is responsible for violations of international humanitarian law attributable to it such as those committed by its military or government empowered individuals and entities.

Another aspect to consider from Bosnia’s side is the issue of reparations and conciliations. Mr. Van der Bissen expressed hopes for reconciliation once the case was over. He believes that once an unbiased account of history is established by a neutral third party i.e. the ICJ both Serbia and Bosnia can move towards reducing animosity on both side and achieve a peaceful conclusion. However, the matter of reparations is still undecided.
4. Serbia's claim

Serbia (later Serbia and Montenegro) denies all accusations made by the Bosnian government. Initially, Serbia was skeptical about whether or not the court had jurisdiction over the matter. Despite the fact that Article IX of the UN charter clearly states that the ICJ has the authority to determine questions of State responsibility for genocide or the failure to prevent genocide, in March 2001, Serbia made a request to reconsider the court’s jurisdiction and questioned the court’s authority to accept the case. Later on, more questions were raised over Serbia's lack of a membership in the UN and whether that exempted Serbia from the court’s jurisdiction. Serbia eventually, albeit reluctantly, accepted the court’s jurisdiction.

Serbia claims that all activities carried out by all personnel involved on Srebrenica were independent actors and free from any form of government association. Their crimes can be identified as crimes committed by individuals and punished on an individual basis, however, holding the state of Serbia and Montenegro liable for their actions is unjust.

Furthermore, the question remains of whether or not the Srebrenica massacre can be regarded as genocide or an act of ethnic cleansing. The crime of genocide requires a demonstrable specific intent to target and destroy as such an identifiable group in whole or in part (dolus specialis). This requirement distinguishes genocide from other violations of the law relating to armed conflict and places a heavy burden of proof on the party alleging the occurrence of the crime of genocide. It is not enough to establish that widespread unlawful killings, mistreatment, rape or mass expulsion of civilians (euphemistically referred to as ethnic cleansing) have taken place for an act to be considered a genocide; it must be proven beyond a reasonable doubt that such atrocities were perpetrated as part of a campaign to totally or partially wipe out a discrete ethnic, religious or national group. Serbian government has questioned how the massacre of Srebrenica can be considered a genocide if it doesn't fulfill the requirements of dolus specialis.

They wish to employ the precedent set in Nicaragua vs. The United States of America that assistance to rebels in the form of provision of weapons or logistical support did not constitute an armed attack, thus making Serbia not liable to the claims of Bosnia. The ICJ's effective control standard in relation to the imputation of State responsibility for acts carried out by armed forces and groups to a government which assists and supports such forces, but does not exercise operational control over them.

Lastly, it claims that the work of the ICTY was sufficient in itself and it punished those who were found guilty, hence, an added case is unnecessary to say the least.
5. Important Personalities:

Vice-President Al-Khasawneh
Judge Ranjev
Judge Shi
Judge Koroma
Judge Owada
Judge Tomka
Judge Keith
Judge Bennouna
Judge Skotnikov
ad hoc Judge Mahiou
ad hoc Judge Kreca
6. Questions For The Court

1. Can the atrocities of Srebrenica be considered to be genocide under light of dolus specialis?

2. Does the case of the USA vs. Nicaragua provide an effective precedent for that of Bosnia vs. Serbia?

3. Was the formation of the ICTY necessary? If so, why?

4. Is an added case necessary considering the earlier actions of the ICTY?

5. Can the Serbian administration be held responsible through the overall control rule or not, considering that they deny any direct association with the entities responsible for the atrocities committed?

6. Since the Serbian government lacks any operational control over the parties responsible, should they still be held under trial in the ICJ?

7. Who do the reparations in the aftermath of the massacre fall to?

8. What needs to be done for an effective decision to be reached by the ICJ?

9. What can be the potential loopholes in any decision that is reached?

10. How can these potential loopholes be countered?
7. Bibliography

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