

Interpretation of Genocide Law Inconsistent

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The reversal of Vidoje Blagojevic's genocide conviction show that judges continue to disagree on what constitutes genocidal intent.

The appeals chamber judgment at the Hague tribunal this week which overturned the genocide conviction of former Bosnian Serb army commander Vidoje Blagojevic raises questions about judges' differing interpretations of the legal definition of the crime.

Appeals judges found on May 9 that Blagojevic was oblivious to the genocidal intent of the main perpetrators of the Srebrenica massacre of 1995 and therefore should not have been found guilty of complicity in genocide.

They upheld Blagojevic's other convictions in relation to his role in the massacre - first rendered in a judgment of January 17, 2005 - and cut his sentence from 18 to 15 years imprisonment.

The appeals chamber judgment shows that it is perfectly possible for one group of judges to find enough evidence to convict the accused of complicity in genocide, and for another to find the same evidence inadequate and to reverse the conviction.

The judges' finding comes three months after judges at the International Court of Justice, ICJ, cleared Serbia of direct responsibility for the genocide which took place at Srebrenica.

The ICJ judgment of February 26 showed that the highest UN court is greatly influenced by findings made by judges at the Hague tribunal.

In finding that genocide took place in Srebrenica in July 1995, it relied heavily on the 2004 appeals chamber judgment of former Bosnian Serb general Radoslav Krstic, which found that he aided and abetted the commission of the crime.

Some legal experts say the ICJ ruling set the standard of proof so high that proving genocidal intent, or mens rea, will now be extremely difficult in genocide cases at the Hague tribunal.

But even before the ICJ decision was announced, it was unclear what evidence was required to prove this at the Hague tribunal.

Several high-level indictees at the UN court have been charged with taking part in a joint criminal enterprise to commit genocide at Srebrenica.

But since Blagojevic's complicity in genocide has now been overturned, only Krstic remains convicted of a genocide charge.

The trial of seven other high-ranking Bosnian Serb military and police officials is currently ongoing at the tribunal, and five of them - Ljubisa Beara, Ljubomir Borovcanin, Vujadin Popovic, Drago Nikolic, and Vinko

Pandurevic - have been charged with genocide.

It remains to be seen whether these charges will be successfully proven in court and whether the judges hearing the evidence - which is very similar to that heard in previous cases related to Srebrenica - will be convinced that the accused shared the genocidal intent with the men believed to be the main architects of this crime - wartime Bosnian Serb army commander Ratko Mladic and former Bosnian Serb leader Radovan Karadzic, who are both on the run.

The interpretation of the legal definition of genocide is often debated by legal scholars. Some argue that genocide is too difficult to prove, while others say it is a very specific definition often charged in cases where it doesn't apply.

But what is it that makes one judge interpret the law differently from another?

There was no new evidence submitted before the appeals chambers in either the Krstic or the Blagojevic case.

That means that in each case, judges reviewed the same evidence that secured the original convictions - the same witness testimony, the same expert opinions and the same documents.

So how can it be that they then reach such different conclusions with regard to genocide?

An important feature of an independent court is that the appeals chamber can reach a different decision from the trial chamber.

But if the decision of appeals judges differs wildly from the original judgment, then perhaps it suggests that there is something wrong with the basic legal concepts applied by the court.

Lawmakers at the ad-hoc tribunals for the former Yugoslavia and for Rwanda have pioneered the prosecution of war crimes at an international level.

International criminal law is being developed from the judgments rendered at these two courts, which were also an impetus for the establishment of International Criminal Court - the world's first permanent international war crimes court.

But legal precedents established at the Hague tribunal in relation to genocide - where findings of the crime are later overturned - may send a rather confusing message.

They also highlight the need for more research to be done into the mechanisms followed by judges when making judgments.

It would be interesting to examine the extent to which judges are influenced by their nationality and also

their political and personal beliefs – particularly when making findings in relation to as grave a crime as genocide.

While judges are only human and, as such, can never be truly objective, independent courts are one place where the ideal of objective truth should be upheld.

So-called truths established at the tribunal have an important role to play in reconciliation in the Balkans.

Many believe that an important function of the court is not just to prosecute war crimes but also to provide an interpretation of what happened during the conflicts in the former Yugoslavia – and help people face their past.

But with so many confusing and contradictory signals coming from the court, one could argue that it has failed to do this.

If its judges cannot agree on the interpretation of the legal definition of genocide - who was responsible and in what mode of liability - then what hope is there that the people of Bosnia and Herzegovina will ever agree?

Perhaps an international jury made up from ordinary citizens would do a better job than the tribunal's judges.

Understanding what constitutes genocidal intent might be an easier task for lay people, who would not be burdened with trying to follow conflicting definitions and highly complicated legal rules.

It would be interesting to see if this hypothetical jury would agree with the appeals chamber's finding that Blagojevic had no idea that genocide was taking place and was only providing logistical support to perpetrators as they committed their atrocities.

Such a jury may find that while it adheres rigidly to the letter of the law of genocide, this judgment also defies a basic logic.

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