

Serbia and Montenegro on Trial for Genocide

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Bosnian lawyers face the daunting task of proving not only that genocide occurred in Bosnia, but also that responsibility lay with an entire state.

Bosnian lawyers launching a genocide case against Serbia and Montenegro at the International Court of Justice, ICJ, the first such state-level lawsuit, will face a formidable challenge when proceedings begin on Monday, February 27, IWPR has established in a far-reaching investigation into the case.

On the face of it, Sarajevo's case appears strong, drawing as it does on many years' worth of research into the atrocities that became the gruesome hallmark of the conflicts that ripped through the Balkans in the Nineties.

But this first ever attempt to prove something as problematic as state responsibility for a crime as complex as genocide is set to throw up a whole host of thorny legal issues.

Over a decade has passed since Sarajevo first registered its complaint against Belgrade at the Hague court, accusing what was then Yugoslavia of genocide against Bosnia's non-Serb population.

Next week, the two sides' legal teams will finally take their seats in the imposing wood-panelled expanse of the court's Great Hall of Justice in order to launch the opening salvos in a battle that could change the fragile political balance of the Balkans forever.

In the intervening period, the Sarajevo legal team has had access to a growing body of evidence generated by prosecutors working for another Hague-based United Nations court, the International Criminal Tribunal for the Former Yugoslavia, ICTY.

Prosecutors at the ICTY have established that at least one episode of the war in Bosnia — the slaughter by Serb troops of thousands of Muslim men and boys from the town of Srebrenica in 1995 — constituted a genocide.

Two years' worth of evidence against the former Yugoslav president Slobodan Milosevic at the same court has also thrown a great deal of new light on Belgrade's links with this and other atrocities. The evidence that has emerged has satisfied judges that he does have a case to answer about genocide in Bosnia.

But for the Bosnian team, securing a ruling in Sarajevo's favour at the ICJ will still be no mean feat.

Besides convincing a new court that the notoriously complex crime of genocide occurred in Bosnia, the Bosnian lawyers will also face the daunting task of showing that responsibility for it lay not just with a set of individuals but with an entire state.

This generates a multitude of intractable legal questions, not least surrounding the fact that the crime of genocide necessarily requires a particular mindset — namely the special intent to destroy a population — which, on the face of it at least, appears difficult to attribute to a state.

What is more, the way in which Belgrade is purported to have committed the crime — largely through covert support for proxies, in a war that its own military wasn't officially involved in — makes the case infinitely more complex.

The case stands in stark contrast to many that have gone before it at the ICJ, which is usually better known for its role in arbitrating such weighty issues as border disputes and rows over maritime boundaries.

Its proceedings are also often technical and slow — though none so slow as this latest case, which has already spent some 13 years on the court's docket — and devoid of even a modicum of drama.

Once the technicalities are out of the way this time, however — and there is still a chance that the suit will be dismissed on grounds of jurisdiction — the Great Hall of Justice will play host to testimony from a series of live witnesses. The court has so little experience of this practice that until recently, staff had no idea where they would even place them.

The stakes are also high. If the 17-judge panel at the World Court upholds Bosnia's case, Serbia and Montenegro, as the successor state to Yugoslavia, could be faced with billions of dollars in reparations payments.

Even more seriously in many people's eyes, it would also become the first country ever to receive the indelible black mark of a legal ruling declaring it an official sponsor of the crime of crimes.

If Bosnia's case comes crashing to the ground, on the other hand, ecstatic celebrations in Belgrade will be matched by mass political recriminations in Sarajevo.

Ultimately, those on both sides hope that this showdown before the world's highest civil court might at least answer once and for all one of the most central and intractable questions surrounding the break-up of Yugoslavia: to what extent was Belgrade responsible for the horrors that overwhelmed the people of Bosnia in the aftermath of that crisis?

IWPR has spoken with all the main players in the case — lawyers from both sides and the new president of the ICJ — and has sought comment from a host of academic and legal experts.

In this report, we explore in detail the Bosnian case and the Serbian response, analyse the legal issues involved, and discuss the likely consequences should either side win.

THE HISTORY

Bosnia and Hercegovina filed its case against the now defunct state of Yugoslavia on March 20, 1993, arguing that the latter had "planned, prepared, conspired, promoted, encouraged, aided and abetted and committed" genocide against its population.

Francis Boyle, the University of Illinois professor of law who instigated the legal proceedings on behalf of Bosnia, told IWPR that the aim was “to shake up the entire world, so they realised that genocide was going on in Bosnia although everyone was denying it”.

The suit cited specific alleged crimes including the murders of over 80 civilians by Serbian paramilitaries in the village of Zaklopaca, the deaths of dozens of Muslim inmates every day at the “Omarska extermination camp” and the destruction of non-Serb villages.

But Belgrade may not have breached only the UN genocide convention, it is also claimed that it may have reneged on its obligations under the Geneva conventions, the Universal Declaration of Human Rights and other aspects of international law.

Those specifically to blame, said the Bosnian lawyers, were “public officials” and “constitutionally responsible rulers” of Yugoslavia, as well as “certain private individuals” who were controlled by them or cooperated with them.

Bosnia asked the court to order Belgrade to pay reparations for damages to persons, property and the environment, as well as to its economy.

When the case opens next week, the Sarajevo legal team will have seven days to lay out their evidence for the suit, before handing the floor to Serbia to reply. The 17 judges overseeing the proceedings will then hear from witnesses and experts.

THE QUESTION OF JURISDICTION

Even with hearings getting under way, however, a number of issues remain outstanding which could stand in the way of the case being seen through to its natural conclusion.

One such potential obstacle is the question of whether the ICJ has the authority to hear the case.

In June 1995, the Belgrade team filed a response to Sarajevo’s suit, arguing that the court had no jurisdiction over it. They claimed, among other things, that Yugoslavia had no involvement in Bosnia; that Bosnia was not party to the genocide convention; and that, even if it was, its accession would have occurred after the crimes in question, meaning that they couldn’t be the basis for a case.

In July the following year, judges at the ICJ threw out these objections and found that the court had jurisdiction to deal with the case. Serbia and Montenegro subsequently failed in an attempt to have the decision overturned.

But Serbian lawyers say the legal situation has since changed in such a way as to support fresh jurisdiction objections.

In 1999, Belgrade filed a separate case at the ICJ against a number of western states, accusing them of committing genocide during the bombing campaign launched by NATO in March that year to halt alleged ethnic cleansing of ethnic Albanians in Kosovo.

Later, however, as Belgrade itself sought to edge towards NATO membership, its legal team scuppered their own case by arguing that the ICJ had no jurisdiction over it, since Yugoslavia had not been a member of the UN during the relevant period.

That case was thrown out unanimously in 2004. While the judges were split almost down the middle on the grounds on which they should reject Serbia's suit, one vote tipped the balance in favour of the argument about Belgrade's non-membership of the UN.

The new president of the court, Judge Rosalyn Higgins of the United Kingdom, was amongst those who disagreed with that argument, warning that the court may be creating a problem for itself in future cases — clearly casting ahead to the now imminent Bosnia case.

Pieter Bekker, an international lawyer who was working in the ICJ's registry department when Bosnia launched proceedings against Belgrade and has since written for legal journals on the case, told IWPR that the court now faces a dilemma.

"Serbia is likely to make an argument that if [it] can't sue NATO countries then the court should be consistent and rule after all that [it doesn't] have standing to be a defendant in this genocide case," he said.

"The court is in a bit of a predicament there," he added.

Sakib Softic, an advisor for constitutional and legal affairs to the Bosnian presidency, dismisses such talk. "In 1996, the ICJ ruled that it has jurisdiction over this case and all the facts were known even then... Nothing has changed since then that would alter that decision," he told IWPR.

Nottingham University law expert Dr Robert Cryer agrees. "In the past they got nowhere with that argument," he told IWPR. "My guess is that [Serbia and Montenegro] will attempt to raise the matter again but it's not going to get anywhere."

The ICJ is in the enviable position of not having to follow any precedents set in previous rulings by its judges. Cryer, though, told IWPR that in practice "the court has a consistent policy of citing its own decisions and would only depart from a previous one in very rare circumstances".

This was confirmed by President Higgins, who told IWPR, "We are extremely aware of our own prior judicial decision making and we certainly try to be consistent."

Maintaining consistency between two such apparently opposed rulings on jurisdiction though may be one of the first tasks facing the ICJ's new president.

THE QUESTION OF SABOTAGE

Before the case has even come to court, the Sarajevo legal team have also been forced to deal with fierce resistance from the whole Balkans region, and even from within Bosnia itself.

Complaints have emerged from various quarters about the expense of the proceedings. In January this year, Professor Radoslav Stojanovic, who is representing the Serbian side at the forthcoming proceedings, told a daily newspaper from Republika Srpska, *Nezavisne Nedjeljne Novine*, that the cost of the lawsuit amounts to around three million euro.

“Why would we spend all this money on accusing one another, when it could be used for improving mutual understanding and compensation for the victims of the war?” he asked during the *Nezavisne Nedjeljne Novine* interview.

Softic has defended the cost, however, saying that the lawyers on the Bosnian side are charging lower fees than normal, content in the knowledge that they will be rewarded “through the professional reputation they’ll get for taking part in this case”.

“The whole case will cost less than two million euro, which is less than what [Vojislav] Seselj demands for his own defence,” he told IWPR, in reference to the notorious hard-line nationalist Serb politician on trial for war crimes at the ICTY.

In addition to such protests, Bosnian Serb politicians have been actively seeking ways to get the suit withdrawn. But it was originally launched on behalf of the state by Bosnia’s collective wartime presidency — which included, at least technically, representatives of the country’s Muslim, Croat and Serb populations — and it cannot be retracted without all three parties agreeing.

In a last ditch attempt to sink the case, the current Serb member of Bosnia’s collective presidency, Borislav Paravac, persuaded the country’s foreign minister — also a Serb — to send a letter to the ICJ, asking it to temporarily suspend the genocide proceedings until Bosnia’s constitutional court had ruled on whether the lawsuit was legal.

But the letter was due to be sent via Bosnia’s ambassador to the Netherlands — a Muslim — who refused to do it, insisting that the only person with authority to communicate directly with ICJ is Bosnia’s legal representative, Sakib Softic.

The next session of the constitutional court in Sarajevo is not until the end of March, too late to affect the start of the case, even if judges there decide that they have jurisdiction over the matter.

Softic told IWPR he was confident that the moves against the case from Bosnia’s Serb community would come to nothing. “Governments of any of the two entities of the Bosnian state can not in any way jeopardise the case, which has been initiated on the state level,” he said.

TO PROVE GENOCIDE

The suit against Serbia and Montenegro — as the successor state to Yugoslavia — will be the first case ever heard by the ICJ taking as its foundation the UN genocide convention, which was drafted in the wake of World War Two and entered into international law over fifty years ago.

According to the convention, genocide is defined as certain acts “committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group”.

But the ICJ won't be the first court to hear such allegations.

The first judgement against an individual was handed down in Arusha at the Rwanda Tribunal in a case against a former mayor — Jean-Paul Akayesu — who was found guilty of genocide in 1998.

At the ICTY, judges have already determined that genocide occurred in Bosnia, when troops of the Bosnian Serb Army, VRS, executed thousands of Muslim men and boys captured after the fall of the Srebrenica enclave in July 1995. VRS commanders Radislav Krstic and Vidoje Blagojevic have since been given prison terms for their roles in the crime of genocide during that episode.

Many senior Serbs have also been indicted by the ICTY for genocide elsewhere in Bosnia — as part of a campaign of ethnic cleansing intended to drive Muslims and Croats from huge swathes of the country earmarked for a future Serb state — though none have yet been convicted on such charges.

There is little doubt by now that the Bosnian war — in which, according to the latest figures, around a 100,000 people lost their lives — was a vicious and brutal conflict.

“That the crimes were committed isn't going to be debated, those days are long gone,” Mark Ellis, a Balkan expert and director of the International Bar Association, told IWPR.

The challenge for the Bosnian lawyers appearing before the ICJ, however, is to secure a ruling from that court that the crimes amounted to genocide, and to provide evidence for longstanding allegations that Belgrade funded and otherwise supported the Bosnian Serb military and paramilitary units responsible.

In some ways, establishing these facts in civil proceedings at the ICJ might be easier than it would be before many other courts. The degree of certainty which judges at the ICJ are typically required to feel in order to come down on one side of any given case is lower than what is required at institutions, such as the ICTY, which deal with questions of individual criminal responsibility.

“The ICJ can decide to convict on the balance of probabilities, rather than beyond all reasonable doubt,” explained Cambridge University international law expert Roger O'Keefe.

ICJ president Higgins told IWPR, however, that the case in hand presents a particular challenge in this respect. “You’re in an overlap area where you’ve got something like genocide, where it is a crime under international law,” she said, adding that the judges were in the process of considering the “difficult questions” thrown up by this blurring of boundaries between criminal and civil law.

BOSNIA’S CASE

Bosnian representatives told IWPR that they were confident they would be able to establish Belgrade’s culpability.

“I personally have no doubts about the positive outcome of the lawsuit against Serbia and Montenegro, and I believe that documents we have at our disposal are sufficient,” said Softic.

Francis Boyle — who is no longer a member of the Bosnian team — added that, given the strength of the evidence, the case had been “won already”.

A number of independent legal experts told IWPR that it was also their belief that the Bosnia case had a good chance of success.

Ellis told IWPR that Serbia would face “an uphill battle on this”, and Cryer expressed a similar view, pointing out that the ICTY’s findings that genocide occurred in Bosnia would be very useful to the Bosnian case.

The Bosnian team will be calling a number of witnesses to shore up its case, including British general Richard Dannatt, who served in Bosnia with the UN Protection Force, UNPROFOR. Dannatt is apparently set to speak about the role played in Bosnia by the Yugoslav military, including its active support of the VRS.

Also due to testify is Andras Riedlmayer, a Harvard expert in Islamic art and architecture, who will give evidence about the destruction of cultural and religious buildings and monuments in Bosnia.

Meanwhile, United States historian Robert Donia will describe the history of the Bosnian war.

Besides witness testimony, Softic told IWPR that documents will also make up a significant part of Bosnia’s case at the ICJ.

Members of the Bosnian legal team have said in the past that they intend to draw much of the documentary evidence for their case from what has gone before at the ICTY.

The ICTY’s dealings with the Srebrenica massacre — already established by that court as an instance of genocide — will most likely form a key part of their case.

Even though the Srebrenica atrocity occurred in 1995, two years after Bosnia first filed its suit, Bekker said evidence relating to that crime would still be admissible.

“The court is likely to look at the whole of the Bosnian war... Bosnia can argue that Srebrenica was a continuing violation of international law,” he told IWPR.

Dr Rachel Kerr, from the Department of War Studies at King’s College, London, told IWPR that there is reason to think that far from just being relevant to the case, Srebrenica will in fact be of special interest to the Bosnian team.

Witness testimony from the enclave clearly showing that men and boys were separated and executed on the grounds of their ethnicity helps to show quite unambiguously that what happened there really was genocide, she explained.

It could be “very difficult”, she added, for Sarajevo lawyers to prove that murders elsewhere in Bosnia were carried out with such clear genocidal intent.

In the course of a decade of work by the ICTY, numerous pieces of evidence have emerged which suggest the existence of relatively direct links between the Srebrenica massacre and the Milosevic regime in Belgrade.

Evidence presented at the trial of Milosevic himself includes a written order for units which included operatives of the Serbian interior ministry to take part in fighting in the Srebrenica area around the time of the massacre.

Last June, further evidence of the alleged link became public in a brutally graphic manner, first in the Milosevic trial courtroom and later on television screens across the world, in the form of a video apparently showing the executions of a number of Srebrenica prisoners.

Those carrying out the murders were apparently members of a paramilitary group known as the Scorpions, who prosecutors say were responsible to Belgrade in the early Nineties. Since the video was first shown, one former Scorpions member has been convicted of the murders by a court in Zagreb. A further five have gone on trial in Serbia.

Material has also emerged in proceedings against Milosevic and others at the ICTY which backs up prosecutors’ claims of much broader financial and logistical support provided to Bosnian Serb forces. This could be employed by the Sarajevo lawyers to try to show that Belgrade was responsible for genocide elsewhere in the country.

Included in the mountains of documentation which help to make up the case against Milosevic are records of wartime meetings of the Bosnian Serb assembly. In one, from May 1994, Bosnian Serb president Radovan Karadzic declared, “Without Serbia nothing would have happened. We don’t have the resources and would not have been able to make war.”

Elsewhere, Milosevic himself is recorded as telling the assembled politicians, “Do not tell us that you feel abandoned.... We shall continue to help you.”

In fact, when prosecutors wrapped up their two-year case against Milosevic in February 2004, the judges overseeing the trial said they had heard enough prima facie evidence to convict him of genocide in Bosnia. Now in the defence stage of his trial, Milosevic is in the process of trying to counter this evidence.

But a crucial bulk of evidence which may have helped the chamber come to this conclusion appears destined to remain out of reach of the lawyers representing Bosnia at the ICJ.

The documents in question, records of meetings of the Supreme Defence Counsel, SDC, a top decision-making body in Yugoslavia, were used extensively in the Milosevic trial to flesh out allegations that Belgrade supported Serb fighters in Bosnia.

Former Yugoslav president Zoran Lilic has testified in the trial that the SDC decided in 1993 to formalise support for officers of the Bosnian Serb military by establishing a body within the Yugoslav army called the 30th personnel centre.

Elsewhere, portions of the SDC records which have been made public suggest that Belgrade was paying the salaries of VRS officers as late as 1998, long after the war in Bosnia reached its bloody end.

As part of a deal brokered between ICTY prosecutors and Belgrade, however, the bulk of these documents remain under seal at the court. During an IWPR investigation into this matter last year, a Serbian official said that a major concern was that this evidence might influence the ICJ case.

Softic acknowledged to IWPR that “the [SDC] documents are very important and they would be very useful in our case”. But since ICJ judges only have access to material provided by the two sides, they seem likely to remain out of reach.

SERBIA’S DEFENCE

Despite the wealth of evidence available to the Bosnian lawyers and their very public confidence that they will win the case, the Belgrade legal team is equally confident and determined to fight its corner to the last.

Stojanovic told IWPR that a key part of the defence case will focus on the issue of the intent which is a part of the very definition of genocide. “Genocide has to [include] the intent to destroy a people, in whole or in part,” he explained. “The intent doesn’t exist in the Serbian case.”

“There are of course maybe individuals who had the intent,” he acknowledged, “but in the ICJ we’re talking about the responsibility of the state.”

It seems clear that attempting to prove that Yugoslavia, at a state level, intended to destroy at least part of the non-Serb population in Bosnia will be a challenge for the Sarajevo lawyers.

But legal observers have told IWPR that it is in fact possible to establish state responsibility for a crime like genocide precisely by looking at the actions and mindsets of senior officials, irrespective of whether these were supported or even known about by the population as a whole.

“People are represented by their government,” said Judith Armatta of the Coalition for International Justice, CIJ, adding, “When the state commits a wrong — through those exercising state power, the state is liable whether or not its population approved.”

This principle is supported by the UN International Law Commission, a body responsible for developing international law. One of its draft statutes states that the conduct of a person or group of persons can be considered to have been carried out by a state as long as, in acting, they are exercising “elements of governmental authority”.

As a result, Gerry Simpson, from the International Law Department at the London School of Economics, told IWPR that in the Bosnian case “there will be a — possibly fictitious — representation of [the Yugoslav political elite] as acting on behalf of the whole state”.

Simpson went on to explain that there are two established methods of seeking to show that a state acted on the basis of genocidal intent — arguably a critical element if the state is to be found responsible for committing the crime of genocide.

The first is called “Nuremberg method”, in reference to its widespread use in the war crimes trials that followed World War Two. It involves first showing that actions have been carried out on the ground with the clear intent to destroy, at least in part, a particular population. After that, a chain of command is established linking these crimes directly and explicitly to the leadership of the state in question.

The alternative to this method, which has been favoured at the ICTY, is often used when there is little clear evidence of a chain of command between events on the ground and the state that is said to be responsible for them.

Under this approach, says Simpson, less emphasis is placed on painstakingly illustrating links between the leadership and events on the ground, while more effort goes into showing how much the events look like the natural consequences of the stated policies of the authorities in question.

For instance, at the ICTY, prosecutors of Serb leaders have often sought to show that the Serb nationalist ideal of creating a “new Serb-dominated state” necessarily involved the displacement of the non-Serb populations in large swathes of Bosnia and Croatia. Evidence of attacks by Serbs on the ground can therefore be related back to this clearly-documented political intention.

However, genocide expert Professor William Schabas, director of the Irish Centre for Human Rights at the National University of Ireland in Galway, warned IWPR that such “displacement” may show intent for ethnic cleansing, but not necessarily for genocide.

“The core debate is about how broadly genocidal intent is interpreted,” he said.

Schabas’ contention is that the only ICTY case where genocide has been proven is the Krstic case, and even here, the judges’ decision emphasises the fact that there was not a universal genocidal intent inherent among the Serb leadership. Rather, the judgment states that the genocidal intent crystallised only a few days before the Srebrenica massacre.

“Srebrenica was one manifestation of a general policy, but from my reading of the Krstic decision, it was more the exception than the rule,” said Schabas.

The Serbian side may therefore argue that there is a lack of evidence that senior Yugoslav officials, even as individuals, had special genocidal intent to destroy a particular part of the Bosnia’s population at all.

Indeed, during the whole of the prosecution case against Milosevic, little clear evidence arose in public to suggest that he himself had this specific kind of genocidal intent.

Professor Vojin Dimitrijevic, the director of the Belgrade Centre for Human Rights, told IWPR that there are even suggestions that Milosevic had no idea in advance of what would happen at Srebrenica, pointing to reports that Milosevic was angry with Mladic in the period that followed.

Even this kind of approach, however, could be undermined by a legal ruling by judges in the Milosevic trial suggesting that an individual, at least, does not need to have genocidal intent in order to commit genocide.

The judges in that case appeared to argue that it is enough for a person to be convicted of genocide if they create a situation where genocide could occur, continue to assist those who are intent on committing it and do nothing to prevent it from happening despite it being within their power to do so.

It is also important to note that under the UN genocide convention which Bosnia accuses Serbia and Montenegro of having broken, the various ways of committing genocide include complicity in genocide, conspiracy to commit genocide and incitement to commit genocide.

Armatta told IWPR that jurisprudence laid down so far in relation to genocide is inconclusive as to whether genocidal intent is a necessary element in these crimes. One decision issued by the judges overseeing the Milosevic trial, she said, suggests that it is not.

“One can take the philosophical position that only the small number of conspirators who planned and set the genocide in motion should be held responsible for such a heinous crime. Or one can take the position that genocide could never occur without broad involvement; therefore, those who knowingly participate should also be held responsible for the crime of crimes,” explained Armatta.

When considering such matters, one must obviously bear in mind the flexibility that judges at the ICJ enjoy when it comes to deciding whether to follow legal precedents. Armatta added, “It will be interesting to see how the ICJ approaches it.”

The complex problems surrounding the questions of genocidal intent and state responsibility are not the only defence available to the Belgrade lawyers in their efforts to fend off the Bosnian genocide charges.

Another key factor in the defence case, Dimitrijevic told IWPR, will be a ruling made by the ICJ in 1986, as part of a case in which Nicaragua sued the US for supporting the Contra insurgency against the Sandinista authorities.

The court found in favour of Nicaragua, ruling that Washington had in fact contravened its treaty obligations by “training, arming, equipping, financing and supplying” military and paramilitary activities in the country.

But, crucially, the judges went on to say that this was still not enough for the US to be held directly responsible for acts committed by the Contras.

Dimitrijevic told IWPR that the standards set by this ruling could prove to be an important consideration for judges determining whether Belgrade’s involvement in Bosnia made it directly responsible for genocide there.

Even if particular episodes of genocide were shown to have occurred, he said, “you have to prove that the Yugoslav government not only paid the salaries [of those responsible] but that they also controlled the operation [in question]”.

Cryer agreed that the Nicaragua case set a “very high threshold” for the evidence required to prove that a state was directly responsible for the actions of another party, so much so that the ruling has been criticised by legal observers.

Significantly, these critics have included judges on the appeals chamber at the ICTY who, during proceedings against the Bosnian Serb Dusko Tadic, said the so-called “Nicaragua test” seemed inconsistent with international law and state practice.

Only a few months ago, the ICJ ruled that Uganda violated international law by giving military and financial support to armed groups operating in the east of the Democratic Republic of Congo.

As part of their efforts to flesh out their case, the Belgrade side will also call a number of witnesses to give evidence in person over a period of five days.

They will include Zoran Lilic, Milosevic’s predecessor as Yugoslav president; retired Yugoslav army general Aleksandar Dimitrijevic; television journalist Lazar Lalic; and former Serbian interior minister Dusan Mihajlovic.

Perhaps more surprisingly, the list also includes Bosnia’s human rights ombudsman Vitomir Popovic and the former commander of the UN peacekeeping force in Bosnia, General Michael Rose.

JUDGEMENT

According to the court schedule, proceedings will end on May 9, 2006. At that stage, it can typically take about a further six months for judges at the ICJ to issue a judgement.

After that the judges will take soundings to try to settle on a majority view. The discussions are guided by the president in the judges' deliberation room. The most junior judges, seated at the ends of a horseshoe-shaped table, are encouraged to give their opinions first, before their senior colleagues, seated nearer to the president, offer theirs.

The panel of judges will be 17 strong, with each side having the right to appoint their own ad hoc judge to the 15 already on the bench. The Serbian judge, Milenko Kreca, has been on every one of the recent Serbia cases. Meanwhile, the Bosnians have selected Ahmed Mahiou, a Frenchman of Algerian origin.

The role of the ad hoc judges is to represent each side during the deliberation process, and ensure that the final judgment is informed with local knowledge and full explanation of each state's point of view.

ICJ president Higgins is particularly keen to maintain the court's tradition that the judges write "every word" of any given decision themselves, despite the fact that this can be a time-consuming process.

"If we get a ruling before the end of the year that will be a quick result," Bekker told IWPR.

Whatever decision the court takes, there will then be no room for the parties to object. By signing the ICJ's charter, UN member states automatically agree to take the court's first-instance judgements as being binding, final and without appeal.

REPARATIONS

If the court finds against Serbia and Montenegro, the judges could just provide a moral condemnation of wrongs which they consider to have been committed. Alternatively, they could order Belgrade to pay reparations to Sarajevo.

Paying "blood" money to the Bosnians is anathema to the majority of the Serbian public. "It is a ton of money at stake," Edgar Chen, of the CIJ, told IWPR. "Something they fear is that the economy could be damaged if an award is made against them."

If successful, however, what exactly the Bosnians would ask for remains unclear. In the event of reparations being ordered, the Sarajevo team may return to the court to request a separate procedure by which reparations would be calculated.

At the end of last year, the ICJ ruled that Uganda would have to compensate the Democratic Republic of Congo for invading and supporting armed groups on the latter's territory. But no settlement has yet been reached in that case.

The only time the court itself has set an amount for reparations was in its very first case, all of 60 years ago, in which Albania was found responsible for damage to British navy ships and the deaths of sailors caused by mines in Albanian waters.

Once compensation has been ordered, the obligation to pay it is backed up by the threat of referral to the Security Council.

After the ICJ found against the US in the Nicaragua proceedings and told it to pay reparations, Washington — a veto-wielding permanent member of the Security Council — was able simply to ignore the order. Serbia and Montenegro would not have that option, nor could they rely on such support at the UN.

"It would be hard for any state to veto a resolution saying 'Serbia who has been found responsible for genocide and must pay this compensation'," said Cryer, although he added that he found it hard to imagine the Security Council slapping Belgrade with sanctions over the matter.

If Belgrade is asked to pay a large sum in recompense to Bosnia, Param-Preet Singh, of Human Rights Watch's international justice programme, told IWPR that this might well encourage other post-conflict states to follow suit and sue for genocide and war crimes.

The implications of such a settlement would go even wider: Croatia is also suing Belgrade at the ICJ for committing genocide on Croatian territory in the early Nineties. It has set its claim at 29 billion dollars — more than Zagreb's total external debt.

The prospect of reparations have also helped to spark debate in human rights circles as to whether cases like this — in which the state of Serbia and Montenegro itself stands charged with genocide and the population as a whole might have to shoulder compensation payments — could reinforce perceptions of collective guilt.

It has long been one of the ICTY's stated aims to battle such perceptions by finding and punishing the actual individuals responsible for atrocities.

"Some would argue that it is not beneficial in the long run to be moving in a direction that talks about collective responsibility versus individual responsibility," said Ellis.

But he added that while he understood where that opinion stemmed from, he didn't subscribe to it himself. "I feel that any legal process that allows the truth to be brought out [and] allows assessment to be made by an independent court or arbitrator is a healthy thing to do," he said.

Param-Preet Singh told IWPR that her organisation, HRW, also considers that generally "this kind of mechanism is a good thing", though she added, "We are mindful that the ICJ could be abused, and we believe this is something to monitor."

THE BROADER CONSEQUENCES

A debate is also raging about the possible political consequences if the ICJ judges rule in Bosnia's favour.

"Once the judgment comes, Serbia and Montenegro will be the polecat of Europe for the rest of time," Boyle told IWPR. "They will have to play a part in rebuilding Bosnia if they are going to establish themselves again in Europe."

Ellis agreed that such a judgement would be an enormous stigma for Belgrade.

"You certainly don't want to be tainted in history as being [responsible for] state-sponsored genocide," he told IWPR. "That is an indictment that any country wants to avoid, certainly a country trying to emerge from the wreckage of the Yugoslav wars and join back into the international community."

Higgins, who has a strong reputation as one who can balance legal argument with a well-grounded pragmatism, told IWPR that solely political concerns could not be allowed to sway the ICJ's legal reasoning.

"What I think the court must never do is to say we know 'x' is the right legal answer, but we mustn't give it because there might be negative political implications if we did," she said

At the same time, however, many observers think the proceedings could in fact have positive consequences for regional relations in the long-term, by forcing people in the Balkans to look history in the face.

"In Serbia, people want to move on without addressing the past," said Chen, of the CJ. "Things like European Union membership and the economy are done at the expense of coming to terms with involvement in the war."

Ellis said he believed he was already witnessing "a fundamental shift in the minds of Serbs in Belgrade" towards recognising the realities of what happened during the wars of the early Nineties, influenced by trials at the ICTY and especially by war crimes proceedings launched locally, in Serbia, Croatia and Bosnia.

"That to me is much more important than whatever was going to happen in the ICJ," he said.

But others think that the ICJ case itself can and should form an integral part of the same process.

"Only a judgment in Bosnia's favour can really help build a friendly relationship between our two nations," Softic told IWPR. "Only when the full truth about the past is uncovered can we start working on our future."

Sonja Biserko, president of the Helsinki Committee for Human Rights in Serbia, expressed a similar viewpoint in a posting on the Bosnia Institute website in October last year, “It is only by deconstructing and demystifying the Serbian project in relation to Bosnia and Hercegovina that the region can achieve stability and peace.”

“Serbia has to come to terms with this part of its past and finally close this chapter,” agreed Mirsad Tokaca, whose Sarajevo-based Research and Documentation Centre is drawing up a tally of those killed during the Bosnian war. “We can build our future only when this issue is settled.”

“Nothing would improve good neighbourly relations between our two states better than establishing the fact that Milosevic's regime was responsible for the genocide in Bosnia, not Serbia's citizens,” Tokaca added.

Others hope that a ruling in Bosnia's favour could even have welcome, concrete consequences for the wider world for a long time to come.

“Once the court says the genocide did take place in Bosnia, we will have some guarantee that it won't happen again,” Softic told IWPR. “At least, the chances for history to repeat itself will be much smaller.”

This report was compiled by Janet Anderson, IWPR's International Justice Programme Director; Mike Farquhar, a London-based contributor to IWPR's tribunal output; and Helen Warrell, an IWPR reporter in The Hague. Lisa Clifford, a journalist based in London, and Merdijana Sadovic, a regular contributor to IWPR's tribunal project, also provided material for this report.

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