

Has the Prosecution Made the Case?

By Stacy Sullivan | February 19, 2004

When prosecutors opened their case against Slobodan Milosevic on February 12, 2002, they told the court that not only would his trial provide the world with a full picture of the “medieval savagery” that stalked the Balkans throughout the Nineties, but that they would also prove that the former Serbian president was guilty of the gravest crime known to mankind—genocide.

Two years on, after hearing nearly 300 witnesses—some of them high-level insiders who have turned on their former leader—and presenting thousands of pages of documents, including telephone intercepts, military orders, and transcripts of political meetings, they are resting their case.

But many legal experts say they fear that the prosecution has not made the case for genocide, in part because the United Nations tribunal has set the bar for doing so extremely high.

Already, in what appears to be an effort to brace tribunal observers for a possible acquittal, chief prosecutor Carla del Ponte has warned that the Belgrade authorities have jeopardized the genocide case by failing to provide her with access to military documents from the state archives.

Milosevic is the man alleged to have orchestrated the break-up of Yugoslavia and the horrific atrocities that went with it. Given the mountain of evidence prosecutors have tendered as evidence, showing his active involvement in arming Serbs in both Bosnia and Croatia—not to mention his role in Kosovo—few have any doubts that the former president will be convicted of crimes against humanity.

But in order to prove genocide, prosecutors need to show that Milosevic orchestrated the crimes with the specific intent to destroy Bosnian Muslims as a people. Since the prosecution has not been able to present unequivocal evidence of genocidal intent—a military order calling for the liquidation of all of the Bosnian Muslims, for example—the experts say that based on earlier rulings, they have serious doubts that the judges will issue a guilty verdict.

An acquittal, they say, would have serious implications not only for attempts to prosecute genocide in the future, but also for efforts that might be undertaken to prevent it from occurring. It would also disappoint victims, and provide ammunition for those who would deny that genocide took place.

“If the court does not find Milosevic guilty of genocide, that would be a very serious problem because it would mean

that the definition of genocide is so specific that it is unmanageable,” said Ivo Banac, a history professor at Yale University who was recently elected as a member of Croatia’s parliament, representing the Liberal Party. “This would have enormous implications for conflicts yet unknown.”

Samantha Power, author of the Pulitzer Prize-winning book *A Problem From Hell: America in the Age of Genocide*, which examines why states don’t act to prevent genocide, said she feared an acquittal would provide governments another reason to remain passive. “If the bar is that high, it will be so much easier for states to argue that something is not genocide.”

That will make it difficult to prosecute future genocide cases. “If Milosevic is acquitted, and if the Iraqi tribunal were to take the standards set by the UN tribunal, Saddam Hussein in the Kurdish case would probably not meet that standard,” said Power.

By far the most serious consequences of an acquittal on genocide charges, however, would be for Bosnia’s victims.

According to Power, “One of the downsides in the creation of a stigma around the word and the crime of genocide is that victims often feel somehow that they are being told that their suffering isn’t worthy if they don’t get a genocide conviction. Bosnian Muslims may be made to feel that they didn’t make the cut.”

How the Bar Was Set

Prosecutors at the UN tribunal for Rwanda have managed to secure about a dozen genocide convictions. But as experts interviewed by the Institute for War and Peace Reporting (IWPR) pointed out, it was easier to prove genocide in Rwanda.

“In Rwanda, the genocidaire [perpetrators of genocide] killed 75 per cent of the Tutsi population, and they announced their plans beforehand,” said Eric Markusen, a



professor in the Department for Holocaust and Genocide Studies at the Danish Institute for International Studies. He added that many of the accused on trial in Arusha had been heard making public speeches advocating the murder of Tutsis. “Bosnia wasn’t that clear-cut and the leaders, or at least Milosevic, were sophisticated enough not to state their plans publicly,” said Markusen.

Prosecutors at Yugoslav tribunal have thus far attempted to prosecute three other suspects for genocide.

The first was Goran Jelesic, commander of the notorious Luka camp in Brcko where thousands of Bosnian Muslims and Croats were imprisoned, beaten, or killed. Jelesic introduced himself to Luka inmates as “the Serbian Adolf,” and proclaimed that he had gone to Brcko to kill Muslims. Jelesic was indicted for violations of the laws or customs of war, crimes against humanity, and genocide. The evidence against him—which included numerous eye-witnesses to murder—was overwhelming, and he pleaded guilty to all but the genocide count and was tried only for that.

Although Jelesic had clearly expressed intent, which is supposed to be the hardest part about securing a genocide conviction, the prosecution could not secure a conviction. As soon as they finished their case, before Jelesic’s lawyers even had a chance to argue their defence, the judges ruled in October 1999 that the prosecution failed to make the case. “The prosecution put forth a brilliant list of circumstantial indicators of genocidal intent,” said Markusen, “But the trial chamber said more or less that the prosecution did not make the case that genocide occurred.”

Stating that they believed Jelesic was mentally unfit, the judges ruled that Jelesic was not acting as part of a larger, organized plan. “At the time, there was a sense that the judges wanted to reserve the crime of genocide for the higher-ups,” said Power.

Not long after the Jelesic case, the tribunal did hand down a genocide conviction. In August 2001, Radislav Krstic, the Bosnian Serb general indicted for orchestrating the 1995 Srebrenica massacre in which more than 7,000 Muslim men and boys were summarily executed was found guilty of genocide and sentenced to 46 years.

To make their case, prosecutors detailed how well-planned the Srebrenica operation was—showing that buses and petrol had been procured, along with blindfolds and wrist restraints. They presented the testimony not only of several massacre survivors, but also of a member of one of the execution squads, Drazen Erdemovic, who pleaded guilty to the crime. And perhaps most important-

ly, they presented military orders and telephone intercepts showing that General Krstic ordered the killings. Krstic’s lawyers challenged the ruling, and the case is now in the appeals chamber.

With one genocide conviction behind them, prosecutors hoped they might be able to secure another in their case against Milomir Stakic, the mayor of the Prijedor municipality, home to the notorious Omarska, Trnopolje, and Keraterm detention camps.

Under Stakic’s reign, thousands of Bosnian Muslims and Croats perished in Prijedor and tens of thousands were expelled from the region. For his role in the ethnic cleansing of Prijedor, the judges sentenced him to life imprisonment, the harshest sentence ever handed down at the tribunal. But in what critics say was an exceedingly narrow reading of the crime of genocide, the trial chamber acquitted Stakic of genocide.

In issuing its judgment, the court stated that there was insufficient proof that a genocidal campaign existed in Prijedor. While it acknowledged that many were killed and that most of the non-Serb population was deported, the judges said that deportation was not enough to constitute genocide.

This ruling was extremely disappointing for prosecutors, and Samantha Power, among other observers, was highly critical of it. The man who invented the word genocide, a Holocaust survivor named Rafael Lemkin, never intended the bar to be set so high, she said—“Lemkin specifically did not try to equate genocide with the Holocaust.”

The Genocide Convention, which Lemkin lobbied so hard to create, defines genocide as any act committed with intent to destroy an ethnic group, in whole or in part, including: killing members of the group, causing serious harm to the group, inflicting on the group living conditions calculated to bring about its physical destruction, imposing measures intended to prevent births within the group, or forcibly transferring children of the group to another group.

“Lemkin used the language of destruction for a reason,” said Power. “The standard was not meant to be Rwanda and the Holocaust. But it seems a standard is now being created that genocide has to be the intention to wipe out the whole, not the part.”

What the Bar Means for Milosevic

Milosevic was initially indicted for genocide in 18 municipalities in Bosnia. Due to time constraints, and after criticism that the scope of the indictment was too

broad, the prosecution reduced the number to six. But given the court's seemingly strict definition of genocide, and the fact that genocide had only been established by the tribunal to have taken place in Srebrenica, prosecutors appeared to focus a significant amount of effort linking Milosevic to the massacres.

Although it was previously assumed by diplomats, journalists, and much of the population in the region that Milosevic had severed his ties to the Bosnian Serb leadership by the summer of 1995 when the Bosnian Serb army, the VRS, overran the UN Safe Area, the prosecution produced military documents showing that some Serbian Interior Ministry forces—known as MUP—participated in the Srebrenica operation.

Because the Serbian MUP were legally under Milosevic's command at the time, this was a shocking development in the trial—but legal experts say the mere presence of these Serbian forces in Srebrenica is not enough to make the case for genocide.

Further evidence linking Milosevic to Srebrenica was presented when Wesley Clark, former Supreme Allied Commander of NATO Forces in Europe, testified in December, telling the court that the accused knew of the execution plans in Srebrenica. Clark told the court that during a meeting with Milosevic the autumn of 1995, the then-Serbian president assured a team of American negotiators that he would be able to speak on behalf of the Bosnian Serbs.

Clark, uncertain about the basis on which he wielded his authority—whether it was legal or a matter of influence, asked Milosevic about the massacres. “Mr. President, you say you have so much influence over the Bosnian Serbs, but how is it then—if you have such influence—that you allowed [Bosnian Serb army chief] General Mladic to kill all those people in Srebrenica?” Clark recounted to the court.

Clark said that Milosevic replied: “Well, General Clark, I warned Mladic not to do this, but he didn't listen to me.”

The fact that Milosevic may have known about the Bosnian Serb leaders' plan to execute the Muslim men and boys from Srebrenica was damning, because he had shown in the past that he was able to exercise considerable influence over their actions.

According to Judith Armatta, a lawyer who monitors the trial for the Coalition for International Justice, knowing about a crime and failing to take action to prevent it from happening would be grounds for the charge of crimes against humanity. But once again, this does not show

intent, so in the absence of an order from Milosevic telling his police to murder the Muslims of Srebrenica, it will be hard to make the case.

If the Krstic genocide conviction is overturned in appeals—and there has been some suggestion that it might be—then, say the experts, all bets are off.

“The Krstic case is a potential spoiler. If they [prosecutors] can't get an appeals chamber to accept that lining up 7,000 men and shooting them is not genocide, then what is?” said Markusen.

Although nothing of the sort was presented during public hearings, numerous other hearings were held in closed session, and many of the documents accepted into evidence were kept confidential.

Prosecution spokeswoman Florence Hartmann said that given the amount of evidence provided in closed session, it is impossible to speculate about the outcome of the trial, though she added that a smoking gun was unlikely. “We don't have an order from Milosevic directing the elimination of Bosnian Muslims—it didn't work like that,” she said.

Even if such an order were to exist, the prosecution would be unlikely to have it in its possession, because the Belgrade authorities have been less than cooperative in providing access to state archives. Bosnia is trying to sue Serbia and Montenegro for genocide at the International Court of Justice, and prosecutors allege that Belgrade is doing everything it can to make sure that nothing that might show genocidal intent makes it into the public domain. There is clearly an effort to avoid being the first country in the history of the world to be found guilty of the crime.

In an effort to show the court that genocide should be provable without having to show an order directing it, the prosecution recently called on genocide scholar Dr. Ton Zwann of the Amsterdam-based Centre for Holocaust and Genocide Studies.

Zwann told the court that genocide is a top-down campaign, originating from those in power. However, in every case of genocide he studied—Cambodia, Armenia, Germany, and Rwanda—he said the leadership was careful to distance itself from the results so as to avoid leaving traces. He implied that proving genocidal intent might have been difficult to prove even in the case of Adolf Hitler. The Nazi leader never witnessed a genocidal act, Zwann said, and he never issued an order directing his subordinates to kill Jews.

The possibility that prosecutors will secure a conviction for genocide—contrary to the expectations of most legal experts following the case—cannot be discounted. But if the judges come out with a conviction that is based on evidence that remains hidden from the public eye, a lot of questions will be asked. Such a ruling would not be seen as fulfilling the tribunal’s mandate of creating a transparent process that establishes the truth of what happened in Bosnia.

Genocide Versus Complicity to Commit Genocide

Although legal experts have expressed doubts about the probability of Milosevic being convicted of genocide, they are more optimistic about a lesser charge prosecutors included in the indictment: complicity to commit genocide.

To prove complicity to commit genocide, according to Cecile Aptel, a policy coordinator for the prosecution, it is not necessary to prove intent. For complicity in genocide, prosecutors would only need to prove that Milosevic knew that the Bosnian Serbs had genocidal intent—in other words that they planned to kill the Muslims in Srebrenica—and continued to aid and abet them in spite of that knowledge.

Given the documents showing the participation of police and vehicles from Serbia, as well as Clark’s testimony that Milosevic knew about the massacre, legal experts say the case for complicity in to commit genocide is much stronger.

In recent days, the prosecution also called on General Philippe Morillon, former commander of the United

Nations Protection Force (UNPROFOR) peacekeepers, and Venezuelan diplomat Diego Arria, both of whom traveled to Srebrenica during the early years of the war. Both witnesses told the court that they warned Milosevic that genocide was taking place in Srebrenica and that something needed to be done.

Bogdan Ivanisevic, a Belgrade-based investigator for Human Rights Watch, suggested that for the victims, a conviction for complicity to commit genocide might lessen the blow of a genocide acquittal.

But Samantha Power disagreed, saying that might be the case if the tribunal had an impeccable relationship with victims. However, given that the tribunal has already been criticized for its irrelevance to the people in the region for whom it is trying to provide justice, and its lack of orientation toward them, Power believes that it unlikely that victims would be satisfied with a guilty verdict on the lesser charge.

“If Milosevic is acquitted, you know what the headline will be. Actually, there will be two headlines. The first will be ‘Milosevic Convicted to Life’—but the second will be ‘Acquitted of Genocide’,” she said. “In some sense, everybody’s pre-existing view of the tribunal will be reinforced. The victims will be disappointed, and the Serbs will say ‘the tribunal is pathetic—it couldn’t even prove genocide’.”

(Stacy Sullivan is the Institute for War and Peace Reporting’s Hague Tribunal Project (www.iwpr.net). This is reprinted by permission for Foreign Policy in Focus (www.fpif.org).)

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