

# STUDY GUIDE

INTERNATIONAL COURT OF JUSTICE

★ **Bosnia and Herzegovina v. Serbia and Montenegro**





# International Court of Justice Study Guide

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# Letter from the Secretary-General

Esteemed Participants,

It is my utmost honour and pleasure to welcome you all to this year's EUROsimA. This year marks the 13<sup>th</sup> anniversary of our conference and court simulations in this journey which has now become longer than a decade, have always been prominent.

European Union has a very strong and a respectable rule of law and international law has been applied and effective throughout its history. In order to understand the law of and the law in the EU, it is crucial for us to understand cases which are political in nature. Therefore this year, International Court of Justice is simulated and a remarkable case is going to be considered: Bosnia and Herzegovina v. Serbia and Montenegro. Bosnian War has been one of the most destructive and horrifying events of the last few decades and it has an indescribable importance for Europe and the whole world.

Therefore, it is essential to revisit this case and all the events to reach for the exact truth and unveil it. For that purpose, this study guide has been prepared for each and every person to understand and comprehend the issue at hand clearly and distinctly. The study guide you are holding in your hands is the result of the dedicated work of Ms. Dicle Yağmur Kılıç. Without her efforts this academically qualified work would have never existed. It is my duty to thank her and I am nothing but extremely grateful.

I once again welcome you all to EUROsimA 2017, and wish you an amazing conference.

**Ali Berk İdil**

Secretary-General of EUROsimA 2017

# Letter from the Under Secretary-General

Dear participants,

Firstly, I would like to welcome you all to EUROsimA 2017! I believe this conference will be a spectacular experience for all the participants, because of the hard work of both Academic and Organization Teams and long-established standards of quality of EUROsimA. It is my honor to be working with these teams as the Under Secretary General of the International Court of Justice.

Moving on to the topic that we will be discussing, I believe our subject is challenging and interesting at the same time, as an issue in the recent history that shocked conscience gravely. The Court will be discussing the Bosnian Genocide claims of Bosnia and Herzegovina raised against Yugoslavia, in the year of 2007. By this topic, the participants will have the chance to develop their legal knowledge on the branches of international criminal law, international law and European history at the same time; and they will have the opportunity to act as the ICJ in the year of 2007 to affect, or possibly change the history according to the wills of the participants.

Before the end of my letter, I would like to thank the Academic and Organization Team members for their committed work, especially our honorable Secretary General for his patience and assistance; and my Academic Assistants for their sincere endeavors.

Lastly, please do not hesitate to contact me if you have any questions regarding any of the processes or documents of the Court. I hope to see you soon in the Conference!

Best regards,

***Dicle Yağmur Kılıç***

Under-Secretary General

# 1. HISTORY OF THE INTERNATIONAL COURT OF JUSTICE

## a. The Origins of the Court

Article 33 of the United Nations Charter counts the eligible practices for the pacific settlement of disputes as: “*negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.*”<sup>1</sup> Even though it is possible to assume that the grounds of International Court of Justice arises from this specific article, the judicial settlement method has a history beyond that clause. Today, it is believed that international arbitration is rooted from the so-called 1794 Jay Treaty between the United States and Great Britain.<sup>2</sup> This Treaty provisioned three commissions, which were designed to be comprised of members from both American and British nationals in equal numbers, with the duty of settling the disputes that could not be resolved by negotiation before. This concept was clearly different from judicial settlement as the commissions were not unbiased third-party adjudication organs, however it evoked the usage of arbitration during the nineteenth century.<sup>3</sup>

The second cornerstone in favor of international arbitration was the 1871 Treaty of Washington. A clause in the treaty that was agreed upon by two of the parties, namely United Kingdom and the US, formed an arbitration process in case of an orientation of allegations regarding breaches. According to that clause, a tribunal composing of five members, which were to be appointed by the Heads of State of the US, The UK; and most importantly by Brazil, Italy, and Switzerland would be created.<sup>4</sup> This clause was important, because it was a further step in the way of reaching a third-party organ which does not have any connections with the parties of the case; as Brazil, Italy, and Switzerland were not parties to the Treaty.

History witnessed the application of the said clause in 1872, because of The Alabama Claims arbitration.<sup>5</sup> In conclusion of this case, the effectiveness of arbitration method was seen. Later on, parties started to add clauses to the treaties regarding arbitration in case of future possibilities for disputes to arise. Consequently, studies shaping a general law<sup>6</sup> of arbitration accelerated. Hence, the idea that a permanent

<sup>1</sup> Un.org. (2016). *Chapter VI | United Nations*. [online] Available at: <http://www.un.org/en/sections/un-charter/chapter-vi/> [Accessed 9 Nov. 2016].

<sup>2</sup> Icj-cij.org. (2016). *History | International Court of Justice*. [online] Available at: <http://www.icj-cij.org/court/index.php?p1=1&p2=1> [Accessed 8 Nov. 2016].

<sup>3</sup> Icj-cij.org. (2016). *History | International Court of Justice*. [online] Available at: <http://www.icj-cij.org/court/index.php?p1=1&p2=1> [Accessed 8 Nov. 2016].

<sup>4</sup> Icj-cij.org. (2016). *History | International Court of Justice*. [online] Available at: <http://www.icj-cij.org/court/index.php?p1=1&p2=1> [Accessed 8 Nov. 2016].

<sup>5</sup> United Nations, (2012). *Alabama claims of the United States of America against Great Britain Réclamations des États-Unis d'Amérique contre la Grande-Bretagne relatives à l'Alabama*. REPORTS OF INTERNATIONAL ARBITRAL AWARDS RECUEIL DES SENTENCES ARBITRALES. [online] Available at: [http://legal.un.org/riaa/cases/vol\\_XXIX/125-134.pdf](http://legal.un.org/riaa/cases/vol_XXIX/125-134.pdf) [Accessed 8 Nov. 2016].

<sup>6</sup> General law is a subset of international law that is unrestricted as to time, is applicable throughout the entire

international arbitral tribunal was started to be shaped.

“*Third base in the modern history of international arbitration*” began with The Hague Peace Conference in 1899.<sup>7</sup> In the conference, peace and disarmament were discussed by some of the states of Europe, Asia and Mexico. Not only was the subject of the Conference a huge improvement of international relations in that time; but the creation of the conference, which is the Convention on the Pacific Settlement of International Disputes, was also a significant development in dispute settlement. The Convention did not only mention arbitration, but it provided other methods such as mediation and good offices.<sup>8</sup>

1899 Convention created an institution as a permanent arbitral trial, called the Permanent Court of Arbitration.<sup>9</sup> The Convention also established the rules governing a Bureau which would function both as a secretariat and an executive organ for the specification of the jurists of the institution.<sup>10</sup> The establishment of the Court of Arbitration in 1900 lifted the international legal value of arbitration in dispute settlement one more stair; and in 1902, the Court of Arbitration started operating.<sup>11</sup>

In 1907, the second Hague Peace Conference was held between the states stated above with the additional contribution of the States of Central and South America. During the conference, the US defended a “*permanent tribunal composed of judges who were judicial officers and nothing else, who had no other occupation, and who would devote their entire time to the trial and decision of international cases by judicial methods.*”<sup>12</sup> Elihu Root, the US Secretary of State wrote:

“*These judges should be so selected from the different countries that the different systems of law and procedure and the principal languages shall be fairly represented.*”<sup>13</sup>

In effect, a joint proposal regarding an establishment of a permanent court was made to the Conference by the US, the UK, and Germany.<sup>14</sup> Yet, later on the difficulty of forming a procedure for the selection process of the judges, which every participant state would agree on, was understood. The discussions did not come to an end and the tribunal could not be formed as a consequence of the second Hague Conference.

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territory subject to the power of the legislature that enacted it, and applies to all persons in the same class – called also *general act*, *general statute*. Please see: (<http://www.merriam-webster.com/legal/general%20law>)

<sup>7</sup> Icj-cij.org. (2016). *History | International Court of Justice*. [online] Available at: <http://www.icj-cij.org/court/index.php?p1=1&p2=1> [Accessed 8 Nov. 2016].

<sup>8</sup> Avalon.law.yale.edu. (2016). *The Avalon Project - Laws of War : Pacific Settlement of International Disputes (Hague I); 29 July 1899*. [online] Available at: [http://avalon.law.yale.edu/19th\\_century/hague01.asp](http://avalon.law.yale.edu/19th_century/hague01.asp) [Accessed 8 Nov. 2016].

<sup>9</sup> Avalon.law.yale.edu. (2016). *The Avalon Project - Laws of War : Pacific Settlement of International Disputes (Hague I); 29 July 1899*. [online] Available at: [http://avalon.law.yale.edu/19th\\_century/hague01.asp](http://avalon.law.yale.edu/19th_century/hague01.asp) [Accessed 8 Nov. 2016].

<sup>10</sup> Avalon.law.yale.edu. (2016). *The Avalon Project - Laws of War : Pacific Settlement of International Disputes (Hague I); 29 July 1899*. [online] Available at: [http://avalon.law.yale.edu/19th\\_century/hague01.asp](http://avalon.law.yale.edu/19th_century/hague01.asp) [Accessed 8 Nov. 2016].

<sup>11</sup> Icj-cij.org. (2016). *History | International Court of Justice*. [online] Available at: <http://www.icj-cij.org/court/index.php?p1=1&p2=1> [Accessed 8 Nov. 2016].

<sup>12</sup> Icj-cij.org. (2016). *History | International Court of Justice*. [online] Available at: <http://www.icj-cij.org/court/index.php?p1=1&p2=1> [Accessed 8 Nov. 2016].

<sup>13</sup> Icj-cij.org. (2016). *History | International Court of Justice*. [online] Available at: <http://www.icj-cij.org/court/index.php?p1=1&p2=1> [Accessed 8 Nov. 2016].

<sup>14</sup> Icj-cij.org. (2016). *History | International Court of Justice*. [online] Available at: <http://www.icj-cij.org/court/index.php?p1=1&p2=1> [Accessed 8 Nov. 2016].

Though, the draft convention regarding the tribunal inspired the Statute of the Permanent Court of International Justice (PCIJ) in the future.<sup>15</sup>

In time, the lacks of the Permanent Court of Arbitration started to come out. The first problem was the incalculable composition of the arbitration which precluded an establishment of a certain international law practice. Secondly, principal of voluntariness in accepting the suit rather than compulsory legal actions was averting the court from being a solid legal foundation. In addition, neither the awards of the court were obligatory, nor it was binding for a state to approach the court in certain circumstances. Consequently, The Permanent Court of Arbitration extended and improved its legal services by adding diverse procedures. “*Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State*” adopted in 1993 and “*Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment*” adopted in 2001 are some of the examples to those diverse procedures that were added.

Thereby, The Hague Peace Conferences and the outcomes of them, such as the Permanent Court of Arbitration, induced the studies on an international judicial tribunal.<sup>16</sup> Permanent Court of International Justice is also one of the results of that period.

Permanent Court of International Justice was created after the First World War. Its legal basis was the Covenant of the League of Nations which gave the responsibility of forming an international court.<sup>17</sup> Article 14 of the Covenant, regarding the establishment of the Permanent Court of International Justice, gave to the PCIJ not only the authority to hear and solve the international legal disputes but also the duty to give advisory opinions when needed. After several reports, studies and discussions; the Statute of the PCIJ was voted and unanimously accepted in 1920.<sup>18</sup> However, the Assembly believed that voting was not enough for the establishment of the PCIJ, since adopting this Statute would impose a legal pressure on the states, each state needed to ratify the Statute according to their internal procedures.<sup>19</sup> As a result, on 16 December 1920, a protocol regarding the Statute of the PCIJ was opened for signatures, faithful to the resolution of 13 December which called upon the adoption of a protocol in order for the states to ratify.<sup>20</sup> In 1921, the Statute of the PCIJ came into force via the completion of the ratification of the protocol by the majority of the states.<sup>21</sup>

<sup>15</sup> Icj-cij.org. (2016). *History | International Court of Justice*. [online] Available at: <http://www.icj-cij.org/court/index.php?p1=1&p2=1> [Accessed 8 Nov. 2016].

<sup>16</sup> Research.un.org. (2016). *Research Guides: UN Documentation: International Court of Justice: Permanent Court of International Justice*. [online] Available at: <http://research.un.org/en/docs/icj/pcij> [Accessed 26 Nov. 2016].

<sup>17</sup> Avalon.law.yale.edu. (2016). *Avalon Project - The Covenant of the League of Nations*. [online] Available at: [http://avalon.law.yale.edu/20th\\_century/leagcov.asp](http://avalon.law.yale.edu/20th_century/leagcov.asp) [Accessed 26 Nov. 2016].

<sup>18</sup> Icj-cij.org. (2016). *History | International Court of Justice*. [online] Available at: <http://www.icj-cij.org/court/index.php?p1=1&p2=1> [Accessed 8 Nov. 2016].

<sup>19</sup> Icj-cij.org. (2016). *History | International Court of Justice*. [online] Available at: <http://www.icj-cij.org/court/index.php?p1=1&p2=1> [Accessed 8 Nov. 2016].

<sup>20</sup> Icj-cij.org. (2016). *History | International Court of Justice*. [online] Available at: <http://www.icj-cij.org/court/index.php?p1=1&p2=1> [Accessed 8 Nov. 2016].

<sup>21</sup> Icj-cij.org. (2016). *History | International Court of Justice*. [online] Available at: <http://www.icj-cij.org/court/index.php?p1=1&p2=1> [Accessed 8 Nov. 2016].

The biggest problem of establishing an international tribunal was solved by the Statute of the PCIJ: the election system for objective and unbiased judges.<sup>22</sup> According to the Statute, the judges were to be elected independently by the Council and Assembly of the League of Nations at the same time. Yet, the judges must have been in the conscious that they “*should represent the main forms of civilization and the principal legal systems of the world.*”<sup>23</sup>

The PCIJ was one of the most important steps in the way reaching to the establishment of the International Court of Justice, which is subjected to our case. It had a permanent procedure binding on the parties who have submitted their case to the court, it improved the international law via its continuing and constant law practices, and it created a kind of an obligatory jurisdiction relying on voluntariness.<sup>24</sup> Briefly, according to this creation, certain legal disputes were under the jurisdiction of the Court mandatorily, when the parties conjunctionally decided to accept it so.<sup>25</sup> The PCIJ restored the faith on an efficiently functioning international court. It solved 29 contentious cases and gave 27 advisory opinions in 18 years.<sup>26</sup> Nevertheless, the Second World War prepared the end of the PCIJ. The Court barely functioned after the eruption of the Second World War. In 1942, the discussions regarding the future of the PCIJ arose. Some states were in favor of the continuation of the jurisdiction of the PCIJ, while some others were in the opinion of establishing an entirely new international court.<sup>27</sup> The UK led the formation of a committee that would be responsible for the examination of the issue, and brought legal experts to London.<sup>28</sup> In 1944, after 19 meetings with the attribution of 11 countries decided on the matter that a new international court which have no jurisdiction on political issues must have been established without any legal attachments to the PCIJ.<sup>29</sup> Just then, a conference was held on 30 October 1943, with the attendance of China, the USSR, the US, and the UK; and as a result, a joint declaration that emphasizes the need for the establishment of an international organization that is based on the sovereign equality and work for the maintenance of international peace and security was released.

After this declaration, the negotiations started for the establishment of a new international organization together with an international court of justice. A committee

<sup>22</sup> Icj-cij.org. (2016). *History | International Court of Justice*. [online] Available at: <http://www.icj-cij.org/court/index.php?p1=1&p2=1> [Accessed 8 Nov. 2016].

<sup>23</sup> Icj-cij.org. (2016). *Other Documents | International Court of Justice*. [online] Available at: <http://www.icj-cij.org/pcij/other-documents.php?p1=9&p2=8> [Accessed 26 Nov. 2016].

<sup>24</sup> Icj-cij.org. (2016). *Other Documents | International Court of Justice*. [online] Available at: <http://www.icj-cij.org/pcij/other-documents.php?p1=9&p2=8> [Accessed 26 Nov. 2016].

<sup>25</sup> Icj-cij.org. (2016). *Other Documents | International Court of Justice*. [online] Available at: <http://www.icj-cij.org/pcij/other-documents.php?p1=9&p2=8> [Accessed 26 Nov. 2016].

<sup>26</sup> Icj-cij.org. (2016). *Other Documents | International Court of Justice*. [online] Available at: <http://www.icj-cij.org/pcij/other-documents.php?p1=9&p2=8> [Accessed 26 Nov. 2016].

<sup>27</sup> Icj-cij.org. (2016). *Other Documents | International Court of Justice*. [online] Available at: <http://www.icj-cij.org/pcij/other-documents.php?p1=9&p2=8> [Accessed 26 Nov. 2016].

<sup>28</sup> Icj-cij.org. (2016). *Other Documents | International Court of Justice*. [online] Available at: <http://www.icj-cij.org/pcij/other-documents.php?p1=9&p2=8> [Accessed 26 Nov. 2016].

<sup>29</sup> Icj-cij.org. (2016). *Other Documents | International Court of Justice*. [online] Available at: <http://www.icj-cij.org/pcij/other-documents.php?p1=9&p2=8> [Accessed 26 Nov. 2016].

comprised of jurists representing 44 states gathered in Washington in 1945 with the aim of forming the draft statute of the future international court of justice. The draft mainly come out from the statute of the Permanent International Court of Justice, it did not bring new rules to the game. Yet, the Statute took its final form at the San Francisco Conference. According to the decisions arose from the negotiations of the San Francisco Conference which 50 states attained, a new court that will be a principal organ of the UN must have been found. PCIJ, as an organization that is linked to the League of Nations could not serve as an organ to the UN, since the United Nations was a fresh organization in a new order.

Albeit, cutting off the linkage between the PCIJ and the ICJ entirely was impossible, considering the fact that even the Statute of the ICJ was predicated on the statute of the PCIJ. Therefore, the ICJ is accepted as the successor of the PCIJ.

In 1945, the PCIJ took its last meeting in order to transfer its archives and jurisdiction to the ICJ. The judges of the PCIJ resigned in 1946, and an election for becoming a member of the ICJ took place at the same year, at the First Session of the UN General Assembly and the UN Security Council. In 1946, the PCIJ was formally dissolved and the ICJ took its first meeting.

## **b. The Structure of the International Court of Justice**

The ICJ is the principal judicial organ of the UN. It was established by the UN Charter and started working in 1946, when the PCIJ was officially dissolved. The seat of the ICJ is in The Hague, Netherlands; at the Peace Palace, specifically.

Settling legal disputes submitted by States, and giving advisory opinions when referred to it by authorized organs of the UN are the work description of the ICJ. While settling disputes, or giving advisory opinions, the court follows international law.

There are 15 judges in the court who are elected by the UN General Assembly and the UN Security Council. In addition, the court has its own administrative organ.

## **c. Functioning of the Court**

There are two types of procedures that the ICJ follows: one being for the contentious cases, which are the legal disputes submitted by the states, and the second one being the advisory proceedings, which are basically requests for advisory opinions on legal problems referred to the ICJ by the UN organs or agencies.

### **i. Contentious Cases**

Only states may submit contentious cases to the Court. In addition, those states must be the ones which are either members of the UN or which are parties to the Statute of the ICJ by accepting the jurisdiction of the Court on the legal condition at hand.

There are three ways that a state may accept the jurisdiction of the Court. Being a

party to a special agreement which gives jurisdiction to the ICJ in special occasions, being a party of a treaty which has a jurisdictional clause that delivers authority to settle disputes or interpret an ambiguous clause of that treaty, or accepting the jurisdiction of the court through reciprocal declarations are the ways to recognize the jurisdiction of the Court. At last, consent is the main obligatory element that is being sought for while submitting to the Court for a contentious case. Moreover, it must be kept in mind that each party to the dispute must have recognized the jurisdiction of the Court, otherwise the Court can not act on the issue.

## ii. Advisory Proceedings

The advisory proceedings are only open for the five organs and sixteen specialized agencies of the UN, while the UN General Assembly and the UN Security Council have the authority to direct questions regarding “*any legal question*,” other authorities are just allowed to direct “*legal questions arising within the scope of their activities*.”<sup>30</sup>

The advisory opinions of the Court are not binding, yet it is an undeniable fact that they are a powerful document that contributes to the forming of the international law.<sup>31</sup> They are organized between the Article 65 and the Article 68 of the Statute of the ICJ.

# 2. FACTUAL BACKGROUND

## a. Timeline of the Region

The beginning of the conflict may be established as the annexation of Bosnia and Herzegovina by the Dual Monarchy<sup>32</sup>, from the previous ruler of the region Ottoman Empire in 1908.<sup>33</sup>

Austria-Hungary, collapsed in 1918, after Second World War.<sup>34</sup> Following, Austria and Herzegovina became a part of a Kingdom that was newly created by Serbs, Slovenes and Croats.<sup>35</sup> Said Kingdom was renamed as the Kingdom of Yugoslavia afterwards in 1933.<sup>36</sup>

The Kingdom of Yugoslavia was effected deeply by the spreading authority of Hitler. On April 6, 1941, Germany attacked to the Kingdom of Yugoslavia.<sup>37</sup> Afterwards, a

<sup>30</sup> Icj-cij.org. (2017). *How the Court works | International Court of Justice*. [online] Available at: <http://www.icj-cij.org/court/index.php?p1=1&p2=6> [Accessed 22 Jan. 2017].

<sup>31</sup> Icj-cij.org. (2017). *How the Court works | International Court of Justice*. [online] Available at: <http://www.icj-cij.org/court/index.php?p1=1&p2=6> [Accessed 22 Jan. 2017].

<sup>32</sup> Austria-Hungary

<sup>33</sup> BBC News. (2017). *Bosnia-Herzegovina profile - Timeline - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-17212376> [Accessed 27 Feb. 2017].

<sup>34</sup> BBC News. (2017). *Bosnia-Herzegovina profile - Timeline - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-17212376> [Accessed 27 Feb. 2017].

<sup>35</sup> Anon, (2017). [online] Available at: <http://www.icj-cij.org/docket/files/91/7199.pdf> [Accessed 27 Feb. 2017].

<sup>36</sup> Anon, (2017). [online] Available at: <http://www.icj-cij.org/docket/files/91/7199.pdf> [Accessed 27 Feb. 2017].

<sup>37</sup> Kingdom-of-yugoslavia-in-ww2.com. (2017). *WW2 timeline – Yugoslavia | The Kingdom of Yugoslavia in World War II*. [online] Available at: <http://kingdom-of-yugoslavia-in-ww2.com/ww2-timeline-yugoslavia/> [Accessed 27 Feb. 2017].

pro-Hitler state annexed from the Kingdom of Yugoslavia on April 10, 1941.<sup>38</sup> The state was named as the Independent State of Croatia, NDH.<sup>39</sup>

Bosnia and Herzegovina was a part of the Independent State of Croatia as an administrative unit called “*the Governdom of Bosnia and Herzegovina*” during the Second World War.<sup>40</sup>

1945 was the year that Bosnia and Herzegovina was liberated by the “*partisan campaigns*” of Tito.<sup>41</sup> Later on, Bosnia and Herzegovina was a part of Socialist Federal Republic of Yugoslavia (hereinafter will be referred to as the SFRY, or the former Yugoslavia) till the collapse of Communism.<sup>42</sup> According to an article published by the Yale University, instability in the area started after the death of President Tito.<sup>43</sup> Allegedly, he was the downward pressure of the rising nationalist voices and after his death the presidency rotated among actors of fluxional powers which were selected by six republics and two autonomous regions comprised of different ethnics.<sup>44</sup>

In 1990 elections, a coalition government was composed by many segregated groups with many conflicted convictions.<sup>45</sup> Three ethnically based parties represented Serb, Croat, and Muslim population under the leadership of Alija Izetbegovic from the Party of Democratic Action.<sup>46</sup> At that time, Muslim nationalists were in favor of a “*centralized independent Bosnia,*” while Serbian nationalists wanted to stay located in “*Belgrade-dominated Yugoslavia.*”<sup>47</sup> Meanwhile Croats departing from the former Yugoslavia were willing to join the independent Croatian state.<sup>48</sup>

From September to November, the Serbian Democratic Party started a propaganda against the agenda of Bosnia and Herzegovina preparing to declare independence from the former Yugoslavia as a Republic.<sup>49</sup> The propaganda included the allegations that some allegedly autonomous regions of Serbs would secede from the possible Republic.<sup>50</sup> Bosnia and Herzegovina claimed that not all of those so-called autonomous regions were populated by Serbian majorities, but there were areas “*strategically located between the Serb majority areas and Serbia*” despite the lower numbers of Serbians domiciled in.<sup>51</sup>

<sup>38</sup> Anon, (2017). [online] Available at: <http://www.icj-cij.org/docket/files/91/7199.pdf> [Accessed 27 Feb. 2017].

<sup>39</sup> Nezavisna Drzava Hrvatska (The Independent State of Croatia) Abbreviations.com. (2017). *What does NDH stand for?*. [online] Available at: <http://www.abbreviations.com/NDH> [Accessed 27 Feb. 2017].

<sup>40</sup> Anon, (2017). [online] Available at: <http://www.icj-cij.org/docket/files/91/7199.pdf> [Accessed 23 Feb. 2017].

<sup>41</sup> BBC News. (2017). *Bosnia-Herzegovina profile - Timeline - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-17212376> [Accessed 27 Feb. 2017].

<sup>42</sup> BBC News. (2017). *Bosnia-Herzegovina profile - Timeline - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-17212376> [Accessed 27 Feb. 2017].

<sup>43</sup> Anon, (2017). [online] Available at: <http://stathis.research.yale.edu/documents/Bosnia.pdf> [Accessed 28 Feb. 2017].

<sup>44</sup> Anon, (2017). [online] Available at: <http://stathis.research.yale.edu/documents/Bosnia.pdf> [Accessed 28 Feb. 2017].

<sup>45</sup> BBC News. (2017). *Bosnia-Herzegovina profile - Timeline - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-17212376> [Accessed 27 Feb. 2017].

<sup>46</sup> Anon, (2017). [online] Available at: <http://www.icj-cij.org/docket/files/91/7199.pdf> [Accessed 28 Feb. 2017].

<sup>47</sup> BBC News. (2017). *Bosnia-Herzegovina profile - Timeline - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-17212376> [Accessed 27 Feb. 2017].

<sup>48</sup> BBC News. (2017). *Bosnia-Herzegovina profile - Timeline - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-17212376> [Accessed 27 Feb. 2017].

<sup>49</sup> Anon, (2017). [online] Available at: <http://www.icj-cij.org/docket/files/91/7199.pdf> [Accessed 28 Feb. 2017].

<sup>50</sup> Anon, (2017). [online] Available at: <http://www.icj-cij.org/docket/files/91/7199.pdf> [Accessed 28 Feb. 2017].

<sup>51</sup> Anon, (2017). [online] Available at: <http://www.icj-cij.org/docket/files/91/7199.pdf> [Accessed 28 Feb. 2017].

In the December of 1991, Bosnia and Herzegovina submitted an application for recognition as an independent State to the European Community (hereinafter will be referred as “the EC”) and announced a referendum on the same issue would be held on 29 February and on 1 March 1992.<sup>52</sup> According to the numbers given by Bosnia and Herzegovina, question of independency was answered positively by 99.4 % of the votes among the 63.4 % participation of the population.<sup>53</sup> This referendum was boycotted by ethnic Serbs.<sup>54</sup> Serb nationalists built their argumentation on the ground that consensus must have been met when making major decisions according to the constitution.<sup>55</sup> On the other hand, Bosnia and Herzegovina claims the validity of the referendum according to the constitution of the meantime. The Presidency of the Republic has been shaped up by seven elected members consisted of two Muslim, two Croat, two Serb representatives, and then a member representing undeclared citizens of the Republic.<sup>56</sup>

Meanwhile, the Respondent, Federal Republic of Yugoslavia (Serbia and Montenegro) was found by the two republics left from the collapsed Socialist Federal Republic of Yugoslavia: Serbia and Montenegro. The new state declared itself as the successor of the former Yugoslavia.

Meanwhile, the legal status of the former Yugoslavia changed in the eyes of international law by the UNSC Resolution 777 (1992)<sup>57</sup> as a response to the request of the Federal Republic of Yugoslavia to automatically continue its membership as the successor of the former state. According to the Resolution, “*the Socialist Federal Republic of Yugoslavia had ceased to exist*” and that Serbia and Montenegro “*could not continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations.*”<sup>58</sup> As a result, Serbia and Montenegro were no longer be able to participate in the work of United Nations General Assembly and its organs till they apply for a membership, which is an incident that happened in a future date from that time, in 2003.

Meanwhile, an article of the NY Times dated 3 March 1992, stated the existence of attacks against the advancements regarding the foundation of the Republic of Bosnia and Herzegovina by some rebel Serbian forces; the article also enounced that these attacks of the Serb rebellions “*disrupted travel.*”<sup>59</sup>

On 28 March 1992, Bosnia and Herzegovina appealed to the United Nations under the demand of the deployment of peacekeeping forces in the Republic as a preventa-

<sup>52</sup> Anon, (2017). [online] Available at: <http://www.icj-cij.org/docket/files/91/7199.pdf> [Accessed 28 Feb. 2017].

<sup>53</sup> Anon, (2017). [online] Available at: <http://www.icj-cij.org/docket/files/91/7199.pdf> [Accessed 28 Feb. 2017].

<sup>54</sup> Cia.gov. (2017). *The World Factbook — Central Intelligence Agency*. [online] Available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/bk.html> [Accessed 28 Feb. 2017].

<sup>55</sup> BBC News. (2017). *Bosnia-Herzegovina profile - Timeline - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-17212376> [Accessed 27 Feb. 2017].

<sup>56</sup> Anon, (2017). [online] Available at: <http://www.icj-cij.org/docket/files/91/7199.pdf> [Accessed 28 Feb. 2017].

<sup>57</sup> Even though UN Resolutions are not accepted as sources of international law, because they show the general acceptance of most of the states, they might implicate international custom.

<sup>58</sup> Anon, (2017). [online] Available at: <http://www.ejil.org/pdfs/18/4/235.pdf> [Accessed 1 Mar. 2017].

<sup>59</sup> 3 Mart 1992 tarihli NY Times gazetesi page 9

tive measure for Serbian attacks.<sup>60</sup>

On 4 April 1992, Serb militia forces launched ground and air military attacks united and in corporation with the former Yugoslav People's Army (YPA).<sup>61</sup>

On 6 April 1992, the independent Republic of Bosnia and Herzegovina was recognized by the European Community.

A lot happened on 7 April 1992. The Republic of Bosnia and Herzegovina was recognized as an independent state by the United States of America;<sup>62</sup> the historic Muslim part of the city Sarajevo was bombed by the Serbian guerillas;<sup>63</sup> and the creation of "Serbian Republic of Bosnia and Herzegovina" was pronounced by the Serb militia forces in cooperation with the former YPA; and the two-thirds of the central and eastern Bosnia, allegedly populated by a muslim was seized by the military, paramilitary, and militia forces.<sup>64</sup>

The arms embargo imposed both by the European Community and the UN in 1991 started to show its effects and the former YPA announced its departure from the Republic of Bosnia and Herzegovina in May 1992. Albeit, Bosnia and Herzegovina claims that the former Yugoslavia is fully responsible from the actions of the YPA and the Serbian militia forces because that declaration regarding the departure of the YPA forces also declared that its members who were born in Bosnia could stay in the region with their military equipments.<sup>65</sup>

Attacks to Sarajevo intensified day by day.<sup>66</sup>

On 13 May 1992, the ambassadors of the European Community and the US was removed from Belgrade.<sup>67</sup>

On 17 May 1992, UN Peacekeeping Forces assigned to supervise a ceasefire between Serbia and Croatia has to withdraw leaving 120 troops behind in Sarajevo due to "*mortar and artillery attacks*."<sup>68</sup>

On 22 May 1992, Bosnia and Herzegovina became a member state of the UN.

On 30 May 1992, Sarajevo witnessed "the most severe attack" of its history, staged by Serbian forces.<sup>69</sup>

On 31 May 1992, the United Nations Security Council imposed economic sanctions against the former Yugoslavia (Serbia and Montenegro).<sup>70</sup>

On 11 June 1992, a UN team moving towards to Sarajevo in order to work on opening

<sup>60</sup> Anon, (2017). [online] Available at: <http://www.icj-cij.org/docket/files/91/13273.pdf> [Accessed 28 Feb. 2017].

<sup>61</sup> Anon, (2017). [online] Available at: <http://www.icj-cij.org/docket/files/91/7199.pdf> [Accessed 28 Feb. 2017].

<sup>62</sup> DAVID BINDER, (2017). *U.S. Recognizes 3 Yugoslav Republics as Independent*. [online] Nytimes.com. Available at: <http://www.nytimes.com/1992/04/08/world/us-recognizes-3-yugoslav-republics-as-independent.html> [Accessed 28 Feb. 2017].

<sup>63</sup> NY Times 7 Nisan 1992, page 3

<sup>64</sup> Anon, (2017). [online] Available at: <http://www.icj-cij.org/docket/files/91/7199.pdf> [Accessed 28 Feb. 2017].

<sup>65</sup> Anon, (2017). [online] Available at: <http://www.icj-cij.org/docket/files/91/7199.pdf> [Accessed 28 Feb. 2017].

<sup>66</sup> CHUCK SUDETIC, (2017). *Serbs Intensify Sarajevo Attacks; 'Pure Terrorism,' Bosnia Charges*. [online] Nytimes.com. Available at: <http://www.nytimes.com/1992/04/22/world/serbs-intensify-sarajevo-attacks-pure-terrorism-bosnia-charges.html> [Accessed 28 Feb. 2017].

<sup>67</sup> 13 mayis 1992 ny times page 10

<sup>68</sup> 17 mayis 1992 ny times page 14

<sup>69</sup> 30 may ny times page 1

<sup>70</sup> [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/757\(1992\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/757(1992))

the airport was attacked by the Serbian guerillas.<sup>71</sup>

On 27 June 1992, UN Security Council issued an ultimatum in order for the Serbian forces to stop the attacks immediately, and hand over the control of their weapons to the UN authorities.<sup>72</sup>

On 30 June 1992, Sarajevo airport was taken into control by the UN troops. Supportive supplies have arrived after 12 weeks.<sup>73</sup>

During the war, attacks got more in number and in the level of severity. Aggression spread around Bosnia and Herzegovina widely outside the scope of her capital city, Sarajevo.

In 1993, because the conflict got even more complex and demonstrative, the UN created safe heavens in Sarajevo, Goradze and Srebrenica.<sup>74</sup>

At the same year, the Republic of Bosnia and Herzegovina submitted its Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) to the International Court of Justice. The case started to be seen before the Court.

Last but not least, one of the most important incidents happened in that year was the establishment of the International Criminal Tribunal for the Former Yugoslavia (hereinafter will be referred to as “the ICTY”) as a UN court. The ICTY was formed by the UNSC Resolution 827 concordant with the Chapter VII of the UN Charter.<sup>75</sup> The Court was given the mission of examining the cases under the law of war crimes; and a man fought for the Serbian militia in Srebrenica massacres was the first person to be convicted by the court, namely Drazen Erdemovic.<sup>76</sup>

In 1995, Serbian forces invaded the Safe Heaven of Srebrenica under the commandership of General Ratko Mladic despite the existence of the UN peacekeepers in the area. NATO involved to the conflict and stoke against the Serbian forces.<sup>77</sup>

In November, 1995, context of the General Framework Agreement for Peace in Bosnia and Herzegovina (also referred to as the Dayton Peace Agreement, the DPA, Dayton Accords, Paris Protocol, or Dayton-Paris Agreement), that ended a war lasted three years and a half was formed at Wright-Patterson Air Force Base, in Ohio, United States.<sup>78</sup> The Agreement was signed on 14 December 1995, in Paris.<sup>79</sup> By the Dayton Peace Accord, “two entities,” one being for Muslims and the other for Croats were cre-

<sup>71</sup> 11 June 1992 ny times page 6

<sup>72</sup> 27 June 1992 ny times page 1

<sup>73</sup> 30 haziran 1992 ny times page 1

<sup>74</sup> BBC News. (2017). *Bosnia-Herzegovina profile - Timeline - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-17212376> [Accessed 27 Feb. 2017].

<sup>75</sup> Anon, (2017). [online] Available at: [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_827\\_1993\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf) [Accessed 1 Mar. 2017].

<sup>76</sup> BBC News. (2017). *Bosnia-Herzegovina profile - Timeline - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-17212376> [Accessed 27 Feb. 2017].

<sup>77</sup> BBC News. (2017). *Bosnia-Herzegovina profile - Timeline - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-17212376> [Accessed 27 Feb. 2017].

<sup>78</sup> Osce.org. (2017). *Dayton Peace Agreement | OSCE*. [online] Available at: <http://www.osce.org/bih/126173> [Accessed 28 Feb. 2017].

<sup>79</sup> Osce.org. (2017). *Dayton Peace Agreement | OSCE*. [online] Available at: <http://www.osce.org/bih/126173> [Accessed 28 Feb. 2017].

ated, in approximately equal sizes.<sup>80</sup> UN took the policing duty of the Agreement.

At the same year, peacekeepers also were located in the area.<sup>81</sup>

Despite the Dayton Peace Accord, absolute peace did not arrive to the Bosnian territory. Serbian nationalism increased in the county politics, and in March 2001, Ante Jelavic was dismissed from the assignment of being the Croat representative in the collective presidency because of his statements declaring an independent Croat republic.<sup>82</sup>

Tensions rose again in May 2001. Bosnian Serbs broke up ceremonies for “*the reconstruction of the mosques destroyed during the Bosnian war*” by using force.<sup>83</sup>

In August 2001, the ICTY made its judgment regarding the case of the Serbian General Radislav Krstic. He was convicted guilty of genocide in Srebrenica and sentenced to 46 years.<sup>84</sup> At that time, three senior Muslim generals were indicted regarding “*war crimes charges*” as well.<sup>85</sup>

In December 2001, principle Serbian nationalist party, namely the Serb Democratic Party voted to expel the war crimes suspects including many Serbian leaders of the past war.<sup>86</sup>

On 3 October 2002, one of the leaders of the Republic of Serbia during the Bosnian war, Biljana Plavsic changed her plea from “not guilty” to “guilty” regarding the charges of genocide, crimes against humanity, and war crimes.<sup>87</sup>

On January 2003, the EU takes over the policing duties from the UN officially.<sup>88</sup>

On December 2004, Eufor (European Union-led force) took over the duty of peace-keeping by NATO.<sup>89</sup>

On November 2005, EU and Bosnia started the Stabilisation and Association Agreement talks.<sup>90</sup>

And the hearings of the Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) will start on February 27, 2006, in The Hague-Sima.

<sup>80</sup> BBC News. (2017). *Bosnia-Herzegovina profile - Timeline - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-17212376> [Accessed 27 Feb. 2017].

<sup>81</sup> BBC News. (2017). *Bosnia-Herzegovina profile - Timeline - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-17212376> [Accessed 27 Feb. 2017].

<sup>82</sup> BBC News. (2017). *Bosnia-Herzegovina profile - Timeline - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-17212376> [Accessed 27 Feb. 2017].

<sup>83</sup> BBC News. (2017). *Bosnia-Herzegovina profile - Timeline - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-17212376> [Accessed 27 Feb. 2017].

<sup>84</sup> BBC News. (2017). *Bosnia-Herzegovina profile - Timeline - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-17212376> [Accessed 27 Feb. 2017].

<sup>85</sup> BBC News. (2017). *Bosnia-Herzegovina profile - Timeline - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-17212376> [Accessed 27 Feb. 2017].

<sup>86</sup> BBC News. (2017). *Bosnia-Herzegovina profile - Timeline - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-17212376> [Accessed 27 Feb. 2017].

<sup>87</sup> Black, I. (2017). *Top Serb changes plea to guilty*. [online] the Guardian. Available at: <https://www.theguardian.com/world/2002/oct/03/warcrimes.ianblack> [Accessed 1 Mar. 2017].

<sup>88</sup> BBC News. (2017). *Bosnia-Herzegovina profile - Timeline - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-17212376> [Accessed 27 Feb. 2017].

<sup>89</sup> BBC News. (2017). *Bosnia-Herzegovina profile - Timeline - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-17212376> [Accessed 27 Feb. 2017].

<sup>90</sup> BBC News. (2017). *Bosnia-Herzegovina profile - Timeline - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-17212376> [Accessed 27 Feb. 2017].

## b. Outstanding Incidents Regarding the Claims

### i. Višegrad Massacres

Located at the eastern border of Bosnia and Herzegovina to Serbia and governed under the autonomous entity of Republika Srpska, Višegrad has been built on Drina River and is a home to a UNESCO World Heritage Site, the Mehmed Paša Sokolović Bridge.<sup>91</sup> For such a small town with rare settlements, one would not expect much of a history beneath it, and that one would be wrong. The city of Višegrad is infamous for the battleground and severe human rights infringements happened within its territory.<sup>92</sup>

3<sup>rd</sup> of March was a turning point in the Bosnian history, as Mr. Alija Izetbegović declared the independence of the country from Yugoslavia on a legal basis constituted from the Bosnian independence referendum of 1992.<sup>93</sup> After years of ethnic tension and unrest within the state, this move was thought to be an expected one regarding the independencies of Slovenia, Croatia, Macedonia; a move that would finally ease the relations between the parties. That was not the conclusion reached, however, as the Bosnian Serbs who had boycotted the independence referendum of 1992, didn't recognize the result and employed their troops within the lands of the newly formed Republic of Bosnia, under the leadership of Radovan Karadžić, the president of the Republika Srpska at the time.<sup>94</sup> This mobilization of forces was the beginning of the Bosnian War, where the Serbs, claiming their full rights upon the territories of Bosnia, conducted a series of bombing, murders and rape, which would also be referred as ethnic cleansing by the judicial reports of the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>95</sup> The Višegrad massacres took place right in the beginning phases of the aforementioned war, during the spring and summer of 1992 to be exact.<sup>96</sup>

Following the international recognition of the Bosnian state as an independent one on 6<sup>th</sup> of April, 1992, Yugoslavian People's Army (JNA) occupied Višegrad eight days afterwards with the bold support from the Serbian government as they had declared independence throughout the regions of Bosnia where Serbs were majority, under the name of Republika Srpska.<sup>97</sup> The city of Višegrad had fallen within the bor-

<sup>91</sup> "Mehmed Paša Sokolović Bridge in Višegrad." UNESCO World Heritage Convention. Accessed March 2017. <http://whc.unesco.org/en/list/1260>.

<sup>92</sup> Aspden, Peter. "The town that Emir Kusturica built." Financial Times. Accessed March 2017. <https://www.ft.com/content/6bdd13b8-fbaf-11e3-aa19-00144feab7de>.

<sup>93</sup> Bartrop, Paul R. *Bosnian Genocide: The Essential Reference Guide*. Santa Barbara: ABC-CLIO, Inc, 2017. January 18, 2016. Accessed March 2017. <https://books.google.com.tr/books?id=IStZCwAAQBAJ&printsec=frontcover&hl=tr#v=onepage&q&f=false>.

<sup>94</sup> History.com Staff. "Bosnian Genocide." History.com. 2009. Accessed March 2017. <http://www.history.com/topics/bosnian-genocide>.

<sup>95</sup> International Criminal Tribunal for the former Yugoslavia. *Judicial reports 1999/ Recueils judiciaires 1999*. Leiden: M. Nijhoff, 2010. Accessed March 2017. [https://books.google.com.tr/books?id=juuwCQAAQBAJ&printsec=frontcover&hl=tr&source=gbs\\_ge\\_summary\\_r&cad=0#v=onepage&q&f=false](https://books.google.com.tr/books?id=juuwCQAAQBAJ&printsec=frontcover&hl=tr&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false).

<sup>96</sup> "The warlord of Visegrad." The Guardian. August 10, 2005. Accessed March 2017. <https://www.theguardian.com/world/2005/aug/11/warcrimes.features11>.

<sup>97</sup> Bartrop, Paul R. *Bosnian Genocide: The Essential Reference Guide*. Santa Barbara: ABC-CLIO, Inc, 2017. January 18, 2016. Accessed March 2017.

<https://books.google.com.tr/books?id=IStZCwAAQBAJ&printsec=frontcover&hl=tr#v=onepage&q&f=false>.

ders of the Serbian entity in Bosnia though 63% of the total population of 25.000 were Bosnian Muslims, according to the 1991 census.<sup>98</sup> After seizing control over the city, the army decided to terminate its activities and presence within Višegrad (along with the other cities that were under the control of Republika Srpska) and withdrew most of its forces by May 1992 as there was an established administration of Serbian forces, namely the Serbian Municipality of Višegrad.<sup>99</sup> The withdrawal had tricky conditions though, while portions of the military were pulled out of the Bosnian regions, most of the highly ranked soldiers, including General Ratko Mladić chose to stay to be a part of the newly formed Army of Republika Srpska.<sup>100</sup> The aforementioned army deepened the crisis regarding extensive military actions and the measures taken to eliminate non-Serbian citizens from the lands of the Republika Srpska.<sup>101</sup>

With the withdrawal of forces came the declaration of Višegrad of “being a Serbian town” by the party in power, Serb Democratic Party.<sup>102</sup> The significance of this statement was that it didn’t solely serve for independency related purposes, it also was the justification of the upcoming policies and actions the municipality would take. Citizens of Višegrad that didn’t have Serbian origins were forced to leave their jobs and end their local business networks.<sup>103</sup> Houses and other properties including mosques that belonged to the local Bosniak community were looted and destroyed.<sup>104</sup> Bosniaks entering or leaving Višegrad were required to possess a travel permit from the Serbian authorities.<sup>105</sup> There was a constant flow of people from a province to another as the Serbian forces including the police, paramilitaries and local Serbs living in parts of Višegrad were allegedly attacking villages and murdering the “non-Serbian” inhabitants.<sup>106</sup> For those that weren’t killed, concentration camps were set throughout the country.<sup>107</sup> For Višegrad in particular, there were camps transformed from former military barracks of JNA (Yugoslav People’s Army) located at Uzamnica and within the town along with hotel Vilina Vlas in use.<sup>108</sup> The striking difference between them was

<sup>98</sup> Sito-Sucic, Daria. “In first census since war, Bosnia’s ‘Others’ threaten ethnic order.” Reuters. September 27, 2013. Accessed March 2017. <http://www.reuters.com/article/us-bosnia-census-idUSBRE98Q0DT20130927>.

<sup>99</sup> Bartrop, Paul R. *Bosnian Genocide: The Essential Reference Guide*. Santa Barbara: ABC-CLIO, Inc, 2017. January 18, 2016. Accessed March 2017.

<https://books.google.com.tr/books?id=IStZCwAAQBAJ&printsec=frontcover&hl=tr#v=onepage&q&f=false>.

<sup>100</sup> “Military Structure of the Army of the Republika Srpska (“VRS”).” International Criminal Tribunal for the former Yugoslavia. Accessed March 2017. <http://www.icty.org/x/cases/borovcanin/ind/en/bor-annexA020906.htm>.

<sup>101</sup> Tanner, Samuel. “The mass crimes in the former Yugoslavia: participation, punishment and prevention?” International Review of the Red Cross. June 2008. Accessed March 2017. [https://www.icrc.org/eng/assets/files/other/irrc-870\\_tanner.pdf](https://www.icrc.org/eng/assets/files/other/irrc-870_tanner.pdf).

<sup>102</sup> European Centre for Minority Issues. *European Yearbook of Minority Issues*. Martinus Nijhoff Brill, 2005. Accessed March 2017. [https://books.google.com.tr/books?id=7dH0qS\\_tQS0C&dq=serbian municipality of visegrad&hl=tr&source=gbs\\_navlinks\\_s](https://books.google.com.tr/books?id=7dH0qS_tQS0C&dq=serbian municipality of visegrad&hl=tr&source=gbs_navlinks_s).

<sup>103</sup> Ibit.

<sup>104</sup> “Bosnian Serb jailed for war crimes.” CNN. August 24, 2007. Accessed March 2017. <http://edition.cnn.com/2007/WORLD/europe/08/24/bosnia.warcrimes.tm/>.

<sup>105</sup> “Posts about Visegrad Massacre on Visegrad Genocide Memories.” Visegrad Genocide Memories. Accessed March 2017. <https://genocideinvisegrad.wordpress.com/tag/visegrad-massacre/>.

<sup>106</sup> “Bosnian Serb jailed for war crimes.” CNN. August 24, 2007. Accessed March 2017. <http://edition.cnn.com/2007/WORLD/europe/08/24/bosnia.warcrimes.tm/>.

<sup>107</sup> Mojzes, Paul. *Balkan Genocides: Holocaust and Ethnic Cleansing in the Twentieth Century*. Lanham, MD: Rowman & Littlefield, 2011. Accessed March 2017. <https://books.google.com.tr/books?id=m5bDUFZXQ5sC&printsec=frontcover&hl=tr#v=onepage&q&f=false>.

<sup>108</sup> Ibit.

that the hotel was turned into a brothel for the Serbian soldiers.<sup>109</sup> Bosniak women, including girls under the age of 14, were detained in the hotel for cases of sexual satisfaction of the military personnel.<sup>110</sup> They were raped and tortured within the facilities continuously, resulting in a generation of “unwanted children of rape”.<sup>111</sup> These camps served mainly to be temporary settlements for its inhabitants, people detained there (with the people collected from other villages) would be systematically killed with various methods and their bodies would be dumped to Drina River.<sup>112</sup> The landmarks of the city were used for inhumane deeds, the river as a mass graveyard and the Mehmed Paša Sokolović Bridge as a frequently used crime scene for collective murders.<sup>113</sup>

Though there had been countless disordered executions among the area, some of them were notable because of either the method of execution or the impact it had on the progression of the events. In the Sjeverin massacre of 22<sup>nd</sup> October, 1992, 16 Serbian Muslim citizens travelling from Priboj (Serbia) to Rudo (Bosnia) were abducted from their buses and sent to Višegrad in a truck.<sup>114</sup> After stopping at the infamous headquarters, Vilina Vlas hotel, for a body search and confiscation of their goods, they were taken to an edge of the Drina River for collective execution.<sup>115</sup> Nobody was able to find their remains.<sup>116</sup> Paklenik (15<sup>th</sup> of June, 1992) and Bosanska Jagodina (26<sup>th</sup> of May, 1992) massacres were similar to Sjeverin in terms of abduction from bus; the former referring to the murder of 50 Bosniak men that were taken from a bus departing local Muslims from Višegrad to Olovo in order to be executed and thrown into a ravine in Rogatica<sup>117</sup> and the latter referring to the murder of 17 Bosniak men that were again taken from a deportation bus headed to Macedonia to be executed and put into mass grave in Crncicima<sup>118</sup>. Two distinct similarities between the massacres are that both of the deportation operations were carried out by the Serbian Municipality of Višegrad and the hijackers who were members of the Army of Republika Srpska.

On 13<sup>th</sup> of July, 1992, the Bosniak villagers of Koritnik were made to leave their villages by force in being deceived into believing that they would be deported to

<sup>109</sup> Stiglmayer, Alexandra, Marion Faber, and Roy Gutman. *Mass rape: the war against women in Bosnia-Herzegovina*. Lincoln: University of Nebraska Press, 1994. Accessed March 2017. <https://books.google.com.tr/books?id=5tJfIDgysEIC&printsec=frontcover&hl=tr#v=onepage&q&f=false>.

<sup>110</sup> Ibid.

<sup>111</sup> Holt, Kate, and Sarah Hughes. “Bosnia’s rape babies: abandoned by their families, forgotten by the state.” *The Independent*. December 12, 2005. Accessed March 2017. <http://www.independent.co.uk/news/world/europe/bosnias-rape-babies-abandoned-by-their-families-forgotten-by-the-state-519257.html>.

<sup>112</sup> Emeric, Amel. “Funeral held for Muslim Bosniaks killed long ago.” *U.S. News & World Report*. May 26, 2012. Accessed March 2017. <https://www.usnews.com/news/world/articles/2012/05/26/funeral-held-for-muslim-bosniaks-killed-long-ago>.

<sup>113</sup> Ibid.

<sup>114</sup> Đokić, Dejan, and James Ker-Lindsay. *New Perspectives on Yugoslavia: Key Issues and Controversies*. London: Routledge, 2011. Accessed March 2017. <https://books.google.com.tr/books?id=gRXJBQAAQBAJ&printsec=frontcover&hl=tr#v=onepage&q&f=false>.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

<sup>117</sup> “Milisavljevic et al: People Vanishing at the Paklenik Pit.” *Justice Report*. December 12, 2012. Accessed March 2017. <http://www.justice-report.com/en/articles/milisavljevic-et-al-people-vanishing-at-the-paklenik-pit>.

<sup>118</sup> Cigar, Norman, and Paul R. Williams. *Indictment at The Hague: the Milošević regime and crimes of the Balkan Wars*. New York and London: New York University Press, 2002. Accessed March 2017. [https://books.google.com.tr/books?id=vIMUCgAAQBAJ&printsec=frontcover&hl=tr&source=gbs\\_ge\\_summary\\_r&cad=0#v=onepage&q&f=false](https://books.google.com.tr/books?id=vIMUCgAAQBAJ&printsec=frontcover&hl=tr&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false).

Kladanj, a relatively secure zone because it had been under the rule of Bosnian government.<sup>119</sup> When the promised “deportation buses” didn’t arrive, the villagers walked to the nearby town, Višegrad.<sup>120</sup> There, they were taken to an abandoned Bosniak house in the hopes of staying overnight, by the recommendation of one of the convicted war criminals of the war<sup>121</sup>, Mitar Vasiljević.<sup>122</sup> When Lukić cousins, Milan and Sredoje (Two of the commanders of the Army of Republika Srpska and the ones mainly responsible for almost all of the massacres within the city of Višegrad<sup>123</sup>) arrived, the villagers were separated into two rooms by gender and their valuables were looted.<sup>124</sup> Late at night, they were ordered to move to another house, approximately sixty people altogether into a room of this new house whose “carpets... were covered with a sticky substance that smelled foul and caused some persons inside the room to choke”.<sup>125</sup> As the scene was set for the plan, Milan Lukić placed the explosive device within the room and set the room on fire.<sup>126</sup> Though there were a few survivors, 59 people were burned to death in that house located in the Pionirska Street.<sup>127</sup> The Bikavac fire had the same plan of execution as well, where at least 60 people were burned to death in a room that they were stacked into in Bikavac neighborhood of Višegrad, on 27<sup>th</sup> of June, 1992.<sup>128</sup> It was a day before the religious holiday of Serbia, the Vidovdan.

With the establishment of ICTY on 25<sup>th</sup> of May, 1993<sup>129</sup> and the war in Bosnia coming to an end with the signing of the General Framework Agreement for Peace in Bosnia and Herzegovina in the city of Paris, even though some trials have been concluded, trials regarding the violations of international humanitarian law within the borders of Yugoslavia are still ongoing in the ICTY.<sup>130</sup>

<sup>119</sup> “Pionirska Street Live Pyre.” BiHbloggen. June 14, 2016. Accessed March 2017. <https://bosnienbloggen.wordpress.com/2013/10/12/pionirska-street-live-pyre/>.

<sup>120</sup> Ibid.

<sup>121</sup> “Judgment in the Case “The Prosecutor v. Mitar Vasiljevic” Accused Sentenced to 20 Years Imprisonment.” Press | International Criminal Tribunal for the former Yugoslavia. November 29, 2002. Accessed March 2017. <http://www.icty.org/en/sid/8051>.

<sup>122</sup> “Pionirska Street Live Pyre.” BiHbloggen. June 14, 2016. Accessed March 2017. <https://bosnienbloggen.wordpress.com/2013/10/12/pionirska-street-live-pyre/>.

<sup>123</sup> “Milan Lukić and Sredoje Lukić Convicted of War Crimes in Višegrad.” Press | International Criminal Tribunal for the former Yugoslavia. July 20, 2009. Accessed March 2017. <http://www.icty.org/en/press/milan-luki%C4%87-and-sredoje-luki%C4%87-convicted-war-crimes-vi%C5%A1egrad>.

<sup>124</sup> “Pionirska Street Live Pyre.” BiHbloggen. June 14, 2016. Accessed March 2017. <https://bosnienbloggen.wordpress.com/2013/10/12/pionirska-street-live-pyre/>.

<sup>125</sup> Ibid.

<sup>126</sup> Olusanya, Olaoluwa. *Double Jeopardy without Parameters: Re-characterisation in International Criminal Law*. Antwerp: Intersentia, 2004. Accessed March 2017. <https://books.google.com.tr/books?id=6hxlHZBC7wUC&printsec=frontcover&hl=tr#v=onepage&q&f=false>.

<sup>127</sup> Ibid.

<sup>128</sup> Gill, Terry D., Robin Geiß, Robert Heinsch, Tim McCormack, Christophe Paulussen, and Jessica Dorsey. *Yearbook of International Humanitarian Law*. Vol. 15. The Hague: Springer Science & Business Media, 2013. Accessed March 2017. <https://books.google.com.tr/books?id=WOjHBAAQBAJ&printsec=frontcover&hl=tr#v=onepage&q&f=false>.

<sup>129</sup> “About the ICTY.” About the ICTY | International Criminal Tribunal for the former Yugoslavia. Accessed March 2017. <http://www.icty.org/en/about>.

<sup>130</sup> “Serbia’s last war crimes fugitive arrested.” Al Jazeera. July 20, 2011. Accessed March 2017. <http://www.aljazeera.com/news/europe/2011/07/201172074249705610.html>.

## ii. Prijedor Massacre

An alleged ethnic cleansing campaign was committed by the Bosnian Serb leadership in the region of Prijedor, Bosnia and Herzegovina during 1992. It is presumed to be the second largest massacre committed within the Bosnian War, right after the Srebrenica. Around 3550 casualties have been reported by the Research and Documentation Centre in Sarajevo (RDC) from Bosnians and Croats according to the Bosnian Book of Dead database.<sup>131</sup> The alleged crimes committed in Prijedor have been subjected to 13 trials before the trials in the ICTY.

According to the ICTY, Serbian politicians attended regular meetings in order to plan the propaganda against non-Serbians.<sup>132</sup>

On 7 January 1992, Serbian members of Prijedor Municipal Assembly announced the Assembly of the Serbian People of the Municipality of Prijedor upon implementing the instructions which were delivered on 19 December 1991 with the Presidents of the local municipal boards of SDP.

Milomir Stakić was elected as the President of the Assembly, who was convicted of mass crimes against humanity by ICTY in 2001<sup>133</sup>.

On 17 January 1992, the Assembly affirmed the aggregating the Serbian territories of Prijedor to the autonomous region of Bosnian Krajina in order to create a Serbian state on that Serbian territories.

On 23 April 1992, Serb Democratic Party decided on a matter inter alia which is proclaiming the start of the preparation for the takeover of the municipality of Prijedor with YPA. More than 1500 Serbs were armed and numbers of Serbian police stations were implemented in Prijedor for the planned takeover.<sup>134</sup>

The declaration of the takeover which asserted Serbian nationalism was read out and repeated throughout the day on Radio Prijedor in the following day of the start of the takeover.

On 29 April 1992, Serbian employees of public security gathered in a part of Prijedor. They were divided into several groups, each having a duty of gaining the control of special centres which consisted of The Assembly buildings, banks, courts, main police buildings, and post offices. The takeover occurred in the early hours of 30 April 1992.

This takeover of power is stated as an illegal coup d'état by the ICTY in 2003<sup>135</sup>.

People of Kozarac, a town located in the Prijedor municipality, organized patrols to control their town.

Serbian authorities strengthened their position militarily after the takeover. Ten-

<sup>131</sup> Patrick Ball, Ewa Tabeau, and Philip Verwimp, *The Bosnian Book of Dead: Assessment of the Database (Full Report)*, report no. 5, The Institute of Development Studies, University of Sussex (Brighton, 2007).

<sup>132</sup> PROSECUTOR v. MILOMIR STAKIĆ (United Nations International Criminal Tribunal for the former Yugoslavia July 31, 2003).

<sup>133</sup> THE PROSECUTOR OF THE TRIBUNAL AGAINST MILOMIR STAKIĆ SECOND AMENDED INDICTMENT (United Nations International Criminal Tribunal for the former Yugoslavia August 31, 2001).

<sup>134</sup> PROSECUTOR v. MILOMIR STAKIĆ (United Nations International Criminal Tribunal for the former Yugoslavia July 31, 2003), 14.

<sup>135</sup> "United Nations International Criminal Tribunal for the former Yugoslavia." Press | International Criminal Tribunal for the former Yugoslavia. Accessed March 20, 2017. <http://www.icty.org/en/press/judgement-case-prosecutor-v-dr-milomir-stakic>.

sion increased among the non-Serbian population of Prijedor significantly. Serbian military formation of Prijedor was improved by the addition of armed soldiers located on top of all high buildings and the establishment of checkpoints.

On 12 May 1992, Assembly of the Serbian People established the Serbian Army by bringing former YPA units together.

The ultimatum that called all Bosnian citizens to declare their loyalty to Serbian Republic by handing their weapons over the Serbian Army and stated that any resistance would be punished was issued. Citizens hoped that if they had complied with these requests, they would be safe; therefore, they did so since there had been common house researches done by Serbian soldiers.<sup>136</sup>

However, unemployment increased in non-Serbian population in that period.

Non-Serbian citizens were obliged to hang white cloth outside their houses as a sign of their loyalty to the Serbian authority.

Serbian authorities set up concentration camps and determined who should be responsible for those camps.

On 21 May 1992, Serbian population of Kozarac started to leave the town. The phone lines were disconnected and the town was surrounded immediately afterwards.

On 22 May 1992, YPA issued another ultimatum to the residents in Hambarine, a Bosnian village within Prijedor municipality. Several residents were alleged as being involved in an attack against YPA; and, those were expected to succumb to YPA. Alleged residents did not comply with that ultimatum. Shelling on Hambarine began the next day. It is reported that shelling came from different three directions, consisted of 1000 Serbian soldiers and a couple of tanks. Shelling lasted for three hours. Bosnian citizens tried to resist the shelling; however, they were forced to leave the village. They escaped to other villages or woods. Refugees, including mostly children, elderly people, and women, which were about 400 people, witnessed the whole destruction. A military operation was concentrated in the woods too.

Another ultimatum was issued for Kozarac on Radio Prijedor right after the attack of Hambarine. This ultimatum threatened the residents of Kozarac upon “razing the town to the ground” if they failed to comply. Therefore, the negotiations took place between the sides which resulted unsuccessfully.

Stojan Župljanin, the leader of Serbian delegation, stated that the army would take the town by force if their conditions were not met.

On 25 May 1992, the attack on Kozarac started. A military convoy approached Kozarac. Its soldiers opened fire on the checkpoints and houses while an intense shelling was continuing from the round of hills. The medical centre was damaged during the attack.

<sup>136</sup> PROSECUTOR v. MILOMIR STAKI] (United Nations International Criminal Tribunal for the former Yugoslavia July 31, 2003).

The aim was the people of Kozarac which were fleeing from there at the time.<sup>137</sup> Still, Serbian soldiers shot the residents in their houses. The surrendered ones were taken to a stadium; however, random shootings continued in there drastically.

After the killings, the houses were set on fire by soldiers. Forces not only ruined all houses in town, but also levelled them to the ground by using heavy machinery. The town was razed to the ground as stated before.

Over 5000 Serbian soldiers participated in the Kozarac attack.

Large numbers of children and women arrived in Prijedor on the first day of the attack. The leaders of Prijedor intervention platoon intervened the arrival and mistreated the children and women. They ordered children and women to board the newly-arrived buses for Trnopolje concentration camp on that day.

On 26 May 1992, defense of the villagers fell. After the falling, Serbian forces announced that the villagers had 10 minutes to reach the stadium reportedly. However, a lot were not given any chance and shot to death in their homes.

It is reported that thousands of people tried to surrender while carrying white flags, still Serbian tanks opened fire on them and killed many.

It was agreed upon that the people of Kozarac would leave the territory on that day. Serbian authority stated that all those who surrendered must form a convoy; therefore, a ceasefire would be in effect during the period. Large numbers of people surrendered in that day. It is learned that when that convoy reached the Banja Luka-Prijedor road, the women and men were separated. The women were taken to Trnopolje concentration camp and men were taken to Keraterm and Omarska concentration camps.

A report sent by the 1st Krajina Corps Command to the Srpska Republika BH Army Main Staff dated 27 May 1992, stated that the villages in the wider area of Kozarac were freed of Bosnians entirely by killing, capturing them and making them be at large.<sup>138</sup>

On 27 May 1992, the attack of Kozarac ended in noon.

Wounded ones were not allowed to leave Kozarac. Doctors were not given any permission to evacuate the wounded; even the children were left to die by Serbian.

There were at least 100 casualties in the attack; and, 1500 people were deported to the concentration camps.

It is stated that the attack on Kozarac caused many villager to flee to the forest while Serbian forces were shooting at “every moving thing”, and it is calculated that at least 2000 villagers were killed in that period by The Report of the Commission of Experts in Bosnia v. Serbia Genocide Case before the International Court of Justice.<sup>139</sup>

On 22 June 1992, it is decided upon that “all socially-owned enterprises, joint-stock

<sup>137</sup> PROSECUTOR v. MILOMIR STAKI] (United Nations International Criminal Tribunal for the former Yugoslavia July 31, 2003), 41.

<sup>138</sup> PROSECUTOR v. MILOMIR STAKI] (United Nations International Criminal Tribunal for the former Yugoslavia July 31, 2003), 42.

<sup>139</sup> CASE CONCERNING APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE (BOSNIA AND HERZEGOVINA v. SERBIA AND MONTENEGRO), REPORTS OF JUDGMENTS, ADVISORY OPINIONS AND ORDERS (INTERNATIONAL COURT OF JUSTICE February 26, 2007), 108.

companies, state institutions, public utilities, Ministries of the Interior, and the Army of the Serbian Republic may only be held by personnel of Serbian nationality” by the Serbian authority.

During the ethnic cleansing of Prijedor, many killings were committed inside and outside of the concentration camps.

It is found that around 200 people from Hambarine arrived in Omarska concentration camp and over 100 people were killed in the camp in late July 1992.

On 17 July 1992, gunshots were heard early in the morning and continued until the dawn. Dead bodies were seen in front of the structure where they were accommodated. The camp guards were seen as they were shooting rounds into the bodies. Everyone was given an extra bullet that was shot in their heads. Total of 180 bodies were loaded to a truck and then taken away.

On 24 July 1992, a massacre known as the Room 3 was committed in Keraterm concentration camp. The massacre was one of the first larger massacres which were committed inside a camp. Newly-arrived Bosnian detainees who were from Brdo area were put in Room 3. Detainees were denied food and subjected to abuse. On the day of the massacre, large numbers of Serbian soldiers arrived to the camp and placed a machine gun in front of Room 3. Shootings and moanings were heard from there through the night. The walls of Room 3 and the area outside were covered in blood in the morning. The piles of 128 dead bodies were loaded to a truck.

In the Stakić case before the ICTY resulted in the way that high numbers of civilian killings and massacres against Bosnians and Muslims occurred within the attacks of Serbian army in Prijedor beyond any reasonable doubt in 1992.

### iii. Srebrenica Massacre

Srebrenica was declared as a UN Safe Area in 1993 under the observation of the UN Protection Force.<sup>140</sup> Tens of thousands of civilians were taken in the area as refugees fleeing from the Bosnian War.<sup>141</sup> The refugees were under the protection of lightly armed Dutch peacekeeping forces which consisted of around 600 soldiers.<sup>142</sup>

Between 6 and 8<sup>th</sup> of July, 1995, the area was laid siege by the Bosnian Serb forces.<sup>143</sup> People inside Srebrenica struggled the deficiency of fresh food and fuel during that time period.<sup>144</sup>

Afterwards, Bosnian Serb forces started shelling Srebrenica. Meanwhile, Bosnian Muslim fighters asked the return of their weapons which were taken by the peace-

<sup>140</sup> Srebrenica.org.uk. (2017). *Remembering Srebrenica*. [online] Available at: <https://www.srebrenica.org.uk/> [Accessed 28 Mar. 2017].

<sup>141</sup> BBC News. (2017). *Timeline: Siege of Srebrenica - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-18101028> [Accessed 28 Mar. 2017].

<sup>142</sup> BBC News. (2017). *Timeline: Siege of Srebrenica - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-18101028> [Accessed 28 Mar. 2017].

<sup>143</sup> BBC News. (2017). *Timeline: Siege of Srebrenica - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-18101028> [Accessed 28 Mar. 2017].

<sup>144</sup> BBC News. (2017). *Timeline: Siege of Srebrenica - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-18101028> [Accessed 28 Mar. 2017].

keeping forces, and the Dutch commander asked the assistance of UN in the means of “close air support,” yet both of the requests were refused.<sup>145</sup>

On July 9, 1995, Serbian forces started to augment their shellings, they attacked Dutch observation posts, and took hostage about 30 soldiers in the area.<sup>146</sup> Refugees started to flee to the southern camps as a result of the Serbian upswing.<sup>147</sup>

On July 10, another request regarding the UN air support was filed by the Dutch Commander Col Karremans, and it was refused right after by the UN Commander Gen Janvier.<sup>148</sup> Because the shellings towards the Dutch positions were too far from being stopped, another request regarding air support of the UN made by the colonel was finally agreed.<sup>149</sup> However, Serbian attacks stopped before the arrival of the planes.<sup>150</sup>

On the night of the same day, there were still 4,000 refugees in the town. In the chaotic environment, “*the crowds were gathered around the Dutch positions.*”<sup>151</sup> It was told to the town leaders by the Peacekeepers that NATO would intervene the situation by launching massive air attacks if the Serbian forces would not withdrawn from Srebrenica till the morning.<sup>152</sup>

Though, the withdrawal did not happen on July 11. Besides, Col Karamens were informed by the UN Headquarter of Sarajevo that his request regarding the air support was filed in a wrong form at 09:00, therefore he needed to resubmit it in order to achieve backup.<sup>153</sup> He resubmitted his request right along, and the request was received by Gen Janvier at 10:30.<sup>154</sup> Still, NATO could not directly launched its air strikes, because its planes, which were airborne since 06:00, had to return their base in Italy to refuel.<sup>155</sup>

Around noon, more than 20,000 refugees, mostly consisted of women, children and the infirm were located to another Dutch base which is to be considered safer.<sup>156</sup>

At 14:30, two Dutch F-16 fighters bombed Bosnian Serb positions located around

<sup>145</sup> BBC News. (2017). *Timeline: Siege of Srebrenica - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-18101028> [Accessed 28 Mar. 2017].

<sup>146</sup> BBC News. (2017). *Timeline: Siege of Srebrenica - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-18101028> [Accessed 28 Mar. 2017].

<sup>147</sup> BBC News. (2017). *Timeline: Siege of Srebrenica - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-18101028> [Accessed 28 Mar. 2017].

<sup>148</sup> BBC News. (2017). *Timeline: Siege of Srebrenica - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-18101028> [Accessed 28 Mar. 2017].

<sup>149</sup> BBC News. (2017). *Timeline: Siege of Srebrenica - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-18101028> [Accessed 28 Mar. 2017].

<sup>150</sup> BBC News. (2017). *Timeline: Siege of Srebrenica - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-18101028> [Accessed 28 Mar. 2017].

<sup>151</sup> BBC News. (2017). *Timeline: Siege of Srebrenica - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-18101028> [Accessed 28 Mar. 2017].

<sup>152</sup> BBC News. (2017). *Timeline: Siege of Srebrenica - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-18101028> [Accessed 28 Mar. 2017].

<sup>153</sup> BBC News. (2017). *Timeline: Siege of Srebrenica - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-18101028> [Accessed 28 Mar. 2017].

<sup>154</sup> BBC News. (2017). *Timeline: Siege of Srebrenica - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-18101028> [Accessed 28 Mar. 2017].

<sup>155</sup> BBC News. (2017). *Timeline: Siege of Srebrenica - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-18101028> [Accessed 28 Mar. 2017].

<sup>156</sup> BBC News. (2017). *Timeline: Siege of Srebrenica - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-18101028> [Accessed 28 Mar. 2017].

Srebrenica.<sup>157</sup> However, they were faced with threats regarding the killing of the Dutch hostages and shelling of the refugees by the Serbian forces, which later on led to the suspension of Dutch strikes.<sup>158</sup>

Around 16:30, Serbian commander Ratko Mladic entered into Srebrenica. At the same night, Gen Mladic released an ultimatum stating that the Muslims needed to deliver their weapons in exchange for their lives.<sup>159</sup>

On July 12, busses started replacing women and children to Muslim populated territories, meanwhile the males were being separated by the Serbian forces from age 12 to 77 for “interrogation for suspected war crimes.”<sup>160</sup> Around 23,000 women and children were deported, “*hundreds of men were held in trucks and warehouses*” in the following hours.<sup>161</sup>

About 15,000 Muslim fighters tried to flee from the area, but shelled after in the mountains.<sup>162</sup>

On July 13, first killings of unarmed Muslims were witnessed in the warehouses in Srebrenica.<sup>163</sup> Approximately 5,000 Muslims sheltering in the Dutch base at Potocari were handed over by the Peacekeeping forces in exchange of 14 Dutch peacekeepers who were taken hostage by the Serbs.<sup>164</sup>

On July 16, reports regarding “the Srebrenica Massacre” started to be released as the first survivors begin to arrive in Muslim-held territories.<sup>165</sup>

During the following days, while “*more than 7,000 Muslim men were thought to have been killed*” as the Serb forces outran Srebrenica, the Dutch Peacekeepers were permitted to leave the area “*leaving behind weapons, food, and medical supplies.*”<sup>166</sup>

### 3. JURISDICTION OF THE COURT

As the submissions for the case at hand has the nature of a request for a contentious procedure rather than a request for an advisory opinion, the jurisdiction of the court must be discussed under the category of contentious jurisdiction. On this fact, the court has to decide in accordance with international law only, on the legal dis-

<sup>157</sup> BBC News. (2017). *Timeline: Siege of Srebrenica - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-18101028> [Accessed 28 Mar. 2017].

<sup>158</sup> BBC News. (2017). *Timeline: Siege of Srebrenica - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-18101028> [Accessed 28 Mar. 2017].

<sup>159</sup> BBC News. (2017). *Timeline: Siege of Srebrenica - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-18101028> [Accessed 28 Mar. 2017].

<sup>160</sup> BBC News. (2017). *Timeline: Siege of Srebrenica - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-18101028> [Accessed 28 Mar. 2017].

<sup>161</sup> BBC News. (2017). *Timeline: Siege of Srebrenica - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-18101028> [Accessed 28 Mar. 2017].

<sup>162</sup> BBC News. (2017). *Timeline: Siege of Srebrenica - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-18101028> [Accessed 28 Mar. 2017].

<sup>163</sup> BBC News. (2017). *Timeline: Siege of Srebrenica - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-18101028> [Accessed 28 Mar. 2017].

<sup>164</sup> BBC News. (2017). *Timeline: Siege of Srebrenica - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-18101028> [Accessed 28 Mar. 2017].

<sup>165</sup> BBC News. (2017). *Timeline: Siege of Srebrenica - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-18101028> [Accessed 28 Mar. 2017].

<sup>166</sup> BBC News. (2017). *Timeline: Siege of Srebrenica - BBC News*. [online] Available at: <http://www.bbc.com/news/world-europe-18101028> [Accessed 28 Mar. 2017].

putes that are submitted by the party states.<sup>167</sup> As it can be seen from the explanation of the contentious jurisdiction, according to the Article 34 (1) of the Statute of the International Court of Justice, only states can be parties to the cases that are being seen by the Court. The Court does not have personal jurisdiction on *de jure*<sup>168</sup> or *de facto*<sup>169</sup> entities that are not categorized as states.

On the other hand, regarding the question of subject-matter jurisdiction, the explanation of the “legal disputes” that can be submitted to the Court will enlighten the situation. According to the Article 36 of the Statute of the ICJ, the Court has jurisdiction on “*the legal disputes concerning:*

- a. *the interpretation of a treaty;*
- b. *any question of international law;*
- c. *the existence of any fact which, if established, would constitute a breach of an international obligation;*
- d. *the nature or extent of the reparation to be made for the breach of an international obligation.”*<sup>170</sup>

As the Article explains itself clearly, there is nothing left for this guide to explain regarding the subject-matter jurisdiction of the Court, except adding the fact that the subjects listed in the Article are not mere examples but the only topics that can be submitted to the court.

At last, according to the Article 36 of the Statute of the ICJ, “*in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.*”<sup>171</sup>

For this case, the existence of the jurisdiction is not an established fact, but it is open for discussions during the trial. If the parties requests to examine the jurisdiction of the Court, the legal discussions must be made in the presence of substantial legal background; and the decision regarding the matter must be explained under legal justification.

## 4. APPLICABLE LAW

Article 38 (1) of the Statute of the ICJ explains the sources of law respectively, as it is organized as following:

<sup>167</sup> <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1>

<sup>168</sup> Latin for “in law.”

<sup>169</sup> Latin for “in fact.”

<sup>170</sup> Icj-cij.org. (2017). *Statute of the Court | International Court of Justice*. [online] Available at: <http://www.icj-cij.org/documents/?p1=4&p2=2> [Accessed 16 Jan. 2017].

<sup>171</sup> Icj-cij.org. (2017). *Statute of the Court | International Court of Justice*. [online] Available at: <http://www.icj-cij.org/documents/?p1=4&p2=2> [Accessed 16 Jan. 2017].

**Article 38**

“1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”<sup>172</sup>

This article does not limit the sources of international law, yet the ones that listed above are accepted as a whole list of reliable and reasonable sources; and mostly, they are the ones to lead the direction during the decision making phase of the ICJ trials.<sup>173</sup>

The Article does not follow a hierarchical order in listing the sources. Though, due to practical reasons the Court generally follows the order specified in the Article. That is because international conventions and treaties are the most dependable sources as they are certain evidences for the existence of the consent of states. Following, international custom is easier to disclose than general principles. And lastly, judicial decisions and teachings of the scholars are subsidiary sources since they are interpretations of original sources.<sup>174</sup>

Hence the meaning of the terms international convention and treaty is clear, there is benefit in explaining the other listed sources briefly.

International Custom is consisted of two elements: *usus* and *opinio juris sive necessitatis*. *Usus* being the consistent and recurring practice; while *opinio juris sive necessitatis* indicates the belief that the consistently observed practice is an obligatory rule of international law. Ultimately, a rule that is being followed by a state for a long time, consistently and recurrently, and if that state observes that practice as a legal obligation that practice is a custom for that state. When that custom is practiced by the international community under the same conditions, that conduct becomes an international custom.<sup>175</sup>

Moving on, general principals are the legal principles that are common to the legal

<sup>172</sup> Icj-cij.org. (2017). *Statute of the Court | International Court of Justice*. [online] Available at: <http://www.icj-cij.org/documents/?p1=4&p2=2> [Accessed 16 Jan. 2017].

<sup>173</sup> KİTAP!!! SAYFA 43

<sup>174</sup> KİTAP SAYFA 45

<sup>175</sup> KİTAP SAYFA 60

systems throughout the world.<sup>176</sup> Despite the Statute of the Court implied the criterion of being recognized by civilized nations in order a principle to gain the title “general,” that condition is challenged by the ICJ itself before, in the *North Sea Continental Shelf Case*. So today, the subject whether being recognized by civilized nations is enough for a principle to earn the title of “general principle” is argumentative.

Lastly, as the Article 38 also referred to the Article 59, “*the decision of the Court has no binding force except between the parties and in respect of that particular case.*”<sup>177</sup> As can be seen from the Article 59, even former decisions of the ICJ are not binding to the Court; but it is obvious that judicial decisions are significant sources while interpreting law.

This guide will examine the substantial sources of law for the subject case, though the participants of the Conference are welcomed to make their own research and use their additional information on any legal source during their contributions to the debate.

## a. The Convention on the Prevention and Punishment of the Crime of Genocide

The Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter will be referred as “the Convention”) was adopted on 9 December 1948 by the General Assembly of the UN.<sup>178</sup> The Convention was adopted on the belief that to cope with such an “*odious scourge*” international cooperation was needed. The Convention referred to the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946; which recognized genocide as a crime under international law that is condemn by the civilized world.<sup>179</sup> The same document also accepted that the crime of genocide is punishable whether the principals and accomplices are “*private individuals, public officials, or statesmen.*”<sup>180</sup>

The Convention, as a document adopted by a reference to the explained Resolution, explained the definition of genocide by accepting that it is a crime, shows the activities that are counted as genocide, and approves that genocide is punishable. The Convention bears the burden to the states that ratified it to abide by the articles; herewith, it is the first human rights convention adopted by the UN General Assembly.<sup>181</sup>

Explaining the Convention in detail, it is better to start with the definition of gen-

<sup>176</sup> KİTAP SAYFA 64

<sup>177</sup> Icj-cij.org. (2017). *Statute of the Court / International Court of Justice*. [online] Available at: <http://www.icj-cij.org/documents/?p1=4&p2=2> [Accessed 8 Feb. 2017].

<sup>178</sup> Anon, (2017). [online] Available at: <https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf> [Accessed 16 Jan. 2017].

<sup>179</sup> Team, O. (2017). *ODS HOME PAGE*. [online] Documents-dds-ny.un.org. Available at: <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NRO/033/47/IMG/NR003347.pdf?OpenElement> [Accessed 16 Jan. 2017].

<sup>180</sup> Team, O. (2017). *ODS HOME PAGE*. [online] Documents-dds-ny.un.org. Available at: <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NRO/033/47/IMG/NR003347.pdf?OpenElement> [Accessed 16 Jan. 2017].

<sup>181</sup> Legal.un.org. (2017). *United Nations Audiovisual Library of International Law*. [online] Available at: <http://legal.un.org/avl/ha/cppcg/cppcg.html> [Accessed 16 Jan. 2017].

ocide, which is of inconceivable importance for the discussions. Article II of the Convention, as the key provision to define genocide must be read, as following:

**Article II**

*“In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such :*

- (a) Killing members of the group;*
- (b) Causing serious bodily or mental harm to members of the group;*
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
- (d) Imposing measures intended to prevent births within the group;*
- (e) Forcibly transferring children of the group to another group.”*

According to this article, committing any of the acts listed above with a special intent (*dolus specialis*) to a protected group which has national, ethnical, racial, or religious characteristics falls under the crime of genocide.

In order for an act to be determined as genocide, the first question that needs to be answered is the existence of the mental element of the crime, which is intention. Intention is the absolute must in every crime, yet it is in a more special shape in genocide (specific intent, *dolus specialis*); accordingly, intent is harder to prove in the genocide cases.

It is not hard to comprehend that killing and causing serious bodily or mental harm which are mentioned in the Article II (a) and Article II (b) require *mens rea*, meaning a criminal intent, The wordings “*deliberately*,” “*intended*,” and “*forcibly*” written in the Article II (c),(d) and (e) shows that *mens rea* is also sought for the occurrence of the crime of genocide. *Mens rea*, is a mental element differing from the *dolus specialis*, meaning that the perpetrator is aware of the fact that his/her conduct is criminal.<sup>182</sup> Whereas, *dolus specialis* is one of the elements separates the crime of genocide from ordinary murders that do not have genocidal features.

*Dolus specialis* is explained as the intent to destroy, “*a national, ethnical, racial or religious group*,” “*in whole, or in part*” in the Article II. In this case, for example, killing members of a group intentionally, even though the actions are being taken by the per-

<sup>182</sup> TheFreeDictionary.com. (2017). *mens rea*. [online] Available at: <http://legal-dictionary.thefreedictionary.com/mens+rea> [Accessed 16 Jan. 2017].

petrator just because that group has a specific identity in the means of race, religion, or such does not show the presence of genocide solely. As stated by the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (hereinafter “ICTY” or “the Tribunal”), persecution and genocide seems quite similar, though, the matter of intent differs them. While both are being committed to specific groups because the victims are part of that group that has specific specialties, the acts that may be used to make those members of that group suffer can be verified in persecution, on the other hand, genocide is committed only for that group to be destroyed in whole, or in part; and every act of the perpetrator serves for this intent.<sup>183</sup> In result, the presence of *dolus specialis* must be examined carefully during the negotiations. The nonexistence of *dolus specialis* would annihilate the possibility of the presence of a genocide crime.

In believing that *dolus specialis* has been explained sufficiently, to move on to the definition of genocide, the meaning of a protected group must be explained. The discussions on how to spot the protected group is contentious even now. There are two ways to define a protected group: one being the positive definition, whereas the other being the negative definition. The positive definition is the one made by referring to the specific characteristics of the group, such as the race, religion or more. The negative definition though, focuses on the characteristics that the group does not have, for example “a group that is not believing the religion A.” The Applicant has to specify the protected group in order for the court to decide on the presence of a breach of a duty under the dues of the Convention. The Applicant may use one way or another while specifying the protected group, though it must be kept in mind that the theory of the need of a positive definition is more acceptable than the negative definition; and in the case the Court does not find that the protected group could not be specified sufficiently, there can be no judgment in favor of the presence of a genocide. So that, the Applicant has to show the protected group in detail to the court. The Applicant has to explain in detail that which characteristics of that protected group cause the perpetrator to commit genocide.<sup>184</sup>

Moving on, examining the second element of genocide, which is the existence of an action or actions; it must be noted that there are some criteria used by different courts in the examination of the interpretation of killing a protected group in part. These criteria will be explained briefly in this guide, however they are not mandatory measures that a court needs to observe. These criteria are different approaches to the situation and the Court is not bound with them, yet it might use the precedents if it sees them adequate. The Court is free to interpret the situation differently, or it is

<sup>183</sup> IT-95-16-T, Judgment, 14 January 2000, para. 636

<sup>184</sup> In case of a discussion on this matter during the trial, precedent cases can be researched to understand the topic better such as: Indictment, Trial of the Major War Criminals before the International Military Tribunal, Official Documents, Vol. 1, pp. 43 and 44 paragraph 198, and IT-97-24-A, Judgment, 22 March 2006, paras. 20-28

totally free for additional approaches to the ones already exists.

First theory suggests that the perpetrator must be acted upon a substantial part of the members of that group, as this is also supported by the rulings of the ICTY, and the International Criminal Tribunal for Rwanda.<sup>185</sup> It is clear that a killing of a person because of his/her religion, race, or such does not show the presence of genocide. Substantiality is a matter attached to this situation, the theory helps the sparing of an ordinary crime and genocide.

Secondly, there is the geographical approach that is widely accepted. According to this approach, in addition to the substantiality criterion, the genocide might be intended to be committed in a specific geographical area particularly. The perpetrator *“is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe.”*<sup>186</sup>

In this approach, mostly the control of the perpetrator in the area is sought for and the opportunity that is available to the perpetrator is important.<sup>187</sup>

The third criterion is more controversial than the others. It suggests the analysis of the situation to be more focused on qualitative measures, rather than quantitative ones. According to this approach, even though a small part of the targeted group is intended and effected by the actions of the perpetrator, if that small portion of the group is enormously important to the targeted group because that group is *“emblematic”* or *“essential to the survival”* of the protected group; than the condition of the destruction in part is satisfied.<sup>188</sup>

As explained, the Court will discuss the matters of intent and acts of the perpetrator in order to find out the existence or nonexistence of genocide during the discussions depending on the information below and the additional legal sources that the judges found in relation with the Article 38 of the Statute of the Court, explaining the sources of international law.

Article II explains the definition of genocide, meanwhile Article I explains the responsibility of the states that have ratified the Convention as following:

#### **Article I**

*“The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.”*

Article I of the Convention starts with the recognition of genocide as a crime under international law. In the definition, it is stated that the genocide is a crime both during time of peace and time of war, as a point that genocide crime differs from the crimes

<sup>185</sup> e.g. Krstić, IT-98-33-A, Appeals Chamber Judgment, 19 April 2004, paras. 8-11 and the cases of Kayishema, Byilishema, and Semanza

<sup>186</sup> In the words of the ILC, BUL, CITE ET. judgment para 199

<sup>187</sup> Krstić, IT-98-33-A, Judgment, 19 April 2004, para. 13

<sup>188</sup> IT-98-33-A, Judgment, 19 April 2004, para. 12

against humanity which is a crime that can be committed only in time of war.<sup>189</sup>

The second important aspect is the question whether this article can be imposed on states as them being perpetrators or not, since it is a crucial issue in this case because the case is brought against the government of Serbia, but not an individual actor. The Court has to determine whether this article only burdens the states to prevent and punish individuals outside the legal entity of the state itself; or the states can also be perpetrators of the crime of genocide and therefore they can breach the Convention by themselves committing the acts specified. In case of the Court to decide in favor of the first likelihood, there can not be a breach of the Convention, but in the other prospect, the discussions on genocide will continue.

The third aspect is designating the legal status of this article, whether it has a criminal law, or contracts law nature. The Article talks about the recognition of an act as a crime fronting criminal law, yet it also brings a contractual relationship and it gave obligations to the ratified states. Identifying the legal status of the responsibility brought in this Article is in crucial importance in determining the weight of the burden of proof. As it will be explained later, while examining the evidences, the responsibility of proving a failure of criminal law is much heavier than the responsibility of proving a breach of a contractual duty.

Lastly, elucidating the identification of the parties is one of the keys of the application of this article to the facts. The court needs to consider whether the parties to the case are contracting parties or not, also as a matter of jurisdiction. In the case that the Court believes that the parties of the case are not parties to the Convention, than there is lack of jurisdiction, if otherwise, the discussions will continue.

Moving on, Article III, IV, V, and VI are not directly related to the case, though they have secondary appendage to the legal discussions. Because the articles are complementary to themselves, they will not be analyzed one by one, but they will be explained together:

### **Article III**

*“The following acts shall be punishable:*

*(a) Genocide;*

*(b) Conspiracy to commit genocide;*

*(c) Direct and public incitement to commit genocide;*

*(d) Attempt to commit genocide;*

<sup>189</sup> Legal.un.org. (2017). *United Nations Audiovisual Library of International Law*. [online] Available at: <http://legal.un.org/avl/ha/cppcg/cppcg.html> [Accessed 16 Jan. 2017].

(e) *Complicity in genocide.*”

**Article IV**

*“Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”*

**Article V**

*“The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in article III.”*

**Article VI**

*“Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”*

These Articles basically define the acts that must be punishable, and it gives the duty to reorganize the domestic law of the contracting states accordingly with this recognition of the punishable acts. At this point, Article VI recognizes the jurisdiction of a territorial or international penal tribunal, when the contracting parties consented to it in case of a genocide committed. International Criminal Tribunal for former Yugoslavia, which is continuing to its discussions during proceedings of this case, is also a reflection of this article.

Coming to the actual point that matters for this case, the Article IV states that even when the *“constitutionally responsible rulers,”* or *“public officials”* commits the act of genocide or the acts enumerated in Article III, regardless of their status their actions will be punishable according to this Convention. This Article takes us to the same question asked during the examination of Article I: Does this Convention accept the perpetrator to be a legal entity of a government as well as natural persons, and if so, are the actions of a government also punishable? The Court will decide on the matter accordingly to the legal interpretation methods also explained in this guide; and the international law findings of the judges in relation with the Article 38 of the Statute of the Court.

In the expectation of the Court to decide that this Convention burdens the governments as well, to not to commit genocide or the actions listed in the Article III; there

is the question of which court to decide on the punishment. At this point, the judges are asked to remember that ICJ is not a criminal court that can decide on criminal measures on punishment. Though, accepting the possibility of the punishability of the states according to this Convention means a burden to the states to not to commit the mentioned actions as a responsibility tied to the contractual relationship of the parties. Therefore, the Court can decide that there is a breach of the Convention, and ask for damages by the party breaching.

Furthermore, the last article that is strictly related to this case is the Article IX. The rest of the Convention is about the procedural points such as signatories, ratifications and as such.

### **Article IX**

*“Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.”*

This article is the basis of the jurisdiction of the International Court of Justice. The question of whether the parties are contracting parties to this Convention or not was already discussed during the examination of the Article I. In case it is decided by the Court, that the parties of the suit are also parties to this Convention, the Court has the jurisdiction over the case. In controversy, the Court will not have jurisdiction over the allegations brought in relation with this Convention.

Furthermore, this article gives the court the power to interpret state responsibility over genocide and the actions enumerated in the Article III, therefore it is supportive for the legal discussions on whether the state itself is responsible for its own actions as a legal entity mentioned above.

## **5. LEGAL PRINCIPLES REGARDING THE BURDEN OF PROOF, STANDARD OF PROOF, AND THE METHODS OF PROOF**

### **a. The Burden of Proof**

As a principal rule of law, the burden of proof is on the party which asserted claims, in this case it is on the Applicant, as also mentioned in the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* as a precedent. Besides, in case of a reverse allegation by the Respondent, the burden

of proof would be on the Respondent as they would be the party asserting the claims in this case. The Court needs to be reminded of this in every phase of the Court, in addition to the principal, that till a fact is proven, it is not accepted by the Court as a substantial base to the judgment.

## b. The Standard of Proof

As explained before, accepting that the case has a contract law nature, the standard of proof will have a lower degree of difficulty to the party which has the burden of proof. On this fact, it is established that for an allegation regarding a breach of treaty obligations, the standard of proof is the balance evidence, or the balance of probabilities. Balance of probabilities demands the court to decide on the matter which is more probable, or most probably true by comparing the evidences.<sup>190</sup>

On the other hand, the theory that the Convention has a value of criminal law, emphasizes an exceptionally gravitational responsibility to the Respondent party. If the court decides coherent to this argument, in order to serve justice to the both parties, because the consequences of the judgment will be inevitably serious to the Respondent party, the proper standard of proof must be beyond a reasonable doubt. The definition of beyond a reasonable doubt can be made as the situation *“that no other logical explanation can be derived*

*from the facts except that the defendant committed the crime, thereby overcoming the presumption that a person is innocent until proven guilty.”*<sup>191</sup>

According to the decision of the Court regarding the legal status of the Convention, the standard of proof will transform. To define the legal status, the advocates and the justices need to rake through the precedents of the ICJ to determine if there is a stance of the Court already, and the methods of interpretation must be used during the deliberations.

Either way, the justices need to consider the standard of proof while analyzing the evidences.

## c. The Methods of Proof

Any kind of material that supports the claims of the parties; such as UN Resolutions, Reports, Photographs, videos, and more are acceptable. Also, the parties can use the documents of International Criminal Tribunal for former Yugoslavia, as a case ongoing during the proceedings of this case of the ICJ.

The Justices are expected to examine the evidences in the matters of reliability, impartiality, and accuracy. Even the documents of ICTY are open for discussion on this

<sup>190</sup> TheFreeDictionary.com. (2017). *balance of probabilities*. [online] Available at: <http://legal-dictionary.thefreedictionary.com/balance+of+probabilities> [Accessed 22 Jan. 2017].

<sup>191</sup> TheFreeDictionary.com. (2017). *beyond a reasonable doubt*. [online] Available at: <http://legal-dictionary.thefreedictionary.com/beyond+a+reasonable+doubt> [Accessed 22 Jan. 2017].

matter, and the Justices are free to navigate their negotiations according to their opinions as long as they are substantiated by legal knowledge and rationale reasoning.

## 6. PROCEDURAL HISTORY OF THE CASE

On 20 March 1993, the documents named as the Application Instituting Proceedings and the Request for the Indication of Provisional Measures of Protection submitted by the Government of the Republic of Bosnia and Herzegovina was filed in the registry of the Court. In these documents, Bosnia and Herzegovina firstly claimed that the International Court of Justice had jurisdiction over the case on the reasons listed:

1. The former Yugoslavia signed the Genocide Convention on 11 December 1948, and deposited an instrument of ratification on 29 August 1950. There were no reservations stated in that time period. Thereby, as successor states, both the Republic of Bosnia and Herzegovina and Yugoslavia (Serbia and Montenegro) are parties to the Convention.
2. Besides, according to the allegations of Bosnia and Herzegovina, On 29 December 1992, Muhamed Sacirbey, Ambassador and Permanent Representative of the Republic of Bosnia and Herzegovina to the United Nations, conveyed a letter which was typed by Dr. Haris Silajdzic, Minister for Foreign Affairs of the Republic of Bosnia and Herzegovina. The letter contained a Notice of Succession regarding the Genocide Convention. According to this letter, Yugoslavia stated that it would start carrying on the duties arising from the Genocide Convention from the date of March 6, 1992.
3. This notification was in accordance with the general principles of law allegedly. Bosnia and Herzegovina claimed that the Vienna Convention on Succession of States in Respect of Treaties of 23 August 1978 was the codification of those general principles; and specifically Articles 17, 22, 23, and 34 imposed liability to the Yugoslavia (Serbia and Montenegro) in the means of a commitment to the responsibilities deriving from the Convention. In addition, Bosnia and Herzegovina stated that “Yugoslavia signed this Vienna Convention on 6 February 1979, and deposited an instrument of ratification for this Vienna Convention on 28 April 1980.”<sup>192</sup>
4. Because of the reasons stated above, Bosnia and Herzegovina claimed that the Genocide Convention was in force both in the Federal Republic of Yugoslavia and Bosnia and Herzegovina during the alleged violations of the Genocide Convention.
5. Furthermore, according to the Article 3 of the UN Charter, the former Yugoslavia became an original member of the UN when it attained to the San Francisco Conference.

<sup>192</sup> Anon, (2017). [online] Available at: <http://www.icj-cij.org/docket/files/91/7199.pdf> [Accessed 23 Feb. 2017].

6. In addition, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro pronounced that they will abide by the international commitments of the former Yugoslavia via adopting a declaration on 27 April 1992.<sup>193</sup>
7. As a result, according to the Article 36 (1) of the Statute of the ICJ and to the declaration dated 27 April 1992, both Bosnia and Herzegovina and Yugoslavia (Serbia and Montenegro) were parties to the Statute of the Court, as members of the UN.

After claiming that the ICJ has jurisdiction over the case, in its Request, Bosnia and Herzegovina made these assertions in their Request:

1. The Federal Republic of Yugoslavia has breached, and breaching its responsibilities rising from the Genocide Convention that they declared to be bound with before the violations. To be more specific, Yugoslavia breached its duty to comply with the terms of the Genocide Convention, it *“has planned, prepared, conspired, promoted, encouraged, aided and abetted and committed genocide against the People and State of Bosnia and Herzegovina.”*<sup>194</sup> Likewise, The Federal Republic of Yugoslavia failed to perform its duty to prevent and punish the ones responsible for the mentioned actions as well.
2. Yugoslavia has been violating the legal obligations deriving from *“the four Geneva Conventions of 1949, the Additional Protocol 1 of 1997, customary international laws of war including the Hague Regulations on Land Warfare of 1907, and other fundamental principles of international humanitarian law against the Bosnian State”* and its People<sup>195</sup>.
3. Yugoslavia continuously violates *“Articles 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26 and 28 of the Universal Declaration of Human Rights with respect to the citizens of Bosnia and Herzegovina.”*<sup>196</sup>
4. Because of the reasons listed above, Yugoslavia needed to *“cease and desist from such activities immediately”* via an indication interim measures of protection from the Court.<sup>197</sup> The Plaintiff, Bosnia and Herzegovina also asked Yugoslavia to pay reparations as *parens patriae*<sup>198</sup> for the damages to persons and property, and to the Bosnian economy in their Request.<sup>199</sup> Bosnia and Herzegovina reserved its right to pronounce the precise amount of the damages for

<sup>193</sup> Anon, (2017). [online] Available at: <http://www.icj-cij.org/docket/files/91/7199.pdf> [Accessed 23 Feb. 2017].

<sup>194</sup> Anon, (2017). [online] Available at: <http://www.icj-cij.org/docket/files/91/7199.pdf> [Accessed 26 Feb. 2017].

<sup>195</sup> Anon, (2017). [online] Available at: <http://www.icj-cij.org/docket/files/91/7335.pdf> [Accessed 26 Feb. 2017].

<sup>196</sup> Anon, (2017). [online] Available at: <http://www.icj-cij.org/docket/files/91/7335.pdf> [Accessed 26 Feb. 2017].

<sup>197</sup> Anon, (2017). [online] Available at: <http://www.icj-cij.org/docket/files/91/7199.pdf> [Accessed 26 Feb. 2017].

<sup>198</sup> *“Latin for “father of his country,” This authority is intended to further the public trust, safeguard the general and economic welfare of a state’s residents, protect residents from illegal practices, and assure that the benefits of federal law are not denied to the general population. States may also invoke parens patriae to protect interests such as the health, comfort, and welfare of the people, interstate water Rights, and the general economy of the state.”* TheFreeDictionary.com. (2017). parens patriae. [online] Available at: <http://legal-dictionary.thefreedictionary.com/parens+patriae> [Accessed 26 Feb. 2017].

<sup>199</sup> Anon, (2017). [online] Available at: <http://www.icj-cij.org/docket/files/91/7199.pdf> [Accessed 26 Feb. 2017].

the future proceedings.

Till 25 August 1995, Bosnia and Herzegovina keep issuing Supplementary Submissions, additional documents, and Amendments regarding their application. Mostly evidences regarding the factual claims and the existence of the jurisdiction of the Court were given by these documents.

Afterwards, on 10 August 1993, Yugoslavia submitted its Request for the Indication of Provisional Measures.

In the Order of 8 April 1993, the Court discussed the issues presented before it by the parties. The Court ordered that the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should “*immediately*” take the necessary measures in the prevention of the crime of genocide based on its undertakings in the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>200</sup>

Secondly, the Court ruled that the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should ensure that any military, paramilitary, or irregular armed units, individual persons or organizations, which are under the control or influence of Yugoslavia must be stopped to commit the act of genocide, or the other actions that are counted in the Convention as punishable.<sup>201</sup>

Finally, the Court order the Federal Republic of Yugoslavia (Serbia and Montenegro) to prevent any action that may interfuse the issue further in the means of the dispute over the prevention and punishment of the crime of genocide.

On 13 September 1993, the Court ordered an interim order of provisional measures. In this document, the Court reaffirmed the actions it took in its order issued on April 8, 1993. The Court held that “*the present perilous situation demands, not an indication of provisional measures additional to those indicated by the Court’s Order of 8 April 1993, but immediate and effective implementation of those measures.*”<sup>202</sup>

Moreover, “*the Court pointed out that it had prima facie jurisdiction in this case to order interim measures only within the scope of the jurisdiction conferred on it by the Convention on the Prevention and Punishment of the Crime of Genocide.*”<sup>203</sup>

On 16 April 1993, the Court issued another order regarding a procedural matter, the *time* limits of the Memorial and Counter-Memorial.

On 13 September 1993, the Court issued an order regarding the requests for the indication of Provisional Measures.

Following 4 orders issued by the Court were about the fixing of the time limits as well.

Even though, Bosnia and Herzegovina directed towards to Yugoslavia regarding other claims about alternative liabilities arising from international law, such as; human

<sup>200</sup> Anon, (2017). [online] Available at: <http://www.icj-cij.org/docket/files/91/7369.pdf> [Accessed 9 Feb. 2017].

<sup>201</sup> Anon, (2017). [online] Available at: <http://www.icj-cij.org/docket/files/91/7369.pdf> [Accessed 9 Feb. 2017].

<sup>202</sup> Anon, (2017). [online] Available at: <http://www.icj-cij.org/docket/files/91/7313.pdf> [Accessed 1 Mar. 2017].

<sup>203</sup> Anon, (2017). [online] Available at: <http://www.icj-cij.org/docket/files/91/7313.pdf> [Accessed 1 Mar. 2017].

rights violations, war crimes, and crimes against humanity, because the membership of Yugoslavia in the time of the alleged violations was unclear, the Court did not examine the issue in its proceedings. Along with its decision to declare the existence of the *prima facie jurisdiction*, the Court neither talk about the other claims, nor enlighten the question of jurisdiction positively, or negatively. Therefore, the matter is open for discussion in the oral hearings that will going to take place in the Hague-SimA.

Following, in its preliminary objection regarding to the legitimacy of the Applicant submitted on 26 June, 1995, Yugoslavia challenged the jurisdiction of the Court in the means of *ratione personae*<sup>204</sup> and *ratione materiae*.<sup>205</sup> The claims regarding the jurisdiction *ratione materiae* can be summarized as:

1. The Convention imposed the duty “to prevent and to punish the crime of genocide” by the means of functioning its legislation correctly and effectively according to the Article 1 and Article 5, which means that the party have to have territorial jurisdiction over the areas to be responsible from the breaches that occurred. The Respondent state had no territorial jurisdiction over the allegedly relevant areas, therefore there is not a conflict existed based on the Convention in the means of Article IX that gives jurisdiction to the Court.<sup>206</sup>
2. The Convention burdens the states that have ratified it, only “to prevent and to punish the crime of genocide” that is committed by individual persons. The states themselves can not be responsible as perpetrators according to the clear language of the Convention.<sup>207</sup>
3. Two of the allegations explained above are the reasons that Article 10 of the Convention can not be invoked here, and the Court does not have jurisdiction *ratione materiae* as an outcome.
4. If the Court would not accept the arguments of Yugoslavia regarding the lack of jurisdiction, then the jurisdiction of the Court could have only started on March 29, 1993; as it is the date that the deposit of the Convention was given in pursuant to the Article XII of the Convention.

Apart from its legal arguments regarding the matter of jurisdiction, the Federal Republic of Yugoslavia “reserved its rights to supplement or amend its submissions in the further pleadings”<sup>208</sup>

On 15 April 1994, Bosnia and Herzegovina submitted its Memorial.

<sup>204</sup> “A court’s power to bring a person into its adjudicative process. It is the jurisdiction over a defendant’s personal rights, rather than merely over property interests.” US Legal, I. (2017). *Jurisdiction Ratione Personae Law and Legal Definition* | USLegal, Inc.. [online] Definitions.uslegal.com. Available at: <https://definitions.uslegal.com/j/jurisdiction-ratione-personae/> [Accessed 9 Feb. 2017].

<sup>205</sup> “The court’s authority to decide a particular case. It is the jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things.” US Legal, I. (2017). *Jurisdiction Ratione Materiae Law and Legal Definition* | USLegal, Inc.. [online] Definitions.uslegal.com. Available at: <https://definitions.uslegal.com/j/jurisdiction-ratione-materiae/> [Accessed 9 Feb. 2017].

<sup>206</sup> Anon, (2017). [online] Available at: <http://www.icj-cij.org/docket/files/91/8618.pdf> [Accessed 26 Feb. 2017].

<sup>207</sup> Anon, (2017). [online] Available at: <http://www.icj-cij.org/docket/files/91/8618.pdf> [Accessed 26 Feb. 2017].

<sup>208</sup> Anon, (2017). [online] Available at: <http://www.icj-cij.org/docket/files/91/7349.pdf> [Accessed 1 Mar. 2017].

In order, Counter-Memorial of the Federal Republic of Yugoslavia was submitted on 22 July 1997.

On 14 November 1995, the Government of the Republic of Bosnia and Herzegovina made a statement on Preliminary Objections to the Court.

On 11 July 1996, the Court finally made its judgment regarding the preliminary objections submitted in the cause of the case. In this judgment, the preliminary objections raised by Yugoslavia were rejected by the Court. Additionally the Court decided that the Application of Bosnia and Herzegovina was admissible.<sup>209</sup>

On 24 April 2001, the Federal Republic of Yugoslavia filed an Application instituting proceedings for the revision of the Judgment of 11 July 1996 which rejected the preliminary objections of Yugoslavia and found the application of Bosnia and Herzegovina admissible.

On 3 February 2003, the Court found the application of Yugoslavia inadmissible.<sup>210</sup>

In this way, the Court will hear the oral submissions starting from 27 February 2006, in the city Hague-SimA.

<sup>209</sup> Anon, (2017). [online] Available at: <http://www.icj-cij.org/docket/files/91/7351.pdf> [Accessed 2 Mar. 2017].

<sup>210</sup> Icj-cij.org. (2017). *International Court of Justice*. [online] Available at: <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=122&code=ybh&p3=5> [Accessed 2 Mar. 2017].





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