



7th Americas Model United Nations INTERNATIONAL COURT OF JUSTICE

Honorable Judges,

Choosing the International Court of Justice (ICJ) means facing the challenge of interacting in an exceptionally high-level debate. And that is one of the reasons why I enjoy this committee so much. The complexity and sophistication, both inherent within international law, make the ICJ such an astonishing committee. It is in this state of mind that I welcome you with a great pleasure to the ICJ.

I would just like to take a moment to briefly introduce myself. My name is Adam Jaime Muniz, or Judge Muniz, as we will be calling ourselves during AMUN. But please leave this kind of formality only for the simulation; call me by my first when we are out of session. I am a fourth year student at Universidade de Brasília (UnB), studying International Relations with a special interest in International Law. I also studied Law for two and a half years – because of that I call myself an *international law student*.

This is a special year for me. Firstly because I am heading this committee. Secondly because my graduation in International Relations is in the end of the year. About Law, only God knows it. Thirdly because this year, exactly two days after the end of AMUN, I will be going to The Hague for the summer course on Public International Law at The Hague Academy of International Law. I am sure our simulation will help me a lot before going to the Netherlands.

For this year we will have two very interesting topics on the docket, embracing the two roles of the ICJ, which are to give advisory opinions and to judge contentious cases between States. For the advisory jurisdiction, there is this hypothetical request by the General Assembly for an advisory opinion on the question of the legality of the threat or use of force by International Organizations without the Security Council authorization. For the contentious one, we will face the case that has been on the real docket of the Court for more than eleven years now: the application of the Genocide Convention, instituted by Bosnia and Herzegovina against Yugoslavia (now Serbia and Montenegro). I hope you enjoy researching on these themes. I hope that you will find these topics to be both interesting and thought provoking.

Finally, there are some acknowledgements that have to be made. I must thank Marina Costa and Melina Maia for their reliance on me when giving me the ICJ to chair. I also would like to thank Judge Antônio Augusto Cançado Trindade, my professor at UnB and great inspiring figure. I also must thank Professor Márcio Garcia, associated-researcher at the International Relations Institute of UnB, for his devoted assistance. At last but definitely not at least, my acknowledgements go to two excellent friends, Maria Helena Notari and Sheila Khattak, ICJ's assistants, whose effort and dedication are responsible for an important part of the success of this committee.

I cannot hide I feel at the same time thrilled and excited to be directing this committee and I and sure we are going to have a wonderful time during AMUN. If you have any question please don't hesitate to e-mail me at any time (icj@amun.com.br); I will be pleased to give you a hand. Comments on the Study Guide are also very welcome.

I am very much looking forward to meeting you next July in Brasília.

Truly Yours,

A handwritten signature in black ink, appearing to read "Adam Jaime Muniz".

Adam Jaime Muniz

AN OVERVIEW OF THE WORLD COURT

By Adam Jaime Muniz

INTRODUCTION

'International law doesn't exist!' One will probably hear this assertion whenever a treaty is arbitrarily denounced or whenever a conflict strikes clearly breaching a convention. Some claim that the environment of international politics is that of a loose anarchy in which no superior political authority exists to compel the observance of the law and, therefore, this 'thing' named international law cannot be called in fact law. On the other hand, the escalating interdependence in contemporary world politics and economics proves that international actors more than ever need to regulate the relations among themselves. Increasing relations mean a greater likelihood towards conflicts – as no one can enter a conflict alone. Therefore, international regulation is not a matter of choice, but of necessity, and the compliance to international law is much more frequent than what the public opinion ordinarily believes.

Every time two or more international actors have any disagreement on a certain subject, international law is invoked. There are many ways in which any divergence can be solved peacefully. Nevertheless, the moment at which the parties to a legal controversy believe that the preferred solution to an issue is to have it resolved authoritatively by a third party, the possibility for an international tribunal to act arises. Adjudication to an international judicial body is certainly the most highly structured method of dispute resolution.

Understanding the 'Thing'

The preliminary question, and perhaps the most difficult one, that we have to answer is: what is an international judicial body, this thing that will be fundamental in the following pages? The answer is, on the contrary so simple, that we do not know it. Even though we are able to recognize an international judicial body every time we come across one, it is very troublesome indeed to define it and we shall leave it to the appropriate opportunity.

But why does it happen? In the past it was quite easy to have a single definition of international judicial body, because, although there were some local initiatives of inter-State adjudication¹, there was only one true international tribunal², a permanent bench of judges, to settle disputes in the international scenario, and that was the Permanent Court of International Justice (PCIJ), the predecessor of the current International Court of Justice (ICJ). However, in the present days, the human creativity has made up so many different types of leading to a solution the various kinds of legal problems that it is almost impossible to bring them all to a single concept.

¹ The Central American Court of Justice (*Corte de Justicia Centroamericana*) was established in 1907.

² Most of contemporary international publicists agree that there is no practical difference in calling an international judicial body court or tribunal.

HISTORY OF THE COURT

A long, long time ago...

International adjudication has its roots in international arbitration. We can establish three phases for the modern history of international arbitration. The first phase is generally recognized as dating from 1794 with the Jay Treaty, between the United States and Great Britain, which established decision making bodies consisted of American and British nationals to settle disputes that could arise from this treaty.³ However, the first true third-party arbitration case, known as *The Alabama Claims*, is considered just in 1872. Under the Treaty of Washington of 1871, the United States and the United Kingdom agree to submit to arbitration claims by the former alleged breaches of neutrality by the latter during the American Civil War. Five judges were chosen, one from the US and the UK, and three from neutral States (Brazil, Italy and Switzerland). The judges ruled in favor of the United States and the award of the arbitral tribunal ordered the United Kingdom to pay compensation. The proceedings served as a demonstration of the effectiveness of arbitration in the settlement of a major dispute and it led to various developments in international arbitration.

The Hague Peace Conferences of 1899 and 1907 marked the beginning of a third phase in the modern history of international arbitration. The impetus to create a more permanent world court for the international community developed as a result of the atmosphere created by these conferences.

In 1899 the countries in the Conference adopted the Convention on the Pacific Settlement of International Disputes that set the provision for the creation of permanent machinery which would enable arbitral tribunals to be set up as desired and would facilitate their work. This institution, known as the Permanent Court of Arbitration, was established in 1900 and began operating in 1902. At the Second Hague Peace Conference, in 1907, to which the States of Central and Southern America were also invited, unlike the first one, the delegates decided to revise that Convention and improved the rules governing arbitral proceedings. The Permanent Court of Arbitration was an important step in the consolidation of the current international legal system.

Nonetheless, at the end of World War I, with the establishment of the League of Nations a concrete shape was given to the idea of a permanent international judicial body, namely the PCIJ, as we said. The shape of the PCIJ was given by the League of Nations, whose Covenant ruled the creation of an international judicial body competent not only to hear and determine any dispute among States, but also to give advisory opinions at the request of the Council or the Assembly of the League. The Statute, which governed the operation of the PCIJ, was however an instrument independent from the Covenant of the League of Nations. The PCIJ was established with 15 judges elected by the Assembly and the Council of the League of Nations; they represented the main forms of civilization and the principal forms of legal systems of the world. The PCIJ, which came into operation in 1922 and ceased functioning in 1940 with the outbreak of World War II, dealt with 29 contentious cases and gave 27 advisory opinions.

The PCIJ was formally dissolved in 1946, followed by a decision at the San Francisco Conference to create a new world court – the ICJ – on the same lines as its predecessor, but as a the principal judicial organ of the United Nations. Contrary to the Statute of the PCIJ, the Statute of the ICJ is part of the Charter of the United Nations (Article 92 of the UN Charter).

³ The Jay Treaty was a treaty of amity, commerce and navigation, a very common sort of treaty at that time until the first half of last century.

THE ORGANIZATION OF THE COURT

The ICJ, as it is a continuation of the PCIJ, is also composed of 15 judges elected for a period of nine years and no more than one national of any State may be a member of the Court. The Court elects, for a term of three years, the President and Vice-President of the Court and is assisted by a Registry, headed by a Registrar.

In order to maintain equality in the status of the parties, the Statute provides that when any of the parties does not have a judge of its nationality sitting on the bench, it may choose an *ad hoc* judge to sit in the case, who should be a national of the party. *Ad hoc* judges so chosen by the parties have the same rights and duties as the members of the Court during the proceedings.

JURISDICTION OF THE COURT

The ICJ possesses two sorts of jurisdiction, as many other international judicial bodies, which are the contentious and the advisory jurisdictions. Contentious jurisdiction involves States that submit the dispute by consent to the Court for a binding decision. Advisory jurisdiction, on the other hand, concerns questions referred to the Court by duly authorised International Organizations (like the General Assembly, the Security Council, UNESCO, WHO, among others)⁴ of the UN System. These questions can only refer to legal questions arising within the scope of their constitutive purposes. Although advisory opinions given by the ICJ are not binding, there are certain instruments or regulations that can, however, provide in advance that the advisory opinion shall be binding.

The basis for jurisdiction in contentious cases is the consent of the States⁵ parties to a dispute. Consent can be expressed in one of the following ways:

Special Agreement: Also called by the French word *compromis*, the special agreements are, as the name implies, agreements between two States to submit their dispute to the ICJ after it has arisen.

Jurisdictional Clause: Including a jurisdictional clause in a treaty has become commonplace in the international practice and is another way of conferring jurisdiction on the Court. Through a compromissory clause⁶ the State party to the treaty agrees, in advance, to submit to the ICJ any dispute concerning the implementation and interpretation of the treaty.

Declaration of Acceptance: Provided under Article 36(2)⁷ of the Statute, the ICJ may also have jurisdiction by virtue of declarations made by States recognizing the Court's compulsory jurisdiction in relation to any other State accepting the same obligation in all or specific legal disputes.

There is also the doctrine of *Forum Prorogatum* in accordance to which the Court infers the consent of the State, expressed in an implied or informal way or by a succession of acts, and after the case has been brought before it.

⁴ Find the complete list of bodies (five UN organs and sixteen specialized agencies of the UN family) at present authorized to request advisory opinions of the Court at: <<http://www.icj-cij.org>>.

⁵ Individuals are not able to be applicants in any dispute in the ICJ. However, States can act in proceedings in order to protect the interests of their nationals involved in an international dispute.

⁶ Article X of the Genocide Convention (1948) is a good example of compromissory clauses. See: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* below.

⁷ Article 36(2) is also called *Optional Clause of Compulsory Jurisdiction* or *Raul Fernandes Clause*. Raul Fernandes was a brilliant Brazilian publicist that developed this idea of a clause whose acceptance should imply a binding jurisdiction. Unfortunately he is rarely mentioned as the drafter of this clause at the time of the creation of the League of Nations.

The applicable law for matters before the ICJ is undoubtedly international law. Article 38 of the Statute is worldwide famous in international law classes for teaching the sources of international law. According to it, the Court is required to 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”.⁸

Further, while the primary function of the Court is to settle the dispute in accordance with international law, Article 38(2) gives power to the Court to decide a dispute *ex aequo et bono*, that is on the basis of equity, if the parties agree.

CLOSING REMARKS

These brief lines may provide us with some general ideas about how the world's main international judicial body – the ICJ – works. This introductory text is aimed at giving the necessary basis for a good understanding of the following pages, which deal with themes that are being or could be dealt by the Court. Nevertheless, we encourage the readers to browse over the Court's website or any of the books listed in the bibliography to find more detailed information about the ICJ.

Besides the ICJ, there are currently more than nine international judicial bodies⁹ in the world, and there are not few projects for future courts and tribunals. This growing process of adjudication in international relations shows that States are progressively accepting the settlement of their international disputes by the authoritative decision of a court. So, for those realists who believe international law does not exist or should not be called *law*, this is just one of the many evidences that compliance to the rule of law is more paramount than ordinarily imagined.

BIBLIOGRAPHY

BROWNLIE, Ian. *Principles of Public International Law*. Oxford University Press, 5th Ed., 2002.

CASSESE, Antonio. *International Law*. Oxford University Press, 2001.

INTERNATIONAL Court of Justice. *The Court at a Glance: general information*. At: <<http://www.icj-cij.org>>.

⁸ See the Statute of the Court at: <<http://www.icj-cij.org/basicdocuments/statute>>.

⁹ Namely, the Permanent Court of Arbitration, the Inter-American Court of Human Rights, the European Court of Human Rights, the European Court of Justice, the International Tribunal for the Law of the Sea, both *ad hoc* International Criminal Tribunals for the Former Yugoslavia and for Rwanda, the International Criminal Court, and to some extent, the Dispute Settlement System of the World Trade Organization.

PROJECT on International Courts and Tribunals. *International Court of Justice*. At:
<<http://www.pict-pcti.org/>>.

UNCTAD. *Dispute Settlement: 1.2. International Court of Justice*. New York and Geneva: United Nations, 2003.

APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

*By Adam Jaime Muniz with the support of
Sheila Khattak and Maria Helena Notari¹⁰*

"Soldiers! Don't give yourselves to brutes, men who despise you and enslave you. Don't give yourselves to these unnatural men, machine men, with machine minds and machine hearts. [...] You don't hate - only the unloved hate. Only the unloved and the unnatural. Soldiers! Don't fight for slavery, fight for liberty. Look up! Look up! The clouds are lifting - the sun is breaking through. We are coming out of the darkness into the light. We are coming into a new world. A kind new world where men will rise above their hate and brutality."¹¹

Final speech of 'The Great Dictator', by Charlie Chaplin

INTRODUCTION

One of Charlie Chaplin's most eminent movies is certainly *The Great Dictator*, conceived in the late thirties but not released until 1940. Bravely speaking out against Nazism with brilliant parody, this film is worth watching just for the scene in which he performs a dance of love with a large inflated globe of the world, in an almost romantic manner. Never has the hunger for world domination been more rhapsodically expressed. Chaplin grabs for the globe and it bursts, and he falls over his desk in tears. He ends the film stepping out of character and addressing the camera with an eloquent speech calling for peace and prophesying a hopeful future for troubled humanity. Half a century later, a gory conflict broke out in the Balkans that triggered memories of the Nazi genocidal crimes in the 1940s. This paper is about this very question: how can the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter Genocide Convention¹²) apply to the problem of genocide in the territory of the former Yugoslavia? Our focus will be on the case concerning the application of the Genocide Convention (Bosnia and Herzegovina versus Serbia and Montenegro¹³) currently on the docket of the International Court of Justice (ICJ).

GEOGRAPHY OF THE CONFLICT

Somewhere in the Balkans...

Dealing with the Balkans necessarily means dealing with a troublesome region, which has for centuries been the Achilles' heel of struggles for power. May we just remember that

¹⁰ A special acknowledgement goes to Professor Antônio Augusto Cançado Trindade, not only for the support but for being such an inspiring figure, motivating my studies in the human protection field and reminding me to follow my dreams of a fairer world.

¹¹ GREAT Dictator, The. Directed by Charles Chaplin. USA: Creative Design Art, 1940. 1 DVD (124 min), wide screen, mono, black and white.

¹² We encourage the reader that is not familiar with this convention to have it at hand for a better understanding of the following pages. The Genocide Convention is available at: <http://www.unhchr.ch/html/menu3/b/p_genoci.htm>.

¹³ Serbia and Montenegro is the current name of the respondent in this case. Notice that we had rather use *Yugoslavia*, because it was the name used at the time of the filling the Application by Bosnia and Herzegovina.

World War I erupted after the murder of Archduke Francis Ferdinand in Sarajevo, nowadays capital of Bosnia and Herzegovina.

During the last century, Yugoslavia was founded three times¹⁴, and collapsed in all of them. The analysis of the present conflict is directly linked to Yugoslavia's major question, *i.e.* to how the feeling of national identity developed among South-Slav peoples¹⁵, which are the Serbs, Croats, Slovenes, Bosnians, and Macedonians, contributed to the conflict.

The literature on this subject diverges about the legitimacy of Yugoslavia. Some regard the Yugoslav State as the realization of a one-century-old dream of those peoples to free themselves from foreign domination, in other words, the legitimacy is based on south-Slavs' common ethnic ancestry. Others say that Yugoslavia is an 'artificial' State, since the peoples in the region were forced to live together due to impositions by the great powers during the Versailles Peace Conference, in 1918-9.

The country once known as the *Socialist Federal Republic of Yugoslavia* (SFRY) was formed by six republics: Croatia, Slovenia, Macedonia, Bosnia and Herzegovina, Montenegro, Serbia, and two autonomous provinces, Kosovo and Vojvodina (encrusted in Serbia)¹⁶. The conflict we are about to study took place at the fall of the SFRY, more precisely during the Bosnian insurrection.



Slovenia and Croatia were Roman Catholic and the most westernized among the republics, due to historical and geographical reasons. They were also the richest republics in Yugoslavia. Montenegro, Serbia, Macedonia, and Vojvodina were Christian Orthodox, with Muslim minorities, and more tuned to Russia and its eastern neighbours. Kosovo also had a predominance of Orthodox Christians, but had an ethnic formation balanced between Serbs and Albanians. These southern republics were much poorer than the northern ones.

The most delicate of these balances was exactly in Bosnia and Herzegovina, as it had a majority of Bosniaks¹⁷ (Slavs converted to Islamism during the Turkish rule) and significant minorities of Orthodox Serbs and Catholic Croats. Its population was something around three million inhabitants only, but it is important to note that all data dealing with population are subject to considerable error due to dislocations caused by military action and ethnic cleansing. Ethnically, Bosnia and Herzegovina was composed of 44 per cent of Bosniaks, 31 per cent of Serbs, 17 per cent of Croats, and 8 per cent of other ethnicities. The major religions in this country are still the Islamism (40 per cent), the Orthodox Christianity (31 per cent), the Roman Catholicism (15 per cent), and the Protestant Christianity (4 per cent) – other faiths do not sum

¹⁴ Yugoslavia means *South Slavia* (the land of the South Slavs). The first South-Slav state was founded in 1918, under the name 'the Kingdom of Serbs, Croats and Slovenes', which was changed to 'the Kingdom of Yugoslavia'. A new Yugoslav state was founded in 1945, officially named 'the Federative Peoples' Republic of Yugoslavia', but then changed to 'the Socialist Federative Republic of Yugoslavia' in 1963. In 1992, Serbia and Montenegro founded the third Yugoslav state, the Federative Republic of Yugoslavia that, despite not collapsing, changed its name again to 'Serbia and Montenegro'.

¹⁵ See: NETHERLANDS Institute for War Documentation. *The History of the Yugoslav State*. In: _____. *Srebrenica: a safe area*. The Hague: Boom Publishers, 2002. At: < <http://www.srebrenica.nl/>>.

¹⁶ See: The Balkans. NETHERLANDS Institute for War Documentation. *Op. Cit.*

¹⁷ Bosniak has replaced Bosnian Muslim as an ethnic term in part to avoid confusion with the religious term Muslim

over 10 per cent of the population. There is also the language problem, as Bosnia and Herzegovina speak Croatian, Serbian, and, obviously, Bosnian.¹⁸

HISTORY OF THE CONFLICT

Rebels with a Cause

The conflict addressed in this study has its roots centuries ago. For the sake of straightforwardness, we will choose a rather nearer point in the conflict's history timeline to start our analysis: the collapse of Yugoslavia.

Yugoslavia was much of an ethnic boiling cauldron. The death of Tito¹⁹ and the fall of the Soviet Union unleashed a long festering process of institutional deterioration, led by growing local nationalisms and political tensions. Conflicts that had always been present in the heart of Yugoslavia therefore emerged, as Serbs, Croats, Slovenes, and Bosniaks no longer wanted to share the very same roof.

Slobodan Milosevic rose to power in 1987 in a nationalistic rhetoric. Though desperately determined to rule the federation united, as did Tito, he lacked legitimacy and mastery at balancing ethnic interests. Late in 1989, due to growing nationalism, Milosevic decided that, in the event of the break-up of Yugoslavia, he would endeavour to win most of it for himself and thus began the implementation of the idea of a "Great Serbia".²⁰

In late 1990 Milosevic forfeited the autonomous status of Kosovo and Vojvodina to the rule of Serbia. And although this may have been accepted by Vojvodina, which was formed by a majority of Serbs, the same was not true for Kosovo, whose population was formed by a large amount of Albanians. As a result, there was an immediate reaction from Slovenia, which supported Kosovo's autonomy, and the consequent retaliation by Serbia, by means of an economic blockade.

The Slovenes held a referendum on the question of succession of Yugoslavia (December 1990). An overwhelming majority voted for independence which opened the door for several secessionist claims. The official dissolution of Yugoslavia began in 1991, as Croatia and Slovenia unilaterally declared their independences, in June that year, which led a prompt military response from the central government in Belgrade. The armed conflict only lasted 10 days in Slovenia, ending with a peace plan (Brioni Agreement) brokered by the European Community. But that path towards peace lost its sparkle, since in Croatia combats were more long-drawn-out, lasting seven months, leading into increasing brutality from both parties, which resulted in thousands of deaths of civilians. Nevertheless, the apparent spitefulness and heartlessness of war in Croatia merely foreshadowed Bosnia and Herzegovina's fate.

Bosnia and Herzegovina were then the following Yugoslav republic to be overcome in the fighting – the most explosive ethnic and religious melting pot of all republics. After elections, a coalition government of three ethnically based parties, representing Serbs, Croats and Muslims, was led to power in Bosnia and Herzegovina, under the leadership of Alija Izetbegovic,

¹⁸ Quoted figures from the Office of the High Representative in Bosnia and Herzegovina, at: <<http://www.orh.int>>.

¹⁹ Josip Broz Tito, Croatian, led the Communist Partisan Forces to resist the Axis occupation of Yugoslavia during World War II. Tito's partisans triumphed with the support of the Allies. During his rule, from 1946 to 1980, Tito suppressed resurgent nationalist ambitions of ethnic groups. After his death on 4 May 1980, no other leader had the same political legitimacy and popularity to rule over such a heterogeneous country.

²⁰ A detailed explanation of the plans to create a 'Great Serbia', though biased, is found in Bosnia's application before the Court. See: INTERNATIONAL Court of Justice. Application of the Republic of Bosnia and Herzegovina (20 March 1993). At: <<http://www.icj-cij.org/icjwww/idocket/ibhy/ibhyframe.htm>>.

head of the Party of Democratic Action. The Serbian Democratic Party declared, however, that some Serbian so-called autonomous regions within Bosnia and Herzegovina would secede from the Republic if it declared its independence from former Yugoslavia.

The government of Bosnia and Herzegovina announced in late-1991 that a referendum would be held on the republic's independence in the beginning of the following year. Independence was approved by 99.4 per cent of those voting. Turnout was 63.4 per cent, due to a boycott set by ethnic Serbs (about 31 per cent of the population), *i.e.* almost 63 per cent of the electorate opted for independence.²¹ Radovan Karadzic, the head of the Serbian Democratic Party, took a hard line, warning that developments in Sarajevo "would make Northern Ireland look like a holiday resort"²². Under the applicable constitutional law, this referendum was valid, and Bosnia and Herzegovina proclaimed its independence on 6 March 1992.

Conflict erupted in Bosnia and Herzegovina as the republic obtained international recognition of its independency on 7 April²³. That same day, the Bosnia Serb parliament decided to definitively carry out the creation of the so-called Serb Republic of Bosnia and Herzegovina, or *Republika Srpska*, based in Pale, a ski resort outside Sarajevo. On the following day, Serb militia forces "acting at the behest of and in co-operation with the former Yugoslav People's Army (YPA)"²⁴ launched military attacks throughout Bosnia and Herzegovina, intending to create territorial corridors between the Serbian communities in Bosnia. Karadzic became *de facto* president of the Bosnian Serb republic, while Izetbegovic became the president of the Republic of Bosnia and Herzegovina.

On 8 April, Izetbegovic started mobilizing the territorial defence force and placed its leadership in the hands of Colonel Hasan Efendic, a Muslim. He issued an order that officers of the YPA had until 20 April to join the territorial defence force, otherwise they would be considered enemy. Few officers did so, only about a hundred. On 23 May, Efendic was relieved of the command of the Bosnian armed forces, due to the extinction of the territorial defence force. Izetbegovic told him that the army needed a younger commander, but according to Efendic himself the real reason was that he was married to a Serb woman. Izetbegovic announced, on 5 July, the formation of the *Armija Bosne i Hercegovine* (ABiH) as the sole official army force of the Bosnian State.

Nevertheless, in practice not much had changed in the following months, since making up an army takes slightly more than just ink onto paper. Though it grew immensely after some years, ABiH initially relied on people with a criminal background, in the main. It was an army not much worried about the rule of law and it repeatedly committed breaches of human rights.²⁵

There were also foreign mercenaries fighting for all three parties during the course of the combats. Russians, Ukrainians, Romanians and Greeks assisted the Serbs. From Germany, Great Britain, and Sweden came the majority of the auxiliaries on the Croat side, which were mostly adventurers and figures of extreme right-wing persuasion. On the Muslim, men from other Muslim countries, especially Turkey, came to fight in Bosnia; they were the *mujaheddin*.

²¹ This boycott was a response to the political manoeuvre in the Bosnian parliament that convened the non-Serb members of parliament to vote the referendum when the Serbs representatives were largely absent. The Bosnian Serb politicians, who felt excluded from the decision, pointed out that the Bosnian constitution required the agreement of all three ethnic groups for changes in the status of the territory. The day before the referendum, the Serb leader, Karadzic, declared that the referendum did not exist for the Bosnian Serbs. See: NETHERLANDS Institute for War Documentation. *Op. cit.*

²² *Ibid.*

²³ In total 72 States recognized Bosnia and Herzegovina on 7 April, including the European Community and USA.

²⁴ INTERNATIONAL Court of Justice. *Op. cit.*

²⁵ "They 'lifted' men from the streets and forced them to dig defence lines at the front. The indispensability of these criminal elements in the first months of the war made them virtually immune to the law, even when they committed acts about which the Bosnian state was less happy". NETHERLANDS Institute for War Documentation. *Op. cit.*

The numbers of foreigners fighting in each side vary a lot, as a result of war propaganda exaggerations.

Greater proportions. Greater solutions?

On 22 May, the United Nations recognized Bosnia and Herzegovina as its 177th Member State²⁶. This meant the recognition of the war in Bosnia as an international conflict, with the aggression in fact originating from the regime in Belgrade and all following UN resolutions would maintain such line of reasoning. The UN, however, did not lift the arms embargo against the new State to enable it to defend itself against an armed attack. Resolution 757, which was approved by the Security Council on 30 May, contained the most far-reaching embargo ever imposed on a country. The resolution also required that all parties “[should] create immediately the necessary conditions for unimpeded delivery of humanitarian supplies to Sarajevo and other destinations in Bosnia and Herzegovina”²⁷. But after the acceptance of Resolution 757, the Bosnian Serbs did not back down at all. The question was whether countries or International Organizations would be prepared to enforce the stipulations of this resolution by military means. Many governments regretted what was happening in Bosnia, but at the same time there was not a single one which thought that it touched on vital interests of their own State, and therefore they were not very willing to become deeply involved in the situation in Bosnia, for instance by putting the lives of their own military at risk. On the other hand, in the media there was growing pressure on the Western governments to ‘do something’.

Hence, on 11 June, the UN sent a troop and some military observers from Croatia to Sarajevo to evaluate the situation and to help calming the parties’ nerves. This was the beginning of the United Nations Protection Force (UNPROFOR) operation in Bosnia and Herzegovina; it was called UNPROFOR II, to distinguish it from the previous peace-keeping operation in Croatia, UNPROFOR I. Inhabitants cheerfully welcomed this act at first. It soon faded, though, as they came to realize that UNPROFOR had not come to fight on the side of the Bosnian government, but to ensure the safe provision of food to the people of Sarajevo. This led people to think the United Nations was just making sure they could die with full stomachs. More and more frequently, blue helmets were the targets of Bosnian government army firing – they wanted their weapons, not their food. In the meantime the Bosnian Serb leaders pressed for agreements for a permanent division of Sarajevo, either by means of a green line as in Nicosia, or by means of a wall such as the one that had divided Berlin or the one that now divides Palestine in two. Fortunately, this was never really implemented as the UN took the supervision of the city area.

There was also the problem of the ever-so-increasing number of people fleeing from their homes. In July 1992, the disconcerting size of the refugee stream from Bosnia started to dawn on the West; it was the biggest in Europe since World War II.²⁸ The largest group among them were the almost eight hundred thousand Bosnians, almost a fifth of the total population. This increased the pressure for action among European’s public opinion – European tourist sites just do not go with homeless refugees, some may have thought.

By December 1992, intensification in public campaigns was discernible. It was no coincidence that several campaigns were concentrated around Christmas, when the western world is keener to charity. The issue of women being raped in Bosnia and Herzegovina became, for instance, the new theme in the public campaigns. Rapes began immediately after clashes broke out, and most of the times they occurred as isolated incidents. But rapes were also

²⁶ UNITED Nations General Assembly. Resolution A/RES/46/237 of 22 May 1992. At: <<http://www.un.org/documents/ga/res/46/a46r237.htm>>.

²⁷ UNITED Nations Security Council. Resolution 757 of 30 May 1992. At: <<http://www.un.org/documents/sc/res/1992/scres92.htm>>.

²⁸ According to the High Commissioner for Refugees, by the beginning of June there were 1.7 million displaced people throughout the whole of Yugoslavia. See: NETHERLANDS Institute for War Documentation. *Op. cit.*

committed in public in which case they appeared to have the objective of forcing ethnic groups to leave. It should also be mentioned that many forms of sexual violence were used against male detainees in prison camps.

All parties to the conflict have committed human rights violations. Some UN officials came to the conclusion that the parties in the Bosnian conflict only differed from one another in the pursuit of evil. A UN official stated that “the Serbs are mass murderers, the Croats are assassins, and the Muslims are killers”.²⁹ In response to the deteriorating human rights situation in the former Yugoslavia, the UN Commission on Human Rights was called into its first ever special session, during which it adopted resolution 1992/S-1/1 on 14 August 1992, requesting the chairman of the Commission to appoint a special *rappporteur* “to investigate first hand the human rights situation in the territory of the former Yugoslavia, in particular within Bosnia and Herzegovina”.³⁰ The report called for criminal prosecution of those responsible for mass and flagrant violation of human rights. On 6 October 1992, the Security Council adopted resolution 780, which requested the establishment of an impartial Commission of Experts to examine the information on the breaches committed in the territory of the former Yugoslavia. In its report, the Commission concluded that ethnic cleansing had been carried out in the former Yugoslavia and that the policy and practices of ethnic cleansing constituted crimes against humanity. On 22 February 1993, the Security Council unanimously adopted Resolution 808, which underlined the Council’s intention to create an international court to prosecute individuals responsible for these violations: the International Criminal Tribunal for the Former Yugoslavia, instituted by Security Council Resolution 827 of 25 May 1993.³¹

This scenario is the background for the institution of proceedings by Bosnia and Herzegovina against Yugoslavia before the ICJ for the application of the Genocide Convention on 20 March 1993. Due to space limitations we will not delve into what happened in the region after this date, but we must draw attention to the fact that the worst was still to come with the fall of the UN-proclaimed “safe areas”, namely Tuzla, Zepa, and especially Srebrenica, leaving hundreds of thousands of deaths.

In 1994, Bosniaks and Croats agreed to a cease-fire and established a joint Federation of Bosnia and Herzegovina. On 1 November 1995, the Muslim-dominated Bosnian government and the leaders of Croatia and Serbia started the peace negotiations at Dayton, Ohio, under the auspices of the United States. People in Sarajevo joked about this by saying that when someone kills a man, he is put in prison, and when he kills twenty, he is declared mentally insane, but when someone kills 200,000 people, he is invited to the US for peace negotiations. They just could not accept an agreement being set among leaders they saw as criminals. On 21 November 1995, a peace agreement was signed. The Republic of Bosnia and Herzegovina was divided into two parts: a Muslim-Croat federation which controlled 51 per cent of the country, the Federation of Bosnia and Herzegovina, and a Bosnian Serb republic which controlled 49 per cent of the country, Republika Srpska.³²

Although the accord was quite well implemented, conditions have slowly improved and much distrust remains among members of all three communities, who now typically live in ethnically homogeneous areas. Bosnian disillusionment with the moderates who had held power since 1998 resulted in electoral victories for the ethnic nationalist parties in 2002. Since the constitution framework set by Dayton Agreement lacks popular legitimacy, and it could not be otherwise due to the then situation, it is little surprise that Bosnia Herzegovina presently does not function as a unitary country and that inter-group tensions continue to run high.

²⁹ Ibid.

³⁰ OFFICE of the United Nations High Commissioner for Human Rights. Resolution 1992/S-1/1 of 14 August 1992. At: <<http://www.unhchr.ch/html/hchr.htm>>.

³¹ UNITED Nations Security Council. Resolution 827 of 25 May 1993. At: <<http://www.un.org/Docs/scres/1993/scres93.htm>>.

³² ROBERTSON, Geoffrey (QC). *Crimes against Humanity: the struggle for global justice*. New York: The New Press, 1999, pp. 303-45.

THE APPLICATION

'Let's Stop Messing About!'

On 20 March 1993 the Bosnian government pursued its case against Yugoslavia in the ICJ. Bosnia and Herzegovina claimed that the acts had been committed by former members of the YPA as well as by Serb military and paramilitary forces under Serbian direction, and demanded reparations for those acts in a sum to be determined by the Court. In its Application, Bosnia and Herzegovina request that the Court adjudge and declare that Yugoslavia, through its agents and surrogates, has *inter alia* breached its legal obligations under the Genocide Convention, violated the Universal Declaration of Human Rights and the UN Charter, and breached its obligation under general and customary international law by killing, murdering, wounding, raping, robbing, torturing, kidnapping, detaining, and exterminating the citizens of Bosnia and Herzegovina. For all those infringements, Bosnia and Herzegovina called for immediate cessation of the above mentioned violations of international law.³³

HISTORY OF THE PROCEEDINGS

Inside the Matrix

Bosnia and Herzegovina filled a request for the indication of provisional measures on that very same day when they filled their application against Yugoslavia, asking that "Yugoslavia, together with its agents and surrogates in Bosnia and elsewhere, must immediately cease and desist from all [...] genocidal acts against the people and State of Bosnia and Herzegovina"³⁴. With no delay, on 1 April 1993, Yugoslavia requested the Court to order the application of provisional measures, including a cease-fire in Bosnia and Herzegovina, closing prisons and detention camps in which Yugoslavia alleged that Serbs were being detained due to their ethnic origin, allowing Serbs to leave specific towns and other places in Bosnia and Herzegovina safely, ceasing destruction of churches and worship places and of other Serb cultural heritage, and putting an end to the discrimination based on nationality or region and the practice of ethnic cleansing.³⁵

The Court ordered provisional measures on 8 April 1993 indicating that Yugoslavia "should immediately [...] take all measures within its power to prevent commission of the crime of genocide" and that both Bosnia and Herzegovina and Yugoslavia "should not take any action [...] which may aggravate or extend the existing dispute".³⁶ The Court refused to assume its *prima facie* jurisdiction³⁷ on other basis, but Article IX of the Genocide Convention.

Little time latter, on 27 July 1993, Bosnia and Herzegovina filed once again a request for provisional measures, stating that Yugoslavia had violated the measures of protection on behalf of Bosnia and Herzegovina and that it was besides "continuing its campaign of genocide against the Bosnian People [...], the Respondent [was then] planning, preparing, conspiring to,

³³ See *Judgement Requested* in: INTERNATIONAL Court of Justice. Application of the Republic of Bosnia and Herzegovina (20 March 1993). At: <<http://www.icj-cij.org/icjwww/idocket/ibhy/ibhyframe.htm>>.

³⁴ INTERNATIONAL Court of Justice. Request for the Application of Provisional Measures (8 April 1993). At: <<http://www.icj-cij.org/icjwww/idocket/ibhy/ibhyframe.htm>>.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ To render an indication of provisional measures, which is a injunction relief in order to protect anything at risk, the Court must identify its jurisdictional basis to hear the case, that is, to find whether it has jurisdiction *prima facie* (at first sight).

proposing, and negotiating the partition, dismemberment, annexation and incorporation of the sovereign State of Bosnia and Herzegovina by means of genocide". Yugoslavia answered with another request for provisional measures: "The Government of the so-called Republic of Bosnia and Herzegovina should immediately [...] take all measures within its power to prevent commission of the crime of genocide against the Serb ethnic group". The Court only reaffirmed the previous measures, by an Order of 13 September 1993, adding though that they should be immediately and effectively implemented.³⁸

After the issuance of this second indication for injunction relief, Bosnia and Herzegovina declared its intention to institute proceedings against the United Kingdom, charging the UK for being liable for the harm inflicted upon Bosnia and Herzegovina. The UK replied that an application in that sense had no foundation whatsoever. Some days later, Bosnia and Herzegovina, after realizing they were playing with fire, informed the Security Council it was not to proceed.³⁹

The Court, after postponing such decision more than once, fixed the time-limits for filling the Memorial (14 April 1994) and Counter-Memorial (30 June 1995) of, respectively, Bosnia and Herzegovina and Yugoslavia. Bosnia and Herzegovina duly filed its Memorial within the extended time-limit.

However, on 26 June 1995, four days before the expiry of the time-limit for filling the Counter-Memorial, Yugoslavia filed certain preliminary objections⁴⁰ relating, firstly, to the admissibility of the Application and, secondly, to the Court's jurisdiction on the case. This suspended the proceedings on the merits, as for the consideration of those preliminary objections some new proceedings had to be organized in accordance with the Rules of the Court. On 11 July 1996, the Court delivered a Judgment dismissing the objections and holding that, on one hand, it had jurisdiction to adjudge the dispute, and on the other, the Application was admissible. Considerations about the jurisdiction of the Court are dealt below.

On 22 July 1997, within the new time-limit laid down by the Court, Yugoslavia filed its Counter-Memorial. In its introduction Yugoslavia pointed out the inclusion of counter-claims, accusing Bosnia and Herzegovina of genocide against the Serbs. The Court then established, by an Order of 17 December 1997, that Yugoslavia's counter-claims were admissible and they would be joined to the current proceedings in the case. The parties were also instructed to submit a Reply and a Rejoinder by respectively the Applicant and the Respondent – the Reply was filled on 23 April 1998 and the Rejoinder on 22 February 1999. Each party contested, in those pleadings, the claims appointed by the other.

On 20 April 2001, Yugoslavia sent a letter to the Court informing its intention to withdraw the counter-claims submitted in its Counter-Memorial. Bosnia and Herzegovina notified the Court it had no objection to the withdrawal of the counter-claims. The latest development in this case was made in an Order of 10 September 2001, in which the President of the ICJ placed the withdrawal of Yugoslavia's counter-claims on record.

Nevertheless, a new case was brought before the Court by Yugoslavia on 24 April 2001 whereby, referring to Article 61 of the Court's Statute, it requested the ICJ to revise the judgment delivered on 11 July 1996 in the proceedings of the *Genocide* case (object of this paper). In the Application, Yugoslavia alleged that its admission to the UN occurred on 1

³⁸ INTERNATIONAL Court of Justice. Request for the Application of Provisional Measures (13 September 1993). At: <<http://www.icj-cij.org/icjwww/idocket/ibhy/ibhyframe.htm>>.

³⁹ MAOGOTO, Jackson Nyamuya. *State Sovereignty and International Criminal Law: Versailles to Rome*, Ardsley: Transnational Publishers, 2003, pp. 350-7.

⁴⁰ Preliminary objections are those that require a decision before the Court can proceed to consider the dispute on its merits (Article 79 of the Rules of the Court).

November 2000; therefore it was not a UN member at the time of that judgment.⁴¹ The Court though considered that admission cannot be regarded as a new fact within the meaning of Article 61, capable of founding a request for revision of that judgment. Consequently, on 3 February 2003 the Court delivered its judgment stating that the Yugoslav application was inadmissible under the terms of Article 61 of the Statute of the Court.

JURISDICTION OF THE COURT⁴²

By its judgment of 11 July 1996, the Court found the Application admissible and that it had jurisdiction to entertain the case on the basis of Article IX of the Genocide Convention. The reasoning of the Court for that judgment follows below. The Court stated also that it was unable to uphold any of the additional bases of jurisdiction invoked by Bosnia and Herzegovina and that its only jurisdiction to entertain the case is on the mentioned article.

*Who? – Jurisdiction *ratione personae**

Jurisdiction *ratione personae* stands for the Court's authority to judge over the parties. The two States, parties in the proceedings, were once territories of the Socialist Federal Republic of Yugoslavia. It was not contested that Yugoslavia was party to the Genocide Convention, since it actually made a formal declaration expressing its intention to remain bound by all international treaties at the time of the proclamation of the Federal Republic of Yugoslavia, on 27 April 1992. Bosnia and Herzegovina, for its part, became a Member of the UN on 22 May 1992 and, on 29 December that same year, it transmitted a Notice of Succession to the UN Secretary-General, as depositary of the Genocide Convention. Bosnia and Herzegovina could, therefore, become a party to the Convention through State succession mechanisms.

However, Yugoslavia still questioned that the Convention could not be in force at the time because the two States did not recognize one another. The Court, on the other hand, stressed that this situation ceased to exist since the Dayton-Paris Agreement, by which the parties recognize each other's sovereignty. Hence, all conditions to found the Court's jurisdiction *ratione personae* were then fulfilled.⁴³

*What? – Jurisdiction *ratione materiae**

Having jurisdiction *ratione materiae* in the present case means having jurisdiction to entertain it in the light of Article IX of the Genocide Convention. For that, the Court had to verify if there was a disagreement that fell within the scope of that provision. Article IX of the Convention provides as follows:

*"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 [...] shall be submitted to the International Court of Justice..." (Emphasis added).*⁴⁴

⁴¹ Yugoslavia claimed as for not being a member-State of the UN it was not then a party to the Statute of the Court and that it was not bound by the Genocide Convention.

⁴² INTERNATIONAL Court of Justice. Judgement of 11 July 1996 – Preliminary Objections. At: <http://www.icj-cij.org/icjwww/idocket/ibhy/ibhyjudgment/ibhy_ijudgment_19960711_frame.htm>.

⁴³ NB: The jurisdiction of the Court should normally be assessed on the date of the filing of the Application instituting proceedings. Nonetheless, the ICJ has always had recourse to the principle according to which it must not penalize a defect in a procedural act which the applicant could easily remedy.

⁴⁴ UNITED Nations (1948). Convention on the Prevention and Punishment of the Crime of Genocide. At: <http://www.unhcr.ch/html/menu3/b/p_genoci.htm>

Once Yugoslavia rejected the claims made against it by Bosnia and Herzegovina, the Court easily found there was a legal dispute.

Yugoslavia posed two reasons for contesting the jurisdiction *ratione materiae*: first, that the conflict had a domestic nature in which Yugoslavia did not take part and it did not have jurisdiction over those lands; and second, that the Memorial of Bosnia and Herzegovina is based upon a “fundamentally erroneous construction”⁴⁵ of the Genocide Convention and, thus the complaints contained in it are based on allegations of State responsibility which fall outside the scope of Article IX.⁴⁶

Concerning the first proposition by Yugoslavia, the Court saw nothing in the Convention that conditioned the acts contemplated by it to a particular sort of conflict, neither national nor international. About Yugoslavia’s role in the conflict it was a matter that the Court left out of its then consideration, since it was to be dealt with in the merits. On the territorial problem, the Court understood that the rights and obligations established by the Convention were *erga omnes*, so that every State’s obligations under the Convention were not territorially limited. The Court, with regard to the second proposition, observed that the reference in Article IX did not reject any form of State responsibility.

It would moreover observe that it was sufficiently apparent from the very terms of that objection that the Parties not only differed with respect to the facts of the case, their imputability and the applicability of the provisions of the Genocide Convention to them, but were moreover in disagreement with respect to the meaning and legal scope of several of those provisions, including Article IX. For the Court, there was accordingly no doubt that there existed a dispute between them relating to “the interpretation, application or fulfillment of the [...] Convention, including [...] the responsibility of a State for genocide”, according to the form of words employed by that latter provision.

When? – Jurisdiction ratione temporis

Based on the principle of the non-retroactivity of legal acts, Yugoslavia alleged that the Court could only deal with events subsequent to the date on which the Genocide Convention came into force between the parties. The Court, on the other hand, restricted itself to mentioning that the Convention did not contain any clause whose object or effect limits the scope of its jurisdiction *ratione temporis*, and nor did any of the States make any reservation in that sense. The Court consequently founds its jurisdiction to give effect to the Convention concerning the facts which had occurred since the beginning of the conflict.

THE VERDICT

A Final Solution

Although it is impossible to predict the enquiries that might pop up from the head of the real ICJ judges when they finally face the duty of rendering a verdict to this case, may we enlighten some of the questions that are likely to be considered in working towards it. Firstly, and most obvious, was there a genocide in the terms of the 1948 Convention? Then, was there present the intent to commit genocide, again in the terms of the Convention? Is ethnic cleansing a sort of genocide? Can Serbia and Montenegro, as a State, be responsible for the alleged

⁴⁵ INTERNATIONAL Court of Justice. *Op. Cit.*

⁴⁶ *Ibid.* According to Yugoslavia, Article IX would only cover the responsibility flowing from the failure of a State to fulfil its obligations of prevention and punishment as contemplated by Articles V, VI and VII; on the other hand, the responsibility of a State for an act of genocide perpetrated by the State itself would be excluded from the scope of the Convention.

crime of genocide or only its leaders at the time? Can the doctrine of *dolus eventualis* apply in the present case? Can we ignore political considerations in the face of human rights violations on both sides? That is, is the Court's and the international community's support of upholding human rights so fierce that human rights violators need to be punished regardless of the political situation? Does *jus cogens* apply here? Cannot the ICJ go beyond the 1948 Convention? And, at last, after Dayton Agreement by which both parties recognised one another as new independent States and formally ended of the conflict, would Serbia and Montenegro still have to pay reparations?

SUGGESTIONS FOR FURTHER RESEARCH

Now It's Your Turn

Now that you read this whole Study Guide you are ready to start your own research. Face this paper as an introduction to your research on the present case. By all means visit the official ICJ website to find all documents needed related to this case (<<http://www.icj-cij.org/icjwww/idocket/ibhy/ibhyframe.htm>>). Do read the application and past decisions available at the website. It is also interesting to focus on legal issues and principles that guide the ruling on the case. For that, our suggestion is to browse through general tests on international law and human rights. Pay particular attention to those aspects concerning the crime of genocide. After doing all that, read this Study Guide once again for a better understanding of the problem. You may find in the bibliography below some interesting sources of information. Have fun!

FINAL REMARKS

That's all folks

Since this paper was prepared to serve as a guiding text for a judgement simulation, we intend to avoid making any conclusion on the merits of this matter – that will be your job during AMUN. Nevertheless, there is one point of consensus in this case: its relevance. It is the first time that the Court finds its jurisdiction on Article X of the Genocide Convention; therefore the final verdict will be an important interpretation of this covenant. Interpreting the 1948 Convention, the Court will be rendering the official understanding that the world shall have about this crime.

BIBLIOGRAPHY

ANNAN, Kofi. *We the peoples: the role of the United Nations in the 21st century*. In: Millennium Report of the Secretary-General of the United Nations. New York: United Nations, 2000. At: <<http://www.un.org/millennium/sg/report/index.html>>.

GREAT Dictator, The. Directed by Charles Chaplin. USA: Creative Design Art, 1940. 1 DVD (124 min), wide screen, mono, black and white

MAOGOTO, Jackson Nyamuya. *State Sovereignty and International Criminal Law: Versailles to Rome*, Ardsley: Transnational Publishers Inc, 2003.

NETHERLANDS Institute for War Documentation. The History of the Yugoslav State. In:_____.
Srebrenica: a safe area. The Hague: Boom Publishers, 2002. At: <<http://www.srebrenica.nl/>>.

ROBERTSON, Geoffrey (QC). *Crimes against Humanity: the struggle for global justice*. New York: The New Press, 1999.

SCHABAS, William A. *Genocide in International Law*. Cambridge University Press, 2000.

Official Documents:

International Court of Justice documents concerning the present case at: <<http://www.icj-cij.org/icjwww/idocket/ibhy/ibhyframe.htm>>.

UNITED Nations (1948). Convention on the Prevention and Punishment of the Crime of Genocide. At: <http://www.unhchr.ch/html/menu3/b/p_genoci.htm>.

United Nations Resolutions at: <<http://www.un.org/documents.htm>>.

THE LEGALITY OF THE THREAT OR USE OF FORCE BY INTERNATIONAL ORGANIZATIONS

*By Adam Jaime Muniz with the support of
Maria Helena Notari and Sheila Khattak⁴⁷*

"The only legitimate use of force is to diminish the total amount of force exercised in the world"

Bertrand Russell

INTRODUCTION

Since the foundation of the United Nations in 1945, a total of 126 countries, representing two-thirds of the members of the United Nations, have engaged in 291 interstate conflicts in which more than 22 million people have been killed. More recently, the debate on the situation in Iraq has focused worldwide attention on the appropriate use of military force in international relations.

Determining in which circumstances, if any, it is necessary and appropriate for a country or, in the case of our study, an international organization (IO) to employ the use of armed force has been a much-debated, but ultimately inconclusive, endeavour.

We are to imagine that the General Assembly (GA) has adopted a hypothetical resolution requesting an advisory opinion from the International Court of Justice (ICJ) on the legality of the threat or use of force by IOs upon the following question:

Can a threat or use of force by International Organizations, without the United Nations Security Council prior authorization, be regarded permitted under International Law?

The proscription of the use of force in international relations is a mandatory norm – *jus cogens*. This rule has its exceptions, however. And these exceptions are the very heart of the present study, which has to do with the measures that may be adopted by IOs whose priority purposes are the maintenance of international peace and security or the exercise of the right of self-defence.

Such organizations enjoy wide powers by virtue of their purposes and implement those powers by the use of various types of force. Seen in that perspective, force is therefore referred to here as a means at the disposal of an organization to which it may have recourse if a Member State fails to perform its obligations or if any State shirks its responsibility to respect international peace and security.

We will not enter the field of non-armed force, such as economic and diplomatic measures, nor the use of armed force for policing purposes, in the case of peace-keeping forces. It is also valid to warn that we do not intend to deepen it on the Theory of International Organizations, but we suggest its study for a better understanding of the problem. Finally, notice that even though our topic is about IOs, the following pages provide a description of how States

⁴⁷ An especial acknowledgment goes to Professor Márcio Garcia, whose support was decisive for the choice of this topic. The amazing classes and the dedication to his pupils make Professor Márcio Garcia a unique International Law Professor.

circumscribed their right to the recourse to force and transferred it to legitimate multilateral bodies.

HISTORY OF THE PROBLEM

To Shoot or Not to Shoot, That is the Question

Over the course of the last century the international community has gradually circumscribed the use of force. This was done firstly, through limiting the range of circumstances under which the use of force was permitted; secondly, by subjecting the actions of States to the consent of legitimate international organisations; and thirdly, by bringing the use of force under the scope of laws of war and, lately, international humanitarian law.

The creation of the League of Nations, in 1919, was aimed at preventing war and maintaining peace and security worldwide. On 10 January 1920, the Treaty of Versailles became a legally-binding international settlement and the League Covenant began operating. Its Article 10 provided the pledge – at USA's insistence – that the League would collectively preserve the integrity and political independence of the Member States and that the Council would recommend on how this engagement would be fulfilled. Article 5, which dealt with voting procedures, provided that decisions by the Council required unanimity among the members in attendance. No one dares to disagree that under ordinary circumstances it seemed appropriate that Council members should unanimously agree on punitive actions against aggressors. But, and there is always a *but*, what the brilliant founding-fathers of the League failed to foresee (or maybe just turned a blind eye to) was that if one of the Council members themselves committed an aggression, it could veto any action against it with no difficulty whatsoever.

At that time, one of the many troubles of dealing with possible breaches of peace was that the League Covenant mentioned 'act of aggression' without defining it. As a result, either the Assembly or the Council of the League would need to consider every single incident between two nations and decide whether an aggression had occurred. Only then could it recommend a course of action to its members. Finally in the 1924 Assembly of the League, Britain and France proposed a 'Protocol for the pacific settlement of international disputes', more commonly known as the Geneva Protocol. By its terms every League member would agree to submit disputes to arbitration and not to go to war while arbitration was taking place.

In February 1925, Germany sent proposals for a peace pact which was to apply to a particular region of Europe and was to be guaranteed by France, Great Britain, Italy, and Germany. The final agreement (the Locarno Pact) was not just a single measure but consisted of several treaties closely related together. The first was a Treaty of Mutual Guarantee whereby all five Powers guaranteed the existing frontiers between Germany, France, and Belgium, and the demilitarization of the Rhineland. These three countries agreed also not to make war against one another unless the terms of the agreement were flagrantly broken or unless so directed by the League against an aggressor. The Locarno Pact was an event of the highest importance in Europe at the time. Unlike the Treaty of Versailles, it was voluntarily signed by Germany, and it was thereby recognized an equal European Power, which seemed a step towards the end of Germany's bitter resentment against its former enemies.

Back to Paris in August 1928, the representatives of fifteen countries agreed over a General Treaty for the Renunciation of War, the Kellogg-Briand Pact, which became a decisive turning point in the development towards a universal and general prohibition of war. The signatories renounced war as an instrument of national policy in their relations with one another and undertook to use only pacific means of settling disputes. However, such a step in international law wouldn't be possible without any reserve: the use of force was allowed for self-defence and against any treaty-breaking State, and in order to carry out responsibilities under

the League of Nations and the Locarno Agreements. This was the most thoroughgoing undertaking in support of peace that the nations had ever made. Its weaknesses were, again, the lack of a definition for 'aggression' and the absence of machinery for enforcing its own provisions, *i.e.* the prohibition of war failed to be linked to a system of sanctions. Consequently a would-be violator of the Pact would have had no difficulty in finding an excuse or any other name for an act of aggression (what do you think about the current 'war on terror'?).

Soon, due to the pressure of conflict between imperial interests, neither the League nor Locarno and Kellogg-Briand Pacts succeeded in their missions to prevent war. World War II erupted in 1939 and was to last until 1945. In April 1946, the members of the League met one final time and voted the organization out of existence.

STATEMENT OF THE PROBLEM

(I-)Legal Issues

As shown above, the legal issues relating to the use of force have been subject to great debate. It is interesting to notice that these issues are much more in terms of the illegality than of the actual legality of the use of force – some authors should be truly called international '*illegalists*'. All the following arguments are aimed at enlightening ideas on the problem at hand and inspiring further explorations on the legality (or illegality) of the use of force. Though many of the following points are directed to States, they must be interpreted in the perspective of the possible actions of IOs.

Nowadays it is impossible to talk about IOs without mentioning the United Nations (UN). The UN Charter came into being on 24 October 1945 with the intent of remedying the defects of its predecessor treaties. According to Article 2(4):

"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."⁴⁸

The prohibition enunciated above is a *jus cogens* norm (a peremptory norm of general international law), as codified in the 1969 Vienna Convention on the Law of Treaties⁴⁹ (Articles 53 and 64) and nowadays constitutes the basis of any discussion on the problem of the use of force.

The founding-fathers of this new IO were wiser than the League ones (grandfathers by then) in terms of the wording of the Charter. Article 2(4) constitutes a considerable improvement, when compared for instance with the Kellogg-Briand Pact. The use or force in general and even its threat are prohibited, rather than only war. The word 'aggression' was also avoided. Furthermore, the prohibition is, at least in theory, safeguarded by a system of collective sanctions against any offender (Chapter VII of the Charter).

The scope and content of this prohibition cannot be determined by an interpretation of Article 2(4) alone, but it must be read in its context with Articles 39, 51, and 53 of the Charter. The Charter itself provides for three exceptions to the prohibition of the threat or use of force: measures against former enemy States, SC enforcement actions, and self-defence. The first, the mechanism of the so-called "enemy-State-clauses" (Articles 53 and 107), will be left aside since it is now unanimously considered obsolete, due to the fact that all former enemy States are now UN members.

⁴⁸ UNITED Nations. *Charter of the United Nations*. At: <<http://www.un.org/aboutun/charter/>>.

⁴⁹ Find the 1969 Vienna Convention at: <http://www.unog.ch/archives/vienna/vien_69.htm>.

With regard to the second exception, the SC has the primary responsibility for the maintenance of international peace and security (Article 24) and Chapter VII of the Charter constitutes the very heart of the global system of collective security. If a threat or breach of the peace occurs, the SC is to decide what shall be done to restore international peace and security (Article 39). If it determines the existence of a threat to the peace, breach of the peace, or that an act of aggression has occurred, it may take, if necessary, military enforcement actions involving the armed forces of the Member States. In actual UN practice, it is common for such enforcement actions to be carried out on the basis of a mandate to, or more frequently an authorization of, States which are willing to participate, either individually or in *ad hoc* coalitions or acting through regional arrangements or other IOs.

The third and most important exception to the prohibition of the use of force laid down in Article 2(4), and also the most controversial issue in this area, is available to States which find themselves to be victims of aggression. The right of individual and collective self-defence against an armed attack, as embodied in Article 51, has become the central point upon which disputes concerning the lawfulness of the use of force usually concentrate, since for its exercise it does not depend necessarily or directly upon the SC. Article 51 reads:

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.[...]”⁵⁰

According to Article 51, individual or collective self-defence through the use of armed force is only permissible in the case of an ‘armed attack’. In other words, if a State experiences an ‘armed attack’ it retains the right to defend itself by using force against the attacking State until the SC is able to take the appropriate action. This right may also be exercised collectively, *i.e.* the victim State may receive the assistance of other States to ward off the attacker.

More recently, some rather innovative interpretations of the right of self-defence set by Article 51 came up. For instance the NATO argument, enriched in its resolution of November 1998⁵¹ on the situation in Kosovo, is based on the right of self-defence interpreted broadly as to include the defence of common interests and values. The critics to this view state that this might create the impression that self-defence has a broader scope than that foreseen in Article 51 and that it can be justified not only against armed attacks.

In terms of the temporal element of the right of self-defence, there is no consensus in international legal doctrine over the point in time from which measures of self-defence against an armed attack may be taken. The wording of Article 51 admits two interpretations of this question of anticipatory self-defence. On the one hand, it could be understood that States have recourse to force in self-defence only once an actual armed attack has occurred (“... *if an armed attack occurs* against a Member”) ⁵². On the other hand, by concentrating the word ‘inherent’, Article 51 could be taken to mean that the Charter does not circumscribe the pre-existing customary right. But, what *right* is that?

Under pre-Charter customary international law, a State could take recourse to force to defend itself not only in response to an actual armed attack, but also in anticipation of an imminent armed attack – the classic illustration of this right of anticipatory self-defence was the *Caroline* case⁵³. Some authors consider Article 51 as confirming this pre-existing right of anticipatory self-defence under the conditions set in the *Caroline* case: “[when] the necessity of

⁵⁰ Ibid.

⁵¹ See: <http://www.nato.int/kosovo/kosovo.htm>.

⁵² UNITED Nations. *Op. Cit.* Emphasis added.

⁵³ See: HARRIS, D.J. *Cases and Materials in International Law*, pp. 994-1060.

that self-defence is instant, overwhelming and leaving no choice of means, and no moment for deliberation”⁵⁴.

Nevertheless, we must bare in mind that this customary right of collective self-defence was examined in the case concerning ‘Military and Paramilitary Activities in and against Nicaragua’ (*Nicaragua case*)⁵⁵, between Nicaragua and USA, in which it can be concluded that before State A may embark upon collective self-defence, State B must declare itself a victim of an armed attack and request State A’s assistance, and there need not be any threat to A’s security. This principle constitutes the legal basis of some military alliances as, e.g., the North Atlantic Treaty Organisation (NATO) and the Inter-American Treaty of Reciprocal Aid (IATRA).

There is a great division within the international community regarding anticipatory self-defence. Although, there may not be an established consensus in support of the permissibility of anticipatory self-defence, there is neither a consensus opposed to it. Consequently, it seems hard to prove the existence of an authoritative and controlling norm prohibiting the use of force for pre-emptive self-defence.

Close to this last question of anticipatory self-defence lays that one of tacit and *ex-post facto* SC authorization to use force – these points are maybe the most controversial ones. Some argue that if the SC fails to disapprove a military action such failure can be interpreted as a tacit authorization. In this same sense it is also said that the SC may authorize the use of force during or after the accomplishment of a military action, which is known as *ex-post facto* authorization. The main argument of these ideas’ supporter is based on the fact that the Charter does not mention timing for SC to deliver its resolution approving or not a military action.

Another aspect about which there is neither a consensus in international legal doctrine is that of the unlawfulness of forcible humanitarian intervention, that is, the use of armed force for the prevention or discontinuation of massive violations of human rights in a foreign State. The objective of humanitarian intervention is the protection of foreign nationals.

On the legality of humanitarian intervention there are two opposing views. The restrictionist theorists regard, by the turns of the Charter, humanitarian intervention as legally impermissible because it does not involve individual or collective self-defence or SC enforcement. Restrictionists say that even though citing humanitarian motives, intervening States or, especially, IOs have generally eschewed expressly humanitarian intervention rationale and, hence, there has thus far been no unambiguous case of reliance on the right of humanitarian intervention.

The counter-restrictionist view is based upon three arguments in support of humanitarian intervention: 1) protection of human rights, as one of the main purposes of the Charter, indicates that the use of force for urgent protection of such rights is no less authorized than other forms of self-help; 2) the revival of the customary right of humanitarian intervention, as for when the UN fails to respond to a humanitarian catastrophe, and customary law revives and States may invoke the right of humanitarian intervention; and 3) permissible use of force below Article 2(4) threshold, that is, the legality of humanitarian intervention relies upon a literal reading of the provisions of Article 2(4). For this last argument, counter-restrictionists suggest that humanitarian intervention does not infringe upon neither the ‘territorial integrity’ nor the ‘political independence’ of States, as set in 2(4) and, therefore, is in conformity with the most fundamental peremptory norms of the Charter.

Close to these opinions there is a quite recent doctrine on humanitarian relief based on the idea of the State responsibility to protect. It basically says that State sovereignty implies

⁵⁴ Ibid.

⁵⁵ See in the *Nicaragua case* the judgment on the merits, paras 199-200 and 232-8.

responsibility for the protection of its population, and where peoples are suffering serious harm and the State in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.⁵⁶ Therefore, in this view, IOs have not only the right but also the obligation to act (and even use force in extreme cases) to guarantee the safety of populations at stake.

At last, but definitely not at least, we must consider the role of the UN General Assembly in dealing with international peace and security. The veto power of the five permanent members of the Security Council has been questioned in its present form. During the Korean War (1950-53), the then Western majority of the United Nations did not accept that the SC could be blocked out of action and influenced by the use of the veto by the Soviet Union, at a time when peace was being threatened or broken. The so-called *Uniting for Peace Resolution*, adopted by the UN General Assembly in November 1950, allowed a qualified majority of the Assembly to assume responsibility for the maintenance of international peace and security, whenever the SC was unable or unwilling to do so.

QUESTIONS THE ADVISORY OPINION MUST ANSWER

There is only one question to be answered, which is whether a threat or use of force by an IO, without the SC prior authorization, is regarded permitted under current international law. Since we are looking at this problem from a theoretical perspective, other questions may come up from that first one and we must aim at an advisory opinion that embraces the following questions (among others to be also considered): is the UN Charter a complete document regarding the use of force in international relations? Can military alliances be considered IOs? How should collective self-defence actions taken by an IO be understood under current international law? Can pre-emptive or anticipatory self-defence be regarded permitted under international law? Is the use of force for humanitarian relief by an International Organization without SC authorization legal? Is the argument of international responsibility to protect valid in international law and for IOs? Can a threat or use of force by an IO be regarded permitted under international law if authorized by the General Assembly?

SUGGESTION FOR FURTHER RESEARCH

The workload has just begun...

This study guide is just as an introduction to the problem. We suggest the reader to focus on the legal issues raised during the research. Each issue can be easily found in books, in the internet, and, especially, in articles, and for that we suggest the ones listed in the bibliography. We have put in our webpage (www.amun.com.br/icj) the hypothetical General Assembly resolution that requests the Court to deliver its advisory opinion, please read it carefully. We decide to leave out, due to space limitations, the jurisdictional problems that the Court would normally face. For that, we suggest the reading of past ICJ advisory opinions (*Nuclear Weapons* case may do that job) for ideas for the presence or lack of jurisdiction of the Court to answer the question proposed. Learn Article 65 (admissibility of requests for advisory

⁵⁶ The doctrine of the *Responsibility to Protect* was developed by the International Commission on Intervention and State Sovereignty, established by the Canadian government in 2000 in order to provide a conceptual basis around questions including, *inter alia*, when an intervention should occur, under whose authority, and how it should be accomplished (the so-called 'right of humanitarian intervention'). The central theme of its 2001 report is the *Responsibility to Protect*, the idea that sovereign States have a responsibility to protect their own citizens from avoidable catastrophe, but when they are unwilling or unable to do so, that responsibility must be borne by the broader community of States. See: <http://www.dfait-maeci.gc.ca/iciss-ciise/>.

cases) of the Statute of the Court. After that, read this Study Guide again. Afterwards, do it one more time. Mind that the more research you do the better informed and articulate you will sound during AMUN.

FINAL REMARKS

Even though our objective in this study guide is not to reach a conclusion about the arguments brought in the last paragraphs, we are sure that the recent measures taken by some States under the framework of an IO, as the NATO use of force in Kosovo for example, are questionable in terms of its legality. The importance of an opinion of the Court in the sense of restricting the threat of use of force by IOs, though not binding, is that States, IOs and also the UN (especially the SC and the General Assembly) will have an additional official legal understanding of this matter to consider before taking any action that could not be in accordance with international law.

BIBLIOGRAPHY

AREND, Anthony Clark; BECK, Robert J. *International law and the use of force: Beyond the UN charter paradigm*. London: Routledge, 2nd Ed., 1993.

HARRIS, D.J. *Cases and Materials in International Law*. London: Sweet and Maxwell, 5th Ed., 1998.

INTERNATIONAL Commission on Intervention and State Sovereignty. *The Responsibility to Protect*. Ottawa: International Development Research Centre, 2001.

_____. *The Responsibility to Protect*. Canada: Department of Foreign Affairs and International Trade. At: <<http://www.dfait-maeci.gc.ca/iciss-ciise/>>.

NORTH Atlantic Treaty Organization. *NATO's Role in Kosovo*. At: <<http://www.nato.int/kosovo/kosovo.htm>>.

LEPARD, Briand. *Rethinking Humanitarian Intervention: a fresh approach based on fundamental ethical principles in international law and world religions*. Pennsylvania University Press, 2000.

SIMMA, Bruno. *Charter of the United Nations: A commentary (the)*. Oxford University Press, 2nd Ed., 1995.

_____. NATO, the UN and the Use of Force: Legal Aspects. In: *European Journal of International Law*, vol. 10, no. 01, 1999. At: <<http://www.ejil.org/journal/Vol10/No1>>.

Official Documents:

UNITED Nations. Charter of the United Nations. At: <<http://www.un.org/aboutun/charter/>>.

UNITED Nations. General Assembly Landmark Documents: *General Assembly Resolution 337(V): Uniting for Peace*. At: <<http://www.un.org/Depts/dhl/landmark/pdf/ares377e.pdf>>.

UNITED NATIONS (1969). Vienna Convention on the Law of Treaties. At: <http://www.unog.ch/archives/vienna/vien_69.htm>.

POSITION PAPERS

Position papers for the ICJ bear very little resemblance to position papers for the other ordinary committees. The major difference is that national policy is set aside; you will not be representing the opinion of your country. Instead, your position paper should allow you to analyze critically and draw your own conclusions about the legal arguments involved in the case. What do you find to be the most compelling arguments from an international law standpoint? It is also important for you to address the issues that you feel are less important and why. We have provided you with a few legal issues to begin exploring, but please do not feel confined to just a discussion of those ideas, treaties, documents, and precedents. Any international text of relevance will be welcome in our discussions. In your position paper, please explain those documents that you think are pertinent and why. The position papers for each case have to be handed out by e-mail (icj@amun.com.br) up to June 27th – all position papers will then be available at our website for reading and analysis before the official beginning of the conference. The position paper of each topic must have five pages at most.