ELIMINATING THE OUTCOMES OF THE BOSNIAN GENOCIDE AS A MEANS TO PERSERVING PEACE IN BOSNIA AND HERZEGOVINA

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***Abstract**: This article deals with setting forth the outcomes of the crime of genocide which was substantiated by the Judgment of the International Court of Justice on 26 February 2007 in the Bosnia and Herzegovina versus Serbia and Montenegro case concerning the violation of the Convention on the Prevention and Punishment of the Crime of Genocide. Providing for an overview of the law relevant to this case, the following article addresses how to eliminate the outcomes of the Bosnian genocide in the interest of protecting peace and security in the West Balkan region.*

***Key Words**: Genocide, Judgment, VRS, international law, peace*

I. Introduction

On 26 February 2007, the International Court of Justice (ICJ) in the Hague delivered a Judgment in the Bosnia and Herzegovina versus Serbia and Montenegro case in respect of the violation of the Convention on the Prevention and Punishment of the Crime of Genocide (The Genocide Convention). It was established that genocide was committed against a group of Bosnian Muslims in and around Srebrenica.

The perpetrators of genocide were, in particular, members of the Army (VRS) and the Ministry of Interior (MUP) of the Republic Srpska. Serbia was found responsible for failing to prevent genocide and punish the perpetrators.

Some officers of the Main Headquarters of the VRS, that planned and committed genocide were receiving salaries and other benefits from the Federal Republic of Yugoslavia (FRY) but were appointed to their commands by the President of Republic Srpska and were subordinated to the political leadership of Republic

Srpska. The officers that planned and committed genocide were exercising elements of public authority of the Republic Srpska.

International law obliges all countries not to recognize conditions created by serious violations of peremptory norms of general international law and also not to give support in maintaining such a condition. The prohibition of genocide presents a peremptory norm of general international law.

Republic Srpska was created on 9 January 1992, and never attained international recognition as a sovereign state, but it had *de facto* control over a substantial part of the territory of Bosnia and Herzegovina and loyalty of large numbers of Bosnian Serbs. It had kept the elements of statehood and territory gained even after the conclusion of the General Framework Agreement on Peace for Bosnia and Herzegovina.

The objectives of the genocide campaign were achieved in a qualitative sense. The Serb ethnic space was expanded to the West of the Drina River by way of the removal of majority Bosniak population. Undertaking measures in accordance with international law that would ensure that the outcome of the said genocide is eliminated (which is the obligation of the international community as whole) is the key to preserving peace in the Balkans and elsewhere.

II. Facts Established or Confirmed by the Judgement[1]

1. The International Court of Justice, for the first time in its history, found a state – Serbia – responsible for violating the Genocide Convention. Therefore, this Judgment has its historical value not only with respect to the Parties concerned, but also with respect to the development of International Humanitarian Law as a whole. The Court ruled, *inter alia*, that:

a) Serbia violated the obligation under the Genocide Convention to prevent genocide that occurred in Bosnia and Herzegovina, specifically in and around Srebrenica in July 1995;

b) Serbia violated its obligation under the Genocide Convention by failing to arrest persons indicted for genocide and complicity to genocide (including Ratko Mladic) and transfer them for trial by the International Criminal Tribunal for the former Yugoslavia (ICTY);

1 See: *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro*) (Judgment) General List No. 91 [2007] ICJ 1 (26 Şubat 2007);
http://www.icj-cij.org/docket/files/91/13685.pdf#view=FitH&pagemode=none&search=%22zimmermann%22

c) Serbia violated its obligation to comply with provisional measures ordered by the Court on 8 April and 13 September 1993 in this case, inasmuch as it failed to take all measures within its power to prevent genocide in Srebrenica in July 1995.

d) That Serbia must take immediate and effective steps in order to satisfy its obligations under the Genocide Convention, as specified in Article II of that Convention, or any other measures specified in Article III of the Convention, and to transfer those indicted for genocide or any other such crimes for trial at the ICTY, and to fully cooperate with the ICTY.

2. The ICJ established participation of the FRY (later Serbia) in the war in Bosnia and Herzegovina, which confirmed the nature of the armed conflict in Bosnia and Herzegovina as an international conflict. This Judgment, together with the final judgments of the ICTY in the *Tadic* and *Celebic* cases indisputably confirms that the war in Bosnia and Herzegovina was an international armed conflict in which the FRY participated as a belligerent party. This international armed conflict, conducted on the territory of Bosnia and Herzegovina by the armed forces of the FRY, or the armed forces under its control, constituted an act of aggression by the FRY against the Republic of Bosnia and Herzegovina.

The subject of this case was not to establish the character of the armed conflict in Bosnia and Herzegovina nor establishing the existence of an armed conflict as a required condition for establishing the existence of genocide. The crime of genocide can be committed not only in time of armed conflict but also in time of peace. Therefore, this subject was not of particular interest to the Court.

Nonetheless, the Court, when dealing with the issue of the responsibility of the FRY for genocide committed in Bosnia and Herzegovina, established that the Army of the FRY had participated in the war in Bosnia and Herzegovina. The Court found that there was sufficient evidence confirming direct or indirect participation by the official army of FRY, along with the Bosnian Serb armed forces in military operations in Bosnia and Herzegovina. However, the Court limited the FRY's military participation to the operations prior to the events in Srebrenica.[2]

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2 It is true that there is much evidence of direct or indirect participation by the official army of the FRY, along with the Bosnian Serb armed forces, in military operations in Bosnia and Herzegovina in the years prior to the events at Srebrenica. That participation was repeatedly condemned by the political organs of the United Nations, which demanded that the FRY put an end to it (see, for example, Security Council resolutions 752 (1992), 757 (1992), 762 (1992), 819 (1993), 838 (1993)). It has however not been shown that there was any such participation in relation to the massacres committed at Srebrenica (see also paragraphs 278 to 297 above). Further, neither the Republika Srpska, nor the VRS were *de jure* organs of the FRY, since none of them had the status of organ of that State under its internal law." *Case Concerning the Application of the Convention*…, para. 386.

In addition to the direct participation of the army of the FRY in the military operations in Bosnia and Herzegovina, the Court established that the FRY was providing considerable military and financial support to Republika Srpska, without which it could not have conducted its crucial military and paramilitary activities.[3] Part of this aid, it was found by the Court, was used to commit genocide in and around Srebrenica.[4]

The July 1995 operations in and around Srebrenica were coordinated from Belgrade, the capital of FRY.[5]

Also, the Court established that the FRY, during the critical period, "had the position of influence over the Bosnian Serbs who devised and implemented the genocide in Srebrenica, unlike any of the other States parties to the Genocide Convention owning to the strength of the political, military and financial links between the FRY on the one hand and the Republika Srpska and the VRS on the other, though somewhat weaker than in the preceding period, nonetheless also during the events in Srebrenica remained very close."[6]

3. The Court established that genocide was committed in Bosnia and Herzegovina, and that Republika Srpska committed that genocide. In the factual and legal description of the crime of genocide, the Court fully adopted and accepted the findings of numerous ICTY judgments.[7]

3 "The Court finds it established that the Respondent was thus making its considerable military and financial support available to the Republika Srpska, and had it withdrawn that support, this would have greatly constrained the options that were available to the Republika Srpska authorities." *Case Concerning the Application of the Convention* …, para. 241.

"While the political, military and logistical relations between the federal authorities in Belgrade and the authorities in Pale, between the Yugoslav army and the VRS, had been strong and close in previous years…and these ties undoubtedly remained powerful, they were, at least at the relevant time, not such that the Bosnian Serbs' political and military organizations should be equated with organs of the FRY. It is even true that differences over strategic options emerged at the time between Yugoslav authorities and Bosnian Serb leaders; at the very least, these are evidence that the latter had some qualified, but real, margin of independence. Nor, notwithstanding the very important support given by the Respondent to the Republika Srpska, without which it could not have 'conduct[ed] its crucial or most significant military and paramilitary activities'…did this signify a total dependence of the Republika Srpska upon the Respondent." *Case Concerning the Application of the Convention* …, para. 394.

4 "Undoubtedly, the quite substantial aid of a political, military and financial nature provided by the FRY to the Republika Srpska and the VRS, beginning long before the tragic events of Srebrenica, continued during those events. There is thus little doubt that the atrocities in Srebrenica were committed, at least in part, with the resources which the perpetrators of those acts possessed as a result of the general policy of aid and assistance pursued towards them by the FRY." *Case Concerning the Application of the Convention* …, para. 422. (See also para. 412).

5 *Case Concerning the Application of the Convention*…, para. 437.

6 "The position of influence, over the Bosnian Serbs who devised and implemented the genocide in Srebrenica, unlike that of any of the other States parties to the Genocide Convention owing to the strength of the political, military and financial links between the FRY on the one hand and the Republika Srpska and the VRS on the other, which, though somewhat weaker than in the preceding period, nonetheless remained very close." See: *Case Concerning the Application of the Convention*…, para. 434.

7 The Trial Chambers in the Krstić and Blagojević cases both found that Bosnian Serb forces killed over 7,000 Bosnian Muslim men following the takeover of Srebrenica in July 1995. See: Prosecutor vs. Krstić (Judgment) IT-98-33-T, (2 August 2001), paras. 426-427 and Prosecutor vs. Blagojević (Judgment) IT-02-60-T, (17 January 2005), para. 643. Accordingly they found that the *actus reus* of killings in Article II *(a)* of the Convention was satisfied. Both also found that actions of Bosnian Serb forces also satisfied the *actus reus* of

During the time pertaining to the crime of genocide Republic Srpska enjoyed the elements of *de facto* independence.[8]

During the commission of the crime of genocide, the Army of Republika Srpska was subordinated to the political leadership of Republika Srpska. The perpetrators of the genocide were acting on behalf of Republika Srpska and were exercising elements of public authority of Republika Srpska.[9]

4. The Court established that genocide was committed against the Muslims of Bosnia and Herzegovina which form a protected group within the meaning of the Genocide Convention. Article II of the Genocide Convention sets a requirement that an act is committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such.

Also, it is not necessary that the object of the crime of genocide are all members of a group regardless of where they might be found. The crime of genocide exists even if the intent of committing genocide is limited to a specific geographical area. Therefore, in the Court's opinion: "the Court observes that it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area."[10]

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causing serious bodily or mental harm, as defined in Article II *(b)* of the Convention both to those who where about to be executed, and to the others who were separated from them in respect of their forced displacement and the loss suffered by survivors among them (*Krstić*, *ibid.*, para. 543, and *Blagojević*, *ibid.*, paras. 644-654)." *Case Concerning the Application of the Convention*…, para. 290.

"The Court concludes that the acts committed at Srebrenica falling within Article II "The Court concludes that the acts committed at Srebrenica falling within Article II *(a)* and *(b)* of the Convention were committed with the specific intent to destroy in part the group of the Muslims of Bosnia and Herzegovina as such; and accordingly that these were acts of genocide, committed by members of the VRS in and around Srebrenica from about 13 July 1995." *Case Concerning the Application of the Convention*…, para. 297.

8 As mentioned by the Court, "of the independent sovereign States that had emerged from the break-up of the SFRY, two are concerned in the present proceedings: on the one side, the FRY (later to be called Serbia and Montenegro), which was composed of the two constituent republics of Serbia and Montenegro; on the other, the Republic of Bosnia and Herzegovina. At the time when the latter State declared its independence (15 October 1991), the independence of two other entities had already been declared: in Croatia, the Republika Srpska Krajina, on 26 April 1991, and the Republic of the Serb People of Bosnia and Herzegovina, later to be called the Republika Srpska, on 9 January 1992 (paragraph 233 above).The Republika Srpska never attained international recognition as a sovereign State, but it had *de facto* control of substantial territory, and the loyalty of large numbers of Bosnian Serbs." *Case Concerning the Application of the Convention*…, para. 235.

9 "There is no doubt that the FRY was providing substantial support, *inter alia*, financial support, to the Republika Srpska…and that one of the forms that support took was payment of salaries and other benefits to some officers of the VRS, but this did not automatically make them organs of the FRY. Those officers were appointed to their commands by the President of the Republika Srpska, and were subordinated to the political leadership of the Republika Srpska. In the absence of evidence to the contrary, those officers must be taken to have received their orders from the Republika Srpska or the VRS, not from the FRY. The expression "State organ", as used in customary international law and in Article 4 of the ILC Articles, applies to one or other of the individual or collective entities which make up the organization of the State and act on its behalf (cf. ILC Commentary to Art. 4, para. (1)). The functions of the VRS officers, including General Mladić, were however to act on behalf of the Bosnian Serb authorities, in particular the Republika Srpska, not on behalf of the FRY; they exercised elements of the public authority of the Republika Srpska. The particular situation of General Mladić, or of any other VRS officer present at Srebrenica who may have been being "administered" from Belgrade, is not therefore such as to lead the Court to modify the conclusion reached in the previous paragraph." *Case Concerning the Application of the Convention*…, para. 388.

10 *Case Concerning the Application of the Convention*…, para. 199. Also, "The Appeals Chamber in the *Krstić* case put the matter in these carefully measured terms: 'The number of individuals targeted should be evaluated

Having in mind such a definition of a protected group, the Court, based on the results of proceedings, identified the protected group as the group of the Bosnian Muslims and part of that group that was the target of genocide, namely, the "Bosnian Muslims of Srebrenica and Bosnian Muslims of Eastern Bosnia." The Court had taken these findings from the ICTY and accepted them fully.[11]

5. The Court accepted as factual evidence that the citizens of Bosnia and Herzegovina and especially the Muslims of Bosnia and Herzegovina, in the period of aggression from 1992 to 1995, were subject to crimes in the form of killing members of the protected group, Article II (a) of the Convention, equalling to genocide in physical sense of the word, thus they cannot be subject of dispute any longer. The Court analyzed the events in Sarajevo, Drina River valley: (a) Zvornik (b) Detention camps: (i) Camp Susica, (ii) Camp Detention-Corrective House Foca (iii) Camp Batkovic; in Prijedor (a) Kozarac and Hambarine, Camps (i) Camp Omarska, (ii) Camp Keraterm, (iii) Camp Trnopolje; Banja Luka: (i) Camp Manjaca; Brcko: (i) Camp Luka.

Analyzing the presented evidence, the Court established that during the period from 1992 to 1995 mass killings were perpetrated in specific areas and detention camps throughout Bosnia and Herzegovina. Mainly the Bosnian Muslims as members of the protected group were the targets. Therefore, the Court concluded that, throughout Bosnia and Herzegovina and during the entire period from 1992 to 1995, mass killings occurred and that the material element (*actus reus)* of the crime of genocide, as defined in the Article (II) (a) of the Convention were fulfilled.[12]

6. The Court, further, established that throughout Bosnia and Herzegovina the Bosnian Muslims as the protected group, during the entire period between 1992 and 1995, were victims of massive mistreatment, beatings, rape and torture that caused serious bodily and mental harm from Article II (b), thus the requirement of this Article from the Convention on genocide was fulfilled. The Court analyzed

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not only in absolute terms, but also in relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4 [of the Statute which exactly reproduces Article II of the Convention]." (IT-98-33-A, Judgment, 19 April 2004, para. 12), quoted from: Case Concerning the Application of the Convention…, para. 200.

11 As stated by the ICTY in the Appeals Chamber of the Krstić case, "having identified the protected group as the national group of Bosnian Muslims, the Trial Chamber concluded that the part the VRS Main Staff and Radislav Krstić targeted was the Bosnian Muslims of Srebrenica, or the Bosnian Muslims of Eastern Bosnia. This conclusion comports with the guidelines outlined above. The size of the Bosnian Muslim population in Srebrenica prior to its capture by the VRS forces in 1995 amounted to approximately forty thousand people. This represented not only the Muslim inhabitants of the Srebrenica municipality but also many Muslim refugees from the surrounding region. Although this population constituted only a small percentage of the overall Muslim population of Bosnia and Herzegovina at the time, the importance of the Muslim community of Srebrenica is not captured solely by its size." (IT-98-33-A, Judgment, 19 April 2004, para. 15); quoted from Case Concerning the Application of the Convention…, para. 296. The Court subsequently added that it "sees no reason to disagree with the concordant findings of the Trial Chamber and the Appeals Chamber".

12 Case Concerning the Application of the Convention …, para. 276.

the events in Drina River valley: (a) Zvornik (b) Foca (i) Camp Batkovici, (ii) Camp Susica, (iii) Camp Detention-Corrective House Foca; in Prijedor (b) Camps: (i) Camp Omarska, (ii) Camp Keraterm, (iii) Camp Trnopolje; Banja Luka: (i) Camp Manjaca; Brcko: (i) Camp Luka, based on which it concluded that the requirement from the Genocide Convention is fulfilled. Therefore, also in this case the material element (*actus reus)* of genocide is fulfilled.[13]

7. The Court also established that the protected group was subject of deportation and expulsion and that its historic, religious and cultural heritage was subject of destruction. Furthermore, the Court established the existence of detention camps throughout Bosnia and Herzegovina where people were killed, harmed and exposed to terrible living conditions.

8. The Court found that the Army and the Police of Republic Srpska participated in the acts of genocide.[14]

9. The Court found that the individuals who participated in the commission of the crime of genocide exercised elements of public authority of Republika Srpska. As has already been stated, Republika Srpska in the critical time had elements of *de facto* independence, and conducted all attributes of the authority on the territory that it controlled. The Judgment states the following:

> The functions of the VRS officers, including General Mladiç, were however to act on behalf of the Bosnian Serb authorities, in particular the Republika Srpska, not on behalf of the FRY; they exercised elements of the public authority of the Republika Srpska...[15]

10. The crime of genocide was perpetrated in the United Nations safe area. The Security Council Resolution number 819 dated 16 April 1993,[16] by declaring Srebrenica as a safe area,[17] established protected areas in Bosnia and Herzegovina. Resolution 824 further increased the number of the safe areas in Bosnia and Herzegovina.[18] In these resolutions, "all the demands of the Council were directed at the Serbs..."[19]

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13 Case Concerning the Application of the Convention …, para. 319.

14 Case Concerning the Application of the Convention …, para. 288.

15 Case Concerning the Application of the Convention …, para. 388.

16 UNSC Res. 819 (16 April 1993) UN Doc. S/RES/819.

17 "The Security Council on 16 April 1993 adopted Resolution 819 by which Srebrenica was declared as safe area. The Resolution was dangerously incoherent. During six hours long consultations before its adoption formed was wide consensus within the Security Council by which something ought to be done in order to prevent Serbs to ethnically clean Srebrenica using brutal force. But, in decision-making, which was necessary due to danger that town might fall, the Council had agreed to create protected zone but it failed to specify which "zone" that was and how it can be protected. Resolution masked but did not resolve any of the fundamental differences in opinion and view of establishing protected zones." J. W. Honig and N. Both, *Srebrenica*, *Hronika ratnog zločina*, (Sarajevo: 1997), p. 130.

18 UNSC Res. 824 (6 May 1993) UN Doc S/RES/824.

19 Report of the Secretary Pursuant to General Assembly Resolution 53/35 (1998), "Srebrenica Report", 15 November 1999.

Subsequently, with the aim to increase security in the protected zone, Security Council Resolution 836[20] was issued. Despite these initiatives, the Bosnian Serbs committed genocide in the UN protected zone which puts before the UN a specific obligation of eliminating the outcomes of genocide.[21] However, the United Nations could not stop the Serb attacks in the safe area.[22]

III. Relevant Law

A. Vienna Convention on the Law of Treaties

The Vienna Convention on Law of Treaties (1969), specifically Article 53, defines a peremptory *(jus cogens)* norm as the "norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." In case that a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates (Article 64).

20 UNSC Res. 836 (4 June 1993) UN Doc. S/RES/836; cited in Report of the Secretary Pursuant to General Assembly Resolution 53/35…, 43.

21 As stated by the Court: "The atrocities committed in and around Srebrenica are nowhere better summarized than in the first paragraph of the Judgment of the Trial Chamber in the Krstić case:

'The events surrounding the Bosnian Serb take-over of the United Nations ('UN') 'safe area' of Srebrenica in Bosnia and Herzegovina, in July 1995, have become well known to the world. Despite a UN Security Council resolution declaring that the enclave was to be 'free from armed attack or any other hostile act', units of the Bosnian Serb Army ('VRS') launched an attack and captured the town. Within a few days, approximately 25,000 Bosnian Muslims, most of them women, children and elderly people who were living in the area, were uprooted and, in an atmosphere of terror, loaded onto overcrowded buses by the Bosnian Serb forces and transported across the confrontation lines into Bosnian Muslim-held territory. The military-aged Bosnian Muslim men of Srebrenica, however, were consigned to a separate fate. As thousands of them attempted to flee the area, they were taken prisoner, detained in brutal conditions and then executed. More than 7,000 people were never seen again.' IT-98-33-T, Judgment, (2 August 2001), para. 1; Case Concerning the Application of the Convention…, para. 278.

22 "On 2 July the Commander of the Drina Corps issued an order for active combat operations; its stated objective on the Srebrenica enclave was to reduce "the enclave to its urban area". The attack began on 6 July with rockets exploding near the Dutchbat headquarters in Potoãari; 7 and 8 July were relatively quiet because of poor weather, but the shelling intensified around 9 July. Srebrenica remained under fire until 11 July when it fell, with the Dutchbat observation posts having been taken by the VRS. Contrary to the expectations of the VRS, the Bosnia and Herzegovina army showed very little resistance (see: Prosecutor vs. *Blagojević* (Judgment) IT-02-60-T, T Ch (17 January 2005), para. 125. The United Nations Secretary-General's report quotes an assessment made by United Nations military observers on the afternoon of 9 July which concluded as follows: 'the BSA offensive will continue until they achieve their aims. These aims may even be widening since the United Nations response has been almost non-existent and the BSA are now in a position to overrun the enclave if they wish.' Documents later obtained from Serb sources appear to suggest that this assessment was correct. Those documents indicate that the Serb attack on Srebrenica initially had limited objectives. Only after having advanced with unexpected ease did the Serbs decide to overrun the entire enclave. Serb civilian and military officials from the Srebrenica area have stated the same thing, adding, in the course of discussions with a United Nations official, that they decided to advance all the way to Srebrenica town when they assessed that UNPROFOR was not willing or able to stop them." (A/54/549, para. 264.) Case Concerning the Application of the Convention…, para. 283.

B. Rules on Responsibility of States for Internationally Wrongful Acts[23]

The International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, in Chapter III entitled: Serious Breaches of Obligations Under Peremptory Norms of General International Law prescribes consequences for breaches of peremptory norms. Article 40 of the Articles applies to the international responsibility of States arising as a consequence of a serious breach of a peremptory norm of general international law. "A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfill the obligation."[24]

Article 41. 2. of the Rules,[25] which relates to the consequences arising from breaches within this Chapter prescribe that no State shall recognize as lawful a situation created by a serious breach of a peremptory norm of general international law, nor render aid or assistance in maintaining that situation. The International Legal Commission of the UN gave examples of international treaties whose breach is in fact a breach of peremptory norms of international law. Breaching the prohibition of genocide is a breach of a peremptory norm of international law.[26]

Art. 40(1) in that Chapter declares that "This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law." Genocide is generally accepted as prohibited by peremptory norms of general international law, as it constitutes a wrong which "shocks the conscience of mankind"[27] Furthermore, the Commentaries to the Draft Articles cite the fact that the ICJ in the Genocide Case, at the Preliminary Objections case, decided that "the rights and obligations enshrined by the [Genocide] Convention are rights and obligations *erga omnes*," that is that, "for the purposes of State responsibility, certain obligations are owed to the international community as a whole, and that by reason of the importance of the rights involved all States have a legal interest in their protection."[28]

Art. 40(2) of the Draft Articles declares that "a breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfill the obligation." That the "seriousness" of the breach requirement is satisfied is

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23 See: UN Doc. A/RES/56/83 from 28 January 2002 Responsibility of States for Internationally Wrongful Acts.

24 UN Doc. A/RES/56/83…, Article 40.

25 UN Doc. A/RES/56/83…, Article 41.

26 Yearbook of the International Law Commission. Vol. II, 1996, p. 248.

27 See inter alia: Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Reports (1951) 15, at 23.

28 See: Commentaries to the Draft Articles, pp. 277-78.

clear from the very Commentaries to the Draft Articles which declare that "it must also be borne in mind that some of the peremptory norms in question**,** most notably the prohibitions of aggression and genocide, by their very nature require an intentional violation on a large scale," thereby establishing the seriousness of the violation without any further requirements.

As has already been described, Article 40 serves to define breaches covered by Chapter III. It establishes two criteria for differentiating between serious breaches of peremptory norms of general international law and other breaches. The first one defines the character of a breached obligation that must arise from the peremptory norm of the general international law. The other one relates to the intensity of a breach that has to be of a serious nature.

The first criterion relates to the character of a breached obligation that has to be of peremptory nature as defined by the Vienna Convention on Law of Treaties. The concept of peremptory norms of general international law is recognized in international practice, in the jurisprudence of international and national courts and tribunals as well as in legal doctrine.

Obligations set in Article 40 arise from breaching the rules of conduct that cannot be tolerated because of a threat that they bear to survival of states, its peoples as well as basic human values.

It is generally accepted that the prohibition of aggression is a peremptory norm of general international law. Also, it is widely accepted that the crime of genocide and the crime of apartheid fall under this category. As for the peremptory nature of the crime of genocide, this position has been confirmed by numerous decisions of national and international tribunals.[29] In addition, falling into this category, by general consensus, are the prohibition of torture, as defined in the Article 1 of the Convention against Torture and other Cruel, Inhuman and Degrading Treatment (1984).[30] The peremptory character of this norm is also confirmed by the decisions of national and international courts.[31]

The second criterion that relates to the breach of a peremptory norm under the ILC Articles is that the breach in question must be "serious" in nature. Article 40. 2. of the Rules defines a serious breach as a gross and systematic failure by the

29 See for example: the International Court of Justice in Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, I.C.J. Reports 1993, 325, at pp. 439-440; Counter-Claims, I.C.J. Reports 1997, p. 243; the District Court of Jerusalem in Attorney-General of the Government of Israel v. Eichmann, (1961) I.L.R., vol. 36.

30 United Nations, Treaty Series, vol. 1465, p. 112.

31 The U.S. Court of Appeals, 2nd Circuit, in *Siderman de Blake v. Argentina,* (1992) *I.L.R.,* vol. 103, 455, at 471; the United Kingdom Court of Appeal in *Al Adsani v. Government of Kuwait,* (1996) *I.L.R.,* vol. 107, p. 536 at pp. 540-541; the United Kingdom House of Lords in *R. v. Bow Street Metropolitan Magistrate, ex parte Pinochet Ugarte (No. 3), (1999) 2 W.L.R.* 827, at pp.841, 881. Cf. the U.S. Court of Appeals, 2nd Circuit in *Filartiga v. Pena-Irala,* (1980), 630 F.2d 876, *I.L.R.*, vol. 77, 169, at pp. 177-179.

responsible State to fulfil the obligation. The word serious means that it is necessary to establish a specific order of proportions in order not to trivialize the breach.

In order to be systematic, a breach must be done in an organized way and deliberately. These expressions are almost synonymous in practice. Indeed, a serious breach would normally be both massive and systematic. Factors that include the seriousness of a breach can include the size and number of individual breaches as well as the seriousness of the consequences with respect to victims. As has already been noted, in cases of aggression and, especially, genocide, these crimes by their very nature require violations of significant scope. Article 41 of the Rules elaborates on particular consequences of serious breaches of Article 40 of the Rules. It has three paragraphs. The first two prescribe a special legal obligation to States confronted with violations within the frame of Article 40 while the third paragraph is in the form of a clause.

According to paragraph 1 of Article 40 States have a positive obligation to co-operate in order to bring to an end serious breaches within Article 40. Due to different circumstances that may exist, this paragraph does not prescribe in detail what form of co-operation ought to exist. This co-operation must be organized within the existing international-legal framework and especially within the framework of the United Nations system. Therefore, this paragraph also foresees the possibility of out-of-institutional co-operation. Also, this paragraph does not prescribe what measures ought to be taken in order to end serious violations stemming from Article 40 of the Rules. These measures must be within the framework of legal means whose selection will depend on the circumstances of each separate case.

However, it is clear that the obligation of co-operation for States, regardless if they are affected by the relevant breach, exist. They are obligated to remove the outcomes of these crimes with co-ordinated efforts. If we look at the current situation we can conclude that such co-operation exists, and often this is the only way in ensuring effective means for bringing an end to such breaches. Paragraph 1 demands the strengthening of existing mechanisms of co-operation, based on the ground of responsibility of all States to respond to serious breaches within Article 40.[32]

While paragraph 1 of Article 40 prescribes to States positive obligations, paragraph 2 prescribes negative obligations: first, not to recognize as lawful a situation created by a serious breach and second, not to render aid in maintaining such situation.

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32 See: *Yearbook of the International Law Commission*. 2001. Vol I. Chapter IV, p. 287.

The first of these obligations points to the obligation of the international community as a whole, of a collective non-recognition of legality of a situation that directly arose from the breaches within the meaning of article 40.[33] "This does not only point to formal recognitions of such situations, but it also prohibits acts that might imply such recognition."[34]

Existence of obligation of non-recognition created by breaching peremptory norms of general international law finds its support within international practice and the decisions of the International Court of Justice.[35]

An example of the practice of non-recognition of breaches of peremptory norms is provided for by the reaction of the Security Council concerning the Iraqi invasion of Kuwait in 1990. After the invasion, Iraq pronounced the general and permanent annexation of Kuwait. The Security Council Resolution 662 (1990) decided that annexation is not legally valid and called all states, international organizations and specialized agencies, not to recognize the annexation and to refrain from any action that could be interpreted as recognition. In reality none of the states recognized the annexation.

Even if an injured state would recognize the condition created by the acts of breaches by encouragement of a responsible State such a condition should not be recognized.[36]

The second obligation contained in paragraph 2 of Article 41 forbids states to render aid in maintaining a situation created by serious breaches of peremptory norms within Article 40 of the ILC Articles. This relates to the behaviour of states after the breach has been committed that serve to aid or assist in preserving the situation created by such a breach. Its existence as an independent obligation, aside from the obligation of not recognizing a situation created by force, is confirmed by Security Council Resolutions that prohibited any form of aid to the illegal regime of apartheid that was created in South Africa or the Portuguese colonial administration.[37] These resolutions express universal ideas applicable to all situations created by breaches within Article 40.

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33 This has been described as an essential legal weapon in the fight against grave breaches of the basic rules of international law.: Christian Tomuschat, "International Crimes by States: An Endangered Species?", in *International Law: Theory and Practice: Essays in Honour of Eric Suy,* ed. K. Wellens (The Hague: Nijhoff, 1998), p. 253.

34 Christian Tomuschat, "International Crimes by States..., p. 253.

35 Christian Tomuschat, "International Crimes by States..., p. 288.

36 Evidently the responsible State is under an obligation not to recognize or sustain the unlawful situation arising from the breach. Similar considerations apply even to the injured State: since the breach by definition concerns the international community as a whole, waiver or recognition induced from the injured State by the responsible State cannot preclude the international community interest in ensuring a just and appropriate settlement.'' Christian Tomuschat, "International Crimes by States..., p. 290.

37 See: UNSC Res. 218 (1965) on the Portuguese colonies and UNSC Res. 418 (1977) and 569 (1985) on South Africa.

According to Paragraph 3 of Article 41, Article 40 is without prejudice to other consequences of the international responsibility of a state and such further consequences that may result from serious breaches of obligations under preemptory norms of general international law. This article has a double aim. Firstly, it explains that serious breaches have legal consequences. Therefore, serious breaches within the meaning of article 40 lead to an international legal obligation to end the breach, to respect a prohibition of such a breach, and to give a guarantee that they will not repeat the breach of peremptory norms. Secondly, paragraph 3 allows the existence of further international-legal consequences caused by these breaches.

The key pre-condition for the implementation of this chapter is establishing the rights of the injured state understood as "a State whose individual right is disputed or injured by international wrongful acts or which is specially injured in another way by that act".[38] This term is presented in article 42 of the Rules and derived from it are different consequences in other articles of this Chapter and the third part of the ILC Articles.

C. The Convention on the Prevention and Punishment of the Crime of Genocide and the Responsibility to Eliminate the Outcomes of the Bosnian Genocide

The Genocide Convention imposes obligations on member states to prevent genocide and to punish perpetrators and to not committee genocide themselves. However, this prohibition also represents a peremptory norm of international law which bounds all states members of the international community and not only the signatories of the Convention. Also, there is an obligation, not only for the signatories of the Convention, but for all states to eliminate the outcomes caused by genocide. Therefore, the situation created by genocide is legally unsustainable. The perpetrator of genocide cannot use and enjoy the outcomes and advantages created by genocide.

This is important not only to correct the injustice caused to genocide victims but also to maintain the principles on which the international legal order as a whole is based. Therefore, the initiative for eliminating the outcomes of genocide cannot solely lie with the genocide victims, but must also lie with the other members of the international community as the crime of genocide is, by definition, a crime against the entire international community.

According to Article I of the Genocide Convention, "the Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a

38 Christian Tomuschat, "International Crimes by States..., p. 293.

crime under international law which they undertake to prevent and to punish". In its Judgment of 26 February 2007, the ICJ held:

> Those characterizations of the prohibition on genocide and the purpose of the Convention are significant for the interpretation of the second proposition stated in Article I – the undertaking by the Contracting Parties to prevent and punish the crime of genocide, and particularly in this context the undertaking to prevent… Those features support the conclusion that Article I, in particular its undertaking to prevent, creates obligations distinct from those which appear in the subsequent Articles. That conclusion is also supported by the purely humanitarian and civilizing purpose of the Convention.[39]

Articles II and III of the Convention on genocide define genocide and punishable acts arising from these breaches; and according to the Article IV individuals found in violation of any of the mentioned acts shall be punished, regardless of whether they are state officials, public servants or individuals. Articles V, VI and VII require legislation, in particular providing effective penalties for persons guilty of genocide and other acts enumerated in Article III of the Convention, and for the persecution and extradition of the alleged offenders. Because those provisions regulating punishment also have a deterrent and therefore a preventive effect, they could be regarded as meeting and indeed exhausting the undertaking to prevent the crime of genocide stated in Article I and mentioned in the title. On that basis this Article could be characterized as merely cautionary. The remaining specific provision of Article VIII, which talks about competent organs of the United Nations taking action, may be seen as completing the system at the political level.[40]

Genocide is a crime under international law and the prohibition of genocide represents a peremptory *(jus Cogens)* norm of international law. In the introductory part of the Genocide Convention it is stated that the Convention is adopted "considering the statement of the United Nations General Assembly, given in the resolution 96 (1) on 11 December 1946 that genocide is a crime, under international law, contrary to the spirit and the aims of United Nations and that civilized world is condemning it…" In the Advisory opinion on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide from 1951, the ICJ held that genocide as a crime under international law[41] presents a denial of the right of existence of entire human groups "a denial which shocks the conciseness of mankind and results in great losses to humanity, and

39 Case Concerning the Application of the Convention…, para. 162.

40 Case Concerning the Application of the Convention…, para. 159.

41 Case Concerning the Application of the Convention…, para. 161.

which is contrary to moral law and to the spirit and aims of the United Nations".[42] The Court further draws two conclusions from such a conception of the crime of genocide. First is that the principles underlying the Convention are principles which are recognized by civilized nations and binding of States even without any conventional obligation. The second one is the universal character both of the condemnation of genocide and of the co-operation required "in order to liberate mankind from such an odious scourge".[43] The Court further states:

> In the preliminary phase of the proceeding for violation of the Genocide Convention, Bosnia and Herzegovina v. FRY, it is stated that the rights and obligations prescribed by the Genocide Convention are the rights and obligations *erga omnes*. Such position contributed to the conclusion that the Court's temporal jurisdiction was not limited to the time when a particular state became a signatory of the Convention.[44]

The Genocide Convention can be found as Annex IV of the General Framework Agreement for Peace in Bosnia and Herzegovina[45] which contains the Constitution of Bosnia and Herzegovina. The Genocide Convention is directly implemented in Bosnia and Herzegovina as part of its constitutional order.

IV. Facts on the Ground: The Outcomes of the Bosnian Genocide

The Judgment of 26 February delivered by the ICJ established that genocide was committed over part of national group of Muslims of Bosnia and Herzegovina: specifically the Muslims of Srebrenica and the Muslims of Eastern Bosnia, in the UN protected zone of Srebrenica. The Court further established that genocide was committed by Republika Srpska, specifically by the Army and the police of Republic Srpska.

The outcomes of the said genocide, not dealt with by the Judgment, could be enlisted as follows:

1. Prior to the genocide campaign, the Bosniaks were the majority population in the following East Bosnia municipalities: Bratunac, Foča, Rogatica, Srebrenica, Višegrad and Vlasenica. They further constituted a significant part of the population in Bijeljina, Bileća, Čajniče, Gacko, Han Pijesak and Rudo. Once the genocide campaign was completed, those municipalities were fully cleansed of Bosniaks.

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42 Reservation to the Convention on the prevention and punishment of the crime of genocide, Advisory opinion of may 28th, 1951, 12

43 Reservation to the Convention, 12.

44 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide,* Preliminary Objections, I.C.J. Reports 1996, 595, at p. 616, para. 31.

45 Additional Agreement on Human Rights which will be implemented in Bosnia and Herzegovina 1. *Convention on the Prevention and Punishment of the Crime of Genocide*, 1948.

The Bosniaks were also the majority (or a significant part of the) population in municipalities in which it was established that genocide was committed only in the physical sense of the word. Those municipalities are, among others, Bosanska Dubica, Bosanska Gradiška, Bosanski Brod, Bosanski Šamac, Brčko, Doboj, Prijedor and Sanski Most.

2. The economy in this region that was employing the majority population is destroyed. The process of privatization was carried out without the participation of the majority population. The private property of the Bosniaks was either destroyed or plundered.

3. Contrary to the General Framework Agreement for Peace in Bosnia and Herzegovina, Republika Srpska has actively prevented the early return of refugees. This is against the Dayton Agreement which explicitly mentions that an "early return of refugees is the key for peace in Bosnia and Herzegovina".

It is necessary to adopt an election law by which local authorities in previously Bosniak dominated municipalities should be formed in accordance with the census results from 1991, in the next decades and in this way prevent advantages from the situation created by genocide.

4. The crime of genocide affected the functioning of the constitutional organization of Bosnia and Herzegovina.

The Constitution of the former (Socialist) Republic of Bosnia and Herzegovina defined Bosnia and Herzegovina in a following way: "Socialist Republic of Bosnia and Herzegovina is a democratic sovereign state of equal citizens, peoples of Bosnia and Herzegovina – Muslims, Serbs and Croats and members of other peoples and ethnic groups living in it**."**[46] Now it is a divided country consisting of two non – functioning entities.[47]

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46 *Official Gazette of SR BiH* number 21/90 from 31 July 1990, amendment LX. This amendment to the Constitution of Socialistic Republic of Bosnia and Herzegovina is in accordance with the Constitution of SFRY and was adopted in accordance with procedure of amending the Constitution. Previous Article 1 (1) stated that: "Socialistic Republic of Bosnia and Herzegovina is a socialist democratic state and socialist self-governing democratic union of working people and citizens, peoples of Bosnia and Herzegovina - Muslims, Serbs and Croats and members of other people and ethnicities..."

47 The official web-cite of Republika Srpska states the following: The Republic of Srpska was proclaimed on January 9, 1992, and as a State Entity was verified by the Dayton Peace Agreement and Paris Peace Accord, which was signed on December 14, 1995. The signature of the Paris Peace Accord ended the 3,5 years war in Bosnia and Herzegovina (1992 – 1995). Today, the Republic of Srpska is a parliamentary republic with the limited international personality. Therefore, the Republic of Srpska realizes some of the interests through the mediation of the joint institution on the State level of Bosnia and Herzegovina, which is an internationally recognized state. The capital of the Republic of Srpska is Sarajevo. The largest city, Banja Luka, with more than 200,000 inhabitants, represents the administrative, economic and cultural centre of the Republic of Srpska.

That is contrary to Constitution of Bosnia and Herzegovina which reads: Article I: Bosnia and Herzegovina: Constitution. The Republic of Bosnia and Herzegovina, the official name of which shall henceforth be "Bosnia and Herzegovina," shall continue its legal existence under international law as a state, with its internal structure modified as provided herein and with its present internationally recognized borders. It shall remain a Member State of the United Nations and may as Bosnia and Herzegovina maintain or apply for membership in organizations within the United Nations system and other international organizations

5. On a daily basis we are witnessing the denial and the soft-pedaling of the Bosnian genocide. It is necessary, in accordance with good European practice, to incorporate into the criminal legislation of Bosnia and Herzegovina, the criminal offence of the denial of cases that, by way of a competent Court decision, constitute genocide.

V. Conclusion on Facts and Law

The International Court of Justice established that genocide was committed against the protected group of the Bosnian Muslims of Srebrenica and the Bosnian Muslims of Eastern Bosnia. Genocide was committed by Republika Srpska through its armed forces: the Army (VRS) and the Police (MUP) of Republika Srpska. Republika Srpska, according to the Court's Judgment, enjoyed the elements of *de facto* independence at the time when genocide was committed. In that way Republika Srpska almost fully realised its self-declared strategic goals, but has so far managed to avoid responsibility for committing genocide. Serbia was held responsible for not preventing genocide.

We have established what obligations are imposed on the international community as a whole by the norms of general international law in cases of violations of peremptory norms of international law. It is necessary to establish a violation of peremptory norms of international law and effectuate the elimination of the outcomes of such violations.

The judgement of the International Court of Justice of 26 February 2007 established that the peremptory norms of international law contained in the Genocide Convention were violated by Republika Srpska, specifically by its Army and the Police.

Republika Srpska violated the Genocide Convention as it failed to prevent the genocide and the current situation in Bosnia and Herzegovina is the outcome of the crime of genocide.

Therefore it is necessary to take all measures in accordance with international law for the elimination of the outcome of the crime of genocide.

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