Prof. dr. Sakib Softić

POST FESTUM: THE LEGAL NATURE OF THE WAR IN BOSNIA AND HERZEGOVINA

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Preface

After the end of the war and the aggression against Bosnia and Herzegovina in the period 1992-1995, on several occasions and on various occasions, I addressed the issue of the legal nature of the war in Bosnia and Herzegovina. This was important because of the efforts of the attackers and aggressors on Bosnia and Herzegovina to portray the war as a civil and religious war waged between different ethnic and religious groups in Bosnia and Herzegovina. And in this way they try to completely amnesty themselves from responsibility for aggression and genocide.

This issue is still important because the ideologies and great - state projects that sponsored aggression against Bosnia and Herzegovina and genocide against Bosniaks have not disappeared.

Even more the bearers of this ideology and projects, that have objectively rewarded for aggression and genocide, experiencing the 1995 peace agreement as an intermediate stage until the final realization of their plans and ideologies. That is, breaking the state of Bosnia and Herzegovina and taking its territory.

This issue was the topic of my doctoral dissertation: The Legal Nature of the War in Bosnia and Herzegovina, which I defended in 1999 at the Faculty of Law, University of Sarajevo.

I adapted the text for publication and published 2ooo. Publisher: Congress of Bosniak Intellectuals in Sarajevo.

After the dissertation was published, the International Criminal Tribunal for the Former Yugoslavia in the Hague (ICTY) began to issue verdicts that contained the Court's perspective on the character of the war in Bosnia and Herzegovina.

In 2002, I took over the duty of the agent of Bosnia and Herzegovina in a dispute against the Federal Republic of Yugoslavia (Serbia and Montenegro)

for violations of the Convention on the Prevention and Punishment of the Crime of Genocide.

I returned to this issue again in 2012 and published an English text entitled Legal nature of the war in Bosnia and Herzegovina. Publisher: Lambert Academic Publishing.

After that came final verdicts and conviction of the International Criminal Tribunal for the former Yugoslavia to the most important living actors in these crimes, which give a legal stamp on the character of the war in Bosnia and Herzegovina. Which justifies returning to this topic again and taking final positions.

Title of the text: Post festum: The legal nature of the war in Bosnia and Herzegovina I adjusted the timing and content of the text.

Sarajevo, January 2020.

Author

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I. INTRODUCTION

1. The Disintegration of Yugoslavia in 1991 - 1992. In the territory of the former Yugoslavia (SFRY), five new successor states were created. During the dissolution of the SFRY, in the second phase of constitutional changes after 1988, there were disagreements about the future character of the Federation between the Slovenian and Croatian republics on one side and Serbia on the other side. While Slovenia and Croatia advocated confederation, Serbia advocated for the creation of a solid federation.[1]

In the alternative, Serbia was willing to support confederation if the remaining territory of Yugoslavia enlarged Serbia to include the Republics of Serbia and Montenegro, at least parts of the Croatian Republic that were inhabited by a predominantly Serbian population, and the whole of Bosnia and Herzegovina or at least its largest part.

The disintegration of the former Yugoslavia had already been announced in 1986 by the Memorandum of the Serbian Academy of Sciences, which treated SFRY as an anti-Serb creation that was drawn in the interest of others, notably the Slovenes and Croats, who established through it their economic and political dominance. Speaking about the position of the Serbian people in other republics, it negatively evaluated the SFRY, especially in Croatia, which was said to have been the biggest obstacle other than during the period of the Independent State of Croatia, Nezavisna Država Hrvatska (NDH). The memorandum also advocated the abolition of the autonomous province within Serbia.

1 See Communique from the meeting of the Presidents of the Yugoslav Republics concerning the Constitutional reorganization of Yugoslavia, Brdo near Kranj, April, 1991, Review of International Affairs, Vol. XLII (20. IV 1991), p. 22; Trifunovska, S. ed. (1994). Yugoslavia through Documents from its creation to its dissolution. Martinus Nijhoff Publishers. p. 281-285.

The memorandum initiated the sequence of events, although its creators and executors tend to minimize its instigatory power, which led to the disintegration of Yugoslavia. In 1991, a politically more explicit act occurred in the *Declaration of Serbian National Unity*. The authors of the declaration asserted that only the Serbs in the former Yugoslavia had not solved their national question, because the republics had violated the national policy of the The Communist Party of Yugoslavia, Komunistička partija Jugoslavije (CPY),. Because the Serbs were "a unique, sovereign and constitutional nation seeking such a change of federation that would allow them to exhibit the mentioned feature 'without limit and without regard to whether the remaining parts of the country lived.'"[2]

These attitudes were the basis for the request for a united Serbia and for an enlarged Serbia, which were given as an ultimatum to the other Yugoslav republics. If they did not comply, the Serbs would be assembled in any country outside the Federation.

The atmosphere surrounding the memorandum lead to Slobodan Milosevic's rise to power in Serbia, whose "goal" to break up Yugoslavia can not be ignored. He generated nationalist sentiment and used it to abolish the autonomy of Vojvodina and Kosovo, and Montenegro's promised autonomy was abolished. He tried to subordinate, in the same way previously, the other republics of Bosnia-Herzegovina and Croatia.

Radical leaders in Croatia and Slovenia, who came to power during the first multiparty elections in 1990 and whose aim was the creation of independent states of Slovenia and Croatia, seized upon the Serbian "anti-bureaucratic revolution."

Conflicts between these two radically opposed visions of the future of Yugolsavia caused a constant threat of military attack from the highest ranks of the Yugoslav National Army (JNA), which accelerated the process of Slovenian and Croatian independence. These two republics, on June 25, 1991, declared independence, and, after Slovenia took over the former Yugoslav border crossings, there was limited intervention by the JNA, which completed its withdrawal from Slovenia and ended the three-month moratorium on Slovenian and Croatian independence.

Discussions of the future constitutional arrangement and the conflicts in Slovenia caused the Commission on Security and Cooperation in Europe (CSCE)[3] and the European Union to become involved in the resolution of the

2 See Markovic, M. (1997). The Serbian issue between myth and reality. Belgrade. p. 21.

3 The CSCE, also known as the Helsinki Commission, is an independent American Government agency created in 1976, during the Cold War, to monitor and encourage compliance with the Helsinki Final Act and other commitments of the Organization for Security and Cooperation

Yugoslav crisis and the debate on the future arrangement of Yugoslavia, which resulted in the establishment and early work of the Conference on Yugoslavia (the Hague Conference) under the chairmanship of Lord Carrington.

Deep differences about these topics paralyzed the work of the conference, which reached its pinnacle on October 18, 1991 with the issuance of the document "Arrangements for General Settlement. "

The only thing that the representatives of Serbia and Croatia could agree about was the need to divide Bosnia and Herzegovina – to wit, in March 1991 Presidents Milosevic and Tudjman met in Karadjordjevo and agreed to divide Bosnia.

However, a different interpretation of the rights to self-determination of Serbs in Croatia in late summer 1991 led to open war between the two sides, with Croatia on one side and the Yugoslav Army, Serbian formations, and local Krajina Serbs on the other side.

2. The answer to the question of the legal nature of the war in Bosnia and Herzegovina depends on the answers to two other questions. The first concerns the nature of Bosnia and Herzegovina at the time of the commencement and conduct of the war, given that aggression concerns the relationship between sovereign states, while civil war concerns the relationship between parties to a conflict within one country. The second question concerns the nature of the attacker, because an attack on Bosnia and Herzegovina from another country would be aggression. If, however, there was a rebellion by an ethnic group against the government or a mutual conflict between ethnic groups, then that would be a civil war.

3. Maintaining international peace and security is the responsibility of the United Nations. That is the purpose of the United Nations, to undertake measures to maintain international peace and security.

Within the United Nations, the primary responsibility for maintaining international peace and security lies with the Security Council. The Security Council has the authority under the UN Charter,[4] guided by political criteria, to determine the character of armed conflicts anywhere in the world, including Bosnia and Herzegovina. Unfortunately, the track record of the Security Council demonstrates that it tends to be paralyzed in such situations because of the requirement of unanimity among its permanent members. For this rea-

in Europe (OSCE) and to serve as a multilateral forum for dialogue and negotiation between East and West. The OSCE is the world's largest regional security organization. It offers a forum for political negotiations and decision-making in the fields of prevention, crisis management and post-conflict rehabilitation and puts the political will of its participating States into practice through its network of field missions.

4 The UN Charter was adopted on June 26, 1945 and came into force on October 24, 1945.

son, it is important to determine the manner of its crisis management when international peace and security deteriorate.

The Security Council may, in fulfilling its primary responsibility for maintaining international peace and security, use regional agreements and institutions and establish various subsidiary organs. In the event of war in Bosnia and Herzegovina, the Council ratified the activities carried out within the CSCE and the European Union to achieve a peaceful resolution of this dispute. In the course of the peace conference on the former Yugoslavia, the European Community (EC)[5] and later the "Contact Group" remained the dominant factor in deciding all aspects of the resolution of this crisis.

Important decisions of the ICTY, which was founded by the UN Security Council as its subsidiary organ, involve the character of the war in Bosnia and Herzegovina.

The General Assembly was also authorized to discuss all issues related to the war in Bosnia and Herzegovina.

The way that the conflict terminated – through the General Framework Agreement for peace in Bosnia and Herzegovina – also speaks to the character of the war in Bosnia and Herzegovina.

Bosnia and Herzegovina, as a sovereign and independent state and as a member of the United Nations, had the right to individual and collective self-defense. It is therefore important to determine whether and to what extent it exercised this fundamental right of state.

International law prohibits the recognition of a situation created by a serious breach of the preemptor norm of general international law. It is therefore important to determine to what extent this principle was respected in this case.

5 The EC was later subsumed by the European Union upon its creation in 1993.

II PROHIBITION OF THE USE OF FORCE IN RELATIONS BETWEEN STATES

1. Introduction

Until the beginning of World War II, the conduct of war was considered a subjective right of States arising from state sovereignty. The right of the State to start a war rested in its sole discretion, whenever one of its interests was threatened. This complete freedom to wage war, however, was limited by the principle that war should be started for reasons that are considered fair.

In this respect, the opinions of legal writers were divided. Thus, some believe that: "States could resort to war for a good reason, a bad reason or no reason at all."[6] There were no agreements between states of a general character dealing with the prohibition against war. There have been bilateral agreements between countries that have banned war between the two contracting States as a precondition to amicable settlement. The prohibition applied during the contracted period. There was no guarantee that the parties would fulfill such an agreement, nor were there sanctions for its violation.

"As an illustration, we may take a treaty concluded between Honduras and Nicaragua in 1878, in which these two countries agreed that 'there shall in no case be war between them and, in the event of a dispute, undertook to arbitration by a friendly nation."[7]

6 Dinstein,Y. (2005). War Aggression and Self-Defence, (4rth ed.). Cambridge: University Press, p. 75. (footnote omitted).

7 Honduras - Nicaragua, Tegucigalpa Treaty of Friendship, Commerce and Extradiction, 1878, 152. S. T. S. 415, 416, (articl 2) cit. Dinstein,Y. (1994). War Aggression and Self-Defence, (2nd ed.). Cembridge: University Press, p. 75. nota 71.

As there were no mechanisms to force states to comply with these contracts that oblige each state to refrain from war and employ the peaceful settlement of disputes, such obligations are reduced to moral ones.

In this respect, even the permanent arbitration agreement concluded between the United Kingdom and France, which was considered at the time to be an ideal settlement of international disputes, anticipated that neither party was required under the agreement to accept arbitration of disputes under the arbitration clause of the agreement if the dispute pertained to a vital interest in the survival of the state or matters of national honor. [8]

Both of the Hague Convention for the Pacific Settlement of International Disputes (Hague Conventions from 1889 and 1907)[9] in Article 2 provide: "In case of serious disagreement or conflict, before an appeal to arms the Signatory Powers agree to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly Powers. " The Conventions still leave discretion to the states to decide whether they will to resort to the use of force or the mediation of friendly countries to resolve disputes.

The Second Hague Convention of 1907 restricts the use of force in order to collect debts, but the limits are quite narrow and apply only to situations in which the borrower agrees to arbitration and respects the arbitration decision. If the debtor country does not agree to arbitration or does not comply with the arbitration decision, war is still possible. States who were parties to the Third Hague Convention were limited in the way that they could commence hostilities.

There are also limitations in the manner of waging war, which govern persons, things, the kinds of weapon used, and the method of warfare. However, this limitation does not involve the question of the compatibility of use of force with international relations and, therefore, is not analyzed in this chapter.

2. The ban on the use of force by the League of Nations

The suffering caused by World War I led to a turning point in understanding the rights of states to initiate war at their discretion whenever their national interests dictate. Peace Treaties concluded after its completion, between the state winners and losers, contained provisions on criminal responsibility

8 See: Bartoš, M. (1955). Contemporary International Problems (Savremeni međunarodni problemi) Sarajevo. p. 152.

9 Convention for The Pacific Settlement of International Disputes, 1907., Available at:© 2008 Lillian Goldman Law Library, http://avalon. law. yale. edu/20th_century/pacific. asp, 6. 12. 2010.

for the inception of the war. It was the first significant attempt to punish states and individuals for causing war by aggression.

After the First World War, the international community created the League of Nations, the predecessor of the Organization of United Nations, whose Covenant, which is essentially a multilateral international agreement, was an integral part of the peace agreement concluded between the principal allied and united force on one side and defeated members of the former Central Powers on the other.

The Covenant of the League of Nations[10] contained provisions that were intended to prevent waging an offensive war in the future. The Covenant contained certain restrictions that concerned the prohibition against initiating an offensive war, but it was a multilateral treaty binding only among its members. Consequently, countries that were not members of the League of Nations, could, among themselves, wage unlimited wars. Such a conclusion exists independently of Article 16 of the Pact, which provided that the agreement bound only the State Parties. Therefore, the restrictions contained in the Covenant are relative to the classical rule of international law that states have the right to wage war. The theoretical explanation that was given was that the right to wage war was part of a state's attributes, but that countries that were members of the League of Nations committed themselves not to exercise this right under the terms of the Covenant.

The Covenant contains an express prohibition against aggression, contained in Article 10, which reads:

"The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled."

The value of keeping such a complete ban on aggressive war has devalued since the Pact as its prohibition has been interpreted. The complex procedure of conciliation, which favored unanimity in decision-making, was destined to create a bad effect.

Article 11 emphasized that any war or threat of war, whether immediately affecting any of the Members of the League or not, was thereby declared a matter of concern to the whole League, and the League would take any action that might be deemed wise and effectual to safeguard the peace of nations.

10 The Covenant of The League of Nations (Including Amendments adopted to December, 1924) Available at:© 2008 Lillian Goldman Law Library,http://avalon. law. yale. edu/20th_ century/leagcov. asp, 6. 12. 2010.

In case any such emergency should arise, the Secretary General was to summon forthwith a meeting of the Council on the request of any Member of the League.

In addition, every member of the League had the right to warn the Assembly or the Council regarding any circumstance that threatened to undermine peace or the agreement among the nations upon which peace depended. This article expressed the equality of the member states of the League of Nations in the responsibility for maintaining peace and security. "This Article to prevent conflict is set good and has the meaning of the earlier existence of mediation, but mediation is raised to a higher level of collective intervention by the Council of the League of Nations. " [11]

Article 12 prescribes ways of resolving disputes among members, stating that "if there should arise between them any dispute likely to lead to a rupture they will submit the matter either to arbitration or judicial settlement or to enquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision, or the report by the Council. In any case under this Article the award of the arbitrators or the judicial decision shall be made within a reasonable time, and the report of the Council shall be made within six months after the submission of the dispute."

Article 13 obliges the Members of the League to submit the entire subject-matter of any dispute that shall arise between them to arbitration or judicial settlement, provided that they recognize such dispute to be suitable for submission to arbitration or judicial settlement to be incapable of satisfactory settlement by diplomacy."Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which if established would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration or judicial settlement."

The Report of the Council, which was adopted unanimously, committed the members of the League not to resort to war against any one party. But paragraph 7 Article 15 entitled members of the League to take those measures that they deemed necessary, including war, as follows: "If the Council fails to reach a report which is unanimously agreed to by the members thereof, …the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice."

11 Kostić, S. (1966). International Relations and International Law. Zagreb, p. 35.

Thus, the League of Nations Pact permitted a country to start a war after exhausting the procedures and deadlines for the peaceful settlement of disputes. From this it follows that the "League of nations did not recognize the full and without conditional legal prohibition of waging a war, but the limitations and possible nature of collective sanctions against countries that resort to war." Article 16 of the Covenant provided:

"Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15 it shall ipso facto be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.

It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League."

In the event of a dispute between a Member of the League and a State that was not a Member of the League, or between two States neither of whom were Members of the League, the State or States not Members of the League were required to be invited to accept the obligations of membership in the League for the purposes of such dispute, upon such conditions as the Council deemed just and necessary (Article 17).

3. The prohibition against war and attempts to define aggression between the two world wars

In the course of its work, the League of Nations attempted to define a war of aggression and its prohibition. The League of Nations Covenant did not prohibit war, but it prescribed limitations, procedures, and deadlines therefor. This led to a division of wars between legal and illegal.

Wars of States that had fulfilled the prescribed procedures and time limits were considered legitimate regardless of the actual causes or contents of the dispute. Nonetheless, a war that was deemed unfair from the standpoint of classical international law could not become a legal war by virtue of its relationship to the procedures outlined in the Pact and, by the same token, a just cause could not be converted into an unlawful war simply because it was conducted in contravention of the provisions of the Covenant. Therefore, it

was necessary from the very beginning of the League of Nations to define and prohibit aggressive war. The draft agreement on mutual assistance and the Geneva Protocol for the peaceful resolution of international problems must be considered in this context.

The Draft Treaty of Mutual Assistance of 1923 was proposed in the League of Nations but was not adopted. In Article 1, it stated:

"The High Contracting Parties solemnly declare that aggressive war is an international crime and severally undertake that no one of them will be guilty of its commission. A war shall not be considered as a war of aggression if waged by a State which is party to a dispute and has accepted the unanimous recommendation of the Council, the Verdict of the Permanent Court of international Justice or an arbitral award against a High Contracting Party which has not accepted it, provided, however, that the first State does not intend to violate the political independence or the territorial integrity of the High Contracting Party."[12]

This provision was completely consistent with Article 15 of the League of Nations Covenant, but it explicitly unequivocally demarcated the boundaries of illegal war.

The Geneva Protocol for the Pacific Settlement of International Disputes, which the League Assembly adopted on October 2, 1924, had the same object as the Draft Treaty of Mutual Assistance and contained provisions with bilateral guarantees by the state parties to resort to peaceful settlement of disputes, as well as security measures. Even the preamble of the agreement indicated the motives behind this provision:

"Recognizing the solidarity of the members of the international community; Asserting that a war of aggression constitutes a violation of this solidarity and an international crime is a violation of this solidarity and international crime, trying to ensure full implementation of the system prescribed in the Pact, the League of Nations for the peaceful resolution of disputes between States and ensuring the repression of international crimes; Desirous of facilitating the complete application of the system of the League of Nations for the pacific settlement of disputes between States and ensuring the repression of international Crimes…" [13]

In Article 2, State Parties would agree: "in no case to resort to war with one another or against a State, if the occasion arises, accept all the hereinafter set out, except in case of resistance to act of aggression or when acting in

12 Brownlie, I. (1981). International Law and the Use of Force by States. Oxford: University Press. p. 68.

13 Brownlie, I. Ibid. p. 69.

agreement with the Council or Assembly of the League of Nations in accordance with the provisions of the Covenant, or of the present Protocol. "[14]

Article 8 contained obligations by State Parties to refrain from any acts that might constitute a threat of aggression against other countries, while Article 10 provided formal criteria for determining the aggressor: "Every State which resorts to war, in violations of the undertaking contained in the Covenant or in the present Protocol is an aggressor. "[15]

The protocol did not provide automatic assistance to States in case of aggression, but the provisions on mutual assistance in case of a war of aggression were much more specific than those contained in the Covenant. The Protocol never entered into effect because it did not collect a sufficient number of instruments of ratification.

The Locarno Treaties of 1925[16] improved upon the previous agreements that lacked legal force. These agreements relied on Article 16 of the League of Nations Covenant, which provided collective sanctions against a violator of the Covenant.

These agreements improved the methods and procedures in the Pacific Settlement of International Disputes, especially regarding Arbitration and Conciliation.

The Final act of the Conference was to create arbitration agreements concluded individually between Germany and: Belgium, France and Czechoslovakia as well as[17]

A key act of the Conference was the creation of a *treaty of mutual guaranties* between Germany and Belgium, France, Czechoslovakia and Poland, as well as between France and Poland and Czechoslovakia. Article 2 reads:

"Germany and Belgium, and also Germany and France, mutually undertake that they will in no case attack or invade each other or resort to war against each other.

This stipulation shall not, however, apply in case of –

1. *The exercise of the right of legitimate defence. That is to say, resistance to a violation of the undertaking contained in the previous paragrapf or to a flagrant breach of Articles 42 or 43 of the said Threaty of Versailles,*

14 Brownlie, I. Ibid. p. 70.

15 Brownlie, I. Ibid. p. 70.

16 Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy; October 16, 1925 (The Locarno Pact) Available at: http://avalon. law. yale. edu/20th_century/locarno_001. asp. 6. 12. 2010.

17 Kositć, S. Ibid.,p. 80 - 82.

if such breach constitutes on unprovoked act of aggresion and by reason of the assembly of armed forces in the demilitarised zone immediate action in necessary.

2. *Action in pursuance of Article 16 of the Covenant. . .*
3. *Action as a result of decision taken by the Assembly or by the Council of the League of Nations or in pursuance of Article 15, paragraph 7, of the Covenant. . . provided that in this last event the action is directed against a State which was the first to attack."* [18]

"In the final act, the Locarno conference pointed out that the aim of the the Locarno Treaties was 'finding common resources and efforts to protect its people from the monstrosity of war and concern for the peaceful resolution of conflicts of every kind that may arise between some of the signatories."'[19]

The attempt to define the act of aggression had a special and important place in the legal drafting and carried the working title "Draft Convention on the definition of aggressors," which was proposed by the delegations of the USSR and Lithuania in 1933 in Geneva.

Under this proposal, aggression consisted of the following:

1. *"The aggressor in an international conflict shall be considered that State which is the first to take any of the following actions:*
    - *b) Declaration of war against another State;*
    - *c) The invasion by its armed forces of the territory of another State without declaration of war;*
    - *d) Bombarding the territory of another State by its land, naval, or air forces or knowingly attacking the naval or air forces of another State;*
    - *e) The landing in, or introduction within the frontiers of another State of land, naval or air forces without the permission of the gouverment of such a State, or the infringement of the condition od such permission, particularly as regards the duration of sojourn or extension of area;*
    - *f) The establishment of a naval blockade of the coast or ports of another State.*
2. *No considerations whatsoever of a political, strategical, or economic nature, including the desire to exploit natural riches or to obtain any sort of advantages or privileges on the territory of another State, or to*

18 Brownlie,I. Ibid., p. 71.

19 Kostić, S. Ibid., p. 81.

the alleged absence of certain attributes of State organization in the case of a given country, shall be accepted as justification of aggression as defined in Clause 1.

In particular, justification for attack cannot be based upon:

A. The internal situation in a given State, as for instance:

a) Political, economic or cultural backwardness of a given country;

b) Alleged maladministration;

c) Possible danger to life or property of foreign residents;

d) Revolutionary or counter-revolutionary movements, civil war, disorders or strikes;

e) The establishment or maintenance in any State af any political, aconomic or social order."[20]

However, two narrower conventions on nonaggression were signed on the 3rd or 4th of July 1933 in London, which defined the aggressor."One of the conventions was signed between the Soviet Union, Estonia, Latvia, Poland, Romania, Afghanistan, Persia, Turkey and the other between the Soviet Union, the Little Antante (Romania, Yugoslavia and Czechoslovakia), and Turkey. "[21]

According to the *London Conventions for the definition of aggress*ion, which were signed July 3-5, 1933, the aggressor in an international conflict was the State that the first committed any of the following actions:

1. *"Declaration of war upon another State;*
2. *Invasion by its armed forces, with or without a declaration of war, of the territory of another State;*
3. *Attack by its land, naval or aircraft of another State;*
4. *Naval blockade of the coasts or ports of another State;*
5. *Provision of support to armed bands formed on its territory which have invaded the territory of another State, or refusal, notwithstanding the request of the invaded State, to take, in its own territory, all the measures in its power to deprive those bands of all assistance or protection.*

ART. III. No political, military, economic or other considerations may serve as an excuse or justification for the aggression referred to in Article II."[22]

20 Stone, J. (1958). Aggression and World Order. London. p. 34. i 35.

21 Perazić, G. Đ. (1966). International law of war (Međunarodno ratno pravo). Beograd. p. 78

22 Andraši, Y. (1984). International Law. Međunarodno pravo. Zagreb: Školska knjiga, p. 551; J. Brownlie, ibid., p. 360.

All of these efforts to execute a treaty prohibiting war, defining aggression, and imposing sanctions on the aggressor country did not lead to positive results, given that the events that followed spawned an even bloodier Second World War.

4. The Briand-Kellogg Pact[23]

Since the Locarno Treaties governed only States that were parties, in order to ensure peace, safety, and the general good, there was a need to devise an treaty that would have a general character. The issue of collective security made it necessary to simultaneously define aggression and the sanctions to be imposed against the aggressor state. Under pressure from the public, the French and Americans offered a proposal called the Kellogg-Briand Pact, which was signed in Paris in 1928. This pact had only two operating Articles, which read:

ARTICLE I

The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.

ARTICLE II

The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

This multilateral agreement made war illegal, but did not define aggression or prescribe sanctions for state aggressors. Also, it did not in any way limit the right of states to defend themselves.

5. The General prohibition of war under the UN Charter

The general prohibition of war is based on the provisions of Article 2 (4) of the United Nations Charter, which reads as follows:

"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."

23 The Kellogg-Briand Pact of 1928. Available at: © 2008 Lillian Goldman Law Library 127 Wall Street, New Haven, CT 06511. http://avalon. law. yale. edu/20th_century/kbpact. asp, 6. 12. 2010.

The objectives of the United Nations were established by Article 1 (1) of the Charter, which proposes the following objective:

"To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."

Article 1 (2) proposes:

"To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace"

These provisions that prohibit the threat or use of force in international relations are now respected as principles of customary international law and viewed as binding on all countries in the world community.

The object of Article 2 (4) is to protect the sovereignty, territorial integrity and political independence of any state. The prohibition applies not only to the Member States of the United Nations but also to countries that are not members of the United Nations and to States that have not yet become members of the United Nations. The way that states shall resolve their disputes is set out in Article 2 (3), which reads:

"All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and. justice, are not endangered"

A complete and correct interpretation of Article 2 (4) would be that the use of armed force is prohibited, except in cases where it is expressly permitted under the Charter. The prohibition against the use of force is accepted as part of customary international law, and even as a *jus cogens* norm as confirmed in the judgment of the International Court of Justice in the case of *Nicaragua v. United States*. [24]

Article 2 (6) of the Charter commits the UN to ensuring that even the countries that are not members of the United Nations act in accordance with established principles, if doing so is necessary to maintain international peace and security.

The prohibition against the use of force is directed toward all states and the protected object is the territorial integrity or political independence of any

24 Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits Judgment, ICJ Reports 1986, p 14, para. 190.

state. The *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty*, of December 21, 1965[25] emphasizes: "No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned."

These principles were confirmed by the new *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States* of December 9, 1981. [26]

The prohibition against the use of force applies even when a state refuses to execute a decision of the International Court of Justice or the Arbitral Tribunal. In this case, the state that is seeking execution of the decision must not resort to the use of force, but rather is obligated to address the UN Security Council in accordance with Article 94 (2), which reads:

"If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."

The United Nations left in force the prohibitions against war contained in the Covenant of the League of Nations and subsequent international documents, developing and elaborating these ideas in accordance with the development of international legal thought and practice. The Charter of the United Nations overcame the shortcomings of the earlier League of Nations Covenant, in particular those relating to the implementation of collective measures against the aggressor state. Most importantly, the Charter evinced an understanding that international peace and security are indivisible and universal values, the benefits of which both member states and non-member States of the United Nations should enjoy.

25 General Assembly Resolution 2131 (XX), Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, Dec. 21, 1965.

26 General Assembly Resolution 36/103, Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, Dec. 9, 1981.

6. Work on the Prohibition against and definition of aggression after the adoption of the Charter

Even at the time of the passing of UN Charter, there were different views on the question of the necessity of a solid definition of aggression or criteria by which one could establish the illegality of the threat or use of force. It is against this difference of opinions that one should place the proposals of Bolivia and the Philippines concerning the definition of aggression and the definition of aggression in the amendments to the draft Charter of *Dumbarton Oaks*. [27] A majority of the delegates in San Francisco was not ready to accept any definition of aggression for at least two reasons. The first was the perceived difficulty of defining aggression generally and the second was the primacy of the other objectives of the Charter. The prevalent view was that the matter of defining aggression should be postponed until a more suitable moment.

The Inter-*American Treaty of Reciprocal Assistance at Rio de Janeiro,*[28] which was signed on September 2, 1947, provides, in pertinent part, as follows:

27 The definition contained in the Bolivian proposal for the Dumbarton Oaks draft charter, which was submitted to Committee 3 of the third commission of the San Francisco conference, read as follows:
A State shall be designated an aggressor if it has commited any of the following acts to the detriment of another State:
Invasion of another State´s territory by armed forces.
Declaration of war.
Attack by land, sea, or air forces, with or without declaration of war, on another State`s territory, shiping, or aircraft.
Support given to armed bands for the purpose of invasion.
Intervention in another State`s internal of foreign affairs.
Refusal to submit the matter which has caused a dispute to the peaceful means provided for its settlement.
Refusal to comply with a judicial decision lawfully pronounced by an international Court.
The definition contained in the proposed amendments to the Dumbarton Oaks draft charter submitted by the Philippine delegation to Committee 3 of the third commission of the San Francisco conference read as follows:
Any nation should be considered as threatening the peace or as an aggressor, if it should be the first party to commit any of the following acts:
To declare war against another nation; (2) To invade or attack, with or without declaration of war, territory, public vessel, or public aircraft of another nation; (3) To interfere with the internal affairs of another nation by supplying arms, ammunition, money or other forms od aid to any armed band, faction or group, or by establishing agencies in that nation to coduct propaganda subversive of the institutions of that nation. Stone, Y. Ibid., p. 205.

28 The Inter-American Treaty of Reciprocal Assistance (commonly known as the Rio Treaty, the Rio Pact, or by the Spanish-language acronym TIAR from Tratado Interamericano de Asistencia Recíproca) was an agreement signed on 1947 in Rio de Janeiro among many countries of the Americas.

"The High Contracting Parties formally condemn war and undertake in their international relations not to resort to the threat or use of force in any manner inconsistent with the provisions of the Charter of United Nations or of this treaty." [29]

The Charter of the Organization of American States[30] of 1948, which is commonly known as the Charter of Bogota, in Article 5 contains the following provision:

"The American States reaffirm the following principles:

(e) the American States condemn war of aggression: victory does not give rights."

Article 15 reads:

"No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The forgoing principle prohibits not only armed force but also any other form of interference or attempted threat against its political, economic and cultural element." [31]

Discussions about the possibility and expediency of defining aggression continued from 1950 on. The war in Korea was an example of the inability of the Security Council to make decisions in accordance with Article 39 of the Charter if the interests of permanent Security Council members were in conflict. Security Council members were solicited for their respective views of the conflict, which prevented the adoption of a unanimous decision in accordance with Article 27 (3).

At that moment, the universal values of international peace and security reached their lowest point, giving rise to the passage of the *Resolution United for Peace,*[32] which empowered the General Assembly to decide issues that previously belonged to the exclusive jurisdiction of the Security Council.

Medium-sized and small countries' efforts were guided by their own motivations for defining aggression as quickly as possible, because they felt threatened by the fact that the permanent members of the Security Council, when deciding whether there had been a threat to peace, a breach of peace, or aggression, were guided primarily by their own national interests and needs.

29 Ibid; Brownlie, I. Ibid., p. 117.

30 Article 1. Available at: http://www. glin. gov/view. action?glinID=81457 22. 3. 2012.

31 Ibid; Brownlie, I. Ibid. p. 117.

32 United Nations General Assembly Resolution A-RES-377(V) of 3 November 1950 (retrieved 2007-09-21).

On the other hand, the large states and members of the Security Council opposed the adoption of such a definition, arguing that aggression is difficult to define because a state that was a potential aggressor could always find new ways of committing aggression that were outside of the cases included in the definition. Their attitude towards the definition of aggression was more favorable to potential aggressor states and they warned that the UN Charter did not speak only of aggression but also of other forms of threats to the peace and breaching the peace.

"They also complained that the UN Charter did not speak only of aggression but also of other violations of peace and of favorable situations that threaten international peace and security and opposed simultaneously crafting the definition of aggression and the definitions of those terms." [33] They also argued that the lack of a code of crimes against the peace and security of mankind was an obstacle to defining aggression and that the adoption of such codes should precede the definition of aggression. Their primary rationale was that aggression was a natural notion whose composition defied precise definition because it was determined by the facts and circumstances of a particular case.

The lone dissenter among the permanent Security Council members was the Soviet Union, which insisted on a definition of aggression that was based on one that it had proposed previously, in 1933. The changes were almost exclusively terminological nature, replacing the word "attack" with the word "aggression." This definition of aggression was enumerative in nature.

It was during this period that Alfaro presented his noted definition of aggression, which reads as follows:

"Aggression is the threat or use of force by a State or government against another State, in any manner, whatever the weapons employed and whether openly or otherwise, for any reason or for any purpose other than individual or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations." [34]

The UN General Assembly, at its session in 1951, concluded, under pressure from a group of small and medium-sized countries, that a definition of aggression was desirable and possible. At that point, a committee was formed to create the definition of aggression and submit it to the General Assembly for adoption. The committee initially had fifteen, then nineteen, and ultimately thirty-five members.

33 Bartoš, M. ibid. p. 166.

34 Stone, J. (1958). Aggression and World Order. London. p. 48. (footnote omitted).

At the same meeting, *N. Spiropoulos*, the Special Rapporteur of the *draft Code of Crimes against Peace and Security of Man*kind,[35] concluded that any "legal" definition of aggression was an artificial creation, which could never, under the conditions of the constant expansion of the methods of aggression, be sufficiently generalized for any future use. However, the draft contained the following provisions addressed to the General Assembly for consideration:

"Article 2: The following acts are offences against peace and security of mankind:

(1) Any act of agrression, including the employement by autorities of a State of armed force against another State for any purpose other than national or collective self-defence or in pursance of a decision or recommendation by a competent organ of the United Nations.

(2) Any threat by authorities of a State to resort to an act of aggression against another State."[36]

After eighteen sessions, the Committee charged with drafting the definition of aggression concluded:

"…although the existence of the crime of aggression may be inferred from the circumstance peculiar to each particular case, it is nevertheless possible and desirable, with a view to ensuring international peace and security and to developing international criminal law, to define aggression by reference to the elements which constitute it."[37]

The joint proposal for the definition of aggression followed that conclusion. The group of countries drafting the proposal included Yugoslavia. The group proposed a mixed definition: the first part consisted of a statement of the constituent elements of aggression, and the second part listed specific acts and typical cases of aggression.

However, among the many definitions of aggression that came from individual states, groups of countries, and various international bodies, the Soviet proposal was among the others submitted to the General Assembly in 1957 as a draft definition[38]. Its earlier versions began to include economic

35 Draft Code of Offences against the Peace and Security of Mankind (Part I), Available at: http://untreaty. un. org/ilc/texts/7_3. htm, 8. 11. 2010.

36 Stone, J. (1958) Aggression and World Order. p. 50, nota 40.

37 Ibid., p. 51.

38 The definition proposed by the USSR in 1956th The Special Committee of the UN contains among others:
(f) Support of armed bands organized in its own territory which invade the territory of another State, or refusal, on being requested by invaded State, to take in its own territory any

and ideological aspects under the rubric of indirect, economic, and ideological aggression.

Bilateral and multilateral agreements reinforced or further developed the principles of the Charter of ensuring international peace and security. Among them, the *five principles of peaceful coexistence*[39] in the agreement between China and India in 1954, were particularly important and were later confirmed by many states. They read as follows:

1. *Mutual respect for each other's territorial integrity and sovereignty,*
2. *Mutual non-aggression,*
3. *Mutual non-interference in each other's internal affairs,*
4. *Equality and mutual benefit, and*
5. *Peaceful co-existence.*

The principles contained in this agreement inspired many states to recognize and ratify it in their relations with other member states of the UN. The *Final Communique of the Asian-African Conference of Bandung* on April 24, 1955[40] confirmed the following principles as the basis for the improvement of international peace and cooperation:

1. Respect for fundamental human rights and for the purposes and principles of the Charter of the United Nations.
2. Respect for the sovereignty and territorial integrity of all nations.
3. Abstention from intervention or interference in the internal affairs of another country.

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action within its power to deny such bands any aid or protection."
Stone, J. Aggression … p. 201. Aggression comprises the following acts. Acting first in: "The opening of dams in its territory to cause flooding and reduction of military and economic potential...
1. Supplying arms, loans and other means of the conquering country, provided that the lawful Government of the aggressor nation to carry out aggression against a third country.
2. Illegal occupation of a territory under the guise of protecting their own defensive lines and conducting elections in the occupied territories for its corporations.
4. Closing the communication that hinder market access.
5. Infiltriranje own agents in another state apparatus in order to change the existing situation in the country infiltrated." Bartoš, M. op. cit. p. 161, 162.

39 Agreement (with exchange of notes) on trade and intercourse between the Tibet Region of China and India", which was signed at Peking on April 29, 1954 This agreement stated the five principles. Available at:http://treaties. un. org/doc/publication/unts/volume%20299/v299. pdf, 22. 2. 2012.

40 *Final Communique of the Asian-African Conference of Bandung* on 24 April 1955. Available at: http://www. bandungspirit. org/IMG/pdf/Final_Communique_Bandung_1955. pdf. 22. 2. 2012.

4. Respect for the right of each nation to defend itself singly or collectively, in conformity with the Charter of the United Nations.
5. Refraining from acts or threats of aggression or the use of force against the territorial integrity or political independence of any country.
6. Settlement of all international disputes by peaceful means, such as negotiation, conciliation, arbitration or judicial settlement as well as other peaceful means of the parties' own choice, in conformity with the Charter of the United Nations.

7. Aggression

The UN General Assembly finally adopted a definition of aggression on December 14, 1974[41] that had the force of recommending to the Security Council that acting in violation of the terms of Article 39 of the Charter or taking any of the actions listed in the Resolution qualified as an attack or act of aggression. International peace and security are constant concerns of the United Nations and are, therefore, the subject of numerous bilateral and multilateral agreements concluded after the adoption of the definition of aggression.

The term aggression is multifaceted. It is used in every day communication to encompass a variety of topics. In the context of the nature of the war in Bosnia and Herzegovina, the important meaning of aggression, which is used as a synonym for the attack, primarily defines an armed attack by one country upon another. [42]

Aggression is an international crime. "Aggression is remarkable because it is the only crime that States can commit against other States…"[43]

41 United Nations General Assembly Resolution 3314 (XXIX). Definition of Aggression. Available at: http://jurist. law. pitt. edu/3314. htm, 9. 12. 2010.

42 Aggression, from the standpoint of international law, is an act of force that one State performs against other States or legally protected objects. The word is of Latin origin, 'aggredi,' which can also be translated as an approach or an attack. Imamovic, M. Aggression on Bosnia and Herzegovina and its immediate consequences, the aggression on Bosnia and Herzegovina and its struggle for survival in the years 1992-1995. Sarajevo, 1997.

43 Walcer, M. (1997) Just and Unjust Wars, Harper Collins Publishers. p. 51.
"Aggression as a legal concept now has significance in two related but distinct contexts:
When the Security Council makes a 'determination' of an 'act of aggression' under Art. 39 of the Charter in order to bring into being its powers to take enforcement action. Alternatively, whwn the General Assembly makes a finding of an 'act of aggression' under the Uniting for Peace Resolution in order to make recomendations for collective measures to maintain or restore peace.
When a State or an individual in a State is charged before a tribunal with having committed the criminal offence of 'aggression' under international law."

Unlike previous attempts to define aggression, the relative prohibition against war in the UN Charter introduced into international law the general prohibition against war. The general prohibition against war started with the ideas contained in the Kellogg-Briand pact for banning war, but continued with a general prohibition against war and sanctions for violations of the prohibition. The legal status of the Briand-Kellogg Pact is unclear, in light of the fact that the international military tribunals at Nuremberg and Tokyo started with the assumption that the Pact was still in force. The legal writers M. C. Neir and Sir Lionel Held, on the occasion of the crisis caused by the triple intervention in Egypt (the Suez crisis), drafted a report asserting that the Pact was still in force, since it was a contract that contained a procedure for its conclusion and termination, which had not been followed.

Even at the time of the passing UN Charter, there were different views on the question of the necessity of a solid definition of aggression or criteria by which one could establish the illegality of the use or threat of force. The proposals of Bolivia and the Philippines concerning the definition of aggression, which were offered as amendments to the draft Charter of Dumbarton Oaks, remain relevant in this regard.

Ultimately, the endeavors of States that strove for adopting a definition of aggression through the United Nations were successful. The General Assembly passed Resolution 3. 314. on the definition of aggression during its 29th regular session on December 14, 1974. [44] It is important to note, however, that the definition adopted in no way narrows and does not limit the authority of the UN Security Council to determine whether and how to respond to aggression. Instead, this definition of aggression gives the discretion to the Security Council to weigh every act of aggression under the totality of the circumstances of each particular case, as the introduction to the resolution indicates when it state that it is still desirable to provide the basic principles that would serve as guidance for a decision on aggression.

In this sense, the definition of aggression gives to the Security Council the authority to determine whether a specific action is an act of aggression.

The resolution consists of eight articles.

The introduction sets forth the reasons for the adoption of the Resolution, noting that one of the main goals of the United Nations is maintaining international peace and security and taking effective collective measures for

Bowett, D. W. (1958). Self-Defence in International Law. Manchester: University Press, p. 255. (footnote omitted).

44 See: United Nations General Assembly Resolution 3314 (XXIX). Definition of Aggression. Available at: http://jurist. law. pitt. edu/3314. htm. 10. 12. 2010.

the suppression of aggression. The introduction also reiterates that the Security Council, in accordance with Article 39 of the Charter, should decide if there has been a threat to peace, breach of the peace or act of aggression and on that basis decide which measures to take in accordance with Articles 41 or 42 of the Charter.

Article 1 Paragraph 1, which defines aggression, is drawn from Article 2 Paragraph 4 of the UN Charter and gives a broad definition of aggression. It reads:

Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.

It further states that the term "state" is used without prejudice to questions of recognition or to whether a State is a member of the United Nations.

Article 2 provides:

"The First use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity."

Article 3 provides:

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof,

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its temtory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Article 4 reads:

The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.

Article 5 provides:

1. *No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.*
2. *A war of aggression is a crime against international peace. Aggression gives rise to international responsibility.*
3. *No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.*

Article 6 states:

Nothing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful.

Article 7 reads:

Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination: nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

Article 8 states:

In their interpretation and applicattion the above provisions are interrelated and each provision should be construed in the context of the other provisions.

8. Armed Intervention

The term "intervention (Lat. Interveniere - to interfere, mediate)" has multiple meanings, but always includes steps or measures by a State that are focused on the solution of a situation or a dispute that is in whole or in part in the jurisdiction of another state."[45] In the literature of international law, intervention is usually defined as an interference in the internal relations of other state(s) without consent. It also means intervention and interference in the internal affairs of other state(s) in order to maintain or change existing internal relations against their will.

What is important for the question of the legal nature of the war in Bosnia and Herzegovina is the question of when armed intervention is allowed. "The principle of non-intervention is part of customary international law and founded upon the concept of respect for the territorial sovereignty of states"[46]

Intervention is prohibited when it bears upon matters that each state is permitted to decide freely by virtue of the principle of state sovereignty. This includes "…the choice of political, economic, social and cultural systems and formulation of foreign policy."[47]

It is very difficult to draw the line between military intervention and war. Intervention differs from other uses of force, such as war, in its objectives and strategies. The goal of intervention is limited to changing or forcibly maintaining a given political order; a strategy of intervention is tantamount to complicity, power, and politics. Compared to war, intervention has limited intentions and resources. [48]

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45 Ibler, V. (1987). Dictionary of International Public Law. Zagreb: Informator. p. 108; "The method of execution, the intervention can be direct, when the state intervenes directly to his troops, or indirect, when used, and provides incentives armed forces or other government moves targets for intervention... interventions were made by sending the armed forces or war materials, or by providing incentives military economy with the aim of provoking an armed conflict in one country. The interventions were undertaken, by an individual and collective state of the several states, so we can talk about individual and collective armed intervention. "
Perazić, D. G. (1966). International Law of War, Beograd. p. 59. i 60.

46 The Corfu Channel Case, ICJ reports, 1949, PP4, 35, 16, ILR, PP. 155, 167 and The Nicaragua case, ICJ, Reports, 1986, PP14, 106, 76, ILR, PP349, 440; see also The Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty of December 21, 1965, and The Declaration on Principles of International Law, 1970, P. 784; Show, N M. (1997). p. 797, nota 17.

47 Show, N. M. (1997). str, 797, i 798.

48 Avramov, S., Kreća, M. (1989) International Public Law. Beograd: Savremena administracija. p. 525.

Intervention is an unacceptable interference in the internal affairs of another state involving the sending of armed forces into another country. It is done to impose a political settlement of the intervenor's choice or to assist one of the warring parties to a conflict within a state. As intra-state conflicts are manifested as conflicts between the legitimate government and rebels, armed intervention is made to help the government or the rebels. In either case, it is interference in the internal affairs of another state. Such interference is a violation of the principles contained in the Charter of the United Nations, pursuant to which all states are required to refrain in their international relations from resorting to the threat or use of force that is against the territorial integrity or political independence of any state or is otherwise contrary to the Charter of the United Nations. The obligation of non-intervention has been confirmed in many subsequent acts of the UN, such as the Manila Declaration on the *Peaceful Settlement of Disputes between States,*[49] the introductory section of which reiterates:

"that no State or group of States has the right to intervenne, directly or indirectly, for any reason whatsoever, in the internal or externalaffairs of any other State"

The Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty of December 21, 1965.[50] also states, in Article 2:

"No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind. Also, no State shall organize, assist, foment, Finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State."

One can, therefore, conclude that the act of armed intervention is contrary to the international legal order and constitutes a violation of those international legal norms that have prohibited the use of force or threat of force in international relations. Therefore, armed intervention is an international crime and should be considered as such. Armed intervention is a mild-intensity war or war limited by aims and intentions. But a nation can modify its war aims at any moment and convert intervention into total war, or war can remain within the limits of military intervention.

49 A/RES/37/10. 68th plenary meeting, Nov. 15, 1982. Available at: http://www. un. org/documents/ga/res/37/a37r010. htm. 23. 2. 2012.

50 General Assembly Resolution 2131 (XX), Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, Dec. 21, 1965. Available at: http://untreaty. un. org/cod/avl/ha/ga_2131-xx/ga_2131-xx. html, 12. 12. 2010.

III. THE SYSTEM OF COLLECTIVE SECURITY

1. Introduction

The United Nations established a system for the maintenance of international peace and security. This system is often called the system of collective security. The main role in guaranteeing the system of collective security belongs to the Security Council. According to Article 24 (1) of the UN Charter, the Security Council is given primary responsibility for the maintenance of international peace and security, and its decisions on Article 25 of the Charter are binding on all Member States of the United Nations.

The Charter of the United Nations not only prohibits the unilateral use of force in Article 2 Paragraph 4 but also controls the use of centralized power by the Security Council. One should distinguish the role of the Security Council, pursuant to Chapter VI of the Charter, in peaceful settlement disputes, which is solely to make recommendations, from its role when it acts pursuant to Chapter VII of the Charter, under which its decisions are binding.

The Preamble to the Charter begins with the words:" We, the peoples of the United Nations, determined to save future generations from the scourge of war," and the first goal of the UN contained in Article 1 of Charter is the maintenance of international peace and security and, to that end,: "to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace" The original plan of the Charter was to form its own Standing Army with the Military Staff Committee. [51] However, this plan was not realized because of the Cold War between and among the main members of the Security

51 See Articles 46 and 47 of The UN Charter.

Council. The result was that the actions undertaken by the Security Council were different than originally planned. The Permanent Army was replaced by a coalition of interested and willing countries, and individual Member States were given authority to take actions that were beyond the resources of the UN. Peacekeeping forces conduct peacekeeping operations. They also substitute for some kinds of enforcement measures under the jurisdiction of the Security Council.

In order for the Security Council to adopt measures to preserve peace and security under Chapter VII of the Charter, it must first establish *"the existence of threats to peace, breach of peace or acts of aggression,"* because these activate Chapter VII of the Charter. When, in accordance with Article 39, the introductory Article of Chapter VII of the Charter, the Security Council determines the character of the dispute or situation, then it can avail itself of the measures prescribed in chapter VII to preserve international peace and security.

Determining the type of dispute or situation depends on the circumstances of the individual case and the relationship to the event. A negative vote by any one of the five permanent members of the Security Council is sufficient to block any Security Council action except procedural ones. The veto of one of the permanent members of the Security Council has been one of the major causes of disability in discharging its tasks of preserving peace and security.

The terms "threat to peace," "breach of the peace" or "act of aggression" used in Article 39 do not have precise definitions. This affords the Security Council a great deal of discretion when deciding whether a situation under Article 39 of the Charter exists, or whether the situation is an internal dispute to which Article 2 (7) applies, which prohibits interference by the United Nations in matters that fall within exclusively within the domestic jurisdiction of any state.

The first case of threats to peace that the Security Council found, in Resolution 54 (1948),[52] was in connection with the conflict in Palestine, where members of the Arab League had refused to accept the extension of the truce in Palestine in order to prevent application of the resolution creating a new state of Israel, which was deemed a "threat to peace in accordance with Article 39 of the Charter "and demanded immediate intervention of the Security Council.

52 United Nations Security Council Resolution 54 of July 15, 1948. Available at: http://www.yale. edu/lawweb/avalon/un/scres054. htm, 20. 12. 2010.

2. Legally impermissible use of armed force

The general prohibition of war is based on the provisions of Article 2 Paragraph 4 of the UN Charter:

"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. "[53]*:*

The objectives of the United Nations, according to Article 1, are to maintain international peace and security, take appropriate collective measures to prevent and eliminate all threats to peace, combat attacks and other violations of peace, achieve peaceful means in accordance with the principles of justice and international law, and regulate and resolve disputes or situations that could lead to a breach of peace.

The way in which states shall resolve their disputes is set out in Article 2 (3), which reads:

"All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."

A complete and correct interpretation of Article 2 (4) would be that the use of armed force is prohibited by all UN member states, as well as by other countries that are not members of the United Nations, except in cases where the use of armed force is expressly permitted under the Charter. [54]

3. Legally permissible use of armed force

International law does not prohibit all use of armed force.

The right to self-defense is a fundamental right of each state and an exception to the prohibition of the use of force. Self-defense, which necessarily includes the right to use armed force, is a privilege to employ a specific form of self-help to which states are allowed to resort in their relations, when some of their rights have been violated. Self-defense in international relations can be defined as a lawful use of force under the conditions prescribed by international law, in response to an unlawful use of force by another state or states. The right of states to self-defense is embodied in Article 51 UN Charter but also forms part of customary international law.

53 Sl. List DFJ, 69/45.

54 See also Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgement, ICT Reports 1986, p 14, para 190.

According to the school of natural law, the right to self-defense is a natural right of every state. If self-defense is not an independent doctrine, but rather is an explanation of the relationship between just causes and just wars, then it is a duty that is imposed on the state by natural law. The traditional definition of the right to self-defense in customary international law arose out of a dispute between the United States and Great Britain known as the Caroline Case.[55] In 1837, Great Britain attacked and destroyed an American ship, the Caroline, which the British suspected was being employed illegally to support rebels in the Canadian insurrection, in port in the United States. The United States arrested and imprisoned one of the British assailants on a charge of murder. The British government claimed that the attack on the Caroline had been an act of self-defense. The Caroline case figured prominently in treaty negotiations between the United States Secretary of State, Daniel Webster, and the British Foreign Minister, Lord Ashburton. Although not a subject of the Webster-Ashburton Treaty, the key principles of self-defense figured prominently in their correspondence. Most notably for the subject matter of this discussion, their correspondence focused on the difference between a civil war arising from a disputed succession and a protracted revolt of a colony against a "mother country" and the duty of noninterference that states have with regard to the internal disputes of other states. These principles were accepted by the British government and have subsequently become part of customary international law.

Article 10 of League of Nations Covenant[56] sets forth the obligation of States to refrain from attacking the territorial integrity and political independence of another state, establishes the legal basis for the distinction between lawful and unlawful use of force, and, when combined with Article 16, gives the modalities of collective self-defense.

Article 2 of the *Locarno Pact*[57] stipulates that Germany, France and Belgium would in no case attack or invade each other or resort to war against each other. The exception to this rule was also laid down in Article 2, which reads:

"This stipulation shall not, however, apply in the case of:

55 The Caroline Case, Available at: http://avalon. law. yale. edu/19th_century/br-1842d. asp, 20. 12. 2010.

56 The Covenant of The League of Nations (Including Amendments adopted to December, 1924) Available at: © 2008 Lillian Goldman Law Library,http://avalon. law. yale. edu/20th_century/leagcov. asp, 20. 12. 2010.

57 Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy; October 16, 1925 (The Locarno Pact). Available at: http://avalon. law. yale. edu/20th_century/locarno_001. asp, 20. 12. 2010.

1. The exercise of the right of legitimate defense, that is to say, resistance to a violation of the undertaking contained in the previous paragraph or to a flagrant breach of Article 42 or 43 of the said Treaty of Versailles, if such breach constitutes an unprovoked act of aggression and by reason of the assembly of armed forces in the demilitarized zone immediate action is necessary."

Some states have, as a precondition for ratifying the *Briand-Kellogg Pact,*[58] sought to clarify their rights to self-defense. The United States, in its note of June 23, 1928, averred that the treaty did not: "restrict or impair… the right of self-defense. That right is inherent in every sovereign State and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and *it alone is competent to decide whether circumstances require recourse to war in self-defense*."[59]

The *International Military Tribunal at Nuremberg,*[60] in its judgment, took the position that self-defense was permissible in a situation in which a country was attacked or threatened with imminent danger, subject to the rules of international law, whether the war is offensive or defensive. When a state is threatened, it must determine, in the first instance, whether to resort to the use of armed force in self-defense. After that, the international community, according to the rules of international law, evaluates, in the second instance, whether such use of force was in self-defense.

4. The right of self-defense under the Charter of the United Nations

4. 1. Introduction

Article 51 of the United Nations Charter states:

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defense 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. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action

58 Kellogg-Briand Pact of 1928. Available at: © 2008 Lillian Goldman Law Library 127 Wall Street, New Haven, CT 06511. http://avalon. law. yale. edu/20th_century/kbpact. asp, 20. 12. 2010.

59 Stone, J. (1958), p. 32. (footnote 29).

60 The Nurenberg Trials of 1945-49. Available at: http://law2. umkc. edu/faculty/projects/ftrials/nuremberg/nuremberg. htm, 20. 12. 2010.

as it deems necessary in order to maintain or restore international peace and security."

To determine the exact meaning of this article, one must consider it in the context of the entire Charter, as well as in relation to customary international law. Article 2 (4) of the Charter obligates all UN members to refrain in their relations from the threat or use of force against the territorial integrity or political independence of any state or in any manner otherwise be contrary to the aims of the United Nations. If an armed attack is directed against the territorial integrity or political independence of a state, such armed attack allows an exception to the general prohibition against the use of force under the Charter and gives the state the right to resort to self-defense.

This is the obvious situation, in which states, without any doubt, would have an excuse to resort to self-defense. These specific circumstances, *prima facie*, constitute a violation of the territorial integrity of the state, so that the permissibility of the use of armed force in self-defense is beyond any reasonable doubt. There are also situations in which the intensity and manner in which territorial integrity is threatened cast doubt on the reasons asserted for resorting to armed force in self-defense. For example, in the wars between Bolivia and Paraguay over the province of Chaco, there are disputes about sovereignty over the province. The League of Nations Commission Report of 1934 states:

"In this dispute each party claims ownership of the Chaco, and therefore maintains it is waging a defensive war in its own territory. How is aggressor to be determined in such a conflict? No international frontier has been crossed by foreign troops, since the Chaco question will only be settled by a determination of this disputed frontier."[61]

The question of whether the armed forces of a State may, in its exercise of the right to self-defense, cross the border of another state is also controversial. This issue should be considered in light of contemporary international law.

In connection with the issue of political independence, there is the problem of determining its content. What is the meaning of political independence?

"The right has been described as involving, inter alia, the right 'to established, maintain, and change its own constitution or form of government and select its own rulers… to negotiate and conclude treaties and alliances…and to maintain diplomatic intercourse with other members of the international community'" [62]

61 Bowett, D. W. (1958) Self-Defence in International Law. Manchester: University Press. p. 35, footnote 1.

62 Ibid. p. 42-43, note 1.

In the *draft Declaration on the Rights and Duties of States* of 1947, this right was defined as follows:

Every state has the right to its own independence in the sense that it is free to provide for its own well-being and to develop materially and spiritually without being subjected to the domination of other states provided always, that in so doing it shall not impair or violate the legitimate rights of other states.[63]

"There is a general assumption by jurists that the Charter prohibited self help and armed reprisals."[64]

Article 51 of the Charter, stipulating the right to self-defense, provides a legal basis for both aspects of self-defense, the right of the individual and the right to collective self-defense. This right to self-defense is a "right" and not a "duty. " Thus, each sovereign state may use its "inherent" right but is not required to do so.

Article 51 of the Charter consists of several interrelated parts:

*a) Nothing in the present Charter shall impair the inherent right of individual or collective self-defence***;**

This phrase, by its nature, is a purely declaratory expression of the earlier development of international law, both contractual and customary. The expression "inherent right" should be interpreted to mean that it is a natural right and is, therefore, of a philosophical nature. The expressed commitment to the right to self-defense for the existence of member states as such is something that is inseparable from the attributes of sovereignty. It also expresses the view that the right to self-defense exists independently of and prior to the Charter. The Charter does not establish this right it was already an inherent right of each state. The Charter only restates this preexisting right and, in a way, limits it in spirit and letter.

b) if an armed attack occurs;

The right of individual or collective self-defense exists only in the case of armed attack. It cannot be extended to cases that do not involve, an "armed attack." This restrictive interpretation, if accepted, would involve two propositions: first, that action in self-defense may not be "anticipatory" but rather must await an armed attack; and, second, that purported self-defense is only legitimate if and when the measures used to violate the state's interests have taken the form of an "armed attack."[65]

63 Ibid. p. 43, note 2.

64 Brownlie, I. (2003). Principles of Public International Law. (6th ed.). Oxford: University Press. p. 265, note 1.

65 Bowett, D. W. (1958). Ibid., p. 188.

Such a restrictive interpretation of the right to self-defense, however, has not found confirmation in the international practice. Leading world powers have not adopted such a narrow interpretation of this article. Instead, in practice, they have extended this right beyond cases in which an armed attack has occurred.

According to customary international law, the right to self-defense exists not only in the case of actual attack, but also if such an attack is imminent. [66]

In the case of *Nicaragua v. The United States,* the International Court of Justice used the definition of aggression in Article 3 (g) to define the meaning of armed attack in international law. The court ruled that an armed attack included "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to," *inter alia,* an actual armed attack conducted by regular forces "or its substantial involvement therein."[67]

After the terrorist attacks of September 11, 2001, Resolution 1368 of September 12, 2001 labeled a terrorist attack as a threat to international peace and security in terms of Chapter VII of the UN Charter.

c) against a Member of the United Nations;

A restrictive interpretation of this phrase could conclude that the reserved right to self-defense is reserved only for members of the UN and exists only if an armed attack occurs against a Member of the United Nations. This would mean that Member States could not assist a non-member State in the event of an armed attack. This is not what this provision means." Art. 51cannot take away nonmembers' rights of self-defence, so that if any restriction is intended it relates only to freedom of members to associate themselves with non-members in their defence." [68]

This article provides an opportunity for member states to unite in defense with other members of the United Nations.

d) until the Security Council has taken measures necessary to maintain international peace and security;

66 In the debate before the Security Council regarding the issue of the Pakistani invasion of Kashmir, the Pakistani representative justified the invasion of Kashmir under the theory that the alleged occupation of Kashmir by India posed an immediate threat to Pakistan, even though there was no doubt that there was no "armed attack" on Pakistan by India. See: Bowett, D. W. (1958). Ibid., p. 189.

67 Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgement, ICT Reports 1986, p 103 (93.)para 195. Available at: http://www. icj-cij. org/docket/files/70/6503. pdf

68 Bowett, D. W. (1958). Ibid., p. 193. nota 6.

This phrase is a product of the centralization of the system of maintenance of international peace and security. It gives Member States the option to take necessary defensive measures that are, by nature, temporary, while the system is not functioning or until the Security Council begins to realize its intended role under the Charter. Under this provision, the Member States to cease the exercise of self-defense, individual or collective, as soon as the Security Council begins to exercise its role.

e) Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council;

This provision introduces a legal obligation upon a Member State that has taken measures in individual or collective self-defense to immediately inform the Security Council what measures it has taken in the exercise of its rights. This report serves as the basis for the Security Council's own decision about what measures it will take in exercising its role as the protector of international peace and security.

f) and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security;

This provision's sole purpose is to reiterate the temporary right of states to individual or collective self-defense and underline the Security Council's primary responsibility for maintaining international peace and security. It has no special meaning beyond this.

4.2. Prerequisites for the existence of the right to self-defense and other issues

In legal literature it is accepted almost unanimously that the right to self-defense only after the following conditions have been met: necessity, (which includes the immanency of the threat) and proportionality.

The International Court of Justice stated, in the Nicaragua case, that Article 51 "does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law."[69]

The rules of necessity and proportionality, however, are rules of customary international law and their fulfillment depends on the circumstances of each particular case. Whether these conditions are met is determined in the

69 Dinstein, Y. (1994). op. cit. p. 202,(footnote 124).

first instance by the country that finds itself in a situation that requires recourse to self-defense and, in the second instance, by the international community and its authorized bodies."Each nation is free at all times and regardless of the treaty provisions to defend itself, and is sole judge of what constitutes the right of self-defence and the necessity and extent of same."[70]

Necessity exists when the state has no other means of response to an armed attack to protect its rights. The customary right of self-defence includes the requirement that the force used be proportionate to the threat.[71]

Proportionality and necessity are flexible concepts, but a state may not respond to a minor violation of its boundaries with disproportionate means, particularly because minor encroachments are often the product of mistakes or misunderstandings within the chain of command.

This issue arises in particular with regard to the question of whether a State that is the victim of a conventional assault could respond with nuclear weapons. "State practice existing on this question is not unequivocal but indicates that the governments of the United States, France, Canada, and the United Kingdom regard the use of nuclear weapons as permissible against an aggressor state irrespective of the weapons employed by the latter."[72]

There is also a question whether actions in self-defense can occur before the provoking attack has occurred. This issue is particularly important for countries that possess nuclear weapons or or could be the object of a nuclear attack, as well as for other countries whose first use of weapons could depend upon the result of such a war.

Article 51 of the Charter permits self-defense only in the case of an existing armed attack. Customary international law opinions on this subject, however, are divided. While some believe that there is no right to preventive war, most legal writers consider that customary international law permits anticipatory self-defense. According to *Westlake*:

"A State may defend itself, by preventive means if in its conscientious judgment necessary, against attack by another State, threat of attack, or preparations or other conduct from which an intention to attack may reasonably be apprehended."[73]

70 Brownlie, I. (2003). Ibid. p. 237, note 4.

71 Ibid. p. 261.

72 Ibid. p. 263.

73 Ibid. p. 257, (fuss nota 5).

Israel, in 1967,[74] made a preemptive strike against its Arab neighbors in response to their amassing of troops on its border, blockade of the Straits of Tiran a port of Eliat, and execution of a mutual-defense pact between Egypt and Jordan. The United Nations, in the discussions that followed, did not condemn the Israeli attack or its characterization of it as self-defense. The International Court, in the case of *Nicaragua v. the United States,* did not address the issue of the imminent threat of armed attack, since that question was not before it.

An additional question is whether a state may use force to protect its citizens and property abroad. Until passing the UN Charter, this issue was unequivocally resolved. The position of customary international law was that a state could defend its citizens, persons who were subject to its jurisdiction, and its property, wherever they were located, even in the territory of another sovereign state. Location within the territory of the State was not necessary to the exercise of self-defense.

Article 51 of the Charter, however, does not recognize the right of self-defense to protect citizens and property abroad. Nonetheless, most legal writers are of opinion that customary international law continues to recognize this kind of self-defense. This is consistent with the contemporary practice in international relations, as well. Imminent danger to the life or property being protected, however, is still a precondition for exercising this extraterritorial self-defense. As the American representative to the conference in Havana in 1928 said:

"What are we to do when government breaks down and American citizens are in danger of their lives?... Now it is principle of international law that in such a case government is fully justified in taking action - I would call it interposition of a temporary character for the purpose of protecting the lives and property of nationals. I could say that is not intervention." [75]

This issue has come up recently: for example, in the well-known US-Belgian rescue of hostages in the Congo in 1964. "The most famous incident, however, was the rescue by Israel of hostages held by Palestinian and other terrorists at Entebbe, following the hijack of an Air France airliner. The Security Council Debate in that case was inconclusive. Some states supported Israel's view that it was acting lawfully in protecting its nationals abroad, where the local state concerned was aiding the hijackers, others adopted the approach that Israel had committed aggression against Uganda or used excessive force."[76] "The US conducted a bombing raid on Libya on 15 April 1986 as a

74 Time Line of the 1967 Six day war (Israeli-Arab 6 Day war Chronology), Available at: http:// www. zionism-israel. com/his/six_day_war_timeline. htm, 22. 12. 2010.

75 Bowett, D. W. (1958). Ibid., p. 99 - 100, (footnote 1).

76 Shaw, N. M. (1997). International Law. Cambridge: University Press. p. 792, (footnotes 84-86).

consequence of alleged Libyan involvement in an attack on US servicemen in West Berlin. This was justified by the US as an act of self-defence."[77]

"The UK Foreign Minister concluded on 28 June 1993 that:

Force may be used in self-defence against threats to one's nationals if: (a) there is good evidence that the target attacked would otherwise continue to be used by the other state in support of terrorist attacks against one's nationals; (b) there is, effectively, no other way to forestall imminent further attacks on one's nationals; (c) the force employed is proportionate to the threat."[78]

4.3. Individual self-defense

In the case of an armed attack, the attacked state is authorized, in accordance with the provisions of Article 51 of the Charter and the rules of customary international law, to take measures of individual self-defense. This article refers to the attack undertaken by a State and directed against another state.

The attacked state has the authority to take all measures permitted by international law to repel the attack. These are primarily meassures of armed response to armed attack. According to H. Kelsen: "(w)ar and counterwar are in the same reciprocal relationship as murder and capital punishment. "[79]

International law imposes a requirement of proportionality between the attack and the defense thereto, but the report of the International Law Commission on this issue states:

"It would be mistaken…to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered. What matters in this respect is the result to be achieved by the 'defensive' action, and not the forms, substance and strength of the action itself." [80]

77 Ibid. p. 793. (footnote 90).

78 Ibid., p. 793. note 92. "Sir Humphrey Waldock reiterated these conditions in somewhat different wording, fitting better the specific context of the protection of nationals abroad: There must be (1) an imminent threat of injury to nationals, (2) a failure or inability on the parts of the territorial sovereign to protectect them and (3) measures of protection stricla confined to the object of protecting them against injury." Dinstein, Y. (1994). Ibid., p. 226. (Footnote 51).

79 Dinstein, Y. (1994). Ibid., p. 230, footnote 75.

80 Ibid. p. 232- 233. note 79.

The State that is the victim of aggression, as a general rule, is permitted to take all necessary military action to destroy the military potential of the aggressor. What is disputed in the international law literature is whether the attacked state has the right to continue the war in after the aggressor state, for whatever reason, has lost the will for further warfare. Some commentators have argued that the defensive state must stop its defensive war because legitimate self-defense requires proportionality. Others reject this approach.

War in self-defense must be conducted at the time of the attack, or there must be a temporal proximity between the act of aggression and the exercise of individual self-defense.

4.4. Collective Self-Defense

The right to collective self-defense had been established by customary international law prior to the adoption of the League of Nations Covenant, which became part of international treaty law. Articles 10 and 16 of the Pact developed the concept of collective defense. Many agreements on mutual assistance were concluded between the two world wars and contained provisions on collective self-defense between the respective countries.

Article 51 of the UN Charter states, inter alia, that the right to collective self-defense is the inherent right of each state. This idea is further developed in Article 52 (1), which states: *"Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations."*

These provisions have served as the basis for the conclusion of many postwar agreements on mutual assistance with the aim that, in the event that one of the parties to an agreement is attacked, the other members are obliged to come to its help. Thus, for example, Article 3 (1) of *The Inter-American Treaty of Reciprocal Assistance* of 1947 states:

"The High Contracting Parties agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations."

These provisions of the Charter were used as the basis for the creation of military alliances, most notably North Atlantic Treaty Organization (NATO) and the now defunct Warsaw Pact. Article 5 of the North Atlantic Treaty provides:

"The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all, and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually, and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security."[81]

"Organizations such as NATO and the Warsaw Pact have been set up since Second World War, specifically based upon the right of collective self-defense under Article 51. By such agreements, an attack upon one party is treated as an attack upon all, thus necessitating the conclusion that collective self-defense is something more than a collection of individual rights of self-defense, but another creatures together."[82]

"This approach finds support in the *Nicaragua* case. The Court stressed that the right to collective self-defense was established in customary law but added that exercise of that right depended both upon a prior declaration by the state concerned that it was the victim of an armed attack and a request by the victim state for assistance." [83]

4.5. Self-defense against terrorism

In response to the terrorist attacks of September 11th, the United States launched a military campaign against Afghanistan, known as *Operation Enduring Freedom,* on October 7, 2001.[84] When the United states informed the Security Council of its intention to take action, it claimed to be acting in self-

81 The North Atlantic Treaty Washington D. C. - 4 April 1949. Available at: http://www. nato. int/cps/en/natolive/official_texts_17120. htm, 23. 12. 2010.

82 Shaw, N. M. (1997). Ibid. p. 794, footnotes 98 & 99.

83 Ibid. p. 794, 795 (footnote omitted).

84 Operation Enduring Freedom, available at: http://www. history. army. mil/brochures/Afghanistan/Operation%20Enduring%20Freedom. htm, 23. 12. 2010.

defense. Great Britain also recognized the United States invasion as an act of individual and collective self-defense. Despite earlier questions about the applicability of the right of self-defense in response to terrorist attacks, the actions of the United States encountered general support. Security Council Resolution1368 of September 12, 2001 explicitly recognized the right to self-defense against terrorism. The subsequent Resolution 1373 of November 14, 2001[85] also referred to the individual and collective right to self-defense.

This is obviously an extension of the traditional model of states' rights to self-defense as prescribed by the UN Charter. Since general support for the right to self-defense in case of terrorist attacks has inured, there has been a reinterpretation of the provisions of the Charter, creating a new international custom recognizing it."Now it is apparently accepted that a terrorist attack on a State's territory by a non-State actor is an armed attack which justifies a response against the State which harboured those responsible." [86] NATO, for the first time in this case, called for Article 5 of its founding treaty to stipulate that an attack on one member state be considered an attack against them all.

The United States and Great Britain believe that they have a right to anticipatory self-defense and preventive war. This right has been accepted by many countries, but only in relation to terrorist threats and no farther. This recognition is further tempered by the requirement that the Security Council recognize the existence of a putative terrorist threat by resolution.

5. Measures of the Security Council pursuant to Chapter VII of the UN Charter

5.1. Introduction

The original intent of the founders of the United Nations, enshrined in the relevant provisions of the UN Charter, was that the Security Council, which was to have at its disposal a standing army, decide on the use of force for maintaining or restoring international peace and security. This ambitious plan was never implemented, so practice has had to be modified. According to Article 24 of the UN Charter, the Security Council has primary responsibility for the maintenance of international peace and security, and its decision under Article 25 of the Charter are binding on all Member States of the United

85 Security Council Resolution S/RES/1373 (2001), available at: http://daccess-dds-ny. un. org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743. pdf?OpenElement, 23. 12. 2010.

86 Gray, C. The use of force and the international legal order. Evans. M. D. (ed.). (2003). International Law. Oxford: University Press. p. 604.

Nations. Because Article 27 of the Charter grants the right of veto to all permanent members of the Security Council, during the Cold War, Security Council action to preserve international peace and security was obstructed by an abuse of this veto right.

Chapter VII of the Charter gives the Security Council broad powers to take measures to achieve its primary task of preserving and protecting international peace and security. When carrying out these measures, the Security Council usually refers to Chapter VII without specifying the exact provision(s) of this chapter that forms the basis for its action. According to Article 39 of the Charter, the Security Council should determine whether there is a threat to peace, breach of the peace or act of aggression and make recommendations or decide what measures should be undertaken, in accordance with Articles 41 and 42, to preserve or restore international peace and security.

5.2. Measures not involving the use of force

Once the Security Council has determined that a dispute or situation constitutes a threat to peace, breach of peace or act of aggression, further measures are authorized. Before taking such measures, it may invite interested parties to abide by provisional measures that it considers necessary or desirable. Such measures are aimed at calming the situation. These actions are based on Article 40 of the Charter. These provisional measures may not affect the rights, claims or position of the interested parties. They are without prejudice to the rights or demands of the parties and are considered a temporary measure to stabilize crisis situations.[87] These temporary measures often include a call for a cease-fire or a temporary withdrawal from occupied territory.

The adoption of provisional measures by the Security Council often has a greater effect than purely temporary action. They can create a calmer atmosphere, leading to negotiations, and help to resolve disputes along the lines of the Security Council resolution that established the provisional measures. [88]

Once the Security Council has determined that there has been a threat to peace, breach of the peace or an act of aggression, it undertakes two types of actions, including: measures not involving the use of force, under Article 41 of Charter, which includes the application of economic or diplomatic sanctions; and measures that include the use of force, under Article 42 of the Charter.

87 See: Shaw, N. M. (2003). Ibid., p. 1124.

88 Ibid. p. 1125.

According to article 41 of the Charter, the Security Council may decide what measures not entailing the use of armed force should be applied to the execution of its decisions and can invite members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radiographic and other connections, as well as the severance of diplomatic relations.

The first major action that did not involve the use of force occurred in connection in response to the Rhodesian white minority government making a unilateral declaration of independence in 1965.[89]

The most thoroughly developed economic sanctions imposed by the Security Council were adopted at the time of the invasion of Kuwait by Iraq on August 2, 1990. [90] Security Council Resolution 661 of 1990[91] resolved that, if Iraq did not withdraw immediately and unconditionally from Kuwait, in accordance with Chapter VII of the Charter, the Council would introduce large-scale economic sanctions against Iraq, including a ban on all countries' importing or exporting from/to Iraq and occupied Kuwait and transferring funds to/from Iraq and Kuwait for such purposes.

In Resolution 757 of May 30, 1992.[92] the Security Council imposed various economic and diplomatic sanctions against the FRY (Serbia and Montenegro), as a penalty for noncompliance with previous resolutions, which demanded an end to its involvement in the war in Bosnia and Herzegovina.[93] This resolution was adopted pursuant to Chapter VII of the UN Charter. The sanctions were reinforced in Resolution 787 of 1992.[94]

89 Ibid. p. 1125.

90 Ibid. p. 1126.

91 Resolution 661 S/RES/0661 (1990), available at: http://www. fas. org/news/un/iraq/sres/sres0661. htm, 24. 12. 2010.

92 Security Council Resolution 757 (1992) (S/RES/757, 30. May 1992). Bethlehem, D., Weller, M. (ed.). (1997). The Yugoslav Crisis in International Law, General issues, part I. Cambridge: University Press. p. 9; But before started imposing economic and diplomatic sanctions the Security Council has repeatedly called for a ceasefire which essentially means the application of provisional measures pursuant to Article 40 UN Charter.

93 UN Resolution No. 752 of May 15, 1992."...demands that all forms of interference from outside Bosnia and Herzegovina, including by units of the Yugoslav People's Army as well as elements of the Croatian Army, cease immediately, and that Bosnia and Herzegovina's neighbours take swift action to end such interference and respect the territorial integrity of Bosnia and Herzegovina."

94 UN Security Council Resolution 787 to extend the sanctions of November 16, 1992.

Resolution 820 of 1993[95] and Resolution 942 of 1994[96] extended the sanctions to the parts of Croatia and Bosnia and Herzegovina controlled by Serb forces. Resolution 1022 of November 22, 1995[97] temporarily suspended these sanctions after the signing of the Dayton Peace Agreement. Resolution 1074 (1996)[98] permanently lifted the sanctions after elections were held in Bosnia and Herzegovina.

5.3. Measures that include the use of the force

In the event that measures not involving the use of force do not yield the expected results or the Security Council deems that measures not involving the use of force, as authorized by Article 41 of the Charter, are insufficient, the Council may, in accordance with Article 42 of the Charter, use the air, maritime and infantry forces of members of the United Nations to establish or preserve international peace and security, including demonstrations, blockades, and other operations.

To contribute to the maintenance of peace and security, in accordance with Article 43 of the Charter, all members of the United Nations are committed to make available their armed forces, assistance and facilities, including granting rights of passage,at the request of the Security Council, in accordance with the special agreement or agreements for the maintenance of peace and security. Pursuant to Article 45, all member States should immediately make their air forces available to the aviation contingent for joint international action, in accordance with the established agreements or agreements mentioned in Article 43. The aim of these measures is to establish joint UN forces to act as the army of the Security Council and to prevent possible threats to peace or acts of aggression.

95 UN Security Council Resolution 820 of 1993 on the situation in B-H, s/res/820 (1993), available at: http://www. ohr. int/other-doc/un-res-B-H/pdf/820e. pdf, 24. 12. 2010.

96 UN Security Council resolution 942 (1994) on reinforcement and extension of measures imposed by the UNSC resolutions with regard to those areas of B-H under the control of Bosnian Serb forces. Available at: http://www. ohr. int/other-doc/un-res-B-H/default. asp?content_id=7074, 24. 12. 2010.

97 UN Security Council resolution 1022 (1995) on suspension of measures imposed by or reaffirmed in Security Council resolutions related to the situation in the former Yugoslavia, Available at: http://www. ohr. int/other-doc/un-res-B-H/default. asp?content_id=7100, 24. 12. 2010.

98 Securiy Council resolution S/RES/1074 (1996), Available at: http://daccess-dds-ny. un. org/doc/UNDOC/GEN/N96/259/27/PDF/N9625927. pdf?OpenElement, 24. 12. 2010.

Article 47 of the Charter regulates the creation of the Military Staff Committee composed of the Chiefs of Staff the five permanent Security Council members or their representatives, whose mission is to advise and assist the Security Council on military matters and be responsible for the strategic direction of any armed forces placed at the disposal of the Security Council. Article 46 directs that plans for the operations of the armed forces be made by the Security Council with the assistance of the Military Staff Committee.

The first example of such operations in practice was the UN response to North Korea's invasion of South Korea in 1950. In June 1950, North Korean forces crossed the 28th parallel[99] separating North from South Korea, which led to armed conflict. Almost immediately, the Security Council declared that this action constituted a breach of the truce and invited all members of the UN to help persuade North Korea to withdraw. [100] Two days later, a second Security Council resolution recommended that UN Member States should provide all necessary assistance to South Korea, while a third resolution authorized the UN to appoint a commander of the armed forces set up to help South Korea and the use of the flag of the United Nations by the forces. [101] The absence of the Soviet Union from the Security Council meeting made the adoption of these resolutions possible. The Soviet Union, at that time, did not participate in the sessions of the Council in protest of the People's Republic of China having been denied Taiwan's place as a permanent member of the Security Council, so the resolution authorizing the engagement of troops in the Korean War was made without the vote of the Soviet Union.

This made military action by the United Nations against North Korea possible, under the leadership of U. S. forces. The Soviet Union returned to the Council at the beginning of August 1950 and blocked further Council action in the Korean War, but could not reverse the previous resolutions, despite its claims that the Soviet boycott rendered them invalid. [102]

The United Nations troops, composed of military forces of sixteen states, were under the control of the United States forces. A series of agreements signed between the United States and all of the other participating countries dictated that they were not operating under the effective control of the General Assembly, but were only acting under the direction of the Security Council. This improvised operation clearly revealed the weaknesses

99 See also: Shaw, N. M. (2003). International Law. (5th ed.). Cambridge: University Press. p. 1134.

100 Ibid. p. 1134.

101 Ibid. p. 1134.

102 Ibid. p.. 1134.

of the UN system for the maintenance of peace and demonstrated that the collective security system, as originally envisioned by the Charter, could not function, but it also demonstrated how the system could reintegrate to function properly.[103]

After the Iraqi invasion of Kuwait on August2, 1990, Resolution 660 (1990)[104] was adopted unanimously the same day by the Security Council condemning the invasion and demanding the immediate and unconditional withdrawal of Iraqi forces. The Security Council was dissatisfied with Iraq's response to the resolutions and adopted Resolution 678 on November 29, 1990,[105] which gave Iraq additional time to comply with previous resolutions and withdraw from Kuwait.[106] This "last chance" was supposed to expire on January 15th, 1991. After this date, member States were authorized, in cooperation with the Government of Kuwait, to use all available resources to implement Resolution 660[107] and to restore international peace and security in the region.

6. The role of the UN General Assembly

If the Security Council, because of the required unanimity of permanent members, is unable to act, are there alternatives to the Security Council, including the General Assembly?

The ability of any permanent member of the Council to veto any decision of the Council often hinders its work, rendering the Council unable to perform its duties. Because the permanent members of the Council are guided primarily by their self-interest, the responsibility of the Council to maintain international peace and security has very frequently been stymied. This became evident soon after the founding of the United Nations and the adoption of the Charter. The first significant crisis in the Cold War world, the events on the Korean peninsula, showed that there were situations that could paralyze the Council's work. This prompted a group of countries, led by the United States, at the extraordinary session of the 1950, to propose a resolution, known as *United for Peace,*[108] which was adopted at that session.

103 Shaw, N. M. (2003) International law. (5th ed.). Cambridge: University Press. p. 1134.

104 Security Council resolution 660 of 2 August 1990. Available at: http://daccess-dds-ny. un. org/doc/RESOLUTION/GEN/NR0/575/10/IMG/NR057510. pdf?OpenElement 25. 12. 2010.

105 Resolution 678 (1990) Adopted by the Security Council at its 2963d meeting on November 29, 1990. Available at: http://www. fas. org/news/un/iraq/sres/sres0678. htm, 25. 12. 2010.

106 Shaw, N. M. (2003). p. 1134.

107 Ibid. p. 1134.

108 Uniting for Peace (UN Resolution 377). Available at: http://www. un. org/depts/dhl/

That resolution provided that:

"if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security."[109]

The procedure for the establishment and maintenance of peace that this resolution established can be applied only in cases in which the work of the Security Council has been paralyzed by the use of a veto by a permanent member. It in no way derogates the provisions of the Charter relating to the procedures in cases in which international peace and security are threatened. It also in no way impinges on the powers and responsibilities of the Security Council to maintain international peace and security. It has a subsidiary importance relative to the Charter -- i. e., it complements the Charter.

"The main problem is that, in all matters pertaining to international peace and security, the General Assembly is authorised (under Charter IV) to adopt only non-binding recommendations."[110] Each Member State "remains legally free to act or not to act on such recommendation"[111]

The powers of the General Assembly and the Security Council in this matter are qualitatively different. While the General Assembly, moving within its (limited) powers established by the Charter, can only make recommendations, those recommendations have considerable moral weight deriving from the inclusivity and authority of the body that passes them The Security Council, by contrast, because of its coercive enforcement powers, makes binding decisions.

"In its Advisory Opinion of 1962, in the Certain Expenses case, the International Court of Justice held that – although, generally speaking, the responsibility of the Security Council respecting the maintenance of international peace

landmark/pdf/ares377e. pdf, 25. 12. 2010.

109 Security Council Resolution 377 (V) S. T. G: A. 10, id (1950), Dinstein, Y. (1994). p. 301-302. note 144; "The resolution was adopted on 3 November 1950 with the majority of 52:5 and two Abstentions, and was first applied on the occasion of the triple aggression against Egypt, made by Great Britain, France and Israel in October 1956, at the suggestion of Yugoslavia. " Avramov S., Kreća, M. (1989). Međunarodno javno pravo. Beograd: Savremena administracija. p. 172.

110 Dinstein, Y. (1994). p. 302, 303. Footnote 150.

111 Ibid, footnote 151.

and security is 'primary' rather then exclusive – only the Council possesses the power to impose explicit obligations of compliance under Chapter VII." [112]

7. The Security Council, International Law and the International Court of Justice

If the Security Council fails to exercise its responsibility, pursuant to Article 39 of the U. N. Charter, to adjudicate the existence of a threat to peace, breach of peace, or act of aggression and take immediate action to maintain or restore international peace and security because of its procedural limitations, including the veto of a permanent member, or if it exercises its responsibility and takes actions that do not satisfy a party to the conflict, the question arises whether the International Court of Justice may take different actions to resolve the conflict at the request of one or more of the parties to the dispute.

This then raises the further question of the institutional competence of the International Court to determine the existence of aggression under international law. In the case of Nicaragua v. United States, the United States objected to the competence of the Court as a judicial body dealing with Nicaragua's petition concerning its illicit use of force, including an alleged act of aggression or breach of the peace, on the ground that it was usurping a task entrusted to the political organs of the United Nations, particularly the Security Council. [113]

The Court, in 1984, dismissed the complaint of the United States, reasoning that the Security Council was the primary but not exclusive body authorized to deal with this issue. The judgment made clear distinction between the Court's judicial role and the Council's political ones. According to the court, both bodies could engage in their separate but complementary tasks concerning the same event.

When the Security Council exercises its power under the Charter to determine the existence of an act of aggression, it does not perform this task in the same way that the International Court of Justice does. The Council can determine the existence of an act of aggression, but it is much more likely to fail to do so for political reasons. Therefore, in determining the existence of aggression, the Council is guided solely or even primarily by geopolitical rather than legal reasons. It can consider legal reasons, but it is not bound by them.

112 Dinstein, Y. (1994) War Agression and Self –Defence, second edition. Cambridge: Cambridge University Press. p. 303. nota 152.

113 Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction, 1984. ICJ Report, 392.

The Council is not the most appropriate body to reach a verdict as to whether a party in an armed conflict is "guilty of violating some legal obligations. " In contrast, the Court rendering a judgment on this question is not bound by political considerations and is fully qualified to make a decision based on legal reasons as to who was the aggressor in an armed conflict.

Therefore, both are competent to determine the existence of aggression and, together, give appropriate consideration to both the political, and legal reasons underlying this decision. The theoretical question therefore arises: what if the two bodies reach a different conclusion as to an act of aggression when assessing the same event. In other words, what happens if, in an armed conflict, the Security Council determines that one party is the aggressor while the Court determines that the other state is the aggressor. This problem can be resolved by timing. The Security Council is called upon to act immediately to reestablish international peace and security, and member States are obliged to immediately comply with the decisions of the Council.

"The Court's role is to settle disputes in accordance with international law. The restoration of peace is more urgent than the settlement of the dispute, and it should be given temporal priority."[114] But the measures taken by the Council are not necessarily the last word on the subject. The final judgment is left to the Court (provided, of course, that it has jurisdiction)."[115]

The measures determined by the Security Council are urgent in nature. They concern cease-fires, the withdrawal of the warring parties from the battlefield, etc. and they do not impair the Court's powers to deal with the legality of the use of armed force by the parties to the conflict. The court decision comes after the cessation of hostilities. There would be no possibility for the parties to the conflict to submit the dispute to the Court during the hostilities.

"Under these circumstances, the Security Council ought to allow the Court to exercise its judicial powers without undue interference, although a cease-fire order will not be out of place."[116]

The jurisdiction of the International Court of Justice is regulated by Article 36, paragraph 2, which contains the so-called optional clause, under which each State may, by its declaration, submit to the jurisdiction of the Court certain types of disputes with any other country that has signed the same declaration. In these situations, each State may unilaterally, if necessary prerequisites are fulfilled, bring the dispute before the Court. The dispute must be legal in

114 Dinstein, Y (2005). War Aggression and Self-Defence, (4th. ed.). Cambridge: University Press. p. 320

115 Ibid. p. 320.

116 Ibid. pp. 320-321.

nature and have the following subject matter: the interpretation of a treaty; a question of international law; the existence of any fact which, if established, would constituted a breach of an international obligation; and/or the nature and extent of the reparation for the breach of an international obligation.

8. Humanitarian intervention

The UN General Assembly, in its resolutions, such as the Definition of aggression[117] and the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations,[118] precludes intervention in absolute terms.

After the Second World War, the issue of the permissibility of using force in some situations that were collectively labeled as humanitarian intervention repeatedly arose. These situations involved government abuses of sovereignty to harm its own people and the inability to protect its own citizens or others within its territory.

These situations gave rise to the questions of the functioning of the system of collective security established by the UN Charter and whether the UN, the provisions of Article 2 (7) of the Charter of the United Nations notwithstanding, which prohibits interference in matters within the domestic jurisdiction of Member States, could intervene in the internal affairs and relations of some UN member states; and whether, if the UN failed to so interfere, whether some UN member states could act unilaterally or in a coalition with other interested States without the prior authorization of the Security Council. Specific tests of the doctrine of humanitarian intervention arose during the interventions in northern Iraq, the Federal Republic of Yugoslavia, Somalia, Bosnia and Herzegovina, Rwanda, Haiti and East Timor. The UN Security Council approved some of these interventions and not others.

The first of these tests occurred during the first Iraq war when the United States, Britain and France established a no-fly zone in northern Iraq to protect endangered Kurdish civilians who lived in the area. Previously adopted nonbinding Security Council resolution 688 (1991) had asked Iraq to allow humanitarian agencies access to the Kurdish area. It explicitly referred to Article 2 (7) of

117 Definition of Aggression, United Nations General Assembly Resolution 3314 (XXIX). Available at: http://www1. umn. edu/humanrts/instree/GAres3314. html, 25. 12. 2010.

118 Declaration of the Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G. A. Resolution 2625 (XXV), Oct. 24, 1970. Available at: http://daccess-dds-ny. un. org/doc/RESOLUTION/GEN/NR0/348/90/IMG/NR034890. pdf?OpenElement, 25. 12. 2010.

the Charter and did not authorize the use of force. Therefore, the legal basis for the establishment of the no-fly zone remains unclear. Great Britain attempted to justify intervention on the ground of *extreme humanitarian need*.

The second test concerned the seventy-eight-day NATO campaign against Serbia to prevent the displacement and repression of the Albanian population of Kosovo, which began in March 1999. The views of the participating countries were expressed during the case about the legality of using force, which is known as the *Legality of the Use of Force*.[119] Belgium,[120] in its submission filed with the Court, took the position that it was an action aimed at rescuing the threatened population and that the action was not directed against the territorial integrity and political independence of the Federal Republic of Yugoslavia. Most other countries that participated in the proceedings did not rely on the doctrine of humanitarian intervention as a justification for the use of force. Rather, they combined humanitarian reasons with the implicit authorization by the Security Council expressed in Resolution 1203 (1999).[121]

Humanitarian intervention refers to the use of force against a foreign state or government that threatens or endangers the lives of a group of people or is unable to protect a group of people, regardless of whether they are its citizens. In classical law, the right to engage in this kind of humanitarian intervention was indisputably recognized.

"A state which had abused its sovereignty by brutal and excessively cruel treatment of those within its power, whether nationals or not, was regarded as having made itself liable to action by any state which was prepared to intervene."[122]

Actions are not directed towards the destruction of internal order or a change of government, although they can achieve such a result. By their very nature, they are very similar to police measures.

"It has sometimes been argued that intervention in order to protect the lives of persons situated within a particular state and not necessarily nationals of the intervening state is permissible in strictly defined situations." [123] "Some writers restricted [the right of humanitarian intervention] to action to free a

119 ICJ Legality of the Use of Force (1999). Available at: http://www. icj-cij. org/docket/index. php?p1=3&p2=3, 26. 12. 2010.

120 Legality of the Use of Force (Serbia and Montenegro v. Belgium) (1999). Available at: http://www. icj-cij. org/docket/index. php?p1=3&p2=3, 26. 12. 2010.

121 Resolution 1203 (1998), adopted by the Security Council at its 3937th meeting on October 24, 1998. Available at: http://www. nato. int/kosovo/docu/u981024a. htm, 26. 12. 2010.

122 Brownlie, Y. Ibid. p. 338.

123 Shaw, M. N. Ibid. p. 802, Footnote 142.

nations oppressed by another; some considered its object to be to put an end to crimes and slaughter; some referred to 'tyranny', others to extreme cruelty, some to religious persecution, and, lastly, some confused the issue by considering as lawful intervention in case of feeble government or 'misrule' leading to anarchy."[124] "Operation of the doctrine was open to abuse since only powerful states could undertake police measures of this sort; And when military operations were justified as 'humanitarian intervention', this was only one of several characterization offered and circumstances frequently indicated the presence of selfish motives."[125]

After the adoption of the Charter of the United Nations, it became very difficult to reconcile humanitarian intervention with the provisions of Article 2 (4) of the Charter, which prohibits the threat or use of force.

"The eight eddition of Openheim states that intervention is legally permissible 'when a state render itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind.'"[126] During the discussion of the question of defining aggression in the Sixtt Committee of the General Assembly, Spiropoulos expressed doubt as to whether action by a state taken to prevent genocide against a racially related minority in a neighboring state would be aggression if it occurred after appealing in vain to United Nations organs.[127]

The only argument that was used to justify the use of "western" troops to secure "safe havens" in northern Iraq after the Gulf War was that the action was undertaken in accordance with the customary international law principle of humanitarian intervention in extreme situations.[128] "One variant of the principle of humanitarian intervention is the contention that intervention, in order to restore democracy is permitted under international law. One of the grounds given for the USA intervention in Panama in December 1989 was the restoration of democracy, but apart from the problem of defining democracy, such a proposition is not acceptable in international law today, in view of the clear provisions of the UN Charter."[129]

International practice shows that humanitarian intervention is solely or mainly an expression of the national interests of the state in which the mili-

124 Brownlie, Y. Ibid. p. 338, Footnote 5.

125 Brownlie, Y. Ibid. p. 338, 339.

126 Brownlie, Y. Ibid. p. 341. Footnote 7.

127 Beownlie, Y. Ibid. p. 341, Footnote 6.

128 See: Shaw, M. N. Ibid. p. 803, note 146.

129 Shaw, M. N. Ibid. p. 803, note 147.

tary intervenes. Therefore, it is possible to find examples of both situations in which humanitarian intervention was not justified and situations in which it was.

9. Peacekeeping Operations

Peacekeeping operations[130] is a general phrase used to describe a wide range of activities of the United Nations peacekeeping force that includes the use of military force if necessary to facilitate a diplomatic peace process.

In the UN Charter, there is no provision that provides an explicit basis for the establishment of peacekeeping forces and the conduct of peacekeeping operations. They have emerged as a result of the failure to implement Article 43 of Charter and other provisions that envisioned the formation of the armed forces of the United Nations. The United Nations has found ways to adapt to unforeseen situations that have arisen after the adoption of the UN Charter.

Since the very beginning of its existence, the United Nations "has shown the need to send its armed forces at a delicate point, not to enforce compulsion, but to perform security and police services and to secure peace in an area where peace has been threatened or violated."[131]

These forces have monitored cease-fires or deployed between the parties in conflict with the mission of preventing conflict between them.

These forces are acting on behalf of the United Nations and wear blue berets or helmets and emblems of the United Nations. The Security Council authorizes their use through resolutions, which also authorize the UN Secretary General to collect and send the forces. Article 98 of the Charter makes it possible to transfer these tasks to the Secretary General.

The basis for this activity is the provisions of the UN Charter, which give broad powers to the Security Council and General Assembly. The provisions of Article 29 of the Charter authorizes the Security Council to establish such subsidiary bodies as it considers necessary to carry out its tasks. Article 34 gives the Security Council the right to examine any dispute or situation that could endanger the maintenance of international peace and security. Articles 36, 37 and 38 give it the ability to recommend appropriate procedures and methods for resolving disputes, and Article 39 authorizes its making

130 The most complete and updated information about the United Nations peacekeeping operations is available at: http://www. un. org/en/peacekeeping/, 26. 12. 2010.

131 Andrassy, J. Bakotić, B. Seršić, M. Vukas, B. (2006). Međunarodno pravo 3. Zagreb: Školska knjiga. p. 82.

recommendations and decisions in order to establish international peace and security.

The UN General Assembly also has broad powers, pursuant to Articles 10 and 11 of the Charter, to discuss and make recommendations on all matters relating to the preservation of international peace and security. Pursuant to Article 14, the General Assembly may make recommendations for the peaceful settlement of any situation, regardless of its origin. Pursuant to Article 22 of the Charter, the General Assembly may establish such subsidiary organs as are necessary for the performance of its functions. Article 98 of Charter authorizes the Secretary General of the UN to carry out certain other tasks pertinent to peacekeeping.

Peacekeeping operations have taken the form of observer missions in Greece in 1947 and Palestine in 1948. A peacekeeping force, the United Nations Emergency Force (UNEF), was first used in Egypt in 1956 during the Suez crisis, where UNEF troops remained deployed until 1967. Their task was to implement the decisions of the General Assembly on the prevention of conflict and to occupy the territory ceded by the departing British, French and Israeli forces. The second use of the peacekeeping force came in 1960 in the Congo. The Security Council adopted a resolution that allowed the Secretary General of the UN to provide assistance to the Government of the Congo, pursuant to which he formed the peacekeeping force. The Secretary General established a peacekeeping force in 1964 in Cyprus in the same manner.

These peacekeeping forces were established with the aim of stabilizing the situations and physically separating the parties to the conflicts, but they were not authorized to impose peace or to use armed force. Their presence was conditioned on the acceptance of the parties to the conflict in whose territory they were deployed. They had limited success because they were able to temporarily stabilize the situation but did not prevent the Israeli-Arab war of 1967 or the Turkish invasion of Cyprus in 1974.

Later, the tasks assigned to the peacekeeping missions became more numerous and complex. They were: providing different kinds of help to countries in transition; assisting in the process of reconciliation within countries; helping to consolidate democratic processes; disarming and reintegrating members of the military units of the conflicting parties; returning and reintegrating refugees; and temporarily assuming individual responsibilities in states in conflicts. These engagements generally occurred at the end of conflicts.

In the beginning, peacekeeping missions were meant to be engaged in interstate conflicts, but they later became engaged in civil and internal conflicts.

In this way, the role of the United Nations forces has evolved. First, they were military observers. Later, they were interposition forces that separated the parties to a conflict. Finally, they were given the mandate of building and enforcing peace.

The early United Nations forces had no mandate to use force. They were later granted the right to use force in self-defense and finally in were granted the right to use force in order to realize the defined tasks of some peacekeeping missions. This shift of the mandate of UN peacekeepers was from the authority granted by Chapter VI to the authority granted by Chapter VII of the Charter.

In January 1992, the UN Security Council requested that the UN Secretary General prepare an analysis and make proposals for strengthening in the framework of the UN Charter and the ability of the United Nations to engage in preventive diplomacy, peacemaking and peacekeeping.

The UN Secretary General made a report known as the *Agenda for Peace*[132] in June 1992. Paragraph 15 defined the goals of the United Nations in the changed circumstances after the end of the cold war: to identify at an early stage situations that could cause conflicts and use diplomacy to try to eliminate the sources rather than results of violence; when conflict has begun, to assist in building peace in order to resolve the dispute that led to conflict; to work to keep the fragile peace after the cessation of hostilities; to help in implementing the agreements reached by peacemakers; to be prepared to assist in peace building in different ways; to rebuild state institutions and infrastructures that have been destroyed by civil war; and to build relationships of mutual benefit for the former combatants.

There are many different types of peacekeeping operations, depending on the nature and circumstances in which peacekeepers operate. We distinguish:

Peace enforcement actions,[133] which involve the use of civilian and military sanctions and safety actions of legitimate international interventionist forces to assist diplomatic efforts to establish peace between warring parties that cannot agree to this kind of action;

132 An Agenda for Peace, Report of the Secretary-General A/47/277 - S/24111 17 June 1992. Available at: http://www. un. org/Docs/SG/agpeace. html 26. 12. 2010; See: Supplement to an Agenda for Peace, A/50/60 & S/1995/1, 3 Jan. 1995 [hereinafter, Agenda Supplement], sec. II, table; The Blue Helmets --A Review of United Nations Peace-keeping (New York, UNDPI, 3rd ed., 1996), pp. v-vii and 4.

133 See Peace Operations: An Australian Perspective (2002). Available at: http://www. defence. gov. au/adfwc/peacekeeping/index. htm, 26. 12. 2010; See also: Paragraph 44 of the 1992 Agenda.

Peacemaking operations,[134] which involve diplomatic actions undertaken with the aim of bringing hostile parties to agreement by peaceful means, as provided in Chapter VI of the Charter;

Peacekeeping operations[135] which are diplomatic instruments that do not involve coercion, by which a legitimate international civil and/or military coalition is employed with the consent of the warring parties in an impartial non-combative way to implement an agreement on the resolution of the conflict or to assist in the delivery of humanitarian aid operations; and

Peace-building operations, [136] which involve deploying a set of strategies to ensure avoid armed conflict or other major crisis or a repeat of the same.

These peace building operations can involve:

a) a) *Pre-conflict peace building* to build a peace that includes long-term economic, social and political measures that could help the state in dealing with crises and conflicts, and

b) b) *Post-conflict peace building* to assist in the rehabilitation and reconstruction of post-conflict societies, including various types of assistance in institution-building and specific practical programs, such as assistance in mining areas.

After the start of the conflict in the former Yugoslavia, the Security Council adopted Resolution 713 of September 25, 1991. [137] In this resolution, the Security Council decided, pursuant to Chapter VII of the Charter of the United Nations, that all States, in order to establish peace and stability in Yugoslavia, should immediately establish a general and complete prohibition and suspension (*the embargo*) of any supply of arms and military equipment to Yugoslavia, until the Security Council specified otherwise, after consultation between the Secretary-General and the Government of Yugoslavia. Resolution 743 (1992)[138] required the establishment of the UN Protection Force (UNPROFOR) to ensure the demilitarization of three areas inhabited by Serbs in Croatia. Resolution 749 (1992)[139] authorized the full deployment of UNPROFOR. Subsequently, the Security Council gradually expanded the mandate of the peacekeeping forces.

134 Ibid.

135 Ibid.

136 See Peace Operations: An Australian Perspective (2002). Available at: http://www. defence. gov. au/adfwc/peacekeeping/index. htm;.

137 Bethlehem, D., Weller, M. (ed.). (1997). Ibid, p. 1.

138 Ibid.

139 Ibid.

Resolution 758 (1992)[140] strengthened the mandate of UNPROFOR and authorized the deployment of military observers and related personnel in Sarajevo.

Acting pursuant to Chapter VII of the Charter, the Security Council adopted Resolution 770 (1992), which called on all states to act individually or through regional agencies or arrangements to facilitate the coordination with UN humanitarian-assistance delivery. Resolution 776 (1992) approved the Report of the Secretary-General on the use of force in self-defense, especially where there were attempts to prevent the exercise of the mandate.

With Resolution 781 (1992),[141] the Security Council created the "no-fly zone," prohibiting military flights over Bosnia and Herzegovina, other than those undertaken by UNPROFOR aircraft. Resolution 816 (1993) extended the no-fly zone. Both of these resolutions were adopted pursuant to Chapter VII of the Charter and authorized both the commander of UN forces and the commander of NATO forces to enforce the no-fly zone.

Resolutions 819 (1993)[142] and 824 (1993),[143] adopted pursuant to Chapter VII of the Charter, established protected areas and entrusted them to UNPROFOR, which was authorized to use force only in self-defense. The Security Council provided neither any means nor a mandate to UNPROFOR to impose its demands on the parties. Instead, the Secretary-General requested that UNPROFOR observe the humanitarian situation in the protected areas and take immediate steps to increase its presence in Srebrenica and its surroundings.[144]

"Following the adoption of Resolution 819 (1993), and on the basis of consultations with members of the Council, the Secretariat informed the of UNPROFOR Force Commander that, in its view, the resolution, calling as it did for the parties to take certain actions, created no military obligations for UNPROFOR to establish or protect such a safe area".[145]

Bosnian Serb forces overran this protected area in July 1995. UNPROFOR failed to take measures for its protection.

Resolution 1031 (1995)[146] adopted after the conclusion of the Dayton Peace Agreement, replaced UNPROFOR with an Implementation Force (IFOR).

140 Bethlehem, D., Weller, M. (ed.). (1997). Ibid., p. 12.

141 Ibid.

142 Ibid.

143 Ibid.

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

145 Ibid. para 58.

146 Security Council Resolution S/RES/1031 (1995). Available at: http://daccess-dds-ny. un. org/doc/UNDOC/GEN/N95/405/26/PDF/N9540526. pdf?OpenElement, 27. 12. 2010.

The legal framework governing the rights and obligations of peace-keepers and observers stems from their status as an organ of the United Nations. They are subject to regulations concerning the organization of the United Nations as a whole, as well as those dealing with the privileges, immunities, and responsibilities thereof. The United Nations is responsible for violations committed by certain members of peacekeeping forces and observing missions[147] and can make demands for compensation for damages and injuries committed by their staff. [148] Ordinarily, the United Nations concludes a formal agreement with the host country, which regulates issues like the use of facilities, logistical issues, compensation, the privileges and immunities of persons and property, dispute resolution, and the like.

The United Nations adopted the *Convention on the safety of United Nations and associated personnel* of April 11th.[149] This Convention provided for the formation of agreements between the UN and a host country on the status of UN operations and personnel engaged in the mission, including the issue of privileges and immunities. The United Nations and its staff was obligated to respect local laws and regulations and to refrain from any activity that was incompatible with the impartial and international nature of their duties. The Convention provided that any offense committed against UN staff and associated personnel was criminal. Party states were obliged to carry out the legislative changes necessary to establish jurisdiction for the offenses committed in their territories or to their nationals.

The question of the application of the law of armed conflict to situations involving the forces of the United Nations needs attention."Since the UN is bound by general international law, it is also bound by the customary rules concerning armed conflict, although not by the rules contained only in treaties to which the UN is not a party."[150] The answer to the question of whether peacekeepers are subject to the rules of international humanitarian law depends on whether the conflicts in which they participate are classified as armed conflicts. If they are, the rules of international humanitarian law apply. A difficult question arises in situations in which peacekeeping forces have the authority to use force in self-defense. Otherwise, in their role as guardians of the peace, United Nations forces are not subject to the rules of international humanitarian law.

147 See: General convention on the Privileges and Immunities of the United Nations, 1946.

148 Advisory Opinion of the International Court of Justice on the compensation of damages suffered in the service of the United Nations of 11 April 1949.

149 Convention on the safety of United Nations and associated personnel. 9. December 1994. Available at: http://www. un. org/law/cod/safety. htm, 27. 12. 2010.

150 Shaw, N. M. (2003). p. 1115-1116.

IV. THE LEGAL NATURE OF BOSNIA AND HERZEGOVINA AT THE TIME OF THE COMMENCEMENT AND WAGING OF WAR

To assess the legal nature of the war in Bosnia and Herzegovina in 1992-1995, it is necessary first to determine the legal nature of the Republic of Bosnia and Herzegovina at that time. Aggression involves the relationship between states as subjects of international law, in which one violates the international law prohibition against starting and conducting an aggressive war. If the conflict does not involve states as subjects of international law, then the armed conflict between the entity or entities does not qualify as aggression. In the latter case, extensive armed conflict can only be characterized as civil war.

The question, then, is whether the Republic of Bosnia and Herzegovina at that time was a state as international law defines that term. According to the opinions of the Arbitration Commission Conference on Yugoslavia, the question of the existence or absence of statehood should be based on principles of international law. The question of statehood is a factual one, and the effects of international recognition of a state are purely declaratory.

Pursuant to customary international law, a state is ordinarily defined as a community consisting of territory and population that are subject to an organized political power and characterized by sovereignty. Article 1 of the Montevideo Convention on the Rights and Duties of States of 1933 provides: "The state as a person of international law should possess the following qualification: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States."[151] The form of inter-

151 Montevideo Convention on Rights and Duties of States of 1933. (1934) 165 L. N. T. S. 19; U. S. T. S. 881; Malloy 4807; 28 A. J. I. L., Supp., 75. U Harris, D. J. (2004). Cases and Materials on International Law. London: Thomson Sweet & Maxwell. p. 99.

nal political organization and constitutional provisions are facts that must be taken into consideration to determine the government's sway over the population and the territory.[152]

Following these principles of international law in approaching the primary problem that this work seeks to address, the nature of the war in the Republic of Bosnia and Herzegovina, it is necessary to consider two main issues: first, whether the Republic of Bosnia and Herzegovina, via the process of the disintegration of the former Yugoslavia, became a state under international law; and, second,, even if so, whether the Republic of Bosnia and Herzegovina was itself in a process of disintegration to such an extent that it ceased to be a state.

1. The statehood of Bosnia and Herzegovina

The Republic of Bosnia and Herzegovina was a country under international law and, therefore, a subject of international law during the period under investigation.

The European Community and its member states recognized the Republic of Bosnia and Herzegovina as a country on April 6, 1992, and the United States and Croatia recognized the Republic of Bosnia and Herzegovina as a country on April 7, 1992. Upon the recommendation of the UN Security Council on May 20, 1992, the Republic of Bosnia and Herzegovina became a member nation of the United Nations on May 22, 1992, whose U. N. membership, pursuant to the Dayton Peace Agreement, is now under the name simply of "Bosnia and Herzegovina."

International recognition of Bosnia and Herzegovina was a mere recognition of the fact of its existence and, therefore, did not confer upon it the status of statehood, but rather recognized and confirmed its statehood that was already in existence. For the Republic of Bosnia and Herzegovina, the significance of international recognition of its statehood was to counteract its challenge by its opponents in the war.

The statehood of Bosnia and Herzegovina is at least as old as the statehoods of its neighboring countries[153]. In order to evaluate its statehood during the period relevant to this thesis, however, its constitutional position within the former Yugoslavia is important.

The first Constitution of Yugoslavia, passed in 1946, explicitly mentioned the sovereignty of the Republics. "The sovereignty of the Republics within

152 See Opinion No. 1 of the Arbitration Commission of the Conference on Yugoslavia.

153 See: Klajić, N. (1994). Medieval Bosnia. Zagreb: Eminex.

the Federal Republic of Yugoslavia is only limited by rights, which are herein given to the Federal People's Republic of Yugoslavia." Article 9 paragraph 1. "The Federal Republic of Yugoslavia protects and defends the sovereign rights of the Republics." Article 2. "Contrary to the Constitution is any act directed against the sovereignty, equality and national freedom of the people of the Federal Republic of Yugoslavia and its Republics." Article 10.

This Constitution created a strong federation. During this time period, in both legal theory and political practice, the prevailing opinion was that the right to self-determination including the right to secede, which belonged to the republics as the sovereign states and was ceded at the time that they entered into the Yugoslav federal state.

Further development of the constitution of the Yugoslav federation led to various weakening and strengthening of the statehood of the republics at in comparison to the Yugoslav federal state. In the final Yugoslav Constitution of 1974, the republics became *de facto* states with all of the attributes of statehood. This constitution created a federal state that was nominally a federation, but its constituent elements were numerous and significant.

The basic principles of the SFRY Constitution of 1974 included:

"The peoples of Yugoslavia, starting from the right of every people to self-determination including the right to secede, on the basis of their freely expressed will of the common struggle of all peoples and nationalities in the National Liberation War and Socialist Revolution in line with their historic aspirations... united in a federal republic of free and equal nations and nationalities, and create... Socialist Federal Republic of Yugoslavia..."

Working people and the peoples and nations exercise their sovereign rights in the socialist republics and socialist autonomous provinces in accordance with their constitutional rights, and in the Socialist Federal Republic of Yugoslavia – where exist the common interests established by this Constitution."

This basic principle of the Constitution was the conceptual and political basis for its interpretation. This first principle unambiguously showed that the republics exercised sovereign rights, and the federation was sovereign only exceptionally when its actions were in the common interest. The basic principles also established the right to self-determination and the right to secede.

Article 1 of that Constitution stated that the Socialist Federal Republic of Yugoslavia was a federal state, as a state community of voluntarily united nations and their socialist republics, and Article 3 defined the republics as follows:

"The Socialist Republic is a country founded on the sovereignty of the people and the authorities and self-management of the working class and all work-

ing people and the socialist self-governing democratic community of working people and citizens and and equal nations and nationalities."

The citizens of the SFRY were not identified with the nation. National and ethnic sovereignty are two different types of sovereignty. National sovereignty relates to the concept of democracy. The nation includes all citizens who live in one state. "National sovereignty" refers to the ideological and political commitment that the people make to sovereign state power granting the government the right to conduct the will of the citizens or nationals of the State, irrelevant of membership in a particular ethnic group. "Ethnic sovereignty" refers to members of an ethnic group as the holders of sovereignty. These constitutional provisions clearly indicate that the nation was the holder of the sovereignty of the people (Article 3) and that the people exercised their sovereign rights in the republic, when in the exceptional situation when it was in the common interest of the federation (basic principle 1).

The Constitution of the Socialist Republic of Bosnia and Herzegovina defined Bosnia and Herzegovina as follows:

"The Socialist Republic of Bosnia and Herzegovina is a sovereign democratic state of equal citizens, the people of Bosnia and Herzegovina - Muslims, Serbs and Croats and members of other peoples and nationalities living in it."[154]

The Constitution of the Socialist Republic of Bosnia and Herzegovina declared that the Socialist Republic of Bosnia and Herzegovina was a sovereign state. Holders of the sovereignty were all of the citizens and nationalities living in it, but the Constitution particularly focused on the following people: Muslims, Serbs and Croats who were living in the republic. Thus, sovereignty belonged to the state - the Socialist Republic of Bosnia and Herzegovina and its people, understood in its broadest sense. The whole concept of the republics of the second Yugoslavia was based on their sovereignty, which was more or less restricted in the interests of other socialist republics. The position of Bosnia and Herzegovina as a multiethnic community was relevant only as a recognition of the reality that it was a multinational community.

The Socialist Republic of Bosnia and Herzegovina had all other features of statehood. According to Article 5 of the Constitution of the SFRY, the "territory of the Socialist Federal Republic of Yugoslavia [wa]s unique and consist[ed] of

154 "Official Gazette of SR B-H" No. 21/90 of 31 July 1990, amendment LX. This amendment to the Constitution of the Socialist Republic of Bosnia and Herzegovina was in accordance with the SFRY Constitution and adopted in accordance with the procedure prescribed by the Constitution. The previous Article 1 (1), which it abrogated, stated: "The Socialist Republic of Bosnia and Herzegovina is a democratic socialist state and socialist self-governing democratic community of working people and citizens, the people of Bosnia and Herzegovina - Muslims, Serbs and Croats and members of other peoples and nations... ".

the territory of republic. “The territory of the republic could not be changed without the consent of the republic. The boundaries of the Socialist Federal Republic of Yugoslavia could not be changed without the consent of all the republics and autonomous provinces. The border between the republics could be changed only by their agreement.”

The Socialist Republic of Bosnia and Herzegovina had a defined territory. Article 5 of the Constitution of the Socialist Republic of B-H read:

“1 The territory of the Republic of Bosnia and Herzegovina is a unique and indivisible.

The borders of the Republic may be changed by the decision of the Assembly of Republic of Bosnia and Herzegovina only in accordance with the will of the citizens of the Republic expressed prior voting by referendum, if they plead for changing at least two thirds of the voters”[155]

Similar provisions of fixed republican boundaries and the method by which they could be changed were contained in the constitutions of other socialist republics.

The citizens of the Socialist Republic of Bosnia and Herzegovina possessed, through republican citizenship and in relation to the other socialist republics, citizenship of the Republic. The constitutions of the republics dictated that citizens of other republics had the same rights and obligations as its citizens, so that practical problems could be avoided. The Socialist Republic of Bosnia and Herzegovina had other compliments of statehood such, as a flag, coat of arms, capital and the like.

All of these characteristics indicate that the Socialist Republic of Bosnia and Herzegovina, at the time of the commencement and events of the Yugoslav crisis, was in the same position as the other republics of the former Yugoslavia, which led to its international recognition.

155 "Official Gazette of SR B-H" No. 21/90. Before amendment, the article read: "The borders of republic may change by the decision of the Assembly only in accordance with the expressed will of the population of the corresponding area and the general interests of the republic, on the basis of agreements with neighboring republic" (Article 5 of the Constitution of the Republic of Bosnia and Herzegovina. 1974).

2. The circumstances and course of international recognition of the Republic of Bosnia and Herzegovina

The international recognition of Bosnia and Herzegovina occurred during the specific conditions of the disintegration of the SFRY. The international community's involvement in the Yugoslav crisis arose in May and June 1991 out of problems resulting from the refusal to accept the Croatian Stjepan Mesić at the head of the Presidency of the SFRY, the declared independence of Slovenia[156] and Croatia[157] and the so-called false Slovenian war. The internationalization of the Yugoslav crisis began with statements[158] and declarations expressing the concern of the international community with the situation in Yugoslavia.

1991 was extremely important for the European Community, which was in the process of transformating into the European Union. As a result, the European Community welcomed the Yugoslav crisis, the most serious crisis in Europe since World War II, as an opportunity to express unity and exercise its new role in international relations.

Because of difficulties with respect to the election of Stjepan Mesić to the Presidency, the European Community sent to Yugoslavia a ministerial troika[159] composed of representatives of Luxembourg (Jean Pos), Holland (Hans Van den Broek) and Italy (Gianni De Michelis). In exchange for the recognition of the election of Mesić the European Community publicly announced that Europe supported the unity of Yugoslavia.[160]

The CSCE adopted several documents on the situation in Yugoslavia, which expressed friendly concern and provided support for democratic development and the territorial integrity of Yugoslavia, human rights in all of Yugoslavia, including minority rights, and peaceful resolution of the crisis and emphasized that was for the peoples of Yugoslavia to decide on the future of the country. These documents required an immediate cease-

156 June 25, 1991.

157 June 25, 1991.

158 (EC) Statement on Yugoslavia, Brussels, 8 May 1991..

159 In the context of the European Community and later the European Union, the term'' troika'' means the representatives of the member states that hold the past, current and future presidency of the EC / EU.

160 In the early hours of July first, the President was finally elected as the head of state, a state that, in the eyes of those who elected him, no longer existed. Despite the vulnerability of the situation, the EC Troika, resolute in its optimism, stated that considerable progress had been made. "L. Silber., Little, A. (1996). Death of Yugoslavia, Beograd: Radio B 92. p. 182.

fire and expressed readiness to organize a mission to help stabilize the cease-fire.[161]

The EC Declaration on the situation in Yugoslavia,[162] adopted at the extraordinary meeting of Ministers of July 5, 1991, expressed the view that it was only for the peoples of Yugoslavia to decide on the future of their state. All parties in Yugoslavia were invited to start dialogue on the future of the state, without any preconditions regarding respecting the principles set forth in the Helsinki Final Act and Paris Charter for New Europe, and with particular respect for human rights, including the right of peoples to self-determination in accordance with the UN Charter and relevant norms of international law, including those relating to the territorial integrity of states.

This Declaration contained a paragraph stating that "... the Community and its member States decided upon an embargo on arms and military equipment applicable to the whole Yugoslavia."[163] This statement was the basis for the relevant Security Council resolution to impose an identical embargo.

Another round of talks between the "European troika" and the participants in the Yugoslav crisis occurred in Brioni on July 7, 1991, during which *the Joint Declaration of the Troika and the Parties directly concerned with the Yugoslav Crisis*,[164] was signed, which contained principles to ensure the peaceful settlement of the Yugoslav crisis. The declaration reiterated the principles contained in the earlier declaration. [165] The Community and its member States

161 Statement on the situation in Yugoslavia issued by the Council of Ministers of the CSCE in Berlin on 19 June 1991; Documents Adopted by the Committee of Senior Officials in the Framework of the CSCE Mechanisms, Prague, 3-4 July 1991; Memorandum of Understanding on the Monitor Mission to Yugoslavia, 13 July 1991. Review of International Affairs, Vol. XLII (5. X-5. XI 1991), p. 21.

162 (EC) Declaraion on the Situation in Yugoslavia (Adopted at the Extraordinary EPC Ministerial Meeting, The Hague, 5 July 1991), EC Press Release P. 61/91. U: Trifunovska, S. ed. (1994). Yugoslavia through Documents from its creation to its dissolution. Martinus Nijhoff Publishers. p. 310-311.

163 Ibid, p. 311.

164 Joint Declaration of the Troika and the Parties directly concerned with the Jugoslav Crisis, the ''Brioni Accord,'', Brioni, July 7, 1991. Europe Documents No. 1725 of 16 July 1991. In: Trifunovska, S., Ibid, p. 311-315.

165 "The conversation occurred during attempts to require Slovenia and Croatia to respect their promise to guarantee the EC a three-month suspension in hostilities to reach a decision and, in the meantime, to seek a settlement to the political solution. " Jović, B. (1996). The last days of Yugoslavia. second edition, Beograd. p. 350. ; "On the Brioni Accord of July 7, 1991. The Declaration was adopted by the European Community as a platform for negotiations on the future of Yugoslavia. " Kadijević, V. (1993). My view of the dissolution, the Army without a state, Beograd. p. 118. "The secession of Slovenia was made official on July 8th at a summit held in Brioni, Tito's idyllic resort on the Adriatic. Before that morning's meeting with

committed themselves to assisting in achieving a peaceful and lasting solution of the existing crisis through negotiations. [166] The declaration contained two annexes: Annex I - Further modalities of the negotiations and preparations, and Annex II - Guidelines for the monitoring mission in Yugoslavia.

The Declaration on Yugoslavia of July 10th called on the parties in Yugoslavia to fulfill the provisions of the Brioni Declaration and announced that the Community and its member States had agreed upon the basis for the establishment of the Monitoring Mission.

In the Statement on Yugoslavia of July 19th, the European Community and its Member States welcomed the news that the Presidency of Yugoslavia had met in plenary session on the 18th of July and that it had made the decision to permit the withdrawal from the JNA of the territory of the Republic of Slovenia.[167]

The Declaration on Yugoslavia of August 6, 1991 reiterated the previously expressed views of the European Community. Its only new feature was the expression of the willingness of the Community and Member States to undertake economic and financial measures against parties that did not comply with the cease-fire and did not respect the established principles and intention to improve economic and financial relations with those who were willing to cooperate.[168]

The next step was the European Community Declaration on Yugoslavia,[169] adopted at the European Political Cooperation (EPC) extraordinary ministerial meeting in Brussels on August 27, 1991. The Declaration states, inter alia, the following:

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the participants, Milosevic and Kucan, the Serbian and Slovenian leaders, had previously agreed on the people's right to secede on January 24th, which the Brioni Accord definitively confirmed. " Silber. L., Litl, A. (1996). Ibid., p. 184. "Brioni, a group file, consists of: the Common Declaration, the modalities of the negotiations and preparation of guidelines for an observer mission in Yugoslavia. " Susic, SB (1995). Balkan geopolitical nightmare. Beograd. p. 125, note 211.

166 "The diplomatic victory went to Milosevic and Kucan, who agreed among themselves on Slovenia's cessation from the federation in a series of meetings, allegedly starting in Belgrade on January 24th and ending on the 18th session of the Presidency on July 18th. " Silber. L., Litl, A., (1996). Ibid., p. 186.

167 "With regard to answers to key questions, the participants found themselves without international mediation. United, Milosevic and Kucan were tricked and in fact destroyed by Federal Yugoslavia. " Silber. L., Litl, A., (1996). Ibid.,

168 Declaration on Yugoslavia, The Hague, 6. August 1991. EC Press Release P. 73/91. Trifunovska, S., Ibid, p. 327-328.

169 Declaration on Yugoslavia, Adopted at the EPC Extraordinary Ministerial Meeting, Brussels, Aug. 27, 1991, EPC Press Release P. 82/91. U: Trifunovska, S. Ibid, p. 333-334.

The European Community and its member States are dismayed at the increasing violence in Croatia. They remind those responsible for the violence of their determination never to recognize changes of frontiers which have not been brought about by peaceful means and by agreements. It is a deeply misguided policy on the part of the Serbian irregulars to try to problems they expect to encounter in a new constitutional order through military means. It is even more disconcerting that it can no longer be denied that elements of the Yugoslav People's Army are lending their active support to Serbian side…

The Community and its member States will never accept a policy of *fait accompli*…

Territorial conquests, not recognized by the international community, will never produce the kind of legitimate protection sought by all in the new Yugoslavia…[170]

This Declaration of the European Community is significant because it accused the Serbian irregular formations of supporting "elements of the JNA" to enhance its constitutional position through military means. Also significant is the position that the European Community would not accept a policy of *fait accompli* or acquisition of territory by force.

This Declaration represented the legal basis for the convening of the Conference on Yugoslavia and the establishment of the Arbitration Commission, which would prove to be a very important institution in the further resolution of the Yugoslav crisis. According to the Peace Conference Declaration, the President of Yugoslavia, the federal government, the Presidents of the republics, and representatives of the EC Council and member States were to meet.

As for the Arbitration Commission, it was to consist of five members who would be elected from the ranks of the Presiding Judges of the constitutional courts of member states of the European Community, two of whom would be unanimously appointed by the President of the SFRY and three of whom would be appointed by the European Community and its member States. Submission of disputes by the competent authorities would initiate the Arbitration Commission, which was obliged to make a decision within two months.

The Presidency of the SFRY, during the meeting held on September 1, 1991, adopted the Declaration of the EC, with all of its consequences.[171]

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170 Ibid. pp. 333-334; Jović, B. Ibid. p. 372.

171 Cease-Fire Agreement, Belgrade, September 1, 1991. Rewiew of International Affairs, Vol. XLII (5. x-5-xi 1991), p. 26; Cease-Fire Agreement, Belgrade, September 1, 1991. U: Trifunovska, S., Ibid, p. 334-336; Memorandum of Understanding on the Extension of Monitoring Activities of the Monitor Mission to Yugoslavia, Belgrade, September 1, 1991. U: Trifunovska, S., Ibid, p. 336-342.

In the new joint statement of September 3, 1991, the EC and its member States declared that they had decided: "In the framework of the Conference, the Chairmen will transmit to the Arbitration Commission the issues submitted for arbitration, and the results of the Commission's deliberations will be put back to the Conference through the Chairman. The rules of procedure for the arbitration will be established by the Arbitrators, after taking into account existing organizations in that field."[172] The six Yugoslav Republics accepted these arrangements at the opening of the Conference for Peace on September 7, 1991. Although the arrangements were summary, it is clear from the terminology used and even the composition of Commission that the intention was to create a body capable of resolving, on the basis of law, the differences that were to be submitted to it by the parties, which precisely constitutes the definition of arbitration.[173]

The political leadership of Serbia and Montenegro accepted the views and opinions of the Arbitration Commission only when they overlapped with the interests of Serbia. Otherwise, it contested them, including legal bases for jurisdiction. Thus, in a joint letter, dated June 8, 1992, after having, on several occasions, initiated arbitration proceedings or at least acceded to them, Serbian President Milosevic and Montenegrin President Bulatovic contested the jurisdiction of the Arbitration Commission to give its opinion on three questions that were submitted to the Commission."In November 1991, the Republic of Serbia took the initiative of submitting three questions to the Commission, of which two were transmitted by the Chairman of the Conference, who also asked a third question of his own."[174] All the Republics took part in this procedure and none challenged the competence of the Commission, demonstrating an identical interpretation of its mandate, and thereby recognizing its competence in consultative issues, as well.[175]

At the opening ceremony of the Peace Conference on September 7, 1991 in The Hague, with Lord Carrington as Chairman, it defined it's task in a joint statement as being "to bring peace to all in Yugoslavia and to find lasting solutions which do justice to their legitimate concerns and aspirations."[176]

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172 (EC) Declaration on Yugoslavia, Adopted at the Extraordinary Ministerial Meeting, The Hague, Sept. 3, 1991. U: Trifunovska, S. Ibid, p. p. 342-343.

173 Interlocutory Decision of the Arbitration Commission of the Peace Conference on Yugoslavia. Trifunovska, S., Ibid., p. 632.

174 Ibid, p. 633, para. 6.

175 Ibid.

176 Declaration on the occasion of the ceremonial opening of the Conference on Yugoslavia, Peace Palace, The Hague, Sept. 7, 1991. EPC Press Release P. 86/91. U: Trifunovska, S., Ibid., p. 343.

The Chairman's position was that the SFRY had disintegrated at the moment of Slovenian and Croatian independence. He also proceeded from the premise that six sovereign states existed, which had an interest in preserving some kind of community or connection. Serbia once again used its well-proven strategy of initially accepting the proposals of the international community but then continuing negotiations "to mutate its concept." So, Milosevic, on October 4th, accepted the proposal of the international community in principle, only to dismiss it four days later.

The proposal on the future constitutional arrangement of the state consisted of three counts, namely: "

A. *a loose association or alliance of sovereign or independent republics;*
B. *adequte arrangements to be made for the protection of communities, including human rights guarantees and possibly special status for certain areas;*
C. *no unilateral changes in borders."*[177]

The final version of the European plan for resolving the Yugoslav crisis, which had the working title *Arrangements for General Settlement* (the so-called Carrington draft Convention), was delivered to the leaders of the republics on October 16th, and was the subject of the session organized on the 18th of November in The Hague, but Serbia refused to sign it. This plan of the EC, even if it were accepted by all the other republics, including Montenegro, had already failed. The plan contained the following provisions:

a) *"Sovereign and independent republics with international personality for those that wish it;*
b) *A free association of the republics with an international personality as envisaged in these arrangements;*
c) *Comprehensive arrangements, including supervisory mechanisms for the protection of human rights and special status for certain groups and areas;*
d) *European involvement, where appropriate;*
e) *In the framework of a general settlement, recognition of the independence, within the existing borders, unless otherwise agreed, of those republics wishing it."*[178]

177 Silber. L., Litl, A., (1996). Ibid. p. 214, (rev'd ed., p. 192).

178 Peace Conference on Yugoslavia: Arrangements for General Settlement (the so-called Carrington Draft Convention), The Hague, Oct. 18, 1991. UN Doc. S/23169, Annex VI. U: Trifunovska, Ibid., pp. 357-365.

Under the proposal, in those areas in Croatia and Bosnia with a majority Serb population, the Serbs would have had the right, at their option, to use the Serbian national symbols and flags, to hold another nationality in addition to the citizenship of the republic in which they resided, and to have a system of education that respected their "values and needs." The proposal also would have given them the right to their own parliament, administrative structure, including a regional police force, and judiciary.[179]

Serbia's refusal (later joined by Montenegro) to accept the proposal of the European Community foreclosed the chance for a peaceful resolution of the Yugoslav crisis in the period following the Peace Conference. The European Union delivered its response at a meeting held in Brussels between December 15th and 17th, at which it adopted the *EC Declaration on Yugoslavia*[180] *and the EC Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*.[181]

179 Ibid. p. 359-360.

180 EC Declaration on Yugoslavia, Dec. 16, 1991. U. K. M. I. L. 1991, (1991) 62 B. Y. I. L. 559. Harris, D. J. (2004). Cases and Materials on International Law, London: Thomson. P. 149-152.

181 EC Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, Harris, D. J. (2004). p. 147-149; Trifunovska, S. Ibid, p. 431.
The Guidelines read as follows:
The Community and its member States confirm their attachment to the principles of the Helsinki Final act and the Charter of Paris, in particular the principle of self – determination. They affirm their readiness to recognise, subject to the normal standards of international practise and the political realities in each case, those new States which, following the historical changes in the region, have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and negotiations.
Therefore, they adopt a common position on the process of recognition of these new States, which requires:
(i) Respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights;
(ii) Guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE,
(iii) Respect for the inviolability of all frontiers which can only be changed by peaceful means and common agreement;
(iv) Acceptance of all relevant commitments with regard to disarmament and nuclear non – proliferation as well as to security and regional stability;
(v) Commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning State succession and regional disputes.
The Community and its member States will not recognise entities which are the result of aggression. They would take account of the effects of recognition on neighbouring States.
The commitment to these principles opens the way to recognition by the Community and its member States to the establishment of diplomatic relations. It could be laid down in agreements.
UN Doc. S/23293, Appendix II, Trifunovska, S. Ibid, p. 431-432.

The Declaration on Yugoslavia was a challenge, announced by the EC, to the Republics who sought recognition of their independence to meet certain requirements and criteria. The deadline for submission of applications was December 23, 1991. The Commission was to make a decision by January 15, 1992.

Applications were to indicate whether each republic:

- wished to be recognized as independent;
- accepted the commitments contained in the draft convention – especially those in Chapter II on human rights and the rights of national or ethnic groups – under consideration by the Conference on Yugoslavia;[182]
- continued to support the efforts of the Secretary General and the Security Council of the United Nations and the continuation of the Conference on Yugoslavia.[183]

Bosnia and Herzegovina, applied for recognition after its President and Republican Assembly, at separate sessions on December 20 1991, passed the *Decision on recognition of the statehood of Bosnia and Herzegovina*.[184]

182 Ibid.

183 EC Declaration on Yugoslavia, Dec. 16, 1991. U. K. M. I. L. 1991, (1991) 62 B. Y. I. L. 559. Harris, D. J. (2004). Cases and Materials on International Law, London: Thomson. P. 149-152; Also EC Declaration Concerning the Conditions for recognition of new States, adopted at the Extraordinary EPC Ministerial Meeting, Brussels, Dec. 16, 1991, UN doc. S/23293, Appendix I. U: Trifunovska, S., Ibid, p. 431-432.

184 The Decision on the recognition of statehood, passed by the President and Republican Assembly on December 20, 1991, read as follows:
I. (The Presidency) The Government of the Federal Republic of Bosnia and Herzegovina, expressing a desire that SR Bosnia and Herzegovina be recognized as an independent state, asks the European Community and its member States to recognize it in the procedure and time schedule of the Brussels Declaration on Yugoslavia.
II. Bosnia and Herzegovina declares that it accepts all the obligations contained in the "EC Guidelines for the recognition of new states in Eastern Europe and the Soviet Union," adopted by the Council of Ministers of foreign affairs in Brussels 16. 12.1991.
III. Bosnia and Herzegovina accepts the draft Hague Convention, and certainly including Chapter II relating to the rights of national and ethnic groups that are considered within the Conference on Yugoslavia.
In doing so, on this occasion, we emphasize again that in Bosnia and Herzegovina there are three equal peoples who, according to the census this year are: 17. 27% Croats, Muslims 43. 74%, 31. 33% Serbs. Also in this republic is 5. 51% of the population declared themselves as Yugoslavs, and only 2. 15% of the population belongs to other ethnic groups.
IV. Our position is that the question of relations between the Yugoslav republics should be resolved peacefully. We appreciate and support the efforts undertaken by UN Secretary General and the European Community and provide support to the Conference on Yugoslavia. The Republic will strive to create a new community that will provide prosperity for all

A *Memorandum* (letter of intent), *Platform on the status of Bosnia and Herzegovina and the future organization of the Yugoslav community*, the SFRY Constitution of 1974, and the Constitution of the Republic of Bosnia and Herzegovina of 1974 with the amendments of 1990 accompanied the application. The Memorandum (letter of intent) and the Platform on the status of Bosnia and Herzegovina and the future organization of the Yugoslav community were adopted at a session of the Council of the Republican Assembly on November 14, 1991.

The *Memorandum*[185] consisted of seven points.

The first point stated the reasons for its adoption: the adoption of the new Constitution of the Republic of Serbia and the important and irreversible changes to the Yugoslav constitution caused by the referendum and plebiscite decisions of Slovenia, Croatia and Macedonia.

The second point stated the commitment of Bosnia and Herzegovina to the survival of the Yugoslav community on a new practical basis. The third point stated that, given the composition of its population, Bosnia and Herzegovina would not accept any solution of the constitutional future of the Yugoslav community that did not include Serbia and Croatia. In any future integration, whatever form it took, Bosnia and Herzegovina needed to be connected in the same way as Serbia and Croatia. Point five stated that the opinions expressed in the Memorandum were those of the majority of Assembly members and, as such, constituted the political will of the majority of citizens of Bosnia and Herzegovina and constituted a binding basis for the conduct of the civil and political authorities of the republic. Point six guaranteed the parliamentary minority the right to exercise every legitimate interest - ethnic, cultural, economic and social - with the condition that such be realized without the use of force and in a legal and democratic way.

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participants.

It is known that Bosnia and Herzegovina has so far not created any obstruction in this area. Here we especially emphasize that Bosnia and Herzegovina has not and will not have as an independent state any territorial pretensions towards any neighboring state and will not take any hostile propaganda activities against neighboring countries, including the use of names that by themselves contain territorial claims.

Therefore, we propose that the European Community and its Member States recognize the sovereignty and independence of Bosnia and Herzegovina.

V. This Decision shall enter into force upon its publication in the "Official Gazette of SR B-H. "

O. Ibraimagić, The statehood and independence of Bosnia and Herzegovina, Sarajevo, 1997, p. 58th and 59; Begic K. I. (1997). Bosnia and Herzegovina from the Vance mission to Dayton, Sarajevo: Bosanska knjiga. p. 41.

185 Official Gazette," No. 32/91.

The Platform[186] consisted of two parts. The first dealt with Bosnia and Herzegovina, the second with Yugoslavia. The first part described the future Bosnia and Herzegovina as a civil republic in which would be protected the national interests of the population. The structure of the Assembly would exclude the possibility of identity-group supremacy in the process of decision making on the most important issues for the equality of all peoples and nationalities living in it. The second part contained a statement that "because of the original structure of the ethnic composition of the population of the Republic of Bosnia and Herzegovina, the Republic accepts and supports the Yugoslav community, which have as integral parts the Republics of Croatia and Serbia."

Bosnia and Herzegovina, on December 20, 1991, applied for international recognition, and the application included the following documents:

1. The answer to a questionnaire sent by the Commission concerning republics, dated December 24, 1991;
2. Excerpts from the Constitution of the Republic of Bosnia and Herzegovina of 1974, amendments to the Constitution adopted in 1990, excerpts of the Constitution of the SFRY, and the draft Constitution that was prepared in the course of applying for international recognition;
3. The "Memorandum" and "Platform" of the Assembly of the Republic of Bosnia and Herzegovina of October 14, 1991;
4. A Letter from the President of SR BiH to the President of the Conference on Yugoslavia, Lord Carrington, of December 27, 1991, about the constitution of the "Assembly of Serbian People of Bosnia and Herzegovina;"
5. The decision of the Prime Minister of SR BiH of January 8, 1992, published in the Official Journal, obliging the Government to respect the provisions of international law cited in the guidelines; and
6. Responses dated January 8, 1992 to the request of the Commission on January 3, 1992 for additional information;[187]

The Commission also had to address two letters sent by the President of the "Assembly of Serbian People in Bosnia and Herzegovina" on December 22, 1991 and January 9, 1992.[188]

After considering the request for recognition and supporting documentation and the submissions of those who disputed Bosnia and Herzegovina's request, the Arbitration Commission took the position that it was necessary

186 "Official Gazette SR B-H", No. 32/91.

187 Arbitration Commission, Opinion No. 4.

188 Ibid.

to conduct a referendum of the citizens of Bosnia and Herzegovina in order to determine the actual will of the population of Bosnia and Herzegovina. In order for the international community to accept the results, the referendum was required to be held under international control.

The *Decision to call a referendum* together with the *Decision on the withdrawal of BiH representatives from all federal agencies and institutions* were adopted at a meeting of the Republican Assembly on January 25, 1992.[189]

The Decision on the withdrawal of the representatives of Bosnia and Herzegovina from federal agencies and institutions terminated the constitutional links between Bosnia and Herzegovina and Yugoslavia, which was in the process of dissolution. Bosnia and Herzegovina had broken its state and legal relationship with the SFRJ entity, which, independently of, but parallel to, the actions of the Assembly of Bosnia and Herzegovina, was in the process of disintegrating.[190]

The referendum question for the citizens of Bosnia and Herzegovina to decide on February 29 and March 1, 1992 was defined as: "*Are you in favor of a sovereign and independent Bosnia and Herzegovina, a State of equal citizens, the people of Bosnia and Herzegovina - Muslims, Serbs, Croats and other ethnic peoples who live in it?*"[191]

The results of the referendum showed that the vast majority of citizens of Bosnia and Herzegovina voted for independence and sovereignty. 63. 95% of the total electorate gave a positive response to the referendum question. *The Republic Electoral Commission,* during its session held on March 6, 1992, determined and published the results of the republic referendum about the status of Bosnia and Herzegovina. The President of Bosnia and Herzegovina, in conjunction with the Assembly, confirmed the report of the referendum, issuing a *Decree with legal force on the implementation of the decisions of the Republic referendum*.[192] This meant that Bosnia and Herzegovina assumed full state sovereignty and international personality.[193]

189 Minutes of the session of the Assembly of the Republic of Bosnia and Herzegovina of 25 January 1992.

190 Opinion No. 1. of the Arbitration Commission, 29. 11. 1991.

191 Issuance (Oslobođenje) No. 15, 661, Jan. 26, 1992, p. 1.

192 "Official Gazette R B-H", No. 3/93.

193 "Since the referendum was under international control, it is important to emphasize that the evaluation of the organization and conduct of the referendum by the European observers did not differ from those provided by the legal authorities. After returning from Bosnia, the Head of the observation mission of the European Parliament, A. Ostlander, a Dutch member of the European Parliament, said that 'the vote was honest, fair organization, and although some political parties have expressed doubts, European observers were convinced that there was

As the Republic Electoral Commission declared the results of republican referendums on March 6, 1992., Bosnia and Herzegovina's status as a sovereign and independent state and as a subject of international law began on this date. This interpretation is confirmed by the fact that, after this date, international recognition of Bosnia and Herzegovina from many states and international organizations followed.

The level of participation in the referendum by ethnic Serbs cannot be determined because one cannot determine with certainty the percentage of participation of any given people in an anonymous referendum. Indirectly, if one takes into account the ethnic structure of the population in some municipalities, it may be assumed that the per capita turnout in the referendum by population, in descending order, was Croats, then Bosniacs (Muslims), and then Serbs. Despite the obstruction of the Serb Democratic Party (Srpska Demokratska Stranka, SDS) and other Serbian political parties a number of Serbs, especially in urban centers, responded to the call for a referendum. The referendum thus manifested the desire of the citizens of Bosnia and Herzegovina for independence and sovereignty. Therefore, the Arbitration Commission, in its Opinion No. 11, stated:

"…in a referendum held on 29 February and 1 March 1992, the majority of the people of the Republic have expressed themselves in favour of a sovereign and independent Bosnia. The result of the referendum was officially promulgated on 6 March, and since that date, notwithstanding the dramatic events that have occurred in Bosnia and Herzegovina, the constitutional authorities of the Republic have acted like those of a sovereign State in order to maintain its territorial integrity and their full and exclusive powers. 6 march 1992 must be considered the date on which Bosnia and Herzegovina succeeded the Socialist federal Republic of Yugoslavia."[194]

After Bosnia and Herzegovina met the requirements for recognition, more than 100 countries formally recognized Bosnia-Herzegovina in its first year of independence, and most of them formally established full diplomatic relations with it. Particularly significant for Bosnia and Herzegovina was recognition by the European Community and its Member States on April 6, 1992 and the United States and Croatia on April 7, 1992. The states and international organizations that recognized Bosnia and Herzegovina were aware of the inability of its central government to fully exercise sovereignty over the entire territory of Bosnia and Herzegovina.

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not fraud and there is no valid basis to challenge the credibility of election results…"' Begić, K. I. Ibid., p. 79, note 11.

194 Opinion No. 11. Trifunovska, S., Ibid, p. 1017.

In the Resolution No. 755 of 20 May 1992, the Security Council

„*Having examined* the application of the Republic of Bosnia and Herzegovina for admission to the United Nations, (S/23971).

*Recommend[ed] t*o the General Assembly that the Republic of Bosnia and Herzegovina be admitted to membership in the United Nations."[195]

The Resolution of the Security Council was followed by a Report of the President of the Council,[196] who addressed the General Assembly. After that, Bosnia and Herzegovina, by *General Assembly Resolution 46/237* of 22 May 1992, was admitted to membership in the United Nations, with all of its rights and obligations.

3. Consequences of recognition of the Republic of Bosnia and Herzegovina

Recognition of the independence and sovereignty of Bosnia and Herzegovina was a direct consequence of the dissolution of the SFR Yugoslavia. After the disintegration of Yugoslavia, five independent and sovereign states created on its territory took its place.

Through international recognition, Bosnia and Herzegovina *ipso jure* acquired certain rights arising from the mere fact of its existence in the international community. These are the so-called fundamental rights of states. In international law, there is a consistent view that these are fundamental rights that belong to each state, as such. In addition to the rights that each country has as a member of the international community, it also has certain obligations.

Through international recognition and admission to the United Nations, Bosnia and Herzegovina acquired the rights protected by the Charter of the United Nations. Specifically, Bosnia and Herzegovina acquired the right to

195 (S/RES/755, 20. May 1992). U: Bethlehem, D. Weller, M. (ed.). (1997). The Yugoslav Crisis in International Law: General Issues, part I, Cambridge: University Press. p. 9.

196 Ibid. (S/23982, 20. May 1992), The Council President stated:
"I am pleased, on behalf of the members of the Council, to extend our congratulation to the Republic of Bosnia and Herzegovina on the occasion of the Council's recommendation to the General Assembly that Bosnia and Herzegovina be admitted to membership in the United natopns.
We note with great satisfaction Bosnia and Herzegovina0s solemn commitment to uphold the Purposes and Principles of the Charter of the United Nations, which include the principles relating to the peaceful settlement of disputes and non-use of force, and to fulfil all the obligations contained in the Charter.
All the members of the Council are confident that Bosnia and Herzegovina will make a significant contribution to the work of Organisation."

sovereignty (independence) and the right to survival (self-preservation). These fundamental rights, which belong to the state *ipso jure*, are guaranteed by the Charter of the United Nations to member States of the United Nations.

The purpose of the United Nations is to achieve certain goals, including the maintenance of international peace and security. To this end, the United Nations has the right to undertake collective measures to prevent and remove threats to peace and to suppress acts of aggression. Article 1(1) of the UN Charter reads:

"The Purposes of the United Nations are:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."

The Charter also protects the sovereignty and equality of states. In this regard, the provision of Article 2 (4) of the UN Charter imposes an obligation on member states to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of another state.

Therefore, Bosnia and Herzegovina, as a member of the United Nations, had all the rights concerning her security that arose from membership. Bosnia and Herzegovina, as a member of the United Nations, had the right to individual and collective self-defense. This right is limited in duration. It lasts until the Security Council takes necessary measures to suppress aggression against Bosnia and Herzegovina in order to maintain international peace and security.

4. Did the acts committed by Serbian and Croatian parties in Bosnia and Herzegovina, aimed at dissolving the republic, influence the character of the war in the Republic of Bosnia and Herzegovina?

Even if the destruction of Bosnia and Herzegovina was planned and prepared outside its borders, as part of a strategy to create a Greater Serbia and Greater Croatia, the irrefutable fact is that Bosnian political parties gathered most of the Bosnian Serb and Croat people, even before the beginning of the aggression against Bosnia and Herzegovina, to take some acts aimed at breaking up Bosnia and Herzegovina, which calls into question its statehood and, therefore, the nature of the war in Bosnia and Herzegovina. It is, therefore, necessary to determine the scope of these acts in terms of international

law in order to respond to the question of the character of the war in Bosnia and Herzegovina.

Before any analysis, it is necessary to note that these political parties participated in the government as part of the ruling coalition of political parties, realizing the interests of their voters in the existing legal institutions of the government of the Republic of Bosnia and Herzegovina (the Assembly, the Presidency, administrative agencies and other authorities), while simultaneously working outside of these institutions to break up the state in which they were represented.

The destruction of Bosnia and Herzegovina started with "SAO-ization" (creation of Serb Autonomous areas) and "HAO-ization" (creation of Croatian autonomous areas) under the guise of regionalization. This process began long before Bosnia and Herzegovina started taking measures aimed at gaining its independence and sovereignty.

The creation of Serb and Croatian autonomous regions (SAOs and HAOs), under the guise of regionalization, began in April 1991 with the creation of the "Community of Municipalities of Bosnian Krajina."[197] Prior to the beginning of the war, five regional autonomous areas were formed, as such: The Autonomous Region of Krajina, the Serbian Autonomous Region of Herzegovina[198], the Serbian Autonomous Region of Romanija-birč, the Serbian Autonomous Region of Semberija and the Serbian Autonomous Region of Northern Bosnia. The "Assembly of Serbian People in Bosnia and Herzegovina," on November 21, 1991, issued a *Decision on the verification of declared Serbian Autonomous Regions in Bosnia and Herzegovina*[199]

The Decision stated that it was made using the results of the plebiscite declaration of the Serbian people on November 9 and 10, 1991 and based on the constitutionally established rights of peoples to self-determination.

Creation of SAOs and HAOs in the territory of the Republic of Bosnia and Herzegovina violated the then-existent Constitution of the Republic of Bosnia and Herzegovina, Article 275 of which allowed the association of municipalities on the conditions that they were linked economically to one another, more rationally and efficiently achieved joint interests, and were established

197 *ICTY, Prosecutor v. Duško Tadić a. k. a. Dule, Case No. IT-94-1-A,* ICTY, Opinion and Judgment of May 7, 1997; Javnost, 4. maj 1991, p. 5 ; Čekić, S. (2004). The aggression against the Republic of Bosnia and Herzegovina: Sarajevo. p. 490-491.

198 *ICTY, Prosecutor v. Duško Tadić a. k. a. Dule, Case No. IT-94-1-A,* ICTY, Opinion and Judgment of May 7, 1997; Čekić, S. (2004). Aggression against the Republic of Bosnia and Herzegovina: Sarajevo. p. 491.

199 Ibid. ; See also: ICTY, Prosecutor v. Momočilo Krajišnik, IT-00_39-T, Judgment of September 27, 2006.

by municipal assemblies. The creation of the SAOs and HAOs violated the aforementioned constitutional provisions governing the purpose for which such communities could be established, as well as Article 304 (21), which dictated that only the Republic was authorized to prescribe the territorial organization of the Republic.

These communities also did not respect the ethnic-neutrality principle, given that they carried the prefixes Serb- and Croatian-, alluding to a Serb and Croat ethnic majorities in those municipalities, which, incidentally, were also often not accurate descriptions because the composition of these areas included municipalities in which ethnic Serbs did not account for more than 6% of the total population.

The Decision on the establishment of the Assembly of Serbian People in Bosnia and Herzegovina of October 24, 1991[200] lacked legal validity. The introduction of the Decision stated that deputies of the Serbian Democratic Party and the Serbian Renewal Movement founded the group in the Assembly of Bosnia and Herzegovina as the legitimate representatives of the Serbian people in Bosnia and Herzegovina on the basis of the Constitution, which established the right to self-determination, including the right to secede. This act was legally unfounded and its constitutional claims inaccurate. The Constitution of the Socialist Republic of Bosnia and Herzegovina did not establish a right of secession. The provisions on the right to self-determination, including the right to secede, existed only in the Constitution of the SFRY, and this right belonged to the republics only. Actions by these political parties, claiming to be the only legitimate representatives of the Serbian people, were legally invalid, under both domestic and international law.

The Constitution of the Republic of Bosnia and Herzegovina defined Bosnia and Herzegovina as a state of equal citizens and the peoples of Bosnia and Herzegovina who lived in it. The territory of the Republic is unique and indivisible. The borders of the Republic could be changed by a procedure that included determining the will of citizens throughout the Republic. Citizens of a part of the Republic could not make a legally valid decision to secede and annex to another country.

The Assembly of Bosnia and Herzegovina was composed of two councils, namely: The Council of Citizens and the Council of Municipalities. [201] The Council of Citizens had 130 deputies who were elected on the basis of universal and equal suffrage, by a direct and secret ballot, while the citizens of

200 The decision of the Constitutional Court of Bosnia andHerzegovina, No 47/92, Sarajevo, October 8, 1992.

201 Amendment LXX, "Official Gazette of SR B-H", No. 21/90.

each municipality and city boards elected one representative in the Council of Municipalities, also by direct and secret ballot. Accordingly, the Constitution did not contain the possibility of organizing the Assembly or the Assembly of the Council using ethnic criteria. The decision of members of two Serb ethnic political parties was not legally valid.

The proclamation of the Serbian people in Bosnia and Herzegovina on January 9, 1992, the Constitution of the Serbian Republic of Bosnia and Herzegovina of February 28, 1992 and all general acts enacted in accordance with these documents also violated the Constitution of the Republic of Bosnia and Herzegovina.[202]

The Constitutional Court of Bosnia and Herzegovina, in its regular session held on October 8, 1992, issued a decision overturning these actions as unconstitutional. *The Decision to proclaim the independence of the Serbian Republic of Bosnia and Herzegovina* of 7 April 1992[203] was unconstitutional for the same reasons.

From the aforementioned, it is clear that the acts of the Serb political parties violated the constitutional order of the Republic of Bosnia and Herzegovina and were therefore legally invalid.

The question of the rights of peoples to self-determination, including the right to secede, arises. Because, among other things, Bosnia and Herzegovina's right to self-determination supported the recognition of it as a sovereign state, the question is whether such a right also belonged to the Serb people in Bosnia and Herzegovina.

The acts of the Serb political parties violated not only the Constitution of Bosnia and Herzegovina but also the constitutional system of the former Yugoslavia, of which Bosnia and Herzegovina was a part, as well as the UN Charter and the established rights of peoples to self-determination recognized in customary international law.

This issue is most clearly demonstrated in the *letter of the Serbian part of presidency of the former Yugoslavia to the Arbitration Commission of the Conference on Yugoslavia*, through Chairman Lord Carrington, in which the Bosnian Serbs claimed, among other things:

"The right to self-determination and secession is the right of the people, not a republic. Only in those republics that, as a federal unit, are a nationally

202 The decision of the Constitutional Court of Bosnia and Herzegovina, No. J: 47/92, Sarajevo, October 8, 1992. What all of these laws shared in common was that they declared a "Serbian Republic of Bosnia and Herzegovina, "a federal unit within the federal state of Yugoslavia.

203 The decision of the Constitutional Court of Bosnia and Herzegovina, No. J: 47/92, Sarajevo, October 8, 1992.

homogeneous nation-state – that is, that have only one nation -- this right is formally and actually manifested as a law of the Republic or the citizens of the republic; however, in all other republics, the right to self-determination is inherent to every Yugoslav nation that is constitutive in these republics... In Bosnia and Herzegovina, those are the Muslims, Serbs and Croats, in Croatia, the Croats and Serbs, and to each constituent people, especially."[204]

The view of the Serbian part of the Presidency of Bosnia and Herzegovina on the same issue stated that: "the current constitution of the Republic of Bosnia and Herzegovina unequivocally establishes that the Serbian people in the republic beside the Muslims and Croats, are constituent nations, which means to have the right to self-determination to secession."[205] The Arbitration Commission of the Peace Conference on Yugoslavia dedicated Opinion No. 2[206] to the right to self-determination and Opinion No. 3[207] to the right to secede.

As for the rights of the Serb people of Bosnia and Herzegovina to self-determination, including the right to secede, the Arbitration Commission declared "that international law as it currently stands does not spell out all the implications of the right to self-determination. However, it is well established that, whatever the circumstances, the rights to self-determination must not involve changes to existing frontiers at the time of independence (uti possidetis iuris) except where the States concerned agree otherwise… Where there are one or more groups within a State constituting one or more ethnic, religious or language communities, they have the right to recognition of their identity under international law…."

"The Serbian population in Bosnia and Herzegovina and Croatia must therefore be afforded every right accorded to minorities under international conventions as well as national and international guarantees consistent with the principles of international law…"

This meant that the Serb population of Bosnia and Herzegovina could not use the right of peoples to self-determination, including the right to secede,

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204 Letter from the SFRY President to Lord Carrington, International Policy, 1001, Feb. 1, 1992, p. 20.

205 The opinion was addressed to the President of the Yugoslavia Arbitration Commission, Ibid., p. 22.

206 Opinion No. 2 of the Arbitration Commission of the Peace Conference on Yugoslavia, Paris, January 11, 1992. International Legal materials, Vol. 31 (1992), p. 1447. Trifunovska, S. Ibid., p. 474-475.

207 Opinion No. 3 of the Arbitration Commission of the Peace Conference on Yugoslavia, Paris, January 11, 1992. International Legal materials Vol. 31 (1992), p. 1499. Trifunovska, S. Ibid., p. 479-500.

to form, within the territory of the Republic of Bosnia and Herzegovina, a Serb state and secede from Bosnia and Herzegovina.

Therefore, these acts of the Serb political parties, made to effectuate the disintegration of the Federal Republic of Bosnia and Herzegovina, were legally invalid, under both the domestic law of the Republic of Bosnia and Herzegovina and international law.

The principles governing the claimed rights of the Serb people of Bosnia and Herzegovina to self-determination, including the right to secede, apply to the claimed rights of the Croats in Bosnia and Herzegovina to self-determination and secession.

The Croatian Democratic Union of Bosnia and Herzegovina (Hrvatska demokratska zajednica Bosne i Hercegovine, HDZ BiH), as the only Bosnian Croat party, began with the idea of division of the Republic of Bosnia and Herzegovina in the Serbian and Croatian areas in October 1991 through the creation of regional communities and their consolidation for secession from Bosnia and Herzegovina and unification with Croatia.

The most important acts of the parties committed to this purpose were the conclusions of the joint meeting of the Herzegovinan regional community and the Travnik regional community, which was held on November 12, 1991 in Grude.[208] The "democratically elected representatives of the Croatian people in Bosnia and Herzegovina"[209] adopted the Decision on the establishment of the Croatian Communities of "Herceg-Bosna" (Hrvatske Zajednice Herceg-Bosne, HZ HB) on November 18, 1991 and the Decision on the establishment of the Croatian Communities of Herceg-Bosna of Bosnia and Herzegovina on July 3, 1992.[210]

208 The minutes of a meeting held on November 12, 1991 in Grude between the representatives of the regional communities of Herzegovina and Travnik. The HDZ regional communities are particularly revealing. The two communities declared that they had "unanimously decided that the Croatian people in Bosnia and Herzegovina must finally embrace a determined and active policy which will realise our eternal dream – a common Croatian state" and that they had to "show ... which territories in BH are Croatian territories [...]. Our people will not accept, under any conditions, any other solution except within the borders of a free Croatia. " ICTY Prosecutor v. Tihomir Blaškić, (iT- 95-14-T), Judgment of March 3, 2000.

209 The Decision on the establishment of the Croatian Community of Herceg-Bosna to determine the territory of the HZ HB dictated that 30 municipalities made up the "regional'' unit. In some of these thirty municipalities, Croats did not comprise either a relative or an absolute majority.

210 Decision amending the Decision on the establishment of the Croatian Community of "Herceg-Bosna" of July 3,1992, the National List of HZ Herceg-Bosna, no. 1/1992, p. 2, published as the Decision on establishing the Croatian Community of Herceg-Bosna;
Ribičić, C. (2001). The genesis of a misconception, p. 37.

The Constitutional Court of Bosnia and Herzegovina annulled these Decisions.[211]

Parastatal creation within Bosnia and Herzegovina did not change the character of Bosnia and Herzegovina because these quasi-states had not received any internal or international legal legitimacy at the time of commencement of the war in Bosnia and Herzegovina. Therefore, their creation could not in any way affect the change of the legal nature of the war in Bosnia and Herzegovina.

211 Official Gazette of R B-H, no. 16/1992., p. 16-18.

V. HISTORICAL FACTS REGARDING THE WAR IN BOSNIA AND HERZEGOVINA IN 1992-1995

1. Introductory remarks

Previous sections of this paper established that aggression is the use of the armed forces of a State against the sovereignty, territorial integrity or political independence of another State or the use of force in any other manner inconsistent with the Charter of the United Nations. The term State does not depend upon the question of international recognition or the question of whether a putative state is a member of the United Nations. The use of force can take on different forms: direct invasion and attacks by a state's own armed forces, armed detachments or a group of volunteers or mercenaries who are taking acts of such seriousness against another state that they can be regarded as aggression.

No political, economic, military or other reason can justify aggression. Aggressive war is a crime against international peace and, as such, the aggressor state is responsible. Aggression in violation of international law can occur only between two independent states It is, therefore, possible to talk about the aggression against Bosnia and Herzegovina, in the international law sense, only after March 6, 1992 the date on which Bosnia and Herzegovina became a state, in terms of international law.

2. Facts relating to the participation of Yugoslavia (Serbia and Montenegro) as an aggressor in the war in Bosnia and Herzegovina

2.1. Historical facts

The Federal Republic of Yugoslavia (Serbia and Montenegro) engaged the of military forces under its control against Bosnia and Herzegovina in the spring of 1992,[212] in order to realize the concept of "Greater Serbia. " The idea of "Greater Serbia" is not new. It is almost two centuries old and has its roots in the "Načertanije" document, written by Ilija Garasanin in 1844. [213] The Chetnik movement during the period of World War II was also part of this project. [214] The idea of "Greater Serbia" was revived by the Serbian Academy of Sciences and Arts (Srpska akademija nauka i umetnosti, SANU) Memorandum of 1986,[215] which set forth the thesis that led to breaking the constitutional order of the former Yugoslavia.

The Memorandum challenged the authority of the representatives of Serbia to the Second Session of the Anti-Fascist Council of the People's Liberation of Yugoslavia (Antifašističko Vijeće Narodnog Oslobođenja Jugoslavije, AVNOJ-a) to agree with the federal concept of the future of Yugoslavia. In addition, the thesis that Croatian and Slovenian discrimination was the reason for the long-term economic backwardness of Serbia had created dissatisfaction among the Serbian people with the SRFY. Finally, the thesis that the position of the Serbian people outside of Serbia, primarily in Croatia, had resulted in an attempt by AVNOJ to redraw the boundaries of the SFRY by force. This led to political demands that the Serbs, as a "unique, sovereign and a constitutional" nation, which hitherto had not resolved its national question, exercise a state of change that would allow them to exercise sovereignty in the entire territory of the former Yugoslavia.

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212 See: *ICTY, Prosecutor v. Duško Tadić a. k. a. Dule, Case No. IT-94-1-A,* ICTY, Opinion and Judgment of May 7, 1997.

213 Rasim Hurem, The idea and practice of fighting for a "Greater Serbia" in the 19th and 20 Century, in: Genocide in Bosnia and Herzegovina 1991-1995. Sarajevo, 1997, p. 177 & 178, note 9.

214 Dedijer, V., Miletić, A. (1990). Genocide against Muslims 1941-1945, Collection of documents and testimony. p. 18-19.

215 The Memorandum was an unfinished text of 74 pages, which was commissioned by SANU on its 25th annual meeting in May 1985, from an educated committee of sixteen academics led by Antonio Fellow, the vice president of SANU. The first run of the article appeared on September 24 & 25, 1986.

On August 15, 1993, the Belgrade daily newspaper, *Večernje novosti* (*The Evening News),* published a second Memorandum from the Serbian Academy of Sciences and Arts entitled, in keeping with tradition, "For the unique Serbian space."[216]

The theses contained in the Memorandum were a "completely political and stripped-down form of the draft "Declaration on the Serbian national unity" of 1990. The authors of the Memorandum departed from the position that only the Serbs in Yugoslavia had not solved their national question, because it claimed that, by the national policy of the Communist Party of Yugoslavia, it had been broken into multiple republics. For that reason, the Serbs in Yugoslavia were a unified, sovereign and constitutional nation, requiring such changes to the federal government that would enable this nation to exhibit the aforementioned characteristics "without limits and without regard to in which part of the country they live."[217]

Preparations for the use of armed force in order to realize their political goals intensified in the last stage of the dissolution of Yugoslavia in 1991, although Serbian President Milosevic had announced them previously in a speech at Gazimestan, the monument commemorating the historical Battle of Kosovo, when he declared the possibility of armed battles in order to enable the Serbian people, as a "unified, sovereign state," to manifest their sovereignty no matter in which part of the country they lived. "Six centuries after the Battle of Kosovo, we are again in battles. They are not armed, although such is not excluded." [218]

The preparations for the use of armed force against Bosnia and Herzegovina can be classified into two groups. The first group consists of the actions of Serbia (and Montenegro) and the JNA, and the other group of activities consists of those of the Bosnian Serbs.

Federal Republic of Yugoslavia in Bosnia and Herzegovina realized its military objectives by employing the JNA and its successors (the Yugoslav Army, the Army, and the Army of the Serb Republic and the Republic of Serbian Krajina), Serbian regular and special units and agents, and Serbian paramilitary groups.[219]

216 Erdman, E. Pandžić, (1997). Genocide in Bosnia-Herzegovina 1991-1995. Sarajevo. p. 163.

217 Marković, M. (1997). The Serbian issue between myth and reality. Beograd. p. 21.

218 Djukic, S. (1997). He, she and we. Beograd. p. 85.

219 See: ICTY, Prosecutor v. Biljana Plavsic, Judgment, IT-39-oo § 40-1 / S of Feb. 27, 2003.

SR Yugoslavia planned,[220] prepared, initiated and waged a war of aggression against Bosnia and Herzegovina, which is a crime against international peace.

Criminal responsibility rests not only with Yugoslavia, but also with individuals.[221]

The Federal Republic of Yugoslavia used armed force against the sovereignty, territorial integrity and political independence of Bosnia and Herzegovina. Its first use of armed force against Bosnia and Herzegovina was, according to the UN General Assembly Resolution of December 14, 1974, *prima facie* evidence of an act of aggression. The FRY also committed the following acts that constitute acts of aggression, pursuant to that resolution:

a) The invasion and attack by the armed forces of the FRY of Bosnia and Herzegovina with the intention of seizing and annexing parts of Bosnia and Herzegovina and the realization of the project of "Greater Serbia;"
b) Bombardment by armed forces stationed in the Federal Republic of Yugoslavia of the military installations and airspace of Bosnia and Herzegovina;
c) Attack by the armed forces of the FRY on the ground forces of Bosnia and Herzegovina;
d) Deployment of armed forces of the FRY, as the JNA, in Bosnia and Herzegovina after May 19, 1992, the date by which they were supposed to withdraw from the territory of BiH;
e) Sending armed detachments of the Federal Republic of Yugoslavia and groups of volunteers and mercenaries who undertook armed actions against Bosnia and Herzegovina and committed crimes of such severity that they can be characterized as acts of aggression against Bosnia and Herzegovina.

Political goals were pursued using armed forces. The political objectives consisted of creating "ethnically pure" areas in Bosnia and Herzegovina.[222] This goal could be achieved only by using the most serious forms of

220 Plans : RAM and Drina. See: Čekić, S. (2004). Ibid.

221 See: *ICTY, Prosecutor v. Duško Tadić a. k. a. Dule, Case No. IT-94-1-A,* ICTY, Opinion and Judgment of May 7, 1997. ; *ICTY,* Prosecutor v. Slobodan Milošević, IT- 02-54- T. Decision on Motion for Acquittal, June 16, 2004 ; ICTY, Prosecutor v. Šešelj, IT – 03 – 67; ICTY, Prosecutor v. Jovica Stanišića and Frank Simatović, IT - 03- 69; ICTY, Prosecutor v. Perišić, IT – 04 – 81, Judgment of Sept. 6, 2011; *ICTY, Prosecutor v. Duško Tadić a. k. a. Dule, Case No. IT-94-1-A, AV, July 15, 1999.*

222 The Decision on the strategic goals of the Serbian people in Bosnia and Herzegovina, adopted by the 16th Bosnian Serb Assembly, May 12, 1992. Official Journal of the Serbian Republic of 26 November 1993. No. 22/93.

serious crimes, including genocide. Against Genocide was committed against Bosniac citizens of Bosnia and Herzegovina.

Serbian propaganda employed, and the international community accepted, the euphemism "ethnic cleansing." The practice of ethnic cleansing consisted of Serbian forces occupying an area, then removing all non-Serbs from it, thus creating an ethnically pure region governed by the Serbian authorities.

The Federal Republic of Yugoslavia's attack of Bosnia and Herzegovina ended with a peace agreement. The Federal Republic of Yugoslavia and the Republic of Bosnia and Herzegovina concluded a peace agreement entitled the "General Framework Agreement for Peace in Bosnia and Herzegovina. " The peace agreement was signed in the United States on the Wright Patterson Air Force Base in Dayton, Ohio and concluded on December 14, 1995 in Paris. This peace treaty *de facto* ratified the results of the aggression against Bosnia and Herzegovina in the sense that previously unique, multi-ethnic areas of Bosnia and Herzegovina had been divided into two separate ethnically based entities, which was a major goal of the aggression.

2.2. Genocide as a method

The Federal Republic of Yugoslavia (Serbia and Montenegro) had, as a war goal, the removal of the non-Serb population in certain areas of Bosnia and Herzegovina and Croatia, and aggression was the method that it chose to accomplish this goal.[223] This goal was included in the war plan of February 28, 1992, known as "the Drina plan. " The plan consisted of the extermination of the Bosniac population in eastern Bosnia and the Bosniac and Croatian population in northern Bosnia and the creation of an ethnically pure Serb area and its annexation to the Serbian state. Genocide was committed to accomplish this goal.[224]

Instead of the word "genocide," Serbian propaganda used the euphemism "ethnic cleansing". The term ethnic cleansing was intended to "serve as an excuse for the omission, for failing to take measures which are envisaged for the situation, to avoid to act in the spirit of its own, clearly the highlight of duty."[225] The policy of "ethnic cleansing" entailed carrying out the systematic killing, imprisonment, deportation and displacement of non-Serbs from the

223 See ICTY, Prosecutor v. Milosevic Slobodan, IT 02-54 - T. Decision on Motion for Acquittal, June 16, 2004, ICTY, Prosecutor v. Radislav Krstic, IT - 98 - 33, Judgment of April 19, 2004; ICTY, Prosecutor v. Biljana Plavsic, IT 00-39 § 40/1 S, plea agreement of Sept. 30, 2002.

224 See ICTY, Prosecutor v. Krstić (IT 98/3), Judgment of April 19, 2004., et seq.

225 Sadiković, Ć. (1998). Human rights without protection. Sarajevo. p. 22.

areas attacked by Serbian forces. These methods of implementation and their effect of "ethnic cleansing" constituted genocide.[226]

The essence of "ethnic cleansing" is best described in the first *Interim Report of the Commission for War Crimes*, established by Security Council Resolution 780 of 6 October 1992.[227] The report contains the following definition: "Ethnic cleansing is a conscious policy of an ethnic or religious group that intends through violent and horrific means to remove the civilian population of another ethnic or religious group from certain geographic areas."

According to this report, policies of "ethnic cleansing" were enforced as follows:

a. In certain parts of this area, in executing the policy of "ethnic cleansing" and its facilitation, the JNA and "the Army of the Serbian Republic" took part;

226 ICTY, Tužilac v. Krstić (IT 98/3), Judgment of April 19, 2004, et seq.

227 "The term 'ethnic cleansing' is relatively new. When viewed in the context of the conflict in former Yugoslavia, 'ethnic cleansing' means an effort to make an area ethnically homogeneous, by the use of force or intimidation to remove from the area of certain groups of people. 'Ethnic cleansing' is punishable by international law. Judging by the numerous reports that describe the policies and procedures that are implemented in the former Yugoslavia, 'ethnic cleansing' was carried out in the form of murders, torture, arbitrary arrest and detention, the death penalty which is not preceded by a judicial proceeding, rape and sexual abuse, imprisonment of civilians in ghetto areas, forcible removal, displacement and deportation of the civilian population, deliberate military attacks or threats of military attacks on civilians and civilian areas, and wanton destruction of property. Such acts constitute a crime against humanity and can be considered specific war crimes. Furthermore, such acts could fall within the scope of the meaning of the Genocide Convention...

As to the behavior of the Serbs in Bosnia and Herzegovina and Croatia 'ethnic cleansing' is commonly used as a term for policies that are implemented to improve the political doctrines that relate to 'Greater Serbia'. Such a policy implemented Serbs in Bosnia and Herzegovina and Croatia and their commanders in the Federal Republic of Yugoslavia. This political doctrine, it actually a complex mix of historical injustices, fears, aspirations and expectations of nationalist and religious, and psychological factors...

The way in which Serbs are carrying out a policy of 'ethnic cleansing' in Bosnia is consistent in the geographic area that can be displayed now covering an area of northern Bosnia, and areas in eastern and western Bosnia, connecting on areas of Serbian Krajina in Croatia.

The practice of 'ethnic cleansing' was conducted in strategic areas which connect Serbia with the areas in Bosnia and Croatia, which was inhabited by Serbs. This fact is of largely strategic importance for the understanding of the fact that the policy of 'ethnic cleansing' carried out in some but not all areas... "Final Report of the committee of experts established pursuant to resolution 780 (1992). UN Security Council (''Bassiounijeva Commission ''). The International Criminal Tribunal for the Former Yugoslavia, the Croatian Helsinki Committee for Human Rights, the Croatian Law Centre, Zagreb 1995. p. 282 - 288.

b. These acts, which aimed to implement this policy, to a large extent were performed against the most marginal elements of society, especially in certain parts of Bosnia;

c. The leaders of the Bosnian Serbs have influenced, encouraged, facilitated and justified these elements in the commission of described crimes. The combination of these facts, to which should be added being deceived by nationalism and historical injustices and encouraging mutual violence and revenge, has led to tragic consequences.[228]

The International Criminal Tribunal for the Former Yugoslavia[229] and the International Court of Justice[230] found that, during this campaign, the crime of genocide was committed against the ethnic and national group of Bosnian Muslims.

That the genocide had committed was confirmed by the national courts of the Federal Republic of Germany[231] as well as by the competent courts of Bosnia and Herzegovina.[232]

228 Ibid. p. 285.

229 See: ICTY, Prosecutor v. Milosevic Slobodan, IT 02-54 - T. Decision on Motion for Acquittal, June 16, 2004, ICTY, Prosecutor v. Radislav Krstic, IT - 98 - 33, Judgment of April 19, 2004. Krstić (IT-98-33) "Srebrenica- Drina Corps ";
IT - 98 - 33, Judgment 19 April 2004: Vujadin Popovic intelligence officer of the Drina Corps convicted of the Srebrenica genocide; Popovic et al. (IT-0 88) Srebrenica; Ljubisa Beara, a colonel, was finally convicted of genocide in Srebrenica; Popovic et al. (IT-05-88) Srebrenica; Drago Nikolic, Chief of Security of the Zvornik Brigade, convicted of genocide in Srebrenica; Popovic et al. (IT-05-88) Srebrenica;
Zdravko Tolimir, Assistant Commander for Intelligence and Security Affairs of the General Staff of the Army of Republika Srpska (VRS), finally convicted of the Srebrenica genocide; Tolimir (IT-05-88 / 2) Srebrenica;
Ratko Mladić, (IT-09-92), charged with genocide. IT-09-92-T Date: 22 November 2017;
Radovan Karadzic, President of the so-called. RS convicted of genocide in Sre-brenica; Case No .: IT-95-5 / 18-T Date: March 24, 2016

230 See: Judgment, Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Feb. 26, 2007.

231 Judgments upheld by the Federal Supreme Court of Germany: Nikola Jorgić, Sentenced at the Supreme Court of Dusseldorf, 26.9.1997. to 4 years in prison; Novislav Dzajic, Sentenced at the Bavarian Supreme Court in Munich, 23.5.1997. to five years in prison, Maksim Sokolovic Sentenced in Dusseldorf Supreme Court on 11/29/1999. to 9 years in prison; Đurad Kušljić Sentenced at the Bavarian Supreme Court in Munich, 21.2.2001 to life imprisonment.

232 Genocide Sentences: Borislav Herak, Milorad Trbic, Milenko Trifunovic, Branko Dzinic, Aleksandar Radovanovic, Branislav Medan Slobodan Jakovljevic.

2.3. The end of the aggression by the SR Yugoslavia against the Republic of Bosnia and Herzegovina

The most common way to end a war is with a peace treaty. Peace treaties are international agreements to which apply the rules of international treaty law, enshrined in the Vienna Convention on the Law of Treaties, of 1969.

The Republic of Bosnia and Herzegovina, the Republic of Croatia and Yugoslavia concluded their peace agreement after negotiations completed November 21,1995 at Wright Patterson Air Force Base in Dayton, Ohio, which they signed on December 14, 1995 in Paris under the name of *the General Framework Agreement for Peace in Bosnia and Herzegovina*.[233]

As stated in the preamble, the parties and signatories to this agreement were: The Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia. The objective of this contract was the "need for a comprehensive solution to end the tragic conflict in the region."[234] The preamble also contained a note that the Federal Republic of Yugoslavia was authorized, by the agreement of August 29, 1995, to sign on behalf of the "Serb Republic" the parts of the agreement relating to the "Serb Republic."[235]

The FR Yugoslavia concluded the peace treaty in its own name as a party. Since the peace agreement aimed to end "the tragic conflict in the region," the question arises: for whom was the conflict in the region tragic? The answer is: for the parties of the agreement. War was the cause for the peace treaty; the signatories to the peace agreement are the parties to the war. The representation by the FR Yugoslavia of the "Serb Republic" in the peace agreement is additional proof that the aforementioned peace treaty with the Republic of Bosnia and Herzegovina was made by the parties to, and of a consequence of, the war.

The General Framework Agreement legalized the factual situation that was created by force.

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233 The General Framework Agreement for Peace in Bosnia and Herzegovina was concluded between the parties: the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia, signed by their respective presidents, Alija Izetbegovic, Franjo Tudjman and Slobodan Milosevic.

234 See: The General Framework Agreement for Peace in Bosnia and Herzegovina.

235 "Radio Belgrade on 30 August reported that an agreement was signed on the joint appearance of Serbia and the so-called 'Republic of Srpska' in the peace talks initiated by Washington. The document was signed by S. Milosevic, Radovan Karadzic, and representatives of the Serbian Orthodox Church: Patriarch Pavle and Bishop Irenaeus. "
Quot. Begić, K. I. Ibid. p. 275, note 4.

It was signed by the parties, as well as witnesses who were to guarantee its implementation and give it additional legitimacy. The witnesses were: The States of the European Union and the "Contact Group" (France, Germany, Russia, the United Kingdom and the United States.

After the legalization of the factual situation created by force, the parties agreed that their relations in the future would be conducted in accordance with the principles set forth in the UN Charter, the Helsinki Final Act and other documents of the Organization for Security and Cooperation in Europe. In particular, the Parties agreed to respectfully their sovereign equality, solve disputes through peaceful means and refrain from any use or threat of force, explicit or implicit, against the territorial integrity or political independence of Bosnia and Herzegovina or any other country (Article 1).

The annexes of the General Framework Agreement were as follows: 1A – Agreement on Military Aspects of the Peace Settlement; 1B – Agreement on Regional Stabilization; 2 – Agreement on Inter-Entity Boundary Line and Related Issues; 3 – Agreement on Election; 4 - Constitution; 5 – Agreement on Arbitration; 6 – Agreement on Human Rights; 7 – Agreement on Refugees and Displaced Persons; 8 – Agreement on the Commission to Preserve National Monuments; 9 – Agreement on Bosnia and Herzegovina Public Corporations; 10 – Agreement on Civilian Implementation; 11 – Agreement on International Police Task Force.

Annex 1-A, Agreement on Military Aspects of the Peace Settlement, confirmed that the other two contracting parties had committed aggression against Bosnia and Herzegovina.

Article 3, entitled "Withdrawal of Foreign Forces," stated:

1. *All Forces in Bosnia and Herzegovina as of the date this Annex enters into force which are not of local origin whether or not they are legally and militarily subordinated to Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, or Republica Srpska, shall be withdrawn together with their equipment from the territory of Bosnia and Herzegovina within (30) days. Furthermore, all Forces that remain on the territory of Bosnia and Herzegovina must act consistently with the territorial integrity, sovereignity, and political independence of Bosnia and Herzegovina. In accordance with Article II, paragraph 1, this paragraph does not apply to UNPROFOR, the International Police Task Force referred to in General Framework Agreement, the IFOR or other elements referred to in Article I, paragraph 1 (c).*
2. *In particular, all foreign Forces, including individual advisors, Freedom fighters, trainers, volunteers, and personnel from neighboring and oth-*

er States, shall be withdrawn from the territory of Bosnia and Herzegovina in accordance with Article III, paragraph 1.

The fact that the military part of the peace agreement ordered the other parties to the agreement to withdraw their armed forces from the territory of Bosnia and Herzegovina proves the existence of aggression.

Annex 4, entitled "Constitution," transformed the Republic of Bosnia and Herzegovina into Bosnia and Herzegovina, which *"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 organization within the United Nations system and other international organizations"*[236]

Annex 7, entitled "Agreement on Refugees and Displaced Persons", gave hope for the reintegration of Bosnia and Herzegovina.

Article 1, "Rights of Refugees and Displaced Persons, states:

All refugees and displaced persons have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them. The early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina. The Parties confirm that they will accept the return of such persons who have left their territory, including those who have been accorded temporary protection by third countries."

The return of refugees and displaced persons was a key issue for the reinforcement of the overall peace agreement, which gave rise to the provision that emphasized the importance of early return to the realization of the agreement.

The compact known as the General Framework Agreement for Peace in Bosnia and Herzegovina, executed in the course of the aggression against Bosnia and Herzegovina, was based on some general principles. These were the *Basic Principles agreed in Geneva 8 September 1995*[237] and *the Additional*

236 The constitutional position of Bosnia and Herzegovina; see Festić I. Bosnia and constitution, Aggression on Bosnia and Herzegovina and the struggle for its survival 1992-1995, Sarajevo 1997; Sarcevic, E. (1997). Constitution and Politics.

237 The Agreed Basic Principles (Geneva, September 8, 1995) stated:
Bosnia and Herzegovina will continue its legal existence with its present borders and continuing international recognition.
Bosnia and Herzegovina will consist of two entities, The Federation of Bosnia and Herzegovina as established by the Washington Agreements, and the Republika Srpska (RS).
The 51:49 parameter of the territorial proposal of the contract Group is the basis for a settlement. This territorial proposal is open for adjustment by mutual agreement.

agreed principles published 26 September in New York.[238] The parties agreed to a cease-fire on September 14th and October 5th, which entered into force on October 10, 1995.

The *Constitutional Law on Amendments to the Constitution of the Republic of Bosnia and Herzegovina,* adopted at the national meeting held on December 12, 1995, established the legal basis for the transformation of the Republic of Bosnia and Herzegovina.[239]

Each entity will continue to exist under its present constitution (amended to accommodate these basic principles).
Both entities will have the right to establish parallel special relationships with neighbouring countries, consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina.
The two entities will enter into reciprocal commitments (a) to hold complete elections under international auspices; (b) to adopt and adhere to normal international human rights standards and obligations, including the obligation to allow freedom of movement and enable displaced persons to repossess ther homes or receive just compensation; (c) to engage in binding arbitration to resolve disputes between them.
The entities have agreed in principle to the following:
The The appointment of a Commission for Displaced Persons authorized to enforce (with assistance from international entities) the obligations of both entities to enable displaced persons to repossess their homes or receive just compensation.
The establishment of a Bosnia and Herzegovina Human Rights Commision, to enforce the entities human rights obligations. The two entities will abide by the Commission`s decisions.
The establishment of joint Bosnia and Herzegovina public corporations, financed by the two entities, to own and operate transportation and other facilities for the benefit of both entities.
The appointment of a Commission to Preserve National Monuments.
The design and implementation of a system of arbitration for the solution of disputes between the two entities.

238 The Further Agreed Basic Principles (New York, September 26, 1995) stated:
Each of the two entities will honour the international obligation of Bosnia and Herzegovina, so long as the obligation is not a financial obligation inccured by one entity with the consent of the other.
It is the goal that free democratic election be held in bouth entities as soon as social condition permit…
Folowing the elections, the affairs and prerogatives of Bosnia –Herzegovina will be vested in the following institutions, in accordance with all of the Agreed Basic Principles.
A parliament or assembly…
A Presidency...
A cabinet of such ministers as may be appropriate...
A Constitutional Court...
The parties will negotiate in the imidiate future as to further aspects of the management and operation of these institutions.
The foregoing institutions will have the responsibility for the forein policy of Bosnia and Herzegovina.... Bosnia and Herzegovina, Essential Texts (2nd revised and updated edition), OHR, January 1998, Agreed basic principles (P. 13), Further Agreed basic principles, (P. 15).

239 ("Official Gazette of R B-H" No. 49/95).

The constitutional law provides: "The Republic of Bosnia and Herzegovina exercising its sovereign rights can create an internal order in accordance with the Constitution of Bosnia and Herzegovina in the framework for international peace agreement for Bosnia and Herzegovina."

The constitutional law included a provision in the case of obstruction of the implementation of the peace agreement. Article 1 of Constitutional law reads:

"2. If the International Peace Agreement for Bosnia and Herzegovina and the Constitution of Bosnia and Herzegovina have not been implemented, the Republic of Bosnia and Herzegovina may declared null and void the Peace Agreement for Bosnia and Herzegovina and continue to act as an internationally recognized, sovereign and independent state, in accordance with the Constitution of the Republic of Bosnia and Herzegovina."

This provision does not contain a time limit within which to evaluate the effectiveness and implementation of the Peace Agreement and the Constitution or indicate which body is responsible for such assessment. The assumption is that the period must be reasonable and that the Parliament of Bosnia and Herzegovina is responsible for the evaluation of the implementation or non-implementation of the peace agreement or the Constitution.

3. Facts related to the participation of the Republic of Croatia in the war in Bosnia and Herzegovina

3. 1. Historical facts

The Republic of Croatia began the attack on Bosnia and Herzegovina in October 1992, although its armed forces in Bosnia and Herzegovina had previously begun to infiltrate Bosnian and Herzegovinan territory in April 1992.[240]

In March 1991, the representatives of Croatia and Serbia, Presidents Tudjman and Milosevic, respectively, held several meetings discussing the division of Bosnia and Herzegovina between their two states.[241] The full agreement

240 ICTY Tužilac protiv Tihomira Blaškića, (iT- 95-14-T), Judgment of March 3, 2000; About planning, preparation, initiation and waging of aggression, see further in: Čekić, S. (2004). The aggression against the Republic of Bosnia and Herzegovina: Sarajevo. p. 935-1118.

241 On the Tudjman team were Dusan Bilandzic, Joseph Šentija (the first director of the Croatian News Agency (Hrvatska izvještajna novinska agencija, HINA)) and Zvonko Lerotić. On the Serbian side were Smilja Avramov (who is a native of Pakrac in Croatia) Dusan Mihajlovic (an academic with close ties to the Serbian and Croatian political leadership), Vladan Markovic and Vladan Kutlešić. These negotiating teams held three meetings in Belje near Osijek, Belgrade and Zagreb. Cit. the"Free Bosnia" file Karadjordjevo, April 6, 1997, p. 8-10; According

that was reached between the two leaders on the need to divide Bosnia and Herzegovina has “leaked” out of these discussions. After these discussions, Croatia began with preparations for an attack on Bosnia and Herzegovina.

to the statement that one participant in the talks, Dusan Bilandzic, gave to "Nacional" in October 1996: "In the beginning of 1991, after his talks with Milosevic, it was agreed that the two committees meet to discuss the division of Bosnia and Herzegovina. Tudjman then told me that he generally agreed with Milosevic, and that we need to elaborate on specific folders. " "Free Bosnia," Sept. 10, 1998, The Hague, p. 31-37. ;

“Croatian-Bosnian conflict, unfortunately, broke out as a result of intended, planned, organized implementation of the agreement from Karađorđevo and preparation for Croatian-Serbian aggression against Bosnia for the purpose of her disappearance and division. At that time, advisor to President Tudjman Mario Nobilo said that there were secret meetings, which included an agreement to make the exchange of population, divide Bosnia and leave a small part of what they would call the Muslim state. " Free Bosnia, war crimes Aug. 24, 1997; See also S. Mesic interview, "Borba,"May 14-15, 1994 ("There are many culprits for the war and the biggest was Milosevic. He reckoned that the war could achieve the goal of creating a 'Greater Serbia,' which had not previously been realized. With him were those who wanted a 'Greater Croatia'. Through the Serbs in Croatia, whom Bora Jovic argued were our problem 'to do with whatever we want,’ burned the fuse of war in Croatia, and assurances that Serbia was interested in only 66% of Bosnia and Herzegovina were addressed to those concerns. And then we had problems with the division of Bosnia and Herzegovina, because if a Serb Republic was created, a Croat Republic in Bosnia should be created, too. Herzeg-Bosna was created, with its flag, army, and government as a response to the Serb areas. " Sarajevo World, History, Conspiracy in Karađorđevo (3), Bosnia, insult and challenge to Milosevic and Tudjman, as told by M. Minic, December 1997. Former American Ambassador to Yugoslavia Warren Zimmerman explained: "Unfortunately, the passivity of America coincided with increasingly greater pressures on Bosnia. Neither Milosevic nor Tudjman tried even a little to hide its intentions with regard to Bosnia from me... At the end of the second meeting with me, Tudjman poured out a torrent of reproach about Izetbegovic and the Muslims: ‘They are dangerous fundamentalists' and accused the... Bosniacs of using Bosnia as a training ground for the spread of their ideology throughout Europe and even the United States. ‘Civilized countries should unite to eliminate this threat. Bosnia never existed as a state. It should be divided between Serbian and Croatian. ’" Ibid.

The British peace mediator for the former Yugoslavia, Lord Carrington, said that he believed that the Serbian and Croatian presidents, Slobodan Milosevic and Franjo Tudjman, had a plan to divide Bosnia. "I think that they all have their own agenda. Independently of one another, Milosevic and Tudjman told me that they mutually agreed to partition Bosnia, and that was three years ago. ” Lord Carrington told BBC television in 1995 “I think you will see that just that will happen, another divide. " Ibid. Paddy Ashdown, in his personal diary, described a conversation with Tudjman after he drew on the back of a napkin a demarcation in Bosnia between Croatian and Serbian: "... Right of this line is the Serbian federation; everything left is Croatia. I asked him what about the Bosnians. He said that they were an insignificant part of the Croatian Federation... " Dnevni Avaz, March 21, 1998, p. 5; The agreement between the Serbs and Croats on the division of Bosnia was apparently confirmed on May 6, 1992. In Graz, Austria the political leaders of the Bosnian Serbs and Croats, Radovan Karadzic and Mate Boban, met and allegedly agreed to arbitration to determine the specific areas that should belong to the Serb or Croat "constituent entities. " ICTY, Prosecutor v. Tihomira Blaškića, (IT- 95-14-T), Judgment of March 3, 2000, para. 105.

These preparations were conducted in Croatian territory and the territory of the Republic of Bosnia and Herzegovina. Croatian military preparations were conducted in Croatian territory. [242] At the same time, in the territory of Bosnia and Herzegovina, actions to break the constitutional order of Bosnia and Herzegovina were taken.

On April 10, 1992, President Tudjman gave General Bobetko command of all units of the Croatian Army on the southern Croatian front, which bordered Bosnia and Herzegovina. While he was in this position, he appointed the officers in command of the defense of Tomislavgrad "in order to achieve efficient, safe and operational command of the Croatian Defence Council (Hrvatsko vijece obrane, HVO) of the Croatian Community of Herceg-Bosna. " He also founded a separate command center, first in Grude in Bosnia and Herzegovina on the Croatian border, where the commander was General Petkovic, and then in Gornji Vakuf, a neighboring municipality in the south of Central Bosnia, where the commander was Zarko Tolo. Bobetko gave Tolo "full authority to coordinate and command the forces in Central Bosnia (Busovaca, Vitez, N. Travnik, Travnik, Vakuf, Prozor,Tomislavgrad, Posusje)."[243]

Croatian army troops were ordered on April 12, 1992 to take off their Army insignia and enter into Bosnia and Herzegovina. By this act, they violated the sovereignty of Bosnia and Herzegovina.[244] Ordinarily, however, Croatian aggression against Bosnia and Herzegovina is considered to have begun on October 25, 1992, when the attack began on Prozor.

242 Dobroslav Paraga, founder of the Croatian Party of Rights 1861 (Hrvatska stranka prava 1861, HSP 1861), in his interview with Free Bosnia, said:
"Ever since the summer of 1991, I was sure that the stories about the plan from Karađorđeva were not fabrications, but a monstrous noose around the neck of the Croatian and especially the Bosniac people. Then, as I already said, the unplanned war happened in Croatia, while everyone was preparing for the planned war in B-H. During the battle of Vukovar, no help arrived for months... Then I learned that all the weapons that we had seized from the JNA barracks in Vukovar were going to Herzegovina... Later, however, it became clear why the weapons were sent back to western Herzegovina: because there a real war was planned. " War crimes, "Free Bosnia," Aug. 24, 1997, p. 10-13.

243 ICTY, Prosecutor v. Dario Kordić and Mario Čerkez. IT-95-14/2-T, Judgment of Feb. 26, 2001, para 125.

244 Command OZ's Split from M-Ploče April 12, 1992, facsimile of a document published in the weekly "Liljana," July 6-13, 1998, p. 6;
ICTY Prosecutor v. Tihomira Blaškića, (IT- 95-14-T), Judgment of March 3, 2000.

Croatia, during the aggression against Bosnia and Herzegovina, used the Croatian Army (Hrvatska vojska, HV), the Croatian police, and the HVO.[245] Croatia had approximately 30,000 troops in Bosnia.[246]

The Republic of Croatia, by the use of armed force against the sovereignty, territorial integrity and political independence of Bosnia and Herzegovina, committed aggression against the Republic of Bosnia and Herzegovina. The first use of armed force against the Republic of Bosnia and Herzegovina is *prima facie* evidence of aggression. Croatia committed the following acts of aggression against Bosnia and Herzegovina:

a) The invasion by the Croatian Armed Forces of Bosnia and Herzegovina, which began in April 1992, and the attack by the Croatian Armed Forces of Bosnia and Herzegovina, which began in October 1992. The attack on Prozor and the *de facto* annexation of the territory of Bosnia and Herzegovina to Croatia, which were committed by force.

b) The bombardment by Croatian Armed Forces of the territory of Bosnia and Herzegovina with ground- and air-based weapons.

c) The attack by Croatian Armed Forces on the Ground Forces of the Republic of Bosnia and Herzegovina.

d) The use of Croatian Armed Forces, whose presence in the territory of Bosnia and Herzegovina on was originally based on the consent of the Republic of Bosnia and Herzegovina, against the sovereignty, territorial integrity and political independence of Bosnia and Herzegovina and the extension of their presence in the territory of Bosnia and Herzegovina after the termination of such consent.

245 See ICTY, Prosecutor v. Zlatko Aleksovski, IT – 95 – 14/1, Judgment of March 24, 2000.

246 Silber, L., Litl, A. (1996). Death of Yugoslavia. Beograd: Radio B 92. p. 351.

3.2. Termination of Croatian aggression against the Republic of Bosnia and Herzegovina

The aggression of the Republic of Croatia against the Republic of Bosnia and Herzegovina ended with the signing of the *Washington Peace Agreement* on March 18, 1994.[247] The parties had previously signed an armistice on February 10th and a military agreement in Split on March 12, 1994.

The integral parts of the Washington Agreement were: The Proposed Constitution of the Federation of Bosnia and Herzegovina, the preliminary agreement on the establishment of a confederation between the Federation of Bosnia and Herzegovina and the Croatian Army and the agreement of March 12, 1994.

The *Proposed Constitution of the Federation of Bosnia and Herzegovina* and the *Preliminary agreement regarding the future economic and military cooperation between the Federation of Bosnia and Herzegovina and the Republic of Croatia*[248] were ratified by the President and the Assembly of the

247 "Washington has begun to put pressure on Zagreb to stop its forces from fighting against Muslims in Bosnia. " Silber L., Little, A. (1996). Ibid, p. 351; "The ATP has quoted officials of the Danish Ministry (February 2) as saying that an EU ministerial meeting has been scheduled in Brussels for 7 and 8 February to discuss possible sanctions against Croatia because of its military involvement in Bosnia. German Chancellor H. Kohl in a television interview (which was transcribed in AFP, February 4) stated, inter alia, that Croatian leaders have failed to keep the oath taken when they were recognized by the international community not to intervene militarily in neighboring countries. Croatia does not keep its promises. This is a scandal and we have strongly condemned it. The Security Council has threatened sanctions if Croatia does not withdraw its troops from Bosnia. In a statement, dated 4 February, accepted by consensus, the Council requested the Secretary-General to make a report within two weeks notifying it of the progress of the withdrawal of the Croatian army and weapons from Bosnia... " "Begić, K. I. Ibid., p. 166, 167.

248 Law on ratification of the agreement accepting the proposal on the Constitution of the Federation of Bosnia and Herzegovina and a Preliminary agreement regarding the future economic and military cooperation between the Federation of Bosnia and Herzegovina and the Republic of Croatia (''Official Gazette of B-H'', No: 8/94). The agreement reads:
"Today we accept the proposed constitution of the Federation of Bosnia and Herzegovina as well as the Preliminary agreement of future economic and military cooperation between the Federation and Croatian. These agreements mark our common will to establish peace in Bosnia and Herzegovina and throughout our region. We agree to intensify our efforts in seeking an overall political settlement which provides for the protection of human rights and preserve the sovereignty and territorial integrity of all states in the region.
Bosniak and Croatian delegations confirmed their willingness to propose this Constitution in the Constituent Assembly as the basis for the Federation, ensuring full national equality, democratic relationships and the highest standards of human rights and freedoms. All delegations will jointly support the principles of the conference that can lay the foundations for a prosperous and secure future for the peoples of the region.

Republic of Bosnia and Herzegovina.[249] The Constituent Assembly of the Federation, at the meeting held on March 30, 1994, adopted the *Decision on proclamation of the Constitution of the Federation*. [250] The Constitution of the Federation transformed the internal structure of the territory of Bosnia and Herzegovina with a majority Bosniac and Croat population, while the fate of the territories with majority Serb populations were left to the Peace Conference on the Former Yugoslavia.

The Constitution of the Federation created two parallel constitutional systems in the parts of Bosnia and Herzegovina that were outside the control of the Serb aggressor forces. It retains the constitutional system of Bosnia and Herzegovina, based on the revised text of the Constitution of the Republic of Bosnia and Herzegovina,[251] while, at the same time, creating and validating the Constitution of the Federation of Bosnia and Herzegovina.

The *Constitutional Law on Amendments to the Constitution of the Republic of Bosnia and Herzegovina*[252] provided the constitutional basis for this system.

The Constitution of the Federation of Bosnia and Herzegovina was adopted to fulfill the peace agreement. The Republic of Bosnia and Herzegovina has continued to function as a state under international law with all the features and attributes that characterize a state, while the Federation has features of a state entity. The Federation comprised 55% of the territory of Bosnia and Herzegovina, while the territory with a majority Serb population accounted for

In order to expand our cooperation, we decided that we will immediately: (1) establish a joint group that will be the exclusive representative of Bosniaks and Croats in all negotiations with the Serbs, in order to establish overall solutions for Bosnia and Herzegovina... (4) keep a full and immediate implementation of measures agreed by the military transition team at the 12 March in Split and encourage the development of arrangements for the further disengagement of forces. "

249 The signatories to the agreement were the President of Bosnia and Herzegovina, Alija Izetbegovic, and the Prime Minister of Bosnia and Herzegovina, Haris Silajdzic, on the one side and the Croatian President, Franjo Tudjman, and the President of the so-called Croatian Republic of Herceg-Bosna, Kresimir Zubak on the other side.

250 «Official Gazette of the Republic of Bosnia and Herzegovina,'' No. : 8/94. p. 117.

251 Official Gazette of the Republic of B-H, 5/93.

252 Article 1 of the Constitutional Law reads as follows: "Based on the sovereignty and territorial integrity of Bosnia and Herzegovina, Bosniaks and Croats as constituent peoples (along with others) and citizens of the Republic of Bosnia and Herzegovina, realizing its sovereign rights can transform the internal structure of the territory with a majority Bosniak and Croatian population in the Republic of Bosnia and Herzegovina and Federation of Bosnia and Herzegovina, which consists of federal units with equal rights and responsibilities. A decision on possible changes in the constitutional and legal status of territories with majority Serbian population will be made during the peace negotiations at the Conference on the Former Yugoslavia. " (''Official Gazette of B-H,'' No: 8/94).

42%. The District of Sarajevo amounted to 3% of the territory of the Republic of Bosnia and Herzegovina.

At a meeting in Vienna between May 7th and 11th, 1994, an agreement was reached setting out principles for the constitution of the cantons. [253] The cantons are territorially organized on ethnic, economic, functional, natural-geographic and communication principles and consist of the municipalities in which, according to the census of 1991, Bosniacs and Croats formed the majority of the population. Municipal boundary limits can be adjusted by adding or subtracting adjacent municipalities in accordance with this ethnic principle.

The preliminary agreement on the establishment of a confederation between the Federation of Bosnia and Herzegovina and Croatia territorialized Croatian interests in Bosnia and Herzegovina. International practice does not recognize the existence of a confederation between a sovereign state and an administrative (political) entity of a second sovereign state.

The integral parts of the Preliminary Agreement were: Annex I - Agreement to ensure the Federation of Bosnia and Herzegovina access to the Adriatic through Croatian territory and Annex II - Agreement between the Federation of Bosnia and Herzegovina and Croatia, which provides Croats with free passage through the Federation. [254]Both agreements came into force upon their signature on March 18, 1994 and remain in force for a period of 99 years, unless the parties otherwise agree.

Included in the reasons for concluding the agreements, listed in Annex I, was the the Federation's need for unrestricted land and air access to the Adriatic sea, through and over Croatian territory, in accordance with the United Nations Convention on the Law of the Sea of 1982 and the Convention on the Transit Trade of Land-locked States of 1965.

Article 1 of the Agreement reads as follows:

a. *"Croatia will rent the Federation, during the term of this Agreement, a piece of land in the port Ploče, including port and harbor components that belong to them...*
b. *Croatia agrees that the leased area enjoys the status of a free zone in which they may not apply customs duties or charges established by Croatia. "*

253 Vienna Agreement: Criteria for determining the territory of the Federation, principles of the constitution of the canton the Agreement on of the allocation of the highest duties (Vienna May 8-11, 1994).

254 Official Gazette of the Republic of Bosnia and Herzegovina,'' No. 8/94.

Included in the reasons for concluding the Agreement, listed in Annex II, was Croatia's need for unrestricted passage through the municipality of Neum. Article 1 of the Agreement reads as follows:

"The Federation shall allow unobstructed passage to and from Croatia by way of Neum, between the eastern and western borders of the Croatian town of Neum."

Annex II, which allows the unhindered passage through Croatian and Federation territory immediately took effect, while Annex I caused various disputes concerning its meaning, so that several years after its conclusion it still had not taken effect. [255]

Croatia is one of the signatories to the General Framework Agreement for Peace in Bosnia and Herzegovina. This agreement legalized the division of Bosnia and Herzegovina into two entities, the Federation of Bosnia and Herzegovina and the Serb Republic, with a territorial ratio of 51-49.

255 During the negotiations in Dayton, on November 10, 1995, the parties signed the Agreement establishing the Federation of Bosnia and Herzegovina. The agreement laid out the general principles that were the reasons for its conclusion. They are: "Twenty months after the adoption of the Constitution of the Federation, the process of strengthening the Federation and building trust between its constituent peoples has not given satisfactory results. " This agreement was signed by, among others, Bosnian President Alija Izetbegovic and Croatian President Franjo Tudjman. The agreement had an international character. On this occasion, the Republic of Croatia and the Federation of Bosnia and Herzegovina signed an agreement to establish a joint council for cooperation.

VI. THE SYSTEM OF COLLECTIVE SECURITY AND AGGRESSION AGAINST THE REPUBLIC OF BOSNIA AND HERZEGOVINA

1. Introduction

The United Nations is based on a system of collective security. The central role in the system of collective security belongs to the Security Council, which is primarily but not exclusively responsible for the protection of international peace and security. In addition to the Security Council, other United Nations bodies, regional agreements and institutions, and states themselves are responsible for the protection of international peace and security. What distinguishes the Security Council and makes international peace and security its primary responsibility is its ability legally to use force, upon its order or approval.

The Security Council exercised its powers under Article 29 of the Charter to establish the ICTY as an additional body to punish the perpetrators of international crimes in the former Yugoslavia. The Tribunal's decisions are also important for determining the nature of the conflict.

Since the General Assembly may discuss any matter within the jurisdiction of the United Nations within the limitations of Article 12 of the Charter, it is necessary to investigate the decisions that characterized the conflict in the former Yugoslavia.

The Security Council may, where appropriate, in accordance with Article 53 (1) of the Charter, utilize such regional arrangements or agencies for enforcement action under its authority or, in accordance with Article 52 (3), encourage the development of pacific settlement of local disputes through re-

gional arrangements or by regional agencies. The Security Council extensively used these options in the aftermath of the war in Bosnia and Herzegovina, so it is necessary to consider the role of these bodies. This primarily refers to the role of the European Community and the CSCE.

The International Court of Justice also has the authority to determine the existence of aggression. Unlike organs of the United Nations and regional organizations, the International Court of Justice is not bound by political considerations, but rather solely by legal ones. The Court addressed the issue of the character of the war in *Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*.

2. The UN Security Council and aggression against the Republic of Bosnia and Herzegovina

2. 1. Introduction

The Security Council is a political rather than judicial authority, and, consequently, its decisions are politically motivated and do not require legal justification or the consent of their state subjects. The origin of its power is Article 24 (1) of the UN Charter, through which the members of the UN have entrusted it with the responsibility for maintaining international peace and security.

The Security Council is the central organ in the system of collective security. Its powers are laid out in Chapters VI, VII, VIII and XII of the Charter.

Chapter VI pertains to the peaceful settlement of disputes in cases in which the duration of a dispute or situation may endanger international peace and security, and Chapter VII pertains to situations in which acts endangering or breaching the peace or acts of aggression have already threatened international peace and security.

When the Security Council classifies a situation as coming under Chapter VII, then it must decide what measures to take in order to restore international peace and security.

In addition to provisional measures, the Security Council has basically two different kinds of repressive measures. The first type consists of measures that do not entail the use of armed force. These are different kinds of economic and diplomatic sanctions, based on Article 41 Charter. If these measures do not achieve the desired result or if the Security Council decides the use of armed force is necessary, it can use force in accordance with Article 42 of the Charter.

Since the UN Charter does not define the meaning of endangering or breaching the peace or aggression in Article 39 of the Charter, the Security

Council, as a political body, on the basis of its political assessment, decides the nature of a situation and what kind of forcible measures shall be applied in a specific situation.

2.2. Measures taken by the Security Council before the commencement of aggression against the Republic of Bosnia and Herzegovina

The problem of Yugoslavia was first placed on the agenda of the Security Council on September 25, 1991 at the request of Budimir Loncar, the former Minister of Foreign Affairs of the SFRY. In his presentation at this meeting, Loncar expressed the view that Yugoslavia was in agony and that none of the actors on the Yugoslav scene were entirely free of guilt.

"The imposition of a singlesolution, even the use of force, as the sole answer to the crisis, has brought about tragic conflicts, the loss of human life and destruction. Nationalism has reduced all questions of existence to the national question alone." [256]

He further stated that the Yugoslav crisis endangered peace and security in Europe and represented a serious threat to the new global architecture that emerged at the end of the cold war. Yugoslavia could not be easily revised. It had to be redefined.

Yugoslavia could not alone solve the crisis. Therefore, it welcomed the action taken by the European Community under the auspices of the CSCE. There was a long list of measures and agreements that had been accepted by European representatives and the major parties in Yugoslavia to solve the problem in the spirit of the UN Charter and the Charter of Paris for a New Europe.

From the beginning of the crisis, basic principles emerged: non-acceptance of any unilateral decision or forced change of borders and the protection of and respect for the rights of all in Yugoslavia and the full recognition of the all legitimate interests and aspirations.[257]

256 Security Council Provisional Verbatim Record, Sept. 25, 1991. (S/PV 3009), U: Bethlehem, D., Weller, M. (ed.). (1997). The Yugoslav Crisis in International Law: General Issues, part I, Cambridge: University Press. p. 63.

257 "Indeed, the Yugoslav example may identify a new concept of the United Nations. It also reaffirmed the original principles of the Charter and the need to preserve international peace and security and to resolve crisis primarly through regional arrangements and mechanisms, and affirms the principles of the Helsinki Final Act and Charter of Paris for a New Europe. In other words, for the sake of Yugoslavia, Europe and the World, it is now essential for the Yugoslav disputes to be resolved through the Hague Conference... " Bethlehem, D., Weller, M. (ed.). (1997). Ibid. p. 64.

The Yugoslav crisis in general, and the aggression against Bosnia and Herzegovina in particular, were characterized by efforts to resolve disputes within regional organizations and institutions, and Loncar's presentation reflected this attitude.

The role of the Security Council at this early stage of the Yugoslav crisis was reduced to control. Acting on the proposal of Austria, Belgium, France, USSR and Great Britain, it adopted Resolution No. 713 of September 25, 1991. [258] In this resolution, the Security Council found that the continuation of the situation described by Yugoslav Foreign Minister Loncar was a threat to international peace and security.

Recalling its primary responsibility for maintaining international peace and security arising from the Charter and the possibility of regional agreements expressed in Chapter VIII, the Resolution praised the efforts of the European Community and its Member States and the Declaration of September 3, 1991 adopted by the CSCE, which emphasized that territorial conquest or changes of the borders within Yugoslavia that were achieved by force were unacceptable.

The Security Council also gave its full support to the joint efforts for peace and dialogue in Yugoslavia that were undertaken under the auspices of the European Community, with support from Member States and the CSCE. It welcomed all the arrangements and measures resulting from these efforts. The Security Council urged the Secretary-General to promptly make available its assistance in consultation with the government of Yugoslavia.

In this way, the scene was set for the outcome of the crisis by the Security Council, the European Community, the CSCE and the UN Secretary General.

The Security Council: "*Decide[d]*, under Chapter VII of the Charter of the United Nations, that all States shall, for the purposes of establishing peace and stability in Yugoslavia, immediately implement a general and complete embargo on all delivers of weapons military equipment to Yugoslavia until the Security Council decides otherwise following consultation between the Secretary-General and the Government of Yugoslavia."[259]

It also: "Call[ed] on all States to refrain from many action which might contribute to increasing tension and to impeding or delaying a peaceful and negotiated outcome to the conflict in Yugoslavia, which would permit all Yugoslav to decide upon and to construct their future in peace."[260]

258 Bethlehem, D., Weller, M. (ed.). (1997). Ibid. ; Security Council Resolution 713, Sept. 25, 1991. p. 1.

259 See Security Council Resolution 713 (1991) Sept. 25, 1991. Para 6.

260 Ibid., para 7.

The first Security Council resolution on the Yugoslav crisis is fundamental to understanding the attitudes of the Security Council in terms of the way to resolve the crisis and its action regarding the aggression against Bosnia and Herzegovina.

With this resolution, the Security Council entrusted and transferred responsibility for the outcome of the Yugoslav crisis, in accordance with Chapter VIII of the UN Charter, to the European Community and its Member States. The resolution, also gave the UN Secretary-General responsibility to closely cooperate with the government of Yugoslavia on resolution of the Yugoslav crisis. By insisting on a regional arms embargo in the resolution and during the collapse of Yugoslavia, the Security Council essentially abdicated the exercise of the right to self-defense to the Republic of Bosnia and Herzegovina after the beginning of the aggression against it.

All the discussants in the debate preceding the adoption of the resolution endorsed its principles for resolving the Yugoslav crisis, which were established by the European Community and mentioned in Loncar's presentation. The Austrian representative, Alois Mock, in his discussion, anticipated developments that would require action to prevent the spread of the war to Bosnia and Herzegovina.[261]

The position of the American Representative, James Baker,[262] differed from that of the others in that that it penetrated to the core problem of diagnosing the causes of the Yugoslav crisis and the war in Croatia and anticipated further developments toward the– creation of a "Greater Serbia. " He expressed the view that the United States should address the causes rather than consequences of the crisis. Speaking about the causes of the Yugoslav crisis, Mr. Baker expressed the view of the American government that Serbia and the Yugoslav Army bore special and the greatest responsibility. The Yugoslav Army was not acting as a neutral factor and guarantor of the cease fire, but, on the contrary, was helping the local Serb forces to violate the cease-fire and causing the death of citizens. It is quite clear that the Serbian leadership supported and encouraged the use of force in Croatia by Serb militants and the Yugoslav Army. It was clear that the Serbian leadership and the Yugoslav Army were "working in tandem" to create "a small Yugoslavia or Greater Serbia" that comprised all of the former SFRY except for parts of Slovenia and Croatia. This new entity would be founded with the same kind of repression that Serbia exercised in Kosovo last years. It would be based on the use of

261 Bethlehem, D., Weller, M. (ed.). (1997). Ibid, Chapter 2: Provisional Verbatim Records and Draft Resolutions of the UN Security Council, p 65.

262 Ibid., p. 71-73.

force in the same way in Croatia and Bosnia and Herzegovina in order to establish control over territory outside the borders of Serbia."The aggression within Yugoslavia, therefore, I think we would all agree, represents a direct threat to international peace and security." [263]

These developments, in his opinion, were threatening what the CSCE had done over the previous sixteen years. Then Baker asked the Security Council to prevent the spread of Serbian aggression.[264]

After this precise and accurate diagnosis of the causes of the wars in the former Yugoslavia, the member countries of the Security Council, as early as at this "first stage" of the aggression against Bosnia and Herzegovina, were aware that the full-scale attack of Bosnia and Herzegovina would follow. "The Case of Bosnia and Herzegovina, in fact, is evidence that the United Nations was not able to exercise their functions whenever aggression occurred."[265]

A turn of events led to the adoption of Security Council Resolution743 of February 21, 1991.[266] Relying on Article 25 and Chapter VIII of the Charter, the Security Council required all parties in Yugoslavia to cooperate fully with the Conference on Yugoslavia in its efforts to achieve a political settlement in accordance with the principles of the Conference on European Security and Cooperation.

2.3. Measures taken by the Security Council after the commencement of aggression against the Republic of Bosnia and Herzegovina

The former Yugoslavia appeared for the first time on the agenda of the UN Security Council on September 25, 1991, when it adopted Resolution No. 713, which was designated options for resolving the Yugoslav crisis. The reason for placing Yugoslavia on the agenda was Serbian aggression against Croatia. The Security Council, in the Resolution, reiterated its primary responsibility for maintaining international peace and security, but, referring to Chapter VIII of the Charter, left the Yugoslav crisis to be resolved by the Conference on Yugoslavia, which the European Community established under the auspices

263 Ibid., Baker, p. 72.

264 Ibid, Baker, p. 72."We must collectively protect also, I think, against the spread of this cycle of violence to yet onother Yugoslav republic. There can be not mistaking that the fateof Bosnia-Herzegovina also hangs in the balance. Serbian leadership and the Yugoslav federal military have it in their power to cease violent provocationsand the unjustified military occupation of that republic here and now.

265 Sadiković, Ć. (1995). Twilight of the United Nations, Sarajevo. p. 41.

266 Bethlehem, D., Weller, M. (ed.). (1997). Ibid., p. 5.

of the CSCE. This view was confirmed by subsequent Security Council resolutions pertaining to the same problem. This resolution also confirmed the views of the CSCE on the Inadmissibility of territorial conquest and the change of borders by force.

The European Community, on April 6, 1992, recognized the sovereignty, territorial integrity and independence of the Republic of Bosnia and Herzegovina. Other nations, including the United States and Croatia, followed suit the following day, April 7th. The Republic of Bosnia and Herzegovina, on the recommendation of the Security Council, became a member of the United Nations on May 22, 1992.

Since the Republic of Bosnia and Herzegovina was sovereign independent and internationally recognized and, as of May 22, 1992, a member of the United Nations with all the rights and obligations arising from membership in the United Nations, the attack on Bosnia and Herzegovina, in international legal terms, was aggression, with all the relevant consequences that arise from it.

The aggression against the Republic of Bosnia and Herzegovina started in the first days of April 1992. It was followed by *Security Council Resolution 749* of April 7, 1992, which created and deployed the UNPROFOR force in the former Yugoslavia in connection with the report of the Secretary General of the UN of April 2, 1992. The last paragraph of the resolution referred to Bosnia and Herzegovina, in which the Security Council "Appeal[ed] to all parties and others concerned in Bosnia and Herzegovina to cooperate with the efforts of the European Community to bring about a cease-fire and a negotiated political solution."

At the time of adoption of this Resolution, Bosnia and Herzegovina had gained international recognition but was not yet a member of the UN. However, Article 35 Paragraph 2 of the Charter provides an opportunity for countries that are not members of the UN to draw the attention of the Security Council in any dispute if one of the parties to the dispute and accepts in advance, in connection with that dispute, the obligation of peaceful solutions envisaged in the Charter. Bosnia and Herzegovina made a request of the UN Secretary General on April 10, 1992, which the Secretary General described as follows:

"On 10 April 1992, I met at Geneva with the Foreign Minister of the republic of Bosnia-Herzegovina, Mr. Haris Silajdžic, who asked for the deployment of United Nations peace-keeping forces in Bosnia-Herzegovina. I once more emphasized the division of labor between the United Nations, whose peacekeeping mandate was limited to the situation in the Republic of Croatia, in accordance with Security Council resolution, and the peace-making role of the European Community (EC) for Yugoslavia as a whole. Concerning his spe-

cific request, I observed that it might be more appropriate for EC to expand its presence and activities in Bosnia-Herzegovina." [267]

The Secretary-General, in this report, expressed his stance on how and through what institutions the issue of aggression on Bosnia and Herzegovina should be addressed. Neither the SFR Yugoslavia nor it successor states were members of the European Community, but they had given their consent to the peaceful resolution of the Yugoslav crisis, through the Conference on Yugoslavia. The subject of discussion at that conference was the transformation of federal Yugoslavia. Through the creation of independent states, the work of the Conference rendered meaningless federal Yugoslavia.

The *Statement by the President of the Security Council* dated April 10, 1992, given at the April 13th session had similar tones. [268] It showed that the Security Council, following the latest developments in Bosnia and Herzegovina, had been alerted to adverse developments there. The Security Council repeated the call contained in Resolution749 (1992) that the parties in Bosnia and Herzegovina immediately cease fighting.[269] It also invited the Secretary-General to urgently send his personal envoy to Yugoslavia, acting in close cooperation with representatives of the European Union to stop the fighting and find a peaceful solution to the crisis.[270]

As the aggression against Bosnia and Herzegovina continued, on April 24, 1992 the Security Council adopted the *Presidential statement,* and the UN Secretary-General submitted a Report to the Security Council related to Resolution 749. Differences in views on the war in Bosnia and Herzegovina had already begun to appear between those contained in the Security Council Presidential statement and those contained in the report of the UN Secretary-General.

The Presidential statement of 24 April contained the following specifications and requirements:

"The Council demands that all forms of interference from outside Bosnia and Herzegovina cease immediately. In this respect, it specifically calls upon Bosnia and Herzegovina's neighbors to exercise all their influence to end such

267 Bethlehem, D., Weller, M. (ed.). (1997). Ibid., Report of the Secretary - General pursant to Security Council Resolution 749 (1992). p. 502.

268 Statement by the President of the Security Council, April 10, 1992. (S/23802, April 13, 1992) Reissued U: Bethlehem, D. Weller, M. (ed.). (1997). The Yugoslav Crisis in International Law: General Issuse, part I, Cambridge: University Press, p. 6.

269 Ibid. U: Bethlehem, D. Weller, M. (ed.). (1997). The Yugoslav Crissis in International Law: General Issues, part I, Cambridge: University Press. p. 6.

270 Ibid., p. 6.

interference. The Council condemns publicly and unreservedly the use of force, and calls upon all regular or irregular military forces to act in accordance with this principle. It emphasizes the value of close and continuous coordination between the Secretary-General and European Community in order to obtain the necessary commitments from all parties and others concerned."[271]

In addition to calling all sides to an urgent ceasefire, this statement expressed support for the efforts undertaken by the European Community in the discussions on constitutional arrangements for Bosnia and Herzegovina within the framework of the Conference on Yugoslavia. It also called on all parties to participate in these discussions and to implement the agreed-upon arrangements.

The significance of this presidential communication was to record the existence of outside interference from neighboring states in Bosnia and Herzegovina and to demand that it stop. In order for the Security Council to address the issue, it had to be of sufficient intensity to justify the engagement of the Security Council. This was a low-level form of Security Council intervention, since presidential communications have the legal force of Security Council resolutions.

The aforementioned statement recorded the existence and operation of regular and irregular foreign formations in Bosnia and Herzegovina.

Part I A of the *Report of the Secretary General of the UN of 24 April,*[272] which addressed the Military/Political Aspects of the Situation in Bosnia-Herzegovina, called the situation a civil war. This characterization of the war in Bosnia and Herzegovina must be placed in the context of the statement of *Cyrus R. Vance*, the Personal Representative of the Secretary-General to Belgrade, Zagreb and Ljubljana, which concluded that "a civil war in Bosnia-Herzegovina would be a great tragedy. Such a war could not have any winner. " From the beginning, it was clear that the UN Secretary-General tended to accept the thesis of civil war as the cause of the conflict, necessitating management and resolution without a winner.

In the report, the Secretary-General presented the military and political aspect of the events in Bosnia and Herzegovina, giving all participants the opportunity to present their views and stating in the introduction that there was no consensus about the causes of the fighting. These developments furthered Milosevic's goals.

271 Statement by the President of the Security Council, April 24, 1992. (S/23842, April 24, 1992), Reissued at the 3070th Meeting of the Council, Ibid. p. 6-7.

272 Report of the Secretary - General pursuant to Security Council Resolution 749 (1992) (S/23836, April 24, 1992), U: Bethlehem, D. Weller, M. (ed.). (1997). Ibid. p. 502-506.

"President Miloševic of Serbia took the position that the principal responsibility for the fighting rested with President of Bosnia-Herzegovina, and that hostilities had been initiated not by forces under his leadership, but rather by units from Croatia. He also asserted that the best solution was cantonization of Bosnia-Herzegovina within its existing borders along ethnic lines, with agreed jurisdictional competences, and a new constitution agreed upon by the three main communities." [273]

While it later became apparent that Milosevic's characterization of the initiation and conduct of hostilities against Bosnia and Herzegovina was untrue, his vision of the future of Bosnia and Herzegovina was nonetheless accepted by officials of the UN and the European Community, so that the international forces, whose duty was to prevent aggression against Bosnia and Herzegovina, mainly engaged in forcing Bosniacs and the constitutional authorities of Bosnia and Herzegovina to accept Milosevic's vision for Bosnia and Herzegovina, with a changed ethnic structure of people through genocide and ethnic cleansing.

According to the report, Tudjman denied that Croatian army units were involved in fighting in Bosnia and Herzegovina. As indicated *supra,* this was not true; Croatian army troops, though camouflaged, participated in the war in Bosnia and Herzegovina. The presidents of both Serbia and Croatia acknowledged the involvement of their irregular formations in the fighting in Bosnia and Herzegovina. President Tudjman acknowledged the presence of Croatian irregular formations in Bosnia and Herzegovina, although, as will be demonstrated *infra,* such Croatian irregular formations did not exist.[274]

"The President of Serbia, for his part, acknowledged the presence of Serb irregulars in the fighting, particularly along the west bank of the Drina River, while maintaining that the Republic of Serbia would not allow itself to be drawn into the conflict."[275]

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273 Ibid, p. 503.

274 "At the same time, he acknowledged that Croat irregulars, who had formerly been engaged in the conflict in Croatia, were fighting in Bosnia-Herzegovina, particulary in the Croat-majority region of Western Herzegovina. Bethlehem, D., Weller, M. (ed.). (1997). Ibid. p. 503. para 9. The Croatian army general, Janko Bobetko, on April 12th ordered the Croatian army to remove visible insignia of the Croatian Army and enter Bosnia and Herzegovina. This was a clear indicator of the intentions of the Croatian state leadership. Command OZ's Split from M-panels 12/04/1992, a facsimile of a document published in the weekly "Liljana" July 6-13, 1998, p. 6.

275 Bethlehem, D., Weller, M. (ed.). (1997). Ibid. p. 503. para. 9. see also, "President Izetbegović again requested the immediate deployment of a United Nations peacekeeping force in Bosnia-Herzegovina. In his view, the Serbian leadership in Bosnia-Herzegovina, supported by JNA elements, had sought forcibly to alter the demographic composition of Bosnia-Herzegovina, in order to prejudge the outcome of a future ethnic division of the Republic...

Speaking about the humanitarian situation, the Report stated that the conflict in Bosnia and Herzegovina was causing a new wave of refugees. According to estimates by the United Nations High Commissioner on Refugees (UNHCR), on April 21/22, in Bosnia and Herzegovina, there were 230,000 refugees, and the number was increasing by 30,00 every day.[276] Instead of addressing the causes of this situation, the Secretary-General and the UN administration that is subordinate to him dealt with its consequences. The UNHCR responded to the new crisis by delivering emergency food aid, in addition to its previous program.[277]

The Secretary General tried to evenly distribute the blame:

"My Personal Envoy came to the firm conclusion from his extensive discussion with all the parties, as well as from his consultations in Lisbon, that no party to the conflict is blameless for the current situation and its escalation. I share Mr. Vance's assessment that all sides have to bear some of the responsibility for the outbreak of the conflict and its continuation."[278]

The responsibility of the Bosniac side and the Government of the Republic of Bosnia and Herzegovina, according to allegations made by the Serbian side, lay with their desire to create a unitary Islamic fundamentalist state.

"They asserted that President Izetbegović wanted to create a unitary, fundamentalist, Islamic State. They maintained that he still resisted the establishment of geographically defined ethnic communities within Bosnia-Herzegovina. In their view, the 'map issue' was the most urgent one."[279]

The Security Council unanimously adopted, without debate, the report of the Secretary-General. Two days later, Hungary sent a written statement to the Security Council stating that "aggression against the sovereignty and territorial integrity of Bosnia and Herzegovina is a violation of fundamental human rights, including the rights of ethnic and national minorities in the areas that the "Yugoslav Army" and Serb irregular formations control, and it represents a serious threat to peace and security throughout central and Southeastern Europe."[280]

The President suggested a restructuring of the JNA leadership in Bosnia-Herzegovina so that Muslims and Croats could be included in the army's higher command structure. Report of the Secretary - General pursuant to Security Council Resolution 749 (1992) (S/23836, April 24, 1992), Bethlehem, D..Weller, M. (ed.). (1997). Ibid. p. 503 - 504.

276 Ibid., p. 503-504. para. 15 – 18.

277 Ibid.

278 Ibid. p. 504. para. 23.

279 Ibid. p. 503. para. 14.

280 S/23845, April 26, 1992.

The UN Secretary-General submitted the following Report to the Security Council on May 12th. In the meantime, it tried to accomplish the European plan, which, at that time, Ambassador Jose Cutilhero, who referred to the cantonization of Bosnia and Herzegovina, was directing.

The Report of the Secretary General of May 12th[281] was composed of two parts. The first concerned the situation in Bosnia and Herzegovina and the second the deployment of UNPROFOR.

Describing the situation in Bosnia and Herzegovina, the General Secretary stated in the Report that he had been informed that Sarajevo was being subjected to heavy bombing by "Serb irregulars" from the surrounding hills who were using artillery given to them by the JNA.

"All international observers agree that what is happening is a concerted effort by the Serbs of Bosnia-Herzegovina, with the acquiescence of, and at least some support from, JNA, to create 'ethnically pure' regions in the context of negotiations on the 'cantonization' of the Republic in the EC Conference on Bosnia-Herzegovina, chaired by Ambassador Cutilhero. The techniques used are the seizure of territory by military force and intimidation of the non-Serb population."[282]

In connection with the withdrawal of the JNA from Bosnia and Herzegovina, which was in progress, the Secretary-General expressed concern that Bosnia and Herzegovina would remain "without effective political control [of] as many as 50, 000 mostly Serb troops and their weapons. They are likely to be taken over by Serb party."[283]

The report also contained observations regarding the presence of the Croatian Army and the Serbo-Croatian settlement. The first observation included the following:

"Intense hostilities are taking place elsewhere in the Republic, notably in Mostar and Neretva valley."[284]

The second observation related to the Serbo-Croatian ceasefire agreement of May 6, 1992, which caused doubts about the division of Bosnia and Herzegovina and left minimum territory to the Muslim community, which was the most populous.[285]

281 Further report of the Secretary - General Pursuant to Security Council Resolution 749 (1992) (S/23900 May 12, 1992); see Bethlehem, D. Weller, M. (ed.). (1997). Ibid. p. 509 – 511.

282 Ibid., p. 509. para. 5.

283 Ibid., p. 509. para. 5.

284 Ibid., p. 509. para. 4.

285 Ibid., vidi: para. 5.

"Meanwhile Ambassador Cutilhero continues his efforts to induce the leaders of the Croat, Muslim and Serb Communities to agree on future constitutional arrangements for the Republic."[286] "As for the United Nations, I had already decided to advance the deployment of UNPROFOR military observers in Bosnia-Herzegovina…"[287]

The report contained a request from President Izetbegović for UN intervention.

"President Izetbegović advocated a peace-enforcement operation of 10,000 to 15,000 soldiers, supported by air forces, to 'restore order,' in Bosnia-Herzegovina."[288]

The attitude of the UN's establishment toward this application was negative. There were estimates that such action would require much greater involvement than the Security Council would approve,[289] and that deploying UN infantry forces, which would have been consistent with the customary practice of UN peace-keeping, would have required an agreement among the principal parties to the conflict.[290]

In the concluding observations of the report, the Secretary-General argued that the situation was not an appropriate one for the use of UN peacekeeping forces. [291] Without the agreement of all parties to the conflict, such forces would not be effective. Since the European Community was to lead discussions on the future constitutional order of Bosnia and Herzegovina, it was more appropriate that the European Community take the lead in peacemaking and peacekeeping.[292]

The Security Council responded to the continuing participation of the Federal Republic of Yugoslavia in the hostilities by adopting *Resolution No. 752 of 15 May 1992*,[293] which confirmed the presence of foreign forces in Bosnia and Herzegovina and determined the direction of Security Council action to end the war and aggression. This resolution is significant in that it was the first resolution that was primarily devoted to the situation in Bosnia and Herzegovina.

286 Ibid., p. 510. para. 8.

287 Ibid., p. 510. para. 9.

288 Ibid. p. 510. para. 12.

289 Ibid., p. 510. para 12.

290 Ibid., p. 510. para. 12.

291 Ibid., p. 512. para. 25.

292 Ibid., p. 512. para. 25.

293 Security Council Resolution 752 (1992) (S/RES/752, May 15, 1992), Adopted unanimously at the 3075th meeting of the Council. U: Bethlehem, D., Wealer, M. (ed.). (1997). p. 7.

Recalling its primary responsibility under the UN Charter to maintain international peace and security, the UN Security Council expressed concern over the serious situation in some parts of the former Yugoslavia, especially the accelerated deterioration of the situation in Bosnia and Herzegovina. Therefore, it required an immediate cessation of all hostilities.

The Security Council, in the Resolution "*Demand[ed]* that all forms of interference from outside Bosnia and Herzegovina, including by units of the Yugoslav People's Army (JNA) and elements of the Croatian Army, cease immediately, and that Bosnia and Herzegovina's neighbors take swift action to end such interference and respect the territorial integrity of Bosnia and Herzegovina."

It also "Demand[ed] that those units of the Yugoslav People's Army (JNA) and elements of the Croatian Army now in Bosnia and Herzegovina must either be withdrawn, or be subject to the authority of the Government of Bosnia and Herzegovina, or be disbanded and disarmed with their weapons placed under effective international monitoring, and requests the Secretary General to consider without delay what international assistance could be provided in this connection."

With this resolution, the Security Council established the parties to the conflict. These were the constitutional authorities of Bosnia and Herzegovina, on the one hand, and the neighbors of Bosnia and Herzegovina (Yugoslavia and Croatia) and irregular forces in Bosnia and Herzegovina, on the other.

As for the Government of the Republic of Bosnia and Herzegovina, the Security Council recognized its exclusive legitimacy to deploy an armed force in the territory of Bosnia and Herzegovina, demanding that those units of the JNA and the Croatian Army in Bosnia and Herzegovina withdraw immediately, submit to the Government of the Republic of Bosnia and Herzegovina, disband, or disarm and place their weapons under effective international monitoring.[294]

With regard to the neighbors of Bosnia and Herzegovina, the Federal Republic of Yugoslavia and Croatia, the Security Council demanded that all forms of interference from outside Bosnia and Herzegovina be immediately

294 The President of Bosnia and Herzegovina issued, on April 27, 1992, the Decision to withdraw the JNA from the territory of the Republic of Bosnia and Herzegovina. "The dynamics and the direction of withdrawal of the JNA will be determined by the competent authorities of the JNA in consultation with the authorities of B-H. " Release, No. 15 753, April 28, 1992,p. 1. The deadline for withdrawal was specified as May 19, 1992, and the Federal Republic of Yugoslavia, on May 4, 1992, informed the Secretary General of its intention to withdraw the JNA and Yugoslav citizens from B-H by May 19th. Bethlehem, D., Weller, M. (ed.). (1997). P. xxxv.

suspended and that the neighbors of Bosnia and Herzegovina take immediate action to end such interference and to respect the territorial integrity of Bosnia and Herzegovina.

As for the irregular forces in Bosnia and Herzegovina, which comprised different units of the Serb Republic Army and the Croatian Defense Council, the Security Council demanded that they disband and disarm.

UN Security Council Resolution 752 of 15 May 1992 was even more explicit than usual in determining the nature of the war in Bosnia and Herzegovina, contrasting the Government of the Republic of Bosnia and Herzegovina, whose legitimacy and right to use armed force in the territory of Bosnia and Herzegovina it recognized, and its neighbors, the Federal Republic of Yugoslavia and Croatia, which were challenging that right.

This resolution referred to the objectives and consequences of the interference by Croatia and Serbia, calling upon "all parties and others concerned to ensure that forcible expulsion of persons from the areas they live and any attempts to change the ethnic composition of the population…cease immediately."[295]

This resolution clearly qualified the nature of the war in Bosnia and Herzegovina and its objectives. It was an international armed conflict whose parties were not in doubt. The aim of the war was to change the ethnic structure of the population.

Nonetheless, the Security Council continued to conform to the form of its earlier resolutions. In this regard, it stated that it:

"Welcomes the efforts undertaken by the European Community in the framework of the discussion on constitutional arrangements for Bosnia and Herzegovina under the auspice of the Conference on Yugoslavia"

It is a tripartite discussion on the constitutional arrangements for Bosnia and Herzegovina under the auspices of the Conference on Yugoslavia.[296] The results of these negotiations have been prejudiced by the efforts of Ambassador Cutilhero that arrange Bosnia and Herzegovina as a state of Cantons within "confederal, independent and sovereign Bosnia and Herzegovina."[297]

The resolution di not neglect the humanitarian aspect of the aggression, expressing the need for urgent humanitarian assistance in light of reports 30,000 new people were displaced each day.

295 Resolution 752 (1992), para 6.

296 Ibid, para. 2.

297 Further report of the Secretary - General Pursuant to Security Council Resolution 749 (1992), (S/23900 May 12, 1992), Bethlehem, D. Weller, M. (ed.). (1997). p. 510. para. 8.

Security Council Resolution 752 of 15 May 1992 set specific tasks for the Secretary General, requesting that he "keep under active review the feasibility of protecting international humanitarian relief programmes, including the option mentioned in paragraph 29 of his report of 12 May 1992, and of ensuring safe and secure access to Sarajevo airport" and "report to the Security Council by 26 May 1992."[298]

It further requested that the Secretary-General, considering the developments and results of efforts undertaken by the European Union, continue to actively consider the possibility of deployment of the mission of the United Nations to maintain peace in Bosnia and Herzegovina.[299]

Bosnia and Herzegovina became a member of the United Nations on May 22d,[300] after which it formally changed its status, because, as a member of the United Nations against whom aggression was in progress, it had the right to seek protection from the United Nations. In accordance with the set deadline, the Secretary-General submitted, on May 26, 1992, a *Report to the Security Council*. [301]

Speaking about the humanitarian situation in Bosnia and Herzegovina, the Report stated:

"There has also been a grievous deterioration in plight of civilian trapped in cities besieged by various irregular forces and in some cases also by various irregular forces and in some cases also by the Yugoslav People's Army. (JNA)."[302]

This statement registered the presence of the Yugoslav People's Army and its participation in the besieging of towns.

The presence of Yugoslavia's Army in Bosnia and Herzegovina after May 19th, the date by which it was obliged to withdraw, was the act of extension of aggression. This report confirmed this.

Considering the available options from the previous Report (S/23900, para. 29), which stated that "the best form of protection is respect for agreements, binding on all the armed parties," since this had proved effective in other conflict situations around the world. During the delivery of humanitarian aid, certain principles had to be respected: "(a) Relief must be given to all who are in need; (b) The delivery of relief must be seen by all the parties as a

298 Resolution 752 (1992), para. 9.

299 Resolution 752 (1992), para. 10.

300 General Assembly Resolution 46/237 on the Admission of Bosnia and Herzegovina to United Nations Membership. Trifunovska, S. (1994). Ibid. p. 580.

301 Report of the Secretary-General Pursuant to Security Council Resolution 752 (19929) (S/24000, May 26, 1992). Bethlehem, D., Weller, M. (ed.). (1997). p. 514-516.

302 Ibid, p. 514. para. 6.

neutral and humanitarian act; (c) Adequate conditions of security must prevail; (d) There must be international monitoring of the relief programme."[303]

If such an agreement could be reached in Yugoslavia, United Nations military observers, who might accompany convoys and be present at points of delivery and distribution, could monitor its implementation. The questions of whether the presence of international military personnel was desirable and whether such military presence would call into question the exclusively humanitarian nature of related activities was to be resolved at the time of any such agreement.[304]

Examined the delivery of humanitarian aid by air, where it would be necessary to achieve agreement of all interested parties needed to open the airport for this purpose.[305]

Since the JNA had crippled all of the other airports, shipping was only possible through the Sarajevo airport. The Serbian side would permit such shipments, provided that they could check all shipments for weapons. The Secretary General stated: "I instructed UNPROFOR to follow up on this and press for the earliest possible agreement on the reopening of Sarajevo Airport."[306]

The report considered the possible armed protection of humanitarian aid and supplies, predicting that the mere presence of UN troops would be insufficient. Given the experience in Bosnia and Herzegovina, "... it would require the deployment of troops in some force on each occasion to clear the route in advance of the convoy and protect it as it passed."[307]

With regard to the question of the Sarajevo Airport, the report noted:

"19. As regards guaranteeing the security of Sarajevo Airport for the delivery of humanitarian supplies, that would, as observed in my last report, require United Nations troop to secure the surrounding hills from which the airport and its approaches can easily be shelled. This too would be a potential combat operation for which a considerable body of troops would be required, with appropriate armament."

Finally, the Secretary-General concluded that was the responsibility of the Security Council to decide whether to deploy UN troops of sufficient strength to provide armed protection of international humanitarian

303 Ibid., p. 515. para. 11.

304 Ibid., p. 515. para. 12.

305 Ibid., p. 515. para. 13.

306 Ibid., p. 515. para. 14.

307 Ibid., p. 516. para. 18.

assistance. Military action of this kind would be "extremely difficult and expensive."[308] It was necessary to take into account that coercive United Nations action against one of the parties to the conflict could impede co-operation with UNPROFOR in achieving its mandate in the United Nations protected area in Croatia.[309]

Using the presence of UNPROFOR as a reason for not fulfilling its obligations under the Charter began well before its deployment to Bosnia and Herzegovina. For the entire duration of the aggression against Bosnia and Herzegovina, the presence of UNPROFOR served as a means of deterring those Security Council members who were willing to fulfill its obligation under the Charter because of the concern that, if the Security Council used force against the aggressors, the United Nations Protection Force, would be jeopardized.

2.4. Security Council Measures under Chapter VII of the UN Charter – Resolution 757 of 30 May 1992

Resolution 757 of 30 May 1992[310] forestalled the Report of the Secretary-General,[311] which was aimed at diluting any Security Council action directed against the aggressors. Resolution 757, which introduced economic and diplomatic sanctions against Yugoslavia for aggression against Bosnia and Herzegovina, was adopted with thirteen votes in favor and two abstentions (China and Zimbabwe).

In this resolution, the Security Council reiterated its primary responsibility for the maintenance of international peace and security. The resolution was adopted pursuant to Chapter VII of the Charter, which implied the existence of a situation under Article 39 of the Charter. In the first part of the resolution, the Security Council expressed its regret that the requirements of Resolution

308 Ibid., p. 516. para. 21

309 Ibid., p. 516. para. 21.

310 Security Council Resolution 757 (1992) (S/RES/757, May 30, 1992).

311 "One hour after the May 30th vote for sanctions against Yugoslavia, the Security Council received a report in which the General Secretary noted that Serb militias under the command of Yugoslav Army General Ratko Mladic 'operate independently'. The report noted that these forces were not 'subordinate governments or authorities of Bosnia and Herzegovina. 'Western diplomats have criticized the report, saying that it was inaccurate and that its conclusions were based on specific cases that should not be interpreted generally. " War crimes in Bosnia and Herzegovina, Report of Amnesty International and Helsinki Watch from the beginning of the war in Bosnia until September 1993. Zagreb: Biblioteka Dokumenti. p. 120 & 121.

752 of 15 May 1992 had not been met, including:

- *that all parties and others concerned in Bosnia and Herzegovina stop the fighting immediately;*
- *that all forms of interfierence from outside Bosnia and Herzegovina cease immediately;*
- *that Bosnia and Herzegovina's neighbors take swift action to end all interference and respect the territorial integrity of Bosnia and Herzegovina;*
- *that action be taken as regards units of the Yugoslav People's Army (JNA) in Bosnia and Herzegoina, including the disbanding and disarming with weapons placed under effective international monitoring of any units that are neither withdrown nor placed under the autority of the Government of Bosnia and Herzegovina;*
- *that all irregular forces in Bosnia and Herzegovina be dibanded and disarmed."*

The Resolution also deplored the fact that its "call for the immediate cessation of forcible expulsions and attempts to change the ethnic composition of the population has not been heeded..."

These allegations by the Security Council established a factual description of the violations that constituted grounds for the imposition of international sanctions against the perpetrators of the violations. From this stylized description of the reasons for the introduction of sanctions and other measures, one can deduce that:

- There were battles between the parties and others concerned in Bosnia and Herzegovina;
- There were different forms of interference from outside Bosnia and Herzegovina;
- There was interference in the struggle by neighbors who did not respect the territorial integrity of Bosnia and Herzegovina
- The Yugoslav People's Army participated in the fighting, was armed, and had not withdrawn or placed its weapons under the supervision of the Government of Bosnia and Herzegovina;
- There were irregular forces in Bosnia and Herzegovina; and
- There were violent expulsions and attempts to change the ethnical structure of the population.

The description of the injuries that Security Council enumerated to establish the basis for its conduct in the situation was contained in the definition of aggression, as defined by Resolution 3314 of the UN General Assembly of Dec.

14, 1974.[312] As mentioned supra, Article 1 Paragraph 1, which defines aggression, reads:

"Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition."

It further states that the term "state" is used without prejudice to questions of recognition or to whether a State is a member of the United Nations.

Article 3 states that each of the following acts, regardless of a declaration of war, is an act of aggression:

(a) *"The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof,*

(b) *Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;*

(c) *The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;*

(d) *The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."*

Fighting and other forms of interference by the neighbors of Bosnia and Herzegovina directed against its territorial integrity, the use of units of the JNA and other irregular formations for the violent expulsion, and the attempts to change the ethnic structure of the population, as determined by the Security Council, represented acts of aggression, pursuant to the definition of aggression contained in Article 1 and the UN Resolution.

As those obliged by the Security Council Resolution had not met the pertinent requirements and the situation in Bosnia and Herzegovina and other parts of the former Yugoslavia continued to constitute a threat to international peace and security, the Security Council resolved the following. It:

1. *Condemns the failure of the authorities in the Federal Republic of Yugoslavia (Serbia and Montenegro), including the Yugoslav People's Army*

312 See UN General Assembly Resolution 3,314 of Dec. 14, 1974 (XXIX), Definition of Aggression, available at: http://jurist. law. pitt. edu/3314. htm. 10. 12. 2010.

(JNA), to take effective measures to fulfill the requirements of resolution 752 (1992);

2. *Demands that any elements of the Croatian Army still present in Bosnia and Herzegovina act in accordance with paragraph 4 of resolution 752 (1992) without further delay;*
3. *Decides that all States shall adopt the measures set out below, which shall apply until the Security Council decides that the authorities in the Federal Republic of Yugoslavia (Serbia and Montenegro), including the Yugoslav People's Army (JNA), have taken effective measures to fulfill the requirements of resolution 752 (1992);*
4. *Decides that all States shall prevent:*
    a. *The import into their territories of all commodities and products originating in the Federal Republic of Yugoslavia (Serbia and Montenegro) exported therefrom after the date of the present resolution;*
    b. *Any activities by their nationals or in their territories which would promote or are calculated to promote the export or trans-shipment of any commodities or products originating in the Federal Republic of Yugoslavia (Serbia and Montenegro); and any dealings by their nationals or their flag vessels or aircraft or in their territories in any commodities or products originating in the Federal Republic of Yugoslavia (Serbia and Montenegro) and exported therefrom after the date of the present resolution, including in particular any transfer of funds to the Federal Republic of Yugoslavia (Serbia and Montenegro) for the purposes of such activities or dealings;*
    c. *The sale or supply by their nationals or from their territories or using their flag vessels or aircraft of any commodities or products, whether or not originating in their territories, but not including supplies intended strictly for medical purposes and foodstuffs notified to the Committee established pursuant to resolution 724 (991), to any person or body in the Federal Republic of Yugoslavia (Serbia and Montenegro) or to any person or body for the purposes of any business carried on in or operated from the Federal Republic of Yugoslavia (Serbia and Montenegro), and any activities by their nationals or in their territories which promote or are calculated to promote such sale or supply of such commodities or products;*

5. *Decides that all States shall not make available to the authorities in the Federal Republic of Yugoslavia (Serbia and Montenegro) or to any commercial, industrial or public utility undertaking in the Federal Republic of Yugoslavia (Serbia and Montenegro), any funds or any other financial or economic resources and shall prevent their nationals and any persons within their territories from removing from their territories or otherwise making available to those authorities or to any such undertaking any such funds or resources and from remitting any other funds to persons or bodies within the Federal Republic of Yugoslavia (Serbia and Montenegro), except payments exclusively for strictly medical or humanitarian purposes and foodstuffs;*
6. *Decides that all States shall:*
    a. *Deny permission to any aircraft to take off from, land in or overfly their territory if it is destined to land in or had taken off from the territory of the Federal Republic of Yugoslavia (Serbia and Montenegro), unless the particular flight has been approved, for humanitarian or other purposes consistent with the relevant resolutions of the Council, by the Committee established by resolution 724 (1991);*
    b. *Prohibit, by their nationals or from their territory, the provision of engineering and maintenance servicing of aircraft registered in the Federal Republic of Yugoslavia (Serbia and Montenegro) or operated by or on behalf of entities in the Federal Republic of Yugoslavia (Serbia and Montenegro) or components for such aircraft, the certification of airworthiness for such aircraft, and the payment of new claims against existing insurance contracts and the provision of new direct insurance for such aircraft;*
7 *Decides that all States shall:*
    a. *Reduce the level of the staff at diplomatic missions and consular posts in the Federal Republic of Yugoslavia (Serbia and Montenegro);*
    b. *Take the necessary steps to prevent the participation in sporting events on their territory of persons or groups representing the Federal Republic of Yugoslavia (Serbia and Montenegro);*
    c. *Suspend scientific and technical cooperation and cultural exchanges and visits involving persons or groups officially sponsored by or representing the Federal Republic of Yugoslavia (Serbia and Montenegro).*

Resolution 757, passed pursuant to Chapter VII of the UN Charter, contained a variety of measures, authorized by Article 41 of the Charter, that not entail the use of armed force. It established a very severe set of economic and diplomatic sanctions. [313] The Sanctions applied to the Federal Republic of Yugoslavia until the Council decided that the authorities in the Federal Republic of Yugoslavia (Serbia and Montenegro), including the JNA, had affected the withdrawal of its armed forces and respected the territorial integrity of Bosnia and Herzegovina. This Resolution is proof that Serbia had committed aggression against the Republic of Bosnia and Herzegovina.

At the time of adoption of this Resolution, May 30, 1992, Bosnia and Herzegovina was already a member of the United Nations entitled to the benefits deriving from membership. The Security Council classiified the conflict as a conflict pursuant to Chapter VII of the Charter and took measures in order to realize its primary responsibility for maintaining international peace and security. Resolution 757 set out the measures aimed at the restoration of international peace and security that were violated by the acts that were a threat to peace, a breach of peace or acts of aggression. Only an act of aggression justifies the application of such strict economic and diplomatic sanctions pursuant to Article 41 of the Charter.

If these measures not entailing the use of armed force proved insufficient to stop the aggression against Bosnia and Herzegovina, the Security Council was obligated, at this stage of the aggression, to respond in ways consistent with its authority under the UN Charter and its primary responsibility for the maintenance of international peace and security.

If one compares the reactions of the Security Council to the aggression against Bosnia and Herzegovina and the aggression against Kuwait, the Security Council, in both cases, acted gradually, first imposing economic and diplomatic sanctions against the aggressor state.[314] In both cases, the sanctions proved insufficient to suppress the aggression. In both cases, the Security Council first, in Resolutions 660 (1990) and 752 (1992), respectively, condemned the invasions and demanded an immediate withdrawal and cessa-

313 ''The United States insisted on it to immediately impose comprehensive sanctions - including the oil embargo. Belgium, France and Britain gave the advantage of more gradually approach 'that would be harder measures, such as an embargo on oil, kept in reserve, while the Belgrade government was given the opportunity to stop the violence in Bosnia and Herzegovina. ' '' War crimes in Bosnia and Herzegovina, Report of Amnesty International and Helsinki Watch from the beginning of the war in B-H to September 1993. Zagreb (1993). p. 119 (fuss note omitted).

314 Resolution 661 (1990), issued under Chapter VII of the UN Charter, imposed mandatory economic sanctions against Iraq that were of a similar nature to the sanctions imposed on the FRY in Resolution 757.

tion of all forms of outside interference. In each case, the Council demanded that the aggressors take immediate action to end their interference and to respect the territorial integrity of the invaded country. Since none of the aggressors in either case had met the Security Council's previous requirements, it acted pursuant to chapter VII and Article 41 Charter to apply economic and diplomatic sanctions against the aggressors.

In the situation involving the aggression against Bosnia and Herzegovina, the Security Council was able to apply measures against the aggressor, unlike most other cases in which this is not done because of a veto by one of the permanent members. Since these sanctions proved to be insufficient and failed to lead to a cessation of aggression, the UN Charter required the Security Council to move to the next phase: the application of armed force under Article 42 of the Charter.

2.5. The lack of a second (armed) phase of Security Council action

Unlike in the example of Iraq, the Security Council did not, in the case of the Federal Republic of Yugoslavia, cross the threshold of economic and diplomatic sanctions and apply measures pursuant to Article 42 of the Charter. The armed forces used in 1995 in parts of Bosnia and Herzegovina were quite different in nature.

The causes of this are many. One of the causes relates to the view of the UN Secretary-General of the aggression against Bosnia and Herzegovina. Another was that the balance of power in the Security Council was very unfavorable for Bosnia and Herzegovina. In the escalation phase of the aggression against Bosnia and Herzegovina, only the United States, among the permanent Security Council members, supported a transition ti the use of military measures against the aggressor, the Federal Republic of Yugoslavia.

Three of the other permanent members of Security Council, France, Great Britain and Russia, explicitly opposed the use of armed force and were unwilling to go beyond imposing economic and diplomatic sanctions. China remained neutral throughout the entire duration of the crisis. Therefore, with regard to the use of force, as opposed to the Kuwait crisis that threatened the economic interests of not only the United States but also the other powers in the Security Council, the Security Council failed, in the end, to fulfill its role as guardian of international peace and security.

To report of the Secretary General of the UN to the Security Council of 30 May 1992[315]elucidates his position with regard to the aggression against Bosnia and Herzegovina, which downplayed the guilt of the aggressor in its actions against Bosnia and Herzegovina and obstructed, in this way, Security Council action against aggressor. As indicated *supra,* western diplomats negatively evaluated this report as inaccurate and contrary to information coming from other sources.

The Security Council took the unusual step of failing even mention the Report in the resolutions that followed it, The report was delivered to the Security Council one hour after it passed the Resolution on the introduction of sanctions. In the opinion of the Federal Republic of Yugoslavia, the report was "kept in a drawer" and published only after the passage of the Resolution of June 2, 1992. "If the report had been delivered promptly, probably sanctions would have been imposed against Croatia, and the situation may have been somewhat alleviated or Croatia may have withdrawn from the conflict."[316] The most damning part of the report was section 5, in which the Secretary-General stated, with regard to the decision of the Belgrade authorities on May 4th to withdraw the JNA from Bosnia and Herzegovina: "Most of them appear to have joined the army of the so-called 'Serbian Republic of Bosnia and Herzegovina'. Others have joined the Territorial Defence of Bosnia and Herzegovina, which is under the political control of the Presidency of that Republic."[317] The report dovetailed with the efforts of the Serbian authorities to evade sanctions.[318]

The next contested allegation was contained in point 9 of the Report, in which the Secretary-General sought to prove that Yugoslav Army General Ratko Mladic had hijacked political control of the JNA from Belgrade and was acting as an independent factor, which implied the conclusion that the Belgrade regime was not involved in the aggression against Bosnia and Herzegovina.[319]

315 War crimes in Bosnia and Herzegovina, Amnesty International's Report, p. 120 & 121.

316 Šušić, S. B. Ibid. p. 136.

317 Bethlehem, D. Weller, M. (ed.). (1997). p. 317, para. 5.

318 ''Serbian President Slobodan Milosevic sent a letter to American President George Bush and Russian President Boris Yeltsin urging the United States and Russia to put under their control "all forces involved" in the Bosnian war. He also urged the United Nations to delay the vote on sanctions and instead convene an international conference on Yugoslavia. See John M. Goshko, The Washington Post, May 31, 1992; War Crimes in Bosnia and Herzegovina, Amnesty International's Report..., p. 119.

319 This statement corresponded to a letter from the President of Yugoslavia, on May 30th, addressed to the Secretary General, in which, inter alia, he stated that Yugoslavia "has not a single soldier or armed formations outside its territory, it did not perform or perform any mobilization of the armed forces, that there are to its territory of 400 000 refugees, including

This section of the report stated as follows:

"While it is my hope that the shelling of the city will not be resumed, it is also clear that emergence of General Mladic and the forces under his command as independent actors apparently beyond the control of JNA greatly complicates the issue raised in paragraph 4 of Security Council Resolution 752 (1992)."[320]

If this conclusion of the Secretary General was accurate, then the imposition of sanctions against the FRY was unjustified.

As written, the report could only have had one goal, obstructing a vote for sanctions against the FR Yugoslavia for aggression. Point 10 of the Report referred to the presence of the Croatian army in Bosnia and Herzegovina:

"As regards the withdrawal of elements of the Croatian Army now in Bosnia and Herzegovina, information currently available in New York suggests that no such withdrawal has occurred."[321]

The position of the Secretary-General in the Report of 12 May 1992, in which he demanded the relocation of UNPROFOR away from Sarajevo, deserves attention. The Secretary General also repeatedly expressed the belief "that the Council attaches disproportionately great attention to the war and suffering in Bosnia, and that the moral condemnation is excessive." He contrasted the Security Council's attention to the disintegration of the former Yugoslavia with the the relatively insufficient attention paid by the international community to the crimes committed against victims outside of Europe, with the genocide in Rwanda being the most horrific example.[322]

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tens of thousands of Muslims who sought salvation from the brutality of civil war and all of which are appropriately concerned, it always sends a huge humanitarian aid to vulnerable populations in Bosnia and Herzegovina and undertake many other activities for a peaceful solution to the crisis. " Šušić, S. B. Ibid., p. 136.

320 Bethlehem, D. Weller, M. (ed.). (1997). p. 518, para 9.

321 Bethlehem, D. Weller, M. (ed.). (1997). p. 518, para. 10.

322 Report of the International Commission for the Balkans, p. 68. "In response to the cease-fire agreement that the EC achieved on July 17th, the Security Council authorized that the force of the United Nations place under control all heavy weapons in the area, which angered Secretary-General Boutros-Ghali. In a private letter dated July 20th, the Secretary General criticized the Security Council members for ignoring his objections and expanding the role of the UN forces in Bosnia and Herzegovina. In a Report of July 22d, the Secretary-General rejected the Security Council's plan with the EC to collect heavy weapons from the three warring parties in Bosnia and Herzegovina. He noted the difficulties posed by constant fighting, but his biggest criticisms were procedural. He was most upset by the fact that the Security Council approved the London Agreement without his knowledge. As a result of a dispute between the Secretary-General and the Security Council, efforts to disarm the warring parties in Bosnia and Herzegovina were suspended." War Crimes in Bosnia and Herzegovina, Amnesty International's Report, p. 128.

The United Kingdom[323] as a member of the European Community and the Security Council, from the very beginning of the aggression against Bosnia and Herzegovina, was opposed to the use of armed force against Serbia.[324] It tried to discourage all other states that had cited the need to use armed force to combat the aggression from doing so. The attitude of Great Britain was that "the conflict" had to be resolved through a negotiated solution.[325] This meant that the constitutional authorities of Bosnia and Herzegovina had to accept the results of ethnic cleansing and the changed ethnic structure of the national population.

On the other hand, Great Britain advocated respect for the Helsinki Final Act of 1975, which prohibits a change of borders by force. Therefore, the British position in this regard was favorable for Bosnia and Herzegovina, but unfavorable for the Bosniacs as a people. By accepting the results of aggression and genocide, Bosnia and Herzegovina would formally survive as a state but without the Bosniacs as its most numerous ethnic grup.

Evidence that this was the view of the United Kingdom was given by British Foreign Secretary Douglas Hurd at the London Conference in August 1992, when he said that "suffering in the former Yugoslavia is a direct result of blatant aggression."[326] But the ultimate lengths to which the UK was ready to go in punishing the aggressors were the economic and diplomatic sanctions contained in Resolution 757, regardless of whether they would achieve the goal of ending aggression.

Just as international economic sanctions had never previously succeeded in deterring an aggressor from continuing aggression, it was not realistic to expect that they would deter the Federal Republic of Yugoslavia. In the discussion that followed the adoption of these sanctions, the British representative David Hannay apologized: "My government does not quarrel with the people of Serbia. They were our allies in the war and we have cooperated with them in peace, and we have nothing except respect for them."[327] After these statements, it would have been difficult to expect Great Britain to be willing to take military measures to prevent aggression.

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323 Report of the International Commission for the Balkans, Unfinished Peace. (1997); Croatian Helsinki Committee for Human Rights Legal Center OSF BH. p 60-61.

324 See Almond, M. A Faraway Country... British Policy. U: Cohen, B. Stamkoski, G. (1995); United Nations Peacekeeping and the war in the former Yugoslavia, With no Peace to Keep, p. 125-133.

325 Ibid. ; See also Simms, B. (2001). Unfinest Hour, Britain and the Destruction of Bosnia. London: the Penguin Press.

326 Report of the International Commission for the Balkans, Ibid. p. 61.

327 Debate S/PV 3082, May 30, 1992. Bethlehem, D. Weller, M. (ed.). (1997), Ibid. p. 91.

Great Britain, against the wishes of the Government of Bosnia and Herzegovina which had asked the Security Council to rescind its embargo on weapons for Bosnia and to provide air support rather than soldiers, with the help of France and Russia, decisively influenced the decision to send UNPROFOR troops into Bosnia and Herzegovina[328]. The presence of UNPROFOR was later used as an excuse for not rescinding the arms embargo.

Serbia entered the crisis of Yugoslav disintegration with the aim of creating a "Greater Serbia" that included aggression against Bosnia and Herzegovina. It had already secured the favor of France.[329] The presence of France in the Security Council as a permanent member was a barrier to any decision to use armed force against the Federal Republic of Yugoslavia (Serbia). France and the United Kingdom pushed for negotiations to achieve solutions among the "three warring factions" with the Federal Republic of Yugoslavia and its surrogates maintaining control of 70% of the territory of Bosnia and Herzegovina, which had been "ethnically cleansed" of Bosniacs.

President Francois Mitterrand of France[330] supported the aggressor in the war in Bosnia and Herzegovina. Together with Great Britain, France used the presence of UNPROFOR on the ground as a means of preventing the use of armed force against the aggressor. President Mitterrand's arrival in besieged Sarajevo on June 28 1992 and his encounter at the airport with Radovan Karadzic is indicative. "His mission was successful insofar as it seemed that the world has shown that no reason for military intervention to enter into Bosnian chaos, reason and progress."[331] With the ascension of Jacques Shirac as the president of France, the French attitude became more balanced.

Because of long historical ties and religious closeness, *Russia*[332] was a powerful trump card for Serbia in the Security Council, ensuring that no armed response to its aggression would be forthcoming. Russian military officials stated that, if the Security Council used armed force against Serbia, Russia would aid Serbia.

328 The Independent, Aug. 10, 1992.

329 France's support of Serbia was a direct result of the meeting between Milosevic and Mitterand in September 1991. Jovic, B. (1996)"The last days of Yugoslavia. " Belgrade: Author. p. 384 - 385.

330 Report of the International Commission for the Balkans, Unfinished Peace. (1997); Croatian Helsinki Committee for Human Rights Legal Center OSF BH. P. 61-62.

331 Silber, L. Litl, A. Ibid. p. 283.

332 Report of the International Commission for the Balkans, UnfinishedPeace. (1997). Croatian Helsinki Committee for Human Rights Legal Center. p. 65-67.

Despite the clear position of the *United States*[333] that the Serbian leadership and the highest ranks of the JNA had planned the aggression, this unfavorable balance of power in the Security Council forced the Security Council to stop at halfway. Despite the fact that economic sanctions had failed to yield results and the aggression continued, military sanctions were not imposed.

By the time of the adoption of Resolution 713 of 25 September 1991, the United States had declared the aggression of Serbia and the JNA against Bosnia and Herzegovina. On the adoption of Resolution 757 of 30 May 1992, the American representative in the Security Council, *Edward Perkins,* said that the Serbian aggression against the government and armed forces of Bosnia and Herzegovina represented a clear threat to international peace and security and a violation of the values and principles enshrined in the Helsinki Final Act, the Paris Charter and the UN Charter. He characterized the imposed sanctions as an obviously positive development and expressed the expectation that they would distract the Serbian regime from further aggression and encourage it to change course."[Serbia] must reverse its brutal aggression. It must cease and desist from the campaign of terror it is conducting against the civilian population of Bosnia and Herzegovina and Croatia…. The Serbian regime and its armed surrogates must cease inflicting suffering on the civilian populations of those two States, creating a humanitarian crisis of nightmare proportions, and applying force to block international humanitarian relief to its victims."[334]

The difference in the approach to the aggression against Bosnia and Herzegovina between the United States and its European partners is obvious. The United States recognized the existence of large-scale humanitarian crisis and the application of force by the Yugoslav People's Army to prevent the delivery of international humanitarian aid to victims of aggression. At the same time, unlike its European partners, the United States had to deal with the causes of the humanitarian crises, which, in its view, was "the Serbian regime and its armed surrogates. " EU countries also knew not only the consequences but the causes of this humanitarian disaster, but took the position that it would only deal with the consequences and not causes. [335]

333 Ibid. 62-65.

334 Security Council Provisional Verbatim Record, Debate, S/PV 3082, 30. May1992. The "Yugoslav" Crisis..., p. 89. U: Bethlehem, D., Weller, M. (ed.). (1997), Ibid. p. 89.

335 The position of Western Europe, with respect to the aggression in Bosnia and Herzegovina, is best described as follows: "Almost from the beginning, Western Europe regarded the war as a humanitarian crisis. Western governments reacted to the war as if it were a flood or earthquake and dealt with the symptoms of conflict, without any real effort to come to grips with their causes. Mitterrand's visits and his comic encounter with a grateful and amiable

The Security Council's actions aimed at stopping the aggression against Bosnia and Herzegovina continued with the adoption of Security Council Resolution No. 757 of 30 May 1992. This Resolution contained, in clause 17, the request that "…all parties and others concerned create immediately the necessary conditions for unimpeded delivery of humanitarian supplies to Sarajevo and other destinations in Bosnia and Herzegovina, including the establishment of a security zone encompassing Sarajevo and airport and respecting the agreements signed in Geneva on 22 May 1992."

The agreement in Geneva on 22 May 1992, signed under the auspices of the International Committee of the Red Cross by "all sides in the conflict" contained the obligation to apply basic principles of humanitarian law.

In order to fulfill these obligations, the parties signed *the Areement on the reopening of Sarajevo airport for humanitarian purposes of 5 June 1992*. [336] The failure of this Agreement created another justification for the Security Council's use of armed force against the aggressor, but the Council nonetheless forwent another opportunity to fulfill its obligations under the Charter when this Agreement was violated.

The Agreement of 5 June was the first step in implementing the 17th point of Resolution 757. The signatories committed that:

1. *"The cease-fire declared for 6:00 p. m. on 1 June 1992 in and around Sarajevo is reaffirmed. The cease-fire will be monitored by UNPROFOR…*
2. *2. To provide physical guarantees that fire will not be brought to bear against the airport, flying aircraft, or aircraft on the ground, they agree that:*
    - *(a) All anti-aircraft weapons systems will be withdrawn from position from which they can engage the airport and its air approaches and be placed under UNPROFOR supervision;*
    - *(b) All artillery, mortar, ground-to-ground missile systems and tanks within range of the airport will be concentrated in areas by UNPROFOR and subject to UNPROFOR observation at the firing line."*

Through this Agreement, the parties agreed that they would in no way interfere with the free movement of UNPROFOR and the monitoring of air traffic in and out of the Sarajevo airport. This traffic referred, inter alia, to that of

Radovan Karadzic was a decisive moment. "Silber. L.Litl, A. Ibid. p. 283. & 284.

336 Agreement on the Reopening of Sarajevo Airport for Humanitarian Purposes, June 5, 1992, UN Doc. S/24075, Annex. Trifunovska, S. Ibid., p. 600 – 601; Report of the Secretary - General pursuant to Security Council Resolution 757 (1992), (S/24075, June 6, 1992). U: Bethlehem, D., Weller, M. (ed.). (1997), Ibid., p. 519.

the humanitarian mission, the UN mission, and the mission of the European Community.

Security Council Resolution 758 of 8 June 1992 noted the agreement on the reopening of the Sarajevo airport for humanitarian purposes under the exclusive jurisdiction of the United Nations and with the help of UNPROFOR, stating that it considered the agreement to be a first step in establishing a protected area that included Sarajevo and its airport. [337]Paragraph 10 required the Secretary General to inform the Security Council of the measures taken in this direction.

The Secretary General addressed the issue of the reopening of the Sarajevo airport in *the Report of 15 June 1992*.[338]

Paragraphs 27 - 31 described the activities undertaken in implementing Resolution 758. UNPROFOR Commander General Chenicheri Satish *Nambiar* appointed General *Lewis MacKenzie,* the new commander of Sector Sarajevo, as his "Chief of Staff" and, with an advance party that included United Nations military observers and reconnaissance elements drawn from the Canadian infantry battalion, sent him to the scene "to establish the cease-fire, start evaluating conditions at the airport and verify the withdrawal of anti-aircraft and heavy weaponry as provided for in the agreement of 5 June."[339] General Nambiar set a June 14th deadline for General MacKenzie's team to perform its assigned tasks and send a report.

The Serbian forces did not respect the cease-fire agreement, and UNPROFOR failed to take control of the airport and provide the city with humanitarian supplies. This caused the Security Council to issue an ultimatum to the Serbian forces in the form of *the Statement on behalf of the Secretary-General* published June 26th. The statement contained a demand that the Serbian troops stop fighting in Sarajevo and put heavy weapons under UN control. The Statement also contained a threat that, if the Serbian forces did not comply with the demand within 48 hours, the Security Council would meet again "to determine which other measures were needed to bring help to the suffering population of Sarajevo."[340]

337 Resolution 758 (1992). (S/RES/758, June 8, 1992).

338 Report of the Sacretary - General Pursuant to Paragraph 15 of Security Counil Resolution 757 (1992) and Paragraph 10 of Security Council Resolution 758 (1992), (S/24100, June 15, 1992). Bethlehem, D. Weller, M. (ed.). (1997), Ibid., p. 521-526.

339 Ibid., para. 29.

340 Lewis, P. "Serbs told to end Siege of Sarajevo or risk UN force" The New York Times, June 27, 1992. Report of the International Commission for the Balkans ..., p. 126.

In reality, however, neither compliance nor consequences for noncompliance occurred. On the day of the ultimatum deadline, June 28, 1992, the French President *Francois Mitterand* arrived unannounced in besieged Sarajevo. This unilateral action was planned in secret without any consultation with other members of the European Union and could only have had one goal: "obstructing" military action in response to the failure of from the Serbian forces to comply with the ultimatum. [341] After meeting with Mitterand, Serbian forces did not feel compelled to meet the requirements set by the Security Council; they did not put heavy weapons under UNPROFOR supervision and they were not punished. The Security Council also failed to enforce the part of point 17 of Resolution 757 that provided for the establishment of protected zones around Sarajevo and the Sarajevo airport.

Mitterand's visit was followed, the next day, by *Security Council Resolution No 761 of 29 June 1992,*[342] the *Statement of the Secretary General of the 29th of June 1992*[343] and the *Report to the Security Council of 29 June 1992.*[344] The Security Council resolution was a milestone in its work concerning the aggression against Bosnia and Herzegovina. In its introduction, the Resolution spoke of "progress," which, in reality, had not been made. This part of the Resolution read: "*Noting* the considerable progress reported by the Secretary-General towards securing the evacuation of Sarajevo airport and its reopening by UNPROFOR and feeling the need to maintain this favorable momentum." It "Authorize[d] the Secretary-General to deploy immediately additional elements of the United Nations Protection Forces (UNPROFOR) to ensure the security and functioning of Sarajevo airport and the delivery of humanitarian assistance in accordance with his report dated 6 June 1992" and compliance with the agreement of June 5, 1992.

In a letter to the Secretary General on July 1, 1992, the President of the Security Council stated that fighting continued in the area surrounding the Sarajevo airport and the nearby settlement of Dobrinja and: "In these circumstances, UNPROFOR cannot consider the airport to be secure, and it must be stated that the persistence of fighting close to the airport continues to endan-

341 Laughland, J. To Belive and to Dare. U: Cohen, B. Stamkoski, G. (1995); United Nations Peacekeeping and the War in the former Yugoslavia, With no Peace to Keep, p. 138.

342 Security Council Resolution 760 (1992) (S/RES/760 June 18, 1992). U: Bethlehem, D. Weller, M. (ed.). (1997), Ibid. p. 13.

343 See Letter from the Secretary - General to the President of the Security Council, July 1, 1992. (S/24222, July 2, 1992). U: Bethlehem, D. eller, M. (ed.). (1997), Ibid. p. 529.

344 See Further Report of the Secretery-General Pursant to Security Council Resolutions 757 (1992), 758 (1992) and 761 (19929, (S/24263, July 10, 1992). U: Bethlehem, D. Weller, M. (ed.). (1997), Ibid. p. 531, para. 3.

ger the safety of both personnel and aircraft."[345] The General Secretary, in his Report only three days later, denied this claim.[346]

The following report of the Secretary-General of 10 July 1992 confirmed that the provisions of the cease-fire agreement had not been fulfilled:

"Despite the endeavors of UNPROFOR's Sector Commander, Maj. Gen. Lewis Mac Kenzie, a cease-fire in and around Sarajevo has not been fully established at any time. Artillery, mortar, tank and small-arms exchanges, have taken place on each day since the United Nations flag was raised on 29 June and the airport was opened by the first flight carrying humanitarian aid"[347]

None of these reports, however, contained a clear statement of the fact that the Sarajevo airport had again closed on June 30th and that it had only opened for a single flight in an attempt by Serbian forces to fool the international community into believing otherwise. After that "the airport was closed on 30 June as artillery attacks intensified."[348]

Serbian forces had not made any significant steps towards fulfilling the agreement. They allowed the landing of the airplane with the French President to discuss what was, in fact, an abandonment of the Security Council ultimatum in exchange for the deployment of Canadian soldiers from UNPROFOR's units. While the West Division of the Canadian battalion was traveling from Croatia in order to assume control at the airport, however, it was intercepted and retained, which allowed the French unit to arrive first and take control of the airport in accordance with the offer of the French government.[349]

In this way, the drama ended with the opening of Sarajevo airport and the abandonment of the Security Council ultimatum to the Serbian aggressors. It

345 Letter from the Secretary - General to the President of the Security Co uncil, 1. juli 1992. (S/24222, 2. juli 1992), U: Bethlehem, D. Weller, M. (ed.). (1997) Ibid. p. 529.

346 According to the Secretary General, "significant progress" had been made, consisting of President Mitterrand's arrival in Sarajevo, as the following indicates:
"Following intensive work by UNPROFOR to establish the modalities of implementation of the agreement, and a visit to Sarajevo by President Mitterrand of France on 28 June, I further reported on 29 June to the Council, which adopted its Resolution 761 (1992) on that date."
Further report of the Secretary-General pursuant to Security Council Resolution 757 (1992), 758 (1992) and 761 (1992) (S/24263 July 10, 1992), Ibid. p. 531. Para. 3. (p. a.) **(describing the creation of** a distorted picture of the situation that General MacKenzie was in charge of on the ground) (n. a.).

347 Further report of the Secretery-General Pursant to Security Council Resolution 757 (1992), 758 (1992) and 761 (19929, (S/24263, 10 July 1992). U: Bethlehem, D. Weller, M. (ed.). (1997), Ibid. p. 631, para. 6.

348 Bethlehem, D. Weller, M. (ed.). (1997), Ibid. p. XXXVII.

349 Letter from the Secretary - General to the President of the Security Council, July 1, 1992. (S/24222, July 2, 1992), U: Bethlehem, D. Weller, M. (ed.). (1997). Ibid. p. 529-530.

was clear that the agreement had not been respected and that the terms of the ultimatum had not been met, but no one insisted on their fulfillment. The Serbian forces allowed only one flight, formally opening the airport briefly, then renewed their shelling around the airport, causing its re-closure. The other requirements listed in the ultimatum were not even mentioned. The Security Council no longer insisted on compliance with point 17 of Resolution 757, which mandated the establishment of protected areas that would have included the Sarajevo airport.

It is evident from the ultimatum and the events that followed that the international community was divided between two approaches to dealing with the issue of aggression against Bosnia and Herzegovina. One was that of the United States,[350] which advocated for the suppression of aggression, and the other was that of France and the UN Secretary General, who opposed armed intervention.

The aggression continued and, with it, the sanction against the Federal Republic of Yugoslavia. [351] The Security Council abandoned its previous efforts to use armed force against the aggressor and recommended "conflict resolution" through negotiations between aggressor and victim.

350 "Despite the introduction of sanctions, Serbian forces continued the shelling of Bosnia and Herzegovina, and humanitarian assistance could not be delivered. Suggestions regarding the use of force, particularly whether the international community should engage in offensive military operations against Serbian forces or armed protection of humanitarian convoys, were discussed. American authorities were divided on the use of force in Bosnia and Herzegovina. On the one hand, the Defense Department was strongly opposed to any direct military role of US forces, and the State Department was willing to use weapons only in defense of the humanitarian mission. On the other hand, members of the US Congress, and especially those in the Senate, were pressuring the Bush administration to consider military intervention to stop the Serbian offensive in Sarajevo. At the end of the Bush administration, it adopted the position that it was ready to send troops to Bosnia and Herzegovina, but only to help supply and monitor humanitarian assistance while the negotiations reached a permanent ceasefire. War crimes in Bosnia and Herzegovina, Amnesty International's Report, p.147.

351 The Security Council rescinded the sanctions imposed on the FRY by Resolution 757 of 30 May 1992 in Resolution No. 1022 (1995) of 22 November 1995 after the signing of the General Framework Agreement for Peace in Bosnia and Herzegovina.
Bosnia and Herzegovina, Essential text, 2d Revised and Updated Edition, OHR, January 1998, p. 285.

2.6. Subsequent acts of the Security Council to confirm the existence of aggression against the Republic of Bosnia and Herzegovina

The Security Council imposed economic and diplomatic sanctions, pursuant to Resolution 757 of UN, for the failure to fulfill the requirements set forth in Resolution 752. After these sanctions failed to lead to the cessation of Yugoslavia's aggression against Bosnia-Herzegovina, the Security Council imposed additional sanctions via resolutions 787 (1992), 820 (1993), 942 (1994), 943 (1994), 988 (1995), 992 (1995) and 1015 (1995).

Because the acts of the Federal Republic of Yugoslavia constituted the international crime of aggression, economic and diplomatic sanctions were introduced. At the conclusion of the peace agreement between Bosnia and Herzegovina and the Federal Republic of Yugoslavia, the sanctions were suspended. The suspension of economic and diplomatic sanctions came after the signing of the General Framework Agreement for Peace in Bosnia and Herzegovina, which prompted the UN Security Council, at its 3595th meeting held on November 22, 1995, to adopt Resolution 1022, which was dedicated to the complete suspension of economic and diplomatic sanctions against the FR Yugoslavia.

The Security Council did not abolish the sanctions, but rather suspended them under the threat that they would reimpose them if the FRY did not sign a peace agreement or if the commander of the international forces to be deployed in Bosnia and Herzegovina to assist with the implementation of the peace agreement determined that Yugoslav or Bosnian Serb forces were not fulfilling their obligations under the peace agreement.

Thus, the aggression against Bosnia and Herzegovina was the reason for the introduction of economic and diplomatic sanctions against the FR Yugoslavia and the conclusion of the peace agreements the reason for their suspension. The content of the sanctions imposed and the reason that they were suspended are *prima facie* evidence of the crime of aggression having been committed against Bosnia and Herzegovina.

Security Council Resolutions 776 (1992), 781 (1992), 786 (1992), 816 (1993) and 836 (1993) documented the aggression committed against Bosnia and Herzegovina through air strikes.

Resolution 776 (1992) highlighted the "…importance of air measures, such as the ban on military flights to which all parties to the London Conference committed themselves, whose rapid implementation could, inter alia, reinforce the security of humanitarian activities in Bosnia and Herzegovina."

Only *Resolution 781 of 9 October 1992* established a true ban on military flights over Bosnia and Herzegovina. The reason for the ban on military flights was the security needs of delivering humanitarian aid, which was supported by Resolution 770 (1992), which authorized the use of all necessary measures to accomplish the delivery of humanitarian aid."*Considering* that the establishment of a ban on military flights in the airspace of Bosnia and Herzegovina constitutes an essential element for the safety of the delivery of humanitarian assistance and decisive step for the cessation of hostilities in Bosnia and Herzegovina." The Security Council "Decide[d] to establish a ban on military flights in the airspace of Bosnia and Herzegovina, this ban not to apply to United Nations Protection Force flights or to other flights in support of United nations operations, including humanitarian assistance."

Since Serbian forces violated the ban on flights, *Resolution 786 of 10 November 1992* reinforced the ban on flights established in Resolution 781 and expressed the Security Council's serious concern over its violation, as confirmed in its *Report to the Secretary-General of 6 November*.

After the United Nations lost credibility with its failed ultimatum of June 26, 1992, the Yugoslav and then Croatian air forces could violate this prohibition without fear of consequence. The following resolution regarding the no-fly zone, confirming the previous one, was important only insofar as it confirms the existence of the aggression against Bosnia and Herzegovina.

In these circumstances, the Security Council issued new *Resolution 816 of 31 March 1993*, in response to the continued violation of the prohibition of military flights in the airspace of Bosnia and Herzegovina documented by the UN Secretary-General in his reports submitted to the Security Council. [352] The Reports of the Secretary-General contained an exact description of the injuries. The Security Council, in this resolution, stated that there had been a flagrant violation of the new ban on flights in the airspace of Bosnia and Herzegovina, as well as the bombing of villages in Bosnia and Herzegovina. As a result, acting pursuant to Chapter VII of the Charter, the Security Council decided to: "extend the ban established by resolution 781 (1992) to cover flights by all

352 Report of the Secretary - General pursuant to Security Council Resolutions (S/24783, S/24810, S/24840, S/24900); Letters from the Secretary - General to the President of the Security Council (S/25443, March 12, 1993 & S/25444, March 19, 1993); The Presidential Statement of March 17th included : "The Council strongly condemns all violations of its relevant resolution and underlines the fact that since the beginning of the monitoring operations in early November 1992, the United Nations has reported 465 violations of the no-fly zone over Bosnia and Herzegovina." Statement by the President of the Security Council, March 17, 1993. (S/25426, March 17, 1993). U: Bethlehem, D. Weller, M. (ed.). (1997) Ibid. p. 32.

fixed-wing and rotary-wing aircraft in the airspace of the Republic of Bosnia and Herzegovina…"

This Security Council resolution included a provision that implied the possibility of the use of armed force within the meaning of Article 42 of the Charter or the application of collective self-defense pursuant to Article 51 of the Charter. The Security Council:

"Authorize[d] Member States, seven days after the adoption of this resolution, acting nationally or through regional organization or arrangements, to take, under the authority of the Security Council and subject close coordination with the Secretary-General and UNPROFOR, all necessary measures in the airspace of the Republic of Bosnia and Herzegovina, in the event of further violations, to ensure compliance with ban of flights referred to in paragraph 1 above, and proportionate to the specific circumstances and nature of the flights."

This provision meant that aggressors could continue to bomb Bosnia and Herzegovina for another week without fear of sanctions and only then would the complicated procedures set in place to prevent violations of the ban, and only if interested countries or regional organizations were willing to to prevent violations of the ban by the use of "necessary measures."

In addition to Security Council Resolutions 752 and 757, numerous reports of the Secretary General of the UN, statements of the President of the Security Council and Resolutions 762 and 787 mention the presence of the JNA and "elements of the HV-e" in Bosnia.

For example, Resolution 787 adopted on November 16, 1992 contains an explicit request to the Federal Republic of Yugoslavia and the Republic of Croatia to stop their aggression against Bosnia and Herzegovina. With this resolution, the Security Council "Demand[ed] that all forms of interference from outside the Republic of Bosnia and Herzegovina, including infiltration into the country of irregular units and personnel, cease immediately, and reaffirms its determination to take measures against all parties and others concerned which fail to fulfill the requirements of resolution 752 (1992) and its other relevant resolutions, including the requirement that all forces, in particular elements of the Croatian army, be withdrawn, or be subject to the authority of the Government of the Republic of Bosnia and Herzegovina, or be disbanded or disarmed."

The presence of foreign armies on the territory of another state against its will cannot be anything other than aggression and occupation.

2.7. Treatment of the aggression against the Republic of Bosnia and Herzegovin as a humanitarian disaster

Security Council Resolution 752 of 15 May 1992 assigned to the Secretary General the task of actively considering the feasibility of the protection of international humanitarian aid programs, including the option of brokering an agreement between the interested parties to allow humanitarian supplies to be distributed without prevention or misuse. Compliance with any such agreement would be an obligation for all armed parties. United Nations military observers could supervise implementation of the agreement.

In accordance with the set deadline, the Secretary-General on May 26, 1992, submitted a *Report to the Security Council* stating that the condition of the civilians besieged and trapped in Sarajevo by the various irregular forces and in some cases also by the JNA was rapidly deteriorating.

It was necessary for all interested parties to agree to permit the opening of the airport for the purpose of delivering humanitarian aid by air. Since all of the other airports in Bosnia and Herzegovina remained crippled by the JNA, delivery through the Sarajevo airport was the only possibility.

The report indicated that the United Nations troops would need to secure the surrounding hills from which the airport and its approaches could be shelled in order to guarantee the security of the Sarajevo airport for the delivery of humanitarian aid.

Since Serbian and later Croatian forces prevented the delivery of humanitarian aid to the Bosnian population surrounded and trapped within the enclave and later the protected area, it was necessary to use UNPROFOR to support humanitarian operations.

These forces were established by UN Security Council *Resolution 743 of 21 February 1992,* which "Decide[d] to establish, under its authority, a United Nations Protection Force (UNPROFOR) in accordance with the above mentioned report and the United Nations peace-keeping plan and request the Secretary-General to take measures necessary to ensure its earliest possible deployment."

Although these forces were deployed in Croatia, their headquarters were in Sarajevo. The deployment plan for UNPROFOR, contained in the Report of the Secretary-General to the Security Council on April 2, 1992, provided for the full deployment of UNPROFOR by mid-May 1992. [353] The report itself in-

353 Annex I Implementation Plan for the Deployment of UNPROFOR, Report of the Secretary-General pursuant to Security Council Resolution 743 (1992) (S/23777, April 2, 1992).

cluded the announcement that UNPROFOR troops would not be deployed on time because of financial and transportation difficulties.

In *Resolution 749 of 7 April 1992,* the Security Council "Decide[d] to authorize the earliest possible full deployment of UNPROFOR". In *Resolution 758 of 8 June 1992,* the Security Council "Decide[d] to enlarge the mandate and strength of UNPROFOR… in accordance with the Secretary-General's report. "

On May 5th, Marrack Goulding, the Under-secretary of the UN for Peacekeeping Operations, visited the former Yugoslavia. In his May 12th report of his visit to the Secretary-General, he reccommend that the Security Council move the headquarters of UNPROFOR from Sarajevo because Sarajevo, after the Serbian artillery attack, was no longer safe. On May 17th, UNPROFOR headquarters moved from Sarajevo to Belgrade. [354]

UNPROFOR was actually deployed in Bosnia and Herzegovina on June 29, 1992 after the arrival of the Canadian UNPROFOR battalion at the Sarajevo airport in accordance with Resolution 761, which "Authorize[d] the Secretary-General to deploy immediately additional elements of the United Nations Protection Force (UNPROFOR) to ensure the security and functioning of Sarajevo airport and the delivery of humanitarian assistance in accordance with his reports dated 6 June 1992." The resolution required that all parties and others concerned cooperate fully with UNPROFOR and international humanitarian agencies and organizations and take all steps to ensure the security of their staff. In the absence of such cooperation, the Security Council did not exclude other measures to deliver humanitarian aid to Sarajevo and its surroundings. None of these resolutions achieved their purpose: to enable the smooth delivery of humanitarian aid.[355] In fact, UNPROFOR had no mandate to use force to achieve its task.

The use of force to protect humanitarian convoys was not authorized until *Resolution 770 of 12 August 1992*. This resolution was significant in that it reflected the new nature of engagement authorized by the Security Council in relation to the aggression against Bosnia and Herzegovina.

The resolution stressed the necessity of achieving a political settlement of the situation in Bosnia and Herzegovina through negotiations, which would

Bethlehem, D., Weller, M. (ed.). (1997), Ibid. p. 448.

354 Bethlehem, D. Weller, M. (ed.). (1997), Ibid. p. XXXV.

355 "Despite the 'valiant effort' of UNPROFOR staff and humanitarian organizations and most of the United Nations Office of the High Commissioner for Refugees (UNHCR), Sadako Ogata, the humanitarian mission did not achieve its goal. They stopped by the Bosnian Serbs, and to a lesser extent, the Bosnian Croats. " Report of the International Commission for the Balkans, Ibid., p. 69.

ultimately lead to the legalization of the results of aggression and ethnic cleansing. Furthermore, the resolution stated that the Security Council recognized "that the situation in Bosnia and Herzegovina constitute[d] a threat to international peace and security and the provision of humanitarian assistance to Bosnia and Herzegovina [wa]s an important element in the Council's effort to restore international peace and security in the area."

This resolution was significant in that it authorized the use of force to restrain the aggressors' attempts to prevent the delivery of humanitarian assistance to the victims. Therefore, it "Call[ed] upon States to take nationally or through regional agencies or arrangements all measures necessary to facilitate in co-ordination with the United Nations humanitarian organizations and others of humanitarian assistance to Sarajevo and wherever needed in other parts of Bosnia and Herzegovina."

The resolution also "Demand[ed] unimpeded and continuous access to all camps, prisons and detention centers be granted immediately to the International Committee of the Red Cross and other relevant humanitarian organizations and that all detainees therein receive human treatment, including adequate food, water, shelter and medical care."

Security Council Resolution No. 1026 of 30 November 1995 authorized extended the mandate of UNPROFOR in Bosnia and Herzegovina until January 30, 1996.[356]

2.8. UN Safe areas

The UN Security Council, during the war in Bosnia and Herzegovina, took the novel action of declaring some of the towns and their surroundings in Bosnia and Herzegovina as safe areas. International Law does not recognize the validity of proclaiming a particular area as protected or of protecting civilians in this way.

2.8.1. Geneva Convention and Additional Protocols

The Geneva Convention on the Protection of Civilian Persons in Time of War of 12 August 1949, as well as the Additional *Protocol to the Geneva Convention of 12 August 1949 on the Protection of Victims of War* (Protocol I), deal with the protection of civilian populations in times of war. In addition, the *Additional*

356 Resolution 1026 adopted by the Security Council at its 3601st meeting (S/RES/1026, November 30, 1995), Bosnian and Herzegovina, Essential texts..., p. 287.

Protocol to the Geneva Convention of 12 August 1949 on the Protection of Victims in Internal Armed Conflicts (Protocol II)[357] deals with the protection of civilian populations from the consequences of war.

The Second part of the *Geneva Convention on the Protection of Civilian Persons in Time of War of 12 August 1949* is entitled "*General protection of populations against certain consequences of war.*" Provisions in this part relate to the protection of whole populations of countries in conflict without any distinctions based, in particular, on race, nationality, religion or political affiliation, and are intended to alleviate the sufferings caused by war (Article 13). The Convention recognizes hospitals and safety zones and localities as well as neutral zones. Article 14 of this Convention defines *hospitals* and *safety zones and localities* in the following way:

"…*In time of peace, the High Contracting Parties and, after the outbreak of hostilities, the Parties thereto, may establish in their own territory and, if the need arises, in occupied areas, hospital and safety zones and localities so organized as to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven.*

Upon the outbreak and during the course of hostilities, the Parties concerned may conclude agreements on mutual recognition of the zones and localities they have created. They may for this purpose implement the provisions of the Draft Agreement annexed to-the present Convention, with such amendments as they may consider necessary.

The Protecting Powers and the International Committee of the Red Cross are invited to lend their good offices in order to facilitate the institution and recognition of these hospital and safety zones and localities".

This Convention, in its content, is quite similar to the *Geneva Convention on Protection of Wounded and Sick Persons of 12 August 1949* in expanding the rights guaranteed to civilian populations and the categories of vulnerable indivduals entitled to special protection: expecting mothers, mothers of children under seven, aged and sick persons. The establishment of these zones starts with and depends on the agreement of the conflicting countries after conflict starts. They are established on the territory of a Contracting Party or on occupied territory. The establishment of hospitals and safety zones and localities exclusively depends on the acceptance of the parties to the conflict.

357 "The innovations made in 1949 have been noticed. It has sought to persuade belligerents to use it not just for the protection of medical activities but for the protection also of all kinds of persons taking no active part in hostilities, and it has even sought to persuade potential belligerents to establish the location of such areas in advance of the hostilities which would make them necessary. " Geoffrey Best, War and Law Since 1945, Clarendon Press, 1994. p. 319.

The Convention also recognizes the establishment of *neutral zones,* stating as follows:

"Article 15

Any Party to the conflict may, either directly or through a neutral State or some humanitarian organization, propose to the adverse Party to establish, in the regions where fighting is taking place, neutralized zones intended to shelter from the effects of war the following persons, without distinction:

(a) Wounded and sick combatants or non-combatants;

(b) Civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character.

When the Parties concerned have agreed upon the geographical position, administration, food supply and supervision of the proposed neutralized zone, a written agreement shall be concluded and signed by the representatives of the Parties to the conflict. The agreement shall fix the beginning and the duration of the neutralization of the zone".

This Convention conditions the creation of hospitals and safety zones and localities on the written agreement of the Parties to the conflict.

The fourth part of the *Protocol Additional to Geneva Convention from 12 August 1949* governing the Protection of Victims of International Armed Conflicts (Protocol I), deals with the protection of civilian populations from the effects of hostilities. Article 51 stipulates that civilian populations and individual civilians shall enjoy general protection against the dangers arising from military operations. Civilian populations, as such, and individual civilians shall not be the object of attack. Acts or threats of violence whose primary purpose is to spread terror among the civilian population are prohibited. This protocol recognizes two categories of localities and zones under special protection. Article 59 defines *non-defended localities* in the following way:

"Article 59. -Non-defended localities

1. *It is prohibited for the Parties to the conflict to attack, by any means whatsoever, non-defended localities.*
2. *The appropriate authorities of a Party to the conflict may declare as a non-defended locality any inhabited place near or in a zone where armed forces are in contact, which is open for occupation by an adverse Party. Such a locality shall fulfill the following conditions:*
    (a) All combatants, as well as mobile weapons and mobile military equipment must have been evacuated;
    (b) No hostile use shall be made of fixed military installations or establishments;

(c) *No acts of hostility shall be committed by the authorities or by the population; and*

(d) *No activities in support of military operations shall be undertaken.*

3. *The presence, in this locality, of persons specially protected under the Conventions and this Protocol, and of police forces retained for the sole purpose of maintaining law and order, is not contrary to the conditions laid down in paragraph 2".*

A declaration of a non-defended locality must be addressed to the other Party, which has to confirm its receipt and treat such locality as a non-defended locality, if the declaration is true. Parties to the conflict can agree to declare a certain locality as non-defended, even if all of the conditions for its proclamation are not fulfilled.

Article 60 defines *Demilitarised zones* and stipulates:

"…1. It is prohibited for the Parties to the conflict to extend their military operations to zones on which they have conferred by agreement the status of demilitarized zone, if such extension is contrary to the terms of this agreement.

2. The agreement shall be an express agreement, may be concluded verbally or in writing, either directly or through a Protecting Power or any impartial humanitarian organization, and may consist of reciprocal and concordant declarations. The agreement may be concluded in peacetime, as well as after the outbreak of hostilities, and should define and describe, as precisely as possible, the limits of the demilitarized zone and, if necessary, lay down the methods of supervision...

6. If the fighting draws near to a demilitarized zone, and if the Parties to the conflict have so agreed, none of them may use the zone for purposes related to the conduct of military operations or unilaterally revoke its status."

The Additional Protocol to Geneva Convention of 12 August 1949 related to the Protection of Victims of Non-International Armed Conflicts (Protocol II) also establishes procedures for the protection of civilian populations. This protocol gives general protection to civilian populations against the dangers arising from military operations. It prohibits starvation of a population as a method of war, as well as forced movement of population. Civilians may not be compelled to leave their own territory for reasons connected with the conflict (Article 17 paragraph 2).

This Convention and Protocols do not recognize safety areas and the protection of civilian populations without an agreement between the Parties to the conflict.

2.8.2. Security Council Resolutions

The United Nations Security Council, whose primary purpose is the maintenance of international peace and security, was involved in the war in Bosnia and Herzegovina from the beginning. The activities of this body were directed towards preventing the escalation of disputes, alleviating their consequences by easing human suffering and striving for peaceful resolution through negotiations. "…*To this date, no issue in the history of the Security Council has engendered more resolutions and statements over a comparable period*."[358] Despite so many resolutions, it was not possible to reach a consensus within the Security Council on the concrete measures that should be undertaken to prevent a war. "*One of the proposals which emerged during this search for compromise within the Council was to establish 'security zones', 'safe havens' and 'protected areas' for the Bosniac population.*"[359] During the London Conference that was held on August 26-27, 1993, the President of the International Committee of the Red Cross proposed the creation of "*protected zones*" as one of a few possible options for resolving humanitarian crises in Bosnia and Herzegovina.[360]

The position of the United Nations Special Rapporteur on Human Rights in the Former Yugoslavia was contained in reports presented to the United Nations.[361]

The safe areas proposed in Bosnia and Herzegovina differed from the "*Safe Haven*" that was made for Kurds in Northern Iraq. "*The difference according to the International Law was that safe havens do not require consent of the parties in conflict and could be increased while safe zones are based on consent*."[362]

358 Report of the Secretary Pursuant to General Assembly Resolution 53/35 (1998), "Srebrenica Report," Nov. 15, 1999. Ibid. para. 41

359 Ibid, para. 45.

360 Ibid.

361 Ibid.para. 46. Some representatives of the United Nations were also supportive at this early stage. In his Report on the situation of human rights in the territory of the former Yugoslavia (E/CN. 4/1992/2-1/10), dated October 27, 1992, the United Nations Special Rapporteur on Human Rights in the Former Yugoslavia, Mr. Tadeusz Mazowiecki, concluded that "a large number of displaced persons would not have to seek refuge aboard if their security could be guaranteed and if they could be provided with both sufficient food supplies and adequate medical care. In this context the concept of security zones within the territory of Bosnia and Herzegovina should be actively pursued." (Ibid.para. 25(b)).

362 J. W. Honig – N. Both, Srebrenica hronika ratnog zločina, (Sarajevo, 1997), p. 130

The root of safe areas[363] was an invitation from the Security Council to the Secretary General to, in consultations with the United Nations High Commissioner for Refugees and other International humanitarian organizations, examine the possibility and need for establishing safety areas for humanitarian purposes, contained in Article 19 of Council Resolution 787 dated November 16, 1992.[364] The UNPROFOR Commander opposed the establishment of safe areas without an agreement between the parties to the conflict.[365]

Security Council Resolution 81,9 dated April 16, 1993,[366] by declaring Srebrenica as a safe area,[367]established the first safe area in Bosnia and Herze-

363 Report of the Secretary Pursuant to General Assembly Resolution 53/35 (1998), "Srebrenica Report," (Nov. 1999), p.15.
"47. Austria, which was then serving as a non-permanent member of the Security Council, was the first Member State to pursue actively the possibility of establishing safe areas in Bosnia and Herzegovina. In general, the permanent members of the Security Council were not supportive, and the first set of discussions on this issue led only to a carefully worded operative paragraph in resolution 787 (1992). 48. Almost immediately, a number of problems became apparent. First, if they were to function effectively, the safe areas would have to be established with the consent of the parties; Second, the concept advanced by the humanitarian agencies was of zones occupied entirely by civilians, open to all ethnic groups and free of any military activity. ... Third, whether or not the safe areas were demilitarised, UNPROFOR would likely have to protect them, Fourth, the establishment of safe areas implied that other areas would not be safe, and not protected, inviting Serb attacks on them "

364 "The Idea of establishing protected zones for the Muslim population in Bosnia was first drawn in winter of 1992 by Comelio Sammaruga, President of the International Committee of Red Cross in Geneva. Sammaruga suggested establishing "protected zones" pursuant to the agreement of all parties to the conflict in Bosnia. The concept of a safe zone was successfully implemented in north Iraq in order to protect Kurds from consequences of Gulf war in 1991. Success in Iraq, however, was dependant on a large number of conditions that were not applicable in Bosnia. First, the coalition defeated the Iraqi Army in Kuwait. The guarantees of protected zone therefore might not have been taken as impartial, nor did they require the consent of the Iraqi government. Second, the protected areas covered a relatively large and compact piece of land bordering with north Turkey. ..."J. W. Honig - N. Both, Ibid. pg. 125, 126.

365 Report of the Secretary... para. 51. "... Protecting the safe areas, in his view, was a job for a combat-capable, peace-enforcement operation"

366 Security Council Resolution 819 (1993) (S/RES/819, April 16, 1993).

367 "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-hour consultations before its adoption, a wide consensus was formed within the Security Council that something ought to be done in order to prevent Serbs from ethnically cleansing Srebrenica using brutal force. But, in decision-making, which was necessary due to the danger that the town might fall, the Council had agreed to create a protected zone but failed to specify which "zone" that was and how it could be protected. The Resolution masked but did not resolve any of the fundamental differences in opinion over the view of establishing protected zones. " J. W. Honig - N. Both, Ibid. p. 130.

govina. The Resolution expressed deep concern for the rapid deterioration of the situation in Srebrenica and in the surrounding areas, which was the result of constant, deliberate armed attacks and shelling of the innocent civilian population by Bosnian Serb paramilitary units. As a direct consequence of these brutal operations, civilians were displaced on a large scale, especially women, children and elderly persons. For these reasons, the Security Council "…*Demand[ed] that all parties and others concerned treat Srebrenica and its surroundings as a safe area which should be free from any armed attack or any other hostile act;"*

The way in which safe areas were established was a new way of protecting a civilian population. The establishment of safe areas was done by the Security Council Resolution and not by the parties of the conflict as foreseen by the relevant Geneva Convention and additional protocols. Also, as indicated by the rest of the Resolution text, the United Nations did not assume responsibility for protecting the safe area. The resolution carefully avoided imposing any obligation upon UNPROFOR forces in relation to protection of the safe area. [368] This way of establishing safe areas was truly novel. The Resolution demanded the immediate cessation of armed attacks by Bosnian Serbs, but left unanswered the question of what would happen if they did not comply with this demand. This Resolution and the others that followed did not answer that question.

The content of this Resolution did not reflect the proposal by the authorities in Srebrenica the Non-Alligned Caucus, to hand over the enclave in exchange for three conditions being met – namely, that they be permitted:

I. to transport wounded soldiers by air;

II. to evacuate civilians; and

III. to guarantee a safe passage for all military personnel to Tuzla by foot.[369]

With this Resolution, the Security Council asked the Secretary General, in light of observations of the humanitarian situation in the protected areas, to undertake immediate action by increasing the number of UNPROFOR troops in Srebrenica and its surroundings. The Security asked all parties and others

368 "56. The Security Council, although acting under Chapter VII of the Charter, has provided no resources nor mandate for UNPROFOR to impose its demands on the parties. Rather, it requested the Secretary-General, 'with a view to monitoring the humanitarian situation in the safe area, to take immediate steps to increase the presence of UNPROFOR in Srebrenica and its surroundings. "Report of the Secretary-General pursuant to General Assembly Resolution 53/35 (1998).

369 Report of the Secretary, paragraph 54.

concerned to fully and promptly cooperate with UNPROFOR[370]. This Resolution, like many others, condemned and rejected the deliberate actions of Bosnian Serbs to force the evacuation of the civilian population from Srebrenica and its surroundings, as well as from other parts of the Republic of Bosnia and Herzegovina, as part of its overall abhorrent campaign of "*ethnic cleansing*".

Since the "*parties to the conflict*" had not agreed on establishing this safe area, the Security Council that established it did not ensure its protection, and the UNPROFOR mandate authorized its forces only to observe but not to engage the aggressors, the Resolution functioned more as an expression of a moral position, the condemnation of the described events, than a true order of protection.

UNPROFOR Commanders on the ground took a different position in relation to the Security Council Resolution and tried to convince the commanders of the Bosniac forces that the needed to sign an agreement pursuant to which they would hand over their weapons to UNPROFOR and, in return, receive UNPROFOR protection, which led to the agreement of April 18, 1993 being signed in Sarajevo. [371] The parties to the conflict interpreted the agreement differently. The Bosniacs and UNPROFOR understood the agreement to relate only to the city of Srebrenica and not to the rural parts of the enclave. The Serbs interpreted the agreement to require disarmament of the entire enclave.

While the Security Council Resolution imposed an obligation on the Serbs, the Agreement imposed an obligation on the Bosniacs. UNPROFOR's actions were justified by the situation in the field. [372] The report of the Security Council Mission, whose members were sent to Srebrenica after the adoption of the Resolution, written after their return, proposed a resolution of the conflict between the demands of the Resolution and the situation on the ground with the proposal that "*Serb forces must withdraw to points from which they can not attack, harass or terrorize the town*. "[373] This report also contained a proposal for the gradual introduction of other measures at the disposal of the

370 "58. Following the adoption of resolution 819 (1993), and on the basis of consultations with members of the Council, the Secretariat informed the UNPROFOR Force Commander that, in its view, the resolution, calling as it did for the parties to take certain actions, created no military obligations for UNPROFOR to establish or protect such a safe area. " Report of the Secretary...

371 Ibid. paras. 59 & 60.

372 "In their report submitted shortly upon return to New York (S/25700), the members of the Security Council Mission wrote that 'the alternative could have been a massacre of 25,000 people. It definitely was an extraordinary emergency situation that had prompted UNPROFOR to act..." See Report of the Secretary... para. 63.

373 Ibid. para. 64.

Security Council in case the Serbs ignored the integrity of the safe areas, including the possibility of applying military measures, if necessary.

The situation on the ground led to the conclusion of a new agreement between Bosniac and Serb parties on May 8, 1993, which imposed obligations on both parties to the conflict. This agreement explicitly stated that Srebrenica was to be viewed as a demilitarized zone pursuant to Article 60 of the Additional Protocol to Geneva the Conventions dated August 12, 1949, entitled Protection of Victims of International Armed Conflicts.[374]

Resolution 824 increased the number of safe areas.[375]

"The Security Council …Deeply concerned at the continuing armed hostilities by Bosnian Serb paramilitary units against several towns in Bosnia and Herzegovina, and determined to ensure peace and stability throughout the county, most immediately in the towns of Sarajevo, Tuzla, Žepa, Goražde and Bihać, as well as Srebrenica, …. Declares that the capital city of the republic of Bosnia and Herzegovina, Sarajevo, and other such threatened areas, in particular the towns of Tuzla, Žepa, Goražde and Bihać, as well as Srebrenica, and their surroundings should be treated as safe areas by all the parties concerned and should be free from armed attacks and from any other hostile act;…"[376] The Resolution clearly defined the obligations of the United Nations with regard to the safe areas. They consisted of observation. The Security Council "Also declare[d] that in these areas the following should be observed:

(a) The immediate cessation of armed attacks or any hostile act against these safe areas, and the withdrawal of all Bosnian Serb military or paramilitary units from these towns to a distance wherefrom they cease to constitute a menace to their security and that of their inhabitants, to be monitored by United Nations military observers;

(b) Full respect by all parties of the rights of the United Nations Protection Force and the international humanitarian agencies to free and unimpeded access to all safe areas in Bosnia and Herzegovina and full respect for the safety of the personnel engaged in these operations…"

This Resolution authorized the Secretary General to strengthen UNPROFOR with a sufficient number of observers.

374 Ibid. para. 65.

375 Security Council Resolution 824 (1993), (S/RES/824 May 6, 1993).

376 Security Council Resolution 824 (1993) (S/RES/824, May 6, 1993).

The Security Council was aware that Serb forces did not respect its authority and knew that they would not comply with its decisions unless they were enforced through the use of force. Even a serious threat had no effect, because the Serbs were convinced that their actions were rhetoric without a readiness to use force. Therefore, it was unrealistic to expect that they would respect the safe areas established by the Security Council. Bringing new witnesses, record-keepers to register violations of the Resolution was unnecessary because the Security Council already had enough information about the situation in these areas and the behavior of the Serb forces. These resolutions, however, called for precisely that.[377]

Security Council Resolution number 836[378] introduced some new policies and contained the most explicit call to date for authorization of the use of armed force pursuant to Chapter VII of the UN Charter. With this Resolution, the Security Council expanded the UNPROFOR mandate,

"*…in order to enable it, in the safe areas referred to in resolution 824 (1993), to deter attacks against the safe areas, to monitor the cease – fire, to promote the withdrawal of military or paramilitary unites other than those of the Government of the Republic Bosnia and Herzegovina and to occupy some key points on the ground, in addition to participating in the delivery of humanitarian relief to the population as provided for in resolution 776 (1992*)."[379]

Paragraph 8 of the Resolution invited member states to put at the United Nations' disposal their forces and logistical support to assist with implementation of the provisions on safe areas, while paragraph 9 authorized UNPROFOR, while implementing the mandate defined by paragraph 5, to act in self-defense and undertake necessary measures, including the use of force, in response to the shelling of or armed attacks against safe areas by any of

377 "68. As with resolution 819 (1993), all of the Council's demands in resolution 824 (1993) were directed at the Serbs. UNPROFOR, as before, stated that it could not implement the resolution unless there were an agreement between the parties or unless it was given the resource to enforce it in the face of Serb opposition. References to enforcement measures, had not been included in the text of resolution 824 (1993). Instead, the Council authorized the Secretary-General to strengthen UNPROFOR with 50 additional unarmed United Nations military observers…" Report of the Secretary Pursuant to General Assembly Resolution 53/35 (1998), "Srebrenica Report," Nov. 15, 1999.

378 Security Council Resolution 836 (1993) (S/RES/836, June 4, 1993), Ibid. p. 43.

379 "Non-Allied countries wanted UNPROFOR to "defend" the protected zones, while five nations that had deployed troops as part of the joint operation insisted on the term "deter". As a concession to the Non-Allied countries, a sentence was added allowing Bosnian Government troops to remain within the protected zones. By allowing Bosnian troops to stay, the Security Council of UN symbolically took the side of the Bosnian Government, although paragraph 9 complicated this position. "J W. Honig - N. Both (1997), Cronicle of war crimes. Sarajevo, p. 141.

the forces or intentional obstruction of the movements of UNPROFOR or protected humanitarian convoys in or around these areas.

The Resolution reflected the complex nature of the Security Council's decisions. Paragraph 5 foresaw the expansion of the UNPROFOR mandate to include "*deterring*" attacks against the protected areas. Paragraph 9 limited the use of force to self-defense as a response to shelling of a safe area by any side. [380]

Paragraph 10 of the Resolution contained the decision authorizing member states, acting independently or through regional organizations or agreements, to undertake, in close cooperation with Secretary General and UNPROFOR, all necessary measures, including through the use of air force in and around the safe areas in the Republic Bosnia and Herzegovina, in order to support UNPROFOR in its implementation of the mandate contained in paragraphs 5 and 9.

The Resolution invited the Secretary General to submit a report on its implementation to the Security Council.

The Secretary General, in his Report dated June 14, 1993[381], analyzed Resolution 836 and expressed his position in relation to the obligations of the United Nations as follows:

"*(a) Deterrence of attacks; (b) Monitoring of the cease-fire; (c) Promotion of the withdrawal of military or paramilitary unites other than those of the Government of Bosnia and Herzegovina; (d) Occupation of key points; (e) Protection of humanitarian relief delivery and distribution.*"[382]

The task analysis of Secretary General and the Resolution itself make clear that the United Nations had taken on the obligation of protecting the safe areas in Bosnia and Herzegovina. Therefore, the Resolution authorized strengthening UNPROFOR so that it would be capable of completing its assigned tasks. The way that the Security Council outlined the tasks of protecting the safe areas, as well as the way that the Secretary General perceived its actions, indicates that United Nations had taken over responsibility for the protection of the safe areas.

380 "... 79. It is essential to note that the resolution explicitly showed their use of the words 'protect' or 'defend', and asked UNPROFOR only 'to occupy some key points on the ground', and linked the use of force to the phrase 'acting in self-defence". See Report of the Secretary Pursuant to General Assembly Resolution 53/35 (1998), "Srebrenica Report," Nov. 15, 1999.

381 Report of the Secretary – General Pursuant to Security Council Resolution 836 (1993) (S/25939, June 14, 1993).

382 Report of the Secretary – General pursuant to Security Council Resolution 836 (1993) (S/25939, June 14, 1993).

In order to achieve the tasks assigned to him, the Secretary General determined that there ultimately needed to be 34,000 UNPROFOR soldiers, but that it was possible to start the implementation of the Resolution with an additional 7,600 soldiers by using the threat of air actions in the case of safe area violations. Answering the question of the UN Secretary General, the NATO Secretary General, in a letter dated June 11, 1993, confirmed his readiness "to offer '*protective air power in case of attack against UNPROFOR in the performance of its overall mandate, if he so requests.* '" The Secretary General kept for himself "*…the first decision to initiate the use of air recourses... in consultation with the members of the Security Council*."[383]

Members of the Security Council interpreted the content of and their obligations under the resolution differently, which enabled the Serbs to continue with attacks against safe areas.

"93. *Following the adoption of Security Council resolution 836 (1993), the Serbs continued to bombard the safe areas at about the same rate as before. In Sarajevo, for example, Serb shell continued to land in the safe area at an average rate of approximately 1,000 per day, usually into civilian-inhabited areas, often in ways calculated to maximize civilian casualties, sometimes at random, and only occasionally for identifiably military purposes.* "[384]

The Security Council, through Resolution 844 on June 18 1993, accepted the Secretary General's report and expressed its determination to fully implement Resolution 836. Paragraph 10 of the Resolution confirmed the authorization for the use of air force in and around the safe areas in order to support UNPROFOR in the performance of its mandate and "*…encourage[d] Members States, acting nationally or through regional organizations or arrangements, to coordinate closely with the Secretary-General in this regard*;"[385]

The same Resolution called on "*Member States to contribute forces including logistic support and equipment, to facilitate the implementation of the provisions regarding the safe area*."[386]

Neither this nor any previous resolutions of the Security Council stopped the attacks against the safe areas. In his Report on December 1, 1994, the Sec-

383 Ibid.

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

385 Security Council Resolution 844 (1993) (S/RES 844, June 18, 1993).

386 "However, at the time when Resolution 844 was adopted, unfortunately, it was clear that engaging 7,600 soldiers would not be possible. Many nations refused to contribute troops to the international forces led by the Spanish general. The French clearly stated that they wanted to deploy their troops in B-Hac and Sarajevo "for their safety" and that they would not take over a third protected zone. " J. W. Honig - N. Both, Ibid., p. 143.

retary General, analyzing the situation in the safe areas, concluded that the attack by Serb forces of the safe zone in Bihac had been provoked by an attack by Government forces from the enclave. Furthermore, he stated that Government military forces were present in all of the safe areas except for Srebrenica and Zepa. In order to achieve the purpose of the safe areas, he proposed changes to the regime of safe areas as follows:

a) "*Delineation of the safe areas;*

b) Demilitarisation of the safe areas and cessation of hostilities and provocative actions in and around the safe areas;

c) Interim measures towards complete demilitarisation;

d) Complete freedom of movement. "[387]

In this way, the United Nations legally shaped the term safe area.

The reports of the UN Secretary General that followed, up until the fall of the safe area of Srebrenica, showed that the situation in the safe areas was insecure, with the constant danger of takeover by Serb forces. The lack of consensus within the Security Council and the "Contact Group" prevented efficient action to prevent attacks and protect the enclaves. The fall of the safe area of Srebrenica showed all of the weaknesses of the ephemeral concept of safe areas. Instead of acting pursuant to the clear authority granted by the UN Charter and using clearly defined ways of protecting the civilian population under International Law, segments within the United Nations chose vague surrogates, which led to a tragic outcome. [388]

387 Report of the Secretary Pursuant to General Assembly Resolution 53/35 (1998), "Srebrenica Report," Nov. 15, 1999, arts. 171 & 172. The Secretary – General's Report of 1December 1, 1994 (S/1994/1389) contained following:
"... The lessons described above create a need to reconsider the safe area concept... Moreover, as explained above, the use of force and, in particular, air power to protect the safe areas cannot be effective if it becomes a destabilizing factor and impedes the primary humanitarian mission of UNPROFOR... The use of force beyond a certain point would exacerbate the conditions of the civilian population... nevertheless, it is important for the international community to remain committed to a safe areas regime even without an agreement by the parties and to continue to demand compliance with the relevant decisions by the Security Council. UNPROFOR recognises that the protection of the population of the safe areas cannot depend exclusively on the agreement of the parties."

388 "The fall of Srebrenica was shocking in part because the enclave's inhabitants believed that the authority of the United Nations Security Council, the presence of UNPROFOR peacekeepers, and the might of NATO air power would ensure their safety. Instead, the Serb forces ignored the Security Council; pushed aside the UNPROFOR troops, and assessed correctly that air power would not be used to stop them. They overran the safe area of Srebrenica with ease, and then proceeded to depopulate the territory within 48 hours. Their leaders then engaged in high-level negotiations with representatives of the international community while their forces on the ground executed and buried thousands of men and

2.8.3. Conclusion

The definition of a safe area, in the context of the war in Bosnia and Herzegovina, was an area in a conflict zone or its immediate vicinity, which the Security Council by Resolution proclaimed as such without the consent of parties to the conflict and in which United Nation forces were deployed with the mandate to utilize all necessary means and measures to deter attacks against it. Since the United Nations forces were deployed within safe areas that they controlled at key locations, an attack against a safe area was also an attack against the United Nations forces, and, as a result, they were obliged to defend themselves and, by defending themselves, defend the safe area from attack, as well.

This legal nature of the safe areas emerges from the relevant Security Council Resolutions described *supra*.

The fact that, in July 1995, the Serbs began the "final resolution" of the issue of the UN safe areas in east Bosnia does not change the legal nature of the safe areas. The hand over of the safe areas was the result of the unpreparedness of the Security Council and its member states to execute their obligations as laid out in Security Council resolutions, not flaws in the Resolutions themselves, because it was clear to the Security Council and the Secretary General what the resolutions meant and what obligations they were supposed to impose. the problem was the discrepancy between their proclamations and the actual readiness of the responsible parties to execute them. The war in Bosnia and Herzegovina is full of such examples.

The criminal activities of individual UN officials engaged in Bosnia and Herzegovina, as described by Srebrenica witnesses in an internal UN report on Srebrenica, may also have played a role in the handing over of the safe areas.[389]

boys within a matter of days." Report of the Secretary-General Pursuant to General Assembly Resolution 53/35 (1998), "Srebrenica Report," Nov. 15, 1999, para. 468.

389 "With the fall of these two zones, i. e. their hand over by UN forces into the hands of the aggressors despite their obligation to protect them, the UN Mission in B-H no longer made any sense. It was a complete legal and moral debacle for the World community, which confirmed that the UNPROFOR mandate favored the aggressor. The Mission's so-called peacekeeping took on an absurd dimension, with the protective forces (UNPROFOR) needing protection, which was the reason why operational forces were rapidly formed. "Kasim I. Begić, Ibid., p. 266. ; The ICTY may indict the UN commander, General Bernard Janvier of France, Colonel Thomas Karremans, the Commander of the Dutchbat III battalion in Srebrenica at the time of the massacre, the brigade commander, General Kees Nicolai, and Japanese UN diplomat Yasushi Akashi based on a secret part of the UN Report on Srebrenica. Slobodna Bosna, No. 161 Dec. 16, 1999, p. 5 - 6.

2.9. The legal nature of the armed action of the UN in the Republic of Bosnia and Herzegovina

During the end of August and beginning of September 1995, the NATO alliance, under the auspices of the UN, engaged in air strikes against the Bosnian Serbs,[390] giving rise to the question of the legal nature of that use of armed force. The question presents two problems. The first concerns the legal basis for the use of force, and the second concerns the goals that the UN forces were trying to achieve through armed action.

As discussed *supra,* during the aggression against Bosnia and Herzegovina three Security Council resolutions authorized the possible use of armed force if neccessary to achieve their objectives.

Resolution 770 of 12 August 1992 related to the delivery of humanitarian assistance. It called on Member States of the United Nations acting individually or through regional agencies or arrangements in cooperation with the United Nations, to take all necessary measures to provide humanitarian aid through the relevant United Nations humanitarian organizations and others, in Sarajevo and other areas of Bosnia and Herzegovina, in which it was needed. The obligation of the States to cooperate with the United Nations or with the Secretary in practice has led to a reinterpretation of the contents of the Resolution.[391]

Resolution 816 of 31 March 1993, which related to the ban on military flights in the airspace of Bosnia and Herzegovina, authorized member States, seven days after its adoption, acting individually or through regional organizations or arrangements, to take all necessary measures, in the event of further violations of the no-fy zone, subject to close coordination with the Secretary-General and UNPROFOR, to ensure compliance with the flight ban under resolutions 781 and 786.

Resolution 836 of 5 June 1993 related to the protection of safe areas and authorized UNPROFOR to carrying out its mandate and to take measures that were necessary in self-defnse, including the use of force in response to the

390 "Early in the morning of August 29th, NATO aircraft began more action, as announced at the headquarters in Brussels, after theUnited Nations concluded that the brutal mortar attack on Sarajevo on Monday without a doubt had come from Serbian positions. (Reuters, Aug. 30). "Begic, K., Ibid, p. 270.

391 The UN Secretariat has its own identity and interests. The Security Council in Croatia and Bosnia and Herzegovina delivered impracticable, unenforceable and ambiguous mandates. The UN Secretariat is seamlessly 'redefined' mandates to reduce the riskof implementation. The forces that have shaped the Security Council mandates, and were acquainted... "Report of the International Commission for the Balkans, Ibid. 75.

shelling of safe areas by any party. It also authorized Member States, acting individually or through regional organizations or arrangements, to take, under the authority of the Security Council and subject to close cooperation with the Secretary General and UNPROFOR, all necessary measures, including the use of air power, in and around the safe areas in the Republic of Bosnia and Herzegovina to support UNPROFOR in the performance of its mandate.[392]

In order for force to be used pursuant to all of these resolutions, two conditions had to be fulfilled. The first was that a country, either acting individually or through a regional arrangement or organization, was willing to use armed force to promote one or more of the goals established in these resolutions, and the second was that the Secretary-General had to be willing to request or approve the use of force. Since NATO, as a regional organization, expressed its willingness to act militarily in any of these cases if such was asked of it, the responsibility for the failure to act rests with the Secretary General of the UN.[393]

When NATO acted in the military operation called "*Deliberate Force,*" the legal basis for its action was Resolution 836, and its justification was the Serb shelling of Sarajevo beginning on August 28, 1995 that killed 37 and wounded approximately 90 civilians. Resolution 836 was adopted in 1993, and its adoption, provided more reasons of at least equal weight for military intervention under the auspices of the United Nations.

By the time that the UN authorized intervention, the international community had agreed on the most important elements of the future constitutional structure of Bosnia and Herzegovina, most importantly the territorial ratio between the future entities and the right of each entity to have special parallel relationships with the neighboring countries that had attacked Bosnia and Herzegovina. [394] All other issues were less important and could be left to the negoti-

392 "The gap between rhetoric and actual readiness of the leading international force to back their words with deeds, had a devastating and shameful consequences. In the history of the Bosnian crisis the disparity between of the proclaimed decision of the Security Council and the willingness of their members and the Secretariat to implement them could not be justified. " Report of the International Commission for the Balkans, Ibid. p. 74.

393 "The Secretary-General of the UN, Boutros Boutros-Ghali, was right when he said that serious disasters in other parts of the world, particularly in Somalia, also required the immediate attention of the Security Council. But the failures of the institution in other parts of the world are not a justification for its failure in the former Yugoslavia. Mr. Boutros-Ghali, the Secretary-General, should discourage any action anywhere in the world that would lead to a reduction of violence against human rights." War Crimes in Bosnia and Herzegovina, Report... p. 131.

394 At the same time, the strategic orientation of the European power centers were redefined, as can be seen in the attitude of the new French President Jacque Shirac in his statement on July 23, 1995: "The Serbs must understand that we will not give in - even in terms of survival of Bosnia. " Begić, K. I., Ibid., p. 267 - 268.

ations between the parties. Since the Bosnian Serbs opposed any solution short of a partition of the so-called Serb Republic, their goal was stalling.[395]

Resolution 942 of 22 September1994 authorized the use of force to end the war in Bosnia and Herzegovina. [396] In its introduction, the Security Council confirmed its commitment to resolving the dispute through negotiation within the framework of the Peace Conference on the Former Yugoslavia and preserving the territorial integrity of all states within their internationally recognized borders. It also described, in particular, the efforts of the representatives of the UN, the European Union, the United States and the Russian Federation in assisting the parties to come up with a solution to the conflict. It also confirmed the necessity of finding long term solutions to disputes to which all of the Bosnian parties could agree and adhere in good faith, condemning the decision of the Bosnian Serbs to reject the proposed territorial solution. (S/1994/1081).

With this resolution, the Security Council, acting pursuant to Chapter VII of the UN Charter:

"A 1. Expresse[d] its approval of the proposed territorial settlement for the Republic of Bosnia and Herzegovina which has been put to the Bosnian parties as part of an overall peace settlement;

2. Expresse[d] its satisfaction that the proposed territorial settlement has now been accepted in full by all except the Bosnian Serb party;

3. Strongly condemn[ed] the Bosnian Serb party for their refusal to accept the proposed territorial settlement, and demands that that party accept this settlement unconditionally and in full;

5. Declare[d] its readiness to take all measures necessary to assist the parties to give effect to the proposed settlement once it has been accepted by all parties, and in this connection encourages States, acting nationally or through

395 "Since the United Nations, under the influence of certain major powers, were not prepared for the Serbian invasion of Bosnia, they treated it in the same way as the Iraqi aggression; it was necessary to create a legal basis for armed intervention to, above all, stop the war. Thus, the UN Security Council, through its resolution 942 of 1994, established the plan for the division of Bosnia, which was mandatory for all 'sides' of that state. In this way, the 'internationalization' of the territory of the Republic of Bosnia and Herzegovina became a legal basis for applying the sanctions provided for in Chapter VII of the UN Charter against 'the Bosnian Serbs. ' This was finally accomplished in late August and early September 1995, which ended the armed conflict in this region, and thus the continuation of massive violations of human rights and freedoms."Sadiković, Ć. Human rights..., p. 54.

396 Security Council Resolution 942 (1994) (S/RES/942, Sept. 22, 1994), UN Security Council Resolutions Concerning Bosnia and Herzegovina, Press Centar AR B-H, Sarajevo, 1995, p. 104 –106.

regional agencies or arrangements, to cooperate in an effective manner with the Secretary-General in his efforts to aid the parties to implement the proposed settlement;

B… Resolve[d] to reinforce and extend the measures imposed by its previous resolutions with regard to those areas of the Republic of Bosnia and Herzegovina under the control of Bosnian Serb forces,

6. Call[ed] upon States to desist from any political talks with the leadership of the Bosnian Serb party as long as that party has not accepted the proposed settlement in full."

After the request of the Bosnian Serbs to have the same capabilities, under the agreement, of special parallel relations with Yugoslavia as the Federation of Bosnia and Herzegovina and Croatia was accepted, the conditions were ripe to resolve the rest of the outstanding issues in the negotiations. Preventing the Bosnian Serbs, who had opposed the proposed resolution and shelled Sarajevo, from being rewarded for participating in aggression and genocide, was the justification and Resolution 836 was the legal basis for the use of force.

The question arises of the legal nature of the use of force by the UN against the Bosnian Serbs and whether it was humanitarian intervention or an armed intervention in order to impose peace.

This use of force by the UN cannot be regarded as humanitarian intervention, unless the notion of humanitarian intervention includes the actions of the UN aimed at the prevention of genocide against some ethnic groups in one country. In Bosnia and Herzegovina, the genocide against the Bosniacs intensified immediately before the armed action of NATO (in Srebrenica and Zepa), and the armed intervention ended the genocide.

The Bosnian Serbs did not abuse their state sovereignty in Bosnia and Herzegovina because they had no state sovereignty. Instead, they tried to gain effective control over territory and to remove its population. The Bosnian Serbs were only an instrument of the Federal Republic of Yugoslavia in its aggression against Bosnia and Herzegovina. Because of the circumstances, the actions of the UN in Bosnia and Herzegovina cannot be regarded as humanitarian intervention, but instead as the application of force to impose peace. As the use of force by NATO had the desired effect of ending aggression in Bosnia, it can rightly be said that it was an armed intervention in order to impose peace.

2.10. The ICTY

2.10.1. Introduction

The Security Council established the ICTY as a subsidiary organ with the aim of contributing to the restoration and maintenance of international peace and security by punishing the individual perpetrators accountable for criminal acts, proscribed in the Statute of the Court, that they committed.

The concept of individual punishment of persons responsible for initiating and conducting a war of aggression was embodied in the peace treaties concluded after the end of World War I, and its full realization occurred after the Second World War in the practice of the International Military Tribunal at Nuremberg and the International Military Tribunal in Tokyo.

The Statute of the International Military Tribunal in Nuremberg contained certain principles that are considered to be the principles of international criminal law. "These principles consist of the following: a) the leaders, organizers, instigators and accomplices participating in the preparation or execution of a common plan or conspiracy to commit criminal acts, are responsible for all acts performed in carrying out that plan or conspiracy no matter from which persons; b) the official positions of the perpetrator, whether as Head of State or responsible authority in the administration, will not be considered as a reason for exemption from responsibility or mitigating punishment; c) the fact that the perpetrator worked on the orders of his government or superior is not a basis for release of liability, but can be considered as a reason to mitigate the sentence if the court finds that justice so requires."[397]

The aggression against the Republic of Bosnia and Herzegovina caused massive violations of international humanitarian law, which led to the reaction of the international community and the Security Council, which, in exercising its primary responsibility for maintaining international peace and security, took a whole range of alternative and subsidiary measures to stop the aggression and the crimes that followed it. One of these measures was the establishment of the International Tribunal with the task of punishing the perpetrators of war crimes in the entire territory of the former Yugoslavia.

397 Comment, SFRY Criminal Code, 1978, p. 490.

2.10.2. Establishment of the tribunal

Following the situation caused by the aggression against Bosnia and Herzegovina, the Security Council had already invited, in *Resolution 752 of 15 May 1992*, all parties and others concerned to ensure that forcible expulsions of persons from the areas in which they lived and any attempts to change the ethnic composition of the population, anywhere in the former Socialistic Federal Yugoslavia cease immediately.

The first resolution of the UN Security Council pertaining to the war in Bosnia and Herzegovina, which was passed in response to massive violations of human rights, was Resolution 771 of 12 August 1992. Since the Security Council's reasons had been diverted from a military to a humanitarian track, this resolution expressed "grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia and especially in Bosnia and Herzegovina including reports of mass forcible expulsion and deportation of civilians, imprisonment and abuse of civilians in detention centers, deliberate attacks on non-combatants, hospitals and ambulances, impending the delivery of food and medical supplies to the civilian population, and wanton devastation and destruction of property."

This resolution also reminded the responsible parties of the Geneva Conventions of 12 August 1949 and the personal responsibility of persons who commit or order the commitment of serious violations of these conventions.

It was Resolution 780 of 6 October 1992 that asked the Secretary-General to urgently establish an impartial *Commission of Experts* to examine and analyze the information submitted pursuant to Security Council Resolution 771 (1992) and deliver their report, together with similar information to which the Commission came across through its own work or the efforts of others. The objective of this research and analysis was the preparation of conclusions and evidence of serious breaches of the Geneva Conventions and other humanitarian law. The resolution also requested that the UN Secretary General report to the Security Council on the establishment of the Commission of Experts[398]

398 In accordance with paragraph 3 of Resolution 780 (1992) of the 14th of October 1992, the Secretary General submitted to the Security Council a Report (S24657), which described how the Secretary General intended to implement the resolution. On the 26th of October 1992, the Secretary-General announced the appointment of the president and four members of the CommissiThe Members of the Commission were G. Fric Kalshoven (Netherlands) as Chairman, Cherif Bassioumi (Egypt), William J. Fenrick (Canada), Keba Mibaye (Senegal) and Torkel Opshal (Norway).
On October 19, 1993 due to the resignation of Eric Kalshoven for health reasons, the Secretary General appointed as the chairman Mr. Bassioumi.

The General Assembly of the UN, in its *Resolution 46/242 of 25 August 1992,* in addition to condemning the violation of the sovereignty, territorial integrity and political independence of the Republic of Bosnia and Herzegovina, condemned the violations of humanitarian law and required the Secretary-General to report to the General Assembly at its 47th session on the implementation of the Resolution.[399]

In *Resolution No. 47/147 of 18 December 1992*, the General Assembly confirmed ''that all persons who commit or authorize the commission of crimes against humanity or other serious violations of international humanitarian law, [were] individually responsible for violations" and that the international community would do everything to bring them to justice and urged all parties to submit to the Commission all relevant information.

The Decision to establish the International Tribunal for these purposes was contained in *Security Council Resolution No. 808 of 19 February 1993*. The Resolution was based on previous Security Council resolutions, the interim report of the Commission of Experts established pursuant to Resolution 780, the recommendations if the Co-Chairmen of the Steering Committee for the International Conference on the Former Yugoslavia, the report of the European Community investigative mission into the treatment of Muslim women in the former Yugoslavia, the report of the commission of jurists submitted by Italy and the report transmitted by the Permanent Representative of Sweden on behalf of the Chairman-in-Office of the Conference on Security and Cooperation in Europe.

This Resolution recognized that the widespread violations of international humanitarian law in the territory of the former Yugoslavia, including mass murder and "ethnic cleansing," constituted a threat to international peace and security. This recognition gave rise to the decision to establish an international tribunal to prosecute persons responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia beginning in 1991. The Resolution requested that the Secretary-General, not later than sixty days later, submit a report to the Security Council on all aspects of this issue, including specific proposals and options.

The Commission held 12 meetings at which it considered a number of material, methodological and organizational issues pertaining to its mandate. At its last session, the Commission unanimously adopted the "Final Report of the Commission of experts established pursuant to resolution 780 (1992) of the UN Security Council (Bassioumi's Commission), the International Criminal Tribunal for the Former Yugoslavia, the Helsinki Committee for Human Rights, Zagreb 1995, p. 250.

399 See Report of the Secretary - General, December 3, 1992. (A/47/747, Dec. 3, 1992), Bethlehem, D., Weller, M. (ed.). (1997). Ibid, p. 566.

The Report of the Secretary-General of 3 May 1993 (S/25704), together with the Statute and *Security Council Resolution 827,* was accepted at the 3217th session of the Security Council on May 25, 1993. [400] With this resolution, the Security Council expressed its belief that the establishment of the Tribunal as an ad hoc measure of the Council, to facilitate efforts to put an end to the extensive and flagrant violations of international humanitarian law, would thus contribute to restoring and maintaining peace. The resolution established "an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace…"

This resolution required the Commission of Experts, after the appointment of the Prosecutor of the International Tribunal, to continue urgently to collect information related to evidence of serious breaches of the Geneva Conventions and other international humanitarian law. It was also decided that all States were required fully to cooperate with the International Tribunal and its organs in accordance with the resolution and the Statute of the International Tribunal.

2.10.3. The legal basis for the establishment of the International Tribunal

In contrast to the international military tribunals established after the Second World War, which were established by the victors of the war to try citizens of the defeated states for the crimes proscribed by the Statute of the International Military Tribunal, the International Criminal Tribunal for the Former Yugoslavia was established by UN Security Council Resolutions 808 and 827 on the basis of its powers enshrined in the UN Charter.

Article 29 of the UN Charter reads: "The Security Council may establish such subsidiary organs as it deems necessary for the performance of its function."

The International Criminal Tribunal for the Former Yugoslavia was established as a subsidiary body of the Security Council with the aim of contributing to the restoration and maintenance of international peace and security.[401] When it established the International Tribunal, the Security Council was

400 Security Council Resolution 827 (1993), (S/RES/827, May 25, 1993), Ibid. p. 42.

401 "28. In this particular case, the Security Council will, in terms of Chapter VII, as a coercive measure to establish a subsidiary body within the meaning of Article 29 Charter, and it will be a judicial nature. It is understood that in performing their judicial functions that would

guided by the recommendation of the Secretary-General under chapter VII of the Charter.[402]

Since Article 39 of the Charter is introductory, Article 41 of Chapter VII, which prescribes the procedure in the case of threats to the peace, breach of the peace or aggression, could possibly answer the question of the character of the decision establishing the International Tribunal. Article 41 governs the imposition of economic and diplomatic sanctions, and Article 42 governs the application of military measures against the aggressor state; the decision to establish the International Tribunal obviously does not fall into either of these groups of sanctions. The creation of the ICTY also was not aimed at any one particular country, but rather at a particular group of people who could be generally characterized as the perpetrators of war crimes in the former Yugoslavia and who could be citizens of any country.

Resolution 757 of 30 May 1992 imposed economic and diplomatic sanctions upon the Federal Republic of Yugoslavia and Croatia and urged them to comply with orders issued by the Security Council. This resolution did not achieve its desired effect; the aggression did not end, and the Security Council did not use armed force as a more effective response, but rather it began to deal with the consequences of the aggression. The establishment of the International Tribunal in order to punish the individual perpetrators of war crimes substituted for the obligation to punish the individual state(s) as the perpetrator(s) of international crimes of aggression.

Given the professed goal of the international community, which was the imposition of a constitutional order for the "future" of Bosnia and Herzegovina, the Tribunal has proven to be a suitable tool. Its establishment and operation did not encroach on the "rights, claims or position of interested parties" but did make possible criminal prosecution of those who violated the principles of international humanitarian law upon which the international community insisted.

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not be subjected to authority and control of the Security Council. As coercive measures in terms of Chapter VII the duration of the Tribunal would be associated with re-establishing and maintaining international peace and security in the former Yugoslavia and with certain decisions of the Security Council. " Report of the Secretary-General in accordance with paragraph 2 of Security Council Resolution 808 (1993), the International Criminal Tribunal for the Former Yugoslavia, the Helsinki Committee..., p. 229.

402 "The Secretary-General believes that the Tribunal should be established in the decision of the Security Council under Chapter VII of the UN Charter. The decision to maintain or restore international peace and security, would follow as a necessary reaction to a threat to peace, breach of the peace or act of aggression. " Ibid., p. 228.

2.10.4. The organization and jurisdiction of the tribunal

The Statute of the Tribunal, which the Security Council adopted with Resolution 827, at its session on May 25, 1993, governs the organization of the International Tribunal. Article 15 of the Statute empowers the Tribunal to adopt rules of procedure, evidence, and protection of victims and witnesses, as well as other relevant rules. The Court, at its session on February 11, 1994, adopted rules of procedure and evidence and, at its session on May 5, 1994, adopted rules governing the detention of persons awaiting trial or appeal before the tribunal or otherwise detained pursuant to its authority.

This legislation provides that the International Tribunal consists of two Trial Chambers, an Appeals Chamber, a Prosecutor and a Registry, which serves the Council and the Prosecutor. All of these provisions have subsequently been amended. The Statute of the International Tribunal prescribes its jurisdiction. The International Tribunal is competent to conduct criminal proceedings against persons responsible for serious violations of international humanitarian law committed in the former Yugoslavia since 1991 (Article 1), which are grouped as: a) Grave breaches of the Geneva Conventions of 1949 (Article 2); b) Violations of the Laws and Customs of War, the "Hague law" (Article 3); c) Genocide (Article 4); and d) Crimes against Humanity (Article 5). The general characteristics of all four groups include crimes whose protective objective is fundamental human rights and freedoms. All of these actions also violated the international and domestic law of the former Yugoslavia.

Personal jurisdiction is limited to natural persons (Article 6).

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime is individually responsible for the crime (Article 7. 1).

The official position of any accused person, whether as a Head of State or Government or as a responsible Government official, does not relieve such person of criminal responsibility or mitigate punishment (Article 7. 2).

The fact that any of the acts were committed by a subordinate does not relieve a superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof (Article 7. 3).

The territorial jurisdiction of the Tribunal is limited to the territory of the former Yugoslavia.

The International Tribunal and national courts have concurrent jurisdiction for conducting criminal proceedings against persons responsible for

serious violations of international humanitarian law in the former Yugoslavia since January 1, 1991. The International Court has primacy over national courts and may, at any stage of the proceedings, formally request that the national court defer to its superior competence.

A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:

(a) The act for which he or she was tried was an ordinary crime, or

(b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

2.10.5. Verdicts of the Tribunal that determine the character of the armed conflict

At its very beginning, the Court raised the question of the character of the armed conflict, since the international character of an armed conflict is a prerequisite for application of Article 2 of the Statute. Article 2 of the Statute governs grave breaches of the Geneva Conventions of 1949.

Therefore, the Court first determined the character of the armed conflict, and then examined the question of individual criminal liability for each defendant.

In the trial court Judgment in the case of *Prosecutor v. Dusko Tadic,* the Court established the existence of an international armed conflict in the period up to May 19, 1992.[403] The Trial Chamber did not determine the character of armed conflicts after that date. The Appeals Chamber determined the character of the conflict after that date. [404]

In terms of distinction between international and domestic armed conflicts, the Court stated:

"84. It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an

403 ICTY, Opinion and Judgment, Prosecutor v. Dusko Tadic, Case no. IT-94-1-T, Trial Chamber II, May 7, 1997; ICTY, Judgment, Prosecutor v. Dusko Tadic, Case no. IT-94-1-T, Trial Chamber II, July 14, 1997.

404 ICTY, Prosecutor v. Dusko Tadic a. k. a. Dule, Case No. IT-94-1-A, Judgment of 15 July 1999, para. 80, available at *http://www. icty. org/x/cases/tadic/acjug/en/tad-aj990715e. pdf.*

internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State."[405]

The Appeals Chamber accepted the finding that the armed conflict had been international in character prior to 19 May 1992. [406] As the Trial Chamber had not made an explicit decision regarding the character of the armed conflict between the Bosnian Serb Army (VRS) and the Army of B-H after the establishment of the VRS in May 1992, this issue was addressed for the first time by the Appeals Chamber.

Resolution of this question first required resolution of the question of the relationship between Belgrade and the Bosnian Serb army.

"87. In the instant case, there is sufficient evidence to justify the Trial Chamber's finding of fact that the conflict prior to 19 May 1992 was international in character. The question whether after 19 May 1992 it continued to be international or became instead exclusively internal turns on the issue of whether Bosnian Serb forces – in whose hands the Bosnian victims in this case found themselves – could be considered as de iure or de facto organs of a foreign Power, namely the FRY."[407]

The Appeals Chamber also held: "JNA military operations under the command of Belgrade that had alreadycommenced by 19 May 1992 did not cease immediately and, from a purely practical point of view, it is highly unlikely that they would have been able to cease overnight in any event"'[408]

It also held that "*the creation of the VRS by the FRY / VJ did not indicate the intention of Belgrade to relinquish control of the FRY / VJ over the army of Bosnian Serbs. To the contrary, in fact, the establishment of the VRS was undertaken to continue the pursuit of the FRY's own political and military objectives, and the evidence demonstrates that these objectives were implemented by military and political operations that were controlled by Belgrade and the JNA/VJ. There is no evidence to suggest that these objectives changed on 19 May 1992*."[409]

The Court concluded that the reorganization of the JNA was carried out in order to keep ethnic Serbs in power in Bosnia and Herzegovina. Through its

405 Ibid., para. 84.

406 ''86. The Trial Chamber found the conflict to be an international armed conflict between BH and FRY until 19 May 1992, when the JNA formally withdrew from Bosnia and Herzegovina." Ibid.

407 Ibid, para 87.

408 Ibid., para. 151 (IV).

409 Ibid, para. 151.

officers, the FRY still controlled the VRS. Elements of the FRY / VJ were still at war in Bosnia and Herzegovina.[410]

The conclusion of the Dayton Peace Agreement also indicated that the FRY exercised control over the VRS.[411] The way that the Serbian delegation

410 "151. What emerges from the facts which are both uncontested by the Trial Chamber and mentioned by Judge McDonald (concerning the command and control structure that officers of the Bosnian Serb army by the FRY) is that the VRS and VJ did not, after May 1992, comprise two separate armies in any genuine sense. This is further evidenced by the following factors:
(i) The re-organization of the JNA and the change of name did not point to an alteration of military objectives and strategies. The command structure of the JNA and the re-designation of a part of the JNA as the VRS, while undertaken to create the appearance of compliance with international demands, was in fact designed to ensure that a large number of ethnic Serb armed forces were retained in Bosnia and Herzegovina.
(ii) Over and above the extensive financial, logistical and other assistance and support which were acknowledged to have been provided by the VJ to the VRS, it was also uncontested by the Trial Chamber that as a creation of the FRY/VJ, the structures and ranks of the VJ and VRS were identical, and also that the FRY/VJ directed and supervised the activities and operations of the VRS. 182 As a result, the VRS reflected the strategies and tactics devised by the FRY/JNA/VJ.
(iii) Elements of the FRY/VJ continued to directly intervene in the conflict in Bosnia and Herzegovina after 19 May 1992, and were fighting with the VRS and providing critical combat support to the VRS. While an armed conflict of an international character was held to have existed only up until 19 May 1992, the Trial Chamber did nevertheless accept that thereafter "active elements" of the FRY's armed forces, the Yugoslav Army (VJ), continued to be involved in an armed conflict with Bosnia and Herzegovina. 183 Much de facto continuity, in terms of the ongoing hostilities,184 was therefore observable and there seems to have been little factual basis for the Trial Chamber's finding that by 19 May 1992, the FRY/VJ had lost control over the VRS." Ibid., 181-85.

411 "159. By an agreement concluded on 29 August 1995 between the FRY and the Republika Srpska and referred to in the preamble of the Dayton-Paris Accord, it was provided that a unified delegation would negotiate at Dayton. This delegation would consist of six persons, three from the FRY and three from the Republika Srpska. The Delegation was to be chaired by President Milo{evi}, who would have a casting vote in case of divided votes. 200 Later on, when it came to the signing of the various agreements made at Dayton, it emerged again that it was the FRY that in many respects acted as the international subject wielding authority over the Republika Srpska. The General Framework Agreement, by which Bosnia and Herzegovina, Croatia and the FRY endorsed the various annexed Agreements and undertook to respect and promote the fulfilment of their provisions, was signed by President Milošević. This signature had the effect of guaranteeing respect for these commitments by the Republika Srpska. Furthermore, by a letter of 21 November 1995 addressed to various States (the United States, Russia, Germany, France and the United Kingdom), the FRY pledged to take "all necessary steps, consistent with the sovereignty, territorial integrity and political independence of Bosnia and Herzegovina, to ensure that the Republika Srpska fully respects and complies with the provisions" of the Agreement on Military Aspects of the Peace Settlement (Annex 1A to the Dayton-Paris Accord). 201 In addition, the letter by which the Republika Srpska undertook to comply with the aforementioned Agreement was signed on 21 November 1995 by the Foreign Minister of the FRY, Mr. Milutinovi}, for the

was formed and acted indicated that the officials of the Serb Republic were subordinates of those of the FRY.[412]

In terms of the character of the armed conflicts, the court concluded:

"162. The Appeals Chamber therefore concludes that, for the period material to this case (1992), the armed forces of the Republika Srpska were to be regarded as acting under the overall control of and on behalf of the FRY. Hence, even after 19 May 1992 the armed conflict in Bosnia and Herzegovina between the Bosnian Serbs and the central authorities of Bosnia and Herzegovina must be classified as an international armed conflict."

The court returned to the character of the armed conflicts in the case of Mucic, et al.[413]

The Court first addressed the question of whether international armed conflict existed in Bosnia and Herzegovina in May 1992, and then addressed the question of whether that conflict continued throughout the rest of the year.[414]

The Court concluded that the international character of the armed conflict stemmed from the direct participation of the FRY in the conflict in Bosnia and Herzegovina. [415] In light of that direct participation, the Court concluded that

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Republika Srpska. 160. All this would seem to bear out the proposition that in actual fact, at least between 1992 and 1995, overall political and military authority over the Republika Srpska was held by the FRY (control in this context included participation in the planning and supervision of ongoing military operations). Indeed, the fact that it was the FRY that had the final say regarding the undertaking of international commitments by the Republika Srpska, and in addition pledged, at the end of the conflict, to ensure respect for those international commitments by the Republika Srpska, confirms that (i) during the armed conflict the FRY exercised control over that entity, and (ii) such control persisted until the end of the conflict. Ibid., 202.

412 Ibid, para. 161.

413 Mucic, et al. IT-96-21-A. (Appeals Chamber), Feb. 20, 2001.

414 "32. The Trial Chamber found that a "significant numbers of [JNA] troops were on the ground when the [BH] government declared the State's independence on 6 March 1992". 45 Further, "there is substantial evidence that the JNA was openly involved in combat activities in Bosnia and Herzegovina from the beginning of March and into April and May of 1992. 46 The Trial Chamber therefore concluded that:
[…] an international armed conflict existed in Bosnia and Herzegovina at the date of its recognition as an independent State on 6 April 1992. There is no evidence to indicate that the hostilities which occurred in the Konjic municipality at that time were part of a separate armed conflict and, indeed, there is some evidence of the involvement of the JNA in the fighting there." Ibid.

415 "33. The Trial Chamber's finding as to the nature of the conflict prior to 19 May 1992 is based on a finding of a direct participation of one State on the territory of another State. Thisconstitutes a plain application of the holding of the Appeals Chamber in Tadic that it "is

there was not any doubt that the conflict before May 19, 1992 was international. With regard to the character of the conflict after May 19, 1992, the Court concluded:

"50. The Trial Chamber came to the conclusion, as in the Tadić case, that the armed conflict taking place in Bosnia and Herzegovina after 19 May 1992 could be regarded as international because the FRY remained the controlling force behind the Bosnian Serbs armed forces after 19 May 1992."

In the Blaskic and Kordic cases, the court addressed the nature of armed conflict between *Croatia and Bosnia and Herzegovina*.

The Trial Chamber, in the *Blaskic* case, determined that it was an international armed conflict.[416] "… Based on Croatia's direct intervention in BH, the Trial Chamber finds ample proof to characterise the conflict as international."[417]

Moreover, the court found: "Aside from the direct intervention by HV forces, the Trial Chamber observes that Croatia exercised indirect control over the HVO and HZHB."[418]

The Court also confirmed Croatian aggression against Bosnia and Herzegovina in paragraphs 89 and 90 of the Judgment, which found the presence of the Croatian army in Bosnia and Herzegovina.

The Appeals Chamber affirmed the trial court's decision.[419]

The Appeals Chamber concluded:"In this case, the States of Croatia and Bosnia-Herzegovina were engaged in a conflict against each other."[420]The Tribunal also confirmed the existence of international armed conflict in *Kordic,* et al.[421]

Finally, the Tribunal's Appeals Chamber in the Prlic case and others, completed in 2017,[422] upheld the position of the Trial Chamber, which established

indisputable that an armed conflict is international if it takes place between two or more States",48 which reflects the traditional position of international law. The Appeals Chamber is in no doubt that there is sufficient evidence to justify the Trial Chamber's finding of fact that the conflict was international prior to 19 May 1992." Ibid.

416 ICTY**,** Prosecutor v. Tihomir Blaskic, IT-95-14-T. March 3,2000. Para. 75-136.

417 Ibid. para. 94.

418 Ibid. para. 95.

419 ICTY, Prosecutor v. Tihomir Blaskic, IT-95-14-A. July 29, 2004.

420 Ibid., para. 187.

421 ICTY, Prosecutor v. Dario Kordic and Mario Cerkez. IT-95-14/2-T, Judgment of 26 February 2001, para. 145.

422 (IT-04-74) PRLIC et al., Prosecutor v. Jadranko Prlic, Bruno Stojic, Slobodan Praljko, Milivoj Petkovic, Valentin Coric and Berislav Pusic, The Hague, 29 November 2017 (Case No .: IT-04-

the existence of a joint criminal enterprise involving the highest Croatian military and political officials, led by Franjo Tudjman, President of Croatia. The aim of the joint criminal enterprise was to create a Croatian entity in Bosnia and Herzegovina, which through ethnic cleansing of the Muslim population would exercise the domination of the Croatian People in the Croat Republic of Herceg - Bosnia and would facilitate unification with Croatia.

2.11. Regional arrangments and institutions and aggression against the Republic of Bosnia and Herzegovina

2.11.1. Introduction

At the time of the emergence and escalation of the Yugoslav crisis, Europe was preparing for a major integration, so it welcomed the Yugoslav crisis as a proving ground. It is in this context that one should consider the statement of Luxembourg's Minister of Foreign Affairs, former Chairman of the European Community, *Jacques Poos*: "This is the hour of Europe. This is not a time of Americans."[423] Europe took part in resolving the Yugoslav crisis and later the aggression against Bosnia and Herzegovina through the CSCE and the European Community.

Regional arrangements and agencies played a role in the aggression against Bosnia and Herzegovina. Regional arrangements and agencies were form by legal agreement among several states. The agreement set forth the goals of these regional arrangements and agencies, their duration and other issues. The UN Charter provides for the existence of regional organizations and institutions, which it treats as an aid to the United Nations system for the peaceful settlement of disputes and enforcement of the Charter. The autonomy of these arrangements and agencies vary, depending on whether peaceful reso-

74 -A Date: 29 November 2017, SUMMARY OF JUDGEMENT):
37. Turning next to how the Trial Chamber described the ultimate purpose of the JCE, Prlić, Stojić, Praljak, and Pu{ić challenge the Trial Chamber's finding that this ultimate purpose was shared by Franjo Tuđman and other leaders and was aimed at setting up a Croatian entity that reconstituted earlier borders and that facilitated the reunification of the Croatian people. The Appeals Chamber finds that they have not demonstrated that the Trial Chamber misinterpreted the relevant evidence, disregarded any evidence, or otherwise erred in reaching its conclusion. They, along with Petković, also allege a variety of factual errors underpinning the Trial Chamber's conclusion concerning the ultimate purpose of the JCE. Their arguments are lacking in merit and are dismissed.

423 Report of the International Commission for the Balkans, Unfinished Peace, Croatian Helsinki Committee for Human Rights and Legal Centre OSF B & H, 1997, p. 56.

lution of a dispute can be accomplished while preserving the autonomy of the parties or whether it requires the use of armed contrary to the autonomy of one or more of the parties. Regional organizations can use force only with the express consent of the Security Council.

With regard to the aggression against Bosnia and Herzegovina, the CSCE and the EC were particularly concerned with achieving peace through negotiations and avoiding armed action under the NATO pact. The engagement of regional organizations in Bosnia and Herzegovina can be divided into two phases. In the first phase, the regional organizations engaged in the former Yugoslavia as a whole; in the second phase, they engaged only in Bosnia and Herzegovina in the first, they engaged independently; in the second, they engaged in cooperation with the United Nations.

2.11.2. The CSCE and the outcom of the Yugoslav crisis

The CSCE was conceived as a pan-European forum for the promotion of security and cooperation on the European continent. At the first summit held in Helsinki in 1975, the CSCE adopted its Declaration on Principles, in which the following principles, the principles of the CSCE, were listed: 1 Sovereign equality and respect for the rights inherent in sovereignty; 2 Refraining from the threat and use of force; 3 Inviolability of borders; 4 The territorial integrity of states; 5 Peaceful settlement of disputes; 6 Noninterference in internal affairs; 7 Respect for human rights and fundamental freedoms, including the freedoms of thought, conscience, religion and belief; 8 Equality and the right of peoples to self-determination; 9 Cooperation among States; 10 Conscientious fulfillment of obligations under international law. At the second session of the CSCE in Paris in 1990, the aforementioned principles were confirmed through the so-called *Paris Charter for a New Europe*. This Charter states, inter alia: "To uphold and promote democracy, peace and unity in Europe, we solemnly pledge our full commitment to the Ten Principles of the Helsinki Final Act. We affirm the continuing validity of the Ten Principles and our determination to put them into practice. All the Principles apply equally and unreservedly, each of them being interpreted taking into account the others. They form the basis for our relations."[424]

The issue of the conflict in Yugoslavia was first on the CSCE agenda on June 19, 1991. [425] At a ministerial meeting in Berlin, the CSCE adopted a *State-*

424 Charter of Paris for a New Europe, the Conference on European Security and Cooperation, Paris, Nov. 19-21, 1990. Available at: http://www. osce. org/mc/39516. 19. 3. 2012.

425 "Foreign Ministers from 34 countries participating in the Conference on Security and

ment on the situation in Yugoslavia, expressing concern and friendly support for the democratic development and territorial integrity of Yugoslavia, the full respect for human rights in all parts of Yugoslavia, including minority rights, and a peaceful resolution to the crisis and emphasizing that it was only for the peoples of Yugoslavia to decide on the country's future. It required an immediate cease-fire and expressed the CSCE's readiness to form a mission, based on an agreement between the European Community and the Yugoslav authorities, to assist in stabilizing the cease-fire.[426]

On June 28th, Italy and Austria called a meeting of the Conflict Prevention Center (CPC) in CSCE headquarters in Vienna and requested that Yugoslavia explain the unusual involvement of the JNA in the crisis region of Slovenia. [427]

The next CPC meeting was held on July 1st and 2d to discuss the request of Austria for an immediate cease-fire in Slovenia. At that meeting, however, they could not reach a unanimous decision authorizing a CSCE observer mission.[428] On July 3-4, the Committee of senior officials of the CSCE, discussed the situation in Yugoslavia."It was agreed to recommend the dispatch of an EC-based mission to supervise the ceasefire and support the CSCE mission."

Among the actions of CSCE with regard to the Yugoslav crisis, the Press Communique issued by senior officials of the CSCE in Prague on August 9, 1991 deserves special attention. In the Communique, the officials expressed their support for the process of negotiations within the framework of CSCE's "good service: and, as a first step in this process, the willingness of the European Community and its Member States to assist the negotiation process in accordance with the Brioni Agreement of 7 July 1991. The conflict prevention and rehabilitation mandate of the CSCE, with which the European Union had entrusted it, was later supported by the United States, the Soviet Union and members of the EC in a joint statement issued on October 18, 1991. [429]

Cooperation in Europe ('CSCE') meeting in Berlin on 19 June issued a joint statement calling on Yugoslav leaders to 'resolve their disputes peacefully' and expressing support for the 'territorial integrity of Yugoslavia.' Bethlehem, D. Weller, M. (ed.) (1997). p. XXVII; see also: Statement on the situation in Yugoslavia issued by the Council of Ministers of the CSCE in Berlin on 19 June 1991. Review of International Affairs, Vol. XLII (5. X-5. XI 1991).

426 Documents Adopted by the Committee of Senior Officials in the Framework of the CSCE Mechanisms, Prague, July 3-4, 1991; Memorandum of Understanding on the Monitor Mission to Yugoslavia, July 13, 1991. Review of International Affairs, Vol. XLII (5. X-5. XI 1991), p. 21.

427 Bethlehem, D. Weller, M. (ed.). (1997). Ibid. p. XXVII.

428 Bethlehem, D. Weller, M. (ed.). (1997). Ibid. p. XXVIII.

429 (EC) Declaration on Yugoslavia, The Hague, Oct. 18, 1991. UN Doc. S/23155, Annex. Trifunovska, S. pp. 356-357.

At its meeting in Prague on September 3d and 4th, the CSCE called for the introduction of an embargo on arms and military equipment to all parties to the conflict.[430]

The first EC and CSCE observers EC arrived in Zagreb on September 5, 1991.[431]

The Committee of senior officials of the CSCE adopted its new *Declaration on Yugoslavia* on November 29, 1991 in Prague. In the first point, the CSCE confirmed its earlier resolutions pertaining to the conflict in Yugoslavia, while, in the second point, it reiterated its strong support of the activities undertaken by the EC and its member states, especially the mandate given to them to organize a Mission of Observers.[432]

The Committee of senior officials of the CSCE, at its meeting in Prague on January 8, 1992, accepted the *Declaration on Yugoslavia*, expressing its "deep emotion" over the dramatic events caused by the illegal use of force. In point 13, the Declaration warned that the current conflict could eventually expand and called on all parties to participate constructively in the Conference on Yugoslavia.[433]

At the third Summit of the CSCE, on July 9 & 10, 1992 in Helsinki, the CSCE adopted a special *Declaration on Yugoslavia,* in which, in the first paragraph, it expressed its outrage over the deteriorating situation in Yugoslavia. While noting that the CSCE had focused for more than a year on the crisis, it warned that, despite the efforts of the United Nations, the European Union and other organizations, "violence and aggression in Bosnia and Herzegovina and Croatia" were still ongoing and that the Government in Belgrade bore the primary responsibility. [434] On July 8, 1992, the CSCE "temporarily" suspended the membership of the remainder of the former Yugoslavia. [435] On October 14, 1992, Yugoslavia was permanently suspended due to its failure to respect CSCE principles, commitments and policies.

"On 16 September, the CSO of the CSCE adopted a report on a CSCE mission to Bosnia of 29 August-4 September which had investigated 21 detention camps.[436]

430 Bethlehem, D. Weller, M. (ed.). (1997). Ibid. p. XXIX.

431 Bethlehem, D. Weller, M. (ed.). (1997). Ibid. p. XXIX.

432 See International Politics, Beograd, Nos. 998-1,000, Dec. 1, 1991, p. 28.

433 See International Politics, Beograd, Nos. 1001. Feb. 1, 1992. p. 12.

434 Politics July 13, 1992, p. 2, cit. according to: Šušić, S. B. Ibid. p. 121. & 122.

435 Bethlehem, D. Weller, M. (ed.) (1997). p. XXXVII.

436 See Bethlehem, D. Weller, M. (ed.) (1997). Ibid. p. XXXIX

At its meeting in Prague on November 5th and 6th, the Committee of senior officials of the CSCE approved a report recommending the formation of an international tribunal for proceedings against the perpetrators of war crimes in the former Yugoslavia.[437]

"Following a meeting of CSCE Foreign Ministers in Stockholm on 14-15 December, a declaration was issued deploring brutality against civilians and ethnic cleansing. The meeting was unable to reach a consensus on requests by some members that the Bosnian government be exempt from the UN Security Council arms embargo. In a compromise, the final declaration noted these requests and called on the UN Security Council to continue to consider the question."[438]

"The CSCE Foreign Ministers' meeting also called for the establishment of a safe area for civilians in Bosnia and indicated that the CSCE would consult with others on how individuals could be brought to trial for war crimes committed in the area."[439]

After this ministerial meeting, the CSCE essentially ceased dealing with the issue of aggression against Bosnia and Herzegovina. Because the CSCE as does not possess armed forces, it had exhausted all of the means at its disposal in its earlier dealings. It had suspended the Federal Republic of Yugoslavia from membership, expressed disapproval of its activities and identified, in the Declaration on Yugoslavia at the third CSCE Summit, the party primarily responsible for the violence and *aggression*: the authorities in Belgrade.

2.11.3. The European Community and the Yugoslav crisis

The European Community became involved in the resolution of the Yugoslav crisis in May and June 1991."In two days of talks on 30-31 May in Belgrade, Jacques Delors, President of the EC Commission, and Jacques Santer, Luxemburg Prime Minister and chair of the EC Council of Ministers., confirmed that the EC was ready to help democratized and reformed Yugoslavia."[440]

The Ministerial Troika composed of *Jacques Poos,* the Luxembourg Foreign Minister, *Hans Van den Broek,* the Minister of Foreign Affairs of the Netherlands and *Gianni De Michelis,* Italy's Foreign Minister, met on June 28th

437 See Bethlehem, D. Weller, M. (ed.) (1997). Ibid. p. XL.

438 Ibid. p. XLI

439 Ibid. XLI.

440 Ibid. p. XXVII.

with Republican leaders in Belgrade and Zagreb to press for the election of Stipe Mesic as President of the SFRY.

The next meeting of Foreign Ministers dedicated to Yugoslavia was held on July 5th. It was an extraordinary meeting. At this meeting, the ministers decided to re-send their troika to Yugoslavia with with the aim of imposing an arms embargo and freezing the 870 million Euro EC foreign aid budget. At this meeting, the ministers decided to follow the recommendations of the CSCE and to send a delegation of fifty members to help stabilize the ceasefire and support the mission of the CSCE. [441]

On July 7th, in Brioni, the European troika composed of *Van den Broek*, Poos, and *João Pinjero,* the foreign minister of Portugal, and representatives of Croatia, Slovenia and the SFRY held a meeting. At the meeting, the participants adopted the Brioni Accord, which consisted of the joint declaration, the procedures for preparing for negotiations and guidelines for an observer mission in Yugoslavia.[442]

Of the later meetings of the EC, the meeting of the EU foreign ministers in Brussels on August 27th, at which they adopted the *Declaration on Yugoslavia,* was of particular importance.[443] This declaration was the most important act of the European Community up until that point relating to the Yugoslav crisis, because it institutionalized the European influence on its course and outcome.

The Declaration identified those responsible for the conflicts in Croatia and in what remained of the SFRY, the JNA and the Serb irregular formations. In addition, it expressed several principles to guide the resolution of the Yugoslav crisis moving forward, including the rejection of conquest as a means of acquiring territory.[444]

In addition to the above principles, the Declaration provided for the convening of peace conferences and the establishment of the arbitration procedure. The President of the SFRY accepted this Declaration on September 1st[445] the six Yugoslav republics accepted it on September 7th at the opening of the peace conference in The Hague.[446] In this way, the parties' mutual agreed con-

441 See Bethlehem, D. Weller, M. (ed.) (1997), Ibid. p. XXVIII.

442 Joint Declaration of the EC Troika and the Parties Directly Concerned with the Yugoslav Crisis, the ''Brioni Accord,'' Europe Documents No. 1725 of 16 July 1991. U: Trifunovska, S. Ibid., p. 311-315.

443 Declaration on Yugoslavia, EPC Press Release P. 82/91. U: Trifunovska, S. Ibid., p. 333-334.

444 Ibid., p. 333.

445 See Jovic, B. (1996). The last days of Yugoslavia, p. 381-382.

446 Declaration on the Occasion of the Cermonial Opening of the Conference on Yugoslavia,

sent to the jurisdiction of the Conference on Yugoslavia created a legal basis in international law for the engagement of the European Community in resolving the Yugoslav crisis.

At the meeting in The Hague on September 3d, it was decided that the peace conference would begin on September 7th in The Hague under the chairmanship of Lord Carrington. [447]The aim of the conference was to achieve a comprehensive peace solution within two months."Carrington picked up where the failed Izetbegović-Gligorov Plan had left off: he recognized six republics as the constituent units of the former federal state, and produced a Plan that would give each of them as much sovereignty as it wanted."[448]

An initial working paper, entitled "*Treaty provisions for the convention,*" was aimed at finding solutions to the Yugoslav crisis that would be formalized in an international treaty. The Hague Conference reached its zenith when, on the 18th of October, the presidents of the republics met again in The Hague to discuss a document entitled "*Arrangements for General Settlement (the Carrington Draft Convention),*"[449] which had been delivered to them two days earlier. This document was a proposed plan for the future structure of Yugoslavia based on an association of sovereign states that would cooperate trade, finance and security and share a joint Council of Ministers, Executive Committee, and Court of Human Rights.

All of the republics adopted this plan except for Serbia and Montenegro, to whom the participants in the conference gave a November 5th deadline to join in the plan. [450]As Serbia had already, for all practical purposes, rejected the plan at the eighth session of the Conference in The Hague, trade sanctions against them were forthcoming in the interim."At their meeting during the NATO summit in Rome on November 8th, the EC Ministers agreed to impose

Peace Palace, The Hague, Sept. 7, 1991. EPC Press Release P. 86/91. U: Trifunovska, S. Ibid., p. 343-344.

447 Declaration on Yugoslavia, Adopted at the EPC Extraordinary Ministerial Meeting, The Hague, Sept. 3, 1991. EPC Press Release p. 84/91. U Trifunovska, S. Ibid., p. 342-343.

448 Silber, L. Litl, A., Ibid. p. 213. (rev'd ed. p. 191).

449 Peace Conference on Yugoslavia: Arrangements for General Settlement (the Carrington Draft Convention), The Hague, Oct. 18, 1991. UN Doc. S/23169, Annex VI. U: Trifunovska, S. Ibid., p. 357-365.

450 Carrington's in intial impressions were as follows: "When I first talked to Presidents Tudjman and Milosevic, it was quite clear to me that bout of them had a solution which was mutually satisfactory which was that they were going to carve it up between them. They were going to carve Bosnia up. The Serb (area) would go to Serbia, the Croat (areas) to Croatia. And they weren't worried too much, either of them, about what was going to happen to the Muslims. And they didn't really mind about Slovenia."
L. Silber - A. Litl, Ibid. p. 213. (rev'd. ed. pp. 190-191).

trade sanctions on Yugoslavia and proposed that the UN Security Council impose an oil embargo. The EC sanctions included the suspension of the 1800 trade agreement."[451]

The *Declaration on Yugoslavia*,[452] adopted by the E. C. foreign ministers on December 16, 1999, called into question the utility of continuing the Conference on Yugoslavia, given the decisive nature of the Declaration's step towards the resolution of the Yugoslav crisis. On January 9th, however, the European sponsors of the Peace Conference on Yugoslavia decided that it should continue to operate in Brussels. The European Community and its Member States recognized Croatia and Slovenia as independent states on January 15th.

In this way, the European Community had exhausted its role, as well as that of the Conference on Yugoslavia, in comprehensively resolving the Yugoslav crisis. Subsequently, its attention was restricted mainly to the situation in Bosnia and Herzegovina, particularly in light of its decision to recognize Bosnia and Herzegovina as a sovereign and independent state in accordance with the opinion of the Arbitration Commission. At the same time, it expressed its desire that Bosnia and Herzegovina would avoid allowing any national group to become a dominant majority within its borders.

In the opinion of the European Union, this goal could be accomplished through national regionalization. Because the Federation of Bosnia and Herzegovina had a fully heterogeneous ethnic composition, except in Western Herzegovina, the European Community believed that regionalization was the best approach to peace in Bosnia and Herzegovina, the result of which was implicitly to support the process of ethnic cleansing that occurred during the Bosnian crisis.

In addition to the former Yugoslav republics, Federal Executive Council (SIV) and the President of Yugoslavia and the UN Security Council gave international legitimacy to the European Union's interference in the resolution of the Yugoslav crisis.

Security Council Resolution No. 713 of 25 September 1991, as well as subsequent resolutions of the Security Council relying on its primary responsibility for maintaining international peace and security, expressed support

451 Bethlehem, D., Weller, M. (ed.) (1997). Ibid., p. XXXI.

452 Declaration on Yugoslavia, Dec. 16, 1991. U. K. M. I. L. 1991. In Haris, D. J. (2004) (ed.) Cases and Materials on International Law (6th ed.), Thomson: Sweet & Maxwell. p. 149;
EC Declaration Concerning the Conditions for recognition of new States, Adopted at the Extraordinary EPC Ministerial Meeting, Brussels, 16. Decembar 1991., UN doc. S/23293, Anex I. U: Trifunovska, S. Ibid., p. 431-432.

and praise for CSCE involvement and the involvement of the European Community and its Member States to “establish peace and dialogue in Yugoslavia. “ The Security Council remained engaged, pursuant to the provisions of the Charter, until a peaceful solution was reached. In this way, the Security Council attempted, with the CSCE and the EC, pursuant to the terms of Chapter VIII of the Charter of the UN, to achieve a peaceful resolution of the Bosnian crisis.

2.11.4. The European Community and Aggression against the Republic of Bosnia and Herzegovina

The European Community became involved in separate discussions about the future of Bosnia and Herzegovina in early February 1992. Until then, the EC had dealt with Bosnia and Herzegovina only through the framework of the Conference on Yugoslavia along with all of the other Yugoslav republics.[453]

The legal basis for the engagement of the European Community in talks on the future of Bosnia and Herzegovina was the same as the legal basis for its involvement in the Yugoslav crisis more broadly. It was the consent of the Federal Republic and the President, as confirmed by Security Council Resolution 713 of 25 September 1991. The Security Council, pursuant to its primary responsibility for maintaining international peace and security, confirmed and approved the commitment and involvement of the CSCE, the EC and its Member States in the peaceful resolution of the Yugoslav crisis, including Bosnia and Herzegovina as a segment of that.

In addition, the three ruling parties in the Bosnian parliament agreed[454] to discuss the future of Bosnia and Herzegovina under the auspices of the European Community and the subsequent Security Council resolutions. Resolution 740 of 7 February 1992 called on all parties in the former Yugoslavia to cooperate responsibly with the Conference on Yugoslavia in its effort to achieve a political agreement in accordance with the principles of the CSCE. The discussions started on February 13 & 14, 1992 in Sarajevo[455] and resumed February 21st in Lisbon. At the meetings in Lisbon on February 21st &

453 "During his stay in Sarajevo in early February 1992, Chairman of the Conference on Yugoslavia, Lord Carrington first announced talks on Bosnia's future and the mediating role of the EC's Carrington Proposal of the 'Conference on Bosnia' with the goal of "discussing what kind of independence and sovereignty the corresponding BH would have.” Begić,K. I., Ibid., p. 83, 84.

454 The parliamentary involved only the ruling three parties, namely: the Bosniac Party of Democratic Action (Stranka Demokratske Akcije,SDA) the Serb SDS and the Herzegovinan-Croatian HDZ.

455 See Begic I. K. (1997). The Bosnia and Herzegovina of the founders of various missions to the Dayton Accords. Sarajevo: The Bosnian Book. p. 84.

22d chaired by *Ambassador Cutilhero,* the parties agreed in principle on three points: the future Bosnia and Herzegovina would retain its current borders, the future constitutional arrangements would recognize multiple entities within those borders and negotiations would continue with the mediation of the EC.[456]

The third round of talks was held in Sarajevo on February 28th[457] and produced no results. In preparation for the fourth round, representatives of the three main political parties expressed their commitment to a lasting peaceful solution to issues related to the future constitutional Republic. They also confirmed their agreement to conduct talks under the auspices of the EC. At the fourth session, held on March 9th in Brussels, Ambassador Cutilhero tried to convince the three delegations to sign the European declaration of principles for the future constitution of Bosnia and Herzegovina.[458] In the end, only the Bosnian and Croatian delegations signed the document, while the "Assembly of the Serbian people," on March 11th, refused to agree to "Brussels's" constitutional proposals.[459]

Nonetheless, on March 18, 1992 in Sarajevo, all of the parties adopted the *Statement of Principles for a new constitutional arrangement of BiH,*[460] to which was added an ethnic map of Bosnia and Herzegovina. Then, on March 30th, a meeting in Brussels followed, at which the parties adopted an Annex to the Statement of Principles, as well the text that formed a working group to define the constituent units. The working group was tasked with proposing a map of the constituent units based on nationality while taking into consideration other criteria, i. e. economic, geographic, etc.[461]

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456 Statement on Principles for a new Constitutional Arrangement for Bosnia and Herzegovina, Lisbon, Feb. 23, 1992, Review of International Affairs, Vol. XLIII (March 1, 1992), p. 14. U: Trifunovska, S. Ibid., p. 517-521.

457 See Begić, I. K. (1997). Ibid. p. 88.

458 Statement on Principles for a new Constitutional Arrangement for Bosnia and Herzegovina, Vjesnik, March 12, 1992.

459 Begić, I. K. (1997). Ibid. p. 89.

460 Vjesnik, March 19, 1992; Bethlehem, D., Weller, M. (ed.) (1997), Ibid., p. XXXIV. Unlike the Brussels proposal of March 9th, which provided that B-H would consist of a number of constituent units, the Declaration of Principles of March 18, 1992 stated that B-H would be composed of three constituent units based on nationality taking into account additional criteria (economic, geographic and other). A map based on the absolute or relative ethnic majorities in each municipality was to be the basis for the working group, subject to modification... "Release" March 19, 1992. This document was adopted at the fifth round of negotiations on B-H on March 19, 1992.

461 The Working Group, which consisted of six members, three domestic and three appointed by the EC, was obliged to submit its proposals by May 15th, but it never started working.

This document contained the following sections: A. Independence; B. General Principles; C. the Assembly and the Government of Bosnia and Herzegovina; D. constituent units; and E. the definition of the constituent units. This document proposed a balanced approach to the creation of the constituent units of the federation. Nevertheless, it opened the door to aggression against Bosnia and Herzegovina since it allowed the possibility of correcting the national criteria for other specified principles when determining the constituent units of the territory.

Additional meetings under the auspices of the EU and President Cutilhera followed on April 10th in Sarajevo and April 29th in Lisbon.[462]

In the meantime, the Bosnian Serbs, with the support of the JNA and various other military and paramilitary troops, occupied much of the territory of Bosnia and Herzegovina, rendering further negotiations meaningless. This occupation caused the withdrawal of the Bosniacs from the negotiations on May 27, 1992,[463] as the President confirmed on June 8th in a letter to the Chairman of the Conference on Yugoslavia, Lord Carrington.

In response, Lord Carrington urged the Bosniacs to fully participate in the negotiations, expressing his belief that the division of Bosnia and Herzegovina should be resolved as soon as possible in order to re-establish international peace and security. In discussions with representatives of UNPROFOR, President Izetbegovic "reaffirmed the Bosnian view that they could resume participation in these talks only if the basis for discussion was changed."[464]

The European Community consistently maintained the attitude expressed in February 1992 in the proposals of its intermediary Ambassador Cutilhera. All of the proposals and subsequent actions of the European Community and its Member States were governed by the logic that Bosnia and Herzegovina should be divided along the lines of certain constituent units.

The willingness of the EC and its Member States to support the establishment of these constituent national units in Bosnia and Herzegovina reinforced the desires of Serbia and Croatia, which had previously agreed on the

462 See Begić, I. K. (1997). Ibid.. p. 93.

463 Successive attempts to set up negotiations between the warring parties in Bosnia failed, the last being on May 27th when Bosnian President Alija Izetbegović withdrew in protest of alleged Serbian atrocities in Sarajevo, including the sheling of a maternity hospital on May 25th & 26th and a mortar attack on civilians queuing for bread on May 27th, in which more than 20 people were killed. Bethlehem, D., Weller, M. (ed.) (1997). Ibid., p. xxxvi.

464 Report of the Secretary-General pursuant to paragraph 15 of Security Council Resolution 757 (1992) and paragraph 10 of Security Council Resolution 758 (1992) (S/24100, June 15, 1992. U: Bethlehem, D. Weller, M. (ed.) (1997). The Yugoslav Crisis in International Law: General Issues, part I, Cambridge: University Press. p. 522, para. 5.

division of Bosnia and Herzegovina, and the position of the European Union gave them an incentive for their occupation and ethnic cleansing of the parts of Bosnia and Herzegovina that were inhabited by members of other ethnic groups.

On May 27, 1992, the European Community and its Member States imposed the trade embargo on the Federal Republic of Yugoslavia,[465] expecting that this would force Serbia into negotiations and the abandonment of aggression."The European Community and its member States have already adopted a series of measures against the Federal Republic of Yugoslavia and have called upon the Security Council to take similar action."[466]

On the recommendation of its three E. C. members and the United States, the Security Council followed the trade embargo with Security Council Resolution 757, pursuant to which the UN imposed upon the FRY extensive economic and diplomatic sanctions.

The economic and diplomatic sanctions imposed upon the Federal Republic of Yugoslavia and the later threats to Croatia that it would also be subject to sanctions if it continued its ongoing aggression against Bosnia and Herzegovina, were symptomatic of the environment in which the European Community endeavored to impose its vision of the future organization of Bosnia and Herzegovina.

Since the EC Conference on Yugoslavia did not complete the tasks for which it was established it, was transformed into the *International Conference on the Former Yugoslavia*. This transformation occurred at the *London Conference* held on August 26 & 27, 1992. [467] The new features of this Conference in relation to the earlier Conference of Yugoslavia were the appointment of two new co-chairs, Cyrus Vance, the former United States Secretary of State (the U. N. chair), and Lord David Owen (the E. U. chair) to replace the former chairman Lord Carrington and the relocation of the headquarters to Geneva.

At the London conference, the EC endorsed certain fundamental principles as the basis for a negotiated settlement of the problems in the former Yugoslavia, including: the imperative need that all parties and others concerned should cease fighting and the use of force; non-recognition of all advantages gained by force or *fait accompli*; the need of all parties to engage in

465 Bethlehem, D. Weller, M. (ed.) (1997). p. XXXVI.

466 Security Council Provisional Verbatim Record, May 30 1992. (S/PV. 3082 May 30, 1992), U: Bethlehem, D. Weller, M. (ed.) (1997). p. 90.

467 International Conference on the Former Yugoslavia – London, Aug. 26-28, 1992, International Legal Materials, Vol. 31 (1992), p. 1531. U: Trifunovska, S. Ibid., p. 694-714.

negotiation on the basis of these principles; respect for highest standard of individual rights, fundamental freedoms and human rights, particularly those of national communities and minorities; condemnation of forcible expulsion, illegal detention and attempts to change the ethnic composition of the population; compliance with international humanitarian law; respect for the independence, sovereignty and territorial integrity of all states in the region; and compliance with UN Security Council resolutions.[468]

At this conference, the EC adopted a *Statement on Bosnia and Herzegovina*,[469] which reiterated respect for certain principles of international law, including those related to national boundaries and the rights of refugees and displaced persons.

The new Peace Conference began its work on September 1, 1992 guided by the principles adopted at the London conference. After two months, on October 17, 1992, it culminated in a document entitled "A possible constitutional structure for B-H," the first comprehensive peace plan for Bosnia and Herzegovina. This was the so-called *Vance-Owen peace plan for Bosnia and Herzegovina*. [470]

This plan envisioned Bosnia and Herzegovina as a decentralized state, composed of ten noncontiguous provinces and a special-status enclave around Sarajevo, with a loose central government. Each of the three national groups would control the provinces in which they had a majority of the population. This plan, to which the Bosniacs and Croats agreed, but which the Serbs rejected, became a *casus beli* for Croatia, which, with the help of Bosnian Croats, attempted to takeover and ethnically cleanse the cantons with majority Croat populations. The Serbs rejected this plan with impunity.

After the collapse of this plan, which had held out a chance for peace to Bosnia and Herzegovina, followed plans based on similar divisions of power and territory: the Owen-Stoltenberg Plan of 1993, the Action Plan of the European Union and the Contact Group plan.

The Owen-Stoltenberg Plan[471] was a step backwards for Bosnia and Herzegovina compared to the previous Vance-Own plan for guiding the division of Bosnia and Herzegovina into three ethnic constituent units taking into account the results of ethnic cleansing and conquest of territory by force. It proposed a union of three territorially defined republics; the final version would have given 53% of the territory of Bosnia and Herzegovina to the Serbs, 17% to the Croats, and 30% to the Bosniacs. This plan failed because the Serbian

468 Statement on Principles, Aug. 26, 1992 – LC/C2 (Final), U: Trifunovska, S. Ibid., p. 697-699.

469 Statement on Bosnia, Aug. 27, 1992 – LC/C5 (Final). U: Trifunovska, S. Ibid., p. 701-703.

470 See Begić, I. K. (1997). Ibid., p. 109-126.

471 See Begić, I. K. (1997). Ibid., p. 127-164.

and Croatian sides were unwilling to make the necessary territorial concessions to the Bosniacs.

On December 22, 1993, France and Germany proposed, at an EU Ministerial Meeting, a larger distribution of territory to the Republic of Bosnia and Herzegovina. This Franco-German proposal was known as *the Action Plan of the European Union*.[472] It proposed dividing the territory of Bosnia and Herzegovina as follows: 49% to the Serbs, 17. 5% to the Croats and 33. 5% to the Bosniacs.

In March 1994, the Bosniacs and Croats created the Bosniac-Croatian Federation of Bosnia and Herzegovina. According to the Constitution of the Federation, it comprised the portions of the territory of Bosnia and Herzegovina that had a majority Bosniac and/or Croat population in the census of 1991. The Washington Agreement and the Vienna Agreement of May 1994 defined the area of the Federation, according to the census of 1991, as covering 55% of the territory of Bosnia and Herzegovina. The Sarajevo District encompassed 3% of the territory, while the territory with a majority Serb population comprised 42% of the territory of Bosnia and Herzegovina.

On February 22, 1994, in Bonn, England, France, Germany, the United States and Russia held a meeting dedicated to Bosnia and Herzegovina, inaugurating the "*Contact Group*. "[473] The Contact group began its work in late April 1994 with meetings in London on April 25th and a visit to Sarajevo on April 26, 1994. The Contact Group assigned itself the task of submitting its own proposals for the division of Bosnia and Herzegovina if the warring parties could not agree on a division of the state.

In preliminary discussions on Bosnia and Herzegovina in Talloires, France on May 24 & 25, 1994, proposed a take it or leave it territorial division between the Federation of Bosnia and Herzegovina and the entities with a Serb majority with a ratio of 51% to the Federation and 49% to the Serb entity. Under this proposal, the territory of the Federation would be reduced from 58% to 51% of Bosnia and Herzegovina, which, as a practical result, would have entailed the abandonment of the principle of non-recognition of the results of ethnic cleansing and the annexation of territory by force, rewarding the Serb aggression against Bosnia and Herzegovina with significant territorial gains. The proposed map of demarcation was drawn at a Ministerial Meeting of the Contact Group held June 5, 1994 in Geneva. According to this map, 49% of the territory of Bosnia and Herzegovina would belong to the Federation, 48% to the Serb

472 Report of the International Commission for the Balkans, UnfinishedPeace (1997). Croatian Helsinki Committee for Human Rights Legal Center... p. 52.

473 Begić, I. K. (1997). Ibid., p. 199-232.

entity, and 3% to the Sarajevo District. Bosnia and Herzegovina as a State and Bosniaks as its majority people have paid the price of creating a "pure" Croatian state " cleaned from the Krajina Serbs. For loss territory in Croatia Serbs were compesatet with mayority bosniaks territory in Ist Bosnia.

The Bosnian Serbs again rejected this proposed territorial partition, leading to Security Council Resolution 942 of 22 September 1994 in support of the plan.[474]

In late August and early September 1995, the UN and NATO used force to impose this territorial solution.

Thus, the General Framework Agreement for Peace in Bosnia and Herzegovina confirmed the territorial division of Bosnia and Herzegovina in a ratio of 51% to the Federation and 49% to the Serb Republic, according to the boundary map made during peace negotiations in Dayton. The territorial division of Bosnia and Herzegovina is a reflection of the European attitude that was expressed in February 1992 at the beginning of talks on the future of Bosnia and Herzegovina: that the future of Bosnia and Herzegovina should be composed of several constituent units based on a nationality principle. The position that nationality as a criterion for division should be complemented by the economic, geographic and other criteria meant that the European Community, in its final version of a settlement, would ultimately reward genocide, forced displacement, and territorial conquest.[475]

2.11.5. The work of the Arbitration Commission

When the EC ministers created the Arbitration Commission as a body of the Conference on Yugoslavia, on August 27, 1991, they stated: "The arbitration procedure in the framework of this peace conference will be established as follows. The relevant authorities will submit their differences to an Arbitration Commission of five members chosen from the Presidents of Constitutional Courts existing in Community countries."[476]

474 See Begic, I. K. (1997), Ibid., p. 199-232; Report of the International Commission for the Balkans, Unfinished Peace (1997). Croatian Helsinki Committee for Human Rights: Legal Center..., p. 51.

475 The most explicit expression of this principle was that of another British diplomat, Douglas Hogg who, in Sarajevo on May 19, 1994, said that Bosnian Muslims needed to recognize military defeat and relinquish their attempts to regain the lost territory by force. Ibid., p. 202.

476 Declaration on Yugoslavia, EPC Press Release P. 82/91. Trifunovska, S. Ibid., p. 333-334. The Arbitration Commission was composed of Robert Badinter, President of the Constitutional Court of France; Casavola Francisco Paolo, President of the Constitutional Court of Italy, Roman Herzog, President of the Constitutional Court of Germany, Elizabeth Palm, Judge of

The Arbitration Commission, at the request of the Chairman and later Co-Chairmen of the Peace Conference, issued 15 opinions in which it took positions on very important issues concerning the former Yugoslavia and its successor states.

In Opinion No. 1 of 29 November 1991,[477] which was dedicated to the question of the disintegration of Yugoslavia and the secession of the republics, the Commission found the following:

- That the Socialist Federal Republic of Yugoslavia was in the process of dissolution;
- That it was incumbent upon the Republics to settle such problems of State succession as may arise from this process in keeping with the principles and rules of international law, with particular regard for the human rights of peoples and minorities; and
- That it was up to those Republics that so wished to work together to form a new association endowed with the democratic institutions of their choice.

Opinion No. 2 of 11 January 1992[478] was devoted to the right of peoples to self-determination. The Serb Republic had posed the following question to the Arbitration Commission: "Does the Serbian population in Croatia and Bosnia and Herzegovina, as one of the constituent peoples of Yugoslavia, have the right to self-determination?"

The Commission decided that, while international law, as it currently stood, had not spelled out all of the implications of the right to self-determination, it did not permit changes to existing frontiers at the time of independence (*uti possidetis juris*) unless the State(s) concerned had agreed otherwise.

As the right to self-determination exists to protect human rights, the Serb population in Bosnia and Croatia had the right to recognition of their identity and to every right accorded to minorities under international conventions, consistent with principles of international law and provisions of the Charter of the UN.

The only possible consequence of this principle might be for the members of the Serb population in Bosnia and Herzegovina and Croatia to have the

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the European Court of Human Rights (from Sweden) and Jose Maria Ruda, Former President of the International Court of Justice (from Argentina).

477 Opinion No. 1 of the Arbitration Commission of the Peace Conference on Yugoslavia, Nov. 29, 1991. Trifunovska, S. Ibid., p. 415.

478 Opinion No. 2 of the Arbitration Commission of the Peace Conference on Yugoslavia – Paris, Jan. 11, 1992. Trifunovska, S. Ibid., p. 474-479.

right to be recognized under agreements between the Republics as having the nationality of their choice (Serbian or Bosnian), with all the rights and obligations that such right entails with respect to the states concerned.

Guided by these principles, the Commission gave the following opinion:

"(i) that the Serbian population in Bosnia and Herzegovina and Croatia is entitled to all the rights accorded minorities and ethnic groups under international law and under the provisions of the draft Conventions of the Conference on Yugoslavia of 4 November 1991, to which the Republic of Bosnia and Herzegovina and Croatia have undertake to give effect; and

(ii) that the Republic must afford the members of those minorities and ethnic groups all the human rights and fundamental freedoms recognized in international law, including, where appropriate, the right to choose their nationality."

Opinion No. 3 of 11 January 1992[479] was devoted to the question: "Can the international boundaries between Croatia and Serbia and between Bosnia and Herzegovina and Serbia be regarded as frontiers in terms of public international law?"

In response to this question, the Arbitration Commission decided as follows:

"First – All external frontiers must be respected in line with the principle stated in the United Nations Charter, in the Declaration on Principles International law…and in the Helsinki Final Act…;

Second – The boundaries between Croatia and Serbia, between Bosnia and Herzegovina and Serbia, and possibly between other adjacent independent States my not be altered except by agreement freely arrived at;

Third – except where otherwise agreed, the former boundaries become frontiers protected by international law…;

Fourth – According to a well-established principle of international law the alteration of existing frontiers or boundaries by force is not capable of producing any legal effect…"

Opinion No. 4 of 11 January[480] was dedicated to the application of Bosnia and Herzegovina for recognition as a sovereign and independent state on December 20, 1991.

479 Opinion No. 3 of the Arbitration Commission of the Peace Conference on Yugoslavia – Paris, Jan. 11, 1992. U: Trifunovska, S. Ibid., p. 479-486.

480 Opinion No. 4 on International Recognition of the Socialist Republic of Bosnia and Herzegovina by the European Community and its Member States, Paris, Jan. 11, 1992. U: Trifunovska, S. Ibid., p. 486-488.

Regarding this question, the Arbitration Commission took the view that "the will of the peoples of Bosnia and Herzegovina to constitute the SRBH as a sovereign and independent State cannot be held to have been fully established. This assessment could be reviewed if appropriate guaranties were provided by the Republic applying for recognition, possibly by means of a referendum of all the citizens of the SRBH without distinction, carried out under international supervision."

Opinion No. 8 of 4 July 1992[481] was devoted to the question of the dissolution of Yugoslavia and whether that dissolution could be considered completed. In response to this question the Arbitration Commission decided that the dissolution of Yugoslavia to which Opinion No. 1of 29 November 1991 referred had, at that time, been completed and that the SFRY no longer existed.

In Opinion No. 10 of 4 July 1992,[482] the Commission decided that the Federal Republic of Yugoslavia (Serbia and Montenegro) was a new state that could not be considered the sole successor of the SFRY. The Commission concluded: "Its recognition by the Member States of the European Community would be subject to its compliance with the condition laid down by general international law for such an act and the joint statement and Guidelines of 16 December 1991."

Opinion No. 11 of 16 July 1993[483] related to the question: "On what date(s) did State succession occur for the various States that have emerged from the Socialist Federal Republic of Yugoslavia?"

The Arbitration Commission decided that, with respect to Bosnia and Herzegovina: "*[I]n a referendum held on 29 February and 1 March 1992, the majority of the people of the Republic have expressed themselves in favour of a sovereign and independent Bosnia. The result of the referendum was officially promulgated on 6 March, and since that date, notwithstanding the dramatic events that have occurred in Bosnia and Herzegovina, constitutional authorities of the Republic have acted like those of a sovereign State in order to maintain its territorial integrity and their full and exclusive powers. So 6 March 1992 must be considered the date on which Bosnia and Herzegovina succeeded the Socialistic Federal Republic of Yugoslavia.*"

481 Opinion No. 8 of the Arbitration Commission of the Peace Conference on Yugoslavia – Paris, July 4, 1992. U: Trifunovska, S. Ibid., p. 634-637.

482 Opinion No. 10 of the Arbitration Commission of the Peace Conference on Yugoslavia – Paris, July 4, 1992. U: Trifunovska, S. Ibid., p. 639-640.

483 Opinion No. 11 of the Arbitration Commission of the Peace Conference on Yugoslavia – Paris, July 16, 1993. U: Trifunovska, S. Ibid., p. 1017-1020.

3. The General Assembly of the UN and the aggression against the Republic of Bosnia and Herzegovina

The General Assembly of the UN may also address issues of importance to the preservation of international peace and security. Its role is especially significant in situations in which the Security Council is blocked by a veto of one or more of its permanent members. The UNGeneral Assembly resolution: United for Peace[484] falls into this category. The General Assembly can only make non-binding recommendations, unlike the Security Council whose acts may be binding. Nonetheless, the recommendations of the General Assembly have considerable political and moral weight.

In addition to the Security Council, the UN General Assembly addressed the aggression against Bosnia and Herzegovina, but in accordance with Articles 10, 11, and 13 of the UN Charter, rather than in the exceptional manner that gave rise to the resolution United for Peace.

The first decision of the General Assembly relating to the aggression against Bosnia and Herzegovina was *Resolution 46/242 of 25 August 1992,*[485] which "strongly" condemned the "abhorrent practice of 'ethnic cleansing,'" as well as serious violations of international humanitarian law.

The resolution recalled the report of the Secretary-General of 12 May 1992, in which he stated that all international observers agreed that Serb militias from Bosnia and Herzegovina, with at least the tacit support of the Yugoslav People's Army, were in a conquest to create ethnically pure areas in furtherance of their territorial goals in the negotiations over the Cantonization of the Republic in the European Community Conference on Bosnia and Herzegovina.

The General Assembly "condemn[ed] the violation of the sovereignty, territorial integrity and political independence of the Republic of Bosnia and Herzegovina…"[486]

The resolution also required that all forms of interference outside of the Republic of Bosnia and Herzegovina cease immediately and that those units of the Yugoslav People's Army and elements of the Croatian Army now in Bosnia and Herzegovina either withdraw, subject themselves to the authority of the Government of Bosnia and Herzegovina, or be disbanded and disarmed and place their weapons under international supervision.

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484 United for Peace (UN Resolution 377). Adopted Nov. 3, 1950. Available at: http://www. un. org/depts/dhl/landmark/pdf/ares377e. pdf, 25. 12. 2010.

485 General Assembly Resolution 46/42 Concerning the Situation in Bosnia and Herzegovina, Adopted at its 91st plenary meeting, Aug. 25, 1992. In Trifunovska, S. (1994). p. 690-694.

486 Ibid.

The Resolution reiterated the requirements contained in Security Council Resolution 752 and subsequent resolutions.

In resolutions 47/88 and 47/147 of 16 and 18 December 1992, respectively, the General Assembly recognized and condemned the acts of genocide directed against Bosnian Muslims. It identified the Serbian leadership as responsible for these acts, which occurred in territories under their control in Bosnia and Herzegovina. "The Yugoslav Army and the political leadership of the Republic of Serbia bear primary responsibility for this reprehensible practice, which flagrantly violates the most fundamental principles of human rights."[487] The Assembly also confirmed that States bear the responsibility for acts committed by their agents in the territory of another state. In this regard, it emphasized to Serbia its responsibility under the Convention of 1948 on the Prevention and Punishment of the Crime of Genocide.

The General Assembly formally and explicitly branded the campaign mounted as one of "genocide,"[488] for which "the Yugoslav Army and the political leadership of the Republic of Serbia b[ore] primary responsibility."[489] In resolution 47/121, it identified Bosniac acts of genocide.

General Assembly resolution 47/121, in paragraphs 3 to 5, contained various provisions relating to the withdrawal of foreign forces from Bosnia and Herzegovina, thus confirming the nature of the aggression against the Republic of Bosnia and Herzegovina.

The UN Secretary-General responded to the General Assembly with regard to the execution of its orders contained in these resolutions. "These provisions of the resolution have still not been fulfilled. It has been reported earlier... that although JNA had withdrawn completely from Bosnia and Herzegovina, former members of Bosnian Serbs origin had been left behined with their equipment and constituted the Bosnian Serb forces."[490]

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487 General Assembly Resolution 47/147, Dec. 18, 1992.

488 The resolution described these acts of genocide as: "a consistent pattern of gross and systematic violations of human rights, a burgeoning refugee problem resulting from mass expulsions of defenseless civilians from their homes and the existence in Serbian Montenegrin controlled areas of concentration camps and detention centers, in pursuit of the abhorrent policy of 'ethnic cleansing,' which is a form of genocide".
General Assembly Resolution 47/121 on the situation in Bosnia and Herzegovina, Dec. 18, 1992. Trifunovska, S. Ibid., p. 790.

489 General Assembly Resolution 47/147 on the situation in Bosnia and Herzegovina, Dec. 18, 1992.

490 Report of the Secretary - General pursuant to paragraph 12 of General Assembly Resolution 47/121 (A/47/869, Jan. 18, 1993, points 30-31. Bethlehem, D., Weller, M. (ed.). (1997). Ibid., p. 581, para. 31.

The General Assembly, in point 11 of Resolution 47/121 and point 28 of Resolution 48/88, called for urgent measures to be taken within the framework of the International Conference on the Former Yugoslavia in order to reach a fair solution and demanded an update on the emergency efforts that had been taken in this regard.

The General Assembly, in additional resolutions during the 48th session, confirmed its commitment to preventing acts of genocide and crimes against humanity in the context of "the continuation of aggression in Bosnia and Herzegovina," thus indicating that a relationship existed between the Federal Republic of Yugoslavia (Serbia and Montenegro) and Serb military and paramilitary groups responsible for such massive and systematic violations.[491]

The resolutions that the General Assemply adopted during its 48th session confirmed the attitude of the wider international community about the nature of the conflict in Bosnia and Herzegovina and the responsibility for initiating and continuing the aggression there.

Resolution 48/153 also condemned the bombing of cities and civilian areas, finding that it was a policy of Bosnian Serbs and Bosnian Croats to do so.

The Assembly cleared up the true identity of the "Bosnian Serbs" who had used the tactic of genocide as a policy, recognizing that, in the territory under Serb control in the republics of Bosnia and Herzegovina and Croatia, the commanders of the Serb paramilitary forces and political and military leaders in the Federal Republic of Yugoslavia (Serbia and Montenegro) bore primary responsibility for most of these injuries. [492]

4. The International Court of Justice and aggression against the Republic of Bosnia and Herzegovina

The International Court of Justice is also responsible, under certain circumstances, for determining the character of armed conflict. Because the Court's decisions are based on legal rather than political reasons, it is not bound by the Security Council's position on this issue.

Article 36 of the Statute governs the court's jurisdiction. Paragraph 2 of the Statue contains the "optional clause," under which the "parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in the relation to any other State

491 General Assembly Resolution 48/88, Dec. 20, 1993.

492 General Assembly Resolution 48/153, Dec. 20, 1993.

accepting the same obligation, the jurisdiction of the Court in all legal disputes" of certain types.

Court jurisdiction also extends to all cases specially provided for in the UN Charter or treaties and conventions in force.

On March 20, 1993, the Republic of Bosnia and Herzegovina (since December 14, 1995 "Bosnia and Herzegovina") filed with the Registrar of the International Court of Justice an application initiating proceedings against the Federal Republic of Yugoslavia (from February 4, 2003 to June 3, 2006 "Serbia and Montenegro"and since June 3, 2006 "The Republic of Serbia") alleging violations of the Convention on the Prevention and Punishment of the Crime of Genocide, which the UN General Assembly passed on December 9, 1948, and associate claims. The complaint cited Article IX of the Convention as the basis for the jurisdiction of the Court.

Bosnia and Herzegovina requested that the court rule that Serbia and Montenegro, through its organs or entities under its control, either committed genocide by participating in its commission or failed to prevent genocide. It also requested that the court find that Serbia and Montenegro had failed to punish the perpetrators before their own courts or to extradite them to the International Criminal Tribunal for the Former Yugoslavia.

In addition, Bosnia and Herzegovina requested that the Court order Serbia and Montenegro to compensate Bosnia and Herzegovina and its citizens for the damage caused by its commission of genocide, in addition to symbolic compensation for failure to comply with the provisional measures of April 8 & 13, 1993, in an amount to be determined by the Court**.** Finally, Bosnia and Herzegovina asked the court to require Serbia and Montenegro to provide specific guarantees and assurances that it would not repeat the wrongful acts alleged, in an order whose form was to be determined by the Court.[493]

493 The submission of Bosnia and Herzegovina was ultimately clarified at oral argument on April 24, 2006, as follows:
"Bosnia and Herzegovina requests the International Court of Justice to adjudge and declare:
1. That Serbia and Montenegro, through its organs or entities under its control, has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by intentionally destroying in part the non-Serb national, ethnical or religious group within, but not limited to, the territory of Bosnia and Herzegovina, including in particular the Muslim population, by
- killing members of the group;
- causing serious bodily or mental harm to members of the group;
- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- imposing measures intended to prevent births within the group;
- forcibly transferring children of the group to another group;

2. Subsidiarily:
(i) that Serbia and Montenegro has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by complicity in genocide as defined in paragraph 1, above; and/or
(ii) that Serbia and Montenegro has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by aiding and abetting individuals, groups and entities engaged in acts of genocide, as defined in paragraph 1 above;
3. That Serbia and Montenegro has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by conspiring to commit genocide and by inciting to commit genocide, as defined in paragraph 1 above;
4. That Serbia and Montenegro has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide for having failed to prevent genocide;
5. That Serbia and Montenegro has violated and is violating its obligations
under the Convention on the Prevention and Punishment of the Crime of Genocide for having failed and for failing to punish acts of genocide or any other act prohibited by the Convention on the Prevention and Punishment of the Crime of Genocide, and for having failed and for failing to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal;
6. That the violations of international law set out in submissions 1 to 5 constitute wrongful acts attributable to Serbia and Montenegro which entail its international responsibility, and, accordingly,
(a) that Serbia and Montenegro shall immediately take effective steps to ensure full compliance with its obligation to punish acts of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide or any other act prohibited by the Convention and to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal;
(b) that Serbia and Montenegro must redress the consequences of its international wrongful acts and, as a result of the international responsibility incurred for the above violations of the Convention on the Prevention and Punishment of the Crime of Genocide, must pay, and Bosnia and Herzegovina is entitled to receive, in its own right and as parens patriae for its citizens, full compensation for the damages and losses caused. That, in particular, the compensation shall cover any financially assessable damage which corresponds to:
(i) damage caused to natural persons by the acts enumerated in Article III of the Convention, including non-material damage suffered by the victims or the surviving heirs or successors and their dependants;
(ii) material damage caused to properties of natural or legal persons, public or private, by the acts enumerated in Article III of the Convention;
(iii) material damage suffered by Bosnia and Herzegovina in respect of expenditures reasonably incurred to remedy or mitigate damage flowing from the acts enumerated in Article III of the Convention;
(c) that the nature, form and amount of the compensation shall be determined by the Court, failing agreement thereon between the Parties one year after the Judgment of the Court, and that the Court shall reserve the subsequent procedure for that purpose;
(d) that Serbia and Montenegro shall provide specific guarantees and assurances that it will not repeat the wrongful acts complained of, the form of which guarantees and assurances is to be determined by the Court;

The Tribunal, in its judgment of 27 February 2007, found:

"297. 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."

On the issue of crimes committed in other parts of Bosnia and Herzegovina,

"276…. the Court… finds that it has been established by conclusive evidence that massive killings of members of the protected group occurred and that therefore the requirements of the material element, as defined by Article II (a) of the Convention, are fulfilled…

277. The Court is however not convinced, on the basis of the evidence before it, that it has been conclusively established that the massive killings of members of the protected group were committed with the specific intent (dolus specialis) on the part of the perpetrators to destroy, in whole or in part, the group as such."

On the issue of the responsibility of Yugoslavia (Serbia and Montenegro), the Judgment states:

"386. …It has not been shown that the FRY army took part in the massacres, nor that the political leaders of the FRY had a hand in preparing, planning or in any way carrying out the massacres. 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"

The Federal Republic of Yugoslavia was responsible because had violated its obligation to prevent genocide, which violated its international legal responsibilitiy.[494]

The Court found that Serbia and Montenegro had failed to fulfill its duty to fully cooperate with the ICTY. This omission was a breach of its obligations under the Dayton agreement and as member of the United Nations and,

7. That in failing to comply with the Orders for indication of provisional measures rendered by the Court on 8 April 1993 and 13 September 1993 Serbia and Montenegro has been in breach of its international obligations and is under an obligation to Bosnia and Herzegovina to provide for the latter violation symbolic compensation, the amount of which is to be determined by the Court. "

494 See paras. 438 & 450 of the Judgment.

accordingly, constituted a violation of its obligations under Article VI of the Genocide Convention.[495]

Serbia also violated the Court's orders regarding provisional measures.

"456. The answer to this question may be found in the reasoning in the present Judgment relating to the Applicant's other submissions to the Court. From these it is clear that in respect of the massacres at Srebrenica in July 1995 the Respondent failed to fulfil its obligation indicated in paragraph 52 A (1) of the Order of 8 April 1993 and reaffirmed in the Order of 13 September 1993 to "take all measures within its power to prevent commission of the crime of genocide".

Serbia also had not complied with paragraph 52 A (2) of the Order of 8 April 1993, which was reaffirmed in the Order of 13 September 1993, and which required it to "ensure that any. . . organizations and persons which may be subject to its. . . influence. . . do not commit any acts of genocide".

Regarding the request for reparations, the Court took the following view:

"463. It is however clear that the Applicant is entitled to reparation in the form of satisfaction, and this may take the most appropriate form, as the Applicant itself suggested, of a declaration in the present Judgment that the Respondent has failed to comply with the obligation imposed by the Convention to prevent the crime of genocide…"

The International Court of Justice, for the first time in its history, established state responsibility for violations of the Convention on the Prevention and Punishment of the Crime of Genocide. Therefore, this judgment has historical importance, not only for the parties to the dispute and for this subject, but also for the development of international humanitarian law in general. The Court in its judgment stated:

a) *That Serbia had violated the obligation to prevent genocide derived from the Convention on the Prevention and Punishment of the Crime of Genocide in connection with events that had occurred in Srebrenica in July 1995;*

b) *That Serbia had violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by not handing over Ratko Mladic, who has been indicted for genocide and complicity in genocide, for trial before the International Criminal Tribunal for the Former Yugoslavia and had failed to fully cooperate with the Tribunal; and*

495 Para. 449 of the Judgment.

c) *That Serbia had not fulfilled its obligations under the provisional measures ordered by the Court on April 8 & 13, September 1993 in the case and, in doing so, had failed to take all measures that it had at its disposal to prevent the commission of genocide in Srebrenica in July 1995 and to ensure that all organizations and individuals under its influence did not commit any act of genocide.*

The International Court ordered Serbia to respect and comply with the Convention. The Court ruled that Serbia should immediately take effective steps to ensure the fulfillment of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide as defined in Article II of the Convention and any other measures provided for in Article III of the Convention, extradite those accused of genocide or other international crimes for trial before the International Criminal Tribunal for the Former Yugoslavia, and fully cooperate with the Tribunal.

The International Court of Justice found that Serbia had participated in the war in Bosnia and Herzegovina by employing its official army. Together with the verdicts of the ICTY in the Tadic and Celebici cases, this Judgement indisputably established that it was an international armed conflict in which the Federal Republic of Yugoslavia participated as a party and that the Federal Republic of Yugoslavia committed aggression against the Republic of Bosnia and Herzegovina.

VII. CIVIL WAR IN THE REPUBLIC OF BOSNIA AND HERZEGOVINA AS A MEANS OF AGGRESSION

Civil wars, unlike inter-State wars are waged within a state's territory between and among its citizens. In order for a conflict within a State to qualify as a civil war, it is essential that it must be more than a common rebellion in its political importance and scope. The causes of civil wars are varied, but the most frequent are ideological, religious and social intolerance among social groups and interference and instigation by other states. The objectives of civil wars include: changes in the form of government, changes in the sociopolitica structure of the state, conflict between different ethnic, national or religious groups, and separation from the country for the purpose of creating an independent state or merging with a neighboring country whose population is of the same ethnic origin.

Members of the Serb and Croat ethnic groups in Bosnia and Herzegovina rose up against the constitutional authorities of the Republic of Bosnia and Herzegovina in significant numbers. These actions, by their political importance and territorial distribution, were more than mere rebellion in character, so that they could be treated as a civil war.

Yet, there are international legal reasons why the sides in the armed struggle in Bosnia and Herzegovina and the Civil War cannot be treated equally. The fighting between different ethnic groups in Bosnia and Herzegovina was a function of the aggression against its sovereignity, territorial integrity and political independence, which was committed in order to realize Serb and Croat territorial ambitions.

The Federal Republic of Yugoslavia and Croatia took advantage of the presence of members of the Serb and Croat ethnic groups in Bosnia and Her-

zegovina to commit aggression. In addition to Bosnian Serb militias, Yugoslavia, also used its own armed forces: the Yugoslav army, police and other regular and irregular formations.

Croatia also used its national army in adition to Bosnian Croat militias in Bosnia and Herzegovina. Members of the Serb and Croat ethnic groups in Bosnia and Herzegovina were used together with to the national forces of these States, so that they cannot be regarded as an independent factor in the fighting in Bosnia and Herzegovina. Military formations of Bosnian Serbs and Bosnian Croats, regardless of name, were in the military line of command directly subordinate to the natinonal military commands in Belgrade and Zagreb.

Their formations were used to a greater or lesser extent depending on the military assessment of whether they were sufficient to achieve the military objectives of the moment. When they were insufficent, military aid, military units and military equipment came directly from the Federal Republic of Yugoslavia and Croatia. Their independence existed only in their self-initiative. All major military decisions and plans were made outside of Bosnia and Herzegovina.[496] The Federal Republic of Yugoslavia and Croatia provided full support to their military formations in Bosnia and Herzegovina, which were mainly composed of the resident population but also included population from the Federal Republic of Yugoslavia and Croatia. Officers of the Bosnian Serb militias and the HVO were on the payrolls of their respective parent states, which also paid contributions into pensions and disability insurance programs and other entitlement programs on their behalf.[497]

The military formations of Bosnian Serbs and Croats, as well as their leadership, did not have the necessary degree of independence to be considered a separate party in the civil war. The domestic participants in the fighting had the status of insurgents, while being a party to the civil war would have required a critical level of independence in relation to the other States that had instigated their rebellion.

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496 ''As long as Bosnia constituted an integral part of Yugoslavia, any hostilities raging there among Serbs, Croats and Bosnians clearly amounted to a civil war. However, when Bosnia-Herzegovina emerged from the political ruins of Yugoslavia as an independent country, the conflict transmuted into an inter-State war by dint of the cross-border involvement of Serbian (former Yugoslav) armed forces in military operations conducted by Bosnian Serbs rebelling against the Bosnian Government (in an effort to wrest control over large tracts of Bosnian land and merge them into a Greater Serbia).'' Dinstain, Y. (2005). Ibid., p. 8.

497 See Opinion and Judgment, "Prosecutor v. Dusko Tadic, Case No. IT-94-1-T, Trial Chamber II, May 7, 1997; Judgment, Prosecutor v. Dusko Tadic, Case No. IT-94-1 T, Trial Chamber II, July 14, 1997; Prosecutor v. Tihomir Blaskic, IT-95-14-T. March 3, 2000.

Rebel Bosnian Serbs and Bosnian Croats were not an independent component in the fighting in Bosnia and Herzegovina, but rather they performed as part of the Serbian and Croatian armed forces and therefore could only have had such status. Their total identity with the aggressor countries made them identical with the aggressors, so that, even though they participated in the fighting in Bosnia and Herzegovina, they did not do so on their own behalf and for their separate goals, but rather they did so on behalf of the Federal Republic of Yugoslavia and Croatia in order to realize their war aims.

Therefore one cannot talk about civil war in Bosnia and Herzegovina separately from the aggression on Bosnia and Herzegovina. The civil war was distinguished by the absence of independence in the military and political decision-making or the identity of military and political objectives of the aggressor states and instrumentalized members of their ethnic groups in Bosnia and Herzegovina.

Serbian propaganda since the beginning of the aggression against Bosnia and Herzegovina endeavored to portray the aggression as a civil war, denying its involvement as a party to the conflict.[498] The reality points to accomplices among influential individuals and in some circles of the international community. [499] The UN Secretary-General in his report of April 24, 1992 describing the situation in Bosnia and Herzegovina, talked about the civil war in Bosnia and Herzegovina as a great tragedy.[500]

This view of the Civil War met with the approval of individual members of the European Community because it fit into their vision of the constitutional and territorial organization of the "future" of Bosnia and Herzegovina as a complex state consisting of several exclusive national constituent units. In this context, it is important to emphasize the contribution of the commander of UNPROFORF, Philip Morrillion, to the introduction of "third parties" in the war in Bosnia and Herzegovina.[501]

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498 War crimes in Bosnia and Herzegovina, Amnesty International's Report..., p. 44.

499 "Different personalities have also influenced the course of events... Eagleburger joined the board of Yugo-America, the American branch of the automobile manufacturers from Serbia, and was president of Henry Kissinger Associates, which had contracts with the Yugo-America and other Yugoslav state enterprises... In mid-August Eaglaburger who was on his way to replace Baker at the site of the State Secretary said that the investigation into the CIA did not reveal any evidence of systematic killing in the camps, but only the 'unpleasant conditions. '" Gutman, R. (1995). The witness of genocide. Sarajevo: VKBI. pp. 29 & 36.

500 Report of the Secretary-General pursuant to Security Council Resolution 749 (1992) (S/23836, April 24, 1992), Bethlehem, D., Weller, M. (ed.) (1997). Ibid., p. 502.

501 "At the time of the General mandate, the Herzegovinian lobby and its 'allies' who were still in the cabinet in Belgrade pressed 'the father of all Croats' in the aggressive imposition of a 'third party ' but said that the general had done the job thoroughly, for them and for

VIII. LEGAL CONSEQUENCES OF THE AGGRESSION AGAINST THE REPUBLIC OF BOSNIA AND HERZEGOVINA

1. Introduction

Since aggression is an international crime, it entails certain international legal consequences. These legal consequences relate to the aggressor state and some of its citizens. The state is responsible on a theory of derelict responsibility, which creates legal indemnity for the victim state and its citizens. The responsibility for the genocide, in the author's opinion, is part of this kind of state responsibility. Nationals of the aggressor State may have individual criminal responsibility for committing a whole spectrum of criminal offenses related to aggression.

This book is confined to determining the legal consequences of the aggression against Bosnia and Herzegovina. The Security Council, as a political body, guided by political considerations, cited the authority granted by Chapter VII of the Charter in its resolutions, rather than explicitly using the term aggression against Bosnia and Herzegovina, but implicit in Resolution 752 of 15 May 1992, as well as others, was the determination that the war in Bosnia and Herzegovina qualified as an act of aggression by the Federal Republic of Yugoslavia and Croatia against Bosnia and Herzegovina. This interpretation is confirmed by Resolution 757 of 30 May 1992, pursuant to the Security Council imposed economic and diplomatic sanctions on the Federal Republic of Yugoslavia.

Euroshemu, according to the theory: well, you do not have yet all parties to the conflict, but you will have them. When his term ended, there were 'three sides in the conflict' and unfortunately, the practical execution of his plan.''Begić, K. I. Ibid. p. 111.

These resolutions caused *political consequences* for the aggression that consisted of the imposition of economic and diplomatic sanctions against the FR Yugoslavia, with the aim of termination of the aggression.

The aggression against the Republic of Bosnia and Herzegovina and the crimes during the war led to the establishment of the ICTY in later Security Council resolutions.

2. Refusal of the international community to recognize the state created by force and aggression against the Republic of Bosnia and Herzegovina

2.1. In general

International law prohibits the recognition of any situation created by a serious breach of its peremptory norms. Article 52 of the Vienna Convention on the Law of Treaties of 1969 defines a peremptory (ius cogens) norm as a "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."

"The legal regime established by the Covenant of the League and the Kellogg-Briand Pact was the basis for the development of the principle that acquisition of territory or special advantages by the illegal threat or use of force did not create a title which would receive recognition by other states.''[502]

This principle is known and often referred to as the Stimson doctrine in reference to the note that American Secretary of State Henry Stimson sent to the Chinese and Japanes governments in 1932, stating that the United States government "…does not intend to recognize any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928, to which Treaty both China and Japan, as well as the United States, are parties.''[503] This doctrine is now widely recognized in both the literature and practice of international law.

After 1932, the principle of non recognition was contained in the form of explicit commitments in multilateral international treaties, particularly in the Pan-American League, but it was generally accepted in the international community.

502 Brownlie,I. Ibid. p. 410.

503 Ibid. p. 412.

"Signatories and adherents of the Anti-War Treaty signed on 10 October 1933, declared in Article 2 that 'they will not recognize any territorial arrangement which is not obtaines by pacific means, nor the validity of an occupation or aquisation of territory that may be brought about force.'"[504]

"The Convention on the Rights and Duties of States signed in 1933 by all American states provided in Article 11 as follows:

The Contracting states definitely establish as the norm of their conduct the precise obligation not to recognize territorial acquisations or special advantages which have been obtained by force whether this consists in the employement of arms, in threatening diplomatic representations, or in any other effective coercive measure…"[505]

This principle was heavily used in international practice before, during, and after the Second World War, although there were certain examples of cases in which it was not honored. One example was the British recognizing first *de facto* and then *de jure* the Italian annexation of Ethiopia, although many other members of the League of Nations, including the United States and the U. S. S. R., which proved to be decisive in the long run.

The German annexation of Austria in 1938 is more complicated. The United States *de facto* accepted the situation created by annexation as can be seen from, for example, their establishing an exceptional shared immigration quota for Germany and Austria, even though the United States did not officially recognize this annexation. The same was the case with Great Britain, which, for practical purposes recognized the annexation, but officially remained in a position of nonrecognition.

After the occupation of Czechoslovakia by Germany in 1939, the Czech President Edvard Beneš sent a statement to the Secretary General of the League of Nations, which stated:

"I…invoke such articles of the League of Nations Covenant as are involved, especially Article 10. I am convinced that no League of Nations' Member will recognize thic crime…"[506]

Indeed, most of the members of the League did not recognize this division and occupation of Czechoslovakia and other member states until 1945. That the United States did not recognize this occupation and division was evident from the following note written by the Secretary of State Edward Stettinius, Jr.:

504 Ibid. p. 412-413. (footnote omitted).

505 Ibid. p. 413. (footnote omitted).

506 Ibid. p. 415. (footnote omitted).

"In view of the recent military occupation of the Provinces of Bohemia, Moravia and Slovakia by German armed forces and the assumption of control over these areas by German authorities, the Department, while not recognizing any legal basis for the assumption of so-called 'protection' over this territory, is constrained by force of the foregoing circumstances to regard the above-mentioned provinces as now being under de facto administration of the German authorities…."[507]

The recognition of a state created through aggression is a form of complicity by the states that do so.

"Moreover, the essential criminality of wars of aggression and analogous forms of the use of force as an instrument of national polici has altered the nature of recognition in such circumstances and given it the aharacter of complicita in criminal activity."[508]

Therefore, the principle of nonrecognition as a legal obligation whose violation is a violation of the rules of international law prohibits the recognition of the conquest of territory by force. Thus, recognition of the conquest is itself a violation of international law and the sovereignty of the state victim of aggression.

2.2. Rules on Responsibility of States for Internationally Wrongful acts

Chapter III, which is entitled **"**Serious breaches of obligations under peremptory norms of general international law", sets forth the Rules of Responsibility for States for breaches of international law[509] and prescribes the consequences therefor. Chapter III contains two Articles. Article 40 of the Rules governs the 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."[510]

507 Ibid. p. 416.

508 Ibid. p. 418.

509 Responsibility of States for internationally wrongful acts, United Nations A/RES/56/83, Jan. 28, 2002.

510 Ibid., Chapter III, Serious breaches of obligations under peremptory norms of general international law.
Article 40 dictates:
Application of this chapter
1. 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.
2. A breach of such an obligation is serious if it involves a gross or systematic failure by the

Article 41. 2 of the Rules,[511] which relates to the consequences arising from breaches within the Chapter, prescribes: "No State shall recognize as lawful a situation created by a serious breach of peremptory norms 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 would in fact be a breach of peremptory norms of international law. Breaching the prohibition against genocide is a breach of a peremptory norm of international law.[512]

It is generally understood that the prohibition of aggression is a peremptory norm of the general international law. In particular, there is a consensus of opinion that human trafficking, genocide, racial discrimination and apartheid fall under this category. Numerous decisions of national and international courts have confirmed the existence of a peremptory international norm prohibiting genocide.[513] Even though the International legal Commission of the UN, in its commentary to Article 53 of Vienna Convention on the Law of Treaties, did not explicitly identify certain other norms as being peremptory in character, it is generally understandood that they also fall under this category. Those are the prohibition of torture, as defined in Article 1 of the Convention against torture and other cruel, inhuman and degrading treatment and punishment from December 1984.[514] National and international courts hae confirmed the peremptory character of this prohibition, as well.

Article 40. 2 of the Rules defines a serious breach of peremptory norms as a gross and systematic failure by the responsible State to fulfill an obligation under international law. The word serious requires a breach of a certain magnitude, establishing a difference between serious and trivial breaches of peremptory norms. Trivial breaches of peremptory norms do not fall under

responsible State to fulfil the obligation.

511 Article. 4, entitled "Particular consequences of a serious breach of an obligation under this chapter," states:

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.

2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law.

512 *Yearbook 1966,* vol. II, p. 248.

513 *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, p. 325, at pp. 439-440; Counter-Claims, I. C. J. Reports 1997, p. 243.*

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

this category and are not included in this Chapter. Only immense breaches fall under this Chapter.

In order to be systematic, a breach must be organized and deliberate. These two terms, massive and systematic, are not mutually exclusive. A serious breach would usually be both. Factors that indicate the seriousness of a breach can include the size and number of individual breaches, as well as the seriousness of the consequences to victims. Aggression and genocide, by their natures, involve violations of great size. Article 41 of the Rules elaborates on the particular consequences of serious breaches of Article 40. It has three paragraphs. The first two prescribe the special legal obligations of States that are confronted with violations of Article 40, while the third paragraph has a nonwaiver clause.

Pursuant to paragraph 1 of Article 40, States have a positive obligation to cooperate in order to bring to an end a serious breach under Article 40. Due to different circumstances that may exist, this paragraph does not prescribe in detail what form of cooperation ought to exist, other than that cooperation 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 noninstitutional cooperation. This paragraph also does not prescribe what measures ought to be taken in order to end serious violations under Article 40 of the Rules. Instead, the selection of the appropriate measure depends on the circumstances of each separate case.

It is clear, however, that an obligation for States to cooperate, irrelevant of whether they are affected by the breach, exists. They are required to take coordinated steps to undo the results of these crimes.

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

The existence of an obligation of nonrecognition of the results of a breach of the peremptory norms of general international law finds it support within international practice and International Court of Justice decisions. [515]

Examples of the practice of non-recognition of breaches of peremptory norms include the reaction of the Security Council to the Iraqi invasion of Kuwait in 1990. After the invasion, Iraq pronounced that it had accomplished a general and permanent annexation of Kuwait. Security Council Resolution

515 ILC 2001, ch. IV, p. 288.

662 (1990) decided that such annexation was not legally valid and called upon 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, no states recognized the annexation.

Even an injured state's recognition of the condition created by the breaches of international law by encouraging the responsible State does not permit such condition to be recognized.[516]

The second obligation contained in paragraph 2 of Article 41 forbids states from rendering aid in maintaining a situation created by serious breaches of peremptory norms under Article 40 of the Rules. This governs the behavior of states that are aiding responsible states in preserving the situation created by breaching international law after a breach has occurred. Its existence as independent obligation regardless of the obligation of non recognition of the results of force is confirmed by Security Council Resolutions that prohibited any form of aid to the illegal regime of apartheids that were created in South Africa or under Portuguese colonial administration.[517] These resolutions expressed universal ideas applicable to all situations created by breaches under Article 40.

According to paragraph 3, Article 40 is without prejudice to other consequences to which it refers and such further consequences that might arise from international law. This article has a double aim. First, it explains that serious breaches have legal consequences. Therefore, serious breaches under Article 40 lead to an obligation that a responsible state stop its illegal action, respect the prohibition against breaches and guarantee that it will not repeat the breach of peremptory norms. Second, paragraph 3 permits additional international-legal consequences caused by these breaches.

The key pre-condition for implementation of this chapter is establishing an injured state "That is a State whose individual right is disputed or injured by international wrongful acts or which is specially injured in another way by that act."[518] Article 42 of the Rules[519] defines "injured state," the

516 Ibid. p. 290. 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 by the injured State cannot preclude the international community's interest in ensuring a just and appropriate settlement.

517 S. C. Res. 218 (1965) on the Portuguese colonies and S. C. Res. 418 (1977) and 569 (1985) on South Africa.

518 See ILC 2001, ch. IV, p. 293.

519 Article 42. Responsibility of States for internationally wrongful acts
Article 42 Invocation of responsibility by an injured State
A State is entitled as an injured State to invoke the responsibility of another State if the

existence of which triggers different consequences in other articles of the Charter.

2.3. The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)

The Genocide Convention imposes obligations on member states to prevent genocide, to punish perpetrators and not to committe genocide themselves. The prohibition against the commission of represents a peremptory norm of international law that binds all state members of the international community and not only the signatories of the Convention. There is also an obligation, not only for the signatories of the Convention, but for all of the world's states, to eliminate the results of acts of genocide. Therefore, the situation created by genocide is unsustainable. The perpetrator of genocide cannot use and enjoy the outcomes and advantages created by genocide.

2.4. The principle of non-recognition of states created by the aggression and genocide against Bosnia and Herzegovina

Contrary to the principles of international law, the international community, embodied in the Security Council, the European Community and the "Contact Group," rewarded the Serbian aggression against Bosnia and Herzegovina.

As demonstrated supra, international law does not recognize the results of and/or the benefits arising from acts of aggression. Many recent authoritative documents express this commonly accepted view within the international community and the importance of generally accepted norms of international law, including the Helsinki Final Act and the Paris Charter for a New Europe, which prohibit the change of borders by force.

The activities of Yugoslavia (Serbia) and the Serb Republic were aimed at creating ethnically pure Serb constituent units within Bosnia and Herzegovina

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obligation breached is owed to:
(*a*) That State individually; or
(*b*) A group of States including that State, or the international community as a whole, and the breach of the obligation:
(i) Specifically affects that State; or
(ii) Is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

in the hope of changing the borders in the future. This is evident from the statements of their highest officials. [520]

The recognition of the results created by the use of force as an instrument of national policy, under international law, makes those members of the international community who have accepted and confirmed them accomplices, despite having avowed that they would not do so throughout the duration of the aggression.

The European Community and the Security Council, since the beginning of the Yugoslav crisis, pledged not to recognize the situation created by force or the results of conquest and ethnic cleansing, and yet they did.

The London Conference of August 26 & 27, 1992 reiterated the principle that European states would not recognize the territorial gains created by force.

The International Court of Justice found that the Serb Republic, as an entity, and its army and police in the exercise of public authority over the Serb Republic, committed genocide against the Bosniacs.

The International Court of Justice, in its judgment, found that the Serb Republic, which, at the time of the commission of genocide, had elements of *de facto* independence, had not gained international recognition, but rather its status was that of an entity within Bosnia and Herzegovina. In this way, the Serb Republic substantially achieved the self-proclaimed strategic goals of the Serb people in Bosnia and Herzegovina but avoided the international legal responsibility for committing genocide.

Serbia was found responsible for not preventing the genocide. Because the norms of general international law impose an obligation upon the international community, in general, to rectify an illegal situation created through the violation of peremptory norms of general international law (i. e., by aggression and genocide), it is necessary to establish the existence of violations in order to enforce the removal of the consequences thereof.

The judgment of the International Court of Justice on February 26, 2007 established a violation of the peremptory norms of general international law enshrined in the Convention on the Prevention and Punishment of the Crime

520 For example, according to former Croatian Prime Minister Hrvoje Šarinić: "Milosevic and I were at a secret meeting in 1993, and he said: 'I will return Knin to Franji and Sarajevo to Alija - I'm with the Republic Serbska, which will eventually be in Yugoslavia, solving the Serbian national question as Tudjman solved the Croatian one with 'Herceg-Bosna. '"Free Bosnia, Feb. 13, 1999, p. 27. The President of the Serb Republic, Nikola Poplasen, said that the inhabitants of the Serb Republic were "fully convinced" that they would be integrated into Serbia and the FR Yugoslavia. "People in the RS are fully convinced that such a future is inevitable. And if not in the immediate future, because we recognized the Dayton agreement. " Dnevni Avaz, Dec. 19, 1998, p. 4.

of Genocide, perpetrated by the authorities of the Serb Republic, an entity within Bosnia and Herzegovina.

The Serb Republic was the perpetrator of the crime of genocide. Therefore, it is necessary, in accordance with international law, for the international community to take all measures to remove the consequences of genocide.

3. The right of the Republic of Bosnia and Herzegovina to self-defense

Since the right to self-defense is a fundamental right of every state, and since Bosnia and Herzegovina, at the beginning and throughout the course of aggression, was a state, it was entitled to self-defense.

Bosnia and Herzegovina became a sovereign and independent state on March 6, 1992, when it certified the results of the referendum. Bosnia and Herzegovina, as as a sovereign and independent state and as a member of the United Nations, had all of those rights that belong to a state, as such, including the right to self-defense. The right to self-defense was established under customary international law and codified in Article 51 of the UN Charter.

The right to of self-defense entails the lawful use of force under the conditions prescribed by international law, in response to an unlawful use of force. Self-defense is a privilege pursuant to which the state resorts to force to protect its fundamental rights when they are threatened by the unlawful use of force by another state. These include, above all, the rights to sovereignty, territorial integrity and political independence.

The Federal Republic of Yugoslavia and the Republic of Croatia performed aggression against the Republic of Bosnia and Herzegovina and its sovereignty, territorial integrity and political independence. The aggression committed by the Federal Republic of Yugoslavia began at the inception of the war. Croatia initially tried to cover up its aggression and the presence of its troops through various pretexts, including concluding a military alliance with the Republic of Bosnia and Herzegovina.

The right of states to self-defense exists in the case of armed attack. The armed attack and aggression committed by Yugoslavia and Croatia against Bosnia and Herzegovina were illegal acts and formed the basis of the right of Bosnia and Herzegovina to self-defense

Bosnia and Herzegovina used its right to self-defense as a state and as a member of the United Nations in response to the aggression. On April 8, 1992, the President of Bosnia and Herzegovina issued a *Decision declaring an im-*

mediate threat of war. [521] As the aggression continued, on June 20, 1992, the President issued *The Decision on the proclamation of the state of war*. [522] On June 26, 1992, the President of Bosnia and Herzegovina adopted *The Platform for Action by the Presidency of Bosnia and Herzegovina in war conditions*. [523] These acts constituted the legal basis and framework for Bosnia and Herzegovina's exercise of its right to individual self-defense in countering aggression and genocide. Through these acts, Bosnia and Herzegovina accepted the rule of international law in response to aggression. [524]

The right of states to self-defense lasts until the Security Council takes measures sufficient to maintain international peace and security. Measures taken by the attacked state are temporary. ; they last until the Security Council performs its role in combating aggression and restoring peace. Since the Security Council, in Resolution 752, since 1992, recognized the existence of a *threat to the peace, breach of the peace or act of aggression* against Bosnia and Herzegovina, its right to take measures of self-defense existed until the Council took sufficient measures to restore peace. As the Security Council undertook progressively more severe measures, the first resolution regarding the war in Bosnia, Resolution 757, called on Croatia to comply with a previous resolution and imposed a wide range of economic and diplomatic sanctions against the Federal Republic of Yugoslavia (Serbia and Montenegro). The right of Bosnia and Herzegovina to self-defense extended through and until the cessation of aggression. The Security Council sanctions were too small in relation to the

521 "Official Gazette of RB-H," No. 1/92.

522 The following reasons were given for these decisions:
"Proceeding from the fact that the Republic of Bosnia and Herzegovina is under the aggression being committed by the Republic of Serbia, the Republic of Montenegro, the Yugoslav Army and the terrorists the Serbian Democratic Party,
- that the fact of aggression was established by Resolution No. 752 of 18 May 1992;
- that this aggression continues after the adoption of the Resolutions of the Security Council;
- that the brutal aggression was followed by genocide against the people of Bosnia and Herzegovina...
... That the Aggressor has occupied about 70% of the territory of Bosnia and Herzegovina and that he has refused to stop the aggression,
- Starting from the right to self-Defense, which is recognized by international law.
The President of the RB-H, on the basis of Amendment LI point 5, paragraph 3, of the Constitution of RB-H, at its session held on June 20, 1992 adopted a Decision on the declaration of war.''Official Gazette of RB-H," No. 7/92.

523 "Official Gazette of RB-H," No. 8/92.

524 "The Republic of Bosnia and Herzegovina shall comply with the provisions of international law and international conventions that govern state behavior in war, and in accordance with Article 51 of the United Nations Charter, will respect the decisions and initiatives of the Security Council that it has made for establishing and maintaining peace and security... ""Official Gazette of RB-H," No. 7/92.

injuries that they sought to prevent. The aggressors were willing to suffer their consequences in order to achieve the objectives of the aggression. Because the Security Council was not prepared to take the next step in the suppression of aggression, the use of armed force, the right of Bosnia and Herzegovina to defend itself lasted until the end of aggression -- i.e. until the conclusion of the General Framework Agreement for peace in Bosnia and Herzegovina.

Keeping Resolution 713 of 25 September 1991, which introduced the embargo on deliveries of weapons and military equipment to the former Yugoslavia, in effect throughout the hostilities prevented Bosnia and Herzegovina from taking effective measures of self-defense.

In Resolution 724 of 15 December 1991, the Security Council continued the embargo and established a Committee to monitor its implementation. Resolution 727 of 8 January 1992 extended the embargo again, and, in Resolution 740 of 7 February 1992, the Security Council invited all countries to cooperate with the monitoring Committee. Subsequent resolutions of the Security Council extended the embargo further.

The existence of the arms and equipment embargo made it difficult for Bosnia and Herzegovina to exercise its right of self-defense. In this way, the Bosnia and Herzegovina denied the exercise of one of the fundamental rights of states. The mechanism of decisionmaking in the Security Council made it impossible to exempt Bosnia and Herzegovina from the arms embargo. As a result, the United States Congress, in early June 1995, unilaterally repealed the arms embargo against Bosnia and Herzegovina. This act had no practical effect, but it expressed the moral sense of the representative body of the leading force against the aggression against Bosnia and Herzegovina.

Since the UN Security Council, for the reasons set forth in detail herein, failed to take sufficient measures to terminate the aggression against Bosnia and Herzegovina and extended the armed embargo against Bosnia and Herzegovina, Bosnia and Herzegovina had its “hands tied” in its effort to oppose the aggression by exercising its inherent right to self-defense.

Bosnia and Herzegovina asked the International Court of Justice in the case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro),* to order that the arms embargo be lifted.

Since the provisions of Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide complement Article 51 of the UN Charter by creating an obligation for a Contracting Party to oppose, prevent, and punish genocide, the request of Bosnia and Herzegovina was based on both grounds:

"112. Bosnia and Herzegovina also claims that as a Party to the Genocide Convention and as a Member of the United Nations Organization and a Party to its Charter, that It possesses the inherent right of both individual and collective self-defence recognized by Article 51 of the United Nations Charter in order to defend Itself and its People from the armed attacks, armed aggressions, and acts of genocide that have been and are currently being inflicted upon It and its People by Yugoslavia (Serbia and Montenegro) and its agents and surrogates...

Pursuant to United Nations Charter Article 51, Bosnia and Herzegovina has the right to seek and receive support from the other 179 Member States of the United Nations, including the right to seek and receive military weapons equipment, supplies, troops, and financing from them in order to defend Itself and its People from the armed attacks, armed aggressions and acts of genocide...."

In addition:

"110. Bosnia and Herzegovina also claims that it has the inherent right under the Genocide Convention to defend Itself and its People against the acts of genocide and the other genocidal acts enumerated in Article III currently being perpetrated upon us by Yugoslavia (Serbia and Montenegro) and its agents and surrogates in Bosnia and elsewhere. This right of self-defence against genocide includes within itself the right to seek and receive support from other Contracting Parties to the Genocide Convention..."[525]

Because proceedings before the International Court of Justice are slow, Bosnia and Herzegovina filed a Request for provisional measures of Protection on March 3, 1993 asking the Court to make an interim finding that Bosnia and Herzegovina had the right to individual and collective self-defense. The Court denied the request of Bosnia and Herzegovina, so the opportunity for Bosnia and Herzegovina to take effective measures of self-defense remained limited.

In exercising its right to self-defense, Bosnia and Herzegovina, on June 16, 1992, by the joint declaration of Presidents Izetbegovic and Tudjman, entered into a military alliance with the Republic of Croatia. The third of the declaration's five counts related to military cooperation. [526] This agreement allowed Croatia to legalize its military presence in Bosnia and Herzegovina, which it later used to commit aggression against Bosnia and Herzegovina.

525 International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro) March 20, 1993.

526 In Izetbegović's words, the armed forces of the two countries would cooperate to fight against a common aggressor and Croatia had so far provided military assistance to Bosnia. The end of the statement specified that the future arrangement of B-H would be decided after the war by all of its peoples. "Who, how, and who first started, Great Deception (Belgrade 1997), p. 16.

The actions that NATO took in late August and early September 1995 cannot be considered as assistance to the Government of the Republic of Bosnia and Herzegovina against the flagrant act of aggression or as collective self-defense.

For all these reasons, it can be rightly concluded that Bosnia and Herzegovina, in exercising its right to self-defense, was left to itself and even obstructed by those parts of the international community whose role and responsibility was supposed to be to take necessary and sufficient measures to suppress the aggression.

IX. CONCLUSION

Based the legal theory of and actual facts about the war in Bosnia and Herzegovina between 1992-1995, as well as the opinions of the competent organs of the United Nations, suggest that the war in Bosnia and Herzegovina was an illicit, illegal and aggressive international war that justified the legitimate and defensive use of force by the Republic of Bosnia and Herzegovina as the victim of the attack.

Under the United Nations system, illicit, illegal and aggressive wars are referred to as crimes against the international peace, as well acts of aggression.

The Federal Republic of Yugoslavia (Serbia and Montenegro) and the Republic of Croatia carried out aggression against the Republic of Bosnia and Herzegovina and thus committed a crime against the international peace.

This book, therefore, draws the following conclusions about the nature of the war in Bosnia and Herzegovina:

1. *War in Bosnia and Herzegovina 1992-1995. is an aggression against the Republic of Bosnia and Herzegovina*

In accordance with the Opinion of the Arbitration Commission of the Conference on Yugoslavia, No. 11 of 4 July 1992, from the time of its commencement on, the war in the Republic of Bosnia and Herzegovina was waged against a sovereign, independent and internationally recognized state. Bosnia andHerzegovina held a referendum on independence on February 29 and March 1, 1992 in which a majority of its citizens, members of different ethnic groups, declared their independence. Beginning on March 6, 1992, the date on

which the official results of the referendum were published, the constitutional authorities of the Republic of Bosnia and Herzegovina were authorized to act on its behalf as a sovereign and independent state in order to preserve its sovereignty, territorial integrity and political independence.

At the time of commencement of the war in Bosnia and Herzegovina, it was a sovereign, independent and internationally recognized state, so the question of the character war waged on its territory depends solely on the character of the attacker.

With independence, international recognition and admission to membership in the United Nations, Bosnia and Herzegovina acquired certain rights guaranteed by international customary law and the Charter of the United Nations, including the right to sovereignty (independence) and the right to survival (self-preservation), which includes the right to self-defense.

At the time of independence and later, Bosnia and Herzegovina was destroyed by the acts and actions of certain Bosnian political parties, most prominently the SDS, the Serbian Radicals and the HDZ. The acts and actions that these political parties undertook were legally invalid from the standpoint of the domestic law of Bosnia and Herzegovina and international law, so the creation of parastatal entities within the territory of Bosnia and Herzegovina did not change its character as a sovereign, independent and internationally recognized state.

The respective governments of Serbia and Croatia could not agree on anything except the need to divide among themselves Bosnia and Herzegovina, to which their leaders agreed in a series of meetings that began in March 1991 in Karađorđevo. Their subsequent bilateral aggression against the Republic of Bosnia and Herzegovina was only the realization of this agreed scenario.

The aggression against the Republic of Bosnia and Herzegovina was commited by the sovereign and independent states of the Federal Republic of Yugoslavia (Serbia and Montenegro) and Croatia and meets the definition of aggression described in United Nations Resolution of 14 December 1974.

The *Federal Republic of Yugoslavia (Serbia and Montenegro)* started the aggression against the Republic of Bosnia and Herzegovina in early April 1992 in order to realize the idea of creating a "Greater Serbia." It circulated the idea of little Yugoslavia, which, in addition to Serbia and Montenegro, included at least the parts of Croatia with a majority Serb population and most of Bosnia and Herzegovina.

The Federal Republic of Yugoslavia committed aggression against the Republic of Bosnia and Herzegovina by using the armed force of the JNA and/or its three named successors: the Yugoslav Army, the Army of the Serb Repub-

lic and the Army of the Serbian Krajina Republic. Despite their three different names, all of these armed forces had a single chain of command. Regular and special Serbian police units, agents, and paramilitary formations were also engaged in the aggression.

In this way, the Federal Republic of Yugoslavia (Serbia and Montenegro) planned, prepared initiated and conducted a war of aggression against the sovereignty, territorial integrity and political independence of the Republic of Bosnia and Herzegovina and, therefore, committed aggression against the Republic of Bosnia and Herzegovina as a crime against the international peace. The FRY committed the following acts of aggression against Bosnia and Herzegovina, which are categorized according to the aforementioned definition adopted by the United Nations:

a) The invasion and attack by the armed forces of the FRY upon the Republic of Bosnia and Herzegovina in order to realize the project of "Greater Serbia";
b) The bombardment and artillery fire by the armed forces of the Federal Republic of Yugoslavia, stationed in the Federal Republic of Yugoslavia, on the territory of the Republic of Bosnia and Herzegovina;
c) The attack of the armed forces of the FRY on the ground forces of the Republic of Bosnia and Herzegovina;
d) The use of the armed forces of the FRY, which titularly remained as the JNA, against Bosnia and Herzegovina before and after May 19, 1992, the date by which they were supposed to withdraw from the territory of the Republic of Bosnia and Herzegovina; and
e) The sending of Yugoslav police, agents, armed detachments, groups of volunteers and mercenaries and various other irregular formations to undertake military actions and crimes of such severity that they can be characterized as acts of aggression against the Republic of Bosnia and Herzegovina.

In order to achieve the objectives of its aggression, the FR Yugoslavia used against the population of Bosnia and Herzegovina ethnic cleansing, committing the most heinous crimes against humanity in Europe since World War II.

The aggression of the FR Yugoslavia against the Republic of Bosnia and Herzegovina ended with the conclusion of the General Framework Agreement for Peace in Bosnia and Herzegovina, which is, by its legal nature, a peace agreement that essentially confirmed the results of aggression.

The FRY committed aggression against the Republic of Bosnia and Herzegovina, and the Republic of Croatia conducted an illegal invasion of the territory of the Republic of Bosnia and Herzegovina. The beginning of Croatian ag-

gression in Bosnia and Herzegovina can be identified as the Croatian attack on Prozor in October 1992. The war aim of the Republic of Croatia was to conquer and create conditions for the annexation of parts of the territory of Bosnia and Herzegovina in which ethnic Croats were a significant portion of the population.

Croatia, by the use of armed force against the sovereignty, territorial integrity and political independence of the Republic of Bosnia and Herzegovina, committed aggression against the Republic of Bosnia and Herzegovina. Croatia committed the following acts of aggression:

a) The invasion of Croatian Armed Forces in the Republic of Bosnia and Herzegovina, beginning in April 1992, and the attack of the Croatian Armed Forces on the Republic of Bosnia and Herzegovina, beginning in October 1992 with the attack on Prozor, as well as the de facto annexation of the territory of the Republic of Bosnia and Herzegovina to Croatia by force;
b) The bombardment by the armed forces of the Croatian areas of Bosnia and Herzegovina with artillery and air strikes;
c) The attack of the Croatian armed forces on the ground forces of the Republic of Bosnia and Herzegovina; and
d) The use of the Croatian armed forces, which had entered the territory of Bosnia and Herzegovina on the basis of various agreements with the Republic of Bosnia and Herzegovina, against the sovereignty, territorial integrity and political independence of Bosnia and Herzegovina, as well as the extension of their presence in the territory of Bosnia and Herzegovina after the termination of these agreements.

The aggression by the Republic of Croatia against the Republic of Bosnia and Herzegovina ended with the Washington Agreement on March 18, 1994, which created the Bosnian-Croatian federation on the territory of Bosnia and Herzegovina. With the conclusion of the General Framework Agreement for Peace in Bosnia and Herzegovina, whose signatories included the Republic of Croatia, Croatia achieved its war aims of territorializing its interests in Bosnia and Herzegovina.

Simultaneously, the Republic of Croatia ethnically cleansed oSerbs and Bosniacs from the parts of the Federation of Bosnia and Herzegovina that are strategically important to it.

The aggression against the Republic of Bosnia and Herzegovina committed by the FR Yugoslavia (Serbia and Montenegro) and the Republic of Croatia was essentially irredentist becausetheir goals were to create great state that would include all of the territory inhabited by Serbs and Croats by changing international boundaries and annexing territory belonging to another state

(the Republic of Bosnia and Herzegovina) through violence.

If it possible to distinguish levels of aggression. Croatia committed aggression against the Republic of Bosnia and Herzegovina at a lower level intensity than the Federal Republic of Yugoslavia, and Croatian public opinion was considerably more resistant to the aggression against Bosnia and Herzegovina. Croatia also did not use paramilitary formations in the aggression against Bosnia and Herzegovina.

2. *"Civil War" was in the function of aggression against the Republic of Bosnia and Herzegovina*

The aggressors against Bosnia and Herzegovina, the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Republic of Croatia, instrumentalized members of their own ethnic groups, citizens of the Republic of Bosnia and Herzegovina, during the aggression against Bosnia and Herzegovina. At the same time, particularly in Serbia, propaganda was employed to present the aggression against Bosnia and Herzegovina as a civil war waged by members of different ethnic groups in Bosnia and Herzegovina.

Inciting fighting within the Republic of Bosnia and Herzegovina between members of different ethnic groups was a function of the aggression against Bosnia and Herzegovina. At the same time, military formations composed predominantly of Bosnian Serbs and Bosnian Croats, as well as their political leadership, did not have the necessary level of independence to be considered as separate parties in the Civil War. These formations were only one component in the arsenal of means used in the aggression against the Republic of Bosnia and Herzegovina. Therefore one cannot talk about civil war in Bosnia and Herzegovina separate from the aggression against Bosnia and Herzegovina.

3. *The UN response to the aggression was insufficient.*

The Organization of the United Nations, whose primary task and the meaning of whose existence are the preservation of international peace and security and, as a component of that, suppression of aggression, in the case of Bosnia and Herzegovina was ineffective.

The *Security Council,* as the organ of the United Nations primarily responsible for taking necessary measures to combat aggression and restore international peace and security, in the case of the aggression against the Republic

of Bosnia and Herzegovina, was stopped half way and failed to take adequate measures to combat the aggression.

Resolution 752 of 15 May 1992 required that all forms of interference from outside Bosnia and Herzegovina, including units of the Yugoslav People's Army and elements of the Croatian Army, cease immediately and that Bosnia's neighbors take immediate action to end such interference and to respect the territorial integrity of Bosnia and Herzegovina.

In addition to requiring that the units of the Yugoslav People's Armyand and the elements of the Croatian Army present in Bosnia and Herzegovina either be withdrawn, subject to the authoritiy of the Government of Bosnia and Herzegovina, or disbanded and disarmed with their weapons placed under effective international monitoring, the Secretary-General requested that the international community promptly consider what assistance it could provide in connection with the conflict.

It also required that all irregular forces in Bosnia and Herzegovina be disbanded and disarmed.

This resolution was adopted on the basis of the UN Secretary General's report of 12 May 1992, in which he described the bombing of Sarajevo from the surrounding hills and the joint effort of the Bosnian Serbs and the Yugoslav People's Army to create an ethnically pure region in the context of negotiations on the ''Cantonization'' of the Republic.

Resolution 757 of 30 May 1992. came after the aggressors failed to meet these requirements. This resolution imposed economic and diplomatic sanctions against the aggressor, the FR Yugoslavia (Serbia and Montenegro), while inviting the other aggressor, the Republic of Croatia to comply with the requirements of previous resolutions.

The Security Council imposed economic and diplomatic sanctions, pursuant to Article 41 of the Charter of the UN, to re-establish the threatened or breached international peace and to combat aggression. Their imposition confirmed existence of the aggression against Republic of Bosnia and Herzegovina.

These measures proved insufficient to stop the aggression. Rather than resort to armed measures authorized by Article 42 of the UN Charter, the Security Council left the European Community to resolve this issue as a regional economic organization that itself did not have the instruments of armed force. In this way, the Security Council refrained from carrying out its obligations to supress aggression stemming from the UN Charter, which is the purpose of its existence.

When, however, the international community used force in Bosnia and

Herzegovina, it was not used against an aggressor, but against a part of Bosnia and Herzegovina, which was labeled as the aggressor.

The legal basis for the use of armed force contained in Resolution 836 of the Security Council and the actual goal of the use of force was the imposition of a territorial division of the Republic, which is confirmed by Security Council Resolution 942, which was opposed by the Bosnian Serbs.

At the third CSCE Summit (CSCE) on July 9 & 10, 1992 in Helsinki, the CSCE adopted a special Declaration on Yugoslavia stating that, despite the efforts of the United Nations, the European Union and other organizations, violence and aggression against Bosnia and Herzegovina and Croatia were still ongoing and the authorities in Belgrade bore primary responsibility.

The UN General Assembly took a clear stand with respect to the aggression against Bosnia and Herzegovina. In its resolutions, it condemned Serbia and Montenegro and the Serbian forces in Bosnia and Herzegovina for violating the sovereignty, territorial integrity and political independence of Bosnia and Herzegovina. It supported the demands of the Security Council that elements of the JNA and the Croatian army withdraw, subject themselves to the authority of the Govornment of Bosnia and Herzegovina, or disband and disarm. However, resolutions of the General Assembly, while perhaps having the highest moral authority, have a limited scope, as they do not have any stronger legal effect than recommendations.

4. *The International Criminal Tribunal for the former Yugoslavia (ICTY) has determined that the war in Bosnia and Herzegovina is an aggression against the Republic of Bosnia and Herzegovina and a partial occupation of Bosnia and Herzegovina*

The International Criminal Tribunal for the Former Yugoslavia, first in the case of *Prosecutor v. Dusko Tadic* and later in other relevant judgments, found that, for the entire duration of the war, the existence of international armed conflict and partial occupation of the territory of Bosnia and Herzegovina by the FR Yugoslavia.

In the case of *Prosecutor v. Tihomir Blaskic* and other relevant rulings, it found that international armed conflict and partial occupation of the territory of the Republic of Bosnia and Herzegovina by Croatia had occurred.

5. *International Court of Justice in The Hague confirms existence of aggression against Bosnia and Herzegovina and genocide against Bosniaks*

The International Court of Justice, in the judgment of 26 February 2007, confirmed the existence of facts that prove the aggression by the Federal Republic of Yugoslavia against Bosnia and Herzegovina.

The Court concluded that there was much evidence of direct and 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. The political organs of the United Nations repeatedly condemned that participation and demanded that the FRY put an end to it.

The Court, in its Judgment, concluded that the acts committed in and around Srebrenica were committed with the specific intent to destroy in part the group of Bosniacs (Muslims) in Bosnia and Herzegovina and that these acts constituted acts of genocide committed by the army and police force of the Serb Republic in and around Srebrenica on approximately July 13, 1995.

On the issue of crimes committed in other parts of Bosnia and Herzegovina, the Court found that it had been established by conclusive evidence that large-scale killings of members of a protected group occurred and that, therefore, the requirements of the material element, as defined by Article II *(a)* of the Convention, had been fulfilled. The Court, however, was not convinced, on the basis of the evidence before it, that it had been conclusively established that the large-scale killings of members of the protected group were committed with the specific intent *(dolus specialis)* on the part of the perpetrators to destroy, in whole or in part, the group as such.

The Court, in this Judgment, confirmed that the Federal Republic of Yugoslavia committed aggression but not genocide in Bosnia and Herzegovina, although it was responsible for not preventing the genocide.

6. *The Republic of Bosnia and Herzegovina was obstructed in the exercise of the right to self-defense.*

The continued enforcement of Resolution 713 of 25 September 1991, which introduced the embargo on arms and military equipment to the former Yugoslavia, including Bosnia and Herzegovina, deprived it of opportunities to take effective measures in self-defense. The way in which this resolution was applied also denied the right of any member of the international community

to come to the aid of Bosnia and Herzegovina in its conduct of legitimate self-defense.

7. *The General Framework Agreement for Peace in Bosnia and Herzegovina known as the Dayton Peace Agreement confirmed that the war in Bosnia and Herzegovina was by its very nature an aggression against the Republic of Bosnia and Herzegovina*

The aggression ended with the conclusion of *the General Framework Agreement for the Peace in Bosnia and Herzegovina*, which was both nominally and in essence a peace agreement. The agreement was concluded between the parties to the war, the Republic of Bosnia and Herzegovina, Croatia and the FR Yugoslavia. In addition to the States that had participated in the armed conflict, representatives of the European Union, France, Germany, the Russian Federation, the United Kingdom and the United States witnessed the agreement.

In the introductory part of the agreement, the signatories reaffirmed their commitment to respect the ceasefire agreements of September 14 and October 5, 1995, which defined them as parties to the armed conflict.

The existence of this agreement, the manner of its conclusion and its contents are evidence of that the FRY and the Republic of Croatia perpetrated the aggression against the Republic of Bosnia and Herzegovina.

8. *Nonrecognition of the results of territorial conquest or benefits created by the use of force is the rule of international law whose violation is an international crime and constitutes complicity in the aggression.*

9. *The Dayton Peace Agreement legalized the results of territorial conquest and ethnic cleansing*

10. *The Serbs realized their aims of aggression in a qualitative sense.*

Bosnian Podrinje was “cleansed” of its Bosniac majority and Bosnian Posavina of its Croat-and-Bosniac majority. The result was an ethnically pure Serbian entity west of the river Drina called the Serb Republic, which is synonymous with territorial conquest and genocide.

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