



*EuroMUN 2017, Maastricht, The Netherlands*

## **Study Guide for the International Court of Justice**

COUR INTERNATIONALE  
DE JUSTICE



INTERNATIONAL COURT  
OF JUSTICE

---

*Federal Republic of Yugoslavia v United States of America: The  
Legality of the use of force*

*Contents:*

*Introduction to International Court of Justice*

*Historical Background of NATO bombings*

*Current Position (Status Quo)*

*Bloc Positions*

*Questions to consider*

*Conclusion*

*Suggested Further Reading*

## **Introduction to International Court of Justice**

The International Court of Justice (ICJ) started its work in 1946, and the feature which makes it different from the numerous international courts and tribunals existing nowadays, it is the integral organ and primary judicial branch of the United Nations. All 192 Member States of the United Nations are parties to it. Moreover, members have the right to elect the judges of the ICJ by means of voting procedure in the General Assembly. This right was exercised in 2008 when the Member States have collectively elected five judges <sup>1</sup>.

The structure and the rules of the ICJ were inherited from its predecessor, the pre-war Permanent Court of International Justice <sup>2</sup>. The Permanent Court has been operating during the era of the League of Nations <sup>3</sup>, but interestingly, it was a separate and independent organ, unlike the ICJ.

At the time of its establishment the ICJ was the only international court in existence. Moreover, in contrast to the plethora of specialized international courts and tribunals which exist today the ICJ has the jurisdiction to hear cases concerning any kind of legal dispute between states. In addition, the ICJ is able to provide advisory opinions on the request of specified United Nations bodies and agencies.

The ICJ has jurisdiction in two types of cases: contentious cases and advisory opinions <sup>4</sup>. In contentious cases, (this is the type of case that the Euro MUN delegates are going to encounter), the ICJ produces a binding ruling between states that agree to submit to the ruling of the court. The second type, advisory opinion, may be requested by any UN agency, or other agency that has been authorized to do so by the General Assembly. Advisory opinions are not binding but they do contribute to the body of international law.

---

<sup>1</sup> <http://www.icj-cij.org/court/index.php?p1=1>

<sup>2</sup> <http://www.indiana.edu/~league/pcioverview.htm>

<sup>3</sup> <https://history.state.gov/milestones/1914-1920/league>

<sup>4</sup> <http://www.icj-cij.org/jurisdiction/index.php?p1=5>

After identifying the type of jurisdiction applicable to a subject matter, the next step is to realize if the Court has jurisdiction over the case. In other words, does the Court have the right to hear the case and make a legally binding judgement? It is important to note that the ICJ does not have unconditional jurisdiction over the UN Member States. The ICJ will only have jurisdiction in a contentious case if the states involved consent to the jurisdiction of the Court. This consent can be given in many ways, but the parties, before or after the dispute, shall come to an agreement to refer the dispute to the ICJ. If such consent is given before the dispute, by way of a bilateral or multilateral treaty, and if this treaty is still in force when the court proceedings commence, the Court will continue to have jurisdiction even if the respondent state opposes it.

It is also worth mentioning that the Court has jurisdiction only on the limited subject matter which specified in the relevant treaty provisions. Another way of consenting to the jurisdiction of the Court is “the optional clause” (this is set out in Article 36(2) of the Statute of ICJ)<sup>5</sup> under which any state can consent to the jurisdiction of the Court in regard to any international law matter against another state that has likewise consented to the Court’s jurisdiction.

There are not many states that have made optional clause declarations<sup>6</sup> accepting the Court's jurisdiction and of those who have many have been made with reservations attached. Among the five permanent members of the Security Council, it is only United Kingdom that has made such a declaration.

---

<sup>5</sup> *Statute of the International Court of Justice*, 18 April 1946, available at: <http://www.refworld.org/docid/3deb4b9c0.html>

<sup>6</sup> <http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3>

## Historical Background of NATO Bombings

Former NATO Secretary General Javier Solana ordered military action against Yugoslavia following a failure in negotiations on the Kosovo crisis in Rambouillet and Paris in February and March 1999.

NATO's decision was officially announced after talks between international mediators (known as the Contact Group), the Yugoslav government, and the delegation of Kosovo Albanians ended in deadlock. Belgrade refused to allow foreign military presence on its territory while Albanians accepted the proposal. Back then, Slobodan Milosevic's forces were engaged in armed conflict with an Albanian rebel group, the Kosovo Liberation Army (KLA), which sought the province's separation from Yugoslavia. Former US President Bill Clinton's special envoy to the Balkans, Robert Gelbard, had earlier described the KLA as "*without any questions, a terrorist group.*"

(The KLA was later repeatedly accused of being involved in the organ trafficking of Serbs in the late 1990s)

However, despite not announcing the link officially, NATO entered the conflict on the side of the KLA, accusing Serbian security forces of atrocities and "*ethnic cleansing*" against ethnic Albanians in Kosovo. The main objective of the campaign was to make Milosevic's forces pull out of the province. The fact that there was violence on both sides of the confrontation was ignored both by allied governments and Western media – which stirred up public anger by focusing only on Serbian atrocities and being far less vocal regarding abuses by Albanians.

*"All efforts to achieve a negotiated political solution to the Kosovo crisis having failed, no alternative is open but to take military action,"* Solana said on March 23, 1999. *"We must halt the violence and bring an end to the humanitarian catastrophe now unfolding in Kosovo."*

### Racak Massacre Controversy

An incident involving the "*mass killing*" of Albanians in central Kosovo's village of Racak – a KLA stronghold – became a major excuse and justification for NATO's decision to start its operation. Serbs were blamed for the deaths of dozens of Albanian "*civilians*" on January 15,

1999. However, it was alleged that the accusations could have been false and the bodies actually belonged to KLA insurgents whose clothes had been changed.

A central role in labelling the events in Racak “*a massacre*” belonged to William Walker, who headed the OSCE Kosovo Verification Mission. He visited the site shortly after the incident and made his judgment.

*“[Walker] arrived there having no powers to make conclusions regarding what had happened,”* Russian Foreign Minister Sergey Lavrov said in an interview with the Russian newspaper Rossiyskaya Gazeta.

Yugoslav authorities accused Walker of going beyond his mission and proclaimed him persona non grata, while Western leaders were infuriated over the Racak incident. *“And some time later the bombing started,”* Lavrov recalled, adding that the situation in Racak became the *“trigger point.”*

Moscow insisted that an investigation should be carried out. The EU commissioned a group of Finnish forensic experts to prepare a report on the incident. Later, the European Union handed it over to the International Criminal Tribunal for the former Yugoslavia, Lavrov said. The full version of the document has never been made public, said the minister, who was Moscow’s permanent representative to the UN between 1994 and 2004.

*“But parts of the report leaked and were quoted in the media saying that [the victims] were not civilians and that all the bodies found in Racak were in disguise and that bullet holes on clothes and bodies did not match. There was also no one who was killed at short range,”* Lavrov said. *“Even though I’ve repeatedly raised this issue, the report itself still has not been shown.”*

NATO halted its air campaign with the signing of the Military Technical Agreement in Kumanovo on June 9, 1999, with the Yugoslav government agreeing to withdraw its forces from Kosovo. On June 10, 1999, the UN Security Council adopted resolution 1244 to establish the UN Interim Administration Mission in Kosovo (UNMIK).

In August 2013, Amnesty International accused the UNMIK of failing to properly investigate the abductions and murders of Kosovo Serbs in the aftermath of the 1998-1999 war.

*“Years have passed and the fate of the majority of the missing on both sides of the conflict is still unresolved, with their families still waiting for justice,”* the organization said.

Moscow's former envoy to NATO (1997-2002), Viktor Zavarzin, believes the military alliance's aggression was "*a crime against humanity*" and a "*violation of international laws and norms*." The event that unfolded 15 years ago laid ground to a new era of the development of international relations – the era of "*chaosization of international law and its arbitrary manipulation*," Zavarzin, an MP for the United Russia party said at the State Duma plenary session on Friday.

#### *Yugoslavia v USA (Legality of Use of Force)*

On 29 April 1999 Yugoslavia filed an application to the ICJ which initiated proceedings against the United States of America "for violation of the obligation not to use force", accusing that State of bombing Yugoslav territory "together with other Member States of NATO". On the same day it submitted a request asking the Court to order the United States of America to "cease immediately its acts of use of force" and to "refrain from any act of threat or use of force" against the FRY. As a basis for the jurisdiction of the Court, Yugoslavia invoked Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948, as well as Article 38, paragraph 5, of the Rules of Court. Article IX of the Genocide Convention provides that disputes between the contracting parties relating to the interpretation, application or fulfillment of the Convention shall be submitted to the International Court of Justice. Article 38(5) of the Rules of Court provides that when a State files an application against another State which has not accepted the jurisdiction of the Court, that application is sent to the other State, but no action is taken in the proceedings unless and until that State has accepted the Court's jurisdiction for the purposes of the case.

#### *Reasoning of the Court:*

In its judgement, the Court emphasizes that it is "deeply concerned with the human tragedy, the loss of life, and the enormous suffering in Kosovo which form the background" of the dispute and "with the continuing loss of life and human suffering in all parts of Yugoslavia". It declares itself "profoundly concerned with the use of force in Yugoslavia", which "under the present circumstances ... raises very serious issues of international law". While being "mindful of the purposes and principles of the United Nations Charter and of its own responsibilities in the maintenance of peace and security under the Charter and [its] Statute", the Court "deems it necessary to emphasize that all parties before it must act in conformity

with their obligations under the United Nations Charter and other rules of international law, including humanitarian law". The Court then points out that it "does not automatically have jurisdiction over legal disputes between States" and that "one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction". It cannot indicate provisional measures without its jurisdiction in the case being established *prima facie*. Concerning Article IX of the Genocide Convention, the Court states that it is not disputed that both Yugoslavia and the United States of America are parties to that Convention, but that when the United States ratified the Convention on 25 November 1988, it made a reservation. That reservation provides that before any dispute, which the United States is a party, may be submitted to the jurisdiction of the Court, "the specific consent of the United States is required in each case". However, in this case, the United States has indicated that it had not given specific consent and that it would not do so. Since the Genocide Convention does not prohibit reservations and since Yugoslavia did not object to the reservation made by the United States, the Court considers that Article IX manifestly does not constitute a basis of jurisdiction in the case, even *prima facie*. In Article 38(5) of the Rules of Court, the Court stresses that, in the absence of consent by the United States it cannot exercise jurisdiction in the case even *prima facie*. The Court concludes that it "manifestly lacks jurisdiction to entertain Yugoslavia's Application" and that "it cannot therefore indicate any provisional measure whatsoever". It adds that "within a system of consensual jurisdiction to maintain on the General List a case upon which it appears certain that the Court will not be able to adjudicate on the merits would most assuredly not contribute to the sound administration of justice". The Court finally observes that "there is a fundamental distinction between the question of the acceptance by a State OF the Court's jurisdiction and the compatibility of particular acts with international law". "The former requires consent; the latter question can only be reached when the Court deals with the merits after having established its jurisdiction and having heard full legal arguments by both parties." It emphasizes that "whether or not States accept the jurisdiction of the Court, they remain in any event responsible for acts attributable to them that violate international law, including humanitarian law" and that "any disputes relating to the legality of such acts are required to be resolved by peaceful means, the choice of which, pursuant to Article 33 of the Charter, is left to the parties". In this context, "the parties should take care not to aggravate or extend: the dispute". The Court re-affirms that "when such a dispute gives rise to a threat to the peace, breach of the peace or act of aggression, the Security Council has special responsibilities under Chapter VII of the Charter".

## **Current Position (as of status quo)**

In an Order issued in the case concerning Legality of use of force (Yugoslavia v. United States of America), the court rejected by twelve votes to three the request for the indication of provisional measures submitted by the Federal Republic of Yugoslavia (FRY). In its Order, the Court, having found that it manifestly lacked jurisdiction to entertain the case, decided to dismiss it. It ordered by twelve votes to three that the case be removed from the List. The Court was composed as follows: Vice-President Weeramantry, Acting President; President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, I-Iggins, ParraAranguren, Kooijmans; Judge ad hoc Kreca; Registrar Valencia-Ospina.

On the issue of prima facie jurisdiction, the ICJ ruled that whilst it was indisputable that both the United States and the Federal Republic of Yugoslavia are parties to the Genocide Convention, a reservation made to Article IX by the United States declaring that its “specific consent” is needed before any dispute is submitted to the ICJ, meant that Article IX could not constitute a basis for jurisdiction. Regarding Article 38(5), the Court said that in the absence of consent by the United States it lacked even prima facie jurisdiction. As a result, in rejecting the FRY’s request for provisional measures by twelve votes to three, the Court concluded that it “manifestly lacked jurisdiction to entertain Yugoslavia’s Application”.

## **Bloc Positions**

### *Federal Republic of Yugoslavia*

As a result of the intervention by NATO forces in March 1999 (which constituted a breach of sovereignty and non-intervention (two fundamental tenets of international law), was not authorized by the United Nations Security Council, and which led to many civilian deaths and human rights violations) the Federal Republic of Yugoslavia would deem it necessary to submit a case against United States of America on the grounds of illegal use of force.

The principle of non-intervention was discussed at length by the ICJ in *Nicaragua v USA*<sup>7</sup>. In this case the ICJ noted that non-intervention was a principle of customary international law (which binds all states) and moreover that it is a jus cogens norm: “Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State” (at para. 205). USA has clearly violated the above principle that was further reflected in Article 8 of the Treaty of Cooperation, Friendship and Mutual Assistance<sup>8</sup>, Helsinki Final Act 1975<sup>9</sup> etc.

The United Nations Security Council (UNSC), under Chapter VII<sup>10</sup>, may breach this principle and lawfully intervene in a state on humanitarian grounds with the aim of restoring peace and security (i.e. see the Libyan intervention). The procedure which is set out in Chapter VII of the UN Charter states that to commence immediate humanitarian intervention, there shall firstly be an agreement within the UNSC that would authorize such an intervention. In the case of Yugoslavia, such an agreement did not eventuate, as Russia and China did not agree on it. Despite that, the USA led a coalition which intervened in Yugoslavia thereby breaching international law.

Besides the gravest violations of international law listed above, the USA has systematically breached international humanitarian law. According to Part III of IV of the Geneva Convention<sup>11</sup> and Part IV of Additional Protocol I<sup>12</sup>, during the armed conflict,

---

<sup>7</sup> <http://www.icj-cij.org/docket/?sum=367&p1=3&p2=3&case=70&p3=5>

<sup>8</sup> <https://www.britannica.com/place/Finland/The-postwar-period#ref393175>

<sup>9</sup> <http://www.osce.org/helsinki-final-act>

<sup>10</sup> Charter of the United Nations 1945, <http://www.un.org/en/charter-united-nations/>

<sup>11</sup> <https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions>

<sup>12</sup> [https://www.icrc.org/eng/assets/files/other/icrc\\_002\\_0321.pdf](https://www.icrc.org/eng/assets/files/other/icrc_002_0321.pdf)

civilians shall be protected and attacks shall not be performed in the places where there is a probability of civilian presence. Furthermore, the attack shall not be of an indiscriminate nature putting at risk the lives of civilians and causing unnecessary suffering. Bombing public buildings and private businesses, and killing approximately five hundred civilians constitutes a breach of IV Geneva Convention and I Additional Protocol.

The obligation to protect the environment, the obligation relating to free navigation on international rivers (Article 1 of 1948 Convention), the obligation not to use prohibited weapons, the obligation to not deliberately cause the physical destruction of a national group (Convention on the Prevention and Punishment of the Crime of Genocide)<sup>13</sup> constitute the gross violations performed by NATO in Yugoslavia.

The Federal Republic of Yugoslavia claims that the USA should be compelled to provide compensation for the damages it has caused.

#### *United States of America*

The United States of America, a member of NATO, which led a humanitarian intervention into Yugoslavia, contends that such an intervention is justifiable. It should be recalled that the same international customary law emerges from state practice, and such a state practice was necessary for the prevention of genocide which is a jus cogens norm. The intervention that was absolutely necessary due to the oppressive regime of Milosevic should not be regarded as a breach of international law, but as its expansion. States should not be limited to the burdens of the existing international law, especially in critical situations that require interim measures. It is a gap of international humanitarian law that a state cannot intervene to protect and prevent the gross humanitarian crisis due to the bureaucratic

---

<sup>13</sup> <https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf>

procedures of Security Council where the permanent five states have dubious opinions on the protection of human rights and are politically rather than morally motivated.

The primary motivation for NATO to intervene in Yugoslavia was the oppressive regime of Milosevic which violated the rights of a national minority, committed genocide and therefore breached the Prevention and Punishment of the Crime of Genocide and 1949 Geneva Convention. Moreover, there were other gross violations of human rights, namely ordering the murder of hundreds of civilians and expulsion of 170 thousand non-Serbs from their homes and “widespread killing of thousands of Bosnian Muslims and Bosnian Croats”<sup>14</sup>. Therefore, the United States of America views the intervention as “an assistance to justified revolution”, prevention of Yugoslav tyranny and “an effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule”<sup>15</sup>.

Despite the fact that intervention is criticized and labelled as being unlawful due to the absence of SC authorization, the USA deems that NATO is a more reliable guardian of human values, and SC authorization is not a necessary prerequisite for humanitarian intervention. It further notices that the politicized nature of SC should not be an obstacle for protecting the human rights that were systematically violated, and deems that international society should be more responsive to such humanitarian crises.

As positivists portray, customary law, and law as a whole emerges from the state practice. States should not blindly follow the existing codes, but should expand the customary laws instead. The USA views the intervention not as a breach of international law, but as its expansion, similar to Truman’s expansion of Law of the Sea regarding the continental shelf. We cannot find a satisfactory response to all situations in the existing codes, and the humanitarian law is an area that needs such developments, especially in the development of a

---

<sup>14</sup> <http://news.bbc.co.uk/1/hi/world/europe/1402790.stm>

<sup>15</sup> KOSOVO: A POWERFUL PRECEDENT FOR THE DOCTRINE OF HUMANITARIAN INTERVENTION; <http://amsterdamlawforum.org/article/view/62/119>

new code for intervention. Without such an expansion, the human rights of many cannot be effectively protected from the regimes they are victims of.

## **Conclusion**

It is possible, according to several contentious reports that the concept of jurisdiction is open for interpretation. The Courts are open for proposition pertaining to interpretation, possibly identifying key areas which may allow the ICJ to perhaps give an Order or at least reserve a case for judgment.

## **Questions to consider**

It is expected that the respective delegate navigates through the legal documents mentioned in the Study Guides, probably by means of footnotes. The questions to be answered in the judgment are whether the principle of sovereignty can be compromised for the sake of protection of minority groups; can USA's intervention be justified in the light of breach of the formal procedure of prior notification and agreement of UNSC; can the principle of sovereignty justify the non-intervention in cases of humanitarian crisis. Additionally, it would be very useful to get a deeper understanding of the principle of sovereignty and non-intervention, and of the humanitarian crisis. Those issues are crucial in the case concerned. Good luck with your preparation, and remember, Study Guide is only the first introductory step to your research!

