

BERKELEY MODEL UNITED NATIONS



LXVI
SIXTY-SIXTH SESSION

INTERNATIONAL COURT OF JUSTICE



WELCOME LETTER

It is my absolute honor to welcome you to the 66th session of Berkeley Model United Nations. My name is Alexandra Maloney, and I will be serving as your head chair for the International Court of Justice, a fast-paced and unique specialized committee in which considerable power lays in your hands, as you will be representing actual judges in a simulation of an actual court case. I am currently a sophomore at UC Berkeley from Greenwich, Connecticut, studying English Literature with a minor in history and hope to attend law school upon graduating and practice law. Growing up in a family of attorneys and law enforcement officials, I've been intrigued by legal procedures and the law for as long as I can remember. I love the field as a study in how linguistic precision when crafting laws and legal rulings can impact case law for decades as well as how the articulation of an argument can sway a jury or judge. I fell in love with international law in a court-style committee like this one when I was a delegate—cross-examining witnesses, scouring statutes and treaties, and crafting final verdicts proved to be intellectual challenges unlike any other I'd had in MUN before and hope this committee will be just as rewarding for you all. Below is a little information about your vice chairs:

Alexander Wilfert's background in MUN is on the international circuit, participating in THIMUN and then serving as a Vice-Chair for the Arab League THIMUN style committee at BMUN 64 and a Vice-Chair on Historical Crisis at BMUN 65. He grew up outside of London, UK with a Lebanese-American mother and German father. This diverse background has led him to study Political Economy with a focus in International Relations here at Berkeley. Outside of the classroom, he is a part of Greek Life, works at a law firm in San Francisco and serves as an ASUC senator as part of Berkeley's student government. He is an avid Tottenham Hotspur supporter and in his free time, he likes to watch any sport, watch Netflix and try out new foods. He looks forward to meeting you all shortly!

Ashwin Srikanth is your other vice chair for ICJ at BMUN 66. He is a freshman at UC Berkeley intending to major in Molecular and Cellular Biology and Public Health. This is his first year at BMUN but his seventh year doing MUN as a whole. He's originally from San Jose California, but grew up in Finland, Brazil, and China, where he finished high school, and it is his upbringing that got him interested in the international community and its unique dynamic. He's a little obsessed with watching TV shows (Parks and Recreation, Game of Thrones, Suits, and House of Cards are some of his favorites), and also sings as part of an acapella group on campus. The ICJ is one of his favorite committees to be a part of in MUN and he's extremely excited to get to be a part of it at BMUN as well. He is looking forward to an amazing conference!

I am beyond thrilled to be your head chair and am incredibly excited to meet all of you in March!

Alexandra Maloney

Head Chair, International Court of Justice

Berkeley Model United Nations, Sixty-Sixth Session

BOSNIA V. SERBIA (BOSNIAN GENOCIDE)

OVERVIEW OF COMMITTEE PROCEDURE AND CONDITIONS

This committee will most likely be one of the more unique experiences you will have in Model UN, as you will not be representing a delegate sent by a particular state; instead, you will be representing an ICJ judge from a UN member state and exercising your judgment on a simulation of a real historical crisis. In turn, the committee's chairs will be serving as lawyers for the case. The committee's debate will mainly revolve around discussions that you, the judges, will have regarding individual aspects of the case and deciding the merits of particular legal arguments and testimony.

Although typical parliamentary procedure rules still apply, this committee will follow additional special procedure. The ICJ will not have a speaker's list during debate, and in its place only moderated and unmoderated caucuses will be used to drive debate forward. A major difference between this committee and a typical Bloc A or B committee is that the ICJ will invite witnesses to testify before the Court. Ten to twelve witnesses representing both sides will enter the committee throughout conference to testify and be questioned by the dais. Then, delegates will have the

opportunity to ask them questions and use their testimony and any legal analysis they offer as evidence or fodder for debate.

Additionally, rather than working on resolutions to present to the committee, judges will work on verdicts which they will present individually. This should not be written in resolution format but rather as a judicial ruling along with an explanation for the verdict you have reached.

We will be trying the case of Bosnia and Herzegovina v. Serbia and Montenegro, heard by the actual ICJ in 2007, for this session of BMUN. However, there are a number of conditions we must assume to make this committee possible—one, we will assume that the actual 2007 ICJ case has not been tried yet. You may use any testimony, evidence, or legal analysis the case included, however, during committee. We will also introduce witnesses that may be living or dead to testify about their experiences and will still treat the deceased witnesses as we would any other witness and cross-examine them.

OVERVIEW OF THE ICJ

The ICJ was established as part of the 1945 United Nations Convention and serves as the UN's primary judicial branch. All 193 UN member states are parties to

the ICJ. The Court is composed of fifteen judges from any of the ICJ's member states and are elected by the UN Security Council and General Assembly to serve nine-year terms. While the court's structure and rules are outlined in the ICJ Convention, the ICJ is able to use international conventions, treaties, and common law to make its rulings.

The ICJ has the jurisdiction to give opinions on two types of cases: contentious issues and advisory opinions. In a contentious issue ruling, the ICJ makes a binding decision on a dispute between two states—individuals, businesses, and regional governments are prohibited from these cases. In order for jurisdiction to be achieved for consensus issues, the two (or more) states can consent to have the case heard; additionally, Article 36(1) of the ICJ Convention stipulates that “matters specifically provided for... in treaties and conventions in force” are also subject to the ICJ's jurisdiction. The ICJ may also issue advisory opinions, which are cases referred to the ICJ by international agencies and the UN General Assembly. These agencies utilize this tool essentially as a request for a legal analysis on a particular issue; thus, these rulings, while they can be helpful, are merely consultative and non-binding. Because the case of *Bosnia and Herzegovina v. Serbia and Montenegro* was a contentious dispute, we will conduct our simulation following the procedure and jurisdictional rules of this type of case.

TIMELINE OF EVENTS

1945: Bosnia-Herzegovina (less formally referred to as Bosnia) becomes a constituent state of The Socialist Federal Republic of Yugoslavia. At its height, the state also includes constituent states of Serbia, Montenegro, Croatia, Slovenia and Macedonia.

1980: Longstanding Yugoslav leader Josip Broz Tito dies after ruling for 27 years.

Late 1980s: Slobodan Milošević ascends to political prominence, eventually becoming President of the Socialist Republic of Serbia in 1989 and later all of Yugoslavia. His rule leads to heightened nationalism and tension between ethnic groups in Yugoslavia and was criticized for prioritizing Serbian rights and autonomy over Yugoslavia's other ethnic groups. While Milošević represents the Serbian Nationalist Movement aiming to centralize Yugoslavia, various ethnic groups begin to call for independence from Yugoslavia, coming to fruition in the form of numerous protests and demonstrations, which sometimes grew violent.

January 11, 1991: Milošević becomes president of Serbia.

June 25, 1991: Slovenia and Croatia declares independence from Yugoslavia, creating the Republic of Slovenia and Croatian Republic of Herzeg-Bosnia respectively and causing the Ten-Day War and Croatian War of Independence.

September 8, 1991: Macedonia declares independence from Yugoslavia.

September 25, 1991: The UN passes Resolution 713, enforcing an arms embargo on all Yugoslav/former Yugoslav territories.

1991: A 1991 census finds that the Bosnia's population is 43.47% Muslim (Bosniak), 31.21% Serbian, and 17.38% Croatian. In Bosnia's first multi-party legislative elections, markedly nationalist leaders gain power and form an uneasy coalition to rule. They have differing goals: Croat nationalists want to join the newly independent Croatia, while Serbian nationalists push for a centralized Yugoslavia, and Muslim Bosniaks advocate for a separate Bosnian state. These conflicting agendas set the stage for political tension and eventually war.

March 1, 1992: Bosnia declared independence from Yugoslavia with the help of Croat nationalist votes at an independence referendum, establishing the Republic of Bosnia and Herzegovina. The vote enraged ethnically Serbian Bosnians, who claimed that the vote was unconstitutional. The Serbian Bosnians would go on to establish the Republika Srpska in majority-Serb areas of Bosnia, an unofficial "splinter state". The territories of Serbia and Montenegro remained united as the Federal Republic of Yugoslavia (FRY). The Republika Srpska maintained a goal of reuniting with the FRY, as they were legally still a part of Bosnia.

April 6, 1992: Serbian and Bosnian Serb forces, led by Radovan Karadžić and allegedly backed by Milošević, begin bombing the Bosnian capital of Sarajevo, a city with

a predominantly Muslim population. Most historical experts consider this to mark the start of the Bosnian War. The war's three main factions were:

1. Ethnically Bosnian forces, which included Bosniaks (Muslim Bosnian) with a goal of defending the newly founded Bosnian state with the official Army of the Republic of Bosnia and Herzegovina (ARBiH);
2. Ethnically Croatian forces with loyalty to the newly founded Croatian state and their army, the Croatian Defense Council (HVO);
3. Bosnian Serb forces who supported the Republica Srpska and its army (VRS).

1993: Croatian-Muslim tensions rise, leading to the destruction of a beloved 16th century bridge in the Bosnian town of Mostar. Alliances between the three factions vary in different parts of Bosnia, resulting in devastating casualties and destruction.

March 1993: After the VRS targets majority-Bosniak cities, killing numerous civilians and preventing the UNHCR from delivering aid, the United Nations intervenes and declares the Bosnian city of Srebrenica as a "safe area", which serves as a demilitarized zone designated to be an area for humanitarian aid to safely assist civilians. Sarajevo, Žepa, Goražde, Tuzla and Bihać become safe areas in May of 1993. These areas are protected by UN peacekeeping units called UNPROFOR

(United Nations Protection Force), although it is unclear what measures these forces are permitted to take to protect these safe areas.

1993-1995: UN-protected safe areas experience tenuous positions against the VRS, which act aggressively near safe areas and conduct shelling attacks near and sometimes on the areas. When these campaigns occur, however, NATO forces retaliate by directing bombing attacks on Serbs. In return, VRS forces capture UN soldiers and hold them as prisoners until the NATO attacks are discontinued.

January 1995: Several hundred Dutch soldiers are sent to Srebrenica to reinforce the UN troops' hold.

July 1995: VRS forces lay siege on Srebrenica and overrun the safe haven despite the Dutch troops' presence. Serbs capture the city and send buses to deport Muslims from the city, only to separate men and boys older than age twelve from their families to be "questioned for war crimes". Other Muslim men run through nearby forests and mountains, hoping to evade capture, but most are caught by Serbian forces. Thousands of Muslim refugees flee to Potocari, a Dutch base, hoping to be protected by the Dutch soldiers. The soldiers, however, turn over the base, allowing the massacre of over 8,000 Muslim Bosniak men and boys by VRS forces.

Summer 1995: NATO airstrikes push back against Bosnian Serbs, putting pressure on Serbia to sign a peace agreement.

December 1995: The Dayton Peace Accord is signed, splitting contested territories in eastern Bosnia into two parts: one for the Bosnian Muslims and Croats and another for the Serbs, ending the Bosnian War. The war resulted in 100,000 deaths, 2.2 million instances of human displacement, and between 12,000 to 50,000 instances of rape.

1996: The International Criminal Tribunal for the former Yugoslavia (ICTY), a UN judicial body established to try and prosecute individuals involved in various war crimes during all Yugoslav Wars, including the Bosnian War, is formed.

1996-present: Various military and political leaders, including Milošević and Karadžić, undergo criminal trial proceedings in the ICJ and ICTY. Some, such as Karadžić, are convicted. Milošević dies before his ICTY trial ends, meaning no verdict was ever delivered for his case.

2007: The ICJ rules that the Srebrenica Massacre was a genocide, although Serbia was not found directly responsible for the genocide, nor was the ICJ able to exercise jurisdiction over allegations of Serbian-perpetrated ethnic cleansing campaigns in Bosnia and Herzegovina v. Serbia and Montenegro. Serbia was, however, ruled to have failed to take “all measures within its power to prevent genocide in Srebrenica”.

2014: A Dutch court rules that the Dutch UN troops were liable for the Srebrenica Massacre.

2017: The ICJ rejects Bosnia's request for a revision of the court's ruling in 2007.

OFFICIAL CHARGES

The court will charge both Serbia and Montenegro with violations of the Convention on the Prevention and Punishment of the Crime of Genocide, which all members are party to. Specifically, defendants are charged with violating Article III of the Convention:

“The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.”

Article II of the Convention defines genocide as follows:

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

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

The ICJ operates with rules more similar to a United States civil court rather than a criminal court, meaning the court does not rule a defendant to only ever be “guilty” or “not guilty”. Instead, it evaluates the legal disputes between the two parties and makes a judgment on it. In this case, judges will rule whether Serbia was “responsible” for genocide rather than “guilty” of it, although your rulings do not necessarily have to be as straightforward as merely declaring them “responsible” or “not responsible”. For example, a judge may find Serbia “not responsible” for a violation of an “attempt to commit genocide” but may rule that it was “complicit in genocide” and should comment upon the numerous legal disputes of the case.

INTERNATIONAL INVOLVEMENT AND ICJ TRIAL

In 1993, Bosnia filed suit against Serbia in the International Court of Justice, alleging that Serbia perpetrated genocide during the Srebrenica massacre and Serbia’s overall campaign against Bosnian Muslims. Bosnia argued that Serbia was responsible for the actions of its armed forces during the Bosnian War. The case was held in The Hague, Netherlands, and carried out in 2006. Witnesses and experts were brought to the court on both sides, and international law scholars argued over applications of the

Genocide Conventions in terms of state responsibility and how the term “ethnic cleansing” related to genocide, if at all.

Bosnia used instances of unlawful confinement, rape, and torture Bosnian Serb forces committed against Bosnian Muslims and Croats to argue that these actions constituted an ethnic cleansing campaign that was pursued during more than just the Srebrenica Massacre and that for this reason Serbia and the VRS were responsible for genocide beyond the Srebrenica Massacre.

The court concluded that the Srebrenica Massacre was indeed a genocide. However, it failed to find Serbia responsible for genocide in Srebrenica and ruled that Serbia’s policy of ethnic cleansing did not constitute genocide, despite the passage of UN Resolution 47/121 in 1992 declaring the opposite. Then-ICJ President Rosalind Higgins admitted in the court’s judgment that despite the fact that extensive evidence existed to find Serbia guilty of numerous war crimes that were perpetrated throughout the war, the case dealt “exclusively with genocide in a limited legal sense and not in the broader sense sometimes given to this term.” (Cassese). Bosnia had only filed charges related to violations relating to the Genocide Convention and not for general war crimes, meaning the ICJ could not rule upon Serbia’s responsibility for these war crimes. The ICJ explained:

“The term ‘ethnic cleansing’ has frequently been employed to refer to the events in Bosnia and Herzegovina which are the subject of this case...General

Assembly resolution 47/121 referred in its Preamble to 'the abhorrent policy of 'ethnic cleansing', which is a form of genocide, as being carried on in Bosnia and Herzegovina...It [ethnic cleansing] can only be a form of genocide within the meaning of the Genocide Convention, if it corresponds to or falls within one of the categories of acts prohibited by Article II of the Convention. Neither the intent, as a matter of policy, to render an area 'ethnically homogeneous', nor the operations that may be carried out to implement such policy, can as such be designated as genocide: the intent that characterizes genocide is 'to destroy, in whole or in part' a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement."

The ICJ clarified, however, that the ethnic cleansing may sometimes qualify as genocide under circumstances:

"This is not to say that acts described as 'ethnic cleansing' may never constitute genocide, if they are such as to be characterized as, for example, 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part'...provided such action is carried out with the necessary specific intent, that is to say with a view to the destruction of the

group, as distinct from its removal from the region...The expulsion of a group or part of a group does not in itself suffice for genocide.”

The ruling outraged most of the international law community, as scholars found that the ICJ set an unreasonably high standard for proving a state to be responsible for genocide. Antonio Cassese, the first president of the ICTY, wrote a blistering criticism of the court’s ruling:

“The massacre was prepared in detail and took place over the course of six days (between July 13 and 19). Is it plausible that the Serbian authorities remained in the dark while the killing was in progress and reported in the press all over the world? It seems far more reasonable to believe that Serbia's leaders were informed about what was going on, and that, despite this, Serbia's military, financial, and political assistance to Mladić [referring to VRS general Ratko Mladić] was never interrupted.”

Controversy also resulted from the court’s ruling as it contradicted UN Resolution 47/121 on the definition of genocide, a standard that was reaffirmed by numerous states including the U.S., which passed a nearly unanimous congressional resolution declaring the Serb forces’ actions in actions in Bosnia to constitute genocide.

KEY LEGAL ISSUES/TERMS

ICJ justices and scholars alike clashed over a number of different legal issues and definitions that ultimately determined the outcome of the case. The most contentious issue justices grappled with was on the definition of genocide to be applied in the case. The ICJ justices ultimately ruled, albeit not unanimously, that the Genocide Convention definition would be applied to determine Serbia's responsibility for genocide. The Convention's definition of genocide, supplied above, is much narrower than Resolution 47/121's. The 1992 Resolution noted its position on this definition as follows:

“Gravely concerned about the deterioration of the situation in the Republic of Bosnia and Herzegovina owing to intensified aggressive acts by the Serbian and Montenegrin forces to acquire more territories by force, characterized by a consistent pattern of gross and systematic violations of human rights, a burgeoning refugee population resulting from mass expulsions of defenceless civilians from their homes and the existence in Serbian and Montenegrin controlled areas of concentration camps and detention centres, in pursuit of the abhorrent policy of ‘ethnic cleansing’, which is a form of genocide...”

If the ICJ applied the UN's definition for the case, the justices would have been able to rule upon Serbia's responsibility (or lack thereof) for the ethnic cleansing campaign. Most scholars agree that if this were the case, Serbia would have been considerably more likely to be found responsible for genocide during the Bosnian War. This conflict between definitions only begets more questions about supremacy of law and how UN resolutions affect legal definitions. Should international law treaties and conventions be updated to match the most recent UN resolutions? If there is a conflict or discrepancy between a UN resolution and an international law treaty, which law takes precedent? These will be questions you will want to consider when crafting your position papers and verdicts that you will write during committee.

Additionally, determining the standards for evidence necessary to find Serbia responsible for genocide were also contentious. According to the court's ruling, "[i]t is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in [the Genocide Convention] must be done with intent to destroy the group as such in whole or in part." However, as scholars and justices noted, it is unclear how much evidence is necessary to prove a state's "intent to destroy" a particular group. Cassese in particular was critical of the high standard the ICJ set:

“To decide whether Mladić acted on Serbia's account when he was planning and ordering the Srebrenica massacre, the court demanded proof that Serbian officials sent him specific ‘instructions’ to commit this act of genocide.

Obviously, such instructions would never be found. Why was it not enough to prove that the Bosnian Serb military leadership was financed and paid by Serbia and that it was tightly connected to Serbia's political and military leadership?”

As justices in the ICJ, you will be tasked with the responsibility of evaluating the case's evidence and deciding whether it is enough to prove Serbia's “intent to destroy” the Bosnian Muslim population and constitutes genocide.

Prosecution Arguments

A successful prosecution of Serbia will have to successfully argue that a connection between Serbia and the Bosnian Serb forces was direct enough to establish Serbia's responsibility for the genocide at Srebrenica and for the ethnic cleansing campaign, if you decide to argue for the use of UN Resolution 47/121. The original court case ruled that Serbia was complicit in the genocide, meaning that they should have been “reasonably aware” that a genocide could have occurred and did not take the proper steps to prevent it. However, one could argue that a paradox exists within the ICJ's own ruling: if Serbia was “reasonably aware” that a genocide could have

occurred and was obligated to stop it, this implies that Serbia had the ability to influence or hinder the ability of the Bosnian Serb forces to commit genocide. Additionally, the ICTY found that Serbia funded and provided military equipment to Bosnian Serb forces and generals, which could be used to prove that Serbia conspired with Bosnian Serb forces to commit genocide. In one instance before Bosnia was recognized as a sovereign state by the international community, Milošević realized Bosnian Serb troops were on the eastern side of the country and had the power to move them outside of Bosnian territory, which could prove that Serbia had enough control over the Bosnian Serb forces to constitute a genocide. The massacre in Srebrenica also took place over the course of six days (from July 13 to July 19 of 1995); during this period, Serbia did not sever its funding of the VRS. One could argue that it is unlikely and perhaps implausible altogether for Serbian officials to have been unaware of the VRS actions taking place during those six days.

Because the court will consider any events that occur before, during, or after the original ICJ trial, the prosecution may want to consider that a number of high-ranking officials for the Republica Srpska were found guilty of genocide by the ICTY, including Radovan Karadžić. While the verdicts cannot be used as evidence for the case, any documents or other pieces of evidence used for the cases may be used for this trial. If the connection between Karadžić and the Serbian state is shown to be strong enough without using the verdicts themselves, one could argue that because these military

officials were convicted, the Serbian state should also be found responsible for the genocide. It is important to note, however, that this school of thought has received criticism by legal scholars for using another court's judgments as evidence in a court with different legal procedures and should not be admissible.

Defense Arguments

A defense of Serbia must focus closely on the indisputable facts and legal definitions to be successful. One can condemn the horrific atrocities that took place in Bosnia without necessarily finding Serbia responsible for them. If the courts bent existing law to seek justice for genocide when evidence and circumstances are not suitable to find Serbia responsible, it would be an injustice in and of itself and muddle precedent for any future cases. Defense attorneys in the actual court case were successful in proving their case to the ICJ for a number of reasons.

The defense can (and did) argue, for example, that because Serbia was charged with violations of the Genocide Convention, the definition of genocide from the Convention should be used to make the court's decision. Thus, using the Resolution 47/121 to define genocide would be outside the scope of the court's jurisdiction, greatly narrowing the breadth of the definition. The defense argued that this precedent was necessary to clarify that content of UN Resolutions do not hold the

same weight as an international treaty, which can be argued to be beneficial for clarity in future international law issues. Similarly, the ICJ held that it was not proven that the Serbian state actively participated in the direction of VRS forces “beyond any doubt” during the Srebrenica Massacre. If a connection cannot be solidly proven between the two entities, then Serbia cannot be held responsible for sections a) through d) of the Genocide Convention’s third article. The actual ICJ found that because it was not adequately proven that Serbia was aware of plans for Bosnian Serbs to commit genocide while it was occurring, Serbia was not responsible for the genocide even if it exerted influence over the VRS.

QUESTIONS TO CONSIDER

1. How does the Genocide Convention help or hinder the Serbian defense?
2. How could responsibility for the overall genocide be placed upon Serbia, if at all?
3. What responsibility does a court have to adhere strictly to the most commonly accepted legal interpretation of statute? When is it justified to break this past precedent, if ever?
4. How responsible is The Netherlands for aiding or contributing to the outcome of the Srebrenica massacre?

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