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The International Court of Justice: Effectively Providing a Long Overdue Remedy for Ending State Sponsored Genocide (Bosnia-Herzegovina v. Yugoslavia)

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The International Court of Justice: Effectively Providing a Long Overdue Remedy for Ending State-Sponsored Genocide (Bosnia-Herzegovina v. Yugoslavia)

William L. Hurlock*

“Out of the dead, cold ashes, life again.”¹

John Bannister Tabb.

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1. JOHN BARTLETT, FAMILIAR QUOTATIONS 554 (Justin Kaplin ed., Little, Brown & Co. 16th ed. 1992).

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INTRODUCTION

For the first time² in the history of international law, a nation seeks enforcement of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide³ before the International Court of Justice.⁴ On April 29, 1996, the newly

2. See Ben McIntyre, *World calls Serbia to Account Over Genocide*, TIMES (London), Apr. 30, 1996, available in 1996 WL 6491795 (stating that Bosnia-Herzegovina is the first nation to charge another nation before the International Court of Justice for allegedly violating the Genocide Convention); Jenifer Chao, *World Court Starts Genocide Hearings*, SUN-SENTINEL (Ft. Lauderdale), Apr. 28, 1996, at 17A (recognizing that Bosnia-Herzegovina is the first nation to charge another nation with violating the Genocide Convention).

3. Convention on the Prevention and Punishment of Genocide, approved Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

4. Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos. & Herz. v. Yugo.), 1993 I.C.J. 3 (Order for the Indication of Provisional Measures of Apr. 8) [hereinafter Order of Apr. 8, 1993]; Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos. & Herz. v. Yugo.), 1993 I.C.J. 325 (Order on Further Requests for the Indication of Provisional Measures of Sept. 13) [hereinafter Order of Sept. 13, 1993]. Bosnia and Herzegovina filed an Application in the Registry of the International Court of Justice on March 20, 1993, alleging the Federal Republic of Yugoslavia (Serbia and Montenegro) violated the Genocide Convention and committed other infractions. *Id.* See also Norbert Reintjens, *Human Rights: Bosnia-Herzegovina Genocide Case Gets Formal Start*, INTER PRESS SERVICE, Apr. 14, 1994, available in 1994 WL 2583373 (stating that Bosnia-Herzegovina filed claims against Serbia and Montenegro before the International Court of Justice).

This Comment addresses only those claims concerning the Genocide Convention. On February 22, 1993, the United Nations issued Resolution 808 recognizing the need for the establishment of a tribunal to prosecute individuals who violated humanitarian law. S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg. ¶ 2, U.N. Doc. SR. 808 (1993). On May 25, 1993, the United Nations Security Council unanimously passed Resolution 827, establishing the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the Territory of the Former Republic of Yugoslavia S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. ¶ 2, U.N. Doc. SR. 827 (1993). [hereinafter International Tribunal for Persons].

It is important to differentiate between the International Court of Justice and the sepa-

formed nation of Bosnia-Herzegovina⁵ began presenting testimony before the International Court of Justice, alleging that the Federal Republic of Yugoslavia (Serbia and Montenegro)⁶ committed the crime of genocide during the conflict that raged in the former Socialist Federal Republic of Yugoslavia.⁷ The International Court of Justice ruled that it possessed jurisdiction to decide the case on July 11, 1996.⁸

rate International Tribunal for Persons. The former is a permanent body exercising jurisdiction only over charges a nation files against another nation, while the latter is a temporary body empowered by the United Nations, exercising jurisdiction solely over individuals charged with committing war crimes in the former Republic of Yugoslavia. International Tribunal for Persons, *supra*; *World Court Hearings on Serbia To Convene The Bosnian Government Accuses Belgrade of Genocide*, ORLANDO SENTINEL, Apr. 28, 1996, at A28. Unfortunately, many confuse the two and are unaware that a parallel proceeding exists before the International Court of Justice. See *Genocide Hearings to Open*, CHARLESTON GAZETTE & DAILY MAIL (West. Va.), Apr. 28, 1996, at 12A (recognizing that the proceedings before the International Tribunal for Persons overshadow the concurrent proceedings before the International Court of Justice). This comment only addresses the proceedings before the International Court of Justice.

5. The parliament of Bosnia declared independence from the former Republic of Yugoslavia on October 15, 1991. Lori Lyman Bruun, *Beyond the 1948 Convention-Emerging Principles of Genocide in Customary International Law*, 17 MD. J. INT'L L. & TRADE 193, 199 (1993). On March 1, 1992, Bosnian citizens passed a republic-wide referendum calling for independence. *Id.*; see also Yehuda Z. Blum, *U.N. Membership of the "New" Yugoslavia: Continuity or Break?*, 86 AM. J. INT'L L. 830, 830 (1992) (recognizing that the United Nations admitted Bosnia-Herzegovina to the General Assembly on May 22, 1992); see generally Victoria Stegic, *Washington Recognizes Bosnia But Fighting Continues*, AGENCE FR.-PRESSE, Apr. 7, 1992, available in 1992 WL 8471069 (acknowledging the independence of Bosnia-Herzegovina following recognition from the United States and the European Community on April 7, 1992).

6. See Blum, *supra* note 5, at 830 (recognizing that the Republics of Serbia and Montenegro are the only former members of the Yugoslav Federation that still claim the name of Yugoslavia).

7. See generally *Genocide Hearings to Open*, *supra* note 4, at 12A (highlighting the commencement of legal proceedings against Serbia and the possible implication for the peace negotiations); *World Court to Weigh Bosnia Genocide Charges Against Serbia*, FORT-WORTH STAR-TELEGRAM, Apr. 28, 1996, at 19 (discussing the probable focus of the International Court of Justice proceedings upon the political and military practices of the Serbian government).

8. Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos. & Herz. v. Yugo.), 1996 I.C.J. __ (Order for Preliminary Objections July 11) [hereinafter Order of July 11, 1996]; see Jenifer Chao, *Bosnia War Crimes: U.N. Issues Two Arrest Warrants*, DAYTON DAILY NEWS, July 12, 1996, at 8A (recognizing the International Court of Justice asserted jurisdiction to determine if Yugoslavia committed genocide in Bosnia-Herzegovina) [hereinafter *Warrants*]; see also Milo Branic, *Bosnia-Herzegovina: Belgrade's Complicity in Genocide Alleged*, INTER PRESS SERVICE, July 11, 1996, available in 1996 WL 10768100 (announcing that the International Court of Justice is now ready to begin considering evidence on all pending charges against Serbia); Jenifer Chao, *Serbs Face Charge of Genocide*, COLUMBIAN, July 11, 1996, available in 1996 WL 10833834 (stating that the International Court Order dated July 11,

On July 29, 1996, the International Court of Justice ordered Serbia and Montenegro to present its defense to Bosnia-Herzegovina's allegations of Genocide Convention violations no later than July 23, 1997.⁹ The Court's ultimate decision will establish the scope and jurisdiction of international law into the next century,¹⁰ and will finally address the international community's concerns regarding genocide first raised at the conclusion of World War II.¹¹

Immediately following World War II, the member nations of the newly formed United Nations¹² drafted the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.¹³ Unfortunately, the Cold War commenced shortly after the member states of the United Nations drafted the Convention.¹⁴ Because of the resulting "paralysis" in international cooperation coexistent with the Cold War, the world lost a tremendous opportunity to establish a meaningful body of inter-

1996 clears the way for Bosnia to show that Serbia had a substantial role in the alleged acts of genocide); Jenifer Chao, *Panel Issues Warrants For Karadzic, Mladic Pressure Grows to Arrest Bosnian Serb Leaders*, SEATTLE TIMES, July 11, 1996, at A21 (noting that the International Court of Justice Order Dated July 11, 1996 greatly assisted Bosnia-Herzegovina's efforts in proving Serbia committed atrocities during the war).

9. *Court Gives Belgrade One Year to Present Case on Genocide*, AGENCE FR.-PRESSE, July 29, 1996, available in 1996 WL 3897053.

10. See McIntyre, *supra* note 2 (recognizing that the proceedings before the International Court of Justice may establish the code of international law for the next fifty years, much like the Nuremberg trials did in 1945).

11. See Scott L. Porter, *The Universal Declaration of Human Rights: Does It Have Enough Force of Law to Hold "States" Party to the War in Bosnia-Herzegovina Legally Accountable in the International Court of Justice?*, 3 TULSA J. COMP. & INT'L L. 141, 141 (1995) (stating that following World War II, the extent of Nazi atrocities in the Holocaust forced nations to realize the necessity of protecting human rights); see also Bruun, *supra* note 5, at 194 (noting that genocidal practices continue and that the world community, since the conclusion of World War II, has not yet acted effectively to prevent or punish such acts).

12. See Robert Y. Jennings, *The International Court of Justice After Fifty Years*, 89 AM. J. INT'L L. 493, 493 (1995) (stating that member nations signed the United Nations Charter on June 26, 1945). The Charter entered into force on October 24, 1945. *Id.* See generally HENRY KISSINGER, *DIPLOMACY* 427 (1994) (recollecting President Truman's speech on April 25, 1945 to the United Nations' organizing conference in San Francisco).

13. See Bruun, *supra* note 5, at 193-94 (asserting that the world community drafted the Genocide Convention in response to Nazi Germany's inhumane acts during World War II); Matthew Lippman, *The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later*, 8 TEMP. INT'L & COMP. L. J. 1, 15 (1994) (stating that nations unanimously adopted the Genocide Convention because of the terrible atrocities committed by the Axis powers during World War II); cf. Genocide Convention, *supra* note 3, at 280 (declaring genocide an international crime, regardless of whether it occurs in time of peace or war).

14. See KISSINGER, *supra* note 12, at 423-25 (recounting the commencement of the Cold War in the immediate aftermath of World War II); see also Bruun, *supra* note 5, at 194 (asserting that Cold War tension between the Soviet Union and the United States prevented effective enforcement of the Genocide Convention).

national law committed to the protection of the most basic of human rights.¹⁵

Recently, the Genocide Convention reemerged from the ashes of the worst conflict the continent of Europe witnessed since World War II.¹⁶ The Genocide Convention's rebirth is due to the United Nation's effort to redress the treatment inflicted on the various warring parties in the former Socialist Federal Republic of Yugoslavia.¹⁷ For a second time, the world community possesses an excellent opportunity to establish an international body of law committed to the protection of human rights.¹⁸ It must not forego this second opportunity to end the crime of genocide.

This Comment undertakes to focus heightened international attention to the claims Bosnia-Herzegovina filed before the International Court of Justice by providing a description of the history of the case and an analysis of the International Court's jurisdiction. This Comment strongly encourages the International Court of Justice, under the legal theories advocated below, to accept jurisdiction over all claims arising pursuant to the Genocide Convention.¹⁹

15. See Payam Akhavan, *Enforcement of the Genocide Convention: A Challenge to Civilization*, 8 HARV. HUM. RTS. J. 229, 230 (1995) (arguing that the "paralysis" of the Cold War and a lack of political will hindered meaningful enforcement of international legal standards to adequately address the crime of genocide); see also Nicole M. Procida, Note, *Ethnic Cleansing in Bosnia-Herzegovina, A Case Study: Employing United Nations Mechanisms To Enforce The Convention on The Prevention and Punishment of the Crime of Genocide*, 18 SUFFOLK TRANSNAT'L L. REV. 655, 655 (1995) (stating that the termination of the Cold War affords an opportunity to circumvent the political stalemates that plagued serious protection of human rights.); KISSINGER, *supra* note 12, at 249-50 (asserting that the Cold War rendered the United Nations ineffective in countering aggression).

16. See Branic, *supra* note 8 (describing the fall of Srebrenica as "Europe's worst war atrocity since 1945"). See also Mary Battiata, *War of the Worlds*, WASH. POST, June 30, 1996 (Magazine), at 22 (recognizing the conflict in the former Republic of Yugoslavia as the first European conflict since World War II).

17. See Order of Apr. 8, 1993, *supra* note 4, at 4-8 (detailing certain of the war atrocities in Bosnia-Herzegovina); Court Order of Sept. 13, 1993, *supra* note 4, at 326-30 (detailing alleged acts Yugoslavia committed during conflict).

18. See Kevin R. Chaney, *Pitfalls and Imperatives: Applying the Lessons of Nuremberg to the Yugoslav War Crimes Trial*, 14 DICK. J. INT'L L. 57, 57 (1995) (arguing that the conflict in the former Republic of Yugoslavia elevated the visibility of international humanitarian rights issues more than any conflict since World War II). "The battle for territory in the former Yugoslavia has created what is perhaps the ideal laboratory for testing the mettle of modern humanitarian law and the resolve of those who wield it." *Id.* See also Howard S. Levie, *The Statute of the International Tribunal For the Former Yugoslavia: A Comparison With the Past and A Look at the Future*, 21 SYRACUSE J. INT'L L. & COM. 1, 2-3 (1995) (arguing that the recent creation of the International Tribunal for Persons signifies the United Nations' commitment to finally address human rights issues); Lara Leibman, Note, *From Nuremberg to Bosnia: Consistent Application of International Law*, 42 CLEV. ST. L. REV. 705, 733 (1994) (remarking that the Yugoslavian crisis created an unusual focus on the rule of international law).

19. Genocide Convention, *supra* note 3, at 282.

In addition, this Comment also argues that the United States should unconditionally recognize the jurisdiction of the International Court of Justice under Article IX of the Genocide Convention.²⁰ A declaration from the United States recognizing the International Court of Justice's jurisdiction, while that Court concurrently considers the current allegations, would demonstrate international commitment to the protection of human rights. The International Court of Justice needs a strong message of support to advance condemnation of the crime of genocide.

This Comment is comprised of five parts. Part I briefly reviews the history and application of the Genocide Convention. Part II examines the history of the International Court of Justice and analyzes the reluctance on the part of the United States to unconditionally accept its jurisdiction. Part III explores the history of the Balkans, including the current conflict in the former Socialist Republic of Yugoslavia and the case filed before the International Court of Justice. Part IV analyzes arguments by both parties in this case concerning the International Court of Justice's jurisdiction over the claims Bosnia-Herzegovina filed against Serbia and Montenegro. Part V recommends certain policies that the United States of America, the International Court of Justice and the international community should implement in recognition of the historic opportunity recent destructive events in the former Socialist Federal Republic of Yugoslavia afford. These recommendations further the establishment of a meaningful body of international law committed to ending the crime of genocide.

I. THE 1948 CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

A. BACKGROUND AND HISTORY OF THE CONVENTION.

Following World War II, the victorious Allied powers formed the United Nations.²¹ Shortly after its formation, this new world organization drafted the Genocide Convention in response to the atrocities committed by the defeated Axis powers.²² In drafting the Genocide Convention, the United Nations General Assembly proclaimed genocide a crime condemned by the civilized world.²³ In recognition

20. *See id.*

21. U.N. CHARTER pmbi.; *See Jennings, supra* note 12, at 493 (stating that the United Nations Charter entered into force on October 24, 1945); *KISSINGER, supra* note 12, at 427 (discussing circumstances surrounding the drafting of the United Nations Charter in 1945).

22. Genocide Convention, *supra* note 3; *see supra* note 13 and accompanying text (discussing reasons why the international community drafted the Genocide Convention).

23. Genocide Convention, *supra* note 3, at 278. The text of the Genocide Convention defines the crime of genocide as follows:

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 member of the group;

of the great losses genocide inflicted upon humanity,²⁴ the United Nations believed the Convention combated both state-sponsored and individual acts of genocide.²⁵

The drafters viewed the Genocide Convention as the foundation for a coherent body of international law since its provisions recognized genocide as a crime under international law.²⁶ The proponents of the Genocide Convention realized that international cooperation would be crucial in order to liberate the human race from the crime of genocide.²⁷ The drafters, however, differed on how to properly codify their realized need for international cooperation.²⁸

The framers of the Genocide Convention specifically enumerated the punishable acts associated with genocide.²⁹ The principles that emerged from the Nuremberg trials formed the basis for the scope of the prohibited offenses.³⁰ The provisions of Article III of the Genocide Convention apply to both individual citizens

(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.

Id. at 280.

24. *Id.* at 278.

25. *Id.* at 280. Article IV of the Genocide Convention provides that "[p]ersons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." *Id.*

26. *See id.* at 280 (declaring genocide a crime recognized under international law); Lippman, *supra* note 13, at 18-21 (recounting the debate over whether to define genocide as a crime under international law or as a crime against humanity).

27. *See* Genocide Convention, *supra* note 3, at 278 (recognizing, in the preamble to the Convention, that genocide is "an odious scourge" requiring international cooperation to eradicate).

28. *See* Lippman, *supra* note 13, at 18-21 (citing U.N. ESCOR Ad Hoc Comm. on Genocide, 6th Sess., 20 mtg. at 6, U.N. Doc. E/AC.25/SR.20 (1948)) (discussing the debate that raged between various representatives over whether genocide was a crime under international or humanitarian law). The representative from France argued that genocide should be defined as a crime against humanity so it would relate to the previous history of the crime, as uncovered at the International Military Tribunal at Nuremberg. *Id.* at 21. Representatives from the United States and the Soviet Union wanted to avoid confusing the body of law emerging as a result of the International Military Tribunal at Nuremberg and unnecessarily linking the definition to wartime activities. *Id.* at 20.

29. *See* Genocide Convention, *supra* note 3, at 280 (stating the following acts punishable under Article III: "(a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.") *Id.*

30. *See* Lippman, *supra* note 13, at 21 (reviewing the influence of the Nuremberg trial in Convention debates as a source for interpreting the various Articles of the Genocide Convention); Leibman, *supra* note 18, at 706-21 (arguing that the principles that emerged from the Nuremberg trials greatly influenced the modern conception of international law).

and national leaders.³¹

Contracting parties to the Genocide Convention are responsible for the imposition of penalties for breach of the Genocide Convention's provisions.³² The provisions contained in the Genocide Convention require that either a tribunal, established where the act occurred, or an international tribunal, acceptable to the parties in the case, adjudicate all claims arising between such parties.³³ Contracting parties may also utilize the United Nations to prevent and suppress acts of genocide.³⁴ The Genocide Convention establishes, however, that the International Court of Justice possesses jurisdiction over all claims arising between nations.³⁵ Until recently, no nation ever applied or implemented provisions of the Genocide Convention.³⁶

B. APPLICATION OF THE GENOCIDE CONVENTION

Shortly after the creation of the United Nations and the drafting of the Genocide Convention the Cold War commenced.³⁷ The Cold War rendered both the United Nations and the Genocide Convention ineffective,³⁸ as the United States and Soviet Union no longer worked together to defeat fascism and faced off against each other for political advantage.³⁹ As a result, both countries hesitated

31. Genocide Convention, *supra* note 3, at 280.

32. *See id.* (stating that under Article V contracting parties to the Genocide Convention undertake responsibility for enactment, with consideration to their respective Constitutions, necessary legislation to enforce provisions of the Genocide Convention and to "provide effective penalties" for those found guilty of genocide).

33. *Id.* at 280. Pursuant to Article VI those charged with committing genocide shall be tried by the national tribunal where commission of the offense occurred, or by an international tribunal afforded jurisdiction by the contracting parties. *Id.*

34. *See id.* at 282 (stating that Article VIII permits a contracting party to utilize the United Nations to effect such action necessary under the Charter of the United Nations to prevent and terminate acts of genocide or other prohibited acts outlined in Article III).

35. *Id.* at 282. Article IX of the Genocide Convention enumerates claims falling under the jurisdiction of the International Court of Justice as:

[d]isputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

Id.

36. *See supra* note 2 and accompanying text (recognizing that Bosnia-Herzegovina v. Yugoslavia is the first case where one nation sought enforcement of the Genocide Convention against another nation).

37. *See supra* note 14 and accompanying text (claiming that the collapse of Germany and the ensuing power vacuum led to the termination of the Allied partnership resulting in the commencement of the Cold War in 1945).

38. *See KISSINGER, supra* note 12, at 249-50 (noting the Cold War rendered the newly-formed United Nations ineffective to implement the goals of the new world organization).

39. *See id.* at 424 (asserting that at the conclusion of World War II the United States and the Soviet Union, the two leading world powers faced off against each other in

to embrace and employ the international rule of law, including the Genocide Convention, fearing its invocation would thwart their respective foreign policy goals.⁴⁰ Many nations refused to ratify the Genocide Convention,⁴¹ and no nation, until now, ever charged another with violating its provisions.⁴²

The Genocide Convention entered into force on January 12, 1951.⁴³ On June 19, 1949, President Truman sent the Genocide Convention to the United States Senate for its advice and consent.⁴⁴ Despite the presidential support of every president, with the exception of President Eisenhower,⁴⁵ the United States Senate did not ratify the Genocide Convention until February 19, 1986.⁴⁶ President Ronald Reagan signed the legislation into law on November 4, 1988, thirty-nine years after President Truman initially presented the Convention to the Senate.⁴⁷ The Senate's resolution ratifying the Convention, however, contained two reserva-

Europe).

40. See Akhavan, *supra* note 15, at 232 (recognizing that both the United States and the Soviet Union voted against a provision for universal jurisdiction contained in the Genocide Convention); Lippman, *supra* note 13, at 58-59 (recounting the United States and Soviet Union's different proposals to restrict the jurisdiction of an international court to enforce the Genocide Convention).

41. See Daniel Schoor, *National Public Radio Weekend Edition: Diplomacy Avoids Many Words to Dodge Involvement*, (NPR radio broadcast, June 19, 1994), transcript available in 1994 WL 8370305 (implying that the United States expressed a lack of interest in the Genocide Convention since it did not "get around to signing" the Genocide Convention until 1989).

42. *Supra* note 2 and accompanying text. See Lippman, *supra* note 13, at 74 (arguing that the Genocide Convention has not been a deterrent to the perpetration of genocide, and, as such, is inadequate in its present form).

43. Genocide Convention, *supra* note 3, at 278 n.1. See Christopher C. Joyner, Introductory Note, *United States: Genocide Convention Implementation Act of 1987*, May 1989, 28 I.L.M. 754-55 (providing a synopsis of the relevant history of the passage of the Genocide Convention in the United States of America) [hereinafter Introductory Note].

44. *Id.* at 754.

45. *Id.*; See S. EXEC. REP. No. 99-2 at 2 (1995), 99th Cong., 1st Sess. (1985), reprinted in 28 I.L.M. 754 (stating that Presidents Truman, Kennedy, Johnson, Nixon, Ford, Carter and Reagan all urged the United States Senate to ratify the Genocide Convention) [hereinafter SENATE GENOCIDE CONVENTION REP.].

46. Genocide Convention Implementation Act of 1987 (the Proxmire Act), Pub. L. No. 100-606, 102 Stat. 3045 (1988) (codified at 18 U.S.C.A. §1091); Joyner, *supra* note 43, at 755. The Senate granted final legislative approval necessary to amend United States law to comply with the Genocide Convention on October 18, 1988. *Id.*

47. Remarks on Signing the Genocide Convention Implementation Act of 1987 (the Proxmire Act) II PUB. PAPERS RONALD REAGAN 1988-89 1443 (Nov. 4, 1988); Joyner, *supra* note 43, at 754.

tions,⁴⁸ five understandings,⁴⁹ and one declaration.⁵⁰ Similar to other member-nations, the United States Senate expressed reservations concerning jurisdictional aspects of the Genocide Convention.⁵¹ The drafters of the Genocide Convention believed national courts incapable of enforcing the provisions of the Genocide Convention because perpetrators often commit genocide with the explicit or implicit support of the state.⁵²

Just prior to the dissolution of the Soviet Union in 1991,⁵³ Soviet leader Mikhail Gorbachev exhibited promising signs that the Soviet Union might respect various agreements concerning human rights.⁵⁴

48. SENATE GENOCIDE CONVENTION REP., *supra* note 45, at 17-21. The United States Senate expressed two reservations before ratifying the Genocide Convention: (1) that the United States must specifically consent before any suit is brought against it pursuant to Article IX of the Genocide Convention before the International Court of Justice; and (2) that nothing in the Genocide Convention required legislation or other action prohibited by the Constitution of the United States. *Id.*

49. *See id.* at 21-26 (detailing the five understandings adopted by the United States Senate before ratifying the Genocide Convention). These understandings were that the United States: (1) interprets the "intent to destroy" language in the Genocide Convention to require specific intent; (2) defines "mental harm," as articulated in Article II of the Genocide convention, to require permanent mental impairment by torture or drugs; (3) read the extradition requirement found in Article VII of the Genocide Convention as only requiring nations to extradite when the alleged act is criminal and not precluding a nation from bringing a national before its own tribunal; (4) does not consider acts committed during the course of armed conflicts lacking the specific intent outlined above to constitute crimes under the Genocide Convention; and (5) reserve the right to participate in any penal tribunal, as outlined in Article VI of the Genocide Convention. *Id.*

50. *Id.* at 21-26. The declaration stated that the President of the United States will not deposit the instrument of ratification until the Senate of the United States enacts the legislation necessary for implementation. *Id.*

51. Akhavan, *supra* note 15, at 232. (recognizing that the Soviet Union, France and the United States voted against universal jurisdiction concerning the punishment for acts of genocide); Joyner, *supra* note 43, at 779-84. In addition, Albania, Algeria, Argentina, Bulgaria, Byelorussia, Czechoslovakia, Democratic Yemen, Germany, Hungary, India, Mongolia, Morocco, Philippines, Poland, Romania, Rwanda, Spain, Ukraine, Russia, the United States, Venezuela and Vietnam expressed reservations recognizing the jurisdiction of the International Court of Justice pursuant to Article IX of the Genocide Convention. *Id.*

52. *See* Akhavan, *supra* note 15, at 232-33 (noting that most acts of genocide are committed by, or in conspiracy with, state governments).

53. *See* KISSINGER, *supra* note 12, at 785 (detailing the Soviet Union's disintegration upon the Soviet army's support of Boris Yeltsin's decision to outlaw the Communist Party).

54. *See* Jennings, *supra* note 12, at 495 (recognizing that former Soviet Premier Gorbachev's recognition of the jurisdictional provisions of the human rights convention provided great encouragement for the rule of international law). Following Gorbachev's recognition, several Eastern European countries announced the withdrawal of their reservations to the jurisdictional aspects of the human rights convention. *Id.*

With the end of the Cold War, the world again possesses an unique opportunity to establish a meaningful body of international law committed to ending the crime of genocide.⁵⁵ The United States is in a position to lead the world community in the enforcement of the Genocide Convention.⁵⁶

II. THE INTERNATIONAL COURT OF JUSTICE

A. HISTORY OF THE COURT

The United Nations Charter, signed by representatives from member nations on June 26, 1945, created the International Court of Justice.⁵⁷ The newly formed United Nations succeeded the League of Nations; and under the United Nations Charter the International Court of Justice replaced the Permanent Court of International Justice.⁵⁸ The International Court of Justice exercises jurisdiction solely over claims arising between nations.⁵⁹

In the last ten years, the caseload of the International Court of Justice increased substantially.⁶⁰ All 184 members of the United Nations are theoretically subject to the jurisdiction of the International Court of Justice.⁶¹ Certain nations, however, still decline to accept the Court's jurisdiction.⁶² Despite this, nations presently utilize the International Court of Justice more than at any other time.⁶³ This phe-

55. See Akhavan, *supra* note 15, at 230 (arguing that the termination of the Cold War affords the international community an opportunity to address the crime of genocide).

56. See SENATE GENOCIDE CONVENTION REP., *supra* note 45, at 2 (stating President Ronald Reagan's belief that ratification of the Genocide Convention signified the United States' commitment to confront human rights abuses around the world). But see KISSINGER, *supra* note 12, at 809 (claiming that the United States' position to dictate international policy and lead the international community has decreased since the Cold War's conclusion).

57. U.N. CHARTER art. 92; Jennings, *supra* note 12, at 493 (relating that the International Court of Justice replaced the Permanent Court of International Justice affiliated with the League of Nations). The International Court of Justice met for the first time on April 1, 1946. *Id.*

58. U.N. CHARTER art. 92. See Jennings, *supra* note 12, at 493-94 (recognizing that the International Court of Justice has existed twice as long as its predecessor court); see also Therese Raphael, *Why the World Must Punish War Criminals*, WALL ST. J. (Asia), Apr. 4, 1996, at 10 (recognizing the succession of international legal tribunals).

59. Porter, *supra* note 11, at 158; see U.N. CHARTER STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, 1946 U.N.Y.B. 843 at 846, 3 T.I.A.S. 1179, ch. II, art 34 § 1 (stating that "[o]nly states may be parties in cases before the Court").

60. See Jennings, *supra* note 12, at 494 (stating that the International Court of Justice implemented a waiting list to facilitate the backlog of cases).

61. As of July 31, 1994, 184 nations were members of the United Nations and subject to the International Court of Justice's jurisdiction. *Id.* Nauru and Switzerland, which are not members of the United Nations, are also subject to the Court's jurisdiction. *Id.*

62. See *supra* note 51 and accompanying text (listing such nations).

63. Jennings, *supra* note 12, at 493-94 (citing Ruth Donner, *Recent Developments in*

nomenon signifies a new-found appreciation for the rule of international law⁶⁴ and creates a forum to adjudicate claims between nations.⁶⁵

B. RELUCTANCE OF NATIONS TO ACCEPT JURISDICTION

Under Article 36(2) of the Statute of the International Court of Justice, nations can submit unconditionally to the jurisdiction of the International Court of Justice.⁶⁶ The Cold War, unfortunately, affected the International Court of Justice in much the same way as it affected the Genocide Convention, and many nations refused to submit to the jurisdiction of the International Court of Justice.⁶⁷ Canada,⁶⁸ Israel and El Salvador contested the unconditional jurisdiction of the International Court of Justice for various reasons.⁶⁹ Reservations to the jurisdiction of the International Court of Justice severely limit the strength of that Court to adjudicate claims.⁷⁰

Despite the setbacks inherent in the withdrawal of the unconditional declarations by Canada, Israel and El Salvador,⁷¹ the Soviet Union, in 1988, reversed its

the Work of the International Court of Justice, FINNISH Y.B. OF INT'L L. 355 (1991)). This new phenomenon is reflected in the world-wide composition of members and parties of the Court. *Id.*

64. See Bruun, *supra* note 5, at 226 (realizing that the international community is advancing international law by recognizing human rights violations as a threat to peace).

65. See John Webb, *Genocide Treaty—Ethnic Cleansing—Substantive and Procedural Hurdles In the Application of the Genocide Convention To Alleged Crimes in the Former Yugoslavia*, 23 GA. J. INT'L & COMP. L. 377, 408 (1993) (arguing that the international community must unite to create a forum to address the allegations concerning violations of the Genocide Convention).

66. U.N. CHARTER STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, 1946 U.N.Y.B. 843 at 846, 3 T.I.A.S. 1179, ch. II, art. 36. See Jennings, *supra* note 12, at 494-95 (explaining that a nation can unconditionally submit to the Court's jurisdiction pursuant to Article 36(2)). As of February 1, 1995, fifty-eight nations filed such declarations with the International Court of Justice, however, the United States has not filed a declaration. *Id.*

67. See Jennings, *supra* note 12, at 493 (stating that once the Soviet Union removed its reservations to submitting to International Court of Justice jurisdiction, other former communist bloc nations followed). This provides an excellent example of what transpires when a nation decides to lead the international community.

68. *Id.* (arguing that Canada removed its declaration to unconditionally accept the Court's jurisdiction). In May 1994, Canada substituted a declaration, which excluded it from adjudication disputes concerning sensitive issues of conservation and management of vessels fishing in the Northwest Atlantic Fisheries Order (NAFO) Regulatory Area. *Id.*

69. *Id.*

70. See Irene Cohn, *Nicaragua v. United States: Pre-Seisin Reciprocity and the Race to the Hague*, 46 OHIO ST. L.J. 699, 699 (1985) (arguing that the United States' refusal to participate in certain International Court of Justice proceedings undermined the Court's credibility); Martin A. Rogoff, *International Politics and the Rule of Law: The United States and the International Court of Justice*, 7 B.U. INT'L L.J. 267, 292 (1989) (advocating that reservations concerning jurisdiction impede the International Court of Justice's ability to effectively adjudicate claims).

71. Jennings, *supra* note 12, at 495.

policy against recognition and recognized the jurisdiction of the International Court of Justice concerning human rights agreements.⁷² Many of the former Communist bloc countries followed the Soviet Union's lead and recognized the Court's jurisdiction.⁷³ The United States, however, advocated a less expansive interpretation concerning the jurisdiction of the International Court of Justice.⁷⁴

1. Arguments Opposing the United States' Unconditional Acceptance of the Jurisdiction of the International Court of Justice Pursuant to Article IX of the Genocide Convention.

The United States is reluctant to accept the unconditional jurisdiction of the International Court of Justice.⁷⁵ This reluctance is best understood by analyzing arguments surrounding the Senate's adoption of the Genocide Convention.⁷⁶ The Genocide Convention contains a clause concerning the unconditional jurisdiction of the International Court of Justice.⁷⁷ Opponents of a United States declaration unconditionally recognizing the jurisdiction of the International Court of Justice under Article IX of the Genocide Convention argue that once the United States recognizes the unconditional jurisdiction of the Court, it becomes subject to frivolous or trivial charges.⁷⁸

Opponents also argue that unconditional jurisdiction fails to protect the United States from the International Court adjudicating proceedings that are not in the United States' interest.⁷⁹ The United States withdrew its declaration of uncondi-

72. See Thomas M. Franck, *Soviet Initiatives: U.S. Responses—New Opportunities For Reviving the United Nations System*, 83 AM. J. INT'L. L. 531, 536-38 (1989) (detailing Premier Gorbachev's intention to respect the International Court of Justice's jurisdiction concerning certain human rights agreements, including the Genocide Convention); Jennings, *supra* note 12, at 494 (relating former Soviet Premier Gorbachev's promise to honor human rights agreements).

73. Jennings, *supra* note 12, at 495.

74. See SENATE GENOCIDE CONVENTION REP., *supra* note 45, at 18-21 (stating that the United States must first consent to the jurisdiction of the International Court of Justice before a nation may file charges that the United States violated the Genocide Convention).

75. See *id.*

76. *Id.*

77. See Genocide Convention, *supra* note 3, at 282; see also *supra* text accompanying note 34 (setting out the Article IX provisions of the Genocide Convention).

78. See SENATE GENOCIDE CONVENTION REP., *supra* note 45, at 28 (reiterating opponents' charges against unconditional acceptance of the International Court of Justice's jurisdiction).

79. See *id.* at 17-20 (discussing the importance of a reservation permitting the United States to address those suits deemed to threaten the national interest in advance). To lessen the initial impact of the reservation, the Committee stated that it did not believe the United States will use this provision frequently and no disrespect was intended to the International Court of Justice. *Id.* at 17-18. The Senate Committee explained that the reservation exhibited respect for both the International Court of Justice and international law. *Id.* at 19. Opponents of unconditional jurisdiction argue that the reservation to jurisdiction

tional jurisdiction after the Court's decision in the case filed by Nicaragua.⁸⁰ Finally, opponents directly attack the International Court of Justice, believing that other venues will adequately bring pressure on offending parties, thus limiting the Court's ability to adjudicate matters.⁸¹ Opponents of unconditional jurisdiction contend that the International Court of Justice is ineffective in bringing to justice State leaders committing genocide.⁸² Others contend that the mechanism for resolving international disputes between nations simply does not work.⁸³

2. Arguments Supporting the United States' Unconditional Acceptance of the Jurisdiction of the International Court of Justice Pursuant to Article IX of the Genocide Convention.

Many Senators advocated accepting the unconditional jurisdictional clause contained in Article IX of the Genocide Convention.⁸⁴ Senators wishing to accept the unconditional jurisdiction of the International Court of Justice argued that the Article IX requirement afforded the United States an excellent opportunity to advance the rule of international law concerning human rights.⁸⁵ Such proponents

is not inconsistent with the purpose of the Genocide Convention since the International Court of Justice is not a significant part of the Genocide Convention. *Id.* at 19. As support for this contention, opponents state that no cases have been submitted to the Court challenging the Convention in its thirty-four year history. *Id.*

80. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27). See SENATE GENOCIDE CONVENTION REP., *supra* note 45, at 30 (reporting United States withdrawal of its declaration supporting unconditional jurisdiction following the Court's decision in a May 1984 case filed by Nicaragua against the United States). Opponents of the International Court of Justice's universal jurisdiction used this decision in support of the declaration rejecting Article IX provisions of the Genocide Convention. *Id.*; see also Military and Paramilitary Activities (Nicar. v. U.S.) 1987 I.C.J. 188 (Nov. 18) (finding that the United States owed reparations to Nicaragua for breaching customary international law and further noting that after the June 27, 1986 ruling, the United States withdrew from the proceedings.)

81. See SENATE GENOCIDE CONVENTION REP., *supra* note 45, at 18 (restating arguments made against unconditional jurisdiction to the International Court of Justice).

82. *Id.*

83. See Akhavan, *supra* note 15, at 246-47 (suggesting that the jurisdiction of the International Court of Justice is contentious and not particularly effective in protecting human rights). John Foster Dulles, former United States Secretary of State in the Eisenhower Administration, stated that "courts are designed to apply law, not make it, and international law has not yet developed the scope and definitiveness necessary to permit international disputes generally to be resolved by judicial rather than political tests." Raphael, *supra* note 58, at 10. But see Jennings, *supra* note 12, at 494 (stating that a general myth exists that parties ignore International Court of Justice decisions).

84. See SENATE GENOCIDE CONVENTION REP., *supra* note 45, at 28 (acknowledging the views of Senators Pell, Biden, Cranston, Sarbanes, Dodd, Mathias, Eagleton and Kerry in support of adopting the unconditional jurisdiction of the International Court of Justice).

85. See *id.* at 28-29 The Senators believed that the refusal of the United States to recognize the jurisdiction of the International Court of Justice seriously limited their ability to protect human rights throughout the world. *Id.* Proponents also argued that, at that time,

rejected arguments suggesting that the United States would become subject to frivolous charges.⁸⁶ Finally, proponents argued that allies of the United States would condemn such a reservation.⁸⁷

3. The United States Should Unconditionally Accept the Jurisdiction of the International Court of Justice Pursuant to Article IX of the Genocide Convention.

The United States should unconditionally accept the jurisdiction of the International Court of Justice pursuant to Article IX of the Genocide Convention.⁸⁸ Withholding unconditional jurisdiction of the International Court of Justice does not adequately address concerns regarding frivolous lawsuits.⁸⁹ Such allegedly frivolous charges ought to be addressed before the International Court of Justice, as that Court itself best addresses such frivolous charges.⁹⁰ The United States could bolster the International Court of Justice's credibility to dispense with

several communist bloc nations adopted the same reservation embraced by the United States, thus sending a message that the United States was not committed to the protection of human rights. *Id.* The Senators argued that the United States should not adopt the similar policies of those countries that have reason to fear charges of genocide. *Id.*

86. *See id.* at 28-29 (arguing that concerns expressed by opponents of unconditional jurisdiction are baseless because a nation may still file suit against the United States, regardless of its unconditional recognition of jurisdiction).

87. *See id.* at 28 (stating that the Netherlands and the United Kingdom do not consider a country making a reservation to Article IX jurisdiction a party to the Genocide Convention). Australia, Belgium, Brazil and Ecuador have also formally objected to Article IX reservations. *Id.*

88. *See id.* at 28-29 (stating the view of certain Senators that the United States adopt Article IX); Daniel P. Moynihan, Keynote Address at the American Society of International Law Proceedings Annual Dinner, in 79 AM. SOC'Y INT'L L. PROC. 322, 325 (1985) (announcing the International Legal Society's strong disagreement with recent efforts by the United States to withdraw from the jurisdiction of the International Court of Justice). In his address, Senator Moynihan illuminated the Society's efforts to urge the United States to accept the jurisdiction of the International Court of Justice. *Id.*; *see also* Michael Lizzi, Note, *Delimiting the World Court's Jurisdiction: Realism in the Interest of Progress*, 12 N.Y.L. SCH. J. INT'L & COMP. L. 203, 234 (1991) (arguing that the United States State Department's proposal for delimiting the jurisdiction of the International Court of Justice shows a commitment to resolving international disputes by the International Court of Justice).

89. *See* J. Patrick Kelly, *The Changing Process of International Law and the Role of the World Court*, 11 MICH. J. INT'L L. 129, 138 (1989) (detailing the United States proceedings before the International Court of Justice). The United States prevailed in many of the cases adjudicated before the International Court of Justice. *Id.* *See also* SENATE GENOCIDE CONVENTION REP., *supra* note 45, at 28-29 (advising that despite the United States' reservations, contracting parties to the Genocide Convention are still capable of filing frivolous lawsuits).

90. *See* Jennings, *supra* note 12, at 505 (recognizing that the International Court of Justice is the proper legal forum to resolve disputes).

frivolous claims by bringing such claims before the Court.⁹¹

Expressing concerns about the ability of the International Court of Justice to adjudicate allegedly frivolous claims only further undermines the Court's jurisdiction.⁹² Such behavior lends credence to the belligerent nations' arguments⁹³ seeking to escape the International Court of Justice's jurisdiction,⁹⁴ and actually provides a basis for the very claims the United States is trying to prevent.⁹⁵

Most importantly, the reservation to the International Court of Justice's jurisdiction, pursuant to Article IX of the Genocide Convention, seriously undermines United States efforts to advance a meaningful body of international law committed to the protection of human rights.⁹⁶ Such actions limit the credibility of the forum responsible for such enforcement: the International Court of Justice.⁹⁷

It is now time for the United States,⁹⁸ in recognition of the unique opportunity

91. See SENATE GENOCIDE CONVENTION REP., *supra* note 45, at 28 (arguing that withholding jurisdiction under Article IX weakens international resolve for adjudicating claims before an international court).

92. See Jennings, *supra* note 12, at 494 (recognizing the potential harm when a nation entertains a reservation concerning the International Court of Justice's jurisdiction).

93. See SENATE GENOCIDE CONVENTION REP., *supra* note 45, at 28 (warning that the international law doctrine of reciprocity allows a country to use the United States' reservations to block United States charges before an international court).

94. *Id.*

95. *Id.*

96. *Id.*

97. See Webb, *supra* note 65, at 397 (advocating that Article IX of the Genocide Convention is weakly applied because many nations, including the United States, filed reservations to the Genocide Convention); Cohn, *supra* note 70, at 699 (contending that the refusal of the United States to participate in the proceedings initiated by Nicaragua impacted the Court's credibility and effectiveness); Keith Highet, Remarks at the American Society of International Law Proceedings Annual Dinner, in 81 AM. SOC'Y INT'L L. PROC. 501, 501 (1987) (implying that the isolationist position of the United States in regards to International Court of Justice jurisdiction departs radically from the previous commitment of the United States to international order); Rogoff, *supra* note 70, at 292 (suggesting that the United States did not advance the rule of international law when it did not abide by the decisions of the International Court of Justice concerning Nicaragua). Rogoff further asserts that the International Court of Justice believed a country which supported the rule of international law as ardently as the United States could never ignore the Court's rulings. *Id.* See generally Shabtai Rosenne, *The Cold War and the International Court of Justice: A Review Essay on Stephen M. Schwebel's Justice in International Law*, 35 VA. J. INT'L L. 669, 676 (1995) (recounting Judge Stephen M. Schwebel's writings in which he argues that the United States' position regarding the jurisdiction of the International Court of Justice is objectionable). Judge Schwebel was the lone dissenter in the opinion the International Court of Justice rendered in the Nicaraguan case. *Id.* at 679; Military and Paramilitary Activities (Nicar. v. U.S.) 1986 I.C.J. 259, 362 (Jan. 10) (Schwebel, J., dissenting).

98. Although rejecting unconditional submission to the International Court of Justice, the United States asserts jurisdiction over certain claims arising out of the conflict in the former Republic of Yugoslavia. See *Doe v. Karadzic*, 866 F. Supp. 734 (S.D.N.Y. 1994),

afforded by the landmark proceedings instituted before the International Court of Justice,⁹⁹ to unconditionally accept the jurisdiction of the International Court of Justice.¹⁰⁰ The United States completely withdrew from proceedings before the Court following an adverse ruling.¹⁰¹ If Bosnia-Herzegovina, Serbia or Montenegro adopted the policies advocated by the United States, then the current opportunity afforded by the proceedings pending before the International Court of Justice would cease to exist.

III. THE FORMER SOCIALIST FEDERAL REPUBLIC OF YUGOSLAVIA: HISTORY OF THE REGION

A. BACKGROUND

Crisis is not new to the region comprising Bosnia-Herzegovina, Serbia, Croatia and Montenegro.¹⁰² In many instances, the current history of the region¹⁰³ re-

rev'd sub nom, *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 2524 (1996) (granting Croat and Muslim citizens of Bosnia-Herzegovina standing to bring suit, before a United States District Court, against the President of the Bosnian-Serb entity of Srpska for a "violation of the law of nations" i.e. international law). In *Kadic v. Karadzic*, the United States Court of Appeals for the Second Circuit ruled plaintiffs possessed standing pursuant to the Alien Tort Claims Act, 28 U.S.C. § 1350 (1988). 70 F.3d at 238-39. According to the Second Circuit, the Alien Tort Claims Act, first passed in 1789, creates jurisdiction over suits alleging torts committed in any nation in violation of international law. *Id.* at 236.

99. See *supra* note 2 and accompanying text (realizing the significance of the Bosnia-Herzegovina proceedings before the International Court of Justice).

100. See *supra* note 85 and accompanying text (noting that certain United States Senators wanted to remove the United States reservation regarding the unconditional jurisdiction of the International Court of Justice pursuant to Article IX of the Genocide Convention).

101. See *supra* note 80 and accompanying text (summarizing the events preceding the decision of the United States not to unconditionally recognize the jurisdiction of the International Court of Justice when ratifying the Genocide Convention).

102. See KISSINGER, *supra* note 12, at 195 (discussing several historical conflicts that occurred in Bosnia-Herzegovina). Following the Congress of Berlin in 1878, Bosnia-Herzegovina afforded a buffer between the Ottoman and Hapsburg Empires and the regions containing Croatian, Serbian, and Bosnian nationals practicing the Roman Catholic, Orthodox and Muslim religions respectively. *Id.* Austria indirectly administered the region for the next thirty years, and a fragile peace ensued as long as no single group exercised autonomy over the others. *Id.* The peace ended in 1908 when Austria, fearing that Serbian unrest would upset its control over the Balkans, annexed Bosnia-Herzegovina following Russia's defeat in the Russo-Japanese War. *Id.* See also David Lenefsky, *3 Strikes and You're In - In An International Criminal Court*, N.Y.L.J., Aug. 11, 1994, at 2 (outlining the circumstances resulting in the Balkan Wars). In 1912, Bulgaria, Serbia, Greece and Romania declared war on Turkey to rid the Balkans of Turkish influence. *Id.* Following Turkey's defeat, a second conflict developed between the victors when Bulgaria believed Serbia annexed more of Macedonia than previously agreed upon. *Id.* As a result, war again

flects the conflicts of the past.¹⁰⁴ Following World War II, Yugoslavia fell under the Soviet sphere of influence.¹⁰⁵ The newly-formed communist government, known as the Socialist Federal Republic of Yugoslavia, consisted of six republics and two autonomous regions.¹⁰⁶

The Communist government of Yugoslavia managed to sustain a tenuous peace throughout the historically splintered region.¹⁰⁷ This fragile peace eroded with a worsening economy and the dissolution of the Soviet Union in the late 1980's.¹⁰⁸ Based on these events, the republics took advantage of this opportunity for independence from Yugoslavia in the early 1990's.¹⁰⁹

erupted in 1913 when Turkey, Serbia, Greece and Romania attacked Bulgaria. *Id.*

103. See Lenefsky, *supra* note 102, at 2 (providing a description of the Balkan War). It is difficult to discern whether an International Commission report inquiring into the causes and conduct of the Balkan Wars was drafted in 1914 or 1996. *Id.* The Carnegie Endowment for International Peace drafted the 1914 report, stating that: "unarmed and innocent populations massacred *en masse*, incredible acts of violence, pillage and brutality of every kind - such were the means which were employed and are still employed by the Serb-Montenegrin soldiery, with a view to the entire transformation of the ethnic character of [these] regions." *Id.*; see also Bruun, *supra* note 5, at 195-97 (describing atrocities committed in the current Balkan conflict).

104. See KISSINGER, *supra* note 12, at 195 (providing a synopsis of the history of the region). Prior to World War I, the Austro-Hungarian and Russian empires were in dispute over possession and control of the Balkan region. *Id.* The tension between these two powers ignited World War I when a Serbian nationalist assassinated Arch Duke Franz Ferdinand, heir to the Austro-Hungarian throne, in Sarajevo on June 28, 1914. *Id.* at 209. See also Lenefsky, *supra* note 102, at 2 (detailing the history of the region after World War I). Yugoslavia became a new country following the Peace Conference ending World War I. *Id.* A tenuous peace developed between the various factions due to Bosnia and Croatia's mutual dependence to further their individual goals. *Id.* The Bosnians desired freedom from the defeated Austro-Hungarian Empire and Serbia expressed a desire to build a Slavic nation. *Id.* From 1919-39, problems existed in the new nation and at the commencement of World War II, Yugoslavia was the only nation in the midst of a civil war. *Id.* Nazi-Germany's invasion of Yugoslavia in 1941 further exacerbated tensions between the various factions. *Id.*

105. See KISSINGER, *supra* note 12, at 328-29 (providing a detailed map of Europe depicting Yugoslavia under the Soviet sphere of influence at the conclusion of World War II).

106. See Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569, 569 (1992) (stating that the former Socialist Federal Republic of Yugoslavia consisted of the republics of Bosnia-Herzegovina, Croatia, Serbia, Montenegro, Macedonia and Slovenia and the autonomous regions of Kosovo and Vojvodina).

107. See Lenefsky, *supra* note 102, at 2 (implying that communist leader Tito's distrust of nationalism, founded on Marxist ideology, led to the creation of a centralized bureaucracy which managed to suppress ethnic conflict); Bruun, *supra* note 5, at 198 (arguing that, following World War II, Tito suppressed ethnic dissent).

108. Lenefsky, *supra* note 102, at 2.

109. See *id.* (advocating that the collapse of the Union of Soviet Socialist Republics and the termination of the Cold War facilitated the dissolution of the Socialist Federal Republic of Yugoslavia).

B. THE CURRENT CONFLICT

The Republics of Croatia and Slovenia declared independence from the former Socialist Federal Republic of Yugoslavia on June 25, 1991.¹¹⁰ On October 15, 1991, the parliament of Bosnia declared independence from the former Socialist Federal Republic of Yugoslavia.¹¹¹ The European Community and the United States recognized Bosnian independence¹¹² on April 7, 1992.¹¹³ Immediately afterward, the crisis in the region escalated.¹¹⁴ This crisis provides an opportunity to employ the provisions of the Genocide Convention¹¹⁵ within the framework of the International Court of Justice.¹¹⁶

The United Nations expressed grave concerns regarding events unfolding in the region.¹¹⁷ On May 22, 1992, the United Nations General Assembly admitted Bosnia-Herzegovina, Slovenia and Croatia as member states into the United Nations.¹¹⁸ Unfortunately, none of the preceding events transpired peacefully, and

110. See Chuck Sudetic, *Two Yugoslavian Republics Declare Their Independence*, AUSTIN AM-STATESMAN, June 26, 1991, at A3 (detailing Slovenia and Croatia's declarations of independence); *Croatia and Slovenia Declared Their Independence From Yugoslavia*, WALL ST. J., June 26, 1991, at A1 (reporting Yugoslavia using army intervention as a means to prevent Croatia and Slovenia from declaring independence).

111. See Milan Dragovic, *Bosnia-Herzegovina Parliament Declares Sovereignty*, AGENCE FR-PRESSE, Oct. 15, 1991, available in 1991 WL 3222620 (reporting the Bosnian Parliament's declaration of independence); *Fact Sheet on Yugoslavia*, AGENCE FR-PRESSE, Apr. 7, 1992, available in 1992 WL 8471059 (reporting Bosnia's passage of a republic-wide referendum for independence on February 29, 1992, which the Bosnian Serbs, calling for their own independence, rejected).

112. See Bosnia and Herzegovina: Constitution of the Federation, Mar. 18, 1994 (detailing the structure for the new nation).

113. Stegic, *supra* note 5.

114. See Victoria Stegic, *Bosnian Serbs Declare Independence as Curfew is Imposed on Sarajevo*, AGENCE FR-PRESSE, Apr. 7, 1992, available in 1992 WL 8471316 (reporting gunfire, shelling and many casualties in Sarajevo on the day the European Community recognized Bosnian Serb independence). Shortly after the fighting began, Yugoslavian forces joined with Serbian militia against Bosnian Muslims and Croatian citizens. Stegic, *supra* note 5; See also *Fact Sheet on Yugoslavia*, *supra* note 111.

115. See Webb, *supra* note 65, at 398-99 (recognizing that the events in Bosnia-Herzegovina provide an excellent opportunity to employ provisions of the Genocide Convention).

116. See Genocide Convention, *supra* note 3, at 282; see also *supra* note 35 and text accompanying (detailing provisions of Article IX of the Genocide Convention).

117. See The International Conference on the Former Yugoslavia: Report of the Secretary General, U.N. GAOR, 47th Sess., ¶¶ 26-45 at 11-15, U.N. Doc. S/24795 (1992) (detailing efforts undertaken to achieve a peaceful transition to newly-formed governments in the former Republic of Yugoslavia). Participants in the sessions expressed a commitment to protecting human rights. *Id.* ¶ 63 at 20.

118. G.A. Res. 237, U.N. GAOR, 46 Sess., mtg. 86, Supp. No. 49, U.N. Doc. A/Res/46/237 (1992); G.A. Res. 238, U.N. GAOR, 46 Sess., mtg. 86, Supp. No. 49, U.N. Doc. A/Res/46/238 (1992); *Three Yugoslav States Join U.N. Bosnia, Croatia, Slovenia*

civil war erupted soon after the announcement of the republics' initial declarations of independence.¹¹⁹ On June 27, 1991, the Yugoslavian army attacked the Slovenian militia,¹²⁰ igniting the worst conflict on the European continent since World War II.¹²¹

The conflict engulfed all political and religious factions in the region,¹²² unleashing horrendous acts of torture, rape and "ethnic cleansing."¹²³ The devastation raged from June 1991¹²⁴ until December 1995.¹²⁵ The General Framework Agreement for Peace in Bosnia and Herzegovina, initialed at Wright-Paterson Air Force Base near Dayton, Ohio, and signed at Paris, France on December 14, 1995, officially ended the conflict in the former Socialist Federal Republic of Yugoslavia.¹²⁶

IV. BOSNIA AND HERZEGOVINA V. YUGOSLAVIA (SERBIA AND MONTENEGRO)— THE CASE BEFORE THE INTERNATIONAL COURT OF JUSTICE

On March 20, 1993, Bosnia-Herzegovina instituted proceedings in the Registry of the International Court of Justice against Serbia and Montenegro, alleging that both Serbia and Montenegro violated the Genocide Convention.¹²⁷ Despite numerous delays, the case is currently proceeding before the International Court of Justice.¹²⁸ As previously mentioned, this is the first time the International Court

Made Full Members, BALTIMORE EVENING SUN, May 22, 1992, at 4A.

119. See Nicolas Miletitch, *Armies and Private Gangs Fighting in Bosnia-Herzegovina*, AGENCE FR.-PRESSE, Apr. 7, 1992, available in 1992 WL 8471065 (describing fighting between the armies of various factions); Weller, *supra* note 106, at 569 (describing fighting during the conflict); *Air Strikes, Artillery Batter Croatia Fighting on Upswing in Civil War*, RECORD N.J., Dec. 31, 1991, at A13 (describing air strikes and fighting in the former Republic of Croatia following independence).

120. See Weller, *supra* note 106, at 570 (reporting that the Yugoslavian army, supported by a column of heavy armor, attacked the Slovenia militia).

121. See Branic *supra* note 16 and accompanying text (detailing the severity of the conflict in Bosnia-Herzegovina).

122. See Bruun, *supra* note 5, at 198-99 (listing participants in the Balkan conflict).

123. See *id.* at 200 (claiming the Serbian's use of the term "ethnic cleansing," which described acts of mass execution and detention camps, implies genocide).

124. Sudetic, *supra* note 110, at A3.

125. See Bosnia and Herzegovina-Croatia-Yugoslavia: General Framework Agreement For Peace in Bosnia and Herzegovina With Annexes, Dec. 14, 1995, 35 I.L.M. 75 (detailing the settlement in the former Republic of Yugoslavia) [hereinafter General Framework Agreement]. The settlement requires all parties to respect certain international conventions, including the Genocide Convention. *Id.* See also Paul C. Szaz, *The Protection of Human Rights Through the Dayton/Paris Peace Agreement on Bosnia*, 90 AM. J. INT'L L. 301, 301 (1996) (detailing the chronology of the peace talks).

126. General Framework Agreement, *supra* note 125, at 75.

127. See *supra* note 4 (providing relevant history of proceedings Bosnia-Herzegovina instituted before the International Court of Justice).

128. See Order of Apr. 8, 1993, *supra* note 4, at 3 (ordering Bosnia-Herzegovina to file

of Justice is adjudicating claims under the Genocide Convention.¹²⁹ It is extremely important to analyze both parties' arguments concerning jurisdiction in order to appreciate the obstacles preventing the establishment of a forum dedicated to adjudicating claims pursuant to the Genocide Convention.¹³⁰ These arguments further support the need for the International Court of Justice to assert

a Memorial on October 15, 1993 and Yugoslavia to file a Counter-Memorial on April 15, 1994); *See also* Order of Sept. 13, 1993, *supra* note 4, at 325 (providing a description of the time table for submissions). On July 27, 1993, Bosnia-Herzegovina filed a second request for provisional measures. *Id.* at 333. The next day, July 28, 1993, Yugoslavia requested the International Court of Justice to allow enough time to adequately defend against the charges. *Id.* On July 30, 1993, Bosnia-Herzegovina objected to any time extensions. *Id.* The Court ruled on July 31, 1993 that the hearing on the second request was to commence on August 25, 1993. *Id.* Bosnia-Herzegovina filed an amendment to the second request for the provisional measures on August 4, 1993, seeking an immediate Order without a hearing based on Article 75 of the Court. *Id.* On August 5, 1993, the President of the Court forwarded a letter to both parties stressing compliance with provisional measures outlined in the Order of April 8, 1993. *Id.* Yugoslavia submitted a response to the amended second request for provisional measures on August 10, 1993. *Id.* At the same time, Yugoslavia filed a request for provisional measures, alleging that Bosnia-Herzegovina violated the Genocide Convention. *Id.* Bosnia-Herzegovina filed amended second requests or supplemented its requests for provisional measures on August 6, 7, 8, 10, 13, 22, 23, and 24, 1993. *Id.* at 334. After issuing the Order on September 13, 1993, the Court required Bosnia-Herzegovina to file its Memorial on April 15, 1994, and Yugoslavia to file its Counter-Memorial on April 15, 1995. *Id.* at 325. *See Bosnia-Herzegovina files Brief on War Crimes*, AGENCE FR.-PRESSE, Apr. 15, 1994, available in 1994 WL 9541120 (reporting the April 15, 1994 filing of Bosnia-Herzegovina's brief describing human rights violations by Yugoslavia); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. and Herze. v. Yugo.) 1995 I.C.J. 80, (Mar. 21) (granting Yugoslavia's request for extension until June 30, 1995 to file its Counter-Memorial); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. and Herze. v. Yugo.) 1995 I.C.J. 279, (July 14) (stating that Yugoslavia filed certain objections to the Court's jurisdiction over the matter on June 14, 1995). The proceedings before the International Court of Justice were suspended and the Court required Bosnia-Herzegovina to file a response to the objections on November 14, 1995. *Id.* *See also World Court to Weigh Bosnia Genocide Charges Against Serbia*, *supra* note 7, at 19; *Belgrade Disputes Authority of International Court on Bosnia*, AGENCE FR.-PRESSE, July 22, 1995, available in 1995 WL 7833320 (stating that Yugoslavia's June 26, 1995 written statement to the International Court of Justice was used to denounce Bosnia-Herzegovina's claims of genocide and question the authority of the Court). On April 29, 1996 the International Court of Justice commenced hearings concerning jurisdiction over the matter. *World Court to Weigh Bosnia Genocide Charges Against Serbia*, *supra* note 7, at 19; *Warrants*, *supra* note 8, at A8. On July 11, 1996, the Court ruled it possessed jurisdiction to hear the case. *Court Gives Belgrade One Year to Present Case on Genocide* *supra* note 9. The International Court of Justice ordered Yugoslavia to file a Counter-Memorial by July 23, 1997. *Id.*

129. McIntyre, *supra* note 2; Chao, *supra* note 2, at 17A (recognizing the significance of the proceedings before the International Court of Justice).

130. *See* Porter, *supra* note 11, at 155-57 (noting difficulties in applying an international body of law).

jurisdiction under Article IX of the Genocide Convention.¹³¹

A. ARGUMENTS CLAIMING THE INTERNATIONAL COURT OF JUSTICE POSSESSES JURISDICTION OVER THE CASE

Bosnia-Herzegovina advanced three main arguments claiming that the International Court of Justice possessed jurisdiction over the case. First, Bosnia-Herzegovina argued that the former Socialist Federal Republic of Yugoslavia accepted the International Court of Justice's jurisdiction based on a letter forwarded by the Presidents of Montenegro and Serbia to the President of the Arbitration Commission.¹³² In this letter, the presidents of Serbia and Montenegro requested that the International Court of Justice adjudicate all disputes arising between the republics.¹³³ This argument is weak because there is no indication that the Presidents of Serbia or Montenegro intended to recognize the jurisdiction of the International Court of Justice with respect to the provisions of the Genocide Convention.¹³⁴

Bosnia-Herzegovina next argued that the International Court of Justice possessed jurisdiction over its claims because Bosnia-Herzegovina was a member of the former Socialist Federal Republic of Yugoslavia, which ascribed to the Genocide Convention's provisions.¹³⁵ This is important because before asserting a

131. *Id.* at 158.

132. *See* Order of Apr. 8, 1993, *supra* note 4, at 14-17.

133. *See id.* (stating that Bosnia-Herzegovina interpreted the text of a Yugoslavian letter as an offer to submit to jurisdiction of the International Court of Justice for all legal disputes arising out of dissolution of the former Republic of Yugoslavia). The President of the Arbitration Commission addressed a letter to the leaders of Bosnia-Herzegovina, Serbia, Montenegro, Croatia, Slovenia, Macedonia and the Federal Republic of Yugoslavia requesting answers to three Commission questions. *Id.* at 16-17. The Commission wanted to know: (1) whether the Federal Republic was a new state; (2) whether dissolution of the former Republic of Yugoslavia was complete; and (3) how the problems of succession should be resolved. *Id.* The text of the letter responding to these questions, sent by Mr. Momir Bulatovic, President of the Republic of Montenegro, and Mr. Slobodan Milosevic, President of the Republic of Serbia, challenged the Commission's competency to decide the issues. *Id.* The response also stated: (1) that the issues raised by the Commission were legal disputes incapable of resolution by agreement between the Republics; and (2) "all questions should be adjudicated by the International Court of Justice in accordance with its statute." *Id.* at 16-17. Based on the content of the Bulatovic/Milosevic letter, Bosnia-Herzegovina argued that Yugoslavia accepted unconditionally the jurisdiction of the International Court of Justice. *Id.*

134. *Id.* at 16-19.

135. *See id.* (stating that the government of Bosnia-Herzegovina notified the Secretary-General of the United Nations of its intention to succeed to the Genocide Convention under the premise that the former Socialist Federal Republic of Yugoslavia had agreed to the Convention's terms). It is important to mention that when evaluating arguments concerning jurisdiction, the International Court of Justice is not deciding the merits of the case. *Id.* at 11-12. Under the Court's rules, judges need only find authority in which jurisdiction may be founded. *Id.* at 11-12. Although the International Court of Justice addressed other issues

prayer for relief under the Genocide Convention, Bosnia-Herzegovina first must prove that it is a contracting party to the Convention.¹³⁶ Finally, Bosnia-Herzegovina argued that the International Court of Justice possessed jurisdiction over the proceeding pursuant to Article IX of the Genocide Convention.¹³⁷ After establishing standing, this argument asserts a basis for the jurisdiction of the Court.¹³⁸

Bosnia-Herzegovina's second request for provisional measures requested that the International Court of Justice enjoin Serbia and Montenegro from attempting to partition or annex Bosnia-Herzegovina and from violating provisions of the Genocide Convention.¹³⁹ In this second request, Bosnia-Herzegovina advanced additional arguments concerning possible authority of the International Court of Justice to adjudicate this matter.¹⁴⁰ Bosnia-Herzegovina again argued that the June 8, 1992 letter served as an additional basis to confer jurisdiction.¹⁴¹ Again, for the reasons stated above, this is a weak argument.¹⁴²

Bosnia-Herzegovina also claimed the International Court of Justice possessed

in this Order, this Comment only addresses those arguments pertaining to jurisdiction.

136. See Genocide Convention, *supra* note 3, at 282 (stating that only contracting parties to the Genocide Convention are subject to its provisions).

137. See Order of Apr. 8, 1993, *supra* note 4, at 13-17. Bosnia-Herzegovina argued both parties were subject to provisions of the Genocide Convention and, as such, Article IX requires all disputes relating to state responsibility concerning the commission of genocide be submitted to the International Court of Justice "at the request of any of the parties to the dispute." *Id.*

138. *Id.*

139. Order of Sept. 13, 1993, *supra* note 4, at 334-36.

140. *Id.* at 339-40 (reiterating Bosnia-Herzegovina's argument that the International Court of Justice possessed jurisdiction pursuant to the Treaty between Allied and Associated Powers and the Kingdom of the Serbs, Croats and Slovenes, on the Protection of Minorities signed at Saint-Germain-en-Laye on September 10, 1919). The Allied and Associated powers referred to consisted of the United States, the British Empire, Japan, France and Italy. *Id.* This treaty established jurisdiction over all infractions of its provisions with the Permanent Court of International Justice. *Id.* As stated before, the International Court of Justice is the successor to the Permanent Court of International Justice. Bosnia-Herzegovina contended that the International Court of Justice now possessed jurisdiction over these claims pursuant to Article 37 of the Statute of the International Court of Justice. *Id.* at 339-40. Bosnia-Herzegovina further argued that Yugoslavia succeeded to the rights of the Kingdom of the Serbs, Croats and Slovenes and the United Nations replaced the League of Nations. *Id.* Thus, Bosnia-Herzegovina argued that as a member nation of the United Nations, it may sue Yugoslavia. *Id.* Moreover, Bosnia-Herzegovina inferred that the International Court of Justice, as successor to the Permanent Court of International Justice, possessed jurisdiction to decide this case. *Id.*

141. See *id.* at 340-41 (stating that Bosnia-Herzegovina again urged the International Court of Justice to interpret the correspondence between Presidents Bulatovic and Milosevic to the President of the Arbitration Commission as availing Yugoslavia of the Court's jurisdiction to adjudicate these claims).

142. See *id.* Court Order of Sept. 13, 1993, *supra* note 4, at 339-40 (rejecting explicitly Applicant's submission on this point).

jurisdiction pursuant to customary and conventional international humanitarian law.¹⁴³ Unfortunately, Bosnia-Herzegovina failed to address specific provisions of the treaties referred to in its arguments.¹⁴⁴ Most importantly, Bosnia-Herzegovina argued that the International Court of Justice possessed jurisdiction over the matter because Serbia and Montenegro asked the Court for similar protections requested by Bosnia-Herzegovina.¹⁴⁵ This is an interesting argument because, while Serbia and Montenegro are requesting relief similar to that sought by Bosnia-Herzegovina,¹⁴⁶ they continue to refuse to recognize the jurisdiction of the International Court of Justice to grant such relief.¹⁴⁷

B. ARGUMENTS CLAIMING THE INTERNATIONAL COURT OF JUSTICE DOES NOT POSSESS JURISDICTION OVER THE CASE

Serbia and Montenegro immediately challenged Bosnia-Herzegovina's standing to bring the suit before the International Court of Justice.¹⁴⁸ First, Serbia and Montenegro argued that the party filing the action was not the legitimate government of Bosnia-Herzegovina.¹⁴⁹ Next, Serbia and Montenegro argued Bosnia-Herzegovina did not continue to be a party to the Genocide Convention simply by virtue of Bosnia-Herzegovina's former membership in the Socialist Federal Re-

143. *Id.* Bosnia-Herzegovina argued that the International Court of Justice possesses jurisdiction based on provisions contained in the Geneva Conventions of 1949, the First Additional Protocol of 1977 and the Hague Regulations on Land Warfare of 1907. *Id.*

144. *See id.* (finding Applicant failed to cite specific provisions to support its claims)

145. *See* Order of Sept. 13, 1993, *supra* note 4, at 341-42 (stating that Bosnia-Herzegovina believed Yugoslavia accepted the Court's jurisdiction over the matter when Yugoslavia, on August 9, 1993, asked the International Court of Justice for the same protections concerning the implementation of the Genocide Convention that Bosnia-Herzegovina initially requested). This is a very persuasive argument.

146. *See id.* (noting similarities between measures requested of the Court by both Respondent and Applicant).

147. *See id.* at 341 (recognizing the doctrine of "*forum prorogatum*" referring to the extension of jurisdiction by consent).

148. Yugoslavia advanced many of the same arguments raised by defendants before the International Tribunal for Persons. *See* George H. Aldrich, *Jurisdiction of the International Criminal Tribunal For the Former Yugoslavia*, 90 AM. J. INT'L L. 64, 65 (1996) (acknowledging that Dusko Tadic challenged the jurisdiction of the International Tribunal for Persons on the ground that the United Nations Security Council lacked the authority to establish the International Tribunal; the International Tribunal could not displace national courts; and that the articles contained in the indictment were only applicable to international conflicts). Tadic argued the conflict was internal, as did Serbia and Montenegro. *Id.*

149. Order of Apr. 8, 1993, *supra* note 4, at 11. Serbia and Montenegro argued that the President of Bosnia-Herzegovina, Mr. A. Izetbegovi, was not a legally elected official. *Id.* As such, Izetbegovi's appointment of agents, which ultimately resulted in the filing of the action before the Court, was illegitimate and should serve to defeat standing to file the action. *Id.* Finally, Serbia and Montenegro also argued that the Serb and Croat citizens of Bosnia-Herzegovina contested the legitimacy of the Bosnian government. *Id.*

public of Yugoslavia.¹⁵⁰ The Socialist Federal Republic of Yugoslavia signed the Genocide Convention on December 11, 1948, and ratified it without reservation on August 29, 1950.¹⁵¹ Serbia and Montenegro argued that the conflict in the former Socialist Federal Republic of Yugoslavia was an internal civil war not covered by the Genocide Convention.¹⁵² Since the International Court of Justice only adjudicates claims between nations,¹⁵³ this argument attacks the standing of Bosnia-Herzegovina to bring charges before the Court.

Serbia and Montenegro also filed charges, on August 9, 1993, requesting protection under the Genocide Convention.¹⁵⁴ This is an interesting charge because it now allows Bosnia-Herzegovina the right to fully assert that Serbia and Montenegro recognizes the jurisdiction of the International Court of Justice to adjudicate Genocide Convention violations. Finally, Serbia and Montenegro argued that the International Court of Justice did not possess jurisdiction over certain requests, unrelated to the Genocide Convention, made by Bosnia-Herzegovina.¹⁵⁵

150. See *id.* at 15-16. The Court noted that Serbia and Montenegro contested the December 29, 1992 letter that Bosnia-Herzegovina filed with the Secretary-General of the United Nations, claiming that it automatically became a party to the Genocide Convention by virtue of the former Socialist Federal Republic of Yugoslavia's prior commitment to honor the Convention's provisions. *Id.* Yugoslavia contends that under the procedures regarding succession, as outlined in the Vienna Convention on Succession of States in Respect of Treaties, Bosnia-Herzegovina may not become a party to the Convention until ninety days after filing the notice, in this case, ninety days after December 29, 1992. *Id.* Based on this argument, Bosnia-Herzegovina could only file claims in connection with alleged acts committed by Yugoslavia after March 1992. *Id.*

151. *Id.*

152. See Julian Borger, *Serbs Halt Returning Muslims*, THE GUARDIAN, Apr. 30, 1996, at 9 (reporting that during the hearings conducted on April 29, 1996, representatives of Serbia and Montenegro argued that the Yugoslavian government played no role in the conflict in Bosnia-Herzegovina); Yvonne Zipp, *The News in Brief*, CHRISTIAN SCI. MONITOR, Apr. 30, 1996, at 2 (explaining that Serbia and Montenegro considered the conflict in Bosnia-Herzegovina an internal civil war in which the Yugoslavian government played no role).

153. U.N. CHARTER art. 35, ¶1.

154. Order of Sept. 13, 1993, *supra* note 4, at 341-42. This charge allowed Bosnia-Herzegovina the right to fully assert that Serbia and Montenegro recognize the authority of the International Court of Justice to adjudicate claims pursuant to the Genocide Convention. *Id.*

155. See Court Order of Apr. 8, 1993, *supra* note 4, at 7-8. The Court noted Bosnia-Herzegovina also requested the International Court of Justice to order Yugoslavia to cease interfering with the internal affairs of Bosnia-Herzegovina and threatening the use of force against the citizens of Bosnia-Herzegovina. *Id.* Serbia and Montenegro urged the International Court of Justice to refrain from issuing any provisional measures in light of the numerous resolutions the United Nations Security Council issued concerning the conflict in the former Socialist Federal Republic of Yugoslavia. *Id.* at 18-19. Serbia and Montenegro specifically addressed Bosnia-Herzegovina's requests as outside the scope of the Genocide Convention. *Id.*

C. THE JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE

In ruling on April 8, 1993, the International Court of Justice evaluated arguments made by Bosnia-Herzegovina and Serbia and Montenegro concerning the jurisdiction of the Court.¹⁵⁶ The International Court of Justice ruled that the Secretary-General of the United Nations permitted Bosnia-Herzegovina to succeed as a party to the Genocide Convention.¹⁵⁷ This ruling afforded Bosnia-Herzegovina standing as a contracting party.¹⁵⁸

The International Court of Justice also found that Article IX of the Genocide Convention provides a possible basis for conferring jurisdiction in the proceeding.¹⁵⁹ The Justices rejected arguments that, for purposes of the Genocide Convention, Serbia and Montenegro submitted to the jurisdiction of the International Court of Justice by virtue of the letter dated June 6, 1992. The Court further indicated, pending its final decision, that Serbia and Montenegro "should immediately ... prevent [the] commission of the crime of genocide,"¹⁶⁰ including acts committed by the military units under its control.¹⁶¹ Finally, the Court ordered Serbia and Montenegro, as well as Bosnia-Herzegovina, to refrain from any actions that would exacerbate the situation.¹⁶²

The International Court of Justice issued a further order, on September 13, 1993, requiring the immediate implementation of the measures outlined in its April 8, 1993 order.¹⁶³ Once again, the Court reviewed additional jurisdictional arguments advanced by Bosnia-Herzegovina.¹⁶⁴ The International Court of Justice

156. *Id.* at 15-18.

157. *See id.* at 15-16 (ruling that Bosnia-Herzegovina did not accede to the Genocide Convention's provisions).

158. *Id.* at 16, 22-23.

159. *See id.* at 11-12. The Court recognized that although it did not need to finally satisfy itself that it possessed jurisdiction on the merits of the case, it should not indicate provisional measures unless the provisions of the Genocide Convention appeared to afford a basis of jurisdiction. *Id.* The Court determined that the provisions relied on by Bosnia-Herzegovina might afford a basis for jurisdiction. *Id.* The International Court of Justice believed that both nations were parties to the Genocide Convention satisfying *ratione personae* ("by reason of the person concerned") personal jurisdiction. *Id.* at 11-12. The Judges further determined that the International Court of Justice possessed *ratione materiae* ("by reason of the matter involved") subject matter jurisdiction pursuant to Article IX of the Genocide Convention. *Id.* *See also* Genocide Convention, *supra* note 3, at 282.

160. *See* Order of Apr. 8, 1993, *supra* note 4, at 24.

161. *Id.*

162. *Id.*

163. Order of Sept. 13, 1993, *supra* note 4, at 375.

164. *Id.* at 339-40. Bosnia-Herzegovina again argued succession to a treaty, the Protection of Minorities Treaty, the Socialist Federal Republic of Yugoslavia signed at Saint-Germaine-en-Laye on September 10, 1919. *Id.* Although not directly addressing succession, the Court rejected this argument, claiming that Bosnia offered no evidence concerning minorities in Bosnia-Herzegovina, which the Treaty protected. *Id.* *See also supra* note 141 and accompanying text.

again rejected the argument that the June 8, 1992 letter represented Serbia and Montenegro's commitment to recognize the jurisdiction of the Court.¹⁶⁵ The judges declared possible jurisdiction over the matter subject to Article IX of the Genocide Convention, and only for claims relating to the provisions of the Convention.¹⁶⁶ Finally, the judges ruled that the Court's first provisional order addressed the allegations Serbia and Montenegro filed against Bosnia-Herzegovina.¹⁶⁷

D. ADDITIONAL GROUNDS FOR JURISDICTION

Additional theories support the contention that the International Court of Justice possesses jurisdiction to adjudicate the allegations Bosnia-Herzegovina asserted against Serbia and Montenegro. The most compelling argument is that the International Court of Justice must unilaterally assert jurisdiction over claims involving the Genocide Convention.¹⁶⁸ In coming before the International Court of Justice to determine if that Court possesses jurisdiction over the claims asserted, nations recognize that Court's jurisdiction to determine whether it possesses jurisdiction to decide the case. The International Court of Justice asserts jurisdiction to adjudicate the issue of jurisdiction when determining the jurisdictional question. Once the International Court of Justice establishes itself as the adjudicator of international claims, nations will finally possess a forum to remedy violations of international law.¹⁶⁹

V. RECOMMENDATIONS

In recognition of the tremendous opportunity¹⁷⁰ afforded under *Bosnia-*

165. Court Order of Sept. 13, 1993, *supra* note 4, at 340-41.

166. *Id.* at 342.

167. *Id.* at 342-44.

168. See Jose Alvarez, *Judging the Security Council*, 90 AM. J. INT'L L. 1, 2 (1996) (evaluating the arguments that the International Court of Justice assert the right to "judicially review" United Nations Security Council actions). The Supreme Court of the United States employed similar techniques in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). *Id.* at 3. The thrust of the *Marbury* was Chief Justice Marshall's assertion that the Supreme Court lacked the jurisdiction to issue a writ of mandamus. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175-76 (1803). The Supreme Court's assertion that it did not have the jurisdiction to issue a mandamus writ, established the jurisdiction of the Court to rule on the question of jurisdiction. *Id.* at 178. This is a very important assertion and may apply to the rule of international law. In the present case, the International Court of Justice asserted jurisdiction to decide if that Court possessed the jurisdiction to adjudicate claims alleged by Bosnia-Herzegovina. Order of July 11, 1996 *supra* note 8.

169. See Webb, *supra* note 65, at 408 (recognizing the need for a forum responsible for the resolution of claims arising under the Genocide Convention).

170. See *supra* note 18 and accompanying text (arguing the current proceedings before the International Court of Justice affords an opportunity for the establishment of an uniform rule of international law).

Herzegovina v. Yugoslavia (Serbia and Montenegro), where the International Court of Justice enforced the provisions of the Genocide Convention for the first time,¹⁷¹ the United States should remove its reservation to the jurisdiction of the International Court of Justice pursuant to Article IX of the Genocide Convention.¹⁷² A United States Senator should introduce legislation repealing the reservation concerning the jurisdiction of the International Court of Justice contained in the ratification of the Genocide Convention. The Senate should immediately enact this legislation, which the President must sign.¹⁷³

The declaration should completely remove the reservation that parties must first seek the consent of the United States before it will submit to the initiation of proceedings before the International Court of Justice.¹⁷⁴ This act will once again signify to the international community that the United States is committed to advancing international law.¹⁷⁵ As nations begin to unconditionally accept the jurisdiction of the International Court of Justice, they must follow Bosnia-Herzegovina's lead by bringing charges against nations that violate the Genocide Convention before the Court.¹⁷⁶ The rule of international law advances when nations enforce existing treaties and conventions.¹⁷⁷

Proponents of the reservation claim that without it the United States would become subject to frivolous and baseless charges and accusations.¹⁷⁸ These proponents should properly address such concerns¹⁷⁹ at a hearing before the International Court of Justice. Opponents of the reservation rightly contend that, despite the reservation, there is nothing preventing a nation subject to the jurisdiction of

171. See *supra* note 2 and accompanying text (arguing the significance of the case of *Bosnia-Herzegovina v. Yugoslavia*).

172. See *supra* note 87 and accompanying text (listing arguments for the removal of the reservation to the unconditional jurisdiction of the International Court of Justice contained in the Senate's ratification of the Genocide Convention).

173. See *supra* note 86 and accompanying text (reiterating the importance of removing the reservation to unconditional jurisdiction of the International Court of Justice contained in the Senate's ratification of the Genocide Convention).

174. *Id.*

175. See Rogoff, *supra* note 70, at 292 (suggesting the United States exhibited an unwillingness to support the rule of international law by adopting a reservation to the jurisdiction of the International Court of Justice when ratifying the Genocide Convention).

176. See *supra* note 2 and accompanying text (reporting that Bosnia-Herzegovina is the first nation to seek enforcement of the Genocide Convention).

177. See Bruun, *supra* note 5, at 207 (advocating that without enforcement of its provisions, the Genocide Convention is weak); Christopher C. Joyner, *Strengthening Enforcement of Humanitarian Law: Reflections on the International Tribunal for the Former Yugoslavia*, 6 DUKE J. COMP. & INT'L L. 79, 100-01 (1995) (recognizing the international community's new found resolve to enforce humanitarian law).

178. See SENATE GENOCIDE CONVENTION REP., *supra* note 45, at 29 (providing opponent's arguments why the United States must not unconditionally adopt the jurisdiction of the International Court of Justice).

179. *Id.*

the Court from filing a frivolous or baseless charge.¹⁸⁰ The United States, however, must set an example for all the nations of the world¹⁸¹ by unconditionally submitting to the jurisdiction of the International Court of Justice and the Genocide Convention.¹⁸²

The International Court of Justice correctly acknowledged a reasonable basis to assert jurisdiction under Article IX of the Genocide Convention in *Bosnia-Herzegovina v. Yugoslavia (Serbia and Montenegro)*.¹⁸³ In an effort to strengthen the rule of international law, the International Court of Justice must fill the current vacuum in international jurisprudence by asserting its proper role as an adjudicator of disputes arising under international law. The International Court of Justice can best accomplish this goal by unilaterally declaring its jurisdiction to adjudicate such questions, asserting the similar rationale advanced by Supreme Court Chief Justice John Marshall in the landmark case of *Marbury v. Madison*.¹⁸⁴

In asserting this power, the judges of the International Court of Justice must reach a balance between tempered judicial activism and outright declaration of jurisdiction.¹⁸⁵ The International Court of Justice enhances its credibility by assuming jurisdiction in a firm, well-reasoned manner. More importantly, by asserting such jurisdiction, the International Court of Justice will create a forum for the adjudication of all claims arising under the Genocide Convention, as stated in Article IX.¹⁸⁶

CONCLUSION

For the second time this century, the international community possesses the opportunity to establish a meaningful body of international law committed to the

180. *Supra* note 84 and accompanying text.

181. *See* Jennings, *supra* note 12, at 495 (providing an example of what happens when a nation assumes a leadership role in defending human rights).

182. *See supra* note 85 and accompanying text (acknowledging support for recognizing unconditional jurisdiction of the International Court of Justice); *see also supra* note 97 and accompanying text (recounting damage caused when the United States issued a reservation to the jurisdiction of the International Court of Justice upon its ratification of the Genocide Convention).

183. Order of Apr. 8, 1993, *supra* note 4, at 11-19; Order of Sept. 13, 1993, *supra* note 4, at 337-38.

184. 5 U.S. (1 Cranch) 137 (1803); *e.g.* Alvarez, *supra* note 168, at 2 (suggesting that the International Court of Justice employ the same legal analysis when reviewing United Nations Security Council Resolutions). This same analysis could be applied to jurisdictional claims arising under the Genocide Convention.

185. *See* Alvarez, *supra* note 168, at 2 (providing an analysis arguing that the International Court of Justice declare jurisdiction over certain aspects arising under international law).

186. *See supra* note 35 and accompanying text (setting forth provisions of Article IX of the Genocide Convention).

protection of the most basic human rights. It must not waste this tremendous opportunity. The International Court of Justice's assertion of jurisdiction under Article IX of the Genocide Convention advanced Bosnia-Herzegovina one step closer to successfully proving, for the first time in history, allegations that a nation committed the crime of state-sponsored genocide.

Far too much time elapsed between the creation of the Genocide Convention and the enforcement of its provisions. The drafters of the Genocide Convention recognized the crime of genocide as an "odious scourge" which inflicts great losses on humanity.¹⁸⁷ It is time for the nations of the world to recognize and unconditionally respect the jurisdiction of the International Court of Justice. This is the first step to the creation of a meaningful body of international law committed to the protection of the most basic of human rights.

187. Genocide Convention, *supra* note 3, at 278.