The Dayton Peace Agreement: short-term redemption or long-term tragedy?

A study concerning the (in)validity of an international treaty

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List of abbreviations

ARSIWA: Articles on Responsibility of States for International Wrongful Acts
Badinter Commission: Arbitration Commission of the Conference on Yugoslavia
DPA: Dayton Peace agreement
EC: European Community
ECHR: European Court of Human Rights
FBiH: Federation of Bosnia and Herzegovina
FRY: Federal Republic of Yugoslavia
Genocide Convention: United Nations Convention on the Prevention and the Punishment of the crime of Genocide
ICC: International Criminal Court
ICJ: International Court of Justice
ICTY: International Criminal Tribunal for the Former Yugoslavia
ICTR: International Criminal Tribunal for Rwanda
ILC: International Law Commission
JCE: Joint Criminal Enterprise
JNA: Yugoslav People's Army
Jus Cogens: Peremptory norms of general international law
MICT: International Residual Mechanism for Criminal Tribunals
NATO: North Atlantic Treaty Organization
PIC: Peace Implementation Council
RBiH: Republic of Bosnia and Herzegovina
RS: Republika Srpska
SDS: Serb Democratic Party
SFRY: Socialist Federal Republic of Yugoslavia
SRBiH: Socialist Republic of Bosnia and Herzegovina
TRNC: Turkish republic of Northern Cyprus
UN: United Nations
UNGA: United Nations General Assembly
UNSC: United Nations Security Council
US: United States
VCLT: Vienna Conventions on the Law of Treaties
VRS: Army of the Republika Srpska

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Introduction

"*It may not be a just peace, but it is more just than a continuation of war (…) in the situation as it is, and in the world as it is, a better peace could not have been achieved*".[1] (Alija Izetbegović, President of the Republic of Bosnia and Herzegovina).

This first comment was made after he reluctantly signed the Dayton Peace Agreement (DPA) together with the Croatian President, Franjo Tudjman, and the President of the Federal Republic of Yugoslavia (FRY), Slobodan Milosević. The agreement ended a nearly four-year armed conflict in Bosnia and Herzegovina.

In the early 1990s, Bosnia and Herzegovina, like other Republics of the Socialist Federal Republic of Yugoslavia (SFRY), opted for independence. After centuries of various occupations and foreign territorial pretensions, the independence of the State was restored. In view of the population structure, this also meant that Bosnian Serbs, on 9. January 1992, declared their *de facto* Republic, i.e., Serb Republic of Bosnia and Herzegovina (later renamed into Republika Srpska) on the territory of the independent declared Bosnia and Herzegovina.

The creation of parallel institutions, an army, and police structures, supported by the Yugoslav People's Army (JNA), heralded the start of a policy that would later become known as ethnic cleansing. As a result, on the territory of Republika Srpska (RS), the most terrible crimes, not seen in Europe since WWII, were committed.

Bosnian Muslims (Bosniaks), Bosnian Croats, and other minorities, ended up in concentration camps, subjected to racial discrimination, systematic raping, that eventually culminated into war crimes, crimes against humanity, and the genocide in Srebrenica, for which many high-ranked officials of the RS were later convicted by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Court of Bosnia and Herzegovina. Moreover, Serbia was held responsible by the International Court of Justice (ICJ) for failing to prevent the genocide. It also confirmed that the genocide was committed by members of the Bosnian Serb Army (VRS).

[1] https://www.theguardian.com/world/from-the-archive-blog/2020/nov/18/the-dayton-accords-a-peace-agreement-for-bosnia-archive-1995.

Finally, after many unsuccessful European peace efforts, the United States (US) forced all parties to enter final peace negotiations in Dayton. The DPA saw the light of day and ensured the continuity, the preservation of sovereignty and international subjecthood of Bosnia and Herzegovina. However, in doing so, the DPA established a new polity that legalised the results of war, more specifically, it meant that the *de facto* existing RS, was eventually recognised and legalized as an entity within the Constitution of the State, although the aforementioned atrocities were committed in its name and by its officials during the armed conflict. Who were later convicted for these atrocities and, in some case, still active in the polity of the State.

After WWII, these crimes acquired the status of peremptory norms of general international law (*jus cogens*), i.e., the highest status a norm can acquire under international law, with the result that any act contrary to such norms has far-reaching consequences. For international treaties this means, that on the basis of article 53 of the Vienna Convention on the Law of Treaties (VCLT), a treaty is, *ab initio*, void if it conflicts with *jus cogens*.

The foregoing leads us to the following main question: *Is the DPA in conflict with jus cogens, and therefore, on the basis of article 53 VCLT, null and void?*

The first chapter will provide a brief history of Bosnia and Herzegovina with an emphasis on the developments between 1991-1995. The second chapter will discuss all faced efforts that preceded the DPA. Subsequently, the implications of the treaty itself will be highlighted. In the third chapter the history, nature and, consequences of *jus cogens* will be described. The fourth chapter will analyse the term genocide and will provide the burden of proof. In the last chapter, we will argue that the DPA is, in its very substance, in conflict with *jus cogens*, and in addition, comment on its future status.

1. A brief history of the Bosnian State and the political development in the period of 1991-1995

1.1. Bosnia through history

The Bosnian State has a long and turbulent history in which it saw its degree of statehood disappear and be restored through different forms of organisation and legal systems. The Bosnian State was mentioned for the first time in the tenth century by Constantin Porphyrogenitus in his book *'De administrando imperio'*.[2] After a long period of successful resistance, in 1463, the Bosnian Kingdom fell under the occupation of the Ottoman Empire, which led to the abolition of its independence. The Bosnian State lost its sovereignty as it continued to exist over the next five hundred years, in various forms, as a province of the Ottoman Empire.[3]

After the Ottoman Empire saw its power decrease, an agreement was established through the Berlin Congress, by which was agreed that Bosnia would be a *'corpus separatum'* under the rule of the Habsburg Empire. At that moment, for the first time in history, Bosnia was renamed as Bosnia and Herzegovina.[4] In the period of 1908-1918, Bosnia and Herzegovina was formally annexed by the Habsburg Empire.[5]

Between the World Wars, Bosnia and Herzegovina was first part of both the Kingdom of Serbs, Croats and Slovens and then of the Kingdom of Yugoslavia. The sovereignty and territorial integrity of the State were, at that time, constantly under pressure. In October 1929 Bosnia and Herzegovina was divided into several regions within the Kingdom of Yugoslavia in such a way that her boundaries became unrecognisable.[6] These circumstances lasted until 25 November 1943, when the statehood was restored by the Antifascist movement (State Antifascist Council of the National Liberation of Bosnia and Herzegovina) in Bosnia and Herzegovina. 247 delegates, from all peoples and parts of the territory of Bosnia and Herzegovina, elected 173 councilors who decided to live in a common State that ensures the equality of all its

2 Ibrahimagić 1999, p. 21-23.

3 Ibrahimagić 1999, p. 28-38. See also Bjarnason 2001, p. 11.

4 In this way, Bosnia became a special area over which, in addition to the emperor, the governments of both Austria and Hungary, the legislature of these States had their rule. In this period, the Ottoman Sultan was still the formal ruler. Ibrahimagić 1999, p. 39.

5 Ibrahimagić 1999, p. 41. See also M. Bjarnason 2001, p. 11.

6 Ibrahimagić 1999, p. 48-54.

inhabitants. Since then, that day was taken as the restoration of the statehood of Bosnia and Herzegovina.[7]

After WWII and the creation of the Federal People's Republic of Yugoslavia,[8] the People's Republic of Bosnia and Herzegovina was recognised as one of the six Republics and had its own government, parliament, legal system, and internal organisation. This strengthened the sovereignty of the State and its equality with the other Republics.[9] After a new Constitution was adopted on 7 April 1963, the name of Yugoslavia was changed to the SFRY.[10] The Socialist Republic of Bosnia and Herzegovina (SRBiH) became one of its six equal Republics.[11]

The SFRY ended up in a crisis after the President of the Socialist Republic of Serbia, Slobodan Milosević, claimed more power to his State. After democratic elections were held in all Republics of the SFRY in the early 1990s, Slovenia and Croatia declared their independence on 25 June 1991.[12] In November of the same year, the Arbitration Commission of the Conference on Yugoslavia (Badinter Commission) stated in its first opinion that "*the Socialist Federative Republic of Yugoslavia is in the process of dissolution*".[13]

1.2. Bosnia and Herzegovina in the period of 1991-1995

In the same period, the debate on independence also flared up in the SRBiH. With an amendment to the existing Constitution of the SRBiH, the State was defined as a democratic and sovereign State of equal citizens and peoples of Bosnia and Herzegovina. Together with the later held referendum, this amendment was seen as a fundamental legal argument for the independence of Bosnia and Herzegovina.[14]

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7 https://www.yumpu.com/xx/document/read/59842714/145-3-zapisnik-sa-prvog-zasjedanja-zavnobiha And http://www.baginst.org/uploads/1/0/4/8/10486668/bosnia_and_herzegovina__historic_facts_by_smail_cekic.pdf

8 Article 2 of Chapter 1 of the Constitution Federal People's Republic of Yugoslavia http://mojustav.rs/wp-content/uploads/2013/04/Ustav1946.pdf

9 Ibrahimagić 1999, p. 64.

10 Tomasevich 2001. See also Lampe 2000. And Ramet 2006.

11 Article 2 of Chapter 1 of the Constitution of the SFRY http://mojustav.rs/wp-content/uploads/2013/04/Ustav-SFRJ-iz-1963.pdf

12 Bjarnason 2001, p. 16. And Balint 2012, p. 17-18. See also Ibrahimagić 1999, p. 72.

13 https://www.pf.uni-lj.si/media/skrk_mnenja.badinterjeve.arbitrazne.komisije.1_.10.pdf See also: Pellet, *EJIL* 1992 p. 178–185.

14 Ibrahimagić 1999, p. 72.

Contrary to the wishes of the Bosniaks and Bosnian Croats,[15] Bosnian Serbs were against the independence of Bosnia and Herzegovina and wanted to remain within the SFRY.[16] This first led to the establishment of the so-called 'Serb Autonomous Regions' on the territory of the SRBiH by the Serbian Democratic Party (SDS), led by Radovan Karadžić.[17] After the parliament of the SRBiH chose for sovereignty on 15 October 1991,[18] the Bosnian Serb politicians proclaimed the so-called Assembly of Serb People of Bosnia and Herzegovina, and held a plebiscite of the Serb people of Bosnia and Hercegovina on 10 November 1991,[19] which resulted in favour of staying in a federal State with Serbia and Montenegro as part of SFRY.[20] In the parliament of SRBiH, Radovan Karadžić threatened that:

"*The road that you want to take Bosnia and Herzegovina down is the same highway to hell and suffering that Slovenia and Croatia have taken. Do not think that you will not take Bosnia and Herzegovina to hell and the Muslim people perhaps to annihilation, because the Muslim people cannot defend themselves if the war breaks out here*".[21]

The SDS leadership wrote a secret document in which the organization and activity of the Serbian people in Bosnia and Herzegovina, in extraordinary circumstances, was formulated. This document contained a plan to take over each municipality by creating shadow-governments and para-structures. Moreover, it contained a plan to prepare Serbs to take over control in co-ordination with the JNA.[22]

On 20 December 1991, the government of SRBiH decided in favour of independence, and asked the European Community (EC) and her Member

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15 Bjarnason 2001, p. 27-28.

16 Power 2008, p. 279-282.

17 http://srpskaenciklopedija.org/doku.php?id=одлука_о_верификацији_проглашених_српских_аутономних_области_у_босни_и_херцеговини_1991 see for Latin transcript on p. 39 of https://www.slobodanpraljak.com/knjige/istina_o_bosni_i_hercegovini_dokumenti_1991_1995.pdf

18 Official Declaration on p. 17 of https://www.slobodanpraljak.com/knjige/istina_o_bosni_i_hercegovini_dokumenti_1991_1995.pdf

19 Official Declaration on p. 25 of https://www.slobodanpraljak.com/knjige/istina_o_bosni_i_hercegovini_dokumenti_1991_1995.pdf

20 Ibrahimagić 1999, p. 74.

21 Statement of Karadžić at the session of the Parliament of the SRBiH of 17 October 1991.

22 Gow 2003, p. 122–123.

States to recognise its sovereignty and independence.[23] In a reaction to this, the self-proclaimed Assembly of the Serb People of Bosnia and Herzegovina voted in favour of a resolution which announced the declaration of the Republic of Serb people of Bosnia and Hercegovina.[24] This intention was realized by declaring the independence of the Republic on 9 January 1992.[25] On 28 February 1992,[26] the Constitution of the Republic of Serb people of Bosnia and Hercegovina was adopted and declared that the territory would include Serb autonomous regions, municipalities and other Serb ethnic entities in Bosnia and Herzegovina, and that this territory would remain part of SFRY.[27]

The Badinter Commission had to answer, *inter alia*, the question whether the Serb population in Croatia and Bosnia-Herzegovina, as one of the equal peoples of Yugoslavia, had the right of self-determination? On 11 January 1992, in its second opinion, it stated:

"*that the Serb population in Bosnia and Herzegovina and Croatia is entitled to all the rights concerned to minorities and ethnic groups (…) Republics must afford the members of those minorities and ethnic groups all the human rights and fundamental freedoms recognised in international law, including, where appropriate, the right to choose their nationality*"

and that this right should be sought within the Republics and could not mean the change of boundaries at the time of independence (*uti possidetis juris*).[28]

On the same day, in its third opinion, it stated that:

"*The boundaries between Croatia and Serbia, between Bosnia and Herzegovina and Serbia, and possibly other adjacent independent states may*

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23 Official Document on p. 50 of https://www.slobodanpraljak.com/knjige/istina_o_bosni_i_hercegovini_dokumenti_1991_1995.pdf

24 Official Document on p. 51 of https://www.slobodanpraljak.com/knjige/istina_o_bosni_i_hercegovini_dokumenti_1991_1995.pdf

25 Official Document on p. 53-54 of https://www.slobodanpraljak.com/knjige/istina_o_bosni_i_hercegovini_dokumenti_1991_1995.pdf

26 Official Document on p. 72 of https://www.slobodanpraljak.com/knjige/istina_o_bosni_i_hercegovini_dokumenti_1991_1995.pdf

27 Bjarnason 2001, p. 29. See also Wedgwood, *CFR* 1999, p. 29-30.

28 https://www.pf.uni-lj.si/media/skrk_mnenja.badinterjeve.arbitrazne.komisije.1_.10.pdf

not be altered except by agreement freely arrived at (…) Except where otherwise agreed, the former boundaries become frontiers protected by international law".[29]

Following the opinion of the Badinter Commission, the Assembly of the SRBiH, decided to call a referendum between 29 February and 1 March 1992.[30] It was mostly boycotted by the Bosnian Serbs.[31] The referendum question was: *Are you for a sovereign Bosnia and Herzegovina, a State of equal citizens, the people of Bosnia and Herzegovina – Muslims, Serbs and Croats, and members of other people's living in it?* On 9 March 1992, the results of the referendum were announced: 64,31% of the citizens with the right to vote responded to the referendum, of which 99,44% answered the question positively.[32] On 7 April 1992, the EC recognised the independence of Bosnia and Herzegovina.[33] On 8 April 1992, the State was renamed as the Republic of Bosnia and Herzegovina (RBiH). Moreover, it became a Member State of the United Nations (UN) on 22 May 1992.[34] Thus, after more than five hundred years, since it lost its independence in 1463, the RBiH was again internationally recognised as a politically independent and sovereign State that had acquired its full international legal subjecthood.[35]

On 12 May 1992, at a session of the self-proclaimed Assembly of the Republic of Serb people of Bosnia and Hercegovina, Radovan Karadžić, its first President, announced six strategic goals for the Serb people in Bosnia and Herzegovina, including the ethnic separation of Bosnian Serbs from Bosniaks and Bosnian Croats and others living in Bosnia and Herzegovina.[36] It was Bosnian Serb General Ratko Mladić, known as the perpetrator of the genocide in Srebrenica, who reacted and argued that the achievement of the strategic goals will not be possible without committing the crime of genocide:

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29 https://www.pf.uni-lj.si/media/skrk_mnenja.badinterjeve.arbitrazne.komisije.1_.10.pdf.

30 Official Document on p. 63 of https://www.slobodanpraljak.com/knjige/istina_o_bosni_i_hercegovini_dokumenti_1991_1995.pdf

31 Bildt, *CFR* 2021, p. 6.

32 Ibrahimagić 1999, p. 74. See Official Document on p. 73 of https://www.slobodanpraljak.com/knjige/istina_o_bosni_i_hercegovini_dokumenti_1991_1995.pdf

33 EC Declaration on Recognition of Bosnia and Herzegovina, 6 April 1992, UN Doc. S/23793, Annex. President Bush's Statement on the Recognition of Bosnia and Herzegovina, Croatia and Slovenia, 7 April 1992, reprinted in Review of International Affairs, Vol. XVIII (1. V 1992), p. 26.

34 UNSC Resolutions 755 of 20 May 1992 and 757 of 30 May 1992.

35 Ibrahimagić 1999, p. 84.

36 Wedgwood, *CFR* 1999, p. 34-35. See also *Persecutor v. Mladić*, *ICTY*, IT-09-92-T, 22 November 2017, par. 3704.

"*There we cannot cleanse nor can we have a sieve to sift so that only Serbs would stay, or that the Serbs would fall through and the rest leave. Well that is, that will not, I do not know how Mr. Krajišnik and Mr. Karadžić would explain this to the world. People, that would be genocide. We have to call upon any man who has bowed his forehead to the ground to embrace these areas and the territory of the State we plan to make*".[37]

On 12 August 1992 the name of the Serb Republic of Bosnia and Herzegovina was changed into Serb Republic (Republika Srpska) and is still used as name of the *de jure* legalized entity of RS to this day. Despite Ratko Mladić's warning, the strategic goals were a prelude of ethnic cleansing, raping, concentration camps, war crimes, and crimes against humanity, that eventually led to the 1995 genocide in Srebrenica.[38]

In its decision of 8 October 1992,[39] the Constitutional Court of RBiH decided to annul the declaration of 9 January 1992,[40] which established the Republic of Serb people of Bosnia and Herzegovina, its Constitution of 28 February 1992,[41] as well as the general acts that were adopted on the basis of the previous acts.[42] However, throughout the whole period of the armed conflict, RS continued to operate as a *de facto* regime, with a high degree of effective power and control on large parts of the territory of the RBiH.[43] In this

37 Official Transcript at https://srebrenicamemorial.org/app/tg/assets/pdf/p/16.%20SJEDNICA.pdf And *Persecutor v. Mladić*, *ICTY*, IT-09-92-T, 22 November 2017, par. 3704.

38 *Persecutor v. Mladić*, *ICTY*, IT-09-92-T, 22 November 2017 and *Prosecutor v. Karadžić*, *ICTY*, IT-95-5/18-T, 24 March 2016. See also Bjarnason 2001, p. 29.

39 Constitutional Court of RBiH of 8 October 1992, No. 47/92 (Official Gazette of RBiH of 7 October 1992, No. 18).

40 Official Document on p. 53-54 of https://www.slobodanpraljak.com/knjige/istina_o_bosni_i_hercegovini_dokumenti_1991_1995.pdf

41 Official Document on p. 72 of https://www.slobodanpraljak.com/knjige/istina_o_bosni_i_hercegovini_dokumenti_1991_1995.pdf

42 The Court argued that *"the creation of such a territory produces incalculable consequences. Aggression was carried out against the independent and sovereign State of Bosnia and Herzegovina, as well as genocide against the Muslim and Croat people, with the aim of ethnic cleansing in the certain areas of RBiH and the establishment of an ethnically pure Serb area. This genocide was committed in the most brutal way"* (translation of the author), the court concluded, then, that *"on the same territory, on which the Republic of Bosnia and Herzegovina exists, a special Republic of the Serbian People was proclaimed, which, according to the constitutional court, violated the basic constitutional principle of the equality of citizens, peoples and nationalities of Bosnia and Herzegovina, its unity and indivisibility. In addition, such a creation, according to the above acts, was declared as an integral part of another State (Federal State of Yugoslavia), which overshadowed the basic constitutional principle of unviability of borders and territorial integrity of the Republic of Bosnia and Herzegovina, because they establish a Republic of only one people (Serb), on the territory of the existing Republic of Bosnia and Herzegovina (…) thus, in fact, unconstitutionally establishes a new constitutional and legal system, which is the grossest violation of the constitution of the Republic of Bosnia and Herzegovina"* (translation of the author). Ibrahimagić 1999, p. 279-281.

43 Crawford 2006, p. 56-61.

context, in *Kadić vs. Karadžić* the court found that Karadžić, indeed, exercised effective control over the territory of the RS and that *"Srpska is alleged to control defined territory, control populations within its power, and to have entered into agreements with other governments. It has a president, a legislature, and its own currency (…)".*[44]

In the period of March and April 1992, the armed conflict on the territory of the RBiH was already a fact. It is exactly the factual existence which, according to the Geneva Conventions, determines whether a state of armed conflict exists.[45] On 8 April, 1992, the Presidency of the RBiH passed a decree on the imminent danger of war[46] and on 20 June 1992, it declared a state of war.[47] Since then, several unsuccessful peace attempts were made to end the armed conflict. All these attempts had the aim, to somehow, internally reorganize Bosnia and Herzegovina in a manner that would be acceptable for all parties.[48] Each of them was more or less based on an ethnic internal division of the State. None of these were accepted by all parties, however, they were a prelude that eventually led to the signing of the DPA.[49]

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44 The Second Circuit of the United States Court of Appeals asserted that *"an unrecognised state is not a judicial nullity"*, and *"[a]ny government, however violent and wrongful in its origin, must be considered a de facto government if it was in the full and actual exercise of sovereignty over a territory and people large enough for a nation"*. *Kadić v. Karadžić*, 70 F.3d 232, 244 (2nd Cir. 1995).

45 Commentary of 2016 of Common Article 2 of the Geneva Conventions, Section D, par. 2, at 210. (https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518#32).

46 Ibrahimagić 1999, p. 271.

47 Ibrahimagić 1999, p. 272.

48 Glaurdić 2011, p. 294. See also Kurtcehajić & Ibrahimagić 2007, p. 120-125. And Bildt, *CFR* 2021.

49 Dummel, *Konrad Adenauer Stiftung* 2015, p. 40.

2. The Dayton Peace Agreement

The DPA forms the main pillar of the State structure and political life in post-war Bosnia and Herzegovina. After several peace efforts had failed,[50] it was the diplomatic initiative of the US, that eventually led to the signing of the DPA on 14 December 1995 in Paris.[51]

The DPA is described as 'a rare example of a major war resolved by a landmark peace agreement' in which superpowers were involved.[52] The main purpose of the agreement was to achieve reconciliation between the parties, what should help them to restore a stable and democratic State.[53]

2.1. Peace attempts in the period of 1992-1995

In the period between 1992-1995, several peace attempts were made to end the armed conflict in Bosnia and Herzegovina. They all foreshadowed the peace treaty that was eventually signed in Dayton.

The first peace attempt for Bosnia and Herzegovina came from the EC Peace Conference held in February 1992 and became known as the Carrington-Cutilleiro Peace Plan.[54] The negotiations were based on the creation of three ethnic constituent units within the existing borders of the State, respecting its territorial integrity.[55] On 18 March 1992, all sides signed the agreement. However, on 28 March 1992, Alija Izetbegović, withdrew his signature after a meeting with the US ambassador to Yugoslavia, Warren Zimmerman, on the ground that he opposed an ethnic division of the State.[56]

In august of 1992, a joint conference was organized by the EC and the UN with the aim to end the armed conflict in Bosnia and Herzegovina.

50 Dummel, *Konrad Adenauer Stiftung* 2015, p. 40.

51 Ni Aolain, *MJIL* 1998, p. 958.

52 Bildt, *CFR* 2021, p. 2.

53 Wedgwood, *CFR* 1999, Council on Foreign Relations, p. 25.

54 https://www.peaceagreements.org/viewmasterdocument/547. And Kurtcehajić & Ibrahimagić 2007, p. 171.

55 Glaurdić 2011, p. 294. See also Vranić, *CSR* 2013.

56 Bildt, *CFR* 2021, p.7. See also Kurtcehajić & Ibrahimagić 2007, p. 125-135.

The conference was concluded by a Declaration on Bosnia and Herzegovina which, *inter alia*, stated that all involved parties must urgently cease fighting and the use of force, that the independence, sovereignty and the territorial integrity of all States in the region, as well as the inviolability of borders, had to be respected.[57] The former Secretary of State, Cyrus Vance, and the former British Minister of Foreign Affairs, Lord David Owen, took over the initiative to seek peace in Bosnia and Herzegovina.

In January 1993, this led to a peace attempt, later to be known as the Vance-Owen Peace Plan.[58] This plan involved the division of Bosnia and Herzegovina into ten semi-autonomous regions within its international recognised borders. The President of the, then, self-proclaimed RS, Radovan Karadžić, signed the plan on 30 April 1993. However, it was rejected on 6 May 1993 by the self-proclaimed National Assembly of RS.[59] As a result, the plan was proclaimed *"dead"*.[60]

The third attempt, that followed in July 1993, and would become known as the Owen-Stoltenberg Peace Plan,[61] was based on an initiative of the Presidents of Croatia and FRY, Franjo Tudjman and Slobodan Milosević, which involved a confederalization of Bosnia and Herzegovina, dividing the country into three ethnic mini-States.[62] The central level would consist of only a few institutions.[63] However, on 29 August 1993, the Parliament of RBiH rejected this plan.[64]

After all European peace attempts had failed, the US took over the initiative. Because the Bosnian Croats, during their Assembly which was organized on 8 February 1994,[65] decided to partake in the conservation of the territorial integrity and sovereignty of Bosnia and Herzegovina, the armed

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57 Kurtcehajić & Ibrahimagić 2007, p. 136.

58 https://www.peaceagreements.org/viewmasterdocument/606. And Bildt, *CFR* 2021, p. 9.

59 https://srebrenicamemorial.org/app/tg/assets/pdf/p/30.%20SJEDNICA.pdf And Minorities at Risk Project, *Chronology for Serbs in Bosnia*, 2004 Online: https://www.refworld.org/docid/469f386dc.html.

60 Totten & Bartrop 2008, p. 455.

61 https://www.peaceagreements.org/viewmasterdocument/472

62 Vranić, *CSR* 2013. And Kurtcehajić & Ibrahimagić 2007, p. 147.

63 Vranić, *CSR* 2013. And Kurtcehajić & Ibrahimagić 2007, p. 147.

64 Kurtcehajić & Ibrahimagić 2007, p. 148.

65 Official Document on p. 367-369 of https://www.slobodanpraljak.com/knjige/istina_o_bosni_i_hercegovini_dokumenti_1991_1995.pdf

conflict between Bosniaks and Bosnian Croats came to an end.[66] It led to the Washington Agreement which was signed on 18 March 1994,[67] and created the FBiH.[68] Both the Federal level and the cantons would have exclusive powers, and those that they shared.[69]

What followed, became known as the Contact Group Plan, which meant that the FBiH would contain 49 percent of the territory, the Serb entity 48 percent, and that Sarajevo would be a district which would contain 3 percent.[70] The Bosnian Serbs rejected this plan, because they would lose territory which was part of the *de facto* existing RS. At the same moment, Richard Holbrooke, the Deputy Secretary of State, increased a diplomatic pressure that led to an agreement that was signed by all parties on 8 September 1995 in Geneva. This agreement meant that Bosnia and Herzegovina would remain within its original borders, that the FBiH would contain 51 percent and RS would include 49 percent of the territory. It is important to point out that, in the same period, Richard Holbrook increased the pressure on Alija Izetbegović, to accept the name Republika Srpska for the territory that would fall under the control of Bosnian Serbs, that Alija Izetbegović eventually did on 5. September 1995 in Ankara.[71]

Prior to that, in July 1995, the Bosnian Serb forces entered into UN Safety Zone of Srebrenica.[72] In a short space of time, more than 8000 Bosniak boys and men were murdered by the Bosnian Serb forces.[73] The extent of these atrocities was not yet known in the summer and autumn of 1995, and only became clear a few years later, after both the International Court of Justice (ICJ) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) had concluded that Bosnian Serb high-ranked political and military officials were responsible for the genocide in Srebrenica.[74] On 13 September 1995, Slobodan Milosević proposed a new round of peace negotiations,

66 Kurtcehajić & Ibrahimagić 2007, p. 154.

67 Bethlehem & Weller 1997. See also Malcom 1996, p. 256-258.

68 https://www.peaceagreements.org/viewmasterdocument/608 and https://www.peaceagreements.org/viewmasterdocument/1214.

69 Kurtcehajić & Ibrahimagić 2007, p. 154-156.

70 Kurtcehajić & Ibrahimagić 2007, p. 159.

71 Bildt, *CFR* 2021, p.12. See also Kurtcehajić & Ibrahimagić 2007, p. 162.

72 Begić 1997, p. 254. And *Persecutor v. Mladić*, *ICTY*, IT-09-92-T. and *Prosecutor v. Karadžić*, ICTY, IT-95-5/18-T.

73 *Persecutor v. Mladić*, *ICTY*, IT-09-92-T. and *Prosecutor v. Karadžić*, ICTY, IT-95-5/18-T.

74 *Persecutor v. Mladić*, *ICTY*, IT-09-92-T. and *Prosecutor v. Karadžić*, ICTY, IT-95-5/18-T.

which led to a cease fire on 14 October 1995,[75] and opened the way for peace negotiations in Dayton.

2.2. Negotiations in Dayton

The US initiative went on further, and led to the final phase of peace negotiations that were held in the Wright-Patterson military base.[76] Compared to previous peace attempts, the US approach was much more direct, that even then resulted in the delegations being locked in the military base and were even deprived of any contact with the press to increase the pressure on reaching an agreement.[77] The main negotiator on the US side was the Deputy Secretary of State Richard Holbrooke, and on behalf of the European side, Carl Bildt.

After almost a month of heavy negotiations, on 21 November 1995 the General Framework Agreement for Peace in Bosnia and Herzegovina was initialled and signed on 14 December 1995 in Paris.[78] The Parties to the agreement committed themselves to do everything in their power to bring about long-lasting peace and stability in Bosnia and Herzegovina.[79]

2.2.1. Parties to the Agreement

The negotiations were attended by a multinational delegation of the RBiH, led by President Alija Izetbegović, the delegation of the Republic of Croatia, led by President Franjo Tudjman and the delegation of the FRY, which negotiated in the name of the Bosnian Serbs as well, led by President Slobodan Milosević,[80] which finally were the treaty parties to the DPA.[81] Moreover,

75 Halilović 2016, p. 187-271. See also The General Framework Agreement for Peace in Bosnia and Herzegovina (Attachment) p.1.

76 Leurdijk 1996.

77 Kurtcehajić & Ibrahimagić 2007, p. 171.

78 The General Framework Agreement for Peace in Bosnia and Herzegovina (https://www.osce.org/files/f/documents/e/0/126173.pdf) see also Sloan, *EJIL* 1996, p. 208.

79 Ibid.

80 The delegation of the FRY was partly formed by Bosnian Serbs, which already on 29 August 1995, gave Slobodan Milosević the authority to sign, on their behalf, the parts of the peace agreement concerning RS. See Also: Sloan, *EJIL* 1996, p. 208.

81 Because of the multinational character of the delegation of Bosnia and Herzegovina, there was disagreement within the delegation itself, and besides that, the delegation had a double role, namely that it signed some of the Annexes as the Republic of Bosnia and Herzegovina, and other Annexes as the delegation of the FBiH. See: Kurtcehajić & Ibrahimagić 2007.

the witnesses, i.e., guarantees to the DPA, were the European Union Special Negotiator, the French Republic, the Federal Republic of Germany, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland, and the US.[82]

2.2.2. The Annexes of the DPA

The text of the DPA consists of eleven Annexes (Agreements). The preamble states that a comprehensive settlement among all parties is needed. The annexes deal with various matters, such as the Agreement on Military Aspects of the Peace Settlement, Agreement on Regional Stabilization, Agreement on Inter-Entity Boundary Line and Related Issues, Agreement on Elections, Constitution of Bosnia and Herzegovina, Agreement on Arbitration, Agreement on Human Rights, Agreement on Refugees and Displaced Persons, Agreement on the Commission to Preserve National Monuments, Agreement on Bosnia and Herzegovina Public Corporations, Agreement on Civilian Implementation, and an Agreement on the International Police Task Force.[83] Although all Annexes form a substantial part of the treaty, hereafter, in the context of the topic of this thesis, particular emphasis will be placed on Annexes 4 and 10.

2.2.2.1. Annex 4: The Constitution of Bosnia and Herzegovina

The 4th Annex presents the Constitution of Bosnia and Herzegovina. It forms the most important and highest legal act of the State and contains the following general provisions: preamble, general provisions on Bosnia and Herzegovina, provisions on human rights, provisions establishing jurisdiction and relations between the institutions of Bosnia and Herzegovina and its entities, provisions concerning the possibility of amending the Constitution, and transitional provisions.[84]

Perhaps, the most important part of Annex 4 is its first article which states that the Republic of Bosnia and Herzegovina continues its State-legal continuity and international subjecthood within the existing internationally

82 The General Framework Agreement for Peace in Bosnia and Herzegovina.

83 Annex 1-A up to Annex 11 of the Dayton Peace Agreement. See also Sloan, *EJIL* 1996, p. 207-210. And Ni Aolain, *MJIL* 1998, p. 958.

84 Annex 4 of the DPA. See also Kurtcehajić & Ibrahimagić 2007, p. 182.

recognised borders with a changed internal structure that contains the entity of FBiH and the entity of RS.[85]

According to the third article, (only) ten competencies belong to the State institutions, such as foreign- and monetary policy. However, the fifth paragraph, under a, provides the possibility for additional competencies:

"*Bosnia and Herzegovina shall assume responsibility for such other matters as are agreed by the Entities; are provided for in Annexes 5 through 8 to the General Framework Agreement; or are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina. Additional institutions may be established as necessary to carry out such responsibilities*".

This article has the potential and strength to provide a sufficient basis for the legal and political integration of Bosnia and Herzegovina, and a fuller realisation of its sovereignty and independence.[86] On this basis, like the article suggests, required State institutions can be established, which were not initially regulated by the treaty.

2.2.2.2. Annex 10: Agreement on Civilian Implementation

With this Annex, the parties expressed a request for the appointment of a High Representative who should facilitate the efforts of the parties regarding the civilian implementation, and accordingly coordinate the activities of organizations and agencies involved in the civilian aspects of the peace settlement.[87]

The High Representative was assigned a wide range of activities, such as economic reconstruction, the establishment of political and constitutional institutions and the protection of Human Rights.[88] The High Representative is the ultimate authority in the interpretation of the agreement, as confirmed by an UN Security Council (UNSC) resolution.[89]

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85 Art. 1 of Annex 4 Constitution.

86 Kurtcehajić & Ibrahimagić 2007, p. 190.

87 Begić 1997, p. 294. See also Ni Aolain, *MJIL* 1998, p. 984-985.

88 Kurtcehajić & Ibrahimagić 2007, p. 206.

89 UNSC Resolution 1031 of 15 December 1995.

On 10 December 1997, during a Peace Implementation Council (PIC) meeting, headed by the High Representative, the powers of the High Representative have been clarified and expanded.[90] Therefore, several decisions were made to promulgate laws necessary for Bosnia and Herzegovina to function. It created the possibility to enforce, on the basis of article III paragraph 5(a) of the Constitution, a law that established a State Court system and a State border service, which led to the establishment of new State organs.[91] More recently, the High Representative enforced a law that prohibits and criminalizes the denial of the crime of genocide.[92] It should be mentioned that the expanded measures seem to give the High Representative unlimited possibilities,[93] which often was criticized as well.

2.3. Provisional conclusion

After almost four years of armed conflict, the DPA established peace in Bosnia and Herzegovina. It is a multilateral agreement that ensured that diplomacy triumphed over chaos, and also confirmed the legal existence, continuity and sovereignty of Bosnia and Herzegovina.[94] However, it also superseded the existing Constitution of RBiH,[95] and gave Bosnia and Herzegovina a new internal structure, which meant that, however it did not received the recognition as a State, the *de facto* existing RS was legalized as a *de jure* entity within the State itself.[96] Because of this, some argued that the substantive result of the DPA is characterized by the ethnicization and 'entitization' of the Bosnian society and State, and established, an ethnocratic, to the detriment of a democrat State, which further accompanies the ethnicization of the Constitution, the internationalization of Constitutional law, and the legalization of the results of aggression.[97] Moreover, it was held that the process of invalidation of Constitutional norms and standards aims to additionally mark the lines of ethnicities and entities, as a kind of prevention of revitalization and renewal of national and State identity. The frequency of

90 See e.g. Article 11 of the Bonn Declaration.

91 Kurtcehajić & Ibrahimagić 2007, p. 215.

92 http://www.ohr.int/hrs-decision-on-enacting-the-law-on-amendment-to-the-criminal-code-of-bosnia-and-herzegovina/.

93 Kurtcehajić & Ibrahimagić 2007, p. 215.

94 Ni Aolain, *MJIL* 1998, p. 958. See also: Dummel, *Konrad Adenauer Stiftung* 2015, p. 49.

95 Tursić, *BZK Preporod* 2016, p. 184.

96 Wedgwood, *CFR* 1999, p. 35.

97 Tursić, *BZK Preporod* 2016, p. 184.

these activities is expressed through the intention to reduce political legitimacy in Bosnia and Herzegovina and maintain a State of political instability, as an integral part of large-scale projects.[98] Such post-aggressive activities became the subject of the constitutionality of the RS, which expressed the academic, political-rhetorical invocation of sovereignty, but also the definition of the right to self-determination in the entity Constitution.[99] The devastating fact is that these facts are correlated with the strategic goals, which are mentioned in the first chapter.[100]

The foregoing raises the major research question in this thesis, namely, how the aforementioned strategic goals of the self-proclaimed Republic of Serb people of Bosnia and Herzegovina (later renamed into RS), demanding the ethnic division on the territory which it *de facto* controlled, and culminated, *inter alia*, into war crimes, crimes against humanity, and the genocide in Srebrenica,[101] for which many of its high-ranked political and military officials were later convicted by the ICTY, relate to the validity of the DPA under article 53 VCLT, which states that an international treaty is void if it is in conflict with a peremptory norm of general international law, also known as *jus cogens*. These norms include most serious crimes, such as the crime of genocide and crimes against humanity. Both *jus cogens* (and its legal consequences), as well as the burden of proof concerning the crime of genocide, will be elaborated in the following chapters.

98 Tursić, *BZK Preporod* 2016, p. 185.

99 In the previously existing preamble of the Constitution of Republika Srpska, the unification of this entity with Serbia was practically called for. The preamble began as follows: *"Taking into account the natural an democratic right, will and determination of the Serb people from the Republika Srpska to fully and firmly connect their State with other States of the Serb people (…)"*. In reaction to this, the Constitutional Court of Bosnia and Herzegovina stated that the text in the preamble had a clear intention of the Republika Srpska leadership to secede from Bosnia and Herzegovina and join Serbia, and that the existence of the entities did not entitle the authorities to maintain the effects of ethnic cleansing in them. See: Tursić, *BZK Preporod* 2016, p. 186.

100 Tursić, *BZK Preporod* 2016, p. 185.

101 Pajić, *HRQ* 1998, p. 126. See also Boyle, *HRQ* 1996.

3. Peremptory norms of general international law (*Jus Cogens*)

3.1. The historical context and nature of Jus Cogens

In scholarship, the growing importance of the term *jus cogens* was identified in modern history.[102] The majority opinion is that the term itself could not be identified by name before the nineteenth century. However, the origin of fundamental norms of international law, which are non-derogable, is much older, and appears already in Roman Law.[103] Scholars, such as de Vattel, identified these norms, in the context of natural law, much earlier.[104]

Despite the fact that the positivist approach (of the binding force of international law) dominated in the nineteenth century,[105] some scholars either directly relied on natural law reasoning, or at least sought tools outside positive law, to justify the idea that rules of international law existed, which protected the whole international community, and which were non-derogable.[106] Even a large number of positivists were of the opinion that States had not an unlimited freedom to draft treaties that were in conflict with principles of international law that had a peremptory character and were recognised by civilized States.[107] Many of them found an explanation outside positive law to confirm that higher norms existed which could void immoral treaties.[108] Jurisprudence used both approaches to explain the nature of *jus cogens*.[109] Therefore, Koskenniemi stated that the peremptoriness of *jus cogens* should be understood as an interaction between both approaches.[110]

Although, in the nineteenth century, a lack of State practice existed,[111] it seems that in both the pre-positivist era, and during the era in which the positivist approach dominated, there was already a conviction, mainly in the

102 Verdross, *AJIL* 1937, p. 31. See also Petsche, *PSIL Rev*. 2010, p. 238-239.

103 International Law Commission, Sixty-eight session, *First report on jus cogens by Dire Tladi, Special Rapporteur,* Geneva 2016, A/CN.4/693, p. 9-10. See also See e.g. Carnegie Endowment for International Peace 1976, p. 18.

104 Wouters & Verhoeven, *ICLR* 2005, p. 401-416.

105 Hernandez, 2019, p. 60. See also: Tladi & Dlagnekova, *SAPL* 2006, p. 111-112.

106 Hannikainen 1988, p. 45-48.

107 Alexidze 1981. See also Hannikainen 1988, p. 48-49.

108 Hernandez, *BYIL* 2013, p. 38.

109 International Law Commission, Sixty-eight session, *First report on jus cogens by Dire Tladi, Special Rapporteur,* Geneva 2016, A/CN.4/693, p. 33-34.

110 Koskenniemi 2006, p. 307-323.

111 Hannikainen 1988, p. 58.

doctrine, of existence of rules from which States could not contract out. The development of this consciousness continued in the period after WWI.[112] Verdross wrote that *"no juridical order can (…) admit treaties between juridical subjects, which are obviously in contradiction to the ethics of a certain community"*.[113] In the same period the term developed in jurisprudence as well.[114]

The atrocities during WWII increased further pressure on the development of *jus cogens* which, eventually, could deal with such atrocities.[115] The most important event was the adoption of the VCLT which led to the recognition of *jus cogens* as a norm of international law.[116] The International Law Commission (ILC) received a wide support for the idea of general rules of international law that were non-derogable.[117] Although, some States expressed their concerns about the problem of identification of *jus cogens*,[118] the norm was increasingly mentioned both in literature and jurisprudence.[119]

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112 After the WWI, scholars pointed out that the peremptoriness of some rules could be found within terms, such as 'community' and 'common interest', that could be found in the Covenant of the League of Nations See e.g. article 11 and 20 of the Covenant, and International Law Commission, Sixty-eight session, *First report on jus cogens by Dire Tladi, Special Rapporteur,* Geneva 2016, A/CN.4/693, p. 13.

113 Verdross, *AJIL* 1937, p. 31.

114 In the *Oscar Chinn case*, Judge Schücking had an separate opinion in which he explicitly used the term *jus cogens*. Although he first stated that the term was not highly developed, he added that "*to create a jus cogens, the effect of which would be that once States have agreed on certain rules of law (…), any act adopted in contravention of that undertaking would be automatically void*". Separate opinion of Judge Schücking in the *Oscar Chinn case*, Judgment of 12 December 1934, Permanent Court of International Justice, Se. A/B No. 63, p. 65, at 148. In the *Pablo Najera* case, article 18 of the Covenant of the League of Nations was interpreted as a rule of *jus cogens* from which Member States could not derogate. *Pablo Najera* (France) v. United Mexican States, Decision No. 30-A of 19 October 1928, Vol. V UNRIAA 466, at 470.

115 International Law Commission, Sixty-eight session, *First report on jus cogens by Dire Tladi, Special Rapporteur,* Geneva 2016, A/CN.4/693, p. 14-15.

116 During the debates within the ILC, different Special Reporters, such as Lauterpacht and Fitzmaurice, stated that treaties, to be valid, should be in accordance with higher norms of international law which had a peremptory character. International Law Commission, Sixty-eight session, *First report on jus cogens by Dire Tladi, Special Rapporteur,* Geneva 2016, A/CN.4/693, at 28-29. See also Third Report on the Law of Treaties by Mr. GG Fitzmaurice, special Rapporteur, A/CN. 4/115 and Corr. 1, under the title 'legality of the object', Yearbook 1958, Vol. II, p. 26-27.

117 Fifth Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur, A/CN.4/183 and Add 1-4, Yearbook 1966, Vol. II, p.1 at 21.

118 International Law Commission, Sixty-eight session, *First Report on jus cogens by Dire Tladi, Special Rapporteur,* Geneva 2016, A/CN.4/693, at 36.

119 McNair 1961, at 213. See e.g. *North Sea Continental Shelf Cases* (*Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands*), Judgment of 20 February 1969, *ICJ Reports* 1969, p.3, par. 72 And in the *Case Concerning Right of Passage over Indian Territories*, in which judge Fernandez stated that "*several rules cogente prevail over any special rules*". *Case Concerning Right of Passage over Indian Territories*, (*Portugal v. India*) *Merits*, Judgment of 12 April 1960, *ICJ Reports* 1960, p. 60.

Finally, this led to the adoption of article 53 VCLT, which states:

"*A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character*".

3.2. Controversies and the position of jus cogens in international law

As present and, through history, there was no doubt about the existence of non-derogable norms of general international law. However, there were many different views and concerns about the criteria for the identification of such norms.[120] Although a widespread acceptance existed, several scholars criticized its place (and effects on other norms) in international law. Some stated that the norm may conflict with main principles of treaty law, such as *pacta sunt servanda*, and that there was a lack of practice concerning these norms.[121] While, others claimed that the norm could undermine the foundations of international law and could not create any real effect.[122] Despite that, the norm was recognised in different domestic and international case law, such as the *Armed Activities on the Territory of the Congo*. In which the ICJ, besides mentioning *jus cogens*, for the first time also recognised that the prohibition of genocide has "*assuredly*" the character of *jus cogens*.[123] Through jurisprudence and State practice, it seems that the norm "*(…) lost its controversial character*".[124]

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120 International Law Commission, Sixty-eight session, *First report on jus cogens by Dire Tladi, Special Rapporteur,* Geneva 2016, A/CN.4/693, at 42.

121 Orakhelashvili 2006, p. 32-35.

122 Kolb 2015, at 15-27.

123 See e.g. *Legality of the Threat or Use of Nuclear Weapons*, Advisory opinion of 8 July 1996, *ICJ Reports* 1996, par. 226. See also: *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, *ICJ Reports 2007*, p. 43, para. 147-184. See also *Prosecutor v Kayishema et al*, *ICTR*, ICTR-95-1 (Trial Judgment), 21 May 1999, para. 88. And *Prosecutor v Furundžija*, *ICTY*, IT-95-1, 10 December 1998. See also *Farhan Mahamoud Tani Warfaa v. Yusuf Abdi Ali*, Judgment of 1 February 2016 of the *United States Court of Appeal for the Fourth Circuit*, No. 14-1880, at 18. See also *National Commissioner of the South African Police Service v the Southern African Human Rights Litigation Centre and Others*, Judgment of 30 October 2014 of the *South African Constitutional Court*, 2014 (12) BCLR 1428 (CC) at para. 4.

124 Paulus, *NJIL* 2005, at 297-298.

3.2.1. Elements of jus cogens

Besides the core elements mentioned in article 53 VCLT, doctrine and practice identified other elements which apply to *jus cogens*. Firstly, in contrast to other norms, *jus cogens* are recognised as being universally applicable, which means that these norms are binding upon all members of international community.[125] Moreover, the universal applicability element is strongly linked to the core element, that *jus cogens* norms are norms of general international law, which is in article 53 VCLT. Secondly, *jus cogens* are described as norms that are superior to other norms of international law,[126] which implies the existence of a hierarchy of norms.[127] Lastly, *jus cogens* are understood in the context of public order values, that aim to protect core values of the International Community.[128] Although these elements clarify the core characteristics of *jus cogens*, they do not give an answer on how *jus cogens* norms can be identified.

3.2.2. Criteria for identification and article 53 VCLT

The criteria for identification of *jus cogens* are intended to refer to those elements of *jus cogens* that should be present before a norm can receive a *jus cogens* status.[129] The definition in article 53 VCLT was meant to define *jus cogens* for purposes of the convention itself. However, it later developed as a general definition in public international law, and as such, was recognised in (inter)national jurisprudence,[130] State practice, and literature.[131]

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125 Conklin, *EJIL* 2012, at 837. And Danilenko 1993, at 211.

126 *Prosecutor v Furundžija*, *ICTY*, IT-95-1, 10 December 1998, par. 151.

127 Danilenko, *EJIL* 1991, at 42.

128 *Prosecutor v Furundžija*, *ICTY*, IT-95-1, 10 December 1998, para. 153. And *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, *ICJ Reports 2007*, para. 147-184.

129 Sixty-ninth session, *Second Report on jus cogens by Dire Tladi, Special Rapporteur,* Geneva 2017, A/CN.4/706, p. 16.

130 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports 1996*, p. 226, par. 83. For national jurisprudence, see e.g. *National Commissioner of The South African Police Service v. Southers*, *African Human Rights Litigation Centre and Another*, *Case No. CC 02/14, Judgment of 30 October 2014*, Constitutional Court of South Africa, 2014 ZACC 30, par. 35.

131 Costelloe 2017, p. 11. And Hannikainen 1988, p. 5-12.

The definition in article 53 VCLT does not give any examples of *jus cogens*, but rather explains which requirements should be met before a norm obtains this status.[132] Firstly, the norm itself must be one of general international law. Secondly, it must fulfil the criterion of recognition and acceptance by the international community of States as a whole, as a non-derogable norm, which can only be modified by another *jus cogens* norm. The latter criterion (and its consequence) is mentioned in several (inter)national jurisprudence.[133] Although non-derogation is not a criterion for *jus cogens* on its own, it is an important consequence of peremptoriness.[134] Recognition and acceptance may arise from treaties and resolutions, but also from materials from expert bodies or international courts.[135] The key consequence is that the aforementioned subjects cannot construct rules (by treaty) that are in conflict with *jus cogens* norms.

Although the emphasis in this thesis is mainly on the consequence within article 53 VCLT, i.e., the nullity of treaties, we will briefly mention other potential consequences..

3.3. Legal consequences of jus cogens in international law

In literature, we identify a wide support for the opinion that the consequences of *jus cogens* are most important,[136] and that these consequences give a norm peremptoriness.[137] In this context, Costelloe described the consequences of *jus cogens* as "*the greater prize than identifying the norm itself*".[138] In what follows we outline the principal consequences recognised in treaty law, by international courts and legal scholars, and by the ILC itself.

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132 Aust 2000, p. 258.

133 *Questions Relating to the obligation to Prosecute or Extradite (Belgium v. Senegal), ICJ Reports*, Judgment of 20 July 2012, para 99. See also *Buell v. Mitchell*, 274 F. 3d 337 (6th Cir. 1988) United States of America, par. 102.

134 Kolb 2015, p.32.

135 From *Questions Relating to the Obligation to Prosecute or Extradite*, follows that resolutions and treaties are a way of State expression of acceptance and recognition. *Questions Relating to the obligation to Prosecute or Extradite (Belgium v. Senegal), ICJ Reports 2012*, Judgment of 20 July 2012, para 99. See also International Law Commission, Sixty-ninth session, *Second Report on jus cogens by Dire Tladi, Special Rapporteur,* Geneva 2017, A/CN.4/706, p. 42.

136 Kolb 2015, p. 104.

137 Kadelbach 2006, p. 29.

138 Costelloe 2017, p. 15.

Legal consequences of *jus cogens* can be found in various areas of international law. Before we turn to the main consequence in this thesis, i.e., the invalidity of treaties conflicting with *jus cogens*, we will first briefly comment on other important legal consequences, and specifically in the context of non-recognition.

Being hierarchically superior, *jus cogens* cause different consequences when other rules conflict with them. In the case of customary international law, unilateral acts of States, and binding resolutions and decisions of international organizations, this means that existing rules cease to exist or cannot be established if conflicting with (existing) *jus cogens*, nor can they create any obligations.[139]

3.3.1. Non-Recognition

Another important consequence, connected with a breach of *jus cogens*, is found in Chapter III of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA). It deals with serious breaches of obligations under peremptory norms of general international law. Article 40 states that the chapter applies to international responsibility which is entailed by a State's serious breach of an obligation arising under peremptory norms of general international law, and that a breach is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.[140] Article 41 provides consequences for third States. Firstly, third States must cooperate in ending the serious breach by lawful means. Secondly, third States are required not to recognise as lawful a situation arising from a serious breach, nor may they render aid or assistance in maintaining the unlawful situation created by such a breach.[141]

The first criterion was recognised by the ICJ as such.[142] In addition, the ICJ concluded that this also means that States must cooperate, in such

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139 *Michael Domingues v. United States* (*Case 12.185*), Inter-American Commission on Human Rights, Report No. 62/02, 22 October 2002, par. 49. And Costelloe 2017, p. 128-150 & 152-182.

140 S. Olleson, *BIICL* 2007, p. 237.

141 S. Olleson, *BIICL* 2007, p. 237.

142 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports 2004*, 9 July 2004, par. 155.

situations, with(in) the UN as well.[143] Moreover, the process must be carried out by legal means.

The obligation of non-recognition became actual after the *Wall in the Occupied Palestinian Territory*.[144] The ICJ held that the construction was contrary to international law, because Israel had violated certain obligations *erga omnes*, such as the right of the Palestinian people to self-determination, and it was "*of the view that all States are under obligation not to recognise the illegal situation (…) They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction*".[145] A similar statement was made in *Namibia*, in which it stated that the presence of South Africa in Namibia was illegal and that other UN Member States had an obligation to refrain from any act that could imply the recognition of this illegal act.[146] Besides jurisprudence of the ICJ, some State practice concerning collective non-recognition of situations created by a breach of *jus cogens* (i.e., non-recognition of new States created by a breach of *jus cogens*), exists as well. The most important examples are the State of Rhodesia and the Turkish Republic of Northern Cyprus (TRNC).[147] Moreover, many declarations pointed out that an obligation exists not to recognise territorial acquisition by States that acted in violation with, e.g. the use of force or aggression.[148] Furthermore, both the UNSC as well as the UNGA, have emphasized the obligation of non-recognition in situations in which there was a breach of the right of self-determination and the prohibition of apartheid,[149] like it was the case of non-recognition of the Bantustans created by South-Africa.[150]

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143 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*. Advisory Opinion, *ICJ Reports* 2019, 25 February 2019, par. 182.

144 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports 2004*, 9 July 2004, par. 155-159.

145 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports 2004*, 9 July 2004, par. 155-159.

146 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, *ICJ Reports 1971*, 21 June 1971, p. 16.

147 Dugard 1987, p. 123-163. See also Gowlland-Debbas 1990.

148 Article 11 of the Draft Declaration on the Rights and Duties of States states that *"every State has the duty to refrain from recognizing any territorial acquisition by another State"* that is in violation of the prohibition of the threat or use of force. See also Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, the Definition of Aggression (1974), and the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations.

149 UNSC Resolution 276 of 30 January 1970.

150 UNGA Resolution 3411 D of 28 November 1975, par. 3.

An important element within the concept of non-recognition is its consequence. A rightly critical question that Talmon posed is:

"*What does it mean (…), not to recognise as lawful a situation created by acts of genocide or slavery? What actual legal consequences followed from the genocide in Rwanda for third States in terms of Art. 41(2) of the ILC Articles on State Responsibility?*".[151]

Then, he continues with a remark that there is not much literature on the exact effects of non-recognition. Because, on one hand, he doubts that illegal acts, especially those created by violation of *jus cogens*, can create rights at all. On the other, he states that no such claims *"to title to territory (…) will usually arise from acts of genocide, torture or slavery, or the violation of the basic rules of international humanitarian law"*.

This view is, in our opinion, debatable, given that the DPA has legalized the existence of a *de facto* regime (i.e., RS during the armed conflict)[152] by granting it the status of a *de jure* entity. Looking at the creation of this entity, and the many convictions (of high-ranked officials) for violating *jus cogens* norms, on which we will comment in the next chapter. However, we cannot ignore the fact that it is indeed possible that cases appear to arise where a claim to territory title indeed can arise from an act of genocide (or the breach of several *jus cogens* norms at the same time). Moreover, it is acknowledged that an act of genocide, crime against humanity, and other *jus cogens*, may result in the creation of an illegal State or the illegal acquisition or occupation of territory.[153] When it comes to the act of genocide specifically, Talmon states that *"It could be argued that any property or other rights predicated on acts of genocide (…) are to be denied any legal effect by other States*".[154] In this context the UNSC stated that the RS could not be recognised as State because the "*taking of territory by force or any practice of 'ethnic cleansing' is unlawful and unacceptable*".[155]

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151 Talmon 2006, p. 106.

152 Crawford 2006, p. 56-61.

153 Malaysian observer in the Human Rights Commission states that: *"It was imperative that the international community should firmly uphold the principle of non-recognition of territories acquired through Serbian aggression, ethnic cleansing and other illegal acts"*. (UN Doc. E/CN.4/1992/S-2/SR.3, 4 December 1992, p.16, par. 71. And Talmon 2006, p. 116.

154 Talmon 2006, p. 117-118.

155 UNSC Resolution 787 of 16 November 1992, par. 2.

In the reverse situation, the ICJ, in *Declaration of Independence in Respect of Kosovo*, allowed an exception in this specific case, in the context of the prevention of ethnic cleansing.[156]

3.3.2. The invalidity of treaties

According to the law of treaties, the most important consequence of a conflict with *jus cogens* norms is the invalidity of a treaty.[157] Although there seems not to be much State practice, States have noted that several treaties were not valid because they conflicted with *jus cogens*. In the context of non-use of force, Iran abrogated two articles of the Treaty of Friendship between Persia and the Russian Socialist Federal Republic (1921),[158] because they provided an unilateral right of intervention.[159] In addition, the 1947 Treaties of Paris declared the Vienna Awards void,[160] and the 1973 Treaty of Prague declared the Munich Agreement invalid because of its content.[161]

This view is also supported in several cases of different (international) courts.[162] Moreover, the consequence of nullity is also included in articles 53 and 64 VCLT. In the context of article 53 VCLT, this means that a treaty is void, *ab initio*, if the conclusion of the treaty is in conflict with a peremptory norm.[163] This means that a treaty is in conflict if the treaty requires or permits conduct that is in conflict with *jus cogens* or when the treaty is drafted for

156 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, *ICJ Reports 2010*, par. 123. See also UNGA Resolution 63/3 of 8 October 2008.

157 Danilenko 1993, p. 212.

158 Articles 5 and 6 of the Treaty of the Friendship between and the Russian Socialist Federal Soviet Republic of 26 February 1921, (9) *League of Nations Series*, p. 382-413.

159 Reisman, *AJIL* 1980, p. 144-154.

160 Costelloe 2017, p. 101-103.

161 Treaty on Mutual Relations Between the Federal Republic of Germany and the Czechoslovak Socialist Republic of 11 December 1973, 951 UNTS, 365-366.

162 *East Timor* (*Portugal v. Australia*), *ICJ Reports*, Judgment of 30 July 1995, par. 223. And *Prosecutor v. Charles Ghankay Taylor*, *Decision of the Special Court for Sierra Leone of 31 May 2004*, Case No. SCSL-2003-01-I, Appeals Chamber, Special Court for Sierra Leone, par. 53. And: *Aloeboete and others v. Suriname* (*Reparation and Costs*), *Inter-American Court of Human Rights*, Judgment of 10 September 1993, Series C, No. 15.

163 International Law Commission, Seventieth session, *Third Report on jus cogens by Dire Tladi, Special Rapporteur,* Geneva 2018, A/CN.4/714, p. 15.

the purpose to contract out of obligations that are imposed by *jus cogens*.[164] Trocan argued that *"in this sense, a treaty that could end an armed conflict and could establish that acts of genocide are amnestied should be considered as null"*.[165] At this point, we may ask the question, how the foregoing view relates to the existence of the DPA? At the time of its signature, this international treaty was the highest achievable result which had the aim to stop bloodshed on the territory of the RBiH. However, it legalised a *de facto* regime (i.e., RS during the armed conflict)[166] into a *de jure* entity. Years later, both the ICTY, and the ICJ have convicted (and/or confirmed that) high-ranked officials of RS (politicians as well as officials of the police and military structures who founded the entity), for various grave crimes, such as crimes against humanity and genocide. In our opinion, it is therefore only right to ask the question how this relates to the legality of the DPA? Mainly because it legalised the RS as an entity that carries such a mortgage. The weight of this mortgage will become apparent in the next chapter.

Moreover, a treaty being *ab initio* void means that no treaty has come into existence. Besides that, article 53 VCLT states that the treaty is in that case wholly invalid, which means that a treaty rule that conflicts with *jus cogens* is not severable from the treaty itself. In addition, article 71 VCLT states that the consequences of any act performed in reliance on any treaty provision which conflicts with *jus cogens*, should be eliminated. This sentence implies that, even though a treaty is wholly void because of article 53 VCLT, some acts that are performed in reliance on treaty provisions which were not in conflict with a *jus cogens* norm, might be recognised and cannot be undone.[167]

However, during the Vienna Conference, a group of States expressed their concerns about the possibility that such treaties could be void *ab initio*. According to these States, this could lead to unilateral actions by States toward international treaties in general. To avoid such uncertainties, States agreed to implement a procedure to confirm the nullity based on article 53 VCLT. We will comment on this procedure bellow when we turn to the future status of the DPA.

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164 Cannizzaro 2011, p. 428. See also *Prosecutor v. Furundžija*, *ICTY*, IT-95-1, 10 December 1998, para. 153, "*The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties (…)".*

165 Trocan, *EPLS* 2013, p. 125. See also: Constantin 2010, p. 148.

166 Crawford 2006, p. 56-61.

167 International Law Commission, Seventieth session, *Third Report on jus cogens by Dire Tladi, Special Rapporteur,* Geneva 2018, A/CN.4/714, p. 16-17.

3.4. Prohibition of committing genocide as jus cogens

General international law contains certain crimes of which the prohibition of these crimes constitutes *jus cogens* norms, such as torture,[168] war crimes,[169] crimes against humanity[170] and the prohibition of committing genocide.[171] Although several *jus cogens* norms may be relevant to this topic, we will put the emphasis on the crime of genocide. Both in the commentaries on article 53 VCLT as well as in the ARSIWA, the ILC identified that prohibition of genocide is a *jus cogens* norm.[172] Although it did not used the term peremptory norm or *jus cogens*, the ICJ stated in *Reservations to the Convention on Genocide*, that the prohibition of genocide had this character.[173] The ICJ confirmed its authority in *Armed Activities on the Territory of the Congo*, by stating that the prohibition contained in the Convention on the Prevention and Punishment of the Crime of Genocide constituted an *erga omnes* obligation and a norm of *jus cogens*.[174] The German Constitutional Court confirmed the foregoing in a case in which a Bosnian-Serb was convicted for the crime of genocide.[175] Moreover, both the ICTY[176] and ICTR[177] confirmed that the prohibition of genocide was a norm of *jus cogens*. In addition, in literature the non-derogable status of genocide was confirmed as well.[178]

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168 *Questions Relating to the obligation to Prosecute or Extradite (Belgium v. Senegal), ICJ Reports 2012*, Judgment of 20 July 2012, par. 99.

169 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports 1996*, 8 July 1996, par. 79.

170 *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, *ICJ Reports 2012*, Judgment of 3 February 2012, p.99.

171 International Law Commission, Seventieth session, *Third Report on jus cogens by Dire Tladi, Special Rapporteur,* Geneva 2018, A/CN.4/714, p. 44.

172 International Law Commission, Seventy-first session, *Fourth Report on jus cogens by Dire Tladi, Special Rapporteur,* Geneva 2019, A/CN.4/727, p. 24-25.

173 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports 1951,* 28 May 1951, p.15.

174 *Armed Activities on the Territory of the Congo*, (New Application: 2002) (*Democratic Republic of the Congo v. Rwanda*), *ICJ Reports 2006*, Judgment of 3 February 2006, par. 64. And *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia Herzegovina v. Serbia and Montenegro*), *ICJ Reports 2007*, Judgment of 26 February 2007 par. 161. And *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia v. Serbia*), *ICJ Reports 2015*, Judgment of 3 February 2015, par. 88.

175 Bundesverfassungsgericht, Beschluss *der 4. Kammer des Zweiten Senats vom 12 Dezember 2000*, 2 BVR 1290/90.

176 *Prosecutor v. Krstić*, *ICTY*, IT-98-33-T, 2 august 2001, par. 541.

177 *Prosecutor v. Clément Kayishema and Obed Ruzindana*, *ICTR*, ICTR-95-1-T, 21 May 1999, par. 88.

178 Pellet 2005, p. 419. And Bassiouni 1996, p. 70.

4. The crime of genocide and the burden of proof

Although other types of crimes have occurred during the armed conflict in Bosnia and Herzegovina, such as crimes against humanity. Yet, in this thesis, we will focus on the crime of genocide as a special type of mass violence. In this chapter, all evidence concerning the crime of genocide will be analysed. The main burden of proof will be formed by the convictions of the ICTY and its authoritative status will be supported by the *Bosnian Genocide* case, in which the ICJ has recognised and applied the fact-finding of the ICTY.[179] In addition, attention will be paid to the convictions for the crime of genocide which are pronounced by the Court of Bosnia and Herzegovina. Moreover, UN resolutions and declarations of other international organisations will belong to the burden of proof as well. Finally, we will briefly point out State resolutions concerning recognition and condemnation of the committed genocide in Srebrenica.

4.1. The historical development of the crime of genocide

Although in the literature the view is held that the crime of genocide already existed before WWII (without the term itself being used). The recognition and development of the concept only took place after the atrocities of WWII.[180] It was Rafael Lemkin, a Jewish scholar who fled the *Holocaust*, and introduced the term that inspired the UN to draw up a convention where a definition of genocide was given.[181] Lemkin stated that the atrocities committed by the Nazi's were a *"crime without name"*.[182] Shortly after, he introduced a term which was based on Greek and Latin words *genos* (race, tribe) and *cide* (killing)[183] and gave a definition for genocide.[184] The foregoing led to an acceptance of genocide as an international crime against humanity.[185] In literature, the opinion is held that the intention of a group annihilation is one of the core elements, and that it is this element what makes genocide a

179 *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, *ICJ Reports 2007*, par. 211-224. And Milanović, *EJIL* 2007.

180 Dadrian, *YJIL* 1989, p. 300-301. And Melson 1992, p. 142-152.

181 Shaw 2015, p. 6-7.

182 Lemkin 1944, p. 79.

183 Hernandez 2019, p. 456.

184 Totten & Parsons 2004, p. 3-4.

185 Totten & Bartrop 2009, p. 12.

different type of mass violence.[186] Although Lemkin's definition of genocide formed the core element for the definition of genocide as it is implemented in the Genocide Convention. Some scholars were of the opinion that this definition was very broad because it was not only focused on the killing as a destruction of a group.[187] In contrast, others believed that genocide is much more than mass killing itself.[188] The latter opinion supports Lemkin's view that genocide is not only a direct annihilation of a nation or ethnic group, but also the indirect annihilation and the devastation of the foundations of a society. Besides that, it intervenes on all aspects of the society and its institutions and attacks and tries to destroy both in a faceted way. [189]

4.2. Genocide in the Genocide Convention

Already in 1946, the UNGA unanimously identified genocide as a crime that is punishable and condemned by the civilized world.[190] In 1948 the Genocide Convention was adopted,[191] and explicitly stated that genocide is an international crime that should be punished and prevented by States. In the second and third article, a definition of genocide, and a description of acts that are punishable under these articles, was given:

'*In the present Convention, genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious groups, as such: a. Killing members of the group; b. Causing serious bodily or mental harm to members of the group; c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d. Imposing measures intended to prevent births within the group; e. Forcibly transferring children of the group to another group.*' (Article II)

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

186 Straus, *JGR* 2001, p. 349-375.

187 LeBlanc 2009, p. 11-22.

188 Shaw 2015, p. 51.

189 Shaw 2015, p. 26-27.

190 UNGA Resolution 96(1) of 11 December 1946.

191 LeBlanc 2009, p. 16-21.

Although, contested by some because of its broadness,[192] the definition as it was implemented in the Genocide Convention, remains a widely accepted core definition in international legal infrastructure.[193] Moreover, based on this definition, in *Prosecutor v. Kambanda*, the ICTR stated that genocide constitutes *"the crime of crimes"* and that its perpetrators must be sentenced appropriately.[194]

4.2.1. The core elements

As stated above, the term genocide has downsides, because it e.g. does not cover the persecution on political grounds nor the annihilation of a culture or language.[195] Moreover, it is not clear what the term 'protected group' exactly means.[196] International courts have rejected to define the term.[197] Because of this, it suffices that the perpetrator identified the victim to be a member of a group that exists in a cultural context.[198]

What makes genocide specific is the fact that the act must include a *dolus specialis*, i.e., members of a specific group are targeted because they are a part of that group, and there has to be a specific intent to destroy or exterminate a group in whole or in part.[199] Therefore, the threshold to proof the intent of genocide is high.[200] However, the proof for genocidal intent can also be distilled from other acts than killing, such as the continuous commitment of similar (discriminatory) acts.[201] Besides killing members of a specific group, rape and sexual violence can also lead to the commitment of genocide, if the *dolus specialis* can be proven.[202]

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192 Andreopoulos 1997, p. 49. See also: Totten & Bartrop 2009, p. 34-35. and Charny 2009, p. 36-44.

193 Straus, *JGR* 2001, p. 362.

194 *Prosecutor v. Kambanda*, *ICTR*, 4 September 1998, par. 16.

195 *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, *ICJ Reports 2007*, par. 344.

196 Dixon, McCorquodale & Williams 2016, p. 544.

197 Hernandez 2019, p. 457.

198 *Prosecutor v. Krstić*, *ICTY*, IT-98-33-T, 2 August 2001, par. 556.

199 Dixon, McCorquodale & Williams 2016, p. 548 And *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, *ICJ Reports 2007*, par. 187.

200 Hernandez, 2019, p. 457.

201 *Prosecutor v. Ncamihigo*, *ICTR*, ICTR-01-63-T, 12 November 2008, par. 331.

202 *Persecutor v. Akayesu*, *ICTR*, ICTR-96-4-A, 1 June 2001, par. 731.

Finally, it is worth noting that both ICTY and ICTR require that the conduct takes place *"in the context of a manifest pattern of similar conduct directed against that group or (…) conduct that could itself effect such destructions"*.[203]

The definition of genocide in the Genocide Convention, is reproduced in the Statutes of the ICTY and ICTR. Moreover, a definition of genocide is implemented in the Statute of the International Criminal Court (ICC) as well.[204] On the basis of ICTY's Statute, many high-ranked officials of the RS were convicted for the crime of genocide, on which we will elaborate bellow.

4.3 The International Criminal Tribunal for the Former Yugoslavia

Already during the armed conflicts in the former Yugoslavia, the need and sense of responsibility arose to act against the already known crimes committed in Bosnia and Herzegovina.[205] The ICTY is an example of an *ad hoc* tribunal, like the Nuremberg tribunal was after WWII. It was specifically established for the criminal settlement of a particular conflict.[206] Together with the ICTR, it was established by UNSC resolutions in the early 1990s.[207] As a result, the basis of jurisdiction is in the competence of the UNSC.[208] The consequence of this was that, on the basis of article 25 UN Charter, the ICTY could oblige all States to comply with it.[209] However, this led to critique that the ICTY applied selective justice and that the UNSC had acted beyond its powers during the constitution of these tribunals.[210]

The ICTY's Statute contains the possibility to prosecute persons that violated international humanitarian law. These violations could exist of war crimes, crimes against humanity, genocide and other grave breaches of the Geneva Conventions.[211]

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[203] Hernandez 2019, p. 457.

[204] Dixon, McCorquodale & Williams 2016, p. 543.

[205] Hernandez 2019, p. 441.

[206] Nollkaemper 2018, p. 460.

[207] UNSC Resolution 827 of 25 May 1993 and UNSC Resolution 955 of 8 November 1994.

[208] *Prosecutor v. Tadić*, *ICTY*, IT-94-1, 2 October 1995, par. 32-40.

[209] Nollkaemper 2018, p. 461.

[210] Hernandez 2019, p. 443.

[211] Ibid. p 442

The ICTY had trail and appeal chambers and by the end of its mandate, it had issued 161 indictments, and concluded the proceedings of 152 people, including 83 sentenced and 19 acquitted.[212] Already in 2000, the UNSC commenced to put pressure on the ICTY to realize a strategy that should end the mandate of the ICTY. This led to the creation of the International Residual Mechanism for Criminal Tribunals (MICT). The main aim of the MICT was to continue the jurisdiction and legacy of the ICTY.[213]

4.3.1. The ICTY convictions of high-ranked officials for the crime of genocide

The prosecutions by the ICTY led to several genocide convictions, committed by high-ranked officials of the RS. Besides that, several members of the army and police of RS were prosecuted and found guilty for the crime of genocide by the Court of Bosnia and Herzegovina. Moreover, the ICJ concluded in *Bosnian Genocide* that Serbia had failed to prevent the genocide in Srebrenica, which was committed by members of the VRS.[214] Due to the scope of this thesis, we will only focus on the high-ranked officials of the RS that are, *inter alia*, convicted for the crime of genocide. We note here that many high-ranked (political and military) officials, such as Biljana Plavšić,[215] Momčilo Krajišnik,[216] Radislav Brđanin[217] and Milomir Stakić,[218] who had a significant political share in various atrocities, such as crimes against humanity (which is a *jus cogens* norm as well), are thereby excluded.

Prosecutor v. Krstić

Radislav Krstić, a Deputy Commander and later Chief of Staff of the Drina Corps of the VRS, was the first Bosnian Serb who was convicted for genocide in Srebrenica. He was the first men in Europe that was convicted for genocide since the Second World War. After he was sentenced to 46 years

212 Ibid. p. 444.

213 Ibid. p. 445.

214 *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, *ICJ Reports 2007*, par. 297.

215 *Prosecutor v. Plavšić*, *ICTY*, IT-00-39 & 40/1, 27 February 2003.

216 *Prosecutor v. Krajišnik*, *ICTY*, IT-00-39, 17 March 2009.

217 *Prosecutor v. Brdjanin*, *ICTY*, IT-99-36, 3 April 2007.

218 *Prosecutor v. Stakić*, *ICTY*, IT-97-24, 22 March 2006.

for the crime of genocide in the first place, the Appeal's Chamber of the ICTY redefined his involvement and affirmed his guilt as an aider and abettor to genocide and sentenced him to 35 years. One of the reasons was that:

"*(…) given the involvement of General Mladić, Radislav Krstić could do nothing to prevail upon General Mladić and stop the executions*". However, the Appeal's Chamber stated that *"(…) The Trial Chamber also found evidence of Radislav Krstić's continued loyalty to General Mladić despite his knowledge of General Mladić's role in the genocide at Srebrenica*".[219]

Therefore, the Appeal Chamber concluded that it was reasonable that Krstić knew about the genocidal intent of the Main Staff of the VRS and that it was impossible to carry out the executions without the aid of the Drina Crops. In this way, "*(…) Radislav Krstić aided and abetted in the planning, preparation or execution of genocide against the Bosnian Muslims in Srebrenica*".[220]

Prosecutor v. Popović, Beara and Nikolic

Ljubiša Beara was a Colonel and Chief of Security of the Main Staff of the VRS. The ICTY issued an indictment against Beara for his role in Srebrenica and eventually sentenced him to life in prison for, *inter alia*, the crime of genocide. The ICTY did not find explicit evidence that Beara had a specific intent for genocide,[221] however, it observed the surrounding circumstances, such as words and acts and that he:

"*was the most senior officer of the Security Branch and had the clearest overall picture of the massive scale and scope of the killing operation. From his presence in Bratunac* on the night of 13 July, to his personal visits to the various detention and execution sites and the significant logistical challenges he faced throughout, Beara had a very personal *view of the staggering number of victims destined for execution. Steeped in knowledge, Beara became a driving force behind the murder enterprise*".[222]

The tribunal found him guilty of participation in a Joint Criminal Enterprise (JCE) which had the aim to murder the able-bodied Bosnian Muslim men from Srebrenica. This led to execution of several thousand

219 *Prosecutor v. Krstić*, *ICTY* (Appeal's Chamber), IT-98-33-A, 19 April 2004, par. 136.

220 Ibid. par. 137.

221 *Prosecutor v. Popović* et al. *ICTY*, IT-05-88-T, 10 June 2010, par. 1311.

222 Ibid. par. 1313-14.

Bosnian Muslim men by the VRS in just a few days.[223] The Tribunal found that:

"*Beara played a key role in orchestrating the murder operation by planning, coordinating and overseeing the detention, transportation, execution and burial of the able-bodied Bosnian Muslim males*"[224] *and that "His vigorous efforts (...) all evidence his grim determination to kill as many as possible as quickly as possible*".[225]

The ICTY sentenced Vujadin Popović, Chief of Security of the Drina Corps of the VRS, to life imprisonment for genocide, extermination, murder and persecution over the genocide.

"*Popović knew that the intent was not just to kill those who had fallen into the hands of the Bosnian Serb forces, but to kill as many as possible with the aim of destroying the group*". *His way of participation demonstrates that he not only knew of this intent to destroy, he also shared it*".[226]

Like Beara, he was found guilty for being a member of the JCE to murder the Bosnian Muslim men of Srebrenica and that he participated in the JCE with persecutory intent.

Drago Nikolić, Chief of Security in the Zvornik Brigade of the Drina Corps, who held the rank of Second Lieutenant in the VRS, was found guilty of aiding and abetting genocide, extermination, murder, and persecution and sentenced to 35 years in prison. Nikolić was responsible for, *inter alia*, managing the Zvornik Brigade Military Police Company and dealing with captured Bosnian Muslim men from Srebrenica from 11 July 1995 until November 1995. The ICTY found that he had no genocidal intent, but he "*participated in the JCE to murder with persecutory intent, that he had knowledge of the genocidal intent of others and that he made a substantial contribution to genocide*".[227]

Prosecutor v. Tolimir

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223 Ibid. par. 1050.

224 Ibid. par. 1298.

225 Ibid. par. 1331.

226 bid.

227 Ibid.

Zdravko Tolimir was a Military Commander of the VRS and reported directly to the commander, General Ratko Mladić. He was convicted to life for, *inter alia*, genocide and conspiracy to commit genocide. In this case, the ICTY found that:

"*(…) the Bosnian Muslim population of Eastern BiH- was murdered and suffered serious bodily and mental harm by acts of murder and forced movement, and that the conditions resulting from the acts of Bosnian Serb Forces, as part of the combined effect of the forcible removal and murder operations, were deliberately inflicted and calculated to lead to the physical destruction of the Bosnian Muslim population of Eastern BiH*".[228]

The ICTY found that already in 1992, there was a policy at the highest political and military level of the RS to remove the Bosnian Muslims from Eastern Bosnia. This policy was reaffirmed in March 1995 and signed by the President of RS, Radovan Karadžić, after it was drafted by different sectors within the Main Staff of the VRS. One of the involved sectors was the Sector of Intelligence and Security Affairs that was headed by Tolimir. The ICTY found that he was a member of two JCE's, i.e., the JCE to murder the able-bodied Bosnian Muslim men from Srebrenica[229] and the JCE to forcible remove the Bosnian Muslims from Srebrenica and Žepa. In this way, he contributed to the idea to "*create an unbearable situation of total insecurity with no hope of further survival of life for the inhabitants*" of these enclaves.[230] The ICTY held him responsible for having knowledge of the situation on the ground from March 1995 onwards and found that he had a coordinating and directing role. Moreover, the ICTY found that Tolimir had knowledge of the genocidal intent of others, and that he possessed this intent too.[231] Tolimir had a very effective communication with his subordinates and his superior, Ratko Mladić. The ICTY found that both "*were in close contact, with both attending daily meeting at the VRS Main Staff Headquarters engaging in the (…) forcible removal, and with the Accused timely reporting Mladić*". Tolimir was seen as the right hand of Mladić and they were "*closer to being equals*".[232] Because of this relationship, the ICTY found that Tolimir had an influential position in taking part in all actions of the Main Staff of the VRS.[233]

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228 *Prosecutor v. Tolimir*, *ICTY*, IT-05-88/2-T, 12 December 2012, par. 1157.

229 Ibid. par. 1164.

230 Ibid. par. 1163.

231 Ibid. par. 1162.

232 Ibid. par. 1164.

233 Ibid. par. 1164.

Besides the fact that the ICTY found that Tolimir "*was determined to obscure the murders of an unspeakably massive scale committed by the members of the Bosnian Serb Forces (…) and had knowledge that the murder operation was being carried out with genocidal intent*",[234] it also found that, at 12 July, an agreement existed to kill all able-bodied men with an aim to commit genocide and that Tolimir "*at the latest by the afternoon of 13 July, had knowledge of the murder operation, and he was actively engaged in concealing the murder operation, (…) resulting in the commission of the crime of genocide*".[235]

Prosecutor v. Mladić

Ratko Mladić was the Chief of the Main Staff of the VRS between 12 may 1992 and 30 November 1995. He was, *inter alia*, convicted for the siege of Sarajevo, the genocide in Srebrenica, membership of JCE (in Srebrenica), crimes against humanity and other war crimes. On 8 June 2021, the Appeal's chamber of the ICTY confirmed the life sentence.

On 12 May 1992, in response to the independence of Bosnia and Herzegovina, the self-proclaimed Bosnian Serb National Assembly voted to create an army. From the beginning, Mladić was the Commander of the VRS. On the same day, Radovan Karadžić announced his six strategic objectives, which, *inter alia*, included the "*Demarcation of the State as separate from the other two national communities*". Mladić responded to Karadžić that:

"*There we cannot cleanse nor can we have a sieve to sift so that only Serbs would stay, or that the Serbs would fall through and the rest leave. Well that is, that will not, I do not know how Mr.* Krajišnik and Mr. *Karadžić would explain this to the world. People, that would be genocide. We have to call upon any man who has bowed his forehead to the ground to embrace these areas and the territory of the State we plan to make*".[236]

The ICTY found that these (and other) statements, such as that Bosnian Muslims in Srebrenica "*would have disappeared a long time ago*" without the presence of the international community, and the conduct of Mladić, led to

[234] Ibid. par. 1175.

[235] Ibid. par. 1175-76.

[236] Persecutor v. Mladić, ICTY, IT-09-92-T, 22 November 2017, par. 1883.

his "*intent to achieve the common objective of the Srebrenica JCE*",[237] including his control and command over units of the VRS and the MUP (Ministry of internal affairs). Moreover, he was found guilty of misleading prisoners that they would be exchanged and his presence at a meeting in the area of Bratunac (Srebrenica) at which the killing of 8,000 Muslim males was discussed.[238]

His statement that the Bosnian Muslims from Srebrenica could "*live or vanish*" and "*survive or disappear*", according to the ICTY, led to the intention to eliminate the group by "*killing the men and boys and forcibly removing the women, young children, and some elderly men from Srebrenica*".[239]

The ICTY found that:

"*Bosnian-Muslim males were killed and thousands of Bosnian Muslims in Srebrenica were subjected to serious bodily or mental harm, which contributed to the destruction of the targeted group as a result of actions of members of the VRS, military police, civilian police, special police, Drina Wolves, and paramilitary formations (…) and that the Bosnian Muslims in Srebrenica constituted a substantial part of the Bosnian-Muslim population in Bosnia-Herzegovina*".

This led to the conclusion "*that the physical perpetrators committed the prohibited acts with the intent to destroy the Bosnian Muslims in Srebrenica, as a substantial part of the protected group of Bosnian Muslims in Bosnia-Herzegovina, which constituted the crime of genocide*".[240]

Prosecutor v. Karadžić

Radovan Karadžić was between 1992 and 1996 the first President of Republika Srpska. He was the co-founder of the SDS in Bosnia and Herzegovina and was a fugitive between 1996 and 2008 after he was indicted for, *inter alia*, genocide. On 24 March 2017 he was found guilty of the genocide in Srebrenica, crimes against humanity and war crimes and sentenced to

[237] The members of the Srebrenica Joint Criminal Enterprise included Radovan Karadžić, Radislav Krstić, Vujadin Popović, Zdravko Tolimir, Ljubomir Borovčanin, Svetozar Kosorić, Radivoje Miletić, Radislav Janković, Ljubiša Beara, Milenko Živanović, Vinko Pandurević, and Vidoje Blagojević.

[238] Persecutor v. Mladić, ICTY, IT-09-92-T, 22 November 2017, par. 5128.

[239] Ibid. par. 5129.

[240] Ibid. par. 5129-5130.

40 years imprisonment. His appeal was rejected and on 20 March 2019 the sentence was increased to life imprisonment.

The SDS, with Karadžić as President, started in 1991 with the establishment of the so-called 'Serb Autonomous Regions' on the territory of Bosnia and Herzegovina. After the parliament of Bosnia and Herzegovina chose for sovereignty on 15 October 1991, the Bosnian Serb politicians proclaimed the Serb Assembly which held a referendum and resulted in favour of staying in a federal State with Serbia and Montenegro as part of SFRY. In the Bosnian Parliament, Karadžić threatened that:

"*The road that you want to take Bosnia and Herzegovina down is the same highway to hell and suffering that Slovenia and Croatia have taken. Do not think that you will not take Bosnia and Herzegovina to hell and the Muslim people perhaps to annihilation, because the Muslim people cannot defend themselves if the war breaks out here*".

The SDS leadership wrote a secret document in which the organization and activity of the Serbian people in Bosnia and Herzegovina, in extraordinary circumstances, was formulated. The document contained a plan to take over each municipality by creating shadow-governments and para-structures. Moreover, it contained a plan to prepare Serbs to take over control in co-ordination with the JNA.[241]

After Karadžić was elected for President of RS, the Constitution of this self-proclaimed territory gave him the power to command the army of the Bosnian Serbs and to appoint, promote and discharge officers of this army.

The ICTY accused him of personal and command responsibility, as the Supreme Commander of the Bosnian Serb armed forces and as President of the National Security Council of RS, for several war crimes, such as the genocide in Srebrenica and the siege of Sarajevo. The ICTY held him responsible for ordering the genocide in Srebrenica by directing the Bosnian Serb forces to "*create an unbearable situation of total insecurity with no hope of further survival of life*" in Srebrenica.[242]

The ICTY found that:

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241 Gow 2003, p. 122–123.

242 *Prosecutor v. Tolimir, ICTY*, IT-05-88/2-T, 12 December 2012, par. 1163.

"*the crimes of genocide, murder, extermination, persecution, and inhumane acts (forcible transfer) were committed by Bosnian Serb Forces following the fall of the Srebrenica in July 1995"* and that Karadžić *"shared the common purpose of eliminating the Bosnian Muslims in Srebrenica by forcibly removing the women, children, and elderly men and by killing the men and boys, and that he significantly contributed to the plan to accomplish this objective*".[243]

Because the ICTY found Karadžić guilty for possessing knowledge to the plan, as well as the killings that took place, it concluded that Karadžić intended these crimes and "*possessed the requisite mens rea for extermination*".[244] To emphasize this intent, the ICTY proceeded and stated that:

"*the plan to eliminate the Bosnian Muslims in Srebrenica was by nature a discriminatory plan targeting the Bosnian Muslims in Srebrenica and (…) the Accused participated in and significantly contributed to this plan with the intent to discriminate against the Bosnian Muslims of Srebrenica, and thus with persecutory intent*".[245]

The ICTY held Karadžić responsible for being a member of the Srebrenica JCE and that he "*shared with Mladić, Beara, and Popović the intent that every able-bodied Bosnian Muslim male from Srebrenica be killed (…) to destroy the Bosnian Muslims in Srebrenica*". Therefore, the ICTY found that these acts were carried out with the intent to destroy a part of a protected group as such.[246] Because of his supreme position, the ICTY found that Karadžić had failed to take the necessary measures to prevent the commission of genocide and therefore concluded that Karadžić was criminally responsible.[247]

4.3.2. Interim conclusion

What these high-ranked officials have in common is that, in addition for committing, or aiding in, the crime of genocide, they were convicted for their membership within a JCE. In our opinion, the convictions for JCE are a logical consequence in the case of commitment of grave crimes, such as

[243] *Prosecutor v. Karadžić, ICTY*, IT-95-5/18-T, 24 March 2016, par. 5822.

[244] Ibid. par. 5823.

[245] Ibid. par. 5824.

[246] Ibid. par. 5830.

[247] Ibid. par. 5848.

genocide and crimes against humanity. It is highly unlikely and virtually impossible to commit such crimes without the presence of a high degree of cooperation and coordination of actions.[248] Although the concept is not explicitly formulated in the Statute of the ICTY, in *Prosecutor v. Milutinović*, the Court explained the definition and argued its implicit presence.[249]

However, its use is not undisputed. On the one hand, critics saw JCE as a means to establish excessive punishments and processes. On the other, proponents held the opinion that the term ensures that those who contribute to, or instigate a crime, are adequately made to account for their involvement in the commitment of the crime.[250] Regarding the scale and gravity of the crimes, but also the high degree of effective control and power the apparatus of the RS had on the territory it controlled. We hold the view that, indeed, a collective plan existed with the aim to destroy other ethnic groups (and their members) as such. In addition, that this collectivity can, therefore, be fully traced back to the six goals as presented by Radovan Karadžić in 1992 at the self-proclaimed Bosnian Serb National Assembly, during which General Ratko Mladić warned that these would not be achievable without committing the crime of genocide.

4.3.3. The Bosnian Genocide Case

In *Bosnian Genocide*, the largest part of the burden of proof was based on ICTY's fact-finding. The ICJ stated that ICTY archives constituted "*extensive documentation*".[251] In the context of genocide, the ICJ observed that, such allegations demand a higher burden of proof and require that the "(…) *Court is fully convinced*"[252] that such a crime was committed and that there must be "*a high level of certainty appropriate to the seriousness of the allegation*".[253] In addition, it emphasised that the foregoing threshold is especially important for the proof of *dolus specialis*.[254]

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248 Guliyeva 2009.

249 *Prosecutor v. Milutinović* et al., *ICTY*, IT-99-37-AR72, 21 May 2003. And https://www.icty.org/x/file/Legal%20Library/jud_supplement/supp41-e/milutinovic-a.htm

250 Abegunde & Filani *AIJCR* 2017 AIJCR, p. 84. See also Laughland 2007, p. 110-124.

251 *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina/Serbia and Montenegro), Judgment of 26 February 2007, *ICJ Reports 2007*, par. 206.

252 Ibid. par. 209.

253 Ibid. par. 213.

254 Ibid. par. 373.

Although it stated that fact-finding is its own responsibility, the ICJ noted that the case was of a special nature, as many allegations brought before it, were already raised in various cases before the ICTY, and that decisions already were made in that regard.[255]

In addition, the Court considered that evidence obtained through examination of those directly involved, and cross-examined by judges capable of reviewing large amounts of factual information, merits the Court's special attention.[256] It did so by referring to a similar approach in *Armed Activities on the Territory of the Congo*.[257] It confirmed that, therefore, ICTY's fact-finding falls within the formulation of 'evidence obtained by examination of persons directly involved',[258] especially referring to:

"*Documentation arising from the Tribunal's processes, including indictments by the Prosecutor, various interlocutory decisions by judges and Trial Chambers, oral and written evidence, decisions of the Trial Chambers on guilt or innocence, sentencing judgments following a plea agreement and decisions of the Appeals Chamber*".[259]

After it analysed the ICTY judicial process, the ICJ concluded that "*(…) it should in principle accept as highly persuasive relevant findings of fact made by the Tribunal*".[260]

Although the foregoing approach concerning the burden of proof is a solid line followed by the ICJ (in previous cases), the importance of which we recognise, however, on this point we ask the critical question, whether conducting the fact-finding itself, might have provided a broader recognition of genocide with regard to other atrocities that were qualified in a different way in many ICTY cases.

With regard to genocide, the ICJ, based on the Genocide Convention on one hand, and using ICTY's cases *Krstić* and *Blagojević* on the other, described the events that took place after the fall of Srebrenica and the genocide

255 Ibid. par. 212.

256 Ibid. par. 213.

257 Ibid. par. 213.

258 Ibid. par. 214.

259 Ibid. par. 214.

260 Ibid. par. 216-223.

that followed.[261] It stated that it was "*fully persuaded that both killings within the terms of Article II (a) of the Convention, and acts causing serious bodily or mental harm within the terms of Article II (b) thereof occurred during the Srebrenica massacre*".[262] Moreover, the proof for *dolus specialis* was based on the aforementioned cases as well.[263]

Finally, concerning the destruction of the protected group, it stated that it "*sees no reason to disagree with the concordant findings of the Trial Chamber and the Appeals Chamber*",[264] and concluded that:

"*the acts committed at Srebrenica falling within Article II (a) and (b) of the Convention were committed with the specific intent to destroy in part the group of the Muslims of Bosnia and Herzegovina as such; and accordingly that these were acts of genocide, committed by members of the VRS in and around Srebrenica from about 13 July 1995*".[265]

Given the manner in which the ICTY was established, and the extent of documentation that it has built up during the cases that were presented to this Tribunal, in this thesis, we follow the reasoning of the ICJ, as the highest international court, concerning the recognition of ICTY's fact-finding in the context of the burden of proof.

Moreover, in *Croatian Genocide*, with regard to the weight of evidence,[266] the fact-finding of the ICTY, and its application of the elements within the Genocide Convention,[267] the ICJ has confirmed and reapplied the aforementioned reasoning.

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261 Ibid. par. 292-294.

262 Ibid. par. 291.

263 Ibid. par. 295.

264 Ibid. par. 296.

265 Ibid. par. 297.

266 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia/Serbia), Judgment of 3 February 2015, *ICJ Reports 2015*, par. 178-182.

267 Ibid. par. 132.

4.3.4. The genocide convictions by the Court of Bosnia and Herzegovina

The Court of Bosnia and Herzegovina has also tried several police and army officials of the RS for genocide, crimes against humanity, and other war crimes. The Bosnian Court has mainly taken on cases that are less politically sensitive and the suspects could be tried within the State itself. This has so far led to convictions for the crime of genocide of Srećko Aćimović,[268] Mendeljev Đurić,[269] Brane Džinić,[270] Željko Ivanović,[271] Slobodan Jakovljević,[272] Duško Jević,[273] Branislav Medan,[274] Petar Mitrović,[275] Slavko Perić,[276] Aleksandar Radovanović,[277] Ostoja Stanišić,[278] Milenko Trifunović,[279] Milorad Trbić,[280] and Radomir Vuković.[281]

4.4. Resolutions of the United Nations, other international organisations, and resolutions of States

Shortly after the announcement of the six strategic goals by the self-proclaimed National Assembly of the Serb Republic of Bosnia and Herzegovina, the persecution of non-Serbs started and led to organization of concentration camps, systematic raping, mass killings and the destruction of

[268] *Prosecutor v. Aćimović*, Court of Bosnia and Herzegovina, S11K020200, 07 June 2021.

[269] *Prosecutor v. Đurić*, Court of Bosnia and Herzegovina, S11K003417, 3 March 2017.

[270] *Prosecutor v. Džinić*, Court of Bosnia and Herzegovina, X-KR-05/24, 23 January 2014.

[271] *Prosecutor v. Ivanović*, Court of Bosnia and Herzegovina, S11K003442, 18 June 2014.

[272] *Prosecutor v. Jakovljević*, Court of Bosnia and Herzegovina, X-KR-05/24, 23 January 2014.

[273] *Prosecutor v. Jević*, Court of Bosnia and Herzegovina, S11K003417, 3 March 2017.

[274] *Prosecutor v. Medan*, Court of Bosnia and Herzegovina, X-KR-05/24, 31 January 2014.

[275] *Prosecutor v. Mitrović*, Court of Bosnia and Herzegovina, X-KR-05/24-1, 22 January 2014.

[276] *Prosecutor v. Perić*, Court of Bosnia and Herzegovina, S11K003379, 5 November 2008.

[277] *Prosecutor v. Radovanović*, Court of Bosnia and Herzegovina, X-KR-05/24, 23 January 2014.

[278] *Prosecutor v. Stanišić*, Court of Bosnia and Herzegovina, S11K010315, 11 October 2018.

[279] *Prosecutor v. Trifunović*, Court of Bosnia and Herzegovina, X-KR-05/24, 23 January 2014.

[280] *Prosecutor v. Trbić*, Court of Bosnia and Herzegovina, X-KRZ-07/386, 19 January 2015.

[281] *Prosecutor v. Vuković*, Court of Bosnia and Herzegovina, S11K006124, 17 December 2015.

cultural and religious objects of Bosniaks and Bosnian Croats. The Bosnian Serbs called these acts ethnic cleansing.[282]

4.4.1. UN resolutions and declarations of other international organizations

In a 1993 Resolution, the UNSC condemned the Bosnian Serb policy of ethnic cleansing in which rules of international humanitarian law were violated in various ways. The UNSC made it clear that acquiring territory by the threat or use of force was unlawful and unacceptable. In the same context, the acts of Bosnian Serb (para)military forces in and around Srebrenica were condemned.[283] In line with this, The UNSC used the term to describe actions that took place in Bosnia and Herzegovina.[284] A UN Commission of experts went on further and stated that ethnic cleansing:

"*(…) means rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area. 'ethnic cleansing' is contrary to international law*" and "*(…) 'ethnic cleansing' has been carried out by means of murder, torture, arbitrary arrest and detention, extra-judicial executions, rape and sexual assaults, conferment of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian population, deliberate military attacks or threats of attacks on civilian areas, and wanton destruction of property. (…) such acts could also fall within the meaning of the genocide Convention*".[285] The UNGA confirmed the foregoing by stating that "*the abhorrent policy of 'ethnic cleansing', (…) is a form of genocide*".[286]

At this point, it is important to note that ethnic cleansing can only be regarded as genocide if acts, included in article II of the Genocide Convention, are present and an intention exists to destroy a group as such.[287] From the

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282 Schabas 2009, p. 221-226. and Power 2003, p. 279-282.

283 UNSC Resolution 819 of 16 April 1993. See also UNSC Resolution 820 of 17 April 1993 and UNSC Resolution 824 of 6 May 1993.

284 UNSC Resolution 787 of 16 November 1992 and UNSC Resolution 827 of 25 May 1993.

285 Interim Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992), UN Doc. S/1993/35374, par. 55-56. And: Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992), UN Doc. S/1994/674, par. 129-130.

286 UNGA Resolution 47/121 of 7 April 1993.

287 *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, *ICJ Reports 2007*, par. 190.

foregoing we can conclude, that under certain circumstances, ethnic cleansing can lead to the determination of genocide.[288] The UNGA confirmed this and stated that ethnic cleansing of the Bosnian people was a form of genocide.[289]

In a Resolution of 1995, the UNSC condemned the offensive acts of the Bosnian Serbs in the UN Safety Zone of Srebrenica, and expressed its concern about the deteriorating situation.[290] In November 1995 it warned the Bosnian Serbs again of not complying with earlier demands, and stated that "*grave violations of international humanitarian law and of human rights in and around Srebrenica (…) including mass murder, unlawful detention and forced labor, rape, and deportation of civilians*" have taken place.[291] In a Resolution that followed in December of 1995, it stated that "*there is overwhelming evidence of a consistent pattern*" in committing the aforementioned atrocities, and condemned "*in the strongest possible terms the violations of international humanitarian law and of human rights by Bosnian Serb and paramilitary forces in the areas of Srebrenica (…)*".[292] In this context it noted that a large number of men in the area of Srebrenica, have been summarily executed by the Bosnian Serb and paramilitary forces. On to this day, the UNSC did not adopt a Resolution that explicitly condemns and recognises the acts of genocide that were committed in Srebrenica. In 2015, the Russian Federation blocked such a draft Resolution in the UNSC.[293]

Another important report within the UN was that of the UN Secretary-General, i.e., "*The Fall of Srebrenica*". In this report, on the basis of many interviews with those who participated directly, or had any form of knowledge about the happenings in Srebrenica, and with the help of Member States and international organizations. The Secretary-General described how after the fall of Srebrenica "*thousands men and boys were summarily executed and buried in mass graves within a matter of days (…)*".[294] Other reports,[295]

[288] Dixon, McCorquodale & Williams 2016, p. 546.

[289] UNGA Resolution 47/121 of 7 April 1993.

[290] UNSC Resolution 1004 of 12 July 1995.

[291] UNSC Resolution 1019 of 9 November 1995.

[292] UNSC Resolution 1034 of 21 December 1995.

[293] UNSC 11961 of 8 July 2015 (https://www.un.org/press/en/2015/sc11961.doc.htm)

[294] UN Secretary-General, UN doc. A/54/549 of 15 November 1999.

[295] Special Rapporteur of the Commission on Human Rights, E/CN.4/1996/9, 22 August 1995.

such as the NIOD report,[296] based on data collected by both governmental and non-governmental organizations, pointed to indications that mass executions had taken place in Srebrenica. Moreover, a report of the Human Rights Watch contains similar findings concerning the genocide in Srebrenica.[297]

In 2005, the EU Parliament adopted a resolution in commemoration of the genocide in Srebrenica, in which it stated that:

"*after the fall of Srebrenica, more than 8 000 Muslim men and boys (…), were summarily executed by Bosnian Serb forces commanded by General Mladić and by paramilitary units, including Serbian irregular police units which had entered Bosnian territory from Serbia, whereas this tragedy, declared an act of genocide by the ICTY*".[298]

4.4.2. Controversial Reports initiated by the RS

Since 2002, two controversial reports concerning events in Srebrenica have been issued on the part of RS. In both reports an attempt was made to undermine the facts about the genocide in Srebrenica. The first report was published by the Republika Srpska Government Bureau for Relations with the ICTY under the name 'Report about Case Srebrenica'. The report denied the massacre in Srebrenica and accused the International Committee of the Red Cross for fabrication of its findings. However, the report was strongly criticized by the international community and was finally disowned by the RS.[299] The report was also criticized by the ICTY as *"one of the worst examples of revisionism"*.[300] Former UN trial attorney Harmon stated that *"the campaign of misinformation and deceit reached its apotheosis seven years after the crimes were committed with the publication of the report (…)"*.[301] Recently, a second report was issued by 'The Independent International Commission of Inquiry on the Sufferings of All Peoples in the Srebrenica Region between 1992 and

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296 NIOD (the institute for war, holocaust and genocide studies) report, 'Srebrenica, reconstructions, background, consequences and analyses of the fall of a 'Safe' area', Amsterdam 10 April 2002.

297 Human Rights Watch, BOSNIA-HERCEGOVINA, The Fall of Srebrenica and the Failure of U.N. Peacekeeping. Vol. 7, No. 13, 1995.

298 European Parliament resolution on Srebrenica, The Balkans: 10 years after Srebrenica, P6_TA(2005)0296.

299 Tracy et al. 2003.

300 *Prosecutor v. Deronjić* (Sentencing Judgment), *ICTY*, 30 March 2004, p. 69.

301 Harmon & Gaynor, *JICJ* 2007, p. 683–712.

1995', chaired by Israeli historian Gideon Greif, and set up by the Republika Srpska National Assembly.[302] Although it described that the executions of thousands of Bosniaks occurred in *"the most horrific way"*, it concluded however, that the overwhelming part of the group were military prisoners and that the murders were committed with the aim to eliminate military threat. The commission denied that the atrocities could be qualified as genocide, and accused the ICTY of anti-Serb bias. As a consequence, to this report, thirty-one international experts on the former Yugoslavia stated in an open letter that the initiative of the government of RS to set up the commission *"looks more like revisionism than a genuine effort to determine truth"*. Many other experts followed and qualified this report as an attempt to distort historical facts.[303]

4.4.3. Resolutions of States

Although the UNSC failed to adopt a Resolution regarding Srebrenica, several individual States have passed resolutions recognizing, condemning and commemorating the genocide in Srebrenica, such as the Resolution of the US Congress.[304] Serbia already adopted a declaration in 2010 condemning the crimes in Srebrenica. However, the Serbian parliament refused to recognise the crimes as genocide. Other European States, such as Croatia,[305] North Macedonia,[306] Belgium, Lithuania, Luxembourg and Switzerland have adopted Resolutions regarding the genocide in Srebrenica. In addition, Canada,[307] Australia and Iran have also passed Resolutions recognizing the crimes in Srebrenica as acts of genocide.[308] Montenegro also managed to adopt such a resolution in 2021.[309]

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302 https://incomfis-srebrenica.org/.

303 https://balkaninsight.com/2021/07/21/bosnian-serb-report-claims-many-srebrenica-victims-werent-civilians/. See also https://www.justsecurity.org/77628/deceptive-report-escalates-srebrenica-genocide-denial-campaign/.

304 Karčić, *JGR* 2015, p. 206-208.

305 https://www.sabor.hr/sites/default/files/uploads/sabor/2020-02-12/153602/PO_SREBRENICA.pdf.

306 https://balkaninsight.com/2010/02/05/skopje-adopts-srebrenica-declaration/.

307 http://instituteforgenocide.org/canadian-2-resolution-on-srebrenica-genocide/.

308 Karčić, *JGR* 2015, p. 206-208.

309 https://zakoni.skupstina.me/zakoni/web/dokumenta/zakoni-i-drugi-akti/98/2450-14936-00-71-20-22-17.pdf.

5. Conclusion: The future status of the Dayton Peace Agreement

After the Badinter Commission had concluded that the SFRY was in a state of dissolution, the ghost of the past in the Balkans was awakened from its slumber. After Slovenia and Croatia declared their independence, it was just a matter of time for the other Republics to follow the same path. All eyes were especially focused on Bosnia and Herzegovina, which, given its multicultural and multidenominational structure, was seen as a miniature Yugoslavia. Already in 1991, the parliament of the SRBiH passed a resolution emphasizing the sovereignty of the State. In the preceding centuries, it was precisely its sovereignty that was under constant pressure.

As explained in the first chapter, the Bosnian Serbs, who made up about a third of the population of Bosnia and Herzegovina, opposed possible independence, and strove to remain part of the SFRY. In response to the parliament's resolution, Radovan Karadžić, spoke threatening words in the parliament announcing the possible annihilation of Bosnian Muslims if an armed conflict would occur. However, the leadership of the SRBiH persisted in its pursuit of independence.

In response, the Bosnian Serbs proclaimed the Serb Republic of Bosnia and Herzegovina (i.e., RS) and established parallel institutions, an army and police structures on the territory they effectively controlled. In this way a *de facto* regime on the territory of the SRBiH was established. Its self-proclaimed National Assembly went on even further by drafting strategic goals with which a systematic campaign of ethnic cleansing started. The General of the VRS, Ratko Mladić, warned that this campaign was unachievable without committing genocide.

The policy of ethnic cleansing, which was discussed in detail in chapter four, was condemned in several UN resolutions and was qualified as a form of genocide. In addition, the UN demanded from the Bosnian Serb structures to immediately put a stop to these atrocities. In the same chapter we provided the burden of proof for the fact that, in the years following the signing of the DPA, many high-ranked RS officials, politicians as well as leaders of the VRS and security structure, were convicted by the ICTY for, *inter alia*, crimes against humanity, genocide, and several JCE's, including Srebrenica. In addition, the Court of Bosnia and Herzegovina has, so far, convicted several members of the aforementioned structures for the same crimes. The ICJ confirmed the

authority of ICTY's fact-finding in *Bosnian Genocide*, which we also took as starting point, and stated that Serbia was responsible for failing to prevent the genocide that was committed by members of the VRS. Moreover, various international organizations and States, through reports and resolutions, recognised and condemned the genocide in Srebrenica. Nevertheless, in recent years various reports appeared, initiated by the RS, which aimed to deny and relativize the committed genocide.

As discussed in the second chapter, after a month of tough negotiations, the parties reached a peace agreement that initially no side was pleased with. The DPA was signed in Paris on 14 December 1995. The largest gain was that Bosnia and Herzegovina maintained its historical continuity within its original borders and saw its sovereignty and international subjecthood preserved. However, the pre-war Constitution and internal structure were abandoned and the State moved forward with a new internal structure consisting of two entities (and a district). It meant that the *de facto* existing regime, the RS, was legalised into a *de jure* entity within Bosnia and Herzegovina. As a result, all atrocities committed in the name of its creation were in this way rewarded.

Although the suspicion of these atrocities was already recognised through aforementioned UN resolutions, their ultimate extent, including the genocide in Srebrenica, was unknown at the time of DPA's drafting.

In the third chapter, a detailed analysis of peremptory norms of general international law, i.e., *jus cogens*, was conducted. In this thesis, the emphasize was mainly on the prohibition of genocide as *jus cogens* norm. In doing so, we have explained the main consequence of a conflict with such a norm, i.e., the nullity of treaties under article 53 VCLT. In addition, to support our main argument, we also considered non-recognition as a legal consequence after a breach of *jus cogens* has occurred.

Given the evidence that we provided, the question arises whether the DPA should have been drafted and signed now that it recognised the consequences, i.e., legalizing RS as an entity, after a breach of *jus cogens* norms. In our opinion, this makes the DPA null and void in substance.

The third chapter showed that there always existed a view, both in literature and practice, that entering into treaties has its limits. More specifically, this means that it was not considered possible to enter into treaties that are of an immoral nature or that conflict with a peremptory norm of international

law. Therefore, as we argued in the same chapter, it is very dubious that an international treaty could have been established legalising an entity, while in the context of its creation, several *jus cogens* norms were breached.

The right question we ask here is how this happened, as the UNSC stated that "*taking of territory by force or any practice of 'ethnic cleansing' is unlawful and unacceptable*"?[310] In our opinion, this premise does not only apply to the creation of new States, but the same approach should be followed by analogy for legalising entities that arose in the same way. In order to defend this argument, a number of examples were mentioned in the third chapter where recognition was impossible because of violation of *jus cogens*.

In the case of the DPA, this means that the treaty amnestied, *inter alia*, acts of genocide by allowing the legalisation of a *de facto* regime in entity form. In this, we follow Trocan's view that such "*(…) a treaty that could end an armed conflict and could establish that acts of genocide are amnestied should be considered as null*".[311]

Applying article 53 VCLT to the DPA, leads us to the category of absolute nullity. This means that in such cases a treaty is, *ab initio*, void. In addition, the treaty is wholly invalid, which means that a treaty rule that conflicts with *jus cogens* is not severable from the treaty itself, and that all treaty parties can invoke its nullity.

However, to avoid unilateral acts of States, a compulsory procedure was implemented that must be followed by the treaty parties if they want to invoke nullity on the basis of article 53 VCLT. This also means that none of them can unilaterally assert the invalidity of its consent or of the treaty itself, and by doing so, refuse to comply with the binding obligations. Invalidation can only be a result of a consent between all treaty parties in which they agree on the measure that is proposed by one of them.[312] In case of a negative response, secondly, a peaceful arbitration settlement must be sought.[313] Should this fail as well, then, the parties can submit the matter to the ICJ. However, its role is

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310 UNSC Resolution 787 of 16 November 1992, par. 2.

311 Trocan, *EPLS* 2013, p. 125. See also Constantin 2010, p. 148.

312 Articles 65, 67, 68, 69, 71, and 78 VCLT.

313 ILC, Seventieth Session, *Third report on jus cogens by Dire Tladi, Special Rapporteur,* Geneva 2018, A/CN.4/714, p.19.

not to declare the nullity itself, but rather to confirm it.[314]

Aware of the fact that the DPA has brought hard-won peace, the question arises what its nullity would mean for the stability in Bosnia and Herzegovina. In case that the DPA would be declared null and void on the basis of the evidence we provided above, the current Constitution, i.e., Annex 4 of the DPA, would be abrogated because article 53 VCLT falls under absolute nullity. Moreover, because, in our opinion, the DPA is null and void in its very substance, it is not permitted nor possible to severe such an important part from the treaty itself. The consequence of nullity would be that the previous legal Constitution would immediately apply, i.e., the Constitution of RBiH.

However, bringing back the previous Constitution and internal organization, i.e., *status quo ante*, could create major uncertainties and put the State back into armed conflict. Our view is, therefore, that there are two possibilities to correct the invalidity of the treaty. The first solution is an internal one, which would mean that all parties within Bosnia and Herzegovina would have to undergo a process of reconciliation, in which there would be no space for denial of all atrocities that took place, and in which shortcomings of the DPA are recognised by all parties. Perhaps, requesting an Advisory Opinion from the ICJ, regarding the legality of the current state, could provide aid. The other way is, to seek a solution within the framework of the UN. This would mean that the UNGA and UNSC, through resolutions, would confirm that the current situation is in conflict with general international law.

Powers that made a great effort in the 1990s to reach a peace agreement (in whatever form), should, within the UN framework, free Bosnia and Herzegovina from this disturbed state in which it now finds itself, in order to provide a fairer polity which will establish more stability and justice, and get the State moving faster towards European integrations. Until then, in our opinion, the DPA remains a short-term redemption, however, a long-term tragedy.

314 Magallona, *PLJ* 1976, p. 529-533.

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