NMUN • NY

# INTERNATIONAL COURT OF JUSTICE

## BACKGROUND GUIDE 2010

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## NATIONAL MODEL UNITED NATIONS

28 March - 1 April 2010 - Sheraton
30 March - 3 April 2010 - Marriott

WRITTEN BY: Joyce Adams, Priscilla Rouyer, Hannah Birkenkotter, Louis Alexandre Cazal, Nikhil Mathur

NATIONAL COLLEGIATE CONFERENCE association™

## CONTACT THE NMUN

Please consult the FAQ section of www.nmun.org for answers to your questions. If you do not find a satisfactory answer you may also contact the individuals below for personal assistance. They may answer your question(s) or refer you to the best source for an answer.

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Emefa Gbedemah | secgen@nmun.org
T: +1.651.204.9310 Ext. 10 phone (NY Time Zone)

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NMUN Director-General (Sheraton)
Amanda Williams | dirgen@nmun.org

NMUN Director-General (Marriott)
Ronny Heintze | dirgen@nmun.org

## NMUN•NY 2010 Important Dates

IMPORTANT NOTICE: To make hotel reservations, you must use the forms at www.nmun.org and include a $1,000 deposit. Discount rates are available until the room block is full or one month before the conference – whichever comes first. PLEASE BOOK EARLY!

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|---|---|---|
| 31 January 2010 | 31 January 2010 | • Confirm Attendance & Delegate Count. (Count may be changed up to 1 March)<br>• Make Transportation Arrangements - DON'T FORGET!<br>(We recommend confirming hotel accommodations prior to booking flights.) |
| 15 February 2010 | 15 February 2010 | • Committee Updates Posted to www.nmun.org |
| 1 March 2010 | 1 March 2010 | • Hotel Registration with FULL PRE-PAYMENT Due to Hotel - Register Early!<br>Group Rates on hotel rooms are available on a first come, first served basis until sold out. Group rates, if still available, may not be honored after that date. See hotel reservation form for date final payment is due.<br>• Any Changes to Delegate Numbers Must be Confirmed to: karen@nmun.org<br>• Two Copies of Each Position Paper Due via E-mail<br>(See Delegate Preparation Guide for instructions).<br>• Preferred deadline for submission of Chair / Rapp applications to Committee Chairs |
| 1 March 2010 | 1 March 2010 | • All Conference Fees Due to NMUN for confirmed delegates.<br>($125 per delegate if paid by 1 March; $150 per delegate if receved after 1 March. Fee is not refundable after this deadline. |
| NATIONAL MODEL UNITED NATIONS | | The 2010 National Model UN Conference<br>• 28 March - 1 April – Sheraton New York<br>• 30 March - 3 April – New York Marriott Marquis |

## POSITION PAPER INSTRUCTIONS

***Two copies of each position paper should be sent via e-mail by 1 MARCH 2010***

### 1. TO COMMITTEE STAFF

A file of the position paper (.doc or .pdf) for each assigned committee should be sent to the committee e-mail address listed below. Mail papers by 1 March to the e-mail address listed for your particular venue. These e-mail addresses will be active when background guides are available. Delegates should carbon copy (cc:) themselves as confirmation of receipt. Please put committee and assignment in the subject line (Example: GAPLEN_Greece).

### 2. TO DIRECTOR-GENERAL

- Each delegation should send one set of all position papers for each assignment to the e-mail designated for their venue: positionpapers.sheraton@nmun.org or positionpapers.marriott@nmun.org. This set (held by each Director-General) will serve as a back-up copy in case individual committee directors cannot open attachments.
*Note*: This e-mail should only be used as a repository for position papers.

- The head delegate or faculty member sending this message should cc: him/herself as confirmation of receipt. (Free programs like Adobe Acrobat or WinZip may need to be used to compress files if they are not plain text.)

- Because of the potential volume of e-mail, only one e-mail from the Head Delegate or Faculty Advisor containing all attached position papers will be accepted.

Please put committee, assignment and delegation name in the subject line (Example: Cuba_U_of_ABC). If you have any questions, please contact the Director-General at dirgen@nmun.org.

www.nmun.org
for more information

| COMMITTEE | EMAIL - SHERATON |
|---|---|
| General Assembly Plenary | gaplenary.sheraton@nmun.org |
| General Assembly First Committee | ga1st.sheraton@nmun.org |
| General Assembly Second Committee | ga2nd.sheraton@nmun.org |
| General Assembly Third Committee | ga3rd.sheraton@nmun.org |
| Security Council | sc.sheraton@nmun.org |
| Security Council 2 | sc2.sheraton@nmun.org |
| SC Working Group: Children and Armed Conflict | caac.sheraton@nmun.org |
| International Court of Justice | icj.sheraton@nmun.org |
| ECOSOC Plenary | ecosoc.sheraton@nmun.org |
| Committee for Development Policy | cdp.sheraton@nmun.org |
| Commission for Sustainable Development | csustd.sheraton@nmun.org |
| Commission on the Status of Women | csw.sheraton@nmun.org |
| Econ. Commission for Latin America & the Caribbean | eclac.sheraton@nmun.org |
| International Atomic Energy Agency | iaea.sheraton@nmun.org |
| Office of the UN High Commissioner for Refugees | unhcr.sheraton@nmun.org |
| United Nations Children's Fund | unicef.sheraton@nmun.org |
| World Food Programme | wfp.sheraton@nmun.org |
| African Union | au.sheraton@nmun.org |
| Association of Southeast Asian Nations | asean.sheraton@nmun.org |
| North Atlantic Treaty Organization | nato.sheraton@nmun.org |
| Organisation of The Islamic Conference | oic.sheraton@nmun.org |

| COMMITTEE | EMAIL - MARRIOTT |
|---|---|
| General Assembly Plenary | gaplenary.marriott@nmun.org |
| General Assembly First Committee | ga1st.marriott@nmun.org |
| General Assembly Second Committee | ga2nd.marriott@nmun.org |
| General Assembly Third Committee | ga3rd.marriott@nmun.org |
| Security Council | sc.marriott@nmun.org |
| Security Council 2 | sc2.marriott@nmun.org |
| SC Working Group: Children and Armed Conflict | caac.marriott@nmun.org |
| International Court of Justice | icj.marriott@nmun.org |
| ECOSOC Plenary | ecosoc.marriott@nmun.org |
| Committee for Development Policy | cdp.marriott@nmun.org |
| Commission for Sustainable Development | csustd.marriott@nmun.org |
| Commission on the Status of Women | csw.marriott@nmun.org |
| Econ. Commission for Latin America & the Caribbean | eclac.marriott@nmun.org |
| International Atomic Energy Agency | iaea.marriott@nmun.org |
| Office of the UN High Commissioner for Refugees | unhcr.marriott@nmun.org |
| United Nations Children's Fund | unicef.marriott@nmun.org |
| World Food Programme | wfp.marriott@nmun.org |
| African Union | au.marriott@nmun.org |
| Association of Southeast Asian Nations | asean.marriott@nmun.org |
| North Atlantic Treaty Organization | nato.marriott@nmun.org |
| Organisation of The Islamic Conference | oic.marriott@nmun.org |

### OTHER USEFUL CONTACTS

| | |
|---|---|
| Entire Set of Delegation Position Papers | positionpapers.sheraton@nmun.org |
| (send only to e-mail for your assigned venue) | positionpapers.marriott@nmun.org |
| Secretary-General | secgen@nmun.org |
| Director(s)-General | dirgen@nmun.org |
| Director of Programs | karen@nmun.org |

Dear Delegates,

Welcome to the National Model United Nations (NMUN) 2010! We are delighted to have you join us for our simulation of the International Court of Justice at the Marriot and Sheraton venues this spring.

We would like to take this opportunity to introduce ourselves. At the Sheraton, Joyce Adams is currently pursuing a JD at Georgetown Law School. She has an MSc in Human Rights from the London School of Economics. At the Marriott, Priscilla Royer is completing graduate studies in International Relations and Public Affairs at Sciences Po, Paris. We are both very excited to be serving as your Directors at this year's conference.

This year's agenda is:

1. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)
2. Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)

This background guide has been prepared to provide delegates with an introduction to the Court's docket. It is not intended to be comprehensive and should be augmented by your own research and preparation work.

There are special requirements for position papers for the International Court of Justice. Instead of preparing position papers, Justices only are expected to submit a Preliminary Opinion, while Counsel are required to submit a Memorial. Special instructions on how to draft these documents are included in the introductory sections of this background guide. They should be formatted according to NMUN guidelines for regular position papers. NMUN will accept preliminary opinions or memorials by e-mail until **1 March 2010**. It is imperative that you refer to and adhere to the NMUN guidelines before submission.

Simulating the principal judicial organ of the United Nations, the International Court of Justice perhaps offers the greatest challenge for NMUN delegates. While your work before and during the conference will be demanding, we are certain that the experience will be extremely rewarding and unashamedly fun.

As you begin your preparation for the conference, please do not hesitate to contact the Director for your venue. We look forward to working with you in New York!

Yours sincerely,

*Sheraton Venue*

Joyce Adams
Director
icj.sheraton@nmun.org

*Marriott Venue*

Priscilla Royer
Director
icj.marriott@nmun.org

# Message from the Directors-General Regarding Position Papers for the 2010 NMUN Conference

At the 2010 NMUN New York Conference, each delegation submits one position paper for each committee it is assigned to. Delegates should be aware that their role in each committee impacts the way a position paper should be written. While most delegates will serve as representatives of Member States, some may also serve as observers, NGOs or judicial experts. To understand these fine differences, please refer to the Delegate Preparation Guide.

Position papers should provide a concise review of each delegation's policy regarding the topic areas under discussion and establish precise policies and recommendations in regard to the topics before the committee. International and regional conventions, treaties, declarations, resolutions, and programs of action of relevance to the policy of your State should be identified and addressed. ICJ Position Papers will be a bit different, please see the following information and change your format accordingly.

Please be forewarned, delegates must turn in material that is entirely original. ***The NMUN Conference will not tolerate the occurrence of plagiarism*.** In this regard, the NMUN Secretariat would like to take this opportunity to remind delegates that although United Nations documentation is considered within the public domain, the Conference does not allow the verbatim re-creation of these documents. This plagiarism policy also extends to the written work of the Secretariat contained within the Committee Background Guides. Violation of this policy will be immediately reported to faculty advisors and may result in dismissal from Conference participation. Delegates should report any incident of plagiarism to the Secretariat as soon as possible.

Delegation's position papers can be awarded as recognition of outstanding pre-Conference preparation. In order to be considered for a Position Paper Award, however, delegations must have met the formal requirements listed below. Please refer to the sample paper on the following page for a visual example of what your work should look like at its completion. The following format specifications are **required** for all papers:

- All papers must be typed and formatted according to the example in the Background Guides
- Length must **not** exceed two single spaced pages (one double sided paper, if printed)
- Font **must** be Times New Roman sized between 10 pt. and 12 pt.
- Margins must be set at 1 inch for whole paper
- Country/NGO name, School name and committee name clearly labeled on the first page; the use of national symbols is highly discouraged
- Agenda topics clearly labeled in separate sections

To be considered timely for awards, please read and follow these directions:

1**. A file of the position paper** (.doc or .pdf) **for each assigned committee** should be sent to the committee email address listed in the Background Guide. These e-mail addresses will be active after November 15, 2009. Delegates should carbon copy (cc:) themselves as confirmation of receipt.

2. Each delegation should also send **one set of all position papers** to the e-mail designated for their venue: positionpapers.sheraton@nmun.org or positionpapers.marriott@nmun.org. This set will serve as a back-up copy in case individual committee directors cannot open attachments. These copies will also be made available in Home Government during the week of the NMUN Conference

Each of the above listed tasks needs to be completed no later than **March 1, 2010 for Delegations attending the NMUN conference at either the Sheraton or the Marriott venue**.

**PLEASE TITLE EACH E-MAIL/DOCUMENT WITH THE NAME OF THE COMMITTEE, ASSIGNMENT AND DELEGATION NAME (Example: AU_Namibia_University of Caprivi)**

*A matrix of received papers will be posted online for delegations to check prior to the Conference. If you need to make other arrangements for submission, please contact Amanda Williams, Director-General, Sheraton venue, or*

*Ronny Heintze, Director-General, Marriott venue at dirgen@nmun.org. There is an option for delegations to submit physical copies via regular mail if needed.*

Once the formal requirements outlined above are met, Conference staff use the following criteria to evaluate Position Papers:

- Overall quality of writing, proper style, grammar, etc.
- Citation of relevant resolutions/documents
- General consistency with bloc/geopolitical constraints
- Consistency with the constraints of the United Nations
- Analysis of issues, rather than reiteration of the Committee Background Guide
- Outline of (official) policy aims within the committee's mandate

Each delegation can submit a copy of their position paper to the permanent mission of the country being represented, along with an explanation of the Conference. Those delegations representing NGOs do not have to send their position paper to their NGO headquarters, although it is encouraged. This will assist them in preparation for the mission briefing in New York.

Finally, please consider that over 2,000 papers will be handled and read by the Secretariat for the Conference. Your patience and cooperation in strictly adhering to the above guidelines will make this process more efficient and is greatly appreciated. Should you have any questions please feel free to contact the Conference staff, though as we do not operate out of a central office or location your consideration for time zone differences is appreciated.

Sincerely yours,

*Sheraton Venue*
Amanda Williams, LCSW
Director-General

amanda@nmun.org

*Marriott Venue*
Ronny Heintze
Director-General

ronny@nmun.org

## Special Instructions for ICJ Position Papers

Position Papers for the ICJ follow a slightly different format to other committees.

***Preliminary Opinions*** *(Justices ONLY)*

The Justices' Position Papers take the form of Preliminary Opinions. These should not reflect any Member State's position on a case, but an objective personal opinion based on reading, research and legal assessment of the issues presented in each case. It should identify what the facts and issues are for each case as well as what possible legal standards should be applied; describe how the standards should be applied to the particular facts; and conclude how the various issues should be resolved. It should be written with the utmost objectivity and reflect on a preliminary finding of fact and law.

The Justices' preliminary opinions should include:

The date on which it was prepared;
The names of the Justices;
The name of the case and its parties;
A statement of facts (what are the facts of the case?);
A statement of the applicable law (the possible legal standards should be applied, what laws, customs, precedents or treaties apply?);
An application of the law to the facts (How does the law view the situation?);
A conclusion

***Memorials*** *(Counsel ONLY)*

The Counsel will produce a position paper that would serve as the memorial/counter-memorial for each State party and will outline the arguments/positions for each side. Their position papers should reflect the following:

1. The date on which it was prepared;
2. The names of the Counsel;
3. The name of the case and its parties;
4. A statement of facts (what are the facts of the case, as viewed in the light most favorable to your position?);
5. A statement of the applicable law (the possible legal standards should be applied, what laws, customs, precedents or treaties apply?);
6. The detailed argument section, which discusses how the law and facts apply to the particular case as well as a counter-argument to the anticipated arguments of your adversary (how do the laws and facts support your case?);
7. An application of the law to the facts (How does the law view the situation?);
8. A summary and request for remedy (what do you want the Court to do?).

## An Introduction to NMUN Court Simulations

NMUN's recreation of the International Court of Justice (ICJ) offers a different experience to taking part in the other committees simulated at the conference. Taking on the role of a Justice or Counsel may seem daunting if you are used to representing Member States in simulations of diplomatic forums. While you might be familiar with the framing of international law in committees such as the United Nations (UN) General Assembly or Security Council, examining how and if the treaties and resolutions passed by these bodies are actually implemented may appear challenging. The following few pages have been prepared to explain what you can expect from the simulation and hopefully inspire you to approach the simulation with confidence and anticipation.

Participating in the Court will test all the skills that you would use in a regular MUN committee. As you prepare for the conference, these will include research, analysis and evaluating contending arguments. Your participation in the committee will test your skills of teamwork, leadership, public speaking, debate and ability to work under pressure. You will also be required to listen to and understand the viewpoints of others, and try to find consensus on points of difference.

However, you will find there are differences from other committee at the conference. Those of you who are acting as Justices will not be representing the policies of Member States, but forwarding your own opinion on the evidence presented to the Court. The small size of the Court means that your level of participation is likely to be higher. Both Justices and Counsel will be regularly invited to speak before the committee and make frequent contributions to the Court's proceedings and deliberations. You must therefore ensure you are thoroughly prepared before attending the conference and are in a position to speak authoritatively on the cases from the Court's first sitting.

The Court will also be employing different Rules of Procedure to other NMUN committees. These will appear on the NMUN website shortly before the conference. They will tend to be less formal than the regular rules and quite easy to learn.

## The Role of the Court's Staff and Delegates

***Committee Director/Registrar***
As with other committees at NMUN, a Committee Director is responsible for guiding delegates through the simulation and managing the Court's work during the conference. Before the conference, he or she will have helped decide the Court's agenda, and have researched and written the Background Guide. During the conference, the Director will have overall responsibility for moderating the Court's proceedings, and ensuring the rules of procedure are followed. He or she will also edit drafts of the judgment, helping delegates to structure their ideas and express them clearly.

***Registrar***
The Registrar serves as the Director's aide and is responsible for the administrative management of the Court. The Registrar will *not* be selected from delegates already within the Court, but from applicants from other committees. The committee's delegates will either take on the role of Justices or Counsel.

***Justices***
The fifteen Justices are responsible for passing a judgment on each of the cases presented to the Court.

Before the conference, they will thoroughly research the facts and law of each case, and write a *preliminary opinion*, which shall take the place of a position paper. During the conference, the Justices will assess the evidence and arguments presented to the Court, and ask questions of the advocates.

After Counsel have been heard, they will debate the merits of each case and find in favor or against either party. The Justices will prepare a written judgment, which shall state the facts of the case and outline the legal reasoning behind the Court's decisions.

The Justices judge the cases on the strength of the arguments and evidence presented to the Court, and do not represent the interests or policy positions of Member States. Due to the small size of the committee, Justices are prohibited from applying to act as chairs or rapporteurs in other committees.

***President***
Under the authority of the Committee Director, the President is responsible for chairing the Court's proceedings. He or she shall moderate the committee's sessions and the deliberations according to the Rules of Procedure. They will combine these duties with those of a regular Justice. The President will be elected from the fifteen Justices on the first night of the conference.

***Counsel***
Working in teams, the Counsel provide legal representation to the States that are party to the cases before the Court.

Before the conference, Counsel will thoroughly research the cases on the Court's docket and prepare the arguments that they will present to the Court. They will also draft *memorials*, which shall take the place of a position paper.

During the conference, they will present evidence and oral arguments at length to the Court and take questions from the Justices. They will also respond to requests made by the Court for written submissions.

Due to the small size of the committee, Counsel are prohibited from applying to act as chairs or rapporteurs in other committees.

## An Overview of the Simulation

***The General List of the Court***

Two cases have been approved for inclusion in the ICJ's agenda (known as the General List of the Court). It is possible that the United Nations (UN) General Assembly or Security Council will request an advisory opinion during the conference. The Committee Director may decide to introduce these requests to the Court, but they will only be considered once judgments are complete on both of the cases already on the General List of the Court.

***Memorials and Preliminary Opinions***

As part of the preparation for the simulation, all participants will be required to submit a position paper. Please see the section on Position Papers in this Background Guide.

***Phase One – Convening the Court***

Once the Committee Director has made his introduction, he or she will open the first sitting of the Court. All officers of the ICJ are required to give declarations that they will carry out their duties according to certain personal and professional standards. The Director will begin with his or her own declaration. Each Justice will then read their declarations from a card. Both Justices and Counsel will remain standing while this takes place. Once a Registrar has been selected, he or she will also make a declaration to the Court.

Once declarations are over, the Director will suspend the meeting so that the Justices can elect a President, decide which case to hear first and consider their preliminary opinions, while the Counsel teams meet to make final preparations for their opening statements and arguments.

***Phase Two – Opening Statements***

The President will return the Court to formal sessions and invite one side and then the other to deliver their opening statements for the first case. Lasting no more than 15 minutes, the opening statements will preview the evidence and highlight the main points of law that are contended. It is strongly recommended that Counsel prepare these statements prior to the Conference and practice delivering them in public. During Opening Statements, Justices and Counsel from the opposing party will not be allowed to interrupt.

***Phase Three – Presentation of the Cases***

The Counsel of one side and then the other will be invited to deliver their full arguments to the Court. Each Counsel team will be allowed around 45 minutes to an hour to present their arguments. Both Counsel and Justices may motion to suspend the sitting as necessary.

Counsel should present the facts of the case as viewed by the State they are representing and explain any law relevant to the case. The arguments should focus on the points of law that most divide the parties. In this simulation, the Counsel will *not* be allowed to present any witnesses, instead focusing on the substance of the law. The Justices will listen carefully to the arguments, taking notes on points that might shape their judgment. They may also interrupt delegates to ask questions.

They may also present written memorials to the Court, which summarize key part of their oral arguments, together with excerpts from relevant treaties that might guide the Justices' decision. The Counsel should provide the Court with three copies of any documents that might be relevant to their deliberations.

Both Justices and Counsel can motion to suspend the sitting as necessary.

***Phase Four – Initial Deliberations***

Once arguments have been heard, the Justices will meet to begin debate of the issues. They will work together to formulate a list of questions to be put to the Counsel. This gives a chance to identify any points in the arguments that are unclear or have been poorly covered.

***Phase Five – Justice Questioning***

The Justices will ask questions to the Counsel to clarify issues, facts and points of law. These should be direct questions to one side or the other. Justices and Counsel can motion to suspend the sitting as necessary.

***Phase Six – Closing Arguments***

Counsel will be allowed around 15 minutes to make final statements to the Court. At this stage, Counsel will have the opportunity to interrupt their opposite Counsel with questions. The Counsel who currently has the floor may choose to hear or not to hear these questions as he or she feels necessary.

***Phase Seven – Deliberation and Judgment***

The Justices now consider their judgment. During its deliberations, the Justices will consider the points of law and evidence that have been presented to the Court. They should work together to understand the opinions of every Justice, and as far as possible find consensus on the contested issues. If necessary, they may pose further questions to the Counsel. Once their deliberations are complete, they will vote formally on each point, and draft a judgment.

The first part of the judgment will be prepared by the Registrar, and shall contain:

- The date on which it is read;
- The names of the justices and counsel;
- The names of the parties
- A brief summary of proceedings; and
- The submission of the parties as contained within the memorials.

The second part of the judgment will be drafted by the Justices, and shall contain:

- A statement of the facts;
- The legal reasoning behind the Court's decision; and
- The Court's formal decisions on each contested point and the names of those Justices that found in favor or against.

If there has been significant disagreement on certain points of law, and individual or multiple Justices disagree with the judgment, the Committee Director may allow the drafting of a brief dissenting opinion.

While the Justices are deliberating, Counsel will prepare for their next case and remain near the Courtroom to provide written documents that the Justice might require or answer additional questions.

Once the judgment is complete, the Justices will sign it and the formal decision shall be read to the Court. The Court shall then hear the next case on the General List of the Court.

## Preparing for the Conference

The Committee Directors have prepared a Background Guide introducing the role of the ICJ and presenting each of the cases before the Court. You should begin your research by reading this guide and reading any relevant sources listed in the Annotated Bibliography.

Your next step should be to consult the ICJ's own website at http://www.icj-cij.org/. The amount of information available for any particular case will vary, but are likely to include the arguments of real Counsel currently arguing the cases before the ICJ. These may take the form of applications, memorials and counter-memorials presenting each side's case in writing, as well as transcripts of oral proceedings before the Court including arguments made by Counsel. Care should be taken that these are only used as research resources, and not plagiarized during the simulation.

Once you have a list of treaties, conventions and other legal documents that are relevant to your case, you should start researching these. Many of these are freely available on the Internet or through online subscription services held by most university libraries. It might be useful to print these off and keep them in a binder so you can refer to them easily during the conference.

Once you feel you have a thorough understanding of the case, Counsel should begin preparation of the arguments that they will be presenting to the Court. Carefully structure your thoughts, referring regularly to relevant law and making sure that the Justices will be able to clearly follow your reasoning. Your argument should include the following sections:

- A statement of facts (what are the facts of the case, as viewed in the light most favorable to your position?);
- A statement of the applicable law (the possible legal standards should be applied, what laws, customs, precedents or treaties apply?);
- The detailed argument section, which discusses how the law and facts apply to the particular case as well as a counter-argument to the anticipated arguments of your adversary (how do the laws and facts support your case?);
- An application of the law to the facts (How does the law view the situation?);
- A summary and request for remedy (what do you want the Court to do?).

Summarizing these arguments in a written memorial will help this process.

The Justices should prepare their preliminary opinions on the case, coming to an objective conclusion based on the facts of the case.

Practicing public speaking and making presentations will also help you prepare for the conference. Your school should organize several practice simulations before the conference to help you develop these skills. Use opportunities such as participating in class seminars or extra-curricular activities to also practice these skills.

The Committee Staff are also available to help answer questions. Please do not hesitate to contact them using the email addresses listed in the welcome letter at the top of this Background Guide.

# A Quick Guide to the Structure of International Law

***Introduction to International Law***

International law is mainly composed of the rules and norms which regulate state conduct. It contains principles that states feel bound to and that they observe in their conduct with each other. International law further contains rules that regulate international organizations, such as the United Nations. Lastly, the past century has known a major development of international law to include rules that apply to individuals. These rules are rights on the one hand (human rights are the most common example of rights to which individuals are entitled *qua* international law) and obligations on the other hand (individuals are obliged not to commit certain crimes, including the crime of genocide or crimes against humanity). The international legal system has thus evolved into a complex system of norms applying to a variety of actors. States remain to date the main subject of international law. The following introduction aims at familiarizing delegates with some underlying concepts of international law that they will need to use and apply throughout the Committee work and in their preparation. It is highly recommended that delegates consult textbooks on general international law in order to get a better insight into legal thinking and the issues at hand in the two cases that the International Court of Justice (ICJ) will discuss at NMUN.

***Sources of international law***

Art. 38 (1) of the ICJ Statue mentions the following as sources of law: (a) international conventions, (b) international custom, (c) the general principles of law and lastly, as a subsidiary source, (d) the "teachings of the most highly qualified publicists of the various nations". International conventions and international customary law remain to date the two main sources of law. Both are an expression of the consent of states to certain conduct.

*Conventions or treaties* are explicit agreements, usually written, between two (bilateral treaty) or more states (multilateral treaty; often also called convention) and are binding only on the parties to the agreement. States normally accede to multilateral conventions by ratification. Normally, the convention foresees that a certain number of ratifications (i.e. state parties) is required for a treaty to enter into force. Once this number of ratifications is reached, the treaty has binding force on all states parties.

*Customary international law* is non-written law. It is formed through consistent state practice adhered to over a period of time by states from a sense of obligation (so-called *opinio juris*). These two criteria for the development of customary international law have been confirmed by several judgments rendered by the International Court of Justice, e.g. by the *North Sea Continental Shelf*-Case (1969). The *opinio juris*, the fact that states regard a given norm as legally binding, is crucial for the qualification as customary international law. If there is only state practice, but no *opinio juris*, the conduct is usually named as "international comity". Complete uniformity of state practice is not necessary.

Customary international law includes certain norms by which all nations must abide. These peremptory norms are referred to as *jus cogens*. The 1969 Vienna Convention on the Law of Treaties (VCLT) defines a peremptory norm as one accepted and recognized by the international community from which no derogation is permitted (Article 53 VCLT). It follows that, if a treaty is concluded in violation of such a peremptory norm of international law, the treaty is null and void. An example of *jus cogens* is the general acceptance of the prohibition of genocide. States are forbidden from both committing genocide and from creating or entering into treaties that permit genocide. Note however that genocide has also been codified in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. States who have ratified this convention need to adhere to all its provisions.

*General principles of international law*, the third source mentioned in Art. 38 ICJ-Statute, have lost their importance due to an ever-increasing legal system of international conventions. Scholars agree that general principles will not

contain specific rules of conduct, but rather indicate main, underpinning principles. One example is the principle of *pacta sunt servanda*, which means that once adhered to a treaty, the treaty must be observed.

Lastly, Art. 38 (1) ICJ-Statute lists "teachings of the most highly qualified publicists of the various nations" and specifies that these be a "subsidiary means for the determination of rules of law". International legal research or case law from international courts (especially the ICJ) does consequently *not* constitute a source of law in themselves. However, they play an important role when determining the exact scope of a given international norm.

***The codification of international law and the role of the International Law Commission***

Because customary international law is often hard to grasp and not easily determined especially when it comes to details, the international community has aimed at increasingly codifying international law. Since there exists no international legislator (states are the supreme subjects of international law, and to date, there is no organization of a supra-national nature), multilateral treaties are the main means of codification. Many of these treaties are concluded under the auspices of the United Nations, i.e. they are negotiated within the United Nations framework in the General Assembly, or at World Summits. In this context, the International Law Commission (ILC) plays a vital role. The ILC is a subsidiary organ of the General Assembly, established in 1947 to pursue one of the main functions of the General Assembly, namely "encouraging the progressive development of international law and its codification" (Article 13 (1) (a) UN-Charter). The ILC consists of independent legal experts that meet once a year. They discuss current developments and trends in international law and attempt to codify existing customary international law. One prime example of the ILC's work was the drafting of the 1969 Vienna Convention on the Law of Treaties, which codified the legal rules governing international treaties. Another important work are the ILC's Draft Articles on State Responsibility, outlining the constitutive elements of an internationally wrongful act committed by a state, and the consequences under international law arising out of such an internationally wrongful act. While the Vienna Convention on the Law of Treaties is a proper multilateral treaty, having been ratified by 96 states, the ILC Draft Articles on State Responsibility are – as the name indicates – a draft. However, the majority of the rules contained in the Draft Articles reflect current customary international law.

***Interpreting norms of international law***

Throughout committee work, delegates will be faced with interpreting certain norms of international law. Arts. 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) contain the main rules of treaty interpretation. These rules are universally accepted and should be applied whenever interpreting a treaty norm.
Art. 31 VCLT provides that: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". When interpreting a particular norm, one looks first at the ordinary meaning of the term that requires qualification. "Context" is defined in Art. 31 (2) VCLT and comprises the entire treaty text, including the preambulatory part, as well as agreements that are somehow connected to the treaty in question. Subsequent practice in applying the treaty between states parties is also to be taken into consideration. The object and purpose of a treaty is often found in its preamble.

If interpretation according to Art. 31 VCLT still leaves uncertainties, Art. 32 VCLT contains subsidiary means of interpretation. Thus, the drafting history of a treaty (*travaux préparatoires*) can be consulted in order to clarify the object and purpose.

***The United Nations and International Law***

The Charter of the United Nations was drafted at the United Nations Conference on International Organization in San Francisco, California. It was signed on June 26, 1945 and entered into force on October 24, 1945. It is the multilateral treaty which created the United Nations organization. The Charter is the constitution of the

organization, defining its purposes, functions, and limitations. It also outlines the rights and duties of member states. Because the Charter creates binding obligations on state parties, it is a treaty.

*The General Assembly*

The General Assembly is the plenary organ of the United Nations. It serves as a forum for the exchange of ideas and discussion of problems. It can also be an important indicator of universal consensus on particular issues or subjects. The functions of the General Assembly are set out in the Charter. Essentially, it considers and makes recommendations to member states, the Security Council, or both on any question within the scope of the Charter.

Under Article 13 of the Charter, the General Assembly is charged with the task of promoting and encouraging the progressive development of international law and its codification. The General Assembly performs this task through various means:

1. Establishment of subsidiary bodies such as the International Law Commission and the Sixth Committee (Legal). The International Law Commission is composed of individual experts and prepares draft conventions or other legal texts;

2. Decisions of the General Assembly on certain topics (i.e. budgetary, member credentials) are binding;

3. Occasionally, resolutions of the General Assembly subsequently gets accepted by the international community as a norm of customary international law. The best example of this is the Universal Declaration of Human Rights. When introduced, it was meant only to be an inspirational statement of human rights. However, over time, its contents have become so universally accepted as promoting the ideal standards for human rights that it is now seen as a document that creates obligations for state parties. It is also used in the international legal system as a tool for evaluation of human rights.

*The Security Council*

Article 24 of the United Nations Charter gives the Security Council primary responsibility for the maintenance of international peace and security. According to Article 25 of the Charter, its decisions are binding upon the members of the United Nations. Traditionally, the Security Council adopts such binding resolutions after having determined a situation as a threat to or breach of peace and security (Article 39 UNC). In recent years however, the Security Council has expanded on traditional interpretations of its power to maintain international peace and security. Particularly relevant to international law is the Security Council's creation of the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The Security Council viewed the lack of judicial process that existed after the genocides in Rwanda and Yugoslavia as a threat to international peace and security and used its power to create, fund and monitor these special courts. Another example for legislative action taken by the Security Council are resolutions that are not limited to a specific situation, but rather stipulate general and abstract obligations for member states. The two most widely known examples of such resolutions are resolutions 1373 (on international terrorism) and 1540 (on nuclear non-proliferation).

## History of the International Court of Justice

As one of the six main organs of the United Nations and its principle judicial organ, the International Court of Justice (ICJ) has guaranteed impartial adjudication free of political pressure or economic bargaining since 1945.[1] The organization of this court is determined by the Statute of the International Court of Justice, an integral part of the United Nations Charter, and is open for signature to Member States only.[2] The International Court of Justice works in French and English and is located at the Peace Palace in The Hague, Netherlands. [3]

The main functions of the Court are to achieve peaceful resolution of disputes submitted by sovereign member states in accordance with international law.[4] Non-Member States may also appear before the Court; however, they must meet the terms outlined by the General Assembly under the recommendation of the Security Council.[5] These non-Member States also have to accept the "Statute of the International Court of Justice," as well as agree to abide by the decision of the International Court of Justice and make annual contributions to the Court.[6] The Court also provides advisory opinions on questions of law submitted by any organ of the United Nations duly authorized by the United Nations General Assembly.[7]

The registry of the International Court of Justice functions as the secretariat and as the administrative organ to the Court. It liaises within and its own bodies.[8] The Court is not the sole international court; however it is the only court that secures the pacific settlements of international disputes for all member states of the United Nations.[9] Other international courts include the European Court of Human Rights (ECHR) and specialized international courts and Tribunals such as the International Criminal Court and the International Criminal Tribunals for Rwanda and the former Yugoslavia (ICTR and ICTY).

The history if the ICJ began with the Hague Conferences of 1897 and 1907 as well as the Hague Convention of 1899.[10] These gatherings called for the establishment of a permanent arbitrary body open to all states for the settlement of international disputes. The decision was made to codify international law in treaties and to establish the first permanent international court, the Permanent Court of Arbitration, which is still functional.[11] Article 14 of the Covenant of the League of Nations, founded after World War I, allowed for the creation of a judicial body providing a peaceful method of dispute settlement based on international law.[12] This new judicial international organization was followed through by the establishment of the Permanent Court of International Justice (PCIJ) in 1920[13]. Between 1921 and 1939 the Permanent Court of Arbitration issued more than 30 decisions and 30 advisory opinions.[14] In the spring of 1945 at the San Francisco Conference, 50 nations drafted the Charter for a new World Organization.[15] However, there were 13 nations not party to the PCIJ Statute. The decision was made to replace the PCIJ with a new court, the International Court of Justice principle judiciary organ, and dissolve the League of Nations. Both the PCIJ and the League of Nations were dissolved on April 18, 1946.[16] In April 1946, the International Court of Justice was installed at the Peace Palace. The cases decided by the ICJ were to carry the same weight as those decided by the PCIJ.

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[1] United Nations, *Charter of the United Nations*, 1945, art. 7.
[2] United Nations, *Statute of the International Court of Justice,* 1945, art. 34(1).
[3] *United Nations, Statute of the International Court of Justice,* 1945, art. 22 and 39.
[4] International Court of Justice, *Home, n.d.*
[5] United Nations, *Charter of the United Nations*, 1945, art. 93(2).
[6] United Nations, *Charter of the United Nations*, 1945, art. 93(2).
[7] United Nations, *Charter of the United Nations*, 1945, art. 96.
[8] International Court of Justice, *International Court of Justice,* 2006, chapter 3.
[9] United Nations General Assembly, *Charter of the United Nations*, 1945, Art. 93(1).
[10] International Court of Justice, *International Court of Justice,* 2006, chapter 1.
[11] Permanent Court of Arbitration, *Home,* 2009
[12] League of Nations, *Covenant of the League of Nations,* 1919, Art 14
[13] International Court of Justice, *Home*, n.d.
[14] Permanent Court of Arbitration, *Home,* n.d.
[15] International Court of Justice, *International Court of Justice,* 2006, chapter 1.
[16] League of Nations, *Resolution for the Dissolution of the League of Nations*, 1946

The International Court of Justice consists of 15 judges each with 9 years terms in office renewable.[17] Five of these judges come from the Western part of the world, three from Africa, three from Asia, two from Latin America, and two from Eastern Europe.[18] The judges are elected at the United Nations Headquarters via secret ballot by the General Assembly and the Security Council.[19] In order to be elected, each judge must receive an absolute majority in both bodies, have a high moral character, expertise in international law, and qualify for the highest judiciary in their country.[20] The judges are independent and do not reflect or represent their governments in any way. No two judges may be elected from the same county. Ad hoc judges are added when the disputing parties have no representation among the judges and these ad hoc judges also retain full voting rights.[21]

The International Court of Justice adjudicates disputes submitted to it in accordance with the terms set forth by Article 38 of its Statute.[22] Once a nation has consented to the jurisdiction of the Court, it must accept the Court's verdict, a single opinion, as final.[23] This decision cannot be appealed, but a Member State can apply for a revision of a judgment under Article 61 of the ICJ Statute.[24] Case resolution encompasses settlement by the parties during the proceedings, state withdrawal from proceedings, and a court verdict. The judgment of the court must be fulfilled by the parties and the Security Council has the right to enforce the Court's judgments.[25] The Court does not have compulsory international jurisdiction and is not governed by an international constitution. The Court bases its decisions on treaties, principles of international law, international custom, judicial decisions, and the writings of the most highly qualified experts on international law.[26]

Procedure before the Court is governed by its Statute and the Rules of the Court.[27] Both of these parts join aspects of the Anglo-Saxon Common Law and European Civil Law. The Court makes decisions for the majority of its cases using Article 38 of the ICJ Statute. Article 38 specifies that 1) the Court, whose function is to decide in accordance with international law such disputes as are submitted to it shall apply: a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b) international custom, as evidence of a general practice accepted as law; c) the general principles of law recognized by civilized nations; d) subject to the provisions of Article 59, judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[28]

Article 59 of the ICJ Statute clarifies the common law notion of precedent, also known as *stare decisis*, does not apply to the decisions of the Court.[29] The Article specifically states that the decision of the Court has no binding force except between the parties and in respect of that particular case.[30] The Court rarely deviates from its previous decisions and treats those decisions as precedent. The Court can also, should the disputing parties agree to allow for it, decide *ex aequo et bono*, or in justice and fairness. This allows the Court to make a reasonable decision based on what is equal and fair under special circumstances.[31] However, this provision has yet to be used in the Court.

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[17] International Court of Justice, *Statute of the International Court of Justice, 1945,* art. 3 and 13.
[18] International Court of Justice, *Home,* 2009.
[19] International Court of Justice, *Statute of the International Court of Justice*, 1945, art. 4.
[20] International Court of Justice, *Statute of the International Court of Justice*, 1945, art. 4.
[21] International Court of Justice, *Statute of the International Court of Justice*, 1945, art. 31.
[22] International Court of Justice, *Statute of the International Court of Justice*, 1945, art. 38.
[23] International Court of Justice, *Statute of the International Court of Justice*, 1945, art. 60; United Nations, *Charter of the United Nations,* 1945, art. 94.
[24] International Court of Justice, *Statute of the International Court of Justice*, 1945, art. 61.
[25] United Nations, *Charter of the United Nations,* 1945, art 94(2).
[26] International Court of Justice, *Statute of the International Court of Justice,* 1945, art 38.
[27] International Court of Justice, *Rules of the Court,* 1978.
[28] International Court of Justice, *Rules of the Court,* 1978, art. 38.
[29] International Court of Justice, *Rules of the Court,* 1978, art. 59.
[30] International Court of Justice, *Rules of the Court,* 1978, art. 59.
[31] International Court of Justice, *Rules of the Court,* 1978, art. 38(2).

The International Court of Justice has authority over cases disputing parties refer to. These cases are governed by Article 36 (1 and 2) of the ICJ Statute which states that 1) the jurisdiction of the Court compromises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force as well as 2) the states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special arrangement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all illegal disputes concerning a) the interpretation of a treaty; b)any question of international law; c) the existence of any fact which, if established, would constitute a breach of an international obligation; and d) the nature or extent of the reparation to made for the breach of an international obligation.[32] The Court retains authority over treaties and conventions that provide recourse in the Court. The Court also has inferred consent to it jurisdiction.

Resolutions of disputes between States are achieved in several steps. The proceedings have to be instituted by either or both of the parties.[33] There are two ways to file suit. The first method is special agreement in which parties to the dispute agree to lodge a complaint. This complaint includes the subject of the dispute and parties to it. The second method is submitting an application. This application is unilateral meaning that it is submitted by the applicant state against the respondent state. Proceedings include written and oral phase. The written phase includes parties filing and exchanging pleadings.[34] However, only two pleadings are allowed. The oral phase consists of public hearings addressing the Court. All proceedings are open to the public unless the parties involved request otherwise. After the completion of the proceedings each party reads their final submission. After this submission, the members of the Court retire for individual research, exchange of notes, and collective secret deliberations. Upon the deliberations, public reading of the Judgment or Opinion including separate or dissenting opinions take place in the Great Hall of Justice.

Only the five organs of the United Nations and the sixteen specialized agencies of the United Nations may ask the ICJ for what is known as an advisory opinion.[35] Advisory opinions are governed by Article 65 of the ICJ Statute which states that the Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.[36] A written request must be submitted along with all the supporting documents. The proceedings are similar for advisory opinions as they are for court cases. Advisory opinions include written and oral statements. After completion and deliberations, the Opinion is released to the Secretary General, members of the United Nations, and Member States or international organizations. Decisions of the Court have no binding force unless the parties agree to this beforehand.

As a significant contributor to world peace, the future of the International Court of Justice lies within the cooperation of the international community. By developing the principles of international law, which provide nations of the world with a framework for coping with potential disputes, the International Court of Justice leads the way to providing greater resolutions to international conflicts. Potential challenges of the Court include the enforcement of its judgments and that the decisions made by the Court may result in catastrophic events.

***Must Reads***

International Court of Justice (1978). *Rules of the Court.* Retrieved November 8,2009 from the International Court of Justice's Web site: http://www.icj-

[32] International Court of Justice, *Statute of the International Court of Justice*, 1945, art. 36.
[33] International Court of Justice, *Statute of the International Court of Justice*, 1945, art. 40.
[34] International Court of Justice, *Statute of the International Court of Justice*, 1945, art. 43.
[35] United Nations, *Charter of the United Nations,* 1945, Art 96.
[36] International Court of Justice, *Statute of the International Court of Justice*, 1945, art. 65.

cij.org/documents/index.php?p1=4&p2=3&p3=0
*The Rules of the Court were adopted of the ICJ in order to detail the inner workings and procedures of the Court. The Rules provide with a thorough explanation of the proceedings. Delegates should refer to them during their preparation for a better understanding of all Court documents they might encounter as well as general principles applied to the case. NMUN will provide adapted rules of procedure for the ICJ simulation.*

United Nations. (1945). *Charter of the United Nations.* Retrieved November 8, 2009 from the United Nations Web site: http://www.un.org/en/documents/charter/index.shtml
*The Charter of the United Nations is the founding document of the organization. Upon its signature in 1945, the Charter established the main organs, functions and inner workings of the UN, Chapter XIV of the Charter is entirely dedicated to the International Court of Justice and establishes the general framework of the Court. Delegates must note that the Statute of the Court was annexed to the Charter since the very beginning of the United Nations, thus emphasizing the importance of the judicial organ of the UN.*

United Nations. (1945). *Statute of the International Court of Justice.* Retrieved August 24, 2009, from the International Court of Justice Web site: www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0
*This portion of the Web site of the International Court of Justice is primarily devoted to the basic documents of the Court. These documents include the United Nations Charter, the Statute of the Court, the Rules of the Court, practice directions and other texts on privileges immunities, etc. In order to fully understand the documentation of the Court, one must read through the information given in this section of the Court's Web site. It lays the foundation for a better understanding of the International Court of Justice.*

## I. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)

***Introduction***

The case presented to the Court deals with the application of the Convention on the Prevention and Punishment of the Crime of Genocide between Croatia and Serbia.[37] With a long history of conflict in the Balkans in the twentieth century, Croatia and Serbia were not the first states to present such a case to the International Court of Justice (ICJ). In 1993, a case between Serbia and Montenegro and Bosnia and Herzegovina was also introduced to the Court.[38] It took the court 14 years for this case to reach a final judgment on 26 February 2007.[39] The current case is still under examination by the Court and is related to events that occurred during the Croatian War of Independence between 1991 and 1995.[40]

***History of the conflict***

The Federal People's Republic of Yugoslavia was formed during the Second World War and united six Socialist Republics and two Socialist Autonomous Provinces under one flag. In the aftermath of the war, a communist government ceased power and renamed the country Socialist Federal Republic of Yugoslavia (SFRY). The largest of Yugoslav state included Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Slovenia and Serbia, including Vojvodina and Kosovo. In 1991, the SFRY started to face its own dislocation during the Yugoslav wars.

On 28 February 1989, the Croatian Democratic Union was formed under the leadership of Dr. Franjo Tudjman who lead Croatia to restore its political independence as a sovereign State .[41] Faced with the dislocation of the SFRY,

[37] International Court of Justice, *Croatia v. Serbia - Application instituting proceedings*, 1999.
[38] International Court of Justice, *Serbia and Montenegro v. Bosnia and Herzegovina - Application instituting proceedings*, 1993.
[39] International Court of Justice, *Serbia and Montenegro v. Bosnia and Herzegovina - Judgment*, 2007.
[40] International Court of Justice, *Croatia v. Serbia - Application instituting proceedings*, 1999.
[41] Kearns, *Croatian politics : authoritarianism or democracy ?*, 1998, p.247-258.

Croatia and Slovenia each declared their independence on 25 June 1991.[42] On 22 May 1992, Croatia was granted membership in the United Nations.[43] Croatia's declaration of independence led to the Croatian War of Independence from 1991 to 1995.[44]

The war was waged between Croatian and Serbs living in the Yugoslav Republic of Croatia, who opposed its secession from the SFRY.[45] Indeed, the Croatian population aimed to establish a sovereign country outside Yugoslavia, and the Serbs, supported by Serbia, opposed the secession and wanted to remain a part of Yugoslavia.[46] The ethnic battle also originated in the rise to power of Slobodan Milosevic in Serbia, now part of the Federal Republic of Yugoslavia (FRY) with Montenegro. The arrival of Milosevic at the head of Serbia started a strong nationalist movement in Croatia and led to the election of Franco Tudjman and the Croatian Democratic Union in April 1991. The party had a very strong nationalist tendency and publicly expressed its aversion for Serbs living on the territory of Croatia and in Serbia. The Croatian government held the referendum on independence in May 1991. According to the Serb population, the options were unfairly presented and a massive boycott followed, allowing an overwhelming 94,17% of the Croat population to vote in favor of independence. With the tensions that followed, the government delayed the independence by three months following the declaration of 25 June 1991. During the declaration of independence of Croatia, the constitution of the new state erased all mention of the Serb population of Croatia as a constituent nation and only referred to "all other nations". The Serbian population interpreted this change in the Constitution as a reclassification of their ethnic group as a "national minority".

Prior to the independence of Croatia, on 28 February 1991, Serbian rebel leaders in the Knin region announced their intention to unite with the Serbs in Serbia, Montenegro and Bosnia and Herzegovina.[47] Serbs then constituted one-eighth of the Croatian population.[48] Encouraged and armed by the FRY federal military, Serb guerrillas took control of about one-third of the republic, driving out members of other ethnic groups.[49] In July 1991, 30,000 individuals were alleged to be registered as displaced persons in Croatia.[50] The refugee crisis reached its peak in November 1991, when 600,000 displaced persons were allegedly registered on the territory of Croatia.[51]

In January 1992, after 14 cease-fires had been broken, a United Nations-sponsored truce took hold.[52] In Sarajevo, Croatia and the « Yugoslav People's Army » (the JNA) signed a cease-fire brokered by Mr. Cyrus Vance, former Secretary of State of the United States of America and a special envoy of the United Nations Secretary-General, Mr. Boutros Boutros-Ghali.[53] In reaction to the increase of violence in the region, the United Nations Security Council decided to pass Resolution 743 in February of the same year, following the recommendation of the Secretary General.[54] The resolution announced the creation of the United Nations Protection Force (UNPROFOR), a peacekeeping mission in Croatia.[55] The Force was fully deployed in April, when the Security Council passed resolution 749 following several alarming reports from the first contingents.[56] Although UNPROFOR was first deployed in the region for a period of twelve months, its mandate was extended and modified several times for interim periods by several resolutions of the Security Council.[57] For nearly three years, 14,000 UN peacekeepers maintained an uneasy standoff between the Croatian defense forces and the rebel Serbs.[58]

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[42] Kearns, *Croatian politics : authoritarianism or democracy ?*, 1998, p. 259.
[43] United Nations Security Council, *Resolution 752*, 1992.
[44] Zimmermann, *War in the Balkans: A Foreign Affairs Reader*, 1999, Introduction, p.14.
[45] Zimmermann, *War in the Balkans: A Foreign Affairs Reader*, 1999, Introduction, p.15.
[46] Malesevic, *Ideology, legitimacy, and the new state: Yugoslavia, Serbia, and Croatia,* 2002, Introduction, p.9.
[47] Malesevic, *Ideology, legitimacy, and the new state: Yugoslavia, Serbia, and Croatia,* 2002, Introduction, p.9.
[48] Ramet, *Serbia, Croatia and Slovenia at peace and at war : selected writings, 1983-2007*,2008, p.45.
[49] Gagnon, *The myth of ethnic war : Serbia and Croatia in the 1990s*. 2004, Part 1, p.38.
[50] Gagnon, *The myth of ethnic war : Serbia and Croatia in the 1990s*. 2004, Part 1, p.39.
[51] Gagnon, *The myth of ethnic war : Serbia and Croatia in the 1990s*. 2004, Part 1, p.40.
[52] Gagnon, *The myth of ethnic war : Serbia and Croatia in the 1990s*. 2004, Part 1, p.50.
[53] Gagnon, *The myth of ethnic war : Serbia and Croatia in the 1990s*., 2004, Part 1, p.30.
[54] United Nations Security Council, *Resolution 743*, 1992.
[55] United Nations Security Council, *Resolution 779*, 1992.
[56] United Nations Security Council, *Resolution 749*, 1992.
[57] United Nations Protection Force, *Background*, 1996.
[58] United Nations Security Council, Resolution 721, *Socialist Federal Rep. of Yugoslavia*, 1991. United Nations Security Council, *Resolution 908*, 1994.

The war officially ended on 14 December 1995, when leaders of Croatia, Bosnia, and Serbia signed the Dayton peace accords.[59] The agreement also established the current territorial limits and political structures of Bosnia and Herzegovina.[60]

***Statement of facts***

The events relevant to the case cover a period of almost four years, between 1991 and 1995, following Croatia's declaration of independence, on 25 June 1991.[61]

According to Croatia's Application instituting proceedings before the Court, the FRY repeatedly violated the United Nations General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, between 1991 and 1995.[62]

First, the FRY is said to have planned an 'ethnic cleansing' of Croatian citizens on the territory of Croatia, in the Knin region, eastern and western Slavonia, and Dalmatia: a form of genocide resulting in large numbers of Croatian citizens being displaced, killed, tortured, or illegally detained, as well as extensive property destruction.[63] Second, the FRY is said to have directed, encouraged, and urged Croatian citizens of Serb ethnicity in the Knin region to evacuate the area in 1995 and engaged in actions culminating in a second round of ethnic cleansing.[64]

Those events allegedly resulted in 20,000 dead, 55,000 injured and over 3,000 individuals still unaccounted for.[65] Furthermore, it is estimated that 10 % of the country's housing capacity have been destroyed.[66]

Croatia further claims that a great number of explosive devices of various kinds were planted on its territory, currently rendering some 300,000 hectares of arable land unusable, and that around 25 % of its total economic capacity was damaged or destroyed.[67]

***Procedural history***

On 2 July 1999, Croatia filed an Application against the FRY in respect of a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide, approved by the General Assembly of the United Nations on 9 December 1948.[68] Both Croatia and Serbia are parties to the Convention. Croatia accessed the Convention on 12 October 1992 by succession of Yugoslavia.[69] While it accessed the Convention later on 12 March 2001, Serbia also did it by succession of Yugoslavia. [70]

The Application invoked Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide as the basis of the jurisdiction of the Court.[71] Article IX of the Convention establishes the right for any of the parties to a dispute, to submit it to the International Court of Justice if related to the interpretation, application or fulfillment of the Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III.[72]

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[59] *Dayton Peace Agreement*, 14 December 1995.
[60] *Dayton Peace Agreement*, 14 December 1995, Annex 4.
[61] International Court of Justice, *Croatia v. Serbia - Application instituting proceedings*, 1999, p.1.
[62] International Court of Justice, *Croatia v. Serbia - Application instituting proceedings*, 1999, p.2.
[63] International Court of Justice, *Croatia v. Serbia - Application instituting proceedings*, 1999, p.2.
[64] Peskin, *International justice in Rwanda and the Balkans : virtual trials and the struggle for state cooperation*, 2008, p46.
[65] International Court of Justice, *Croatia v. Serbia - Application instituting proceedings*, 1999, p.3.
[66] International Court of Justice, *Croatia v. Serbia - Application instituting proceedings*, 1999, p.4.
[67] International Court of Justice, *Croatia v. Serbia - Application instituting proceedings*, 1999, p.4.
[68] International Court of Justice, *Croatia v. Serbia - Application instituting proceedings*, 1999, p.1.
[69] United Nations Treaty Collection, *Convention on the Prevention and Punishment of the crime of Genocide,* 2009.
[70] United Nations Treaty Collection, *Convention on the Prevention and Punishment of the crime of Genocide,* 2009.
[71] United Nations General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, article IX.
[72] United Nations General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, article IX.

According to the Statute of the Court, only states may be parties to the Court.[73] Under Article 93 of the Charter of the United Nations, all states member of the United Nations are a party to the Court.[74] The ICJ's jurisdiction is also determined in accordance with Article 36 of the ICJ-Statute, which provides that the Court has jurisdiction over any case presented to it by the parties as well as the cases specified by the Charter of the United Nations and international treaties.[75] While in the first case the Court requires the agreement of both parties to have jurisdiction (also known as jurisdiction by "special agreement" or "*compromis*"), Article 36 (1) of the Statute of the Court also refers to a jurisdiction by treaty. [76] In the second case, the treaty must give explicit jurisdiction to the Court in cases regarding its application or interpretation, since the decisions of the court are binding to all parties to the Statute of the Court.

On 11 September 2002, the FRY raised preliminary objections relating to the Court's jurisdiction to entertain the case and to the admissibility of the Application.[77] Two objections to the jurisdiction of the Court were entertained: the identification of the Respondent Party and issues of jurisdiction *rationae materiae*.[78]

*Identification of the respondent Party*
The question of Serbia's access to the Court is relevant in this case, as the previously mentioned events took place from 1991 to 1995, before Serbia succeeded the FRY as a state.[79]

In February 2003, the FRY informed the Court that, following the adoption and promulgation of the Constitutional Charter of Serbia and Montenegro, by the Assembly of the FRY on 4 February 2003, the name of the State had been changed from the "Federal Republic of Yugoslavia" to "Serbia and Montenegro".[80] Following the announcement of the results of a referendum held in Montenegro on 21 May 2006, the National Assembly of the Republic of Montenegro adopted a declaration of independence on 3 June 2006.[81]

It first noted that, by a letter dated 3 June 2006, the President of the Republic of Serbia (Serbia) informed the Secretary-General of the United Nations that "the membership of the state union Serbia and Montenegro in the United Nations, including all organs and organizations of the United Nations system, [would be] continued by the Republic of Serbia, on the basis of Article 60 of the Constitutional Charter of Serbia and Montenegro".[82] He further stated that in the United Nations the name 'Republic of Serbia' was to be henceforth used instead of the name 'Serbia and Montenegro' and added that the Republic of Serbia "remain[ed] responsible in full for all the rights and obligations of the state union of Serbia and Montenegro under the UN Charter".[83] In another communication dated 16 June 2006, the Minister for Foreign Affairs of Serbia informed the Secretary-General of the United Nations that his country would continue to honor the past commitment to treaties and international agreement of the former Republic of Serbia and Montenegro.[84]

The Court therefore found the Republic of Serbia to be bound by the Convention on the Prevention and Punishment of the Crime of Genocide as the successor of the FRY, which in turn is the successor of the Socialist Federal Republic of Yugoslavia (SFRY).[85]

The Court further observed that the facts and events occurred at a period of time when Serbia and Montenegro were part of the same State.[86] It noted that Serbia had accepted "continuity between Serbia and Montenegro and the

[73] United Nations, *Statute of the International Court of Justice,* 1945, art 34.
[74] United Nations General Assembly, *Charter of the United Nations,* 1945, art. 93.
[75] United Nations, *Statute of the International Court of Justice,* 1945, art 36(1).
[76] United Nations, *Statute of the International Court of Justice,* 1945, art 36(1).
[77] International Court of Justice, *Preliminary Objections of the Federal Republic of Yugoslavia*, 2002.
[78] International Court of Justice, *Preliminary Objections of the Federal Republic of Yugoslavia*, 2002, p.2.
[79] International Court of Justice, *Croatia v. Serbia - Application instituting proceedings*, 1999, p.3.
[80] International Court of Justice, *Croatia v. Serbia - Judgment on the Preliminary Objections,* 2008, para.11.
[81] International Court of Justice, *Croatia v. Serbia - Judgment on the Preliminary Objections*, 2008, para.11.
[82] International Court of Justice, *Croatia v. Serbia - Judgment on the Preliminary Objections*, 2008, para.23.
[83] International Court of Justice, *Croatia v. Serbia - Judgment on the Preliminary Objections*, 2008, para.23.
[84] International Court of Justice, *Croatia v. Serbia - Judgment on the Preliminary Objections*, 2008, para.24.
[85] International Court of Justice, *Croatia v. Serbia - Judgment on the Preliminary Objections*, 2008, para.32.
[86] International Court of Justice, *Summary of the Judgment of 18 November 2008,* 2008.

Republic of Serbia".[87] Montenegro, on the other hand, is a new State admitted as such to the United Nations.[88] Therefore, it does not continue the international legal personality of the State union of Serbia and Montenegro.[89]

The Court concluded that Serbia is the sole Respondent in the case.[90] It also accordingly concluded that on 1 November 2000, the Court was open to the FRY and rejected the preliminary objection raised by Serbia on the matter.[91]

*Issues of jurisdiction ratione materiae*
The Court then considered the question of its material jurisdiction or jurisdiction *ratione materiae*, which forms the second aspect of the objection submitted by Serbia requesting the Court to declare that it lacks jurisdiction.[92]

Indeed, Serbia did not find itself a party to the Convention on the Prevention and Punishment of the Crime of Genocide, at the date of filing of the application instituting proceedings, namely on 2 July 1999.[93] It maintained that it only became a party by accession in June 2001.[94] Furthermore the notification of accession by the FRY, dated 6 March 2001 and deposited on 12 March 2001, contained a reservation to the effect that the FRY "did not consider itself bound by Article IX of the Convention".[95]

The Court considered the history of the relationship with the Convention on the Prevention and Punishment of the Crime of Genocide, of, first, the SFRY, and, subsequently, of the Respondent. Examining in particular a formal declaration adopted on behalf of the FRY, on 27 April 1992, and an official note of the same date transmitted to the Secretary-General of the United Nations, it noted that the FRY did not consider itself to be one of the successor States of the SFRY, emerging from the dissolution of that State, but the sole continuing State, maintaining the personality of the former SFRY.[96]

The Court therefore considered that from that date onwards the FRY was bound by the obligations of a party in respect of all the multilateral conventions to which the SFRY had been a party at the time of its dissolution, including the Convention on the Prevention and Punishment of the Crime of Genocide.[97] The Court consequently rejected this objection.[98]

Since the court concluded that Serbia could be identified as a respondent party and that it was a party to the Convention on the Prevention and Punishment of the Crime of Genocide since it inherited the obligations of the state entities that preceded, it established that it did have jurisdiction over the case.[99] On 20 January 2009, following this judgment, the Court fixed 22 March 2010 as the time-limit for the filing of the Counter-Memorial of the Republic of Serbia which is the next step in the proceedings of the Court regarding this case.[100]

***Merits of the case***

Serbia has been charged with repeated and numerous violations of the United Nations General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide. According to the Republic of Croatia, the Federal Republic of Yugoslavia has breached its legal obligations towards the people and Republic of Croatia under

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[87] International Court of Justice, *Croatia v. Serbia - Judgment on the Preliminary Objections*, 2008, para.32.
[88] United Nations Security Council, *Resolution 1691*, 2006.
[89] International Court of Justice, *Croatia v. Serbia - Judgment on the Preliminary Objections*, 2008, para.33.
[90] International Court of Justice, *Croatia v. Serbia - Judgment on the Preliminary Objections*, 2008, para.34.
[91] International Court of Justice, *Croatia v. Serbia - Judgment on the Preliminary Objections*, 2008, para.34 and 146.
[92] International Court of Justice, *Preliminary Objections of the Federal Republic of Yugoslavia*, 2002.
[93] International Court of Justice, *Preliminary Objections of the Federal Republic of Yugoslavia*, 2002, p.2.
[94] International Court of Justice, *Preliminary Objections of the Federal Republic of Yugoslavia*, 2002, p.2.
[95] International Court of Justice, *Croatia v. Serbia - Judgment on the Preliminary Objections*, 2008, para.94.
[96] United Nations General Assembly, *Resolution 55/12, Admission of the Federal Republic of Yugoslavia to membership in the United Nations*, 2000.
[97] International Court of Justice, *Croatia v. Serbia - Judgment on the Preliminary Objections*, 2008, para.96.
[98] International Court of Justice, *Croatia v. Serbia - Judgment on the Preliminary Objections*, 2008, para.146.
[99] International Court of Justice, *Judgment Preliminary Objections,* 2008, para 119.
[100] International Court of Justice, *Fixing of the time-limit for the filing of the Counter-Memorial of Serbia,* 2009, p.2.

Articles I, II (a) , II ( b), II (c) , II (d), III (a) , III (b), III(c), III (d), III (e), IV and V of the Genocide Convention.[101]

*Violations of Articles I of the Convention on the Prevention and Punishment of the Crime of Genocide*
Article I of the Convention on the Prevention and Punishment of the Crime of Genocide recognizes genocide as a crime under international law that must be prevented when possible and punished when applicable.[102] By becoming a party to the Convention, any state has the legal obligation of undertaking actions in order to fulfill the objectives of the convention in the fields of prevention and punishment of genocide. Dealing with a potential violation of article I, proof must be made by Croatia that Serbia did not try to prevent the events reported in the application and therefore violated article I of the Convention, although it was possible for Serbia to prevent said events. The applicant must thus prove that Serbia did not prevent an act of genocide, and additionally, that Serbia had a possibility to prevent the genocide. Article I thus establishes the main obligation under the Convention. In turn, the exact meaning of "genocide" is defined in Articles II and III of the convention.

*Violations of Articles II and III of the Convention on the Prevention and Punishment of the Crime of Genocide*
The Convention on the Prevention and Punishment of the Crime of Genocide defines genocide as follows (Art. II.): " genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: *(a)* Killing members of the group; *(b)* Causing serious bodily or mental harm to members of the group; *(c)* Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; *(d)* Imposing measures intended to prevent births within the group; *(e)* Forcibly transferring children of the group to another group."[103] In addition, the Convention outlaws the following acts (Art. III): *"(a)* Genocide; *(b)* Conspiracy to commit genocide; *(c)* Direct and public incitement to commit genocide; *(d)* Attempt to commit genocide; *(e)* Complicity in genocide." [104] Serbia has been accused of violations of articles II and III of the Convention on the Prevention and Punishment of the Crime of Genocide, by seizing control of the Knin region and eastern Slavonia from 1991 to 1995, with the intent to "ethnically cleanse" these regions, and to unite them with the Federal Republic of Yugoslavia to form a "greater" Serbian State.[105]

In the case of a potential violation of the Articles II and III of the Convention on the Prevention and Punishment of the Crime of Genocide, the Court will have to determine if the elements of the crime of genocide are present in the case of Croatia vs. Serbia. According to the Convention, three elements are necessary: the presence of "a national, ethnical, racial or religious group", the criminal intent and the presence of one of the listed criminal acts.[106] If the court finds that an act of genocide has occurred, it will further have to satisfy itself that the act of genocide is attributable to Serbia as a state, as only a violation of international law attributable to a state will trigger state responsibility under international law.[107] Generally, attribution is given if the act in question is carried out by an organ of the state, or a person exercising elements of governmental authority.[108] If the act is carried out by a person whose conduct is not attributable to the state through his or her institutional function, there will nevertheless be attribution of conduct if said person is under the control of the state.[109]

In a previous judgment on the case of Serbia and Montenegro v. Bosnia and Herzegovina, the International Court of Justice defined the protected groups cited by the Convention.[110] According to the judgment of 2007 by the ICJ, the protected group allegedly targeted by genocide must be "in law positively defined".[111] In order to be considered

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[101] International Court of Justice, *Croatia v. Serbia - Application instituting proceedings*, 1999, p.17.
[102] United Nations Treaty Collection, *Convention on the Prevention and Punishment of the crime of Genocide,* 2009, art 1.
[103] United Nations General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, article II.
[104] United Nations General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, article III.
[105] International Court of Justice, *Croatia v. Serbia - Application instituting proceedings*, 1999, p.18.
[106] United Nations General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, article II.
[107] United Nations International Law Commission, *Draft Articles on State Responsibility*, 2001, Article 2.
[108] United Nations International Law Commission, *Draft Articles on State Responsibility*, 2001, Articles 4, 5.
[109] United Nations International Law Commission, *Draft Articles on State Responsibility*, 2001, Article 8.
[110] International Court of Justice, *Serbia and Montenegro v. Bosnia and Herzegovina - Judgment*, 2007, para 191 to 201.
[111] International Court of Justice, *Serbia and Montenegro v. Bosnia and Herzegovina - Judgment*, 2007, para 196.

protected by the Convention, the group above-mentioned must be destroyed in part of in its entirety.[112] In its judgment on the case of Serbia and Montenegro v. Bosnia and Herzegovina, the ICJ established that a "substantial part" of the group must be concerned by the alleged crime of genocide.[113] A second criteria invoked by the court pertains to the geographical element of the alleged crimes. The judgment states that the intent does not have to involve every member of the protected group, but can target the members of that group in a "geographically limited area".[114] The Court also provides a qualitative criteria in this regard and also takes into consideration the relative importance of the part of the protected group allegedly victim of genocide.[115] This criterion means that, if the victims of the alleged genocide are considered "emblematic" or essential to the survival of the protected group, the numeric criteria of substantiality can be atoned to a certain degree.[116]

In addition to the nature of the group targeted during the claimed genocide, proof of a criminal intent to destroy must be made.[117] The ICJ interprets that mental element as a "specific intent" or *dolus specialis*.[118] The perpetrator must consciously desire that the acts he committed will result in the destruction in whole or in part of the group targeted.

In the case of Croatia vs. Serbia, the Court must determine if the State of Serbia specifically targeted Croatian citizens based on their nationality and if it was the intent of the State to destroy this group in whole or in part. The question of whether the State of Serbia carried out any specific acts will be governed by the rules of state responsibility.

In addition to violations of article II of the Convention, the State of Serbia is also accused of violations of article III of the same convention.[119] Again, it is for the Court to determine if any of the acts mentioned in the Application are in accordance with the acts outlawed in article III of the Convention on Prevention and Punishment of the Crime of Genocide.

*Violations of Articles IV and V of the Convention on the Prevention and Punishment of the Crime of Genocide*
Under Article IV of the Convention on the Prevention and Punishment of the Crime of Genocide, individuals who commit genocide, or any of the acts described in Article III, must be punished, regardless of their official or private status.[120] In addition, under Article V, States parties must provide effective penalties for persons guilty of genocide, or any of the acts described in Article III.[121] Serbia has been accused of violations of its obligations under Article IV and Article V of the Convention by not punishing individuals who committed acts of genocide, or other acts described in Article III, and not providing for effective penalties for such persons.

In the application instituting proceedings set by Croatia, the State claims that Serbia did not punish individuals committing acts described in article III of the Convention. The absence of prosecution and adequate punishment for the individuals responsible for the acts outlawed by Article III constitute violations of both articles IV and V of the Convention. Under Article V, individuals accused of crimes described in Article III must be prosecuted and punished according to the national Constitution and legal provisions applicable in the country. The Convention in its Article IV states that these individuals should be punished regardless of their status.

In the case of Croatia vs Serbia, the Court will have to determine if the measures taken by Serbia fulfill the dispositions of Article IV and V of the Convention on Prevention and Punishment of the Crime of Genocide or if, as claimed by Croatia, actions taken by the Respondent do not constitute "effective penalties for persons guilty of

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[112] United Nations General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, article II.
[113] International Court of Justice, *Serbia and Montenegro v. Bosnia and Herzegovina - Judgment*, 2007, para 198.
[114] International Court of Justice, *Serbia and Montenegro v. Bosnia and Herzegovina - Judgment*, 2007, para 199.
[115] International Court of Justice, *Serbia and Montenegro v. Bosnia and Herzegovina - Judgment*, 2007, para 200.
[116] International Court of Justice, *Serbia and Montenegro v. Bosnia and Herzegovina - Judgment*, 2007, para 200.
[117] United Nations General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, article II.
[118] International Court of Justice, *Serbia and Montenegro v. Bosnia and Herzegovina - Judgment*, 2007, para 187.
[119] International Court of Justice, *Croatia v. Serbia - Application instituting proceedings*, 1999, p.17.
[120] United Nations General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, article IV.
[121] United Nations General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, article V.

genocide or any of the other acts enumerated in article III".

***Issues to discuss***

Since all preliminary objections raised by Serbia were rejected by the Court, the counsels can no longer contest the jurisdiction of the ICJ and will now concentrate their arguments on the material claims of Croatia. In the case submitted, the Court will have to determine if the violations of the Convention on the Prevention and Punishment of the Crime of Genocide that allegedly occurred as stated in Croatia's application have happened and fit the definitions of those violations provided by Article I, II, III, IV and V of the Convention.

***Must Reads***

> *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948. Retrieved July 23rd, 2009, from http://www.unhchr.ch/html/menu3/b/p_genoci.htm
> *After World War II, the international community was horrified by the atrocities it had just witnessed. The UN was one of their efforts; this treaty was another. It requires that States take action to stop genocide. Delegates should have a copy of the Convention as it represents the essential document related to the charges, in this case.*
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> International Court of Justice (1945). *Statute of the International Court of Justice.* Retrieved July 23, 2009, from http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0
> *The Statute of the ICJ provides with the general dispositions of the Court. This document determines its organization and functions and outlines the proceedings in use during a case. Delegates should have a copy of the Statute and be aware of its main provisions.*
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> International Court of Justice (1999). *Application instituting proceedings.* Retrieved August 14, 2009, from http://www.icj-cij.org/docket/index.php?p1=3&p2=1&k=73&case=118&code=cry&p3=0
> *On 2 July 1999, Croatia filed an Application against the FRY in respect of a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide, approved by the General Assembly of the United Nations on 9 December 1948. The Application invoked Article IX of the Genocide Convention as the basis of the jurisdiction of the Court. Delegates should have a copy of the Application as it recalls the fundamentals of the indictment.*

## II. Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)

***Introduction***

The case at hand deals with one of the most pressing questions of contemporary international law: How can the international community respond to grave violations of human rights ordered by a head of state and make sure that such violations are addressed? The case was brought before the International Court of Justice (ICJ) by the Kingdom of Belgium over the question whether Senegal has fulfilled its obligations under international law to either prosecute or extradite former President of the Chad, Hissène Habré.[122] Belgium argues in its application that Senegal has failed to respond to Belgium's request to bring Hissène Habré to trial for acts that he allegedly committed during his term of office and that can be characterized as crimes against humanity.[123] Chadian victims had instituted proceedings in front of a Belgian court after proceedings before the Court in Senegal had failed. Belgium consequently asked Senegal to either bring Mr. Habré to trial or to extradite him to Belgium, so that the Belgian courts could institute proceedings. Senegal refused the extradition. The Senegalese President Abdoulaye Wade reportedly stated that he refused the extradition on the grounds that Africans should be brought to justice in Africa.[124] The proceedings will revolve around questions as to whether a state has an obligation under conventional or customary international law to prosecute certain crimes, regardless of whether these crimes have been committed

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[122] International Court of Justice, *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite, Application Instituting Proceedings,* 2009, paras. 7/8.
[123] International Court of Justice, *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite, Application Instituting Proceedings,* 2009, para. 7.
[124] BBC, *Senegal trial for ex-Chad leader*, 2006.

on the territory of the state in question or by a national of that state. In order to address the applicant's case, Senegal will need to demonstrate that there has been adequate prosecution of Hissène Habré, or that there was no obligation under international treaty or customary law to do so.

***Statement of the Facts***

Hissène Habré, also known as the "Desert Fox", came into power in Chad in 1982, supported by the American and French governments who saw him as a counter-weight to Libyan President Muammar el-Qaddafi.[125] A conflict between Libya and Chad over the Azouzou Strip ended with President Muammar el-Qaddafi and Hissène Habré accepting Libyan control of the area.[126] Habre was able to unify the Chadian state under the FAN, Forces Armées du Nord.[127] His control of Chad, especially his building of coalitions among various ethnic groups, was based on military dominance over the factionalism that has characterized Chadian politics.[128] Throughout his one-party regime, grave human rights abuses including arresting and killing of members from opposing political groups on a large scale were reported by various human rights organizations.[129] A Commission of Inquiry (Truth Commission) that was set up in the 1990s said that more than 40,000 politically motivated killings and more than 200,000 cases of torture had taken place while Mr. Habré was in office.[130] According to the Truth Commission's report, both the *Direction de la Documentation et de la Sécurité* (DDS, National Security Service) and the *Brigade Spéciale d'Intervention Rapide* (BSIR, Special Rapid Action Brigade), a small elite group within the DDS, were responsible for carrying out acts allegedly including arrest, torture, assassinations and large-scale massacres.[131]

Habré was overthrown in 1990 by Idriss Déby at which time Habré fled to Senegal.[132] While the Truth Commission called for the immediate prosecution of those responsible for the atrocious human rights violations that marked Habrés regime, Senegal did not institute proceedings against Habré, who resides in Senegal since he left Chad in 1990. Likewise, Chad did not make any formal extradition request to Senegal with the intention to bring Mr. Habré to trial.[133] However, in 1999 the successful arrest of Augusto Pinochet in London and subsequent ruling by the British House of Lords led to a milestone in international law affirming that universal jurisdiction, i.e. the possibility to prosecute individuals for *inter alia* acts of torture in any given state, regardless of whether this state is tied to the individual by the principle of territoriality (i.e. the acts were committed in the state) or the principle of personality (either the perpetrator or one or more victims are nationals of the state in question).[134] The so-called "Pinochet Precedent" motivated victims' associations in Chad to prepare a case with the assistance of Human Rights Watch to bring a case against Mr. Habré in Senegal.[135] This marks the beginning of the intricate procedural history preceding the filing of the case in front of the ICJ.

***Procedural history***

Belgium, the applicant, instituted proceedings against Senegal on the grounds that a dispute exists between the Kingdom of Belgium and the Republic of Senegal regarding Senegal's compliance with its obligation to prosecute the former President of Chad, Hissène Habré, or to extradite him to Belgium for the purposes of criminal proceedings.[136] This application follows a long series of proceedings in front of different domestic courts.

*Proceedings in Senegal*

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[125] Brody, *The Prosecution of Hissène Habré – An "African Pinochet"*, p. 321, 2001.
[126] Paulson, Colter, *"Compliance with Final Judgements of the International Court of Justice since 1987,"* page 437, 2004.
[127] Roger, Charlton, *"Warlords and Militarism in Chad,"* page 17, 1989.
[128] Roger, Charlton, *"Warlords and Militarism in Chad,"* page 18, 1989.
[129] Brody, *The Prosecution of Hissène Habré – An "African Pinochet"*, p. 322, 2001.
[130] BBC, *Chad's Hissène Habré*, 2006.
[131] Brody, *The Prosecution of Hissène Habré – An "African Pinochet"*, p. 322, 2001.
[132] Baker, Bruce, *"Twilight of Impunity for Africa's Presidential Criminals,"* page 1487, 2004.
[133] Brody, *The Prosecution of Hissène Habré – An "African Pinochet"*, p. 323, 2001.
[134] *R* v *Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 3)*, 1 AC 147, House of Lords, pp. 106–108, 2000.
[135] Brody, *The Prosecution of Hissène Habré – An "African Pinochet"*, p. 323, 2001.
[136] International Court of Justice, *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite, Application Instituting Proceedings,* 2009, paras. 7/8.

On January 26, 2000, seven Chadian victims and the AVCRP (Chadian Association of Victims of Political Repression and Crime) filed a criminal complaint in the Dakar Regional Court.[137] The prosecution provided details of 97 cases of political killings, 142 cases of torture and 100 cases of "disappearance" during Habre's rule.[138] Investigative Judge Kandji of the Dakar Regional Court indicted Habré on torture charges and Habré was subsequently placed on house arrest. Habre's attorneys filed a motion to dismiss the case arguing that Senegal did not have jurisdiction over alleged crimes committed in Chad.[139] The case met with resistance from the new Senegalese government under President Abdoulaye Wade, who appointed Habré's attorney and later presided over a panel that removed Judge Kandji from the case. The indictment was finally dismissed by the Dakar Court of Appeal (*Chambre d'Accusation, Cour d'Appel*) on the grounds that crimes against humanity did not form part of Senegalese criminal law and that Senegal could not prosecute acts of torture allegedly committed by an alien abroad.[140] President Wade supported the ruling and maintained that Senegal had no jurisdiction to pursue the charges of crimes committed outside Senegal. Wade additionally indicated, "if there was to be a trial, it should be in Chad or in countries like France or the US that had backed Habre's rule."[141]

*Proceedings in Belgium and Belgian extradition request*

Following the failure of proceedings in Senegal, ACVRP and several individuals subsequently filed a criminal complaint with the Belgian judicial authorities.[142] Due to the fact that one of the victims who have filed the cases is a Belgian national of Chadian origin, Belgian courts intend to exercise their power not on the basis of universal jurisdiction (like the British Court in the Pinochet precedent), but based on the principle of passive personality.[143] The principle of passive personality allows a state to prosecute crimes if the victim of a given crime is a national of that state. Essentially, the principle of passive personality allows any Belgian national to file complaint on crimes that have been committed against that national but not on Belgian soil. [144]

According to Belgium, the Belgian Courts made an extradition request to Senegal on September 19, 2005 by virtue of an international arrest warrant.[145] The international arrest warrant also specified that any immunities that may be claimed by Mr. Habré on the ground that he was a former head of state had been waived by the Chadian authorities. Indeed, Chad's Minister of Justice had already indicated on 7 October 2002 that Chad would waive any immunities relating to Mr. Habré.[146] However, the Dakar Court of Appeal found on 25 November 2005 that it could not extradite Mr. Habré to Belgium because the acts in question had been committed by a Head of State in the exercise of his functions.[147] However, the Foreign Minister of Senegal stated that Habré would remain in Senegal until a decision was reached by the African Union as to whether Senegal should extradite Mr. Habré or not.[148]

*Decision by the African Union and AU proceedings*

During the African Union (AU) Summit in Khartoum in January 2006, AU heads of state decided to establish a Commission consisting of eminent jurists that should address questions relating amongst others to standards of a fair trial and costs of trial as well as finding an African solution.[149] The findings of the Commission were considered at the subsequent AU Summit in Banjul, July 2006, where the AU decided to consider the case of Hissène Habré as an

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[137] Brody, *The Prosecution of Hissène Habré – An "African Pinochet"*, p. 324, 2001.
[138] Baker, *"Twilight of Impunity for Africa's Presidential Criminals,"* p. 1489, 2004.
[139] Brody, *The Prosecution of Hissène Habré – An "African Pinochet"*, p. 328, 2001.
[140] International Court of Justice, *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite, Order on the Request for the Indication of Provisional Measures*, 2009, para. 3.
[141] Baker, *Twilight of Impunity for Africa's Presidential Criminals,* page 1489, 2004.
[142] International Court of Justice, *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite, Order on the Request for the Indication of Provisional Measures*, 2009, para. 4.
[143] International Court of Justice, *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite, Application Instituting Proceedings,* 2009, para. 3.
[144] Hobe, *Einführung in das Völkerrecht [Introduction to International Law]*, 2004, p. 97.
[145] International Court of Justice, *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite, Application Instituting Proceedings,* 2009, para. 6.
[146] Gaeta, *Ratione Materiae Immunties of Former Heads of State and International Crimes The Hissène Habré Case*, p. 186, 2002.
[147] International Court of Justice, *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite, Order on the Request for the Indication of Provisional Measures*, 2009, para. 5.
[148] BBC, *Habré allowed to stay in Senegal*, 2005.
[149] African Union, *Decision on the Hissène Habré Case and the African Union (Doc.Assembly/AU/8 (VI)) Add.9*, 2006.

AU case. The decision further mandated Senegal to bring Mr. Habré to trial in the name of the AU.[150] According to the Belgian Application, Senegal amended its penal code in reaction to this decision by including the offences of genocide, war crimes and crimes against humanity as well as enabling Senegalese courts to exercise universal jurisdiction.[151] While these efforts show at least a certain amount of willingness by Senegal to comply with the AU decision, announcements by several high-ranking Senegalese officials that the trial will be delayed for several years due to funding have brought about skepticism as to whether Senegal will indeed continue to pursue its efforts to bring Habré to trial.[152]

*Belgium's application to the ICJ and request for the indication of provisional measures*
On February 2, 2009, the Kingdom of Belgium filed an application with the ICJ. In this application, Belgium requests the ICJ to adjudge and declare that the Republic of Senegal has an obligation under international law to bring criminal proceedings against Mr. Habré for acts including crimes of torture and crimes against humanity alleged against Habré, or, failing to bring Mr. Habré to trial, that Senegal is under an obligation to extradite Mr. Habré to Belgium.[153] Belgium argues that Senegal's failure to prosecute Mr. H. Habre or alternatively its failure to not extradite Mr. H. Habre to Belgium constitutes a violation of:

1. United Nations Convention against Torture (1984) - Article 5, paragraph 2;
   "Each State Party shall likewise take measures as may be necessary to establish its jurisdiction over offenses in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the states mentioned."[154]
2. United Nations Convention Against Torture (1984) - Article 7, paragraph 1;
   "The State party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution."[155]
3. United Nations Convention Against Torture (1984) - Article 9, paragraph 1.
   "States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings bought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings."[156]

Additionally, the applicant adds that Senegal's failure to prosecute or extradite Mr. Habre violates the general obligation to punish crimes against international law, which is to be found in numerous texts of derived law and treaty law.[157] Such texts include the Rome Statute of the International Criminal Court, the Statutes of the International Criminal Tribunal for the Former Yugoslavia and the Statute of the International Criminal Tribunal for Rwanda. The Geneva Conventions equally include provisions that put an obligation on states to prosecute individuals who have allegedly committed grave breaches of international humanitarian law.[158]

Belgium also requested the Court indicate a provisional measure requesting the Republic of Senegal to avail all measures within its power to keep Mr. Habré under the control and surveillance of the Senegalese authorities assuring that Mr. Habré's movements and safety be monitored to ensure the future proceedings of a potential criminal trial. The applicant indicates this provisional measure as it sees that there is a real and imminent risk that irreparable prejudice may be caused to the case dispute.[159] In this context, Belgium referred to statements made by

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[150] African Union, *Decision on the Hissène Habré Case and the African Union (Doc.Assembly/AU/3 (VII))*, 2006.
[151] International Court of Justice, *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite, Application Instituting Proceedings,* 2009, para. 6.
[152] Moghadam, *Revitalizing Universal Jurisdiction: Lessons from Hybrid Tribunals applied tp the Case of Hissène Habré*, p. 506, 2008.
[153] International Court of Justice, *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite, Application Instituting Proceedings,* 2009, para. 16.
[154] United Nations, *Convention Against Torture*, 1984.
[155] United Nations, Convention Against Torture, 1984.
[156] United Nations, Convention Against Torture, 1984.
[157] International Court of Justice, *Belgium institutes proceedings against Senegal and requests the Court to indicate provisional measures*, February 29, 2009.
[158] *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, Article 146, 1949.
[159] International Court of Justice, *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite, Order on the Request for the Indication of Provisional Measures*, 2009, paras. 13-15.

Abdoulaye Wade, who indicated that in case Senegal did not have the funds required to organize the trial of Mr. Habré, it could at any time abandon its prosecution of the person in question.[160] Belgium contends that such a scenario would violate Senegal's obligation to prosecute Mr. Habré for the alleged crimes under international law because Senegal could in that case not extradite Mr. Habré to Belgium anymore.[161]

Senegal requested the Court to reject this provisional measure. During the proceedings regarding the provisional measure, Senegal argued that the statements made by President Wade did by no means demonstrate that there was an imminent risk that Senegal would abandon its efforts to bring Mr. Habré to trial, but rather confirmed that Senegal was willing to continue proceedings.[162] It further pointed out that even if Mr. Habré left Senegal, this would not constitute an irreparable prejudice to Belgium since Belgium was arguing that Senegal was under an obligation to extradite Mr. Habré deriving from customary international law, a norm subsequently applicable to any country where Mr. Habré might be present.[163] During the proceedings, Senegal further asserted that "Senegal will not allow Mr. Habré to leave Senegal while the present case is pending before the Court. Senegal has no intention to allow Mr. Habré to leave the territory while the present case is pending before the Court".[164] Based on this statement, the ICJ found that there was no urgency to justify the indication of provisional measures.[165] This decision, as the Court stated, is without prejudice to any legal questions arising out of Belgium's application.[166] This means that the Court will be required to examine all legal questions that are before it. Delegates will need to address issues both relating to preliminary observations, such as jurisdiction, as well as to the merits of the case, i.e. to the question whether Senegal has fulfilled its obligation under international law to either prosecute or extradite Hissène Habré.

***Legal Issues for Consideration***

In Belgium's application, it requested the ICJ to adjudge and declare that:

1. The Court has jurisdiction to entertain the dispute between the Kingdom of Belgium and the Republic of Senegal regarding Senegal's compliance with its obligation to prosecute Mr. H. Habré or to extradite him to Belgium for the purposes of criminal proceedings;
2. Belgium's claim is admissible;
3. The Republic of Senegal is obliged to bring criminal proceedings against Mr. H. Habré for acts including crimes of torture and crimes against humanity which are alleged against him as perpetrator, co-perpetrator or accomplice; and
4. Failing the prosecution of Mr. H. Habré, the Republic of Senegal is obliged to extradite him to the Kingdom of Belgium so that he can answer for these crimes before the Belgian courts.[167]

*Jurisdiction of the Court*

According to the ICJ statute, only state parties can be represented in the court, rather than individual person, or persons.[168] Jurisdiction of the court is important to establish the court's competence to hear the case. Article 36 of the ICJ Statute provides that jurisdiction of the Court includes all cases which are provided for in treaties and conventions. The same article also provides that states may make unilateral declarations accepting the jurisdiction

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[160] International Court of Justice, *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite, Order on the Request for the Indication of Provisional Measures*, 2009, para. 24.

[161] International Court of Justice, *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite, Order on the Request for the Indication of Provisional Measures*, 2009, para. 24.

[162] International Court of Justice, *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite, Order on the Request for the Indication of Provisional Measures*, 2009, paras. 29&37.

[163] International Court of Justice, *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite, Order on the Request for the Indication of Provisional Measures*, 2009, para. 37.

[164] International Court of Justice, *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite, Order on the Request for the Indication of Provisional Measures*, 2009, para. 68.

[165] International Court of Justice, *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite, Order on the Request for the Indication of Provisional Measures*, 2009, para. 73.

[166] International Court of Justice, *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite, Order on the Request for the Indication of Provisional Measures*, 2009, para. 74.

[167] International Court of Justice, *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite, Application Instituting Proceedings,* 2009, para. 16.

[168] International Court of Justice, *Statute of the International Court of Justice*, Article 34.

of the ICJ for all future disputes.[169] Both Senegal and Belgium have made such declarations. Furthermore, Article 30 of the CAT equally provides that any dispute between states parties to the CAT concerning its interpretation can be submitted to the ICJ, if the dispute cannot be settled through negotiations or international arbitration.[170] Both States are party to the CAT, Senegal since August 1986 and Belgium since June 1999.[171]

During the proceedings on provisional measures, Senegal contested the existence of a dispute between itself and Belgium. It argued that Belgium's application requested the Court to adjudge and declare that Senegal is under an obligation to bring Mr. Habré to trial, although Senegal has already taken steps to comply with that obligation. Consequently, Senegal submitted that there was no dispute in the sense of Article 30 CAT and that subsequently, the ICJ did not have jurisdiction to hear the case.[172] Senegal further indicated that Article 30 CAT requires an arbitral procecure, and claimed that it could not find the Note Verbale in which Belgium allegedly requested recourse to arbitration.[173] Based on the fact that Belgium contests that Senegal is fulfilling its obligations under the CAT, despite the fact that Senegal argues to the contrary, the ICJ found in its order on provisional measures that there was at least *prima facie* evidence that a dispute as to the interpretation and application of the CAT exists.[174] Nevertheless, as already indicated, the order is without prejudice to future proceedings before the ICJ. This means that the ICJ might come to a different finding throughout its proceedings. The ICJ will need to examine whether all conditions of Article 30 CAT are fulfilled, most importantly whether there is a dispute between Belgium and Senegal, and whether the procedural requirements (attempt to settle the dispute through negotiation, recourse to arbitration, failure of arbitral proceedings) are fulfilled.

*Merits*

In its Application to the ICJ, Belgium requests the Court to adjudge and declare that the Republic of Senegal is obliged to bring criminal proceedings against Mr. Habré, or, failing that, to extradite Mr. Habré to Belgium so that he may be tried before the Belgian courts.[175] This principle is known as *aut dedere aut judicare* (either extradite or judge), a question which is currently under consideration by the United Nations International Law Commission (ILC).[176] *Aut dedere aut judicare* can be characterized as an obligation on a state in whose territory an alleged offender is present to ensure that adequate prosecution of that offender takes place, be it in this or another state.[177] Belgium submits to the Court that this obligation stems from Article 5(2), 7(1), 8(1) and 9(1) CAT.[178] According to its Article 4, the CAT applies to acts of torture. The main obligation stemming from CAT is to criminalize any act of torture, so as to ensure adequate punishment of such acts.[179] Furthermore, Articles 5(2) and 7(1) of the CAT foresee that states shall take legislative measures to establish their jurisdiction over acts of torture in cases where the alleged offender is present in their territory. This is the obligation to prosecute acts of torture, regardless of whether the alleged perpetrator is a national or not, or whether the acts of torture have been committed on that territory. Articles 8(1) and 9(1) CAT foresee an obligation for states to assist other states in criminal proceedings relative to acts of torture. This includes mutual legal assistance and the inclusion of the act of torture as an extraditable offence, i.e. an offence for which any other state may claim extradition. It is thus clear that Senegal was upon ratification of the CAT under an obligation to either prosecute acts of torture or to extradite alleged perpetrators. However, the obligation under the CAT does not extend to any other types of crimes, such as crimes against humanity, as they are not explicitly listed in Article 4 CAT. Responsibility to prosecute or extradite under the CAT is further only required if there is at least *prima facie* evidence that the alleged perpetrator is indeed responsible for

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[169] International Court of Justice, *Statute of the International Court of Justice*, Articles 36 (1) and 36 (2).
[170] *Convention Against Torture,* Article 30 (1), 1984.
[171] United Nations, Ratifications of the Convention Against Torture.s
[172] International Court of Justice, *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite, Order on the Request for the Indication of Provisional Measures*, 2009, para. 45.
[173] International Court of Justice, *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite, Order on the Request for the Indication of Provisional Measures*, 2009, para. 45.
[174] International Court of Justice, *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite, Order on the Request for the Indication of Provisional Measures*, 2009, para. 47.
[175] International Court of Justice, *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite, Application Instituting Proceedings,* 2009, para. 16.
[176] Galicki (UN Special Rapporteur), *Third Report on the Obligation to Extradite or Prosecute (Aut dedere aut judicare)*, 2008.
[177] *Draft Code of Crimes against Peace and Security of Mankind*, 1996.
[178] International Court of Justice, *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite, Application Instituting Proceedings,* 2009, para. 11.
[179] *Convention Against Torture,* Article 4, 1984.

acts of torture as foreseen in Article 4 CAT. Lastly, it is important to note that the CAT does not specify any requirements for the prosecution of an individual suspected to have committed acts of torture. It rather limits itself to the obligation to establish jurisdiction. Whether or not Senegal's renewed indication that it would like to go through with the proceedings against Mr. Habré is sufficient to fulfil the obligation imposed by the CAT is a matter of interpretation of the relevant treaty norms.

Belgium equally submits that Senegal has an obligation to either prosecute Mr. Habré or to extradite him to Belgium stemming from customary international law.[180] Whether there is a general obligation under customary international law to prosecute or extradite certain crimes is a much-disputed issue. The UN Special Rapporteur on the issue reported that states' opinions on this question were divided, with some delegations rejecting the idea of a customary norm of *aut dedere aut judicare* while others considered that the obligation has acquired customary status.[181] Some delegations considered that an obligation *aut dedere aut judicare* only existed with regard to the most serious international crimes. However, it is not clear whether there is a list of such crimes, which would include specific offences such as genocide, crimes against humanity and war crimes (essentially offences that have been characterized as crimes under international criminal law) or whether the acts that would trigger a responsibility to either prosecute or extradite should rather be determined following concepts such as "crimes against the peace and security of mankind" or crimes that affect the "international community as a whole".[182]

Customary international law is a source of international law in accordance with Article 38 (1) (b) ICJ statute. It consists of two elements, namely state practice (*consuetudo*) and a general acceptance that a specific behavior is required by law (*opinio juris*).[183] The weight which is given to each factor depends on the rule under dispute and is often decided on a case-by-case basis.[184] It is perfectly possible for a treaty obligation to become such a norm of customary international law.[185] Treaty obligations and obligations of customary international law are often complementary, and in case of an overlap, the state will be bound by both custom and treaty law.[186] This can be important with regard to the jurisdiction of the ICJ: If the Court does not have jurisdiction in view of a specific treaty, it can still have jurisdiction with regard to customary international law and might be able to deliver a judgment on the question if the treaty obligation and the customary obligation are identical.[187]

Acts of international organisations that are in themselves not legally binding can nevertheless have a great impact on the development of international customary law. This is especially true for resolutions issued by the UN General Assembly.[188] It is noteworthy that the General Assembly has addressed the issue of prosecution of serious crimes as early as in 1973, stating that "war crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment".[189] Likewise, the Statutes of the ad-hoc tribunals for the Former Yugoslavia and Rwanda as well as the Rome Statute of the International Criminal Court contain similar calls that the most serious crimes be brought to justice.

***Conclusion***

The case at hand on questions relating to the obligation to prosecute or extradite addresses one of the most significant legal problems of contemporary international law, namely how to ensure justice for those who have suffered from some of the most heinous crimes. This question has occupied legal minds for the past decades, with a

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[180] International Court of Justice, *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite, Application Instituting Proceedings,* 2009, para. 12.
[181] Galicki (UN Special Rapporteur), *Third Report on the Obligation to Extradite or Prosecute (Aut dedere aut judicare)*, 2008, para. 98.
[182] Galicki (UN Special Rapporteur), *Third Report on the Obligation to Extradite or Prosecute (Aut dedere aut judicare)*, 2008, paras. 99/100.
[183] International Court of Justice, *North Sea Continental Shelf Case, Judgment,* 1969, para. 71.
[184] Dixon, *Textbook on International Law*, 2005, p. 29.
[185] International Court of Justice, *North Sea Continental Shelf Case, Judgment,* 1969, para. 71.
[186] Dixon, *Textbook on International Law*, 2005, p. 35.
[187] Dixon, *Textbook on International Law*, 2005, p. 36.
[188] Hobe, *Einführung in das Völkerrecht [Introduction to International Law]*, 2004, p. 97.
[189] United Nations General Assembly, *Resolution 3074 (XXVIII), Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity*, 1973, para. 1.

renewed impetus given with the establishment of international criminal tribunals and the International Criminal Court in 2002. Delegates will need to research and discuss the following issues: Does the Court have jurisdiction in the present case? Jurisdiction arising from the CAT needs to be differentiated from jurisdiction stemming from unilateral declarations in accordance with Article 36 (2) ICJ statute. If the Court has jurisdiction, is Senegal under an obligation to prosecute or extradite Mr. Habré? Does such an obligation exist under the CAT and/or customary international law? If such an obligation exists, has Senegal complied with it? If it has not complied with it, is it under an obligation to extradite Mr. Habré to Belgium?

***Must Reads***

International Court of Justice (February 16, 2009). *Application Instituting Proceedings. Retrieved: September 10, 2009 from: http://www.icj-cij.org/docket/files/144/15054.pdf*
*This is the formal Belgium of application to institute proceedings against Senegal. Outlined is the relevant international law and the ICJ statutes that the applicant uses to pursue the case. It includes the material facts (subject of dispute), jurisdiction of the court, Belgium's submissions and an annex.*

International Court of Justice (May 28, 2009). *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite. Order on Provisional Measures.* Retrieved October 12, 2009 from: http://www.icj-cij.org/docket/files/144/15149.pdf
*This order was decided upon by the ICJ pursuant to Belgium's application on provisional measures to ensure that Mr. Habré stays in Senegal. The order depicts the procedural history of the case up until the order, and discusses prima facie questions of jurisdiction necessary for the indication of provisional measures.*

International Court of Justice. *Statute of the International Court of Justice.* Retrieved: September 12, 2009 from: http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0
*The statute of the ICJ is annexed to the Charter of the United Nations. The objective of the Statute is to organize the composition and functioning of the Court.*

United Nations. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. (1984). Retrieved: September 12, 2009 from::/www2.ohchr.org/english/law/cat.htm
*The treaty is a major foundation of the case of Belgium v. Senegal. The treaty aims to protect the rights inherent to a human person and includes articles to enforce the articles of the treaty. The treaty has been almost universally ratified.*

Moghadam, T. (2007-2008). Revitalizing Universal Jurisdiction: Lessons from Hybrid Tribunals Applied to the Case of Hissène Habré. *Columbia Human Rights Law Review, 39*, 471-528.
*This article suggests that following the AU proceedings, the international community might consider applying some elements of hybrid tribunals to the case of Hissène Habré. It is a must-read for delegates since it traces back most of the procedural history of the case save Belgium's application to the ICJ. Very instructive regarding the various factors, both legal and political, that have accompanied the case of Hissène Habré from the start.*

## Annotated Bibliography

***History of the International Court of Justice***

International Court of Justice. (2006). *International Court of Justice.* United Nations Publications: New York.
*This volume will provide with detailed explanations on the work of the Court. From the Court's history to basic knowledge on international law including detailed sections on the different positions and proceedings, it is a good source of preparation for delegates attending the simulation. Delegates should note that this text is in no way critical of the work of the institution since it merely serves an educational purpose.*

International Court of Justice. (n.d.). *Yearbook of the International Court of Justice.* International Court of Justice: The Hague.
*Each year, the International Court of Justice publishes a yearbook covering its work from 1 August of the preceding year to the 31 July of the current year. The volume also includes a bibliography of documents used and written by the Court during its proceedings.*

International Court of Justice. (n.d.). *Home.* Retrieved August 24, 2009, from http://www.icj-cij.org/
*The Web site of the International Court of Justice offers substantive and comprehensive information on the Court. This includes a history of the Court, members of the Court, presidency, how the Court works, annual reports of the Court, the Court's jurisdiction, as well as cases of the Court. This Web site will provide you with basic documents of the Court including the United Nations Charter, the Statute of the Court, and rules of the Court. Further information is available in press releases of the Court. The Web site of the Court is extremely important because of the amount of information it offers on the Court itself. It is the best source for in depth research on the International Court of Justice.*

League of Nations. (1924). *The Covenant of the League of Nations.* Retrieved November 8, 2009 from the Yale Law School – Avalon Project Web site: http://avalon.law.yale.edu/20th_century/leagcov.asp
*The League of Nations was the first universal international organization to create a permanent judicial organ to peacefully resolve international questions of law. The Covenant of the League of Nations provided the organization with the predecessor of the ICJ, the Permanent Court of International Justice. Article 14 of the Covenant describes precisely the court and its functions and served as the inspiration for the creation of the ICJ.*

Permanent Court of Arbitration. (n.d.). *Home.* Retrieved November 8, 2009 from http://www.pca-cpa.org/
*Still functional to this day and established in 1899 by the Hague Convention, the Permanent Court of Arbitration (PCA) still serves in the field of international justice. While the ICJ deals with disputes between states and advisory opinions commanded by the United Nations' system, the PCA acts as an arbitrator with various combinations of states, state entities, intergovernmental organizations, and private parties.*

***I. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)***

*Dayton Peace Agreement* (1995). Retrieved July 23rd, 2009 from Office of the High Representative website http://www.ohr.int/dpa/default.asp?content_id=379
*The Dayton Peace Agreement signed in 1995 constitutes the final act of peace between battling nations of Croatia, Bosnia, and Serbia and thus the settling point for a peaceful coexistence between those states in the region. Signed under the supervision of the United Nations, the Agreement stabilized the situation and constructed the modern states of Croatia, Bosnia, and Serbia.*

Gagnon, V. (2004). *The myth of ethnic war: Serbia and Croatia in the 1990s.* London : Cornell University Press.
*Yugoslavia in the late 1980s was, in Gagnon's view, on the verge of large-scale sociopolitical and economic change. He argues that the strategy of violence was a means for threatened elites to demobilize the population. Gagnon's rather controversial argument would benefit the delegate, as it would provide them with a substantially new way of understanding the politics of ethnicity, at stake in this case.*

International Court of Justice (2002). *Preliminary Objections of the Federal Republic of Yugoslavia.* Retrieved August, 14, 2009, from http://www.icj-cij.org/docket/index.php?p1=3&p2=1&k=73&case=118&code=cry&p3=91
*On 11 September 2002, the FRY raised preliminary objections relating to the Court's jurisdiction to entertain the case and to the admissibility of the Application. Two objections the jurisdictions of the Court were entertained:*

*identification of the respondent Party and Issues of jurisdiction ratione materiae. Delegates will find this document useful as it consists in the first judgment of the Court in this case.*

International Court of Justice (2008). *Judgment on preliminary objections*. Retrieved July 23rd, 2009 from International Court of Justice Website, http://www.icj-cij.org/docket/index.php?p1=3&p2=1&code=cry&case=118&k=73
*This decision of the International Court of Justice defined the consequences to be attached to developments regarding the identity of the Respondent in the case, Serbia. The Court finds that it has jurisdiction, on the basis of Article IX of the Genocide Convention, to entertain the case on the merits.*

International Court of Justice (2009). *Judicial database*. Retrieved July 23rd, 2009 from International Court of Justice Website, http://www.icjcij.org/docket/index.php?p1=3&p2=1&code=cry&case=118&k=73
*This website is the most comprehensive database related to the ICJ. The Judicial Database includes transcripts, orders, motions and other documents related to the latest developments in the case. The documents are available in TIFF format and without payment or registration required. This tool will provide delegates to the court with a more detailed perspective on the proceedings of the court in the case.*

International Court of Justice (2007), *Serbia and Montenegro v. Bosnia and Herzegovina – Judgment*. Retrieved November 8, 2009 from http://www.icj-cij.org/docket/files/91/13685.pdf
*The judgment of the case of Serbia and Montenegro v. Bosnia and Herzegovina is crucial to the examination of the present case. As for the case Croatia v. Servia, it deals with the question of genocide during the same time period and in the same region. One of the highlights of that case was the discussion around the definition of genocide in the context of the Balkans as well as the largely discussed events of Srebrenica.*

Kearns, I. (1998). *Croatian politics : authoritarianism or democracy ?* Contemporary Politics, London.
*The politics of Croatia takes place in a framework of a parliamentary representative democratic republic. The author analyses the political background of the Croatian independence war and the development of the Croatian Democratic Union, formed under the leadership of Dr. Franjo Tudjman who would lead Croatia to restore its political independence as a sovereign State. Delegates might find this analysis useful to better understand the political implications at stake in this case.*

Malesevic, S. (2002). *Ideology, legitimacy, and the new state: Yugoslavia, Serbia, and Croatia,* London : Frank Cass Publishers.
*This is a comparative analysis of the dominant ideologies and modes of legitimization in communist Yugoslavia and post-Communist Serbia and Croatia. The aim of the book is to identify and explain dominant normative and operative ideologies and principal modes of legitimization in these three case studies. The author aims to demonstrate the crucial role that ideology plays in the underpinning of the identity transformation in these three societies. Delegates might find this comparative analysis useful to better understand the context in which this trial takes place.*

Peskin, V (2008). *International justice in Rwanda and the Balkans : virtual trials and the struggle for state cooperation*, Cambridge: Cambridge University Press.
*Victor Peskin's analysis of international justice focuses on "virtual trials": the battles by ad hoc criminal tribunals to secure state cooperation in the enforcement of international law. Concentrating on this under-explored theme, this book is a major contribution to the literature on transitional justice. Delegates might find this analysis useful to further expand their knowledge on transitional justice.*

Ramet, S (2008). *Serbia, Croatia and Slovenia at peace and at war : selected writings, 1983-2007*, Berlin : Lit ; London : Global Distributor.
*Sabrina Ramet has written extensively on nationalism, Eastern Europe, and the countries of the former Yugoslavia. She is a well-known specialist in the field. Her selected writings on Serbia, Croatia and Slovenia would provide the delegates with a neutral overview of historical facts in the region.*

Zimmermann, W. (1999). *War in the Balkans: A Foreign Affairs Reader*, Council on Foreign Relations Press.

*Zimmermann's acclaimed account of the war in former Yugoslavia contains substantial new material. It discusses the end of the five-year conflict and looks ahead to an uneasy future in this turbulent region. Delegates might find this book useful to better understand the causes of the conflict and reflect upon its consequences.*

***II. Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)***

African Union Assembly. (2006, January 24). *Decision on the Hissène Habré Case and the African Union (Doc.Assembly/AU/8 (VI)) Add.9*. Retrieved November 1, 2009, from Http://www.africa-union.org/root/au/Documents/Decisions/hog/AU6th_ord_KHARTOUM_Jan2006.pdf
*This decision addressed the case of Mr. Habré in an African Union context, after the Senegalese court refused to decide on the extradition request brought forward by Belgium. The African Union favored an African solution and installed a Commission of eminent jurists to develop a solution.*

African Union Assembly, & African Union Assembly. (2006, July 2). *Decision on the Hissène Habré Case and the African Union (Doc.Assembly/AU/3 (VII))*. Retrieved November 1, 2009, from http://www.africa-union.org/Official_documents/Assemblee%20fr/ASS06b.pdf
*This second decision by the African Union on the case of Mr. Habré mandated Senegal to continue with the trial, and issued a call to the international community to financially assist Senegal in order to be able to continue with the trial.*

Atlas, Pierre (1999). *Conflict among former Allies after Civil War Settlement: Sudan, Zimbabwe, Chad and Lebanon*. Journal of Peace research, Vol. 36, No. 1, pp 35 - 54.
*The article investigates how civil war begin and how it stops in particular cases. It also evaluated the process of conflict transformation, whereby the conflict becomes less important or is pursued without using mass violence. It specifically evaluates how Hissene Habre came into power and the political scenario of his ascendency.*

Baker, Bruce. (2004). *Twilight of Impunity for Africa's Presidential Criminals.* Third World Quarterly, Vol. 25, No. 8, pp. 1487 - 1499
*The article examines the politics that have determined the fate of various African tyrants and examines how changes in international law still allow for many of these tyrants to evade prosecution. Also examined is how international law and enforcement is changing with the new powers being granted to the International Criminal Court. It also examines the African Union and its ever increasing role in African politics.*

BBC News (July 3, 2006). *Profile: Chad's Hissene Habre.* Retrieved: September 12, 2009 from: http://news.bbc.co.uk/2/hi/africa/5140818.stm.
*The BBC article profile's Hissene Habre and gives a brief background of the alleged crimes committed. The article also gives a brief background of Habre's political history and his rise to power.*

Charlton, Roger. (1989) *Warlords and Militarism in Chad*. Review of African Political Economy, No. 45/46, Militarism, Warlords & the Problems of Democracy, pp. 12 - 25.
*The research evaluates the prevailing concern in many African states of regimes characterized by collapse and violence. They use an approach comparing Chinese history and Warlords in African States to explain power based rule and military force. It focuses on the postcolonial history of Chad and the rise of Hissene Habre.*

Dixon, M. (2005). *Textbook on International Law* (5th ed.). Oxford, New York: Oxford University Press. (Original work published 1990)
*This textbook gives an essential overview of major lines in international law. A good introductory work for those who are studying international law for the first time. The textbook explains the big lines of international law, giving many examples of case law that has shaped the development of international law.*

Gaeta, P. (2003). Ratione Materiae Immunties of Former Heads of State and International Crimes: The Hissène Habré Case. *Journal of International Criminal Justice, 1*, 186-196.
*This article discusses questions regarding immunities ratione materiae for former heads of states. Normally, heads of states benefit from an immunity for acts carried out during their office and as part of their function. However, there is a discussion in international law as to whether this immunity can also be invoked in view of serious crimes. Recent case law, including the Pinochet case decided by British domestic courts or the Arrest Warrant case decided by the ICJ point indicate that such an immunity can at least not be invoked before international tribunals and for acts that constitute serious human rights violations. Since Chad has waived the ratione materiae immunity, the question is not directly relevant for the case at hand. However, it is an interesting read for those who would like to get a better insight into current issues of international law.*

Galicki (UN Special Rapporteur), Z. (2008, June 10). *Third Report on the Obligation to Extradite or Prosecute (Aut dedere aut judicare)*. Retrieved November 1, 2009, from http://www.un.org/Docs/journal/asp/ws.asp?m=A/CN.4/603
*The latest report of the Special Rapporteur to the International Law Commission on the obligation to extradite or prosecute reflects the current state of the debate on the content of this obligation. The aim of the International Commission's work on the issue is to determine whether the obligation is an obligation of customary international law. It also proposes some draft articles in order to codify the current state of law.*

Geneva Convention relative to the Protection of Civilian Persons in Time of War, Aug 12, 1949, http://www.icrc.org/ihl.nsf/CONVPRES?OpenView
*The Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War was adopted along with the other Three Geneva Conventions. Together, they constitute the basis of international humanitarian law today. The Fourth Geneva Convention was the major addition to already existing humanitarian law – all other provisions were simply updated and extended. Standards for the protection of civilians were felt to be necessary, taking into account the atrocious experiences from World War II. All standards contained in the Four Geneva Conventions are universally acknowledged and are thus legally binding upon all states.*

Habre allowed to stay in Senegal . (2005, November 27). *BBC News*. Retrieved from http://news.bbc.co.uk/2/hi/africa/4476724.stm
*This short article informs about the reaction of Senegalese courts to Belgium's extradition request. The court decided that it could not decide whether or not to extradite Mr. Habré to Belgium since the matter was under discussion by the African Union.*

Human Rights Watch. *Chronology*. Retrieved October 5, 2009 from: hrw.org/eng/news/2009/02/12/chronology-habr-case
*Human Rights Watch has played a role in monitoring the progress of the case. The website links to a chronology from particular incidents of note in the biography of Hissene Habre as well as the step by step chronology of the case through the African Union ultimately leading to the ICJ. Also contains many links to other pertinent background information.*

Human Rights Watch. (2006). *Universal Jurisdiction in Europe: The State of the Art: VI. Belgium*. Retreieved: September 12, 2009 from: http://www.hrw.org/reports/2006/ij0606/6.htm
*A country case study by Human Rights Watch, the report analyzes the introduction and amending of Belgium's universal jurisidiction law. It outlines the details and of the articles and how it was amended in the 1999 revisions.*

International Court of Justice. (February 8, 2009). *Questions relating to the Obligation to Prosecute of Extradite (Belgium v. Senegal). Conclusion of the public hearings on the request for the indication of provisions measures submitted by the Kingdom of Belgium*. Retrieved: September 10, 2009 from: http://www.icj-cij.org/docket/files/144/15112.pdf
*An ICJ release on the deliberation on the provisional measures submitted by the Kingdom of Belgium. The release contains the submissions of both parties and the exact proceedings of the hearing.*

International Court of Justice (February 29, 2009). *Belgium institutes proceedings against Senegal and requests the Court to indicate provisional measures.* Retrieved September 10, 2009 from: http://www.icj-cij.org/docket/files/144/15052.pdf
*Press release from the ICJ indicating the start of proceedings of Belgium v Senegal on the grounds that a disputes exists "between the Kingdom of Belgium and the Republic of Senegal regarding Senegal's compliance with its obligation to prosecute" Hissene Habre. Belgium also requested in its application provisional measures in order to protect its rights during the Courts deliberations.*

International Court of Justice (May 28, 2009). *Request for the indication of provisional measure.* Retrieved: October 12, 2009 from: http://www.icj-cij.org/docket/files/144/15143.pdf
*The ICJ found that the circumstances of the case do not require the exercise of its power to indicate the provisional measures requested by Belgium. The court rejected the reasoning of the applicant that the provisional measures would curtail risk of irreparable prejudice and urgency to its case.*

International Court of Justice (May 28, 2009). *Request for the indication of provisional measures, Summary of the Order of May 28, 2009.* Retrieved: October 12, 2009 from: http://www.icj-cij.org/docket/files/144/15146.pdf
*This is a summary, not official document released from the ICJ. The summary outlines Belgium's case against Senegal and the four point it requests the Court to adjudge. The document essentially gives an update of the information and documents received from both parties.*

Kimminich, O., & Hobe, S. (2004). *Einführung in das Völkerrecht [Introduction to International Law]* (8th ed.). Tübingen, Germany: A. Francke. (Original work published 1975)
*This book (in German) is an excellent introduction into international law. It thoroughly discusses various issues, including specific topics such as international economic law, international criminal law and international humanitarian law. It is comprehensive, yet concise and covers all important aspects, providing many references for further and more detailed reading.*

Paulson, Colter. (2004) *Compliance with Final Judgements of the International Court of Justice since 1987.* The American Journal of International Law, Vol. 98, No. 3, pp 434 - 461.
*The article looks at the relationship between ICJ cases and compliance. It specifically looks over the effect of ICJ judgement and how legal and political situations change after judgement. It also investigates enforcement of the ICJ. The article also explains the ICJ case concerning the Aousuzo strip, disputed by Libya and Chad.*

United Nations Refugee Agency (October 16, 2009). *African Union: Press Senegal on Habre Trial.* Retrieved: September 12, 2009 from: http://www.unhcr.org/refworld/country
*Outlined in the article are the arguments of the NGOs and Chadian victims to prosecute Hissene Habre. It contains a background of the case and review of the African Union's statements and decision. The article also gives brief information on the Senegalese action regarding Hissene Habre.*

United Nations. Vienna Convention 1961. Retrieved: September 12, 2009 from: http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf
*The Vienna Convention outlines the rights of diplomats and emissaries in foreign states. It is a cornerstone document protecting the rights of individuals sent as representatives of a state. The document has been ratified by most nations and is universally accepted as practiced principles.*

United Nations. Ratifications: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. (1984). Retrieved: September 12, 2009 from: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en
*This link to the UN database includes the names and dates of the countries that have ratified the UN Convention Against Torture treaty. Both Belgium and Senegal are party to the treaty.*