

The Authority of the International Court of Justice in Islamic Jurisprudence: Fatwas on Genocide and War Crimes in Bosnia and Herzegovina¹

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Abstract

This article explores how the authority of the International Court of Justice (ICJ) is perceived in fatwas on genocide and war crimes committed in Bosnia and Herzegovina during the 1992-1995 war. Sources include the ICJ's judgement in *Bosnia and Herzegovina v. the Federal Republic of Yugoslavia (Serbia and Montenegro)*; verdicts of the International Criminal Tribunal for the Former Yugoslavia; two fatwas from the Islamic Community in Bosnia and Herzegovina's Council of Muftis on war crimes against the Bosniak populations of Srebrenica, Žepa, Prijedor and the Sana Valley; and preparatory materials written by expert groups that preceded the fatwas' issuance. Despite initial criticism of the localisation of genocide in the ICJ's judgement, the fatwas recognise its authority in cases that apply the Genocide Convention. The argumentation of these fatwas is based on the higher objectives of Islamic law (*maqasid al-Sharia*), in accordance with the role of Islamic normativity in a secular state.

Key words: authority, Bosnia and Herzegovina, fatwa, genocide, International Court of Justice, international law, Islamic jurisprudence, war crimes

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Introduction

Among the current issues in international and Islamic law scholarship are whether international law² is truly international, and to what extent international judicial forums for the peaceful resolution of interstate disputes are attractive to countries with elements of the Islamic legal tradition embedded in their judiciaries. In general, it is argued that it is inherently difficult for Islamic law countries (ILS) to accept the jurisdiction of the International Court of Justice (ICJ) and international criminal courts.³ More optimistic opinions emphasise that Islamic normative principles are generally or mostly compatible with international legal standards. Muslim majority states are bound by Sharia and ratified international agreements, as well as *jus cogens* norms of international law, to implement post-conflict and transitional justice mechanisms, including ensuring fair compensation for victims of war, and the prosecution of perpetrators of genocide, crimes against humanity and war crimes.⁴ More nuanced approaches point to various factors that lead some ILS to support the ICJ, and others to renounce its jurisdiction.⁵

Other studies focus on the representation of Islamic legal principles in the case law of the ICJ or other international tribunals,⁶ or the status of a fatwa as a unilateral declaration by the religious head of an Islamic state under international law.⁷ Most research to date has therefore focused on ILS legal systems (characterised by the nexus of Islamic and secular law) and their (non)acceptance of the jurisdiction of international courts. An exception is Emilia Justyna Powell's *Islamic Law and International Law: Peaceful Resolution of Disputes*, one chapter of which deals with the perception of international dispute resolution in different schools of Islamic jurisprudence, and whether their approaches influence ILS' behaviour towards international courts.⁸ There is a clear research gap regarding

2 Anthea Roberts found international law to be not as international as is commonly perceived. See: *Is International Law International?* (Oxford: Oxford University Press, 2017).

3 Charles N. Brower and Jeremy K. Sharpe, "International Arbitration and the Islamic World: The Third Phase", *American Journal of International Law* 97:3 (2017), pp. 643-656. See also: Emilia Justyna Powell, *Islamic Law and International Law: Peaceful Resolution of Disputes* (New York: Oxford University Press, 2019).

4 Mohamed Elewa Badar, "Islamic Law (*Shari'a*) and the Jurisdiction of the International Criminal Court", *Leiden Journal of International Law* 24:2 (2011), pp. 411-433; and M. Cherif Bassiouni, *The Shari'a and Islamic Criminal Justice in Time of War and Peace* (New York: Cambridge University Press, 2014), p. 153.

5 Emilia Justyna Powell, "Islamic Law States and the International Court of Justice", *Journal of Peace Research* 50:2 (2013), pp. 203-217; Emilia Justyna Powell, "Islamic Law States and the Authority of the International Court of Justice: Territorial Sovereignty and Diplomatic Immunity", *Law and Contemporary Problems* 79:1 (2016), pp. 209-236.

6 Clark B. Lombardi, "Islamic Law in the Jurisprudence of the International Court of Justice: An Analysis", *Chicago Journal of International Law* 8:1 (2007), pp. 85-118.

7 Tavakol Habibzadeh, "Nuclear Fatwa and International Law", *Iranian Review of Foreign Affairs* 5:3 (2014), pp. 149-177.

8 See: "Legal Schools and Regions", in Emilia Justyna Powell, *Islamic Law and International Law: Peaceful Resolution of Disputes* (Oxford: Oxford University Press, 2020).

how the authority of international courts, including the ICJ, is reflected in fatwas as expert opinions in Islamic jurisprudence issued by ‘non-state’ Muslim religious leaders or institutions. This includes the issuance of fatwas in countries where Muslims constitute more than 50 percent of the population but whose current legal systems are secular in nature, although they have historically included significant segments of the Islamic legal tradition.⁹

This article contributes to the literature by investigating how the authority of the ICJ as the highest court in the world is perceived in the fatwas of the Council of Muftis of the Islamic Community of Bosnia and Herzegovina (ICBiH). The ICBiH is a religious community that gathers Muslims in Bosnia and Herzegovina (BiH), Serbia, Croatia and Slovenia, as well as members of the Islamic communities of Bosniaks in European countries, Australia, and North America. Like churches and other religious communities in BiH, it is separated from the state, but can be consulted for cooperation in matters of common interest, such as education, culture, and charitable work. Historically, Islamic law was applied in BiH to varying degrees from the Ottoman conquest in the mid-15th century until the establishment of the communist system in the mid-20th century, when the country’s legal system was completely secularised. Among the ICBiH’s main objectives are to provide an interpretation of Islamic norms, and to ensure that its members live according to them.¹⁰ Competences for the interpretation of Islamic norms through the issuance of official fatwas rest with the Ra’is al-‘Ulama as the head of the ICBiH and its supreme mufti; the Council of Muftis, which consists of all the Community’s muftis; and muftis as individual religious authorities.¹¹ Significantly, the fatwas of the Ra’is al-‘Ulama and the Council of Muftis are binding for all bodies of the ICBiH, and carry significant authority for its members.¹² The Council of Muftis has issued two fatwas that directly refer to the ICJ’s judgement in the 2007 case of *Bosnia and Herzegovina v. the Federal Republic of Yugoslavia (Serbia and Montenegro)* of 2007, and to judgements of the International Criminal Tribunal for the former Yugoslavia (ICTY) against perpetrators of the genocide against Bosniak Muslims in Srebrenica in July 1995, and war crimes committed in other parts of the country.

9 It is important to mention Moe’s valuable study on the reception of the work of the ICTY in Bosniak Muslim religious circles. The author of the present article understands that Moe’s research was undertaken prior to the issuance of the Council of Muftis’ fatwas on genocide and war crimes. See: Christian Moe, “Vindicating Victimhood: The Bosnian Muslim Reception of the ICTY”, Revised draft, 12 March 2008. The research was part of the Religion and Nationalism in the Western Balkans project, at the Department of Culture Studies and Oriental Languages, University of Oslo, founded by the Norwegian Ministry of Foreign Affairs. The author thanks Christian Moe for making the draft available.

10 Constitution of the ICBiH 2014, Articles 6-7.

11 Constitution of the ICBiH 2014, Articles 52, 60 and 61.

12 Constitution of the ICBiH 2014, Article 60.

Based on an analysis of the content of both fatwas and their preparatory documents, this article answers the questions: Do the fatwas of the Council of Muftis, the ICBiH's highest religious body responsible for interpreting Islamic law, accept the ICJ's jurisdiction in cases of genocide and war crimes perpetrated against Muslims? Is the ICJ's authority in the eyes of Bosniak-Muslim scholars who participated in the preparation and issuance of the fatwas determined primarily by the relationship between Islamic and international law, or by the content of the ICJ's judgement? On which sources and arguments are the fatwas based? Do the fatwas qualify the war crimes in Srebrenica and other parts of BiH in compatibility with the ICJ's judgement, or do they criticise ICJ case law from the perspective of norms in Islamic humanitarian and criminal law?

The article contains an introduction, five chapters and a conclusion. The first chapter examines how the ICJ's timing, composition and jurisdiction affects its authority as a mechanism for the settlement of international disputes. The second addresses how ILS perceive the ICJ's authority; the third analyses the representation of Islamic legal principles in current ICJ case law; the fourth outlines the content of the ICJ's judgement in *BiH v. FRY (Serbia and Montenegro)*; and the fifth and sixth analyse the ICBiH Council of Muftis' fatwas on genocide and war crimes committed during the war in Bosnia (1992-1995).

Despite its initial criticisms in the preparatory documents that recommended against reducing the qualification of genocide to the locality of Srebrenica, these fatwas recognise the jurisdiction of the ICJ, and its authority as an international arbitrator in the application of the Genocide Convention in cases where victims were Bosniak Muslims. Moreover, ICJ and ICTY judgements appear among the primary sources on which the Council of Muftis based its qualification (*hukm*) of war crimes, which is rare in this type of Islamic discourse. Further, the absence of an official application of Islamic law has significantly shaped the argumentation of the fatwas: they are based on the objectives of Islamic law (*maqasid al-Sharia*), rather than the elaboration of norms of Islamic criminal or humanitarian law.

The International Court of Justice: Its origin, composition and jurisdiction

The authority of the ICJ as a mechanism for resolving interstate disputes is conditioned by a number of factors, among which are the global political reality at the time of its establishment, the representation of diverse legal cultures in the composition of its body of judges and jurisprudence, and the scope and character of its jurisdiction in international law. The ICJ was established in 1945, a time

when most Asian and African countries, including those with a Muslim majority, were still under European colonial rule. This means they were not involved in the ICJ's establishment, nor in the design of provisions in the UN Charter and Statute that regulate its organisation and function. The UN Charter states that the ICJ is "the principal judicial organ of the United Nations",¹³ whose task is to resolve legal disputes between states, in accordance with international law, and to provide advisory opinions on international legal issues. It is considered "the highest court in the world and the only one with both general and universal jurisdiction: it is open to all Member States of the United Nations" and "may entertain any question of international law".¹⁴ In this respect, it differs from the ICTY and the International Criminal Court (ICC), whose jurisdictions are limited to the prosecution of international crimes (e.g., genocide, crimes against humanity, and war crimes). The forerunners of the ICJ were the Permanent Court of Arbitration, established in 1899 by the Convention for the Peaceful Settlement of International Disputes, and the Permanent Court of International Justice (PCIJ), which operated under the auspices of the League of Nations from 1922 to 1946. Both were important developments in the modern history of peaceful international dispute settlement.¹⁵

The ICJ is one of the UN's six main organs, along with the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council and the Secretariat.¹⁶ Its composition, jurisdiction and procedure are regulated by the Statute, which is attached to the UN Charter, and the Rules of Procedure of the Court, which elaborates on the previous document.¹⁷ The seat of the ICJ is in The Hague, and its work is supported by the Registry Office as an administrative body.¹⁸

The ICJ consists of fifteen elected, independently acting judges, who are persons of high moral character and have held the highest judicial office in their country, or are lawyers with recognised expertise in international law.¹⁹ Judges are elected on an ad hoc basis by the 193 UN member states and other signatory states to the ICJ Statute. For a candidate to be a member of the ICJ, they must receive an absolute majority of votes in both the General Assembly and the UN Security Council. Once elected, ICJ judges do not act as delegates of their states

13 United Nations Charter, Chapter XIV: The International Court of Justice, Article 92., <https://www.un.org/en/about-us/un-charter>, accessed 8 December 2022.

14 *The International Court of Justice: Handbook*, 5, <https://www.icj-cij.org/public/files/publications/handbook-of-the-court-en.pdf>, accessed 7 December 2022.

15 *The International Court of Justice: Handbook*, 5, pp. 10-17.

16 United Nations Charter, Chapter III: Organs, Article 7.

17 *The International Court of Justice: Handbook*, pp. 16-17.

18 "The Court", <https://www.icj-cij.org/en/court>, accessed 7 December 2022.

19 Statute of the International Court of Justice, Chapter 1: Organization of the Court, Article 2, <https://www.icj-cij.org/en/statute>, accessed 8 December 2022.

or governments, but in an individual capacity, with the obligation to perform their duties impartially and conscientiously.²⁰ The General Assembly and the Security Council are expected to consider representation of “the main forms of civilization and the main legal systems in the world” when electing judges to the ICJ.²¹ Consequently, all major regions of the world are reflected in the Court’s membership.²² Although judges from Muslim-dominated regions (such as North Africa and the Middle East) have been elected to the ICJ, however, Islamic law (one of the world’s three major legal systems) will not necessarily be represented if these judges do not have an educational background in the Islamic legal tradition.²³

Islamic law states and the authority of the International Court of Justice

In addition to the general factors that affect the authority of the ICJ and its attractiveness as a forum for the settlement of international disputes, a number of specific factors potentially affect the acceptance or non-acceptance of its jurisdiction by ILS.²⁴ It has been argued that ILS are “a least likely case for ICJ authority”, primarily because the inherent connection between Islamic law and religion is contrary to the secular nature of international law.²⁵ There are, however, several ILS that recognise the coercive and compromissory nature of the ICJ’s jurisdiction.²⁶

20 *The International Court of Justice: Handbook*, pp. 21-23.

21 Statute of the International Court of Justice, Chapter 1: Organization of the Court, Article 9.

22 The ICJ currently includes judges from North and South America, Europe (Western, Central and Eastern), Asia (Western, Southern and Eastern) and Australia. See: “International Court of Justice: Current Members”, <https://www.icj-cij.org/en/current-members>, accessed 8 December 2022.

23 At the time of writing, the ICJ has three judges from countries in which Islamic law is a source of legislation: Mohamed Bennouna from Morocco; Abdulqawi Ahmed Yusuf from Somalia; and Nawaf Salam from Lebanon. See: “International Court of Justice: Current Members”, <https://www.icj-cij.org/current-members>, accessed 6 February 2023.

24 The phrase “Islamic law states (ILS)” is borrowed from Emilia Justyna Powell, who uses it to mean a country that “officially and directly applies sharia as a substantial part of personal, civil, commercial or criminal law”. See: Powell, “Islamic Law States and the Authority of the International Court of Justice”, p. 214.

25 Powell, “Islamic Law States and the Authority of the International Court of Justice”, p. 209. ILS have so far shown no determination to establish a Sharia-based international court to address international disputes among themselves. The Islamic International Court of Justice was conceived at the 5th Islamic Summit in 1987, but is yet to begin operation (Powell, “Islamic Law States and the Authority of the International Court of Justice”, p. 235). See also: Michele Lombardini, “The International Islamic Court of Justice: Towards an International Islamic Legal System?”, *Leiden Journal of International Law* 14:3 (2001), pp. 665-680.

26 Compulsory ICJ jurisdiction is recognised among ILS by Egypt, Gambia, Iran, Nigeria, Pakistan and Sudan. See: “Declarations Recognizing the Jurisdiction of the Court as Compulsory”, <https://www.icj-cij.org/declarations>, 6 February 2023.

Powell identifies systemic similarities and differences between Islamic and international law that may aid the understanding of variation among ILS – i.e., whether they accept the ICJ’s jurisdiction, or turn to alternative forums for peaceful dispute resolution.²⁷ In terms of similarities, the crucial role of legal scholars in shaping international and Islamic law is primary, but the recognition of custom as a source of norms is another potentially unifying factor.²⁸ Further, although there is no single codification of either international or Islamic law, prioritising the peaceful settlement of disputes (*sulh*) and adherence to the rule of law are common features of both systems, and can enhance the ICJ’s attractiveness in countries that apply Islamic law.²⁹

Scholars and practitioners of international law argue that a key factor that prevents ILS from accepting the jurisdiction and authority of the ICJ is their different understandings of the relationship between law and religion. Although certain principles and rules of international law have their origins in religious sources and teachings, it is fundamentally considered a secular order. The sources of international law mentioned in Article 38(1) of the Statute of the ICJ “are strictly secular in nature” and include “international conventions, treaties, international custom, general principles of law recognized by civilized nations, judicial decisions, and teachings of the most highly qualified publicists”. In contrast, the primary sources of Islamic law are religious in nature, and include the texts of the Qur’an (the last divine revelation) and the hadith, which contains reports on the statements and actions of the Prophet Muhammad (pbuh). Further, the Statute of the ICJ does not regulate the religious affiliation of judges, and the majority of judges do not belong to the Islamic religion, which is another potential obstacle for at least some ILS to recognise the Court’s authority. This is because, according to classical Islamic procedural law, a non-Muslim cannot perform the function of judge in cases that relate to Muslims. Additionally, the delegation of authority a priori before a dispute arises, which occurs under both the ICJ’s coercive and compromissory jurisdictions is problematic from an Islamic law perspective, as strict interpretations of Islamic law oppose aleatory contract clauses.³⁰

Powell and Mitchell suggest a significant correlation between the characteristics of the domestic legal system and the relationship of states to international institutions such as the ICJ. The overarching influence of civil law on the rules and procedures of the ICJ, as well as the fact that the majority of its sitting judges belong to the ‘continental’ legal family, explains to a large extent

27 Powell, “Islamic law states and the International Court of Justice”, pp. 203-2017.

28 For the role of custom in the Islamic legal tradition and the civil codes of modern Muslim nation-states, see: Ayman Shabana, “Custom and Modern Constructions of Shari‘a: Transnational Juristic Discussions on the Status of ‘*Urf*’”, *Journal of Islamic Ethics* 3:1-2 (2019), pp. 30-63.

29 Powell, “Islamic Law States and the International Court of Justice”, pp. 206-207.

30 Powell, “Islamic Law States and the International Court of Justice”, pp. 207-209.

why the ICJ's jurisdiction is more attractive to civil than Islamic law countries. Conversely, the importance of the *pacta sunt servanda* principle in the Islamic legal tradition greatly contributes to the more enduring adherence of ILS than other countries to the ICJ's verdicts.³¹

Islamic law in the jurisprudence of the International Court of Justice

As previously stated, ILS' reliance on a competing Islamic legal system based on religious sources, including elaborated norms on international relations (*siyar*), makes it difficult to establish the ICJ's authority in these countries, because the Court works according to a mainly Western legal tradition. As a result, reasonable suggestions have been made that greater incorporation of Islamic legal principles into the ICJ's jurisprudence may enhance its authority in ILS. To achieve this, the ICJ should include judges who are well versed in the Islamic legal tradition (*al-turath al-fiqhi al-islami*) and knowledgeable in those ways of contemporary Islamic legal reasoning that reconcile the divergent points of Islamic and international law.

Lombardi explains that the ICJ rarely refers to Islamic law in its judgements, or even in the opinions of its individual judges.³² When these references have occurred, it has usually been to express a judge's concern about the legitimacy of the Court's opinion in the eyes of the Muslim world.³³ In this way, some judges have sought to strengthen the legitimacy of certain principles of international law by pointing to their rootedness in the Islamic legal tradition.³⁴ Others have argued that international legal norms should be applied in disputes involving Muslim-majority countries, but in a way that respects the Islamic legal culture.³⁵ Still others

31 Emilia Justyna Powell and Sara McLaughlin Mitchell, "The International Court of Justice and the World's Three Legal Systems", *The Journal of Politics* 69:2 (2007), pp. 397-415.

32 From the time of its establishment until 2006, the ICJ issued 83 verdicts in contested cases. In two of these, the official judgement mentions Islamic law, and seven others contain references to Islamic law in the concurring or dissenting opinions of individual judges. See: Clark B. Lombardi, "Islamic Law in the Jurisprudence of the International Court of Justice: An Analysis", *Chicago Journal of International Law* 8:1 (2007), p. 94.

33 Lombardi, "Islamic Law in the Jurisprudence of the International Court of Justice", p. 115.

34 In *North Sea Continental Shelf* (1969), for example, Judge Fouad Amoun of Lebanon argued that the ICJ should reference Islamic legal theory to support the precept that boundaries should be drawn according to "equitable principles" (Lombardi, "Islamic Law in the Jurisprudence of the International Court of Justice", p. 96).

35 In the Advisory Opinion in *Western Sahara* (1975), Judge Amoun criticised the ICJ's unwillingness to consider more seriously an Islamic legal concept proposed by Morocco in the dispute between two majority Muslim countries (Lombardi, "Islamic Law in the Jurisprudence of the International Court of Justice", p. 100).

have relied on Islamic legal sources to establish that “a ruling reached entirely by non-Islamic reasoning cannot be dismissed as contrary to Islamic law”.³⁶

The only case in which a majority of ICJ judges referred to Islamic law to defend the legitimacy of their judgement was *United States Diplomatic and Consular Staff in Tehran* (1980). The case concerned the arrest and detention of diplomatic and consular staff of the US Embassy in Tehran, in actions supported by the revolutionary Islamic government. The ICJ issued a decision declaring that Iran had violated international law, and ordered “the release of hostages, restoration of facilities and reparations to the United States”.³⁷ The ruling refers in passing to the important contribution of the “traditions of Islam” to the “development of international conventions and principles protecting diplomatic missions”.³⁸ In his separate concurring opinion, Judge Tarazi emphasised that there was a well-developed tradition of protecting diplomats in Islamic law, and supported his claim with references from a lecture published in French in the Proceedings of the Hague Academy of International Law, and a Soviet work on international law.³⁹

Scholars of Islamic international law qualified Iran’s actions as a violation of *siyar* and international law. Gamal Moursi Badr stated that “what happened in Tehran was an aberration and indeed a clear violation of Islamic law as well as conventional and customary international law”. In two 1980 resolutions, the Organization of the Islamic Conference (OIC) did not recognise the special authority of the ICJ, but called on Iran to resolve the hostage crisis in the spirit of Islamic values.⁴⁰

Unlike in *United States Diplomatic and Consular Staff in Tehran*, in which judges observed a compatibility between *siyar* and international law, the conflict between the two legal cultures came to the fore in the ICJ’s Advisory Opinion in *Western Sahara* (1975). The opinion concerned the dispute between Morocco and Mauritania, both of which had territorial claims to Western Sahara in the process of its decolonisation in 1974. Defending its case before the ICJ, Morocco “equated the Western Sahara people’s religious allegiance to the Moroccan Sultan with territorial sovereignty”. The IJC’s opinion preferred, however, “the territorial ties-based, Western model of sovereignty grounded in political authority”.⁴¹

36 In *Aegean Sea Continental Shelf* (1976), on a dispute between Greece and Turkey over the area in question, Judge Salah El Dine Tarazi of Syria cited a colonial translation of the Ottoman Civil Code (*Majalla*) to argue that giving effect “to the intents of the parties is a practice accepted not only by the European-inspired modern international legal tradition, but also by Islamic law” (Lombardi, “Islamic Law in the Jurisprudence of the International Court of Justice”, p. 101).

37 Powell, “Islamic Law States and the Authority of the International Court of Justice”, p. 229.

38 Lombardi, “Islamic Law in the Jurisprudence of the International Court of Justice”, p. 102.

39 Lombardi, “Islamic Law in the Jurisprudence of the International Court of Justice”, p. 103.

40 Powell, “Islamic Law States and the Authority of the International Court of Justice”, p. 230.

41 Powell, “Islamic Law States and the Authority of the International Court of Justice”, pp. 222-224.

Powell's juxtaposition of these (and similar) cases demonstrates that the behaviour of at least some ILS towards the ICJ has not been shaped solely by their preference for *siyar* over international law, but also by strategic considerations. In *United States Diplomatic and Consular Staff in Tehran*, the shared principle of inviolability of diplomats between Islamic and international law did not prevent an ILS from questioning the legitimacy of the ICJ. Conversely, in the Advisory Opinion in *Western Sahara*, an ILS was willing to allow the ICJ to adjudicate despite the divergent conceptions of territorial sovereignty in the two legal traditions. The analysis of these specific cases does not, however, discredit the expectation that the integration of Islamic legal principles into the jurisprudence of the ICJ could help establish the latter's legitimacy in the eyes of ILS.⁴²

Lombardi's analysis of references to Islamic law in ICJ jurisprudence highlighted the "judges' limited familiarity with Islamic law".⁴³ He is rightly suspicious of the ability of "passing references to Islamic law by legal professionals with no sustained training or recognized authority in Islamic law" to convince "skeptical Muslim or Islamic states that the Court's opinions are actually rooted in (or consistent with) God's Shari'ah".⁴⁴ The question therefore arises: Should the ICJ improve its engagement with the Islamic legal tradition through the inclusion of an Islamic legal scholar (*faqih*) on its bench? In 2020, Tiedrez presented a similar proposal in the context of electing judges to the ICC. Two of her arguments can easily be applied to the ICJ. First, unlike civil and common law systems, Islamic law (the third major legal system in the world) has not received adequate recognition in the ICC's jurisprudence, which calls into question its international character. Second, the ICC's practice addresses issues related to Islam or Muslims, which justifies greater sensitivity to the values and principles of Islamic legal culture.⁴⁵ The next chapter will address one such case from recent ICJ case law, which concerns war crimes committed against the Bosnian Muslim population in BiH during the 1992-1995 war.

42 Powell, "Islamic Law States and the Authority of the International Court of Justice", p. 221.

43 Lombardi, "Islamic Law in the Jurisprudence of the International Court of Justice", p. 103.

44 Lombardi, "Islamic Law in the Jurisprudence of the International Court of Justice", p. 115.

45 Juliette Rémond Tiedrez, "Time for an Islamic Legal Scholar at the ICC? On the International Criminal Court's Lack of Islamic law Representation", *Völkerrechtsblog*, 6 July 2020, doi: 10.17176/20200706-224909-0.

The International Court of Justice's judgement in Bosnia and Herzegovina v. Serbia and Montenegro

The 26 February 2007 judgement in *BiH v. Serbia and Montenegro* is an important precedent in ICJ case law, as it established that genocide was committed against members of the Bosniak-Muslim population in Srebrenica in July 1995. This was the first case in which the ICJ could apply the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide, and in which a country was convicted of violating this convention.

The Genocide Convention was adopted on the advocacy of Polish-American lawyer Raphael Lemkin, who believed that the terrifying experiences of the Holocaust suffered by Jews and other groups during the Second World War, and that the “destruction of whole populations – of national, racial and religious groups – both biologically and culturally” must be treated differently from other crimes against humanity. It was Lemkin who coined the term ‘genocide’, as a combination of the Greek *genos*, meaning race, people or tribe, and the Latin *cide* (*caedere, occidere*) meaning to kill. The Convention stipulates two elements of the crime of genocide: subjective (*mens rea*) and objective (*actus reus*). The first refers to the mental state of the perpetrator, which is reflected in the intention to destroy, in whole or part, a national, ethnic, racial or religious group. The second concerns the physical components of the crime, which may include: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting conditions on the group calculated to bring about its physical destruction in whole or part; (d) imposing measures intended to prevent births within the group; or (e) forcibly transferring children of the group to another group.⁴⁶

In its 11 July 1997 judgement, the Court established the international nature of the dispute between BiH and Serbia and Montenegro, and confirmed its jurisdiction based on Article IX of the Genocide Convention.⁴⁷ The dispute raised two fundamental questions: whether the crime of genocide against the non-Serb population was committed on the territory of BiH under the control of the military and paramilitary forces of the FRY and the self-proclaimed Republika Srpska; and whether the FRY was responsible for that crime.⁴⁸

46 Convention on the Prevention and Punishment of the Crime of Genocide, Article II, Doc.1_Convention on the Prevention and Punishment of the Crime of Genocide.pdf, accessed 10 February 2024.

47 The ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia): Preliminary Objections*, Judgement of 11 July 1996, para. 47.

48 The ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement of 26 February 2007, para. 65.

As Crnić-Grotić elaborates, the Court had no difficulty establishing the existence of an objective element of the crime, given the extensive evidence of atrocities and mass murders submitted by the applicant and taken from ICTY case law. In defining the subjective element, the Court decided that the crime must include specific intent (*dolus specialis*),⁴⁹ “in order to distinguish genocide from other serious crimes committed during the conflicts”.⁵⁰ According to this reasoning, such intention to destroy the group or its substantial part could not be proven on the basis of the Decision on the Strategic Goals of the Serbian People alone.⁵¹ Instead, the Court derived special intent from the behavioural patterns of perpetrators of the Srebrenica massacre: i.e., the killing of around 8,000 Muslim men between 11 and 19 July 1995, and the forced relocation of women, children and the elderly resulted in the physical disappearance of the Muslim population in Srebrenica, and constituted a substantial part of the Bosniak-Muslim nation. The Court did, however, reject the existence of genocidal intent in the widespread and serious atrocities committed in other parts of the territory under the control of the Army of Republika Srpska.⁵²

The ICJ confirmed that states can be responsible for not only preventing but also committing genocide, through their organs, persons or groups whose acts can be attributed to the state. In this particular case, it found ample evidence of the participation of the FRY’s official army and the Army of the Republika Srpska in military operations in BiH, and strong political, military and logistical ties between the two authorities in the years before the Srebrenica massacre, and during the war generally. Despite this, the ICJ did not find the FRY army responsible for the genocide in Srebrenica, nor that Republika Srpska and its army were de jure organs of the FRY. The fact that the applicant proved General Ratko Mladić received a salary from Belgrade until 2002, and that he was promoted to the rank of Colonel General in Belgrade on 24 June 1994, did not help their case.⁵³

The judgement did, however, find Serbia responsible for not taking the necessary actions to prevent the genocide in Srebrenica, and for not extraditing Ratko Mladić (accused of genocide and complicity in genocide) to be tried at the

49 For the ICJ’s discussion on specific intent (*dolus specialis*), see: *Bosnia and Herzegovina v. Serbia and Montenegro*, Judgement of 26 February 2007, para. 186-188.

50 Vesna Crnić-Grotić, “Crime of Genocide before the International Court of Justice”, *Zbornik radova Pravnog fakulteta Sveučilišta u Rijeci* 40:3 (2019), p. 1039.

51 Odluka o strateškim ciljevima srpskog naroda u Bosni i Hercegovini [Decision on the Strategic Goals of the Serbian People in Bosnia and Herzegovina] (1992), *Official Gazette of the Republic of Srpska*, 22/93. See also: *Bosnia and Herzegovina v. Serbia and Montenegro*, Judgement of 26 February 2007, para. 371. The Decision was adopted by the National Assembly of the self-proclaimed Republika Srpska in Bosnia and Herzegovina on 12 May 1992. It declared the establishment of an ethnically pure Serb territory in BiH, and its unification with the FRY.

52 *Bosnia and Herzegovina v. Serbia and Montenegro*, Judgement of 26 February 2007, para. 376.

53 *Bosnia and Herzegovina v. Serbia and Montenegro*, Judgement of 26 February 2007, para. 386-388.

ICTY, which meant the country had not cooperated fully with the Tribunal.⁵⁴ In his dissent, Vice-President of the ICJ Judge Al-Khasawneh criticised the majority interpretation for enabling states to carry out criminal activities through non-state actors or surrogates, and thereby to avoid direct responsibility for the crimes committed.⁵⁵

The verdict met with great disappointment among Bosniaks,⁵⁶ whose political representatives and religious leaders saw it as partial justice. They did, however, highlight as positive aspects the fact that a country had been convicted of violating the Genocide Convention for the first time, and that the political and military leadership of the Bosnian Serbs had been found responsible for committing genocide.⁵⁷ According to British historian Marko Attila Hoare, the verdict was largely determined by political rather than legal factors, and represented “a big step backwards when it comes to punishing genocide before international courts”. By absolving Serbia of responsibility for or complicity in the genocide, the verdict has emboldened nationalist forces in the country, who ignore the subtlety of the verdict, and treat it “as a clear justification of the Serbian position”.⁵⁸ Degan particularly criticised two aspects of the judgement: first, that the Court examined the causal link between the genocide in Srebrenica and Serbia’s responsibility only at the time when the massacre took place; and second, that it found the determination of Serbia’s responsibility for not preventing the genocide was “adequate satisfaction”, i.e., an order for the payment of monetary compensation would not be appropriate.⁵⁹ According to Hartmann, the documentation of the Supreme Defence Council of the FRY, which ICTY experts had access to in May 2003, before the ICJ verdict was passed, confirms Serbia’s responsibility for the war and war crimes committed in BiH.⁶⁰

54 *Bosnia and Herzegovina v. Serbia and Montenegro*, Judgement of 26 February 2007, para. 386.

55 *Dissenting Opinion of Vice-President Al-Khasawneh*, <https://www.icj-cij.org/sites/default/files/case-related/91/091-20070226-JUD-01-01-EN.pdf>, accessed 3 March 2024.

56 Christian Moe, “Vindicating Victimhood”, p. 10.

57 See: Ajša Hafizović-Hadžimešić, “Presuda Međunarodnog suda pravde: Nepravdna odluka” [International Court of Justice Ruling: Unfair Decision], *Islamske informativne novine Preporod*, no. 5/847, pp. 6-7.

58 Marko Attila Hoare, “Umanjivanje genocida do nepostojanja: Presuda Međunarodnog suda pravde u slučaju Bosna i Hercegovina protiv Srbije” [Diminution of Genocide Beyond Existence: International Court of Justice Verdict in *Bosnia and Herzegovina v. Serbia*], *Kriminalističke teme*, p. 37.

59 Vladimir Đuro Degan, “Zločin genocida pred međunarodnim sudištima” [The Crime of Genocide before International Courts], *Zbornik Pravnog fakulteta u Zagrebu* 58:1-2 (2008), pp. 90-92.

60 Florence Hartmann, *Mir i kazna, tajni ratovi međunarodne politike i pravosuđa* [Peace and Punishment: The Secret Wars of International Politics and Justice] (Sarajevo: Buybook, 2007). For the French edition, see: *Paix et châtement. Les guerres secrètes de la politique et de la justice internationals* (Paris: Flammarion, 2007).

The Council of Muftis' Fatwas on genocide and war crimes in Bosnia and Herzegovina

The fatwas of the Council of Muftis (the highest religious body of the ICBiH) on the genocide of Muslim Bosniaks in Srebrenica and Žepa (which were “protected zones of the United Nations”) and the war crimes in the Sana Valley took the unequivocal position of respecting the ICJ’s jurisdiction and the authority of its decisions that established responsibility for the aforementioned criminal acts, and the punishments imposed on their perpetrators. The dilemma that arose in these materials, i.e., whether the ICBiH, contrary to the ICJ and ICTY judgements, should qualify crimes committed in other parts of the country as genocidal acts, has been resolved in the texts of the fatwas, which bring the adopted qualification of genocide in line with these judgements.

The preparatory materials of the IC’s Expert Group on Srebrenica

In 2015, Husein-ef. Kavazović, Ra’is al-‘Ulama of the ICBiH, appointed the six-member Expert Group for Srebrenica,⁶¹ to consider declaring the Srebrenica Memorial Center a *haram* (sacred space).⁶² It was entrusted to determine: (a) the nature of the decision that the Council of Muftis of BiH should make; (b) the meaning of the term *haram* in the scholarly works of the Hanafi *madhab*; (c) a term that would indicate the special status of the Srebrenica Memorial Center; (d) the territory that should be covered by that special status; and (e) content that would permanently preserve the memory of the genocide committed in Srebrenica. The latter point reflected the main intention of this initiative, which was to ensure the memorialisation of the genocide committed against the Bosniaks of Srebrenica.⁶³ This article uses the Expert Group’s report (which includes joint conclusions and the individual opinions of its members), and the subsequent Council of Muftis fatwa for the genocide in Middle Podrinje, to investigate how the ICJ’s jurisdiction and the authority of its jurisprudence are perceived from an Islamic normative perspective, taking the *BiH v. Serbia and Montenegro* verdict as a case study.

61 The Expert Group was chaired by Vahid-ef. Fazlović, Mufti of Tuzla. Its members were: Hilmo Neimarlija, professor at the Faculty of Islamic Studies in Sarajevo; the late Fikret Karčić, professor at the Faculty of Law of the University of Sarajevo, and then president of the Constitutional Court of the ICBiH; Senad Čeman, then teaching assistant at the Faculty of Islamic Studies in Sarajevo; Rifat Fetić, head of the office of the Ra’is al-‘Ulama; and lawyer Asim Crnalić.

62 Senad Čeman of the Expert Group stated in an interview that the initiative came from Hasan Čengić, then President of the Assembly of the ICBiH.

63 Islamic Community in Bosnia and Herzegovina – Expert Group on Srebrenica, Report of 5 June 2015.

The Expert Group agreed that “the term *haram* would not be suitable for naming a cemetery, due to Sharia and legal/political reasons”.⁶⁴ Elaborating on these reasons in the context of Srebrenica, the group also expressed its position towards the ICJ and the ICTY and their judgements, which can be briefly described as: (a) attachment to the jurisdiction of international courts, followed by (b) a criticism of the reduction of the qualification of genocide against Bosniaks to Srebrenica. The Expert Group decided that the verdicts of the international courts on the genocide in Srebrenica had rightly been criticised for “localizing the genocide” and “reducing it to the municipal level”, which is a *sui generis* case in international criminal law.⁶⁵

To date, no proven genocide in history has been localized in this way. Each genocide was marked either by the name of the people against whom it was committed (e.g. the genocide of the Jews) or by the name of the country in which it was committed (e.g. the genocide in Rwanda).⁶⁶

More importantly, the Expert Group was of the opinion that the declaration of a *haram* in Srebrenica would “accept the localization of genocide”.⁶⁷ Contrary to the ICJ verdict, the Group found it necessary to “insist that the genocide against Bosniaks in the period 1992-1995 or genocide in Bosnia and Herzegovina in the period 1992-1995 was committed”.⁶⁸ In support of this, it was stated that German courts investigated allegations of genocide in Foča (the Novislav Džajić case) and Dobož (the Nikola Jorgić case).⁶⁹ At that time, final verdicts in the ICTY’s Karadžić and Mladić cases had not yet been passed, and it was expected that the qualification of genocide could be extended beyond the locality of Srebrenica.⁷⁰ The Expert Group concluded that it was important to “preserve both the symbolic and factual meaning of Srebrenica as a symbol of all victims and preserve the national character

64 Islamic Community in Bosnia and Herzegovina – Expert Group on Srebrenica, Report of 5 June 2015.

65 Čeman stated that prof. Fikret Karčić made a key contribution to the work of the Expert Group. See: Senad Čeman, “Harem kao sveti prostor u muslimanskoj pravnoj misli” [*Haram* as a Sacred Space in Muslim Legal thought], in *Islamska pravna kultura u tranziciji*, ed. Ahmet Alibašić et al. (Sarajevo: Center for Advanced Studies, 2020), 261. The Group’s conclusions largely incorporated prof. Karčić’s proposals.

66 Expert Group on Srebrenica, Report of 5 June 2015.

67 Expert Group on Srebrenica, Report of 5 June 2015.

68 Expert Group on Srebrenica, Report of 5 June 2015.

69 On 23 May 1997, the Court of Appeal of Bavaria found Novislav Džajić guilty as an accessory to 14 murders in former Yugoslavia. Džajić was “sentenced to five years’ imprisonment by a court in Munich. He was acquitted of having been an accessory to genocide as the Court did not establish with sufficient certainty the existence of the intent to destroy, in whole or in part, the group in question”. See *The Prosecutor’s Office v. Novislav Džajić*, <https://www.internationalcrimesdatabase.org/Case/1096/Novislav-Djajic/>, accessed 25 February 2024. In contrast, Nikola Jorgić was found guilty of genocide by the German courts, whose verdicts were upheld by the European Court of Human Rights. See Federal High Court of Germany, Translation of Press Release into English, no. 39 on 30 April 1999, “Federal High Court Makes Basic Ruling on Genocide”, <http://www.preventgenocide.org/punish/GermanFederalCourt.htm>, accessed 25 February 2024; European Court of Human Rights, *Jorgic v. Germany*, Application no. 74613/01, 12 July 2007.

70 Expert Group on Srebrenica, Report of 5 June 2015.

of Srebrenica”.⁷¹ Fikret Karčić, a professor at the Faculty of Law of the University of Sarajevo, insisted on this, and suggested that the term ‘genocide against Bosniaks’ be used at the level of discourse in the ICBiH, and that Srebrenica be treated “as the last and most brutal phase of the genocide”.⁷²

Further, the Expert Group decided that the Council of Muftis should issue a fatwa on the genocide of Bosniak Muslims, through which the ICBiH would communicate “its view of the crime and the criminals”.⁷³ This is explained in such a way that, although the ICJ has reached a verdict on the genocide, the ICBiH should express its own position in this authoritative form of Islamic discourse.⁷⁴

The fatwa on the genocide in Srebrenica and Žepa

Following the Expert Group’s conclusion, the Council of Muftis issued a fatwa on 3 July 2015, which “qualifies acts of terror, killing and expulsion of Muslims in the protected zone of Srebrenica and Žepa, and from the point of view of Islamic law, as genocide against Bosniak Muslims” (*al-ibada al-jama’iyya didd al-muslimin*).⁷⁵ In addition to the qualification of genocide, the fatwa points to several modalities of post-conflict and transitional justice, the implementation of which would include individuals and domestic and international institutions, in order to ensure security, stability and the restoration of trust between peoples and prevent future conflicts.⁷⁶ It emphasises the individual and collective obligation⁷⁷ of Muslims in BiH, Serbia, Croatia and Slovenia, as well as the Bosniak diaspora, to do everything in their power to neutralise the consequences of the genocide, in accordance with the fiqh maxim “harm is to be removed” (*al-darar yuzal*).⁷⁸ The Expert Group’s conclusion also highlights the responsibility of both domestic and international courts to prosecute the perpetrators of genocide. The central focus of the fatwa is to ensure the continuance of historical memory, through the declaration of the Middle Podrinje region as the “*šehitluci* (the martyr cemeteries) of the genocide against Bosniak Muslims”.⁷⁹ Finally, the fatwa supports the rule of law and the restoration of trust among nations, by prohibiting individuals and groups from undertaking acts of revenge, and by striving to “protect the life,

71 Expert Group on Srebrenica, Report of 5 June 2015.

72 Expert Group on Srebrenica, Report of 5 June 2015.

73 Expert Group on Srebrenica, Report of 5 June 2015.

74 Expert Group on Srebrenica, Report of 5 June 2015.

75 Islamic Community in Bosnia and Herzegovina – Council of Muftis, *Fatwa no. 03-2-74/15*, 3 July 2015.

76 On the different modalities of post-conflict and transitional justice, see: Bassiouni, *The Shari’a and Islamic Criminal Justice*, p. 250.

77 In Islamic legal theory, the term *wajib ‘ayni* is used for individual obligation, and *wajib kifaya’i* for collective obligation. See: Muhammad Abu Zahra, *Usul al-Fiqh* (Kairo: Dal al-fikr al-‘arabi, 2004), p. 37.

78 For commentary on this principle, see: Shahrul Hussain, *Al-Qawa’id al-Fiqhiyya: A Treasury of Sacred Maxims. A commentary on Islamic Legal Principles* (Leicestershire: Kube Publishing, 2016), pp. 48-51.

79 *Fatwa no. 03-2-74/15*, 3 July 2015.

religion, dignity, freedom and property of people, regardless of their religious and national belonging”.⁸⁰

The qualification of war crimes against Bosniak Muslims has as its framework the theory of the higher goals of Islamic law (*maqasid al-Sharia*). These goals include the protection of the fundamental values (*daruriyyat*) of human life (*nafs*), dignity (*ird*), freedom (*hurriyya*) and property (*mal*) of each individual, whereby the crime of genocide is a violation of the sanctity (*hurma*) of these values. The group cites Islam’s primary sources, the Qur’an⁸¹ and the hadith of the Prophet Muhammad (pbuh),⁸² which indicate this sanctity and forbid its violation.⁸³

In addition, the fatwa explicitly refers to the resolutions of the UN Security Council on the establishment of the UN protected zones of Srebrenica and Žepa, and to the ICJ’s judgement of 26 February 2007, according to which Bosnian Serb forces

with the knowledge of the Republic of Serbia, ‘which violated the obligation to prevent genocide’, in the period from July 13, 1995, carried out terror, killing and persecution, which constitutes an act of genocide, with the aim of destroying Bosnian Muslims.

Apart from the fact that it makes a rare direct reference to the judgement of an international court, the Council of Muftis fatwa is significant in that it provides unqualified recognition of both the ICJ’s jurisdiction to adjudicate in an international dispute in which the Genocide Convention is applied, and the authority of its judgement on the genocide of Muslims in BiH. This can be seen in the fact that the fatwa links the qualification of genocide to war crimes committed within UN protected zones (i.e., in Srebrenica and Žepa), in full compatibility with the ICJ’s verdict. Although the Expert Group recommended that the ICBiH insisted on the qualification of genocide against Bosniaks without territorial limitation, the prevailing argument in the Council of Muftis was that such an approach might undermine the authority of judgements adopted by the ICJ and ICTY. It was thought that this would only assist the political actors in BiH and abroad who denied the genocide against Bosniaks in Srebrenica, and believed the international courts to be biased and selective concerning the wartime events in BiH between 1992 and 1995.⁸⁴ In addition, the Council of

80 *Fatwa no. 03-2-74/15*, 3 July 2015.

81 Qur’an, 5:32.

82 *Sahih al-Bukhari*, pp. 1739, 1741 and 1742; *Sunan Abu Dawud*, p. 1905; *Sunan Ibn Maja*, p. 3055.

83 *Fatwa no. 03-2-74/15*.

84 See, for instance: B. M. R., “Reakcije na presudu: Osudeni ratni zločinci podržali Karadžića – Svjetski mediji izvještavaju o doživotnoj presudi Karadžiću i satisfakciji prema žrtvama” [Reactions to Verdict: Convicted War Criminals Support Karadžić – World Media Report on Karadžić’s Life Sentence and Satisfaction Towards Victims], <https://zurnal.info/clanak/osudeni-ratni-zlocinci-podrzali-karadzica/21963>, accessed 14 December 2022.

Muftis held the explicit position that the trial of those responsible for the crime of genocide against Bosniak Muslims was within the competence of domestic and international courts. It further expressed that it was “important” that the Council “accept[ed] the decisions of the courts”.⁸⁵ The latter point can be related to the fiqh maxim: “agreement is the law of the contracting parties” (*al-‘aqd shari‘a al-muta‘aqidin*).⁸⁶ Like the previous fatwa, this one declares it forbidden (*haram*) for an individual or group to undertake an act of revenge for the genocide, because it would constitute a “violation of the principle of legality in an ordered human society”.⁸⁷ Although the text of the fatwa does not elaborate on the acceptance of the jurisdiction and decisions of international courts, it is understood that it recognises the binding nature of the international agreements on which these decisions are based. The obligation to fulfil signed agreements stems from several Quranic verses⁸⁸ and hadith reports from the Prophet of God (pbuh).⁸⁹ According to Bassiouni, international agreements have the same binding force as civil law contracts, because they are based on the aforementioned Islamic legal maxim that corresponds to the Roman law principle of *pacta sunt servanda*, which is also contained in the Vienna Convention on Contract Law.⁹⁰

Contrary to the expectations expressed in the preparatory materials, although the fatwa provided the qualification of genocide against Muslims it was not accompanied by an elaboration of the provisions of Islamic criminal or humanitarian law applicable to this crime.⁹¹ Instead, the qualification was placed within the framework of the protection of fundamental human values, as previously noted. There are several possible reasons for this. First, the Council of Muftis has accepted the jurisdiction of secular domestic and international courts to determine responsibility for the genocide in Srebrenica and impose sanctions on its perpetrators, in accordance with the principle of the rule of law. As a result, it has not engaged in a more detailed explanation of the Islamic legal perspective on the genocide and its consequences. Further, although Muslims constitute the majority of BiH’s population and are simultaneously victims of genocide, Islamic law has not been part of the country’s positive legal system since 1946, when the Sharia courts were abolished. In reality, their criminal jurisdiction was abolished

85 *Fatwa no. 03-2-74/15*, 3 July 2015.

86 Bassiouni, *The Shari‘a and Islamic Criminal Justice*, p. 150.

87 *Fatwa no. 03-2-74/15*.

88 Qur’an, 17:34; 5:1; 2:177.

89 “The Muslims are bound by their obligations, except an obligation that renders the lawful unlawful, and the unlawful lawful” (Bassiouni, *The Shari‘a and Islamic Criminal Justice*, p. 154). Al-Albani declared this hadith good (*hasan*). See: Muhammad Nasir al-Din Al-Albani, *Al-Ta‘liqat al-Radiyya* (Riyadh: Dar Ibn al-Qayyim and Qairo: Dar Ibn ‘Affan, 2003), vol. 2, p. 174.

90 Bassiouni, *The Shari‘a and Islamic Criminal Justice*, pp. 153-154.

91 Prof. Fikret Karčić was of the opinion that the Council of Muftis’ fatwa should not only present the Sharia-legal position on genocide, but also on responsibility for the genocide, its consequences, and the punishment of its perpetrators. See: Expert Group on Srebrenica, Report of 5 June 2015.

even earlier, during the reform of Ottoman public law in the second half of the 19th century. Shifting the emphasis from the legalistic aspect of Sharia norms to the moral values protected by those norms in the fatwa should therefore be seen in this context. In addition, the fatwa follows the approach of reform-oriented Bosnian Muslim scholars, who emphasise the difference between individual norms (*al-abkam al-juz'iyya*) and the goals of the entire Islamic normative system (*maqasid al-Sharia*). While individual norms (and the sanctions for violating them) are not necessarily applicable to Muslims living in a country without Sharia courts, the general rules and goals represent enduring categories that are relevant to Muslims regardless of place and time.⁹² Moe notes that Bosnian Muslim scholars are receptive to the idea that international humanitarian law shares the general goals of protecting life, dignity, religion and property with the Islamic normative tradition, and Muslims can therefore unite around the terms of international agreements. This makes Islamic humanitarian law an appropriate frame of reference for considering the implications of genocide.⁹³

Islamic humanitarian law and Islamic international criminal law prohibit “the killing of members of groups, regardless of whether the act has been committed in whole, in part or only against a single member of a given group”.⁹⁴ The crime of mass killing or genocide can be classified as a *qisas* crime under Islamic criminal law, because the category includes two concepts of genocide: “murder which results in the death of the victim of the crime of genocide and the intention to kill but the action may not have resulted in the death of the victim”.⁹⁵ Genocide is expressly prohibited in the 1990 Cairo Declaration on Human Rights in Islam, which guarantees the right to life of every human being, and forbids resorting to means that may result in genocidal extermination.⁹⁶ Malekian states that Islamic international criminal law chronologically preceded international criminal law regarding the recognition of genocide as a crime.⁹⁷ If the Council of Muftis’ fatwa had elaborated Islamic norms concerning genocide, it would have identified interesting differences in the standards for proving the crime’s subjective element (*mens rea*): i.e., genocidal intention. For an act to be punishable in Islamic criminal law, the perpetrator’s intent must be established. The principle that actions are judged according to the intent of the perpetrator (*al-umur bi maqasidiha*) is

92 On the relevance of Sharia norms to Muslims in secular societies, see: Fikret Karčić, *Studije o šerijatskom pravu i institucijama* [Studies on Sharia Law and Institutions] (Sarajevo: El-Kalem and Center for Advanced Studies, 2011), pp. 203-204.

93 Moe, “Vindicating Victimhood”, p. 18.

94 Farhad Malekian, *Principles of Islamic International Criminal Law* (Leiden: Brill, 2011), p. 239.

95 Malekian, *Principles of Islamic International Criminal Law*, pp. 240-241.

96 The Cairo Declaration of the Organization of Islamic Cooperation on Human Rights, Article 2, CDHRI_2021_ENG.pdf (oic-oci.org), accessed 20 February 2024.

97 Malekian, *Principles of Islamic International Criminal Law*, p. 241.

derived from the Qur'an and the Sunnah.⁹⁸ Abu Zahra explains criminal intent as the intention to act willingly and knowingly, with premeditation and in full agreement with its intended results.⁹⁹ The standards used to prove intent in cases of (mass) murder in Islamic criminal law are different from those applied by the ICJ, and make it easier to prove genocidal intent. Since it is difficult to determine a person's intention, Muslim jurists did not envisage an investigation into the killer's psyche or an extensive examination of behavioural patterns, as was the case in the ICJ verdict on the Srebrenica genocide. Instead, they focused on the objects used in the crime, which are likely to transmit internal the workings of the offender's mind. This allows for the distinction between an intentional (*'amdan*) and unintentional act (*hata'an*). When balancing subjective and objective criteria to determine the perpetrator's intent, preference is therefore given to the latter.¹⁰⁰

*The fatwa on war crimes with elements of genocide
in Prijedor and the Sana Valley*

On the initiative of the *Majlis* of the IC Kozarac,¹⁰¹ the Office of the Mufti of Bihać turned to the Council of Muftis with a proposal to declare the area of Prijedor and the Sana Valley “*šehitluci* (the martyr cemeteries) and the area of the most serious crimes committed in the aggression against Bosnia and Herzegovina in the period 1992-1995”.¹⁰² Following this proposal, on 12 July 2017, the Council of Muftis appointed a five-member committee with the task of conducting “necessary research and establishing relevant facts” to prepare an expert opinion, on the basis of which a decision on the initiative could be made.¹⁰³ The committee's report was considered at the Council of Muftis session on 21 March 2018. It contained an analysis of: the extent of the crimes committed against the non-Serb population (especially Bosniak-Muslims) in Prijedor and the Sana Valley; completed and ongoing court proceedings against perpetrators

98 See Hussain, *A Treasury of Sacred Maxims*, pp. 17-23.

99 Badar, “Islamic Law (*Shari'a*) and the Jurisdiction of the International Criminal Court”, pp. 426-427.

100 Badar, “Islamic Law (*Shari'a*) and the Jurisdiction of the International Criminal Court”, pp. 426-428.

101 A *Majlis* is an organisational unit of the ICBiH that includes all local congregations (*jamaats*) in a municipality (Constitution of the ICBiH 2014, Article 39).

102 The initiative included the martyr cemeteries of Kamičani, Skela, Biščani, Rakovčani, Rizvanović, Hambarine, Čarakovo and Zecovi in the *Majlis* of IC Prijedor; Vrhpolje in Sanski Most; Biljani and Pudina Han in Ključ; and Blagaj Japra in Bosanski Novi (see: Letter from the Office of the Mufti of Bihać to the Council of Muftis of Bosnia and Herzegovina - Proclamation of the area of Prijedor and the Sana River Valley as *šehitluci* (martyr cemeteries) and areas of the most serious crimes, no. 01-02-1-1-63-9/2018, 12 June 2018).

103 The committee consisted of Chairman Hasan-ef. Makić, then Mufti of Bihać; Osman-ef. Kozlić, then Mufti of Banja Luka; Vahid-ef. Fazlović, Mufti of Tuzla; Vedad Gurda, professor at the Faculty of Law of the University of Tuzla; and Hikmet Karčić, then senior expert associate at the Institute for the Islamic Tradition of Bosniaks in Sarajevo. See: Council of Muftis of the ICBiH, Decision No. 03-2-116/17, 12 July 2017.

of these crimes before the ICTY, the Court of BiH, other domestic courts and courts in the Republic of Serbia; and previous activities to commemorate the suffering that occurred between 1992 and 1995. Ultimately, the committee recommended the systematic and planned marking of the most serious crimes committed in the area.¹⁰⁴

The most difficult dilemma the committee faced was whether to call the crimes committed in Prijedor and other places in the Sana Valley genocide. It ultimately decided not to use this term, “because the said sufferings are not characterized in that way in the court judgments”. Instead, it used the expression ‘the most serious crime’, which is devoid of strictly legal connotations. Ra’is al-‘Ulama Husein-ef. Kavazović, however, highlighted part of the ICTY’s verdict against Momčilo Krajišnik, which states that “certain crimes represent some of the acts of genocide”.¹⁰⁵

Based on the committee’s report, on 4 July 2018, the Council of Muftis issued a “fatwa on *šehitluci* (martyr cemeteries) in the area of the most serious crimes with elements of genocide in Prijedor and the Sana Valley”.¹⁰⁶ This fatwa relies on the same argument used in the fatwa for the genocide in Srebrenica and Žepa. In addition, it recommends following the Sunnah of the Prophet Muhammad (pbuh), the practice of his companions (*sahaba*), and the Islamic tradition of Bosniaks, “which dictates to treat *mezaristan*¹⁰⁷ with respect, and *šehitluci* with special respect”.¹⁰⁸ The fatwa declares Prijedor and the Sana Valley to be “*šehitluci* (martyr cemeteries) and the area of the most serious crimes with elements of acts of genocide”,¹⁰⁹ whereby these qualifications based on ICTY decisions: i.e., the

104 See the Draft Report of the Committee of the Council of Muftis for research into, and determination of, the facts and the preparation of documents on which a reasonable decision could be based about the *Majlis* of IC Kozara’s initiative on the issuance of a fatwa on the genocide/suffering of Muslims in Prijedor and its surroundings. The Draft Report is in the Council of Muftis’ archive, and in the personal archive of the author of this article.

105 Minutes of the 15th Regular Session of the Council of Muftis of the ICBiH, 21 March 2018, Ad. 11. The Ra’is al-‘Ulama’s statement refers to paragraph no. 867 of the verdict, which reads: “The Chamber finds that some of the crimes described earlier in part 5 meet the requirements of the *actus reus* for genocide”. After analysing the number of victims in relation to the size of the local Muslim and Croat populations and the detention centre where the murders took place; official reports; and the words of perpetrators and other persons at the scene of the crime, the ICJ concluded that there was no conclusive evidence that these acts were undertaken with the intention of destroying the Bosnian-Muslim and Bosnian-Croat ethnic groups. See: paragraphs 868-869 of the verdict.

106 Islamic Community in Bosnia and Herzegovina – Council of Muftis, *Fatwa on Šehitluci (the martyr cemeteries) in the Area of the Most Serious Crimes with Elements of Genocide in Prijedor and the Sana Valley*, no. 03-2-119/18, 4 July 2018.

107 The term is used in Bosnian for Muslim cemeteries.

108 The ‘Islamic tradition of Bosniaks’ is one of the four pillars on which ICBiH’s organisation and activities rest. See: Art. 3, Constitution of the ICBiH – official revised text, 2014. The document is available in Bosnian at: https://islamskazajednica.ba/images/stories/Ustavi/Ustav_IZ-e_precisceni_tekst_2014.pdf, accessed 8 March 2024.

109 *Fatwa no. 03-2-119/18*, 4 July 2018.

first-instance verdict in the Karadžić case,¹¹⁰ and the final verdicts in the cases of Krajišnik,¹¹¹ Brđanin,¹¹² Stakić¹¹³ and Sikirica.¹¹⁴ Although the fatwa does not cite the ICJ's decision, it is understood that it takes into account and respects the jurisdiction of both the ICTY and ICJ, and accepts their judgements as criteria for a Sharia qualification (*hukm*) of the crimes committed against Bosniak Muslims during the 1992-1995 war in Bosnia and Herzegovina.

Conclusion

The relationship between international adjudication and Islamic law is increasingly drawing the attention of scholars. Evidence from previous studies suggests that ILS are generally reluctant to accept the jurisdiction of international tribunals, but that a number of factors may influence their conduct in this regard. This article conducted a systematic literature review to describe these factors, which included the representation of Islamic normative principles in ICJ case law. Significantly, the article explains how the ICJ's authority is reflected in fatwas declared by the ICBiH Council of Muftis on war crimes committed against Bosniak Muslims during the 1992-1995 war. The central part of the article analyses the ICJ's verdict in *BiH v. FRY (Serbia and Montenegro)*, and the two Council of Muftis fatwas on genocide and war crimes in Srebrenica, Žepa, Prijedor and the Sana Valley.

The analysis shows that, despite their initial criticism of some aspects of the ICJ's judgement, the fatwas recognise the Court's jurisdiction in cases that apply the Genocide Convention to war crimes committed against Bosniak Muslims. It thereby contributes to earlier studies that highlight the need for a more nuanced approach to considering the relationship between the Islamic legal tradition and international law.

The Council of Muftis' critique of the localisation of genocide is not expressed in terms of Islamic jurisprudence, but is based on the argumentation of secular international law. This means the ICJ's authority is determined by the content of the judgement, not by considering the jurisdiction of international judicial mechanisms from the perspective of Islamic normativity. These findings

110 ICTY, Radovan Karadžić, Case no. IT-95-5/18-T, 24 March 2016, <https://www.icty.org/x/cases/karadzic/tjug/bcs/160324-presuda-1od4.pdf>, accessed 15 December 2022.

111 ICTY, Momčilo Krajišnik, Case no. IT-00-39-A, 17 March 2009, <https://www.icty.org/x/cases/krajisnik/acjug/en/090317.pdf>.

112 ICTY, Radoslav Brđanin, Case no. IT-99-36-A, 3 April 2007, <https://www.icty.org/x/cases/brdanin/acjug/en/brd-aj070403-e.pdf>, accessed 15 December 2022.

113 Milomir Stakić, Case no. IT-97-24-A, 22 March 2006, <https://www.icty.org/x/cases/stakic/acjug/en/sta-aj060322e.pdf>.

114 Duško Sikirica et al., Case no. IT-95-8, 13 November 2001.

are consistent with Moe's research, which found that Bosnian Muslims did not develop Islamic criticism of the ICTY, another important international tribunal that prosecuted war criminals in former Yugoslavia.

Both fatwas are based on the general fiqh rules (*al-qawa'id al-fiqhiyya al-kulliyya*) and the theoretical framework of the objectives of Islamic law (*maqasid al-Sharia*), and neither elaborate on the specific norms of Islamic criminal or humanitarian law. This is explained by the fact that the ICBiH interprets Islamic norms in the context of a secular state, and that Bosniak Muslim scholars are receptive to the idea of compatibility between international humanitarian law and the values that the Islamic normative system protects.

These fatwas have two further important characteristics. First, they explicitly refer to the verdicts of international courts in criminal matters, which is rare in this type of Islamic discourse. This characteristic is in line with Auda's elaboration of the spectrum of contemporary sources of Islamic law, which includes the 'modern values' expressed in international declarations and conventions.¹¹⁵ Second, in addition to containing a common element of rule of law (*hukm*), by which an action is placed on a scale of five legal and moral values, from mandatory (*wajib*) to prohibited (*haram*), these fatwas contain the qualification of specific crimes committed, which is a feature of a court verdict (*qada'*). This includes qualifications about the genocide (*al-ibada al-jama'iyya*) committed in Srebrenica, and war crimes with elements of genocide in Prijedor and the Sana Valley, which the fatwas include in accordance with ICJ and ICTY judgements.

Because this study is limited to analysing the reception of ICJ judgements in the ICBiH Council of Muftis fatwas, future studies are necessary to examine the treatment of international court verdicts in the fatwas of fiqh councils and individual Muslim scholars.

Bibliography

- Abu Zahra, Muhammad, *Usul al-Fiqh* (Kairo: Dal al-fikr al-'arabi, 2004)
 Al-Albani, Muhammad Nasir al-Din, *Al-Ta'liqat al-Radiyya* (Riyadh: Dar Ibn al-Qayyim and Qairo: Dar Ibn 'Affan, 2003), vol. 2.
 Auda, Jasser, *Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach* (London - Washington: The International Institute of Islamic Thought, 2008)

115 Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach* (London - Washington: The International Institute of Islamic Thought, 2008), pp. 159-169.

- Badar, Mohamed Elewa, “Islamic Law (*Shari’a*) and the Jurisdiction of the International Criminal Court”, *Leiden Journal of International Law* 24:2 (2011), pp. 411-433.
- Bassiouni, M. Cherif, *The Shari’a and Islamic Criminal Justice in Time of War and Peace* (New York: Cambridge University Press, 2014)
- B. M. R., “Reakcije na presudu: Osuđeni ratni zločinci podržali Karadžića – Svjetski mediji izvještavaju o doživotnoj presudi Karadžiću i satisfakciji prema žrtvama” [Reactions to Verdict: Convicted War Criminals Support Karadžić – World Media Report on Karadžić’s Life Sentence and Satisfaction Towards Victims], <https://zurnal.info/clanak/osudeni-ratni-zlocinci-podrzali-karadzica/21963>, accessed 14 December 2022.
- Brower, Charles N. and Sharpe, Jeremy K., “International Arbitration and the Islamic World: The Third Phase”, *American Journal of International Law* 97:3 (2017), pp. 643-656.
- Constitution of the ICBiH – official revised text, 2014. The document is available in Bosnian at: https://islamskazajednica.ba/images/stories/Ustavi/Ustav_IZ-e_precisceni_tekst_2014.pdf, accessed 8 March 2024.
- Convention on the Prevention and Punishment of the Crime of Genocide, Doc.1_Convention on the Prevention and Punishment of the Crime of Genocide.pdf, accessed 10 February 2024.
- Council of Muftis of the ICBiH, Decision No. 03-2-116/17, 12 July 2017.
- Crnić-Grotić, Vesna, “Crime of Genocide before the International Court of Justice”, *Zbornik radova Pravnog fakulteta Sveučilišta u Rijeci* 40:3 (2019)
- Ćeman, Senad, “Harem kao sveti prostor u muslimanskoj pravnoj misli” [*Haram as a Sacred Space in Muslim Legal thought*], u *Islamska pravna kultura u tranziciji*, ed. Ahmet Alibašić et al. (Sarajevo: Center for Advanced Studies, 2020)
- “Declarations Recognizing the Jurisdiction of the Court as Compulsory”, <https://www.icj-cij.org/declarations>, 6 February 2023.
- Degan, Vladimir Đuro, “Zločin genocida pred međunarodnim sudištima” [The Crime of Genocide before International Courts], *Zbornik Pravnog fakulteta u Zagrebu* 58:1-2 (2008), pp. 90-92.
- Dissenting Opinion of Vice-President Al-Khasawneh*, <https://www.icj-cij.org/sites/default/files/case-related/91/091-20070226-JUD-01-01-EN.pdf>, accessed 3 March 2024.
- Draft Report of the Committee of the Council of Muftis for research into, and determination of, the facts and the preparation of documents on which a reasonable decision could be based about the *Majlis* of IC Kozarac’s initiative on the issuance of a fatwa on the genocide/ suffering of Muslims in Prijedor and its surroundings.

- Duško Sikirica et al., Case no. IT-95-8, 13 November 2001.
- European Court of Human Rights, *Jorgic v. Germany*, Application no. 74613/01, 12 July 2007.
- Federal High Court of Germany, Translation of Press Release into English, no. 39 on 30 April 1999, “Federal High Court Makes Basic Ruling on Genocide”, <http://www.preventgenocide.org/punish/GermanFederalCourt.htm>, accessed 25 February 2024.
- Habibzadeh, Tavakol, “Nuclear Fatwa and International Law”, *Iranian Review of Foreign Affairs* 5:3 (2014), pp. 149-177.
- Hafizović-Hadžimešić, Ajša, “Presuda Međunarodnog suda pravde: Nepravedna odluka” [International Court of Justice Ruling: Unfair Decision], *Islamske informativne novine Preporod*, no. 5/847.
- Hartmann, Florence, *Mir i kazna, tajni ratovi međunarodne politike i pravosuđa* [Peace and Punishment: The Secret Wars of International Politics and Justice] (Sarajevo: Buybook, 2007)
- Hoare, Marko Attila, “Umanjivanje genocida do nepostojanja: Presuda Međunarodnog suda pravde u slučaju Bosna i Hercegovina protiv Srbije” [Diminution of Genocide Beyond Existence: International Court of Justice Verdict in *Bosnia and Herzegovina v. Serbia*], *Kriminalističke teme*, p. 37.
- Hussain, Shahrul, *Al-Qawa'id al-Fiqhiyya: A Treasury of Sacred Maxims. A commentary on Islamic Legal Principles* (Leicestershire: Kube Publishing, 2016)
- ICTY, Momčilo Krajišnik, Case no. IT-00-39-A, 17 March 2009, <https://www.icty.org/x/cases/krajisnik/acjug/en/090317.pdf>
- ICTY, Radoslav Brđanin, Case no. IT-99-36-A, 3 April 2007, <https://www.icty.org/x/cases/brdanin/acjug/en/brd-aj070403-e.pdf>, accessed 15 December 2022.
- ICTY, Radovan Karadžić, Case no. IT-95-5/18-T, 24 March 2016, <https://www.icty.org/x/cases/karadzic/tjug/bcs/160324-presuda-1od4.pdf>, accessed 15 December 2022.
- “International Court of Justice: Current Members”, <https://www.icj-cij.org/en/current-members>, accessed 8 December 2022.
- Islamic Community in Bosnia and Herzegovina – Council of Muftis, *Fatwa on Šehitluci (the martyr cemeteries) in the Area of the Most Serious Crimes with Elements of Genocide in Prijedor and the Sana Valley*, no. 03-2-119/18, 4 July 2018.
- Islamic Community in Bosnia and Herzegovina – Expert Group on Srebrenica, Report of 5 June 2015.

- Islamic Community in Bosnia and Herzegovina – Council of Muftis, *Fatwa no. 03-2-74/15*, 3 July 2015.
- Karčić, Fikret, *Studije o šerijatskom pravu i institucijama* [Studies on Sharia Law and Institutions] (Sarajevo: El-Kalem and Center for Advanced Studies, 2011)
- Letter from the Office of the Mufti of Bihać to the Council of Muftis of Bosnia and Herzegovina - Proclamation of the area of Prijedor and the Sana River Valley as *šehitluci* (martyr cemeteries) and areas of the most serious crimes, no. 01-02-1-1-63-9/2018, 12 June 2018)
- Lombardi, Clark B., “Islamic Law in the Jurisprudence of the International Court of Justice: An Analysis”, *Chicago Journal of International Law* 8:1 (2007), pp. 85-118.
- Lombardini, Michele, “The International Islamic Court of Justice: Towards an International Islamic Legal System?”, *Leiden Journal of International Law* 14:3 (2001), pp. 665-680.
- Milomir Stakić, Case no. IT-97-24-A, 22 March 2006, <https://www.icty.org/xl/cases/stakic/acjug/en/sta-aj060322e.pdf>
- Minutes of the 15th Regular Session of the Council of Muftis of the ICBiH, 21 March 2018.
- Roberts, Anthea, *Is International Law International?* (Oxford: Oxford University Press, 2017)
- Powell, Emilia Justyna, *Islamic Law and International Law: Peaceful Resolution of Disputes* (Oxford: Oxford University Press, 2020)
- Powell, Emilia Justyna, *Islamic Law and International Law: Peaceful Resolution of Disputes* (New York: Oxford University Press, 2019)
- Powell, Emilia Justyna, “Islamic Law States and the Authority of the International Court of Justice: Territorial Sovereignty and Diplomatic Immunity”, *Law and Contemporary Problems* 79:1 (2016), pp. 209-236.
- Powell, Emilia Justyna, “Islamic Law States and the International Court of Justice”, *Journal of Peace Research* 50:2 (2013), pp. 203-217.
- Powell, Emilia Justyna and Mitchell, Sara McLaughlin, “The International Court of Justice and the World’s Three Legal Systems”, *The Journal of Politics* 69:2 (2007), pp. 397-415.
- Malekian, Farhad, *Principles of Islamic International Criminal Law* (Leiden: Brill, 2011)
- Moe, Christian, “Vindicating Victimhood: The Bosnian Muslim Reception of the ICTY”, Revised draft, 12 March 2008.
- Odluka o strateškim ciljevima srpskog naroda u Bosni i Hercegovini [Decision on the Strategic Goals of the Serbian People in Bosnia and Herzegovina] (1992), *Official Gazette of the Republic of Srpska*, 22/93.

- Statute of the International Court of Justice, <https://www.icj-cij.org/en/statute>, accessed 8 December 2022.
- Shabana, Ayman, “Custom and Modern Constructions of Shari‘a: Transnational Juristic Discussions on the Status of ‘Urf”, *Journal of Islamic Ethics* 3:1-2 (2019), pp. 30-63.
- The Cairo Declaration of the Organization of Islamic Cooperation on Human Rights, Article 2, CDHRI_2021_ENG.pdf (oic-oci.org), accessed 20 February 2024.
- “The Court”, <https://www.icj-cij.org/en/court>, accessed 7 December 2022.
- The ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement of 26 February 2007.
- The ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia): Preliminary Objections*, Judgement of 11 July 1996.
- The International Court of Justice: Handbook*, 5, <https://www.icj-cij.org/public/files/publications/handbook-of-the-court-en.pdf>, accessed 7 December 2022.
- The Prosecutor’s Office v. Novislav Džajić, <https://www.internationalcrimes-database.org/Case/1096/Novislav-Djajic/>, accessed 25 February 2024.
- Tiedrez, Juliette Rémond, “Time for an Islamic Legal Scholar at the ICC? On the International Criminal Court’s Lack of Islamic law Representation”, *Völkerrechtsblog*, 6 July 2020, doi: 10.17176/20200706-224909-0.
- United Nations Charter, <https://www.un.org/en/about-us/un-charter>, accessed 8 December 2022.

Autoritet Međunarodnog suda pravde u islamskoj jurisprudenciji: fetve genocida i ratnim zločinima u Bosni i Hercegovini

Sažetak

Ovaj članak istražuje kako se autoritet Međunarodnog suda pravde (ICJ) percipira u fetvama o genocidu i ratnim zločinima počinjenim u Bosni i Hercegovini tokom rata 1992-1995. Izvori uključuju presudu ICJ u predmetu *Bosna i Hercegovina protiv Savezne Republike Jugoslavije (Srbije i Crne Gore)*; presude Međunarodnog krivičnog tribunala za bivšu Jugoslaviju; dvije fetve Vijeća muftija Islamske zajednice u Bosni i Hercegovini o ratnim zločinima nad bošnjačkim stanovništvom Srebrenice, Žepe, Prijedora i doline Sane i pripremne materijale napisane od stručnih grupa koji su prethodili izdavanju fetvi. Uprkos početnoj kritici lokalizacije genocida u presudi ICJ, fetve priznaju njegov autoritet u slučajevima u kojima se primjenjuje Konvencija o genocidu. Argumentacija ovih fetvi zasniva se na višim ciljevima islamskog prava (*maqasid al-Sharia*), u skladu sa ulogom islamske normativnosti u sekularnoj državi.

Ključne riječi: autoritet, Bosna i Hercegovina, fetva, genocide, Međunarodni sud pravde, međunarodno pravo, islamska jurisprudencija, ratni zločini