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INTERIM MEASURES OF PROTECTION IN THE TWO ORDERS OF THE ICJ- GENOCIDE CASES (BOSNIA AND HERZEGOVINA v. SERBIA AND MONTENEGRO

The subject of this article consists of the legal analysis of two orders of the International Court of Justice: first from 8 April 1993- case concerning application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)-Request for the indication of provisional measures and the second from 13 September 1993- case concerning application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)- further request for the indication of provisional measures. We will show which conditions are necessary for the ICJ to indicate the interim measures of protection such as: a) urgent situation, b) irreparable prejudice, c) preservation of rights of the Parties. Also the notion of competence prima facie will be discussed as well as the binding or not force of the order, its enforceability, and the relationship between the Security Council and the ICJ.

Kea words: International Court of Justice; Bosnia and Hercegovina v. Serbia; genocid; interim measures

I. INTRODUCTION

The Charter of the UN (Article 94) and the Statute of the ICJ (Article 41) which is its integral part, contain articles regarding ordering of the interim measures of protection. Also the internal rules of the ICJ, namely Rules (Reglement) contain regulations related to interim measures of protection (Article 75 and following).

Article 94 (Charter)

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give to the judgment.

Article 41 (Statute)

1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council

Rules of the Court (1978) as amended in 2002

SECTION D. INCIDENTAL PROCEEDINGS

Subsection 1. Interim Protection

Article 73

1. A written request for the indication of provisional measures may be made by a party at any time during the course of the proceedings in the case in connection with which the request is made.

2. The request shall specify the reasons therefore, the possible consequences if it is not granted, and the measures requested. A certified copy shall forthwith be transmitted by the Registrar to the other party.

Article 74

1. A request for the indication of provisional measures shall have priority over all other cases.

2. The Court, if it is not sitting when the request is made, shall be convened forthwith for the purpose of proceeding to a decision on the request as a matter of urgency.

3. The Court, or the President if the Court is not sitting, shall fix a date for a hearing which will afford the parties an opportunity of being represented at it. The Court shall receive and take into account any observations that may be presented to it before the closure of the oral proceedings.

4. Pending the meeting of the Court, the President may call upon the parties to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effects.

Article 75

1. The Court may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties.

2. When a request for provisional measures has been made, the Court may indicate measures that are in whole or in part other than those requested, or that ought to be taken or complied with by the party which has itself made the request.

3. The rejection of a request for the indication of provisional measures shall not prevent the party which made it from making a fresh request in the same case based on new facts.

Article 76

1. At the request of a party the Court may, at any time before the final judgment in the case, revoke or modify any decision concerning provisional measures if, in its opinion, some change in the situation justifies such revocation or modification.

2. Any application by a party proposing such a revocation or modification shall specify the change in the situation considered to be relevant.

3. Before taking any decision under paragraph 1 of this Article the Court shall afford the parties an opportunity of presenting their observations on the subject.

Article 77

Any measures indicated by the Court under Articles 73 and 75 of these Rules, and any decision taken by the Court under Article 76, paragraph 1, of these Rules, shall forthwith be communicated to the Secretary-General of the United Nations for transmission to the Security Council in pursuance of Article 41, paragraph 2, of the Statute.

Article 78

The Court may request information from the parties on any matter connected with the implementation of any provisional measures it has indicated.

II. UNIQUE NATURE OF THE REQUESTS

Until Bosnian case, it has been **only one occasion** on which the Court was called upon to respond to **a second request** for provisional measures. That was in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America); when such a request was filed in the Registry of the Court on 25 June 1984. Nicaragua stated in its second request (pursuant to paragraph 41 (C) of the Order of the Court dated 10 May 1984), that it was occasioned by the alleged failure of the United States to comply with the aforementioned Order of the Court, and that the Court ought to make a second order to secure compliance with the first one. As in the present case, Nicaragua annexed to the application fresh evidence of breaches of the Court's Order. The Court did not entertain the second request, considering, as contained in the letter from the President of the Court dated 16 July 1984, that Nicaragua should await the outcome of the proceedings on jurisdiction which were then pending before the Court. This episode was referred to in paragraph 287 of the Court's 1986 Judgment. However, the Court, in paragraph 288 of the same Judgment, re-emphasized, in the light of its findings on the merits, the Order that had been made on 10 May 1984.

In the Bosnian case, the Respondent also filed its own request for an indication of provisional measures. The Security Council was also seized of this dispute and there have been many resolutions passed on it. The Security Council, by resolution 819 (1993) of 16 April 1993 took note of the Order of the Court of 8 April 1993 and, in that resolution, reaffirmed its condem-

nation of all "violations" of international humanitarian law and "ethnic cleansing" in particular. Both the Court and the Security Council have taken steps in order to stop the ongoing acts of genocide in Bosnia.

> The Court, on the first request for an indication of provisional measures presented to it by the Applicant in this case, issued on 8 April 1993 the following order:
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> 'The Court
>
> Indicates, pending its final decision in the proceedings instituted on 20 March 1993 by the Republic of Bosnia and Herzegovina against the Federal Republic of Yugoslavia (Serbia and Montenegro), **the following provisional measures**:
>
> A. (1) Unanimously,
>
> The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent commission of the crime of genocide;
>
> (2) By 13 votes to 1,
>
> The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should in particular ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group;
>
> ...
>
> B. Unanimously,
>
> The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Government of the Republic of Bosnia and Herzegovina should not take any action and should ensure that no action is taken which may aggravate or extend the existing dispute over the prevention or punishment of the crime of genocide, or render it more difficult of solution.'

The question arises, what steps have been taken by each Party to ensure compliance with this Order. If it can be said that **the first Order has not been complied with**, maybe it would be better that the Court refrains from issuing a second Order until the first Order indicating interim measures has been implemented? The Court has the inherent power to make an order or reject an application apart from invoking the provisions of Article 41 of the Statute. It has powers under Section D of the Rules of the Court, especially those contained in Articles 73, 74, 75 and 76 of those Rules. It was not the case of the requests as were presented to the Court in **the Nicaragua case,** where the Applicant was seeking an order of the Court to the effect:

> "That, until such time as the United States ceases and desists from all activities that do not comply with the Order of 10 May 1984, the facilities of the Court shall not be available to the United States for the purpose of rendering a decision in its favor in any other pending or future case, and the United States shall not be permitted to invoke the Court's aid in any matter." (**Request of the Republic of Nicaragua concerning implementation of the Court's Order of 10 May 1984 dated 25 June 1984.)**

In many domestic courts, especially in the common law countries, **interlocutory applications** are exclusively at the discretion of the court. In most cases when the court is called upon to exercise such a discretion (which is a part of the inherent power of the court), "equity" plays very important role. An applicant who "wants equity must do equity" implying, that that applicant "must come with clean hands". This means that, if an applicant wants the court to exercise its equitable discretion on a matter, he must first satisfy the court that the earlier order issued by the court has been complied with, otherwise the court may refuse to make any further order.

Fitzmaurice expressed his doubt as to whether the jurisdiction of the Court is inherent per se. He asked whether the Court's jurisdiction to indicate provisional measures would normally or automatically form **part of its inherent powers** as an international tribunal, in the absence of specific provisions, such as Article 41 of the Statute of the Court. However, he concluded his position by expressing an ambivalent view in the following terms:

"On that occasion the present writer expressed the view that in existing international conditions, the arguments against 'inherency' would prevail in any test case. He nevertheless indicated his belief that the arguments for are much weightier, and he sees no reason to change this conclusion." (Fitzma-

urice, The Law and Procedure of the International Court of Justice, Vol. II, 1986, p. 774.)

However with regard to **inherent powers under the Statute**, he expressed his view as follows:

> "The jurisdiction to indicate interim measures of protection is, so far as the International Court is concerned, **part of the incidental jurisdiction** of the Court, the characteristic of which is that it does not depend on any direct consent given by the parties to its exercise, but is an inherent part of the standing powers of the Court under its Statute. Its exercise is therefore governed, not by the consent of the parties (except in a remote sense) but by the relevant provisions of the Statute and of the Rules of Court." (Ibid., p. 533; emphasis added.)

One may argue that this is still an inherent power derived from the Statute and Rules of Court. Perhaps it is important to note that its jurisdiction is incidental, like all other incidental powers of other international adjudicating tribunals. Therefore, once the Court is seized of a case in which it has **jurisdiction prima facie**, all of its incidental powers ought naturally to flow from that jurisdiction whether statutory or otherwise, like any other international tribunal, even though most of these powers, functions and jurisdiction are provided for in the Statute and Rules of Court.

The author went even further when he stated that:

> "As has been shown above, the power of the Court to indicate interim measures falls into the same category as its **compétence de la compétence**. Both are an exercise of incidental jurisdiction, necessary in the case of compétence de la compétence to enable the Court to function at all, and, in the case of the power to indicate interim measures, to prevent its decisions from being stultified ... Yet it is established law that this power is part of the inherent powers of all international tribunals, irrespective of whether it has been expressly conferred on them or not." (Ibid., p. 542.)

This view of Sir Gerald Fitzmaurice was definitively affirmed in the Nottebohm case, where the Court clearly and positively claimed such an incidental power when it pointed out that:

"Paragraph 6 of Article 36 merely adopted, in respect of the Court, a rule consistently accepted by general international law in the matter of international arbitration. Since the Alabama case, it has been generally recognized, following the earlier precedents, that, in the absence of any agreement to the contrary, **an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction." (I.C.J. Reports 1953, p. 119.)**

Since the issue of jurisdiction is an incidental one - like the power of the Court to indicate provisional measures - then it follows that such a power should likewise be a part of the inherent power of the Court. The decision of the Court in the Corfu Channel case on proceedings in default of appearance shows, that in matters of procedure, what is not specifically prevented by the rules may be applied by the Court (Rosenne, The Law and Practice of the International Court, 1965, Vol. II, pp. 590-591, para. 244). There is support for the view that:

"the failure of a State to comply with an interlocutory decision can lead to the automatic imposition by the Court itself of a sanction against that State, and will only bring it disadvantage ... since the interlocutory decision in itself does not dispose of the substantive rights of the parties" (ibid., Vol. I, pp. 124-125).

The discretionary power of the Court, even though statutory, flows from **Article 75 of the Rules of Court**. Paragraph 1 of the Article makes it clear that **proprio motu,** the Court may at any time indicate provisional measures, if the circumstances of the case so dictate and that such measures ought to be complied with by any or all the parties involved in the case. Paragraph 2 goes further to empower the Court to indicate measures that are in whole or part different from those requested by the parties, if in its discretion such measures ought to be taken or complied with by the parties. This Article gives the Court a wider discretionary power than does Article 41 of the Statute of the Court. It is an Article which to a great extent allows the Court to function as it ought to and in turn derives its validity from Article 30, paragraph 1, of the Statute of the Court which states that: "The Court shall frame rules for carrying out its functi-

ons. In particular, it shall lay down rules of procedure." Apart, therefore, from the discretionary and inherent powers of the Court, these rule-making powers are necessary to enable the Court to function as a Court.

1. Is the Order Binding?

This question is difficult to answer. The controversy as to whether an order of the Court has binding force results from the wording of the text of Article 41 of the Statute and Article 94 of the Charter. Sir Hersch Lauterpacht regrets this situation and suggests adequate amendment. He said that:

> "This circumstance illustrates to some extent the difficulty and the degree of artificiality surrounding the subject of provisional measures - drawbacks which stem from the fact that according to the wording and, perhaps, the intention of the Statute no legally binding force attaches to Orders issued under Article 41 of the Statute. The latter statement is controversial. However, that very fact may suggest the necessity of amending the Statute with a view to removing what is either an ambiguity or, on the assumption that Orders under that Article lack legal force, a provision inappropriate to a legal instrument." (Sir Hersch Lauterpacht, The Development of International Law by the International Court, 1958-1982, pp. 112-113; emphasis added.)

What then is wrong with **Article 41 of the Statute** that makes it not legally binding? Is any such deficiency one of "omission" or "commission"? Is there really an ambiguity contained therein? How should it have been worded? On the face of the text of the Article, there is nothing that specifically leads one to conclude that it lacks binding force. The first paragraph reads thus:

> "The Court shall have the power to indicate, if it considers that circumstance so require, any provisional measures which ought to be taken to preserve the respective rights of either party."

If one looks into the jurisprudence of this Court, it will be seen that there has been no categorical pronouncement on this issue, but that on 19 August 1929, in the Free Zones of Upper Savoy and the District of Gex case, the Permanent Court of International Justice stated that, unlike the final

judgment of the Court, orders of the Court have no "binding force" or "final effect" in the decision of any dispute. The relevant paragraph reads as follows:

> "and whereas, in contradistinction to judgments contemplated by Article 58 of the Statute, to which reference is made in Article 2, paragraph 1, of the Special Agreement, orders made by the Court, although as a general rule read in open Court, due notice having been given to the Agents, have no 'binding' force (Article 59 of the Statute) or 'final' effect (Article 60 of the Statute) in deciding the dispute brought by the Parties before the Court" (P.C.I.J., Series A, No. 22, p. 13).

Since then (about 64 years ago), the issue of whether the indication of provisional measures does or does not have legal binding force has continued to be in controversy.

In fact a careful examination of Article 41, paragraph 1, will suggest that it is prima facie devoid of any ambiguity. The use of the words "shall" and "power" is undoubtedly mandatory and imperative, giving the Court an indisputable prerogative to indicate provisional measures. The phrase "if it considers that circumstances so require" relates to the discretionary exercise of such power, to be used or applied in deserving cases. The reason why the power was given is clearly apparent in the later part of the Article; and that is to enable the Court to function as it should by preserving the "rights" of either party.

One may also ask what is the point of giving a request for an indication of provisional measure urgent attention, a quick and immediate hearing and priority (in most cases leading to an order being made within one or two weeks), if in spite of all the effort put into it, the resulting order is to be considered not legally binding and ineffective?

The situation of urgency as dictated by Article 74 of the Rules of Court which sounds like an application for habeas corpus in the common law countries. That Article reads:

> "1. A request for the indication of provisional measures shall have priority over all other cases.
>
> 2. The Court, if it is not sitting when the request is made, shall be convened forthwith for the purpose of proceeding to a decision on the request as a matter of urgency." (Art. 74, paras. 1-2; emphasis added.)

If we accept, that the jurisdiction to deal with a request for the indication of provisional measures **is part of the incidental jurisdiction** of the Court, it can be assumed, that an incidental order, forms a part of the outcome of the adjudicating assignment of the Court which is the final goal.

Taking into account the above, there is no reason why the Court's Order should not be binding on the Parties; otherwise the Court would not be empowered to make such orders in accordance with the provisions of the Statute and Rules of Court. The Court is empowered to make rules under Article 30 of the Statute; thus by evoking that Article, such orders made under the Rules are equally valid and binding.

2. Consequence of Non-Compliance - Is the Order Enforceable?

If an order is not binding, it is difficult to see how it can be enforced. This difficulty was highlighted in **the United States Diplomatic and Consular Staff in Tehran case,** Order of 15 December 1979 (I.C.J. Reports 1979, pp. 20-21, para. 47). In fact, this was the first important "test case" since the adoption of the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963, between two Members of the United Nations - the United States of America and Iran.

This case was filed in the Court by way of an Application by the United States of America on 29 November 1979 against the Government of Iran with regard to the dispute concerning the seizure and holding of hostages who were members of the United States Embassy in Tehran. A request for the indication of provisional measures was annexed to the Application and both the Application and the request were aimed at securing the immediate release of the hostages.

Even though the Government of Iran was notified, it refused to participate in the proceedings, but merely sent a telegram denying the jurisdiction of the Court. However, the Court exercised its power and discretion and proceeded with the hearing of the request by the United States of America.

Five provisional measures were indicated in an Order in which Part A (containing three measures) directed the Government of Iran to release the hostages, give back the Chancery and Consulates of the United States of America which had been occupied, afford all the diplomatic and consular personnel of the United States of America the full protection, privileges and immunities to which they were entitled under the aforementioned Vienna

Convention, and permit the hostages to leave Iran. The rest of the measures are not all that relevant to my thesis here. The important point was that the Islamic Republic of Iran refused to carry out all or any of the measures ordered by the Court. The Court has no machinery for enforcement and relies only on the Security Council to ensure such enforcement under Article 94 of the Charter.

At this point, it is important to state the provision of Article 94 of the Charter, which reads:

> "1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.
>
> 2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment." (Emphasis added.)

The consequential effect and problem created by this Article with regard to justiciability and enforceability of orders for an indication for provisional measures of protection on matters pending before the Court, are better perceived from the plea of Sir Gladwyn Jebb, when the United Kingdom took its complaint to the Security Council - presumably under Article 94, paragraph 1 - in the **Anglo-Iranian Oil Co. case,** which is another classical example of difficulty with the enforcement of interim measures of protection, as indicated by the Court.

In this case, like the earlier case concerning the United States Diplomatic and Consular Staff in Tehran, Iran refused to comply with the Order of the Court. But formally and legitimately, the United Kingdom presented its complaint to the Security Council under Articles 34 and 35 of the Charter of the United Nations. Even if matters of this nature cannot be presented to the Security Council under Article 94 relating to orders of the Court, there is nothing to prevent the affected State from taking its matter to the Security Council under Articles 34 and 35 of the Charter. It would be done to ensure that the order of the Court is not treated lightly, even though, and most regrettably, that may also prove ultimately futile at times.

Sir Gladwyn made a statement that: "the Council has special functions in relation to decisions of the Court, both under Article 94, paragraph 2, of

the Charter, and under Article 41, paragraph 2, of the Statue of the Court ... and this must clearly imply that the Council has the power to deal with matters arising out of such interim measures... Now, it is established that a final judgment of the Court is binding on the parties; that, indeed, is expressly stated by Articles 59 and 60 of the Statute and Article 94, paragraph 1, of the Charter. But, clearly, there would be no point in making the final [judgment] binding if one of the parties could frustrate that decision in advance by actions which would render the final judgment nugatory. It is, therefore, a necessary consequence, we suggest, of the bindingness of the final decision that the interim measures intended to preserve its efficacy should equally be binding." (United Nations, Official Records of the Security Council, 559th meeting, 1 October 1951, S/PV.559, p. 20; emphasis added.)

Article 94, paragraph 2, deals only with the judgment and not incidental orders or interlocutory matters. By contrast, Article 94, paragraph 1, deals with decisions. One may observe that, paragraph 1 is somehow weak and too general, because the use of the word "undertake" tends to imply an appeal to the "moral obligation" of a State. A more imperative word like "ought", "must", "shall" and "under obligation to" should perhaps have been employed. It would be better if the word "decision" have been used in both cases, otherwise it may even be better to spell matters out by inserting, in both provisions, the words "judgments or orders" which would demonstrate the desire to ensure that all the decisions of the Court are to be complied with. But the complaint of the United Kingdom was brought under Articles 34 and 35, which implied a cautious approach.

Sir Gladwyn also referred to the binding force of the decision of the Court under Articles 59 and 60 of the Statute of the Court. The way these two articles were drafted, puts too much emphasis on ratione personae and ratione materiae. Article 60 adequately strengthens the power and function of the Court, in order to ensure the finality of the settlement of any dispute that may be brought before it.

There is no reason why a judgment should be delivered or handed down in such cases, if the order of the Court would be frustrated in advance, which in effect, would make the judgment a mere exercise in futility. The Court should not be seen to make any further order if and when the parties in dispute have not taken the necessary steps to ensure the compliance with the earlier order made by the Court. For that reason one can share the view of Rosenne when he states:

> "That law, the attitude of which to States is impersonal and not eclectic, is ex hypothesi binding on all States. Lex vera, atque princeps, apta ad jubendum, et ad vetandum! For this reason it is submitted that the obligation to comply with the decision of the Court cannot be regarded only as a 'moral obligation'." (Rosenne, The Law and Practice of the International Court, 1965, Vol. I, p. 120.)

3. The Court and the Security Council

The Charter of the United Nations clearly provides that the Security Council gives effect to the possible enforcement of the decisions of the Court - Article 94 of the Charter. The Security Council has immense powers under Chapter VI and Chapter VII of the Charter, which in this regard serves as its "executive function". However, a point was made repeatedly by Bosnia in the proceedings on the request for an indication for provisional measures for protection with regard to the arms embargo placed on it and its need for self-defence to prevent continuing acts of genocide. In Article I of the Genocide Convention the High Contracting Parties confirm inter alia:

> "that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish" (emphasis added).

On self-defence, the Agent of Bosnia referred many times during the hearings, and in his earlier Application, to Article 51 of the Charter of the United Nations. This is an important provision on self-defence which provides that:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

There is no doubt that the Security Council has been giving its careful consideration to the hostilities in Bosnia and, as a result of this, has passed many resolutions. For example, on 16 April 1993, just a week after the Court's Order, the Security Council promptly passed resolution 819 (1993) in which it took note of the Court's Order and reaffirmed its condemnation of all the violations of international humanitarian law, in particular the practice of "ethnic cleansing".

By resolution 808 (1993) the Security Council has established an international tribunal for the prosecution of persons responsible for serious violations of humanitarian law committed in the territory of the former Yugoslavia. Just recently, on 24 August 1993, another resolution 859 (1993) was passed by the Security Council to ensure and reaffirm the territorial integrity of Bosnia-Herzegovina and its membership of the United Nations. All these resolutions leave one in no doubt that the Security Council has given and continues to give due consideration to international obligations under Chapters VI and VII of the Charter with regard to the hostilities going on in Bosnia.

The fourth request in its fresh request reads thus:

> "That the Government of Bosnia and Herzegovina must have the means 'to prevent' the commission of acts of genocide against its own People as required by Article I of the Genocide Convention."

It is rather difficult to understand this request. What form of measure can the Court indicate to enable Bosnia "to have the means, 'to prevent' the commission of acts of genocide against its own People"? It must, however, be constantly borne in mind that the aim of indicating provisional measures of protection is "to preserve the respective rights of either party", even though one is aware of the requirement of Article I of the Genocide Convention.

Article IX of that Convention provides:

> "Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III ..."

shall be submitted to the Court at the request of any of the parties.

On this particular fourth request of Bosnia, if it is asking for a declaratory judgment of the Court, and provided that such a request is entertainable by the Court, it must await the final hearing of the case on the merits.

Furthermore, the question is whether the issue of genocide as provided for in Article I of the Convention is not exclusively a matter for the States which "undertake to prevent and to punish" it. Again, another pertinent question may be asked, namely: "Who are the 'Bosnian People'? Does this not include the Croats, Serbs, Muslims and Jews"? Has the request not missed its target since it is alleged therein that "violations" and "acts of genocide" are being directed against the Muslims? As to the power, function and obligations of the Court, they have been adequately addressed and discharged by the Order issued on 8 April 1993, especially on the subject of the prevention of acts of genocide which is the subject-matter of the Applicant's request for provisional measures.

If, however, the issue of "prevention" is overstretched to include the question of access by the Applicant to the means (weapons) "to prevent" the commission of acts of genocide, the request is misconceived as far as the Court is concerned. It was the Security Council acting upon its powers under the Charter - and rightly too - that on 25 September 1991 placed an embargo upon the provision of arms and military equipment to Yugoslavia, with that State's consent.

Even though the Applicant has argued, that at that time (25 September 1991) the State of Bosnia and Herzegovina was not in existence and declared its independence only on 6 March 1992 and became a Member of the United Nations on 22 May 1992, and that the former State of Yugoslavia is no longer in existence, ever since its (Bosnia's) independence the same resolutions on embargo have been maintained. In this regard, the Security Council is now acting within its power under Chapter VII, and it is still seized of the matter.

Had any indication been made by the Court on this particular request, and if the same were not complied with (as happened with respect to the Order of 8 April 1993) Bosnia might still have had to present its complaints to the Security Council, either under Articles 34 and 35 of the Charter, or under Article 94.

Any order, like a judgment should be effective. It should be binding and enforceable, otherwise, ab initio, there may be a good and reasonable ground to question its being issued at all. The Court, it is submitted, should not be seen to act in vain.

The Court has this power under the Statute and Rules, so that it also forms a part of its inherent power under general international law. Otherwise it may be impeded from functioning as a Court. The Court should have

rejected or refused to issue the request for another Order in this case, unless and until the first Order of 8 April 1993 had been complied with by both Parties, and that is why the Court reaffirmed its first indication of provisional measures and re-emphasized to both Parties, that they should take all necessary steps to implement and comply with the first Order of the Court, made on 8 April 1993.

III. CONCLUSIONS.

It appears from the above analysis that the only way to interpret Article 94(2) in such a way that, in strictly legal terms, might confer an independent normative function to this provision and, thus, a reason for it to have been inserted in the Charter is to consider it as the legal basis for the Council to take enforcement action of the kind set forth in Chapter VII, irrespective of the preconditions provided for in Article 39, i.e., `the existence of any threat to the peace, breach of the peace, or act of aggression'. Nevertheless, this contention remains of only theoretical importance, so long as the Council keeps interpreting the preconditions for its coercive action set out in Article 39 as extensively as possible, so as to consider even cases of non-compliance with a Court decision that may not involve the use of force as a threat to the peace. For the rest, Article 94(2) only reiterates, with special regard to cases of non-compliance with Court decisions, other Charter provisions of a more general character:

(a) Articles 35(1) and 37(1), that give any Member State a *locus standi* before the Council with regard to Chapter VI like situations;

(b) Articles 36 and 37(2), that confer the Security Council the power to act *motu proprio* with respect to the same kind of situations;

(c) Article 39.

Even if, from a legalistic point of view, one can see little additional value in Article 94(2), and even if one were to consider the latter as devoid of almost any normative autonomy, it seems appropriate to have a provision in the Charter that singles out a *locus standi* before the Council for cases of non-compliance with a Court decision. In the light of relevant practice, the Charter provisions are in line with the main political tendency of the United Nations system. On the one hand, it is in keeping with those Charter provisions aimed at upholding the `rule of law': the purpose of the peaceful settlement of disputes (Article 2(3) and Chapter VI) and the importance the Charter attaches for its pursuance to the International Court of Justice (Ar-

ticles 7, 36(3), and 92), the binding character of its decisions (Article 94(1)) and the duty for all Members to `fulfill in good faith the obligations assumed by them in accordance with the [...] Charter' (Article 2(2)). On the other hand, in conformity with the general rationale of the Charter, Article 94(2) combines the above principles with the needs of international politics. In order to meet such needs, the Charter has avoided putting the Security Council under the judicial authority of the Court and has provided the Permanent Members of the Council with the right to veto any decision, or even recommendation, concerning `action with respect to threats to the peace, breaches of the peace, and acts of aggression', especially so, if any of them was allegedly responsible for the existence of such a situation. When the Council was asked to take action under Article 94(2) against one of its Permanent Members for non-compliance with a Court decision in a case involving the use of force, it was blocked by the veto of the defaulting Permanent Member. However, this apparently negative result for the rule of law in the *Nicaragua* case, as well as the lack of action in the *Anglo-Iranian Oil Co.* case, were reached through a policy decision-making process, which did not really impair the legal authority of the Court. In both cases, the Members of the Council who were against action to give effect to the judicial decision, presented their position by and large on mainly political grounds, without questioning the legal reasoning of the Court.

In order to preserve the balance between respect for legal values and satisfaction of political exigencies is the separation between the dispute before the Court and the dispute concerning non-compliance with the Court's decision, the latter of which is to be dealt with by the Council. When the case is before the Court, the judicial organ of the UN, legal considerations necessarily prevail. When a case of non-compliance with a Court ruling comes to the Security Council, which is the political body established and functioning under legal rules, such a case becomes one of political relevance.

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PRIVREMENE MERE ZAŠTITE U DVE PRESUDE MEĐUNARODNOG SUDA PRAVDE- SLUČAJEVI GENOCIDA (BOSNA I HERCEGOVINA PROTIV SRBIJE I CRNE GORE)

Rad se bavi pravnom analizom dve presude Međunarodnog suda pravde: prve od 8. aprila 1993. godine- slučaj koji se tiče primene Konvencije o sprečavanju i kažnjavanju zločina genocida (Bosna i Hercegovina protiv Jugoslavije (Srbije i Crne Gore))- zahtev za izricanje privremenih mera i druge od 13. septembra 1993. godine- slučaj koji se tiče primene Konvencije o sprečavanju i kažnjavanju zločina genocida (Bosna i Hercegovina protiv Jugoslavije (Srbije i Crne Gore))- kasniji zahtev za izricanje privremenih mera. Ukazaćemo na uslove koji su neophodni da bi Međunarodni sud pravde izrekao privremene mere zaštite kao što su: a) hitne situacije, b) nenadoknadiva šteta, c) zaštita prava stranaka. Takođe će biti razmotren pojam nadležnosti prima facie kao i uspostavljanje ili ne obavezujuće snage presude, njena izvršivost i odnos između Saveta bezbednosti i Međunarodnog suda pravde.

Ključne reči: Međunarodni sud pravde u Hagu; tužba Bosne i Hercegovine; genocid; privremene mere