The International Court of Justice and the Crisis in the Balkans: *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Yugoslavia)

1. *Introduction*

The tragic circumstances of the crisis in the Balkans have recently come before the International Court of Justice in proceedings brought by Bosnia and Herzegovina ("Bosnia") against the Federal Republic of Yugoslavia, Serbia and Montenegro ("Yugoslavia").[1] Bosnia has accused Yugoslavia of various genocidal acts and has sought orders related to various aspects of the conflict. While a decision on the merits is not expected for some time,[2] in two recent decisions the Court granted and then confirmed the granting of Bosnia's request for provisional measures.[3] This case has raised many important issues and could have serious consequences for the role of the ICJ in future international disputes.

2. *International Litigation and the International Court of Justice*

A. *The Nature of the International Court of Justice*

The International Court of Justice was established by Article 92 of the United Nations Charter as the "principal judicial organ" of the United Nations. The Court succeeded the Permanent Court of International Justice as the instrument chosen by the international community for the judicial settlement of disputes

1 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, ICJ Rep 1993 at 3; 32 ILM 888 (1993); and Provisional Measures, Order of 13 September 1993, ICJ Rep 1993 at 325; 32 ILM 1599 (1993).

2 In ICJ Communique 93/31, dated 11 October 1993, it was reported that the Registrar of the Court had set 15 April 1994 as the due date for Bosnia-Herzegovina's memorial and 15 April 1995 as the due date for Yugoslavia's counter-memorial. Assuming there are no more pleadings and there usually are not, the Court should begin hearing the merits of the case in late 1995 or early 1996.

3 For the hearing of the initial request for provisional measures (first request) the Court consisted of President Jennings, Vice-President Oda, and Ago, Schwebel, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ranjeva and Ajibola JJ. For the decision on the further request for provisional measures (second request), the Court consisted of President Jennings, Vice-President Oda, and Schwebel, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ajibola and Herczegh JJ, and Lauterpacht and Kreca JJ ad hoc. In the second decision Vice-President Oda, Shahabuddeen, Weeramantry and Ajibola JJ, and Lauterpacht J ad hoc appended separate concurring opinions to the Order of the Court, whilst Tarassov J and Kreca J ad hoc appended dissenting opinions to the Order of the Court.

between states. As Rosenne points out, the assumption underlying the establishment of the Court: "is that the world political organization, already possessed of executive, deliberative and administrative organs, would be incomplete unless it possessed a fully integrated judicial organ of its own."[4]

The operation and function of the Court is governed by the Statute of the International Court of Justice. It defines the major tasks of the Court as the exercise of power to resolve disputes (known as its contentious jurisdiction) and and the provision of advisory opinions to assist other United Nations organs and autonomous specialised agencies.[5] Only States can be parties to proceedings before the Court, and by Article 93(1) of the United Nations Charter all members of the United Nations are automatically parties to the Statute. Other States may be admitted by the General Assembly upon the recommendation of the Security Council or may submit to the jurisdiction of the Court ad hoc.[6] The jurisdiction of the Court in any particular case is established by separate declarations of acceptance, or by a treaty requiring the parties to submit their disputes in relation to that treaty to the Court (such as the Genocide Convention in the present case), or by a special agreement between the parties. Finally it should be noted that as a principal organ of the United Nations, the Court is under a duty to act in concert with the other organs to achieve the fundamental aims of the United Nations.[7]

B. Provisional Measures

As was pointed out above, a decision on the merits in this case is not expected for some time. However the Court has made two orders as regards provisional measures. Provisional measures are in many ways the international equivalent of the interim injunction which might be ordered by a domestic tribunal. The power to order such measures is contained in Article 41 of the Court's Statute, which "presupposes that irreparable prejudice shall not be caused to rights which are the subject of dispute in judicial proceedings".[8]

When will the Court have the jurisdiction to order provisional measures? Although there has been some disagreement regarding the appropriate jurisdictional test,[9] it now seems clear that the Court needs only to establish prima facie jurisdiction. As the Court stated in the second case:

> on a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case yet it ought not to indicate such measures unless the

4 Rosenne, S, *The World Court: What It Is and How It works*, (4th edn, 1989) at 27–8.
5 For example United Nations Educational, Scientific and Cultural Organisation (UNESCO) and the International Labour Organisation.
6 Charter of the United Nations, Art 93(2).
7 For a discussion of this duty see above n4 at 28.
8 First request at par 34. Although it is not cited in the judgment, this statement a direct quotation from the judgment of the Court in the *Nuclear Tests Cases* (Australia v France, New Zealand v France) Interim Protection ICJ Rep 1973 at 99.
9 See Warbrick, C J, "Interim Protection from Genocide" (1993) 52 *Camb LJ* 367 at 370.

> provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be established.[10]

An issue of considerable debate is whether orders indicating provisional measures are binding on the parties to the dispute.[11] The fact that this is controversial may seem odd to a domestic lawyer. However the doubts that exist are due wholly to the language of certain provisions in the Statute and the United Nations Charter,[12] and in particular to Article 41 of the Statute which empowers the Court to "indicate" provisional measures, and not to "order" them. Commentators seem divided on this issue, and Sztucki has gone so far as to state that "any categorical opinion on the subject seems to be vulnerable from one point or another".[13] However the better view is that of Fitzmaurice who argues that the whole logic behind provisional measures, being based on the necessity of preserving the status quo between the parties, entails that they are binding.[14] Although doubts have been expressed whether the Court is empowered to pronounce on this issue,[15] this issue was taken up in some of the judgments in the second case, and will be returned to below.

2. *The Standing of the Parties*

A. Bosnia-Herzegovina

In the proceedings concerning both the first and second requests for provisional measures, Yugoslavia disputed "the legitimacy of the Applicant". It claimed that since neither the President of Bosnia-Herzegovina, A Izetbegovic, nor his government were legally elected, they did not have the requisite status to conduct proceedings before the Court.[16] In a succinct response to this argument the Court pointed to the recognition of President Izetbegovic as a legitimate Head of State by the United Nations, and consequently his power to act on behalf of Bosnia in international relations.[17]

B. Yugoslavia

The standing of Yugoslavia was a much more difficult problem. This presented a delicate situation since it was not in the interests of either party to deny the legitimacy of Yugoslavia as a party to the proceedings. If Bosnia were to do so, it would defeat the purpose of bringing the proceedings in the

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10 Second request at par 24. Once again this statement is based on a similar statement made by the Court in the *Nuclear Tests Cases* above n8 at 99.

11 For an excellent discussion of this topic see Sztucki, J, *Interim Measures in the Hague Court* (1983) at 280–302.

12 Specifically Arts 41 and 59 of the Statute and Art 94 of the Charter.

13 Above n11 at 280.

14 Fitzmaurice, G, *The Law and Procedure of the International Court of Justice* Vol II (1986) at 548.

15 Ibid. The doubts arise because power of the Court to interpret its decisions and pronounce on their effects under Art 60 of its Statute is limited to "judgments"; orders indicating provisional measures are not technically "judgments".

16 See first request at par 12; second request at par 23.

17 First request at par 13; second request at par 23.

first place. On the other hand, for political reasons, Yugoslavia would not want to question its own existence as a valid international State.

The application maintained the continuity of Yugoslavia with the former Socialist Federal Republic of Yugoslavia, a member of the United Nations. The problem with this was that it appeared to be contradicted by the actions of both the United Nations General Assembly and the Security Council. In particular, Security Council resolution 777 (1992) of 19 September 1992 recommended that, given that the claim by the current Federal Republic of Yugoslavia (consisting only of Serbia and Montenegro) of continuity with its socialist namesake (which had consisted in addition of Bosnia-Herzegovina, Croatia, Macedonia and Slovenia) had not been generally accepted, the new State should not be able to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia and should therefore apply anew for membership in the United Nations and not participate in the work of the General Assembly until it had been admitted. This recommendation of the Security Council was approved by the General Assembly in resolution 47/1 (1992). These resolutions placed Yugoslavia seemingly in a position of international limbo. In a letter referred to by the Court, the Under-Secretary-General and Legal Counsel of the United Nations stated that the practical consequence of these resolutions was that although the new Yugoslavia could not participate in the work of the General Assembly, "Yugoslavia" remained a member of the United Nations, and could still participate in the work of organs other than Assembly bodies. He envisaged that the admission to the United Nations of a new Yugoslavia would "terminate the situation created by resolution 47/1".[18]

The Court responded to this situation with a thundering understatement, noting that it "is not free from legal difficulties".[19] However it avoided a detailed examination of these difficulties by noting that the issue of whether Yugoslavia is a party to the Statute of the Court was not one that required a definitive determination at that stage of the proceedings. The Court felt that Yugoslavia could have prima facie standing on the basis that it was a party to the Genocide Convention, and could therefore fall within the terms of Article 35 of the Statute of the Court.[20]

3. *The Basis of the Court's Jurisdiction*

A. *Bases Claimed in the First Request*

The primary basis upon which Bosnia claimed to found the jurisdiction of the Court was Article IX of the Genocide Convention.[21] That Article provides that disputes between contracting parties as to the application or fulfilment of the Convention shall be submitted to the International Court of Justice at the request of

18 Cited in the first request at par 17.

19 Id at par 18.

20 Article 35 provides that the Court shall be open to States who are not parties to the its Statute on the basis of a special provision in a treaty in force. See first request ibid.

21 The full title of the Convention is the Convention on the Prevention and Punishment of the Crime of Genocide (1948).

any of the parties to the dispute. The clarity of this provision meant that the only real issue faced by the Court was to determine whether Yugoslavia and Bosnia were parties to the Convention. The former Yugoslavia had ratified the Convention in 1950, and its purported successor adopted a formal declaration on 27 April 1992 to the effect that it considered itself bound by all the commitments the Socialist Federal Republic of Yugoslavia had assumed internationally. This intention to honour the relevant international treaties was confirmed in a note to the Secretary-General of the United Nations, dated 27 April 1992.

Bosnia had transmitted a Notice of Succession to the Secretary-General on 29 December 1992 expressing its desire to succeed to the Genocide Convention and undertaking to abide by the provisions therein. However in the proceedings before the Court, Yugoslavia disputed the validity of this purported succession, claiming that Bosnia had no right to succeed to the former Yugoslavia's international obligations merely because it occupied part of common territory. On this basis the Notice could only be an instrument of accession, which, by the terms of the Convention,[22] could only become effective 90 days after its deposit with the Secretary-General. Hence Yugoslavia claimed the Court could only have jurisdiction under the Convention in respect of facts subsequent to the expiration of 90 days from 29 December 1992.

The Court noted first that the Secretary-General had treated Bosnia's declaration as a succession, and not an accession.[23] Furthermore it argued that even if the temporal limitation did apply, 90 days had passed between the filing of the Application in this case and the oral proceedings. The Court was somewhat ambiguous as to whether it would be limited to an examination of events subsequent to the expiration of the 90-day period in the merits phase of the case, but decided that since a decision on provisional measures "is concerned, not so much with the past as with the present and with the future",[24] the transitional period was not a bar to the exercise of its powers under Article 41 of the Statute.

During the proceedings before the Court, Bosnia claimed that a letter from the Presidents of Montenegro and Serbia, to the President of the Arbitration Commission of the International Conference for Peace in Yugoslavia, constituted an additional basis of jurisdiction. Bosnia argued that it represented an unconditional and unilateral submission to the Court of a wide range of disputes relating to the dissolution of the former Yugoslavia. The Court rejected this claim on the basis that it was "by no means clear" that the letter was intended to be an "immediate commitment" to accept the Court's jurisdiction in these matters.[25]

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22 Specifically Art XIII.
23 First request at par 25.
24 Ibid.
25 Id at par 31.

B. Bases Claimed in the Second Request

(i) Why did the Court consider further bases of jurisdiction?

Having established the Genocide Convention as a basis of its jurisdiction, why did the Court consider additional bases in the second case? The Agent for Bosnia had sought to reserve the right to modify or supplement its application, and in reliance upon this proceeded to claim various additional bases of jurisdiction. The Court made it very clear that a party could not simply confer upon itself such a power.[26] However, the Court decided that it could consider whether "in all the circumstances the new claim afforded an additional basis of prima facie jurisdiction".[27] One important factor in making this decision was whether the additional bases acted so as to "transform the dispute brought before the Court by the application into another dispute which is different in character".[28]

(ii) The jurisdictional bases claimed

The first additional basis of jurisdiction relied upon by Bosnia was a treaty signed in 1919 by the Allied and Associated Powers and the Kingdom of the Serbs, Croats and Slovenes on the Protection of Minorities. Certain provisions of the treaty provide for the reference of disputes regarding the treaty to the Permanent Court of International Justice, the predecessor of the present Court. Nonetheless the Court rejected the treaty as a basis of jurisdiction on the grounds that, even if the present Yugoslavia was bound by the treaty, its obligations under the treaty would appear to be limited to the present territory of Yugoslavia.[29] Bosnia's claims are limited to activities in its own territory.

Bosnia again sought to rely on the letter of 8 June 1992 to establish the Court's jurisdiction. This submission was swiftly rejected on the basis that the letter had been rejected in the previous proceedings and Bosnia had "not put forward any new fact which might lead the Court to reopen the question".[30]

An attempt by Bosnia to rely on the laws of war and international humanitarian law as expressed through various conventions[31] was also rejected by the Court. It held that Bosnia had failed to bring to its attention any specific provisions in these treaties which might confer jurisdiction.

One final jurisdictional basis submitted by Bosnia was founded on the doctrine of *forum prorogatum*. The Court's findings in this area represent one of the most important aspects of the decision, and thus necessitate a detailed discussion of the doctrine.

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26 Second request at par 28.

27 Ibid.

28 Ibid, quoting from the judgment in the *Nicaragua* case: *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America) Jurisdiction and Admissibility, Judgment, ICJ Rep 1984 at par 80.

29 Second request at par 31.

30 Id at par 32.

31 Specifically, the four Geneva Conventions of 1949, their First Additional Protocol of 1977, the Hague Regulations on Land Warfare of 1907 and the Nuremberg Charter, Judgment and Principles: see id at par 33.

(iii) *Forum Prorogatum*

The doctrine of *forum prorogatum* is a means whereby the jurisdiction of the Court may be established ex post facto. The particular situation where this may take place has been described by Hersch Lauterpacht, one of the most renowned judges of the Court:

> exercise of jurisdiction by virtue of the principle of *forum prorogatum* takes place whenever, after the initiation of proceedings by joint or unilateral application, jurisdiction is exercised with regard either to the entire dispute or to some aspects of it as the result of an agreement, express or implied....[32]

The doctrine is explained in simpler terms by Hersch Lauterpacht's son, Elihu Lauterpacht QC who has been appointed the Bosnian Judge ad hoc[33] in the present proceedings:

> [*forum prorogatum*] is the possibility that if State A commences proceedings against State B on a non-existent or defective jurisdictional basis, State B can remedy the situation by conduct amounting to an acceptance of the jurisdiction of the Court.[34]

Forum prorogatum is available because neither the Statute nor the Rules of the Court require that an applicant must specify the formal basis upon which it founds the Court's jurisdiction. It is important to note that this doctrine in no way deviates from the requirement that parties before the Court consent to their appearance; it merely enables the Court to examine the conduct and statements of the parties to determine whether this consent has been expressed or may be implied.

The principle first emerged in decisions of the Permanent Court,[35] and was invoked for the first time before the present Court in the *The Corfu Channel Case* (Preliminary Objection).[36] In that case, the Court held that the language in a letter from Albania to the Court stating that it was "prepared notwithstanding [a claimed] irregularity in the action taken by the Government of the United Kingdom, to appear before the Court", could not: "be understood otherwise than as a waiver of the right subsequently to raise an objection directed against the admissibility of the Application founded on the alleged procedural irregularity of that instrument".[37]

Since then the doctrine has been invoked a number of times with varied success.[38] Generally respondent States have resisted the bait, and taken no

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32 *The Development of International Law by the International Court* (1958) at 103; quoted in Brownlie, I, *Principles of International Law* (3rd edn, 1979) at 726–7.

33 When the bench of the Court in any particular proceedings does not include a judge of each of the parties' nationality, Art 31 of the Statute provides that the unrepresented party (or parties) may appoint a Judge ad hoc, who can take part in the decision on terms of complete equality with his or her colleagues; see above n4 at 69. For a discussion of the debate surrounding this provision see, Gross, L, "The International Court of Justice: Consideration of Requirements for Enhancing its Role in the International Legal Order", in Gross, L (ed), *The Future of the International Court of Justice* Vol I (1976) at 61–4.

34 Second request per Lauterpacht J (separate opinion) at par 24.

35 In particular the decision in the *Rights of Minorities in Polish Upper Silesia Case* PCIJ Rep, Series D, No 2 (1928).

36 ICJ Rep (1947–48) at 27.

37 Ibid.

38 The doctrine was successful in conferring jurisdiction upon the Court in the *Request for*

positive action which could be construed as consenting to the Court's jurisdiction. Perhaps the most significant pronouncement on the doctrine came in the *Anglo-Iranian Oil Co Case*,[39] in which Iran, while maintaining its objections to the Court's jurisdiction, also advanced some objections to the admissibility of the United Kingdom claim which could only be determined if the Court did, in fact, have jurisdiction. However the Court rejected *forum prorogatum* as a basis for its jurisdiction, noting that Iran had "consistently denied the jurisdiction of the Court".[40] The other objections were "clearly designed as measures of defence which it would be necessary to examine only if Iran's objections to the jurisdiction were rejected".[41]

It should be noted that most commentators have stressed that the respondent's consent, although implied, must still be real. As Fitzmaurice points out the Court has: "showed an evident unwillingness to take advantage of technical errors of pleading, or of possibly *unguarded or premature statements* made on behalf of a party"[42] (emphasis added). This view is clearly reflected in the Court's judgment in the present case.

How then did the issue of *forum prorogatum* arise in these proceedings? The basis of Bosnia's claim of prorogated jurisdiction lies in a letter from the Federal Minister for Foreign Affairs of Yugoslavia to the Registrar of the Court dated 1 April 1993 in which he recommended that the Court order six particular provisional measures, at least four of which related to matters that could not be described as "genocide, as genocidally related or as necessarily causally linked with genocide".[43] Bosnia claimed that Yugoslavia had thereby enlarged the jurisdiction of the Court beyond those matters covered by Article IX of the Genocide Convention. The majority of the Court examined this issue only briefly, and rejected *forum prorogatum* as a basis of jurisdiction on account of Yugoslavia's constant denial of the Court's jurisdiction, and the fact that in a subsequent communication,[44] Yugoslavia's request for provisional measures was directed solely to the protection of asserted rights under the Geno-

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Interpretation of the Judgment of 20 Nov, 1950, in The Asylum *Case* (Colombia v Peru), ICJ Rep 1950 at 395, and the *Monetary Gold Case*, (Italy v France, UK and USA) ICJ Rep 1954 at 19 (although the Court declined to hear the case because it lacked jurisdiction on another ground). It was unsuccessful in the *Treatment in Hungary of Aircraft and Crew of the USA Cases* (USA v Hungarian Peoples' Republic, USA v USSR) ICJ Rep 1954 at 99, 103; the two *Aerial Incident* cases; *Aerial Incident of October 7th, 1952* (USA v USSR) ICJ Rep 1956 at 6, 9; *Aerial Incident of March 10th, 1953* (USA v Czechoslovakia); and the *Antarctica Cases* (UK v Argentina, UK v Chile) ICJ Rep 1956 at 12, 15. It should be noted that Yugoslavia has itself recently attempted to rely on *forum prorogatum*. On 24 March 1994 Yugoslavia applied for a declaration against the North Atlantic Treaty Organisation (NATO) Member States on the basis that NATO had breached Article 2(4) of the United Nations Charter through an unauthorised threat of force. To this date the NATO Member States have not consented to the Court's jurisdiction and it is very unlikely they will do so in the future.

39 (United Kingdom v Iran) Jurisdiction ICJ Rep 1952 at 93.

40 ICJ Rep 1952 at 114.

41 Ibid.

42 Above n14 at 510.

43 Second request per Lauterpacht J ad hoc (Lauterpacht J) at par 26. These requests related to cease-fire arrangements, prison camps, rights of safe passage for Bosnian Serbs, and the treatment of Orthodox priests.

44 A letter to the Court dated 9 August 1993. See second request at par 12.

cide Convention.[45] It concluded that Yugoslavia's initial letter could not, even prima facie, be regarded as a voluntary acceptance of the Court's jurisdiction.

This issue was examined in much greater detail in the two separate opinions delivered by Shahabuddeen J and Lauterpacht J ad hoc. Shahabuddeen J agreed with the majority that *forum prorogatum* was not applicable in the situation before him. He stressed the fact that Yugoslavia had consistently denied the jurisdiction of the Court beyond that stipulated in the Genocide Convention, even in the letter relied upon by Bosnia to establish the prorogated jurisdiction. He concluded that rather than being an offer to expand the Court's jurisdiction, the requests by Yugoslavia were (mistakenly) assumed to be "incidentally pertinent" to the proceedings under the Genocide Convention.[46]

Lauterpacht J examined this claim more thoroughly than the other members of the Court. He noted that if the Yugoslav proposals were seriously meant they could only have been put forward on the basis of some supposed ground of jurisdiction. Regardless of whether this ground was an expansive reading of the definition of "genocide" or an acceptance of Bosnia's requests outside the scope of the Convention, he concluded that: "the conduct of the Respondent seems to enlarge the jurisdiction of the Court beyond the range of matters strictly covered by an objective reading of Article IX of the Genocide Convention."[47]

In response to a citation of the decision in the *Anglo-Iranian Oil Co Case* (Preliminary Objection) by Yugoslavia, Lauterpacht J noted that whereas Iran's objections in that case were classified as being "clearly designed as measures of defence", the matters raised by Yugoslavia were "assertive requests"; that is, they were aimed at persuading the Court to take specific measures, and not at dissuading the Court from doing something.[48]

Lauterpacht J denied that any overwhelming significance should be attached to Yugoslavia's consistent denials of the Court's jurisdiction beyond the Convention. Noting that Yugoslavia's requests which lay outside the scope of the Convention "were neither brief nor accidental", he emphasised that Yugoslavia could not ask the Court to go beyond the Convention while simultaneously requesting that it limit its jurisdiction to the Convention.[49] Moreover, he concluded that the purported withdrawal by Yugoslavia in the subsequent communication was insufficient to negate the effect of the previous letter.

Which approach to this issue should be preferred? In terms of a strictly legal analysis, Lauterpacht J's seems more persuasive. Whatever the reasons were behind the sending of the 1 April letter (and one can suspect that domestic considerations were paramount), the requests were seriously intended to authorise the Court to rule on areas outside the Genocide Convention. However one must not forget the fundamentally consensual nature of the Court's jurisdiction. Although it may be legally distasteful to accept that once Yugoslavia realised the implications of its statement it could change its mind, that is the reality of international litigation. *Forum prorogatum* does not involve a

45 Second request at par 34.
46 Id per Shahabuddeen J at 354.
47 Id per Lauterpacht J at par 27.
48 Id at par 32.
49 Id at par 34.

true estoppel, and the Court has consistently displayed its reluctance to force States to become parties to proceedings they wish to avoid.[50]

4. *The Orders of the Court*

A. *The First Request for Provisional Measures*

Having decided that the Genocide Convention was the sole basis on which it could exercise jurisdiction, the Court indicated three provisional measures designed to curb genocidal activities in Bosnia. It re-emphasised that its decision in no way prejudged the question of the jurisdiction to deal with the merits of the case, nor the merits themselves. However, given that there was "a grave risk of acts of genocide being committed",[51] the Court felt obliged to indicate measures to avoid the aggravation or extension of the dispute. The provisional measures ordered were:

> A. (1) (Unanimously), Yugoslavia should take all measures within its power to prevent the commission of the crime of genocide.
>
> (2) (By 13 votes to 1), Yugoslavia should ensure that any military units, organisations or people over which it had control do not commit any acts of genocide, whether against the Muslims in Bosnia or any other group.
>
> B. (Unanimously), Yugoslavia and Bosnia should not take any actions which might aggravate or extend the existing dispute, or which might render it more difficult to resolve.[52]

The one dissenting voice on the second measure was that of Tarassov J. In a separate declaration he expressed the view that this particular measure was prejudicial since it gave the impression that the Court believed that Yugoslavia was conducting or condoning acts of genocide. He claimed that this provision was "very-close to a pre-judgment of the merits".[53] This seems to be a reasonable opinion since the second measure does implicitly accuse Yugoslavia of genocidal acts. However, as Warbrick points out, the "awfulness of the wrong" alleged may have justified the Court in ordering such a measure, given that there was enough evidence presented to implicate Yugoslavia in acts of genocide.[54]

B. *The Second Request for Provisional Measures*

Having decided that there were no jurisdictional bases available other than that identified in the previous decision, that being the Genocide Convention, the Court noted that since its previous Order

> great suffering and loss of life has been sustained by the population of Bosnia-Herzegovina in circumstances which shock the conscience of mankind

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50 An example of this can be seen in the decision in the *Nuclear Tests Cases* above n8 at 135.
51 First request at par 45.
52 Id at par 52.
53 Id per Tarassov J (separate declaration) at 26.
54 Above n9 at 370.

> and flagrantly conflict with the moral law and the spirit and aims of the United Nations.[55]

The Court was not satisfied that all that might have been done to prevent the commission of the crime of genocide had in fact been done. Therefore the Court decided that the situation demanded, not an indication of further measures, but the "immediate and effective implementation" of the previously ordered measures.[56]

This finding raises directly the issue of whether orders indicating provisional measures are binding. If not, what was the point of the Court indicating the measures in the first case, let alone calling for their "immediate and effective implementation"? The majority decision avoided an explicit discussion of this issue, merely noting in reliance on the *Nicaragua* case that "it is incumbent on each party to take the Court's indication seriously into account".[57] However the point was discussed in detail in the separate opinions delivered by Weeramantry and Ajibola JJ.

Weeramantry J noted that such orders should be considered binding since they are part of the inherent authority of a judicial authority. Moreover this conclusion was supported by an analysis of the terminology of the United Nations Charter, and the Statute and Rules of the Court, and on the basis of past decisions and the extra-judicial writings of ICJ Judges.

A similar conclusion was reached by Ajibola J who stated that an order indicating provisional measures:

> ought not to be ineffective, artificial or illusory. 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.[58]

5. *Implications of the Case*

One important implication of the case is that it demonstrates the dire need to make orders indicating provisional measures binding upon the parties to the case. If the Court is to have any real authority in governing the relations between States it must have the power to maintain the status quo while it deliberates on any particular dispute. This view was expressed by the United Kingdom representative in the Security Council in the course of discussions over the *Anglo-Iranian Oil Case*:

> 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 ... of the bindingness of the final decision that the interim measures intended to preserve its efficacy should equally be binding.[59]

Article 94 of the United Nations Charter requires Member States to comply with the Court's "decisions", and gives the Security Council the power to

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55 Second request at par 52.
56 Id at par 59.
57 Id at par 58.
58 Id per Ajibola J (separate opinion) at 406.
59 Cited in Fitzmaurice, above n14 at 549.

enforce this directive.[60] Although it is arguable that the word "decisions" already encompasses orders indicating provisional measures, this provision should be amended to explicitly authorise the Security Council to enforce such orders by way of sanctions, or even the use of armed force, as in the case of a breach of international peace and security.

An even more fundamental issue which arises from the case is whether proceedings such as these should be entertained by the Court at all. While it is clear that genocide is an international crime which should be punished, the question remains, did Bosnia bring this action in order to punish Yugoslavia for a crime, or was it merely a propaganda exercise? In short, was the bringing of these proceedings an abuse of the Court's process? Clearly the dispute between Bosnia and Yugoslavia is primarily a political dispute. It might be suggested that the political organs of the United Nations, the Security Council and the General Assembly, as well as those of the European Union, would be more appropriate forums for examination of the issues arising from this conflict. Furthermore, now that the United Nations has established an International War Crimes Tribunal, is the Court wasting a considerable amount of time in addressing a situation which would be better handled by the Tribunal, a body more suited to the task?

In response to these suggestions it should first be noted that it is not obvious that the Court has the power to dismiss proceedings as an abuse of process. The United Nations Charter and the Statute of the Court make no mention of any such power. Although this power is generally considered to be included in the inherent powers of domestic tribunals, it does not necessarily follow that it is also vested in the International Court. Indeed Rosenne claims that: "there can be no doubt that in principle the Court ought to decide every case which has been validly submitted to it and over which it has jurisdiction".[61]

The Court did dismiss the proceedings in the *Nuclear Tests Cases* on the basis that by reason of the later abandonment by France of its atmospheric nuclear tests, the action lacked object and purpose. However such a ruling would be inappropriate in the present case where the Applicant is seeking to punish the Respondent for past deeds as well as to regulate future actions. For the same reason it would be inappropriate for the Court to dismiss the present proceedings even though Serbia has now expressly disavowed support for the Bosnian Serbs on the basis of their refusal to agree to recent peace proposals.

What is the significance of the political nature of the dispute? In the *South-West Africa Oral Petitions* case,[62] Lauterpacht J expressed the view that any court cannot properly refuse to pronounce on a legal issue merely because in its view the matter would be better dealt with by some political body.[63] In striving to settle disputes between international States the Court will often be required to act concurrently with political bodies; however the political nature of a dispute should not be taken as an excuse for the Court to abdicate its

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60 See Charter of the United Nations, Art 94(2).

61 Rosenne, S, *The Law and Practice of the International Court* (2nd rev edn, 1985) at 308.

62 *Admissibility of Hearings of Petitioners by the Committee on South-West Africa*, ICJ Rep 1956 at 23; 23 ILR 38.

63 Cited in Fitzmaurice, above n14 at 655–6.

function.[64] This view is supported by the decision in the *Iranian Hostages* case where the Court held that nothing in its Statute or previous jurisprudence precluded it from dealing with a legal dispute submitted to it merely because that dispute was "only one aspect of a [broader] political dispute".[65] This conclusion is given even more force when the case concerns something so abhorrent as genocide. Article I of the Genocide Convention confirms that "genocide, whether committed in time of peace or in time of war, is a crime under international law". It would be wholly inappropriate for the International Court of Justice to refuse an opportunity to punish a crime which "shocks the conscience of mankind, results in great losses to humanity ... and is contrary to moral law and to the spirit and aims of the United Nations".[66]

One of the most interesting issues raised by the case concerns the power of the Court to review the legality of decisions made by the political organs of the United Nations. Specifically, the question arose whether the Court has the right to decide that a Security Council resolution is ultra vires. An affirmative answer to that question was implied by the Court's decision in the *Lockerbie* case.[67] In that case Libya asked the Court to declare that certain Security Council resolutions[68] were ultra vires in that they infringed upon the exercise of Libya's rights under the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971. The Court rejected this claim on the basis that Article 103 of the United Nations Charter meant that any obligations that Member States had under international agreements were "trumped" by their obligations under the Charter, including their obligation under Article 25 to accept and carry out decisions of the Security Council. However, as Franck points out,[69] what is most significant about this decision is what the Court left unsaid. The decision clearly implies that the Court can review the legality of the decisions of the political organs of the United Nations. Although the Court acceded to the Council's broad discretionary powers, "it [acceded] not by refusing to decide, but by exercising its power of decision".[70]

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64 The Court reflected this view when it rejected a claim by Yugoslavia that provisional measures would be inappropriate merely because the Security Council was also addressing the Balkan situation at that time; first request at par 33.

65 *Case Concerning United States Diplomatic and Consular Staff in Tehran* (USA v Iran) ICJ Rep 1980 at par 37. See Jeffrey, A, "The American Hostages in Tehran: The ICJ and the Legality of Rescue Missions" (1981) 30 *ICLQ* 717.

66 United Nations General Assembly resolution 96 (1) of 11 December 1946 on "the Crime of Genocide", referred to by the Court in its Advisory Opinion on *Reservations to the Convention on the Prevention of the Crime of Genocide* ICJ Rep 1951 at 23; quoted by the Court in the first request at par 49.

67 *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom* (*Lockerbie* case) Request for Indication of Provisional Measures, ICJ Rep 1992 at 15.

68 The first resolution called on Libya to surrender two of its nationals accused of taking part in the Lockerbie bombing; a subsequent resolution imposed universal mandatory commercial and diplomatic sanctions to secure compliance: SC Res 731 (Jan 21, 1992) and SC Res 748 (Mar 31, 1992).

69 Franck, T, "The 'Powers of Appreciation': Who is the Ultimate Guardian of UN Legality" (1992) 86 *Am J Int'l L* 519 at 521.

70 Ibid.

The issue was raised in the present proceedings in connection with the fourth measure that Bosnia requested the Court indicate. The fourth request was: "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".[71] This request, at least in part, related to the decision of the Security Council to impose an arms embargo in the territory of the former Yugoslavia, and to maintain the embargo even after that State had fragmented into several separate States, including Bosnia-Herzegovina.[72] The implications of the request were ignored by the majority of the Court; however they were examined in detail by Lauterpacht J. He first noted that the embargo operated unequally between the two sides since the Bosnian Serbs had had the military support of Serbia.[73] He argued that this meant that the Security Council's embargo was directly hampering Bosnia in its attempts to prevent the commission of genocide:

> [T]he Security Council resolution can be seen as having in effect called upon Members of the United Nations, albeit unknowingly and assuredly unwillingly, to become in some degree supporters of the genocidal activity of the Serbs ....[74]

Could the Court do anything about this? Was the resolution somehow invalid because of the effect it was allegedly having? Lauterpacht J's initial response was to confirm the decision in the *Lockerbie* case:

> [T]he Court, as the principal judicial organ of the United Nations, is entitled, indeed bound, to ensure the rule of law within the United Nations system and, in cases properly brought before it, to insist on adherence by all United Nations organs to the rules governing their operation.[75]

However he then distinguished this case from the *Lockerbie* decision on the basis that, whereas the previous case involved a conflict between a Security Council resolution and a conventional obligation, here there was a conflict between a resolution and a rule of *jus cogens*, that is, the prohibition of genocide.[76] Since principles of *jus cogens* override treaties, even the United Nations Charter, it was clear that the Security Council resolution could not prevail.[77] Lauterpacht J noted that, although the logical result of this finding

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71 See second request at par 6.

72 SC Res 713 (1991).

73 The past tense is appropriate here given that Serbia-Montenegro has now withdrawn support for the Bosnian Serbs because of their rejection of the latest peace proposal.

74 Second request per Lauterpacht J at par 102.

75 Id at 99. It could be argued that implicitly Judge Ajibola also recognised the Court's powers of judicial review when, in discussing the Security Council's embargo, he stated that "[i]t was the Security Council acting upon its powers under the Charter — *and rightly too* — that ... placed an embargo" (emphasis added).

76 Article 53 of the Vienna Convention on the Law of Treaties 1969 defines a rule of *jus cogens* as: "a peremptory norm of general international law ... a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". Lauterpacht J notes in his judgment that the "prohibition of genocide has long been regarded as one of the few undoubted examples of *jus cogens*"; second request per Lauterpacht J at par 100.

77 The possibility that this situation could arise was foreseen by Acting President Oda in the *Lockerbie* case. He contended that had Libya been able to allege a more general ground of

would be that the resolution was invalid, and that Members of the United Nations could ignore it, a solution "more in accord with the realities of the situation" would be for the attention of the Council to be drawn to the relevance of *jus cogens*, so that they could "give due weight to it in further considerations of the embargo". Clearly this decision has far-reaching implications for the role of the Court in the United Nations system. Even so, the power of judicial review does not seem to be inconsistent with the Court's function as the principal judicial organ of the United Nations.

6. *Conclusion*

In conclusion, it is clear that even at this early stage of the proceedings this case has raised many important legal and moral issues. Unfortunately it has also highlighted the inadequate powers of the present International Court of Justice. As long as there is doubt whether the Court is able to issue binding provisional orders, and whether the Security Council is empowered to enforce such orders,[78] its influence in international affairs will remain at best, marginal, and the great potential it offers for effective resolution of international disputes will continue to be unrealised.

BEN GAFFIKIN*

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ultra vires, such as a right under general international law, the question of whether the Court had jurisdiction would certainly have been "a different matter"; *Lockerbie* case, Declaration of Oda J, pt III at 3. See Franck, above n67 at 522.

78 The power to enforce decisions of the Court is effectively vested in the Security Council by Arts 25 and 94 of the United Nations Charter.

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