

Innovative approach of the International Court of Justice in the Use of its Power Under Article 78 of the Rules of the Court

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Abstract:

According to article 78 of the Rules of the International Court of Justice, the Court may request information from the parties on any matter connected with the implementation of any provisional measures it has indicated. While having high capacity in the implementation of the Court's interim order, this provision has not been adequately considered so far. In the case relating to the "Alleged Violations of the Treaty of Amity", however, the Court adopted an innovative approach and, contrary to its practice, exercised its power under article 78 only a few months after the interim order was issued. It, therefore, requested the United States of America to notify the Court of any measures taken to execute the interim order within a maximum of 48 days. It is believed that repetition and confirmation of the Court's innovative approach in future cases will promote the Court as a supervisory entity for the implementation of provisional measures that are envisaged in interim order.

1. Introduction

In contemporary international law, the binding nature of obligations arising from the interim orders of the International Court of Justice is not disputed. Nonetheless, pursuing the implementation of the provisional measures envisaged in the Court's interim order is still contentious. Provisional measures envisaged in the Court's interim orders are the response to the urgent needs, and naturally, the issues concerning their implementation need to be pursued urgently. When provisional measures are requested from the Court,¹ in fact, it must be proved that a

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¹ The provisional measures requested from the International Court of Justice do not restrict the Court, and the Court shall, in accordance with its procedural law (Article 75 (2)), have the power to indicate measures distinct from those requested. The practice of the court in the cases "Application of the International Convention on the Elimination of All Forms of Racial Discrimination", and "Application of the International Convention for the Suppression of the Financing of Terrorism and of the

real, imminent risk and an irreparable prejudice will arise by the time the Court renders its judgment, and the Court which is providing some measures, shall prevent loss to the rights of the parties which are determined in the judgment of the court.² While urgency is a prerequisite for the issuance of an interim order, there is no need to take any specific action regarding the urgency of implementing the interim order in the Statute and the Rules of the Court. The Court's Rules, also, do not indicate any practical steps in this regard, such as whether there is a time limit for the implementation of the interim order or whether the Court should consider whether the parties implemented the interim order.

While the Court's interim orders can be implemented by the UN Security Council under article 94 (2) of the Charter,³ the Court may also make efforts to enforce its interim orders by exercising some of its powers. The refusal to implement the interim order which creates legal obligations may be considered in the judgment of the Court as a basis for the responsibility of the refusing party.⁴ Hence, the Court may use the

International Convention on the Elimination of All Forms of Racial Discrimination" are examples. See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018, para. 73; Application of the International Convention on the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017, para. 100)

² Statute of International Court of Justice, art. 41(1).

³ The possibility of recourse to the UN Security Council according to paragraph 2, article 94, for the implementation of the Court's interim orders is disputed. The practice of the UN Security Council, following the interim order issued in "Application of the Convention on the Prevention and Punishment of the Crime of Genocide" (Bosnia and Herzegovina v. Serbia) case, has been for the Council to put the issue of the implementation of the interim order on its agenda, but so far it has not made any recommendations or decisions in this regard under article 94 (2) (Morteza Najafi Asfad and Mehdi Hadi, 'The Guarantee of Implementation of the Judgments of the International Court of Justice' [2005] Legal Letter. (in Persian) 39).

⁴ The International Court of Justice in "LaGrand" case declared that the interim order shall create legal obligations and if such obligation are breached, the other party may obtain reparation (LaGrand Case (Germany v, United States of America), I.C.J. Reports 2001, paras 110, 116).

The reparation for disregarding the Court's interim order was first raised in "Interpretation and Application of the Convention on the Prevention and Punishment of the Crime of Genocide" case. In this case, the applicant (Bosnia and Herzegovina) claimed that failure to comply with the Court's interim order (dated April 1 and September 13) by the respondent (Serbia) constitutes a breach of the international obligations of the state and, therefore, Serbia must compensate as much as the Court determines. Nevertheless, since the Court failed to find a causal link between the respondent's obligation to prevent genocide and the damages caused by the genocide in "Srebrenica", it declared that determining compensation is not an appropriate form of reparation for disregarding the interim order, and the compensation which the applicant was entitled to is satisfaction. Hence, a Declaratory Judgment is deemed sufficient in this case (Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and