

SEPARATE OPINION OF JUDGE SHAHABUDDEEN

I agree with the Court in reaffirming, and in effect emphasizing, the continued applicability of its previous Order to the deteriorating human situation in Bosnia-Herzegovina. In support, I give below my reasoning on some of the issues which, in my view, merit the exercise of the right to speak separately under Article 57 of the Statute of the Court.

I. BOSNIA-HERZEGOVINA'S REQUEST FOR PROVISIONAL MEASURES

Forum Prorogatum

As to paragraph 34 of the Order, the consensual basis of the Court's jurisdiction requires no emphasis. *Forum prorogatum* jurisdiction is no exception. The argument that Yugoslavia accepted the jurisdiction of the Court beyond the scope of Article IX of the Genocide Convention of 1948 is based on the fact that, in its written observations of 1 April 1993 on Bosnia-Herzegovina's first request for provisional measures, Yugoslavia stated that it "recommends that the Court . . . order the application of" certain other provisional measures. But, in paragraph 5 of the same written observations, Yugoslavia asked the Court to reject the last five of the six provisional measures then sought by Bosnia-Herzegovina

"taking into account that these measures are outside Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide and that therefore the Court is not competent to decide upon them".

Also, in paragraph 6 of that document Yugoslavia stated

"that it does not accept the competence of the Court in any request of the Applicant which is outside the Convention on the Prevention and Punishment of the Crime of Genocide. This is without prejudice to the final decision of the Yugoslav Government to be party to the dispute submitted by the 'Republic of Bosnia and Herzegovina'."

Again, at the hearing on Bosnia-Herzegovina's first request for provisional measures, on 2 April 1993, the acting Co-Agent for Yugoslavia stated:

“The Federal Republic of Yugoslavia does not consent to any extension of the jurisdiction of the Court beyond what is strictly stipulated in the [Genocide] Convention itself.” (CR 93/13, p. 16, 2 April 1993, afternoon, Professor Shabtai Rosenne.)

Having regard to these clear statements on the basic jurisdictional position taken by Yugoslavia, the question which arises is one of construction of Yugoslavia's own request for provisional measures of 1 April 1993 in so far as jurisdiction is concerned. In the light of those statements, two of which were set out in the same document requesting provisional measures, it is difficult to interpret the request as intended by Yugoslavia as an offer to expand the jurisdiction of the Court; it seems more reasonable to understand the request as intended to be considered only on the basis that the provisional measures which it sought were considered by Yugoslavia (whether rightly or wrongly) to be incidentally pertinent to genocide proceedings brought under Article IX of the Genocide Convention, assuming that the Convention was in force between the Parties. Since the question is one of consent, it is Yugoslavia's intention which matters, not the correctness of its view as to the relevance of its request to the subject of genocide. It seems unlikely that the measures which it sought were understood by Bosnia-Herzegovina as intended by Yugoslavia to raise issues outside of the scope of Article IX of the Genocide Convention. Bosnia-Herzegovina did not then seek to raise a question of *forum prorogatum* on the basis of the measures so sought by Yugoslavia; on the view which it now advances, it should have been in its interest to do so in order to repel Yugoslavia's persistent objection that jurisdiction did not exist outside of that conferred by that provision.

The question in the *Anglo-Iranian Oil Co.* case really turned on the intention with which Iran had filed its objections, other than its preliminary objection to jurisdiction. Its intention was that they were to be considered only if its basic objection to jurisdiction failed; accordingly, they could not be interpreted as implying acceptance of the very thing which was being consistently objected to (*I.C.J. Reports 1952*, pp. 113-114). Yugoslavia's objection to jurisdiction outside of Article IX of the Genocide Convention is its basic position. That objection, being clear and consistently pursued, could not reasonably be supposed to be intended by Yugoslavia to be neutralized by something else contained in the very document advancing the objection — at any rate, not in the absence of language manifesting so contradictory an intention with unequivocal

clarity. Thus, from the point of view of intention, I am not persuaded that Yugoslavia's request for provisional measures can be treated differently from Iran's objections.

In the *Corfu Channel* case, *Preliminary Objection*, the Court noted that Albania had by letter accepted "in precise terms 'the jurisdiction of the Court for this case'" (*I.C.J. Reports 1947-1948*, p. 27). This being so, the Court was able to regard the letter as constituting a "voluntary and *indisputable* acceptance of the Court's jurisdiction" (*ibid.*; emphasis added). The need for clarity can scarcely be less imperative where, as in this case, there is no statement accepting jurisdiction "in precise terms". Yugoslavia's conduct cannot, in my opinion, be characterized as implying an *indisputable* acceptance of the Court's jurisdiction in excess of that conferred by Article IX of the Genocide Convention of 1948. The overriding requirement of clear proof of consent sufficiently explains Fitzmaurice's conclusion that "[i]n actual fact the Court seems to have adopted an attitude of considerable caution and conservatism on the subject of prorogated jurisdiction", useful though the concept is (Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court*, 1986, Vol. II, p. 511).

Interim Judgment

In paragraph 19 of its written observations of 9 August 1993 on Bosnia-Herzegovina's second request for provisional measures, Yugoslavia pleaded:

"Some of the provisional measures, like the one requested under No. 3 [relating to annexation or incorporation], have the character of a judgment. They are intended to legally resolve the subject-matter of the dispute. Disputes are settled with judgments, not by provisional measures. (*Factory at Chorzów, P.C.I.J, Series A, No. 12*, p. 10.)"

On its own terms, that submission was not addressed to all of the measures sought by Bosnia-Herzegovina. Assuming, however, that Yugoslavia is in fact invoking the interim judgment doctrine of the *Factory at Chorzów* case in relation to Bosnia-Herzegovina's request for provisional measures to restrain genocide, I should think that the limits of the doctrine were clearly demonstrated if its effect were to put the Court in the position of a powerless bystander at the possible commission of that offence. The Court's case-law shows that that cannot be the true result of the doctrine (see *Nuclear Tests (Australia v. France)*, *Interim Protection*, *I.C.J. Reports 1973*, p. 99; *Nuclear Tests (New Zealand v. France)*, *Interim Protection*, *I.C.J. Reports 1973*, p. 135; and *United States Diplomatic and Consular Staff in Tehran, Provisional Measures*, *I.C.J. Reports 1979*, p. 16, para. 28).

In domestic systems the proposition that an interlocutory injunction can in no circumstances cover the same ground as the main remedy does not always prevail¹.

The idea of a provisional measure of protection which may have the same effect as the main remedy is conceptually distinct from the idea of an interim judgment. The object of the former is the protection of the right in issue pending the final adjudication of the claim; the object of the latter is to give to the plaintiff interim relief by way of advance payment on account of a liability which is admitted or reasonably clear but not yet precisely quantified. Provisions for interim payment exist in some legal systems². By contrast, as the Court pointed out in the *Factory at Chorzów* case, a request which is really for relief by way of interim judgment is “not covered by the terms of the provisions of the Statute and Rules . . .” of the Court (*P.C.I.J., Series A, No. 12*, p. 10).

In that case, Germany did use some of the language associated with provisional measures. It is clear, however, that it was really seeking an interim judgment in the sense mentioned above. This was illustrated by its opening premise “that the principle of compensation is recognized and that only the maximum sum to be paid by the Polish Government is still in doubt . . .” (*ibid.*, p. 6). That was the essential basis on which it was asking for an Order requiring Poland to “pay to the German Government, as a provisional measure, the sum of thirty millions of Reichsmarks within one month from the date of the Order sought” (*ibid.*, p. 10). The request was rightly refused, the Court simply having no such power. Here, provided that a measure is truly conservatory of the rights in contest pending judgment, the possibility that it may produce the same effect as the main relief sought (though a discretionary consideration) does not put it out of the power conferred on the Court by Article 41 of the Statute to indicate provisional measures (see Dr. E. Dumbauld, *Interim Measures of Protection in International Controversies*, 1932, pp. 163-164, and the general discussion in Jerzy Sztucki, *Interim Measures in the Hague Court: An Attempt at a Scrutiny*, 1983, pp. 93 ff.).

¹ See, in English law, *Halsbury's Laws of England*, 4th ed., pp. 537-538, para. 953, and *Woodford v. Smith*, [1970] 1 All ER 1091 n. and [1970] 1 WLR 806.

² See, for example, the position in English law as set out in *The Supreme Court Practice 1993*, London, 1992, Vol. 1, Order 29/9 ff.

Media Material

Some criticism was offered by Yugoslavia in so far as the means of proof tendered by Bosnia-Herzegovina included press, radio and television statements and reports. Are these admissible and, if so, how far?

The Court is of course “bound by the relevant provisions of its Statute and its Rules relating to the system of evidence” (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *I.C.J. Reports 1986*, p. 39, para. 59). But those provisions have to do with time-limits and other matters designed “to guarantee the sound administration of justice, while respecting the equality of the parties” (*ibid.*). They do not bear on the categories of material admissible as evidence, or on the principles by which evidence is assessed by the Court.

As regards these, there are no technical rules, such as those which exist in most domestic systems (*South West Africa, Second Phase, I.C.J. Reports 1966*, p. 430, Judge Jessup, dissenting opinion; and *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 98, para. 58, Judge Sir Gerald Fitzmaurice, separate opinion, and *ibid.*, p. 215, para. 97, Judge Jessup, separate opinion). Referring to the common law “best evidence” rule, Judge Sir Gerald Fitzmaurice pointedly observed that “[i]nternational tribunals are not tied by such firm rules . . ., many of which are not appropriate to litigation between governments” (*ibid.*, p. 98, para. 58).

In *United States Diplomatic and Consular Staff in Tehran*, the Court said:

“The essential facts of the present case are, for the most part, matters of public knowledge which have received extensive coverage in the world press and in radio and television broadcasts from Iran and other countries.” (*I.C.J. Reports 1980*, p. 9, para. 12.)

The Court also noted that it had been stated on behalf of the United States of America that the latter “has had to rely on newspaper, radio and television reports for a number of the facts stated in the Memorial . . .” (*I.C.J. Reports 1980*, p. 10, para. 12; and see *I.C.J. Pleadings, United States Diplomatic and Consular Staff in Tehran*, pp. 192 ff. and pp. 329 ff.).

The Court clearly considered that material. The material had been communicated to the Government of Iran “without having evoked from that Government any denial or questioning of the facts alleged . . .” (*I.C.J. Reports 1980*, p. 10, para. 13). But it seems to me that the absence of denial by Iran of the facts alleged went to weight, and not to admissibility.

True, as the Court later said, even where such material meets high standards of objectivity, the Court regards it

“not as evidence capable of proving facts, but as material which can nevertheless contribute, in some circumstances, to corroborating the existence of a fact, i.e., as illustrative material additional to other sources of evidence” (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *I.C.J. Reports 1986*, p. 40, para. 62; and *ibid.*, Judge Schwebel, dissenting opinion, p. 324).

That limited use does not make the material any the less admissible, but it is a consideration which should be carefully noted.

If media material is admissible at the merits stage, as in the *United States Diplomatic and Consular Staff in Tehran* case, it should be no less admissible at the provisional measures stage, as in this case. In fact, media material was also presented to the Court at the provisional measures stage in that case (*I.C.J. Pleadings, United States Diplomatic and Consular Staff in Tehran*, p. 45, and p. 67, Appendix C, and *I.C.J. Reports 1979*, p. 10, para. 7). It is well known that in some domestic systems the rules of evidence are relaxed in proceedings for interlocutory injunctions so as to let in hearsay material not otherwise admissible¹.

In this case, the need for reliance on media material is clear. The Co-Agent for the Applicant, Professor Boyle, spoke more than once of difficulties in communicating with Sarajevo; no reason appeared to doubt those assertions. Even Yugoslavia presented certain statements in the form of press reports (see Yugoslavia's written observations, 9 August 1993, Annexes I, IV and V).

In my opinion, subject to questions of weight and to the limitation referred to above, the media material presented by Bosnia-Herzegovina is admissible. However, because of the legal considerations explained in the Order, the reaction of the Court to its request can go no further than therein set out.

¹ Thus, in English law, evidence as to information and belief, if the sources and grounds are stated, is receivable on interlocutory applications. See *The Supreme Court Practice 1993*, Vol. 1, Order 29/1/11 and Order 41/5/1-2.

II. YUGOSLAVIA'S REQUEST FOR PROVISIONAL MEASURES

The Extent of Permissible Use of the Evidence

A major initial question, if a somewhat delicate one, concerns the extent to which the Court can take account of the supporting evidence in judging whether the circumstances require an indication of the measures sought. The problem here is that, while it is reasonably clear from previous cases that the Court does make use of the evidence, it is less clear in what way or to what extent it does so. True, the Court does not at this stage make definitive findings of fact, but beyond this there is little that can be said with assurance. If it does not make definitive findings on the evidence, does it make provisional ones? The lack of elucidation is, I think, attributable to some apprehension that any use made by the Court of the evidence might lead to unwarranted inferences of prejudgment. And yet the evidence is presented by the Parties to be used by the Court and is used by it. It seems to me that apprehensions of unwarranted inferences of prejudgment are less substantial than the danger deriving from uncertainty as to the way in which, or the extent to which, the Court makes use of the material.

The settled principle that the Court cannot at this stage make definitive findings on the merits is recalled in paragraph 48 of the Order. To say that the Court can make such findings, subject to subsequent alteration or amendment in the final judgment, is in effect to put the Court at the merits stage in the position of a court of appeal, sitting on review of its own previous judgment. The obvious unacceptability of that position does not, however, have the consequence that the Court must at this stage mechanically indicate measures so long as some supporting material is before it and regardless of its evidential quality. A court which does that may claim the virtue of avoiding all risk of prejudgment, but it is a virtue bought at the price of placing both parties on an artificial basis of evidential equality in circumstances in which the evidence on one side may be patently weak. A preliminary appraisal of the quality of the evidence avoids payment of that price; in so far as it may be thought to involve some risk of prejudgment, the craft of the judge accustoms him to make such an appraisal for the limited purposes of interlocutory proceedings without incurring a risk of prejudgment of the merits.

Provisional measures (whether legally binding or not) are expected to be implemented and can be immediately productive of important prac-

tical consequences. They are not indicated by the Court unthinkingly. Under Article 41, paragraph 1, of its Statute, the Court has power to indicate provisional measures “if it considers that circumstances so require”. The Court cannot know what are the circumstances without having to consider the evidence produced in proof of the circumstances. This the Court must do if Judge Anzilotti was correct in speaking of “the possibility of the right claimed . . . and the possibility of the danger to which that right was exposed” (*Polish Agrarian Reform and German Minority, P.C.I.J., Series A/B, No. 58, p. 181*). If that is the test, as I respectfully think it is, then the Court is called upon at this stage to make a decision as to whether there is on the evidence a possibility of the rights claimed by Yugoslavia and a possibility of danger to those rights; it cannot do that without considering the quality of the material before it.

This conclusion accords with the position taken by Yugoslavia in its written observations of 1 April 1993 on Bosnia-Herzegovina’s first request for provisional measures, in paragraph 5 of which it submitted that “[t]he assertions on the basis of which the Court is requested to grant these provisional measures are not true, i.e. they are inconsistent with facts”. That submission necessarily implied that the Court, even at the interlocutory stage, can competently consider questions of credibility.

As to the standard applicable, some help may be had from Dumbauld, who wrote:

“In view of the need for rapidity and the provisional nature of the order, absolutely convincing proof, such as would be necessary in forming the Court’s opinion on final judgment, is not necessary.

The Court’s decision must be based on the evidence before it, however, and not upon mere speculation. Substantial credibility rather than formally impregnable accuracy should be sought.” (Dr. E. Dumbauld, *Interim Measures of Protection in International Controversies*, 1932, p. 161.)

Thus, although it is not necessary to produce “absolutely convincing proof”, “substantial credibility” is required. That, I would think, is the test to be applied in making an evaluation of the quality of the material before the Court. To the making of such an evaluation I accordingly pass.

The Methods by Which the Yugoslavian Material Has Been Prepared

Each Party disclaims responsibility for genocide and accuses the other of it. So, from this point of view, there is a certain symmetry in positions.

But the symmetry is broken by an important difference concerning the position taken by each side in relation to the conflict. Bosnia-Herzegovina is of course involved in the conflict; Yugoslavia asserts that it is not. It states that there is a civil war in Bosnia-Herzegovina, that Yugoslavia

“is no belligerent party, that it has no soldiers in the territory of the ‘Republic of Bosnia and Herzegovina’, that it supports with arms no side in the conflict and that it does not abet in whatever way the commission of crimes cited in the Application [made by Bosnia-Herzegovina on 20 March 1993]” (letter from the Federal Ministry for Foreign Affairs of the Federal Republic of Yugoslavia to the Registrar, 1 April 1993; see also statement by Mr. Zivkovic in CR 93/13, p. 7, 2 April 1993, afternoon).

On the contrary, says Yugoslavia, it has offered refuge to a large number of Muslims from Bosnia-Herzegovina and has extended humanitarian help to Bosnia-Herzegovina in several ways (written observations of Yugoslavia on Bosnia-Herzegovina’s second request for provisional measures, 9 August 1993, para. 11).

In effect, Yugoslavia’s own position is that it has adopted an even-handed approach of non-involvement in the military situation in Bosnia-Herzegovina. Whether that is factually so or not is not now the point; the point now is that that is the position adopted by Yugoslavia. The adoption of a position of military non-involvement is relevant to the way the Court approaches the allegations made by Yugoslavia; it has a bearing on the quality of the allegations.

The main elements of the case presented by Yugoslavia were assembled by the “Yugoslav State Commission for War Crimes and Genocide”. The case so assembled by the Yugoslav Commission alleges that genocide is being committed, but that it is all being done by Muslims against Serbs; no hint is given of genocide being committed by Serbs against Muslims. That is not surprising seeing that, in the first instance, the mandate of the Commission did not extend so far, its report being entitled “Memorandum on War Crimes and Crimes of Genocide in Eastern Bosnia (Communes of Bratunac, Skelani and Srebrenica) Committed against the Serbian Population from April 1992 to April 1993”. But page 79 of the Memorandum states:

“A good part of the documentation on the killings, organized ambushes, massacred persons, destroyed property, maltreatment in prisons, the looting and the burning is in the possession of the competent authorities: police stations, health centres and other communal establishments, as well as the command and units of the Army of the Republic of Srpska.”

Professor Boyle correctly made the point that not only does this show that the Yugoslav State Commission for War Crimes and Genocide relied on documentation provided by “the command and units of the Army of the Republic of Srpska”, but that it also suggests the existence of close relations between the Yugoslav authorities and the military authorities of the Bosnian Serbs. It would be correct for the Court to refrain at this stage from acting on material of that kind, not simply because it is partisan, as it is, but because it is partisan material presented by a Party which asserts a position of military non-partisanship.

Yugoslavia's Assertion of Non-Involvement in the Military Operations of Bosnian Serbs

It is necessary now to return to Yugoslavia's assertion of non-involvement in, or non-support for, Serbian military activity in Bosnia. A statement made on behalf of the Government of Serbia (part of Yugoslavia) after the Court's first Order was issued shows that that Government, at great cost to itself, has in fact been “unreservedly and generously helping” Serbs in what it regards as “a just battle for freedom and the equality of the Serbian people [which] is being conducted in the Serb Republic”, i.e., in the territory of Bosnia-Herzegovina (see the Communiqué issued after the Session of the Government of the Republic of Serbia, set out in Bosnia-Herzegovina's second request of 27 July 1993, at pp. 43-44). A statement issued on behalf of the Federal Government of Yugoslavia is to similar effect (Federal Government Communiqué, set out in Bosnia-Herzegovina's second request of 27 July 1993, at pp. 44-45). It was in evidence also that, in a statement made on 11 May 1993, President Slobodan Milosevic of Serbia said:

“In the past two years, the Republic of Serbia — by assisting Serbs outside Serbia — has forced its economy to make massive efforts and its citizens to make substantial sacrifices. These efforts and these sacrifices are now reaching the limits of endurance. Most of the assistance was sent to people and fighters in Bosnia-Herzegovina, but a substantial amount of aid was given to the 500,000 refugees in Serbia. At the same time, because of its solidarity with and assistance to the Serbs in Bosnia-Herzegovina, Serbia is subjected to brutal international sanctions. Today there can be no comparison between us and any other country in the world, or very few countries, in terms of the economic and general difficulties we face. Clearly, we were aware we would face these difficulties when deciding to provide assistance to Serbs who were at war.”

Now conditions for peace in Bosnia have been created. Following a year of war and long-term peace negotiations, the Serbs have gained their freedom and have regained the equality taken from them when the war started. *Most of the territory in the former Bosnia-Herzegovina belongs now to Serb provinces.* This is a sufficient reason to halt the war, and to remove further misunderstandings through negotiations and by peaceful means.

* * *

Serbia has lent a great, great deal of assistance to the Serbs in Bosnia. Owing to that assistance they have achieved most of what they wanted." (BBC transcript, as reproduced in the second request by Bosnia-Herzegovina, pp. 47-48.)

From this and other material it is, at this stage, at least arguable that Yugoslavia has in fact been giving military and other forms of assistance to the war effort of the Bosnian Serbs; that this assistance began before and continued uninterrupted by the Court's Order of 8 April 1993; that the object of the assistance was to enable Bosnian Serbs to obtain territory in Bosnia-Herzegovina; and that consequently President Milosevic was accepting responsibility for the "ethnic cleansing" which was central to the methods by which the territory was acquired.

Yugoslavia's assertion of non-involvement in the conflict is open to serious question. That question must in turn cause the Court to hesitate at this stage to act on the material presented by it in support of its allegations of genocide being committed by Bosnia-Herzegovina.

Yugoslavia's Silence on the Question Whether Bosnian Serbs Have Been Committing Genocide

If, as I consider, the evidence points to Yugoslavia being in fact supportive of the Serbian military effort in Bosnia-Herzegovina, the Court might at this stage reasonably expect Yugoslavia to be in a position to know whether the Serbian authorities in Bosnia-Herzegovina have or have not been committing genocide. Yugoslavia neither affirms nor denies this. It says:

"The FR of Yugoslavia has not directed, supported or influenced anybody to exercise the crime of genocide or any act described by Article III of the Genocide Convention against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical or religious group." (Written observations of Yugoslavia of 9 August 1993, para. 11.)

A pleading position of that kind leaves open the possibility that genocide is being committed by Serbs against Muslims, that Yugoslavia is in a position to know this and does know this, but that Yugoslavia is merely taking the position that such genocide is being committed without its own support. It is, no doubt, permissible to take up such a position at the merits, the issue being one as to Yugoslavia's responsibility. But I should have thought that a less sparing approach was appropriate where Yugoslavia was itself requesting provisional measures for genocide allegedly being committed by Muslims against Serbs. Bosnia-Herzegovina for its part denies that genocide is being committed against Serbs. That is disputed by Yugoslavia, but it is at least a clear statement of position. The point, in the case of Yugoslavia, is not that it denies that genocide is being committed by Serbs, but that it neither admits nor denies it, though in a position to do one or the other. That, in my opinion, is a circumstance to be carefully weighed by the Court when exercising its discretion as to whether it would accede to Yugoslavia's request for provisional measures in favour of Serbs.

Yugoslavia's Request for Provisional Measures Has Been Made Only because of Bosnia-Herzegovina's Second Request

Then, as to the timeliness of Yugoslavia's allegations. The fact that Yugoslavia's request is made in response to Bosnia-Herzegovina's second request is not necessarily a point against the former. But the question which arises is this: would Yugoslavia's request have been made at all had it not been for Bosnia-Herzegovina's? I cannot feel that it would have been. The basic material on which Yugoslavia relies relates to the period April 1992 to April 1993 and had been collected by the Yugoslav State Commission for War Crimes and Genocide over a period ending in April 1993. Assuming that this material (whether in whole or in part) could not be presented to the Court at the previous hearing, it is difficult to appreciate why it is being presented to the Court only some four months after it was assembled and then only in response to a second request by Bosnia-Herzegovina. If genocide is in fact being committed against Serbs, the need for remedial action always remains, any delay in approaching the Court notwithstanding; but any such delay is, in my view, relevant in appreciating Yugoslavia's own confidence in the quality of the allegations now being advanced by it before a judicial body.

In my opinion, without raising any question of urgency as a juridical element in its own right, one may reasonably take the view that Yugoslavia's request has been made only because of Bosnia-Herzegovina's and

has not been presented with sufficient timeliness to suggest that the Court would, at this stage, be correct in acting upon the supporting material for the purpose of indicating the provisional measures which Yugoslavia seeks.

Yugoslavia's Attitude to the Court's Order of 8 April 1993

Account has also to be taken of Yugoslavia's disposition to the provisional measures indicated by the Court in its Order of 8 April 1993. It is Bosnia-Herzegovina's complaint that Yugoslavia has at no stage sought to implement these measures. The fact that the Court is not at this point engaged in adjudicating on the merits of the case does not mean that the Court cannot make a definitive finding on the particular question whether the measures indicated by it have been implemented. In my opinion, the evidence warrants a finding of non-implementation against Yugoslavia.

The question of non-implementation naturally leads into the question whether provisional measures are legally binding. The nearest that the Court has come to answering this question was in 1986, when it said:

“When the Court finds that the situation requires that measures of this kind should be taken, it is incumbent on each party to take the Court's indications seriously into account, and not to direct its conduct solely by reference to what it believes to be its rights.” (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, I.C.J. Reports 1986, p. 144, para. 289.)

That statement, and the reference to it in paragraph 58 of today's Order, stopped short, in its careful formulation, of saying that provisional measures are binding. Indeed, it could bear the interpretation that the measures themselves are not binding, a party merely having a duty to take account of the Court's indication of them.

The question, if it remains open, dates back to the founding of the Permanent Court of International Justice (P.C.I.J., Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee, June 16th-July 24th, 1920*, p. 735). The main outlines of the argument as to whether provisional measures are recommendatory or legally binding appeared in the 1931 records of the rule-making proceedings of the Court (*Acts and Documents concerning the Organization of the Court, P.C.I.J., Series D, Second Addendum to No. 2*, pp. 181-200). I do not propose to summarize or analyse the conflicting currents of thought running through the considerable literature which has since grown up around the subject. One exchange of opinions may however be mentioned.

Adverting in 1935 to the drafting of Article 41, paragraph 1, of the Statute of the Permanent Court of International Justice, Henri Rolin perceptively distinguished the question of enforceability from the question of the binding character of provisional measures, observing:

“le motif allégué pour expliquer l’omission du mot ‘ordonne’ permet de toucher du doigt la fragilité des considérations qui ont retenu le Comité de juristes: pas de moyen d’exécution, donc pas d’ordre! Comme si le même argument n’aurait pas pu être invoqué contre le caractère obligatoire des sentences au fond, comme si dans l’ordre des juridictions nationales aussi le décrètement des mesures provisoires n’appartient pas au judiciaire, le contrôle de leur exécution à l’exécutif!” (Henri A. Rolin, “Force obligatoire des ordonnances de la Cour permanente de Justice internationale en matière de mesures conservatoires”, in *Mélanges offerts à Ernest Mahaim*, 1935, Vol. 2, p. 286).

In 1952, speaking of the terms of Article 41, paragraph 1, of the Statute of the present Court in the light of the Charter, he remarked:

“Ces termes pourraient paraître impliquer un pouvoir de décision et une obligation pour les parties de s’y conformer.

Telle ne paraît pourtant pas être la portée de l’article 94 de la Charte qui n’attribue d’effets obligatoires qu’aux arrêts rendus par la Cour.” (*Annuaire de l’Institut de droit international*, 1954, Vol. 45, I, p. 487.)

For these reasons, he proposed an amendment to Article 41 in order to make it clear that provisional measures were binding (*ibid.*, p. 431).

For his part, Hersch Lauterpacht in the following year observed:

“I am fully in agreement with the suggestion — though not perhaps with the reasoning — of M. Rolin with regard to Article 41 of the Statute relating to provisional measures. Without expressing an opinion on the question whether the *indication* of provisional measures is merely in the nature of a recommendation I am of the view that if the latter interpretation is correct there is room for an amendment of the Statute in this respect. It is not necessarily inconsistent with the effectiveness of the administration of international justice that the Court should have no power to decree, with binding effect, provisional measures to be taken by the parties. But I believe that it is not part of the function of the Court to *recommend* measures which the parties are free to accept or to reject.” (*Ibid.*, pp. 535-536.)

Thus, on one view, it might well be tolerable that, having regard to the special framework in which it functions, an international court, unlike a municipal court, should not have any power to decree provisional measures with binding effect. What was less acceptable was that it should

have “power”, but “power” merely to recommend measures to the parties which they were free to accept or to reject.

The suggested solution by way of amendment does not, of course, remove the duty of the Court to pronounce meanwhile upon the question of interpretation, in a proper case, as to whether provisional measures are binding. A doubt which may present itself is whether an answer to the questions now before the Court requires a determination of that particular issue of interpretation. The need for a determination of the issue might arise if, for example, the question were whether a party was entitled to reparation for non-implementation by the other party of provisional measures, or to reparation for implementation by it where the main claim against it later fails either for want of jurisdiction or on the merits. But it is not the case of Bosnia-Herzegovina that any breach by Yugoslavia of the provisional measures indicated on 8 April 1993 will expose Yugoslavia to some specific legal penalty or give to Bosnia-Herzegovina some specific legal right relevant to these proceedings.

This doubt may be regarded as somewhat narrowly based; the better view may well be that the question of interpretation does arise. I do not, however, propose to express an opinion on the question because it appears to me that an alternative approach is possible.

The material issue is whether Yugoslavia has in fact implemented the measures as the Court expected it would, whether or not they are legally binding. A distinction may be drawn between the *indication* of measures and the *measures* indicated. The question relating to the “indication” is whether it has the effect of a judicial decision which attaches a legal obligation to a party. The question relating to the “measures” is whether they represent a judicial finding as to what needs to be done to preserve the rights in contest. In my opinion, even if the indication is not legally binding, the measures possess the character of a judicial finding as to what was required to preserve those rights *pendente lite*, that finding having been made after due hearing by the Court sitting as a court of law in exercise of a specific power conferred by law. It follows that any non-implementation, even if not in breach of a legal obligation, represents an inconsistency with that judicial finding.

Now, the Court has no power to penalize such an inconsistency; but, in my view, the inconsistency is something to be taken into account by it in evaluating the quality of the evidence presented by the non-implementing party in support of a request for provisional measures to preserve substantially the same rights which the Court’s original Order was in the first instance intended to protect. Unless the Court, which has an undoubted discretion in deciding whether it would grant a request, can take account of a non-implementation in that way, there

is little point in the provision in Rule 78 of the Rules of Court to the effect that

“[t]he Court may request information from the parties on any matter connected with the implementation of any provisional measures it has indicated” (discussed in Geneviève Guyomar, *Commentaire du règlement de la Cour internationale de Justice*, 1983, pp. 495-496).

This point having been reached, it is useful to consider the following view expressed by Dumbauld:

“When a refusal to furnish information or to carry out provisional measures is put on record, apparently a presumption arises which takes the place of direct evidence in the sense that it legitimates a conclusion derived from the fact in question by reasonable inference.” (Dr. E. Dumbauld, *Interim Measures of Protection in International Controversies*, 1932, p. 161; footnotes omitted.)

Yugoslavia, not having implemented the provisional measures indicated by the Court, now seeks provisional measures of its own. I do not go so far as to suggest that the non-implementation necessarily or automatically debars Yugoslavia from making its request (as well it might in a corresponding case in some domestic jurisdictions); but it is, in my view, something which legitimates the conclusion that, in all the circumstances, it would not be correct for the Court, at this stage, to act on the material presented by Yugoslavia in support of the particular measures it requests.

III. CONCLUSION

It is difficult to think of any measures which the Court could both usefully and competently indicate in addition to those already set out in its previous Order. On the other hand, such has been the deterioration in the situation since the making of the previous Order, that the Court could hardly do less than call for the immediate and effective implementation of the provisional measures therein indicated. Judge Sir Hersch Lauterpacht was not thinking of the Court when he said:

“Admittedly, there is as a rule no difficulty encountered by doing nothing or little, but this is hardly a reasonable standard by which to gauge the fulfilment of the task of the supervising authority.” (*Admissibility of Hearings of Petitioners by the Committee on South West Africa*, I.C.J. Reports 1956, p. 53.)

The Court is not of course in the position of the supervisory authority there referred to, but that scarcely suffices to denude the remark of relevance to such competence as belongs to the Court. Nor should it; for, to transpose words once used by Judge Read from their peaceful context to the unthinkable inhumanities being unleashed in Bosnia-Herzegovina:

“It takes one bold act to transform the unthinkable into the thinkable, and a second or third to make it a normal course.” (Cited in Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. IV, p. 21.)

(Signed) Mohamed SHAHABUDEEN.
