DISSENTING OPINION OF JUDGE TARASSOV

By the present decision the Court reaffirms its Order of 8 April 1993 whereby it indicated three provisional measures (two of which — A (1) and A (2) — were addressed to Yugoslavia, while one measure — B — was addressed to both Parties) and stresses that all these measures should be immediately and effectively implemented. In April 1993, I voted for two such measures but was unable to support provisional measure A (2), explaining my negative vote against it in a declaration appended to the Order. I am still of the same opinion with respect to that measure, considering it to be as very close to a prejudgment, and to impose requirements that are ill-defined and practically unlimited.

The second request of Bosnia and Herzegovina, submitted to the Court on 27 July 1993, confirms my worst apprehensions relating to that measure because the new request is based entirely on acts allegedly committed by Serbs in the civil war in Bosnia, all of which are ascribed by the Bosnian side to Yugoslavia, without any attempt to demonstrate a causal or logical relationship such as to imply that the Government of Yugoslavia is responsible for the commission of those acts (even if their genocidal character, which is very doubtful and in any case has not yet been established by the Court, were to be proved in further judicial proceedings). It would be very dangerous for international law and for international relations if nothing more than the ethnic homogeneity of a given State's population could be taken to imply that State's responsibility for the actions of the same ethnic group living in another State and committed on the territory of the latter. (In its second request, Bosnia and Herzegovina, under the sub-title "Chronology of Respondent's Violations of This Court's Order of 8 April 1993", went so far as to refer, *inter alia*, to reports of actions allegedly committed even by Croats living in Bosnia and Herzegovina, who have absolutely nothing in common with Yugoslavia[1]).

As I said before, I voted for measure A (1) which provides that the Government of the Federal Republic of Yugoslavia "should immediately . . . take all measures within its power to prevent commission of the crime of genocide". The written pleadings and the intervention of the Parties during the oral hearings provided the Court with certain reasons for adopting

[1] See, for instance, communications under the dates 18 and 20 May, 1 and 7 June 1993 in the request of 27 July 1993.

such a measure. At that time, only the Bosnian side presented communications to the Court about events in Bosnia and Herzegovina which, in its contention, amounted to acts of genocide committed "under the direction of, at the behest of, and with assistance from Yugoslavia". The Yugoslavian side, due to the very limited time allowed to it for the preparation of its oral arguments, confined itself to a statement that "genocide and genocidal acts are being perpetrated against the Serb population of the territory of Bosnia and Herzegovina". In his communication dated 1 April 1993, the Federal Minister for Foreign Affairs of Yugoslavia, on behalf of his Government, requested the Court:

> "to establish the responsibility of the authorities controlled by A. Izetbegovic for acts of genocide against the Serb people in the 'Republic of Bosnia and Herzegovina', on which it [the Government of Yugoslavia] will subsequently submit relevant evidence".

While I supported measure A (1), in my declaration appended to the Order of 8 April 1993 I stressed that it had to be taken not only in respect of the Government of Yugoslavia, but also in respect of the Government of Bosnia and Herzegovina. For me it was obvious that the latter Government has responsibility for acts committed on *its territory by its own citizens* irrespective of whether they are Muslims, Serbs or Croats, officials or private individuals. And, as I then stressed, both Parties were of course expected to take all such measures to prevent the commission of crimes of genocide, as might be in their *real power* respectively.

The Court itself, in paragraph 45 of that Order of 8 April 1993, pointed out that:

> "in the view of the Court, in the circumstances brought to its attention ... in which there is a grave risk of acts of genocide being committed, Yugoslavia and Bosnia-Herzegovina, whether or not any such acts in the past may be legally imputable to them, are under a clear obligation to do all in their power to prevent the commission of any such acts in the future".

In the present Order the Court has recalled its above-mentioned conclusion but unfortunately, in the operative part, it confines itself to reaffirming measure 52 A (1) in its previous form, addressed only to the Government of Yugoslavia. It does not mention the analogous obligation of the Government of Bosnia and Herzegovina — even though, on this second occasion, the Yugoslavian side officially and formally requested the Court to indicate, as a provisional measure, that the Government of Bosnia and Herzegovina:

> "should immediately, in pursuance of its obligation under the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent

> commission of the crime of genocide against the Serb ethnic group";

and presented the Court with material which gives it every reason for laying such an obligation upon the Government of Bosnia and Herzegovina, as well.

Given that requests for the indication of provisional measures have been submitted by both Parties in new proceedings and given the numerous communications on which those requests are based, regarding acts which allegedly relate to the crime of genocide and which have purportedly been committed in this inter-ethnic, civil conflict in Bosnia and Herzegovina by all ethnic groups against each other, the Court's decision to make an order ascribing the lion's share of responsibility for the prevention of acts of genocide in Bosnia and Herzegovina to Yugoslavia is a one-sided approach based on preconceived ideas, which borders on a prejudgment of the merits of the case and implies an unequal treatment of the different ethnic groups in Bosnia and Herzegovina who have all suffered inexpressibly in this fratricidal war. I, as a judge, cannot support this approach. It is especially dangerous now, when as a result of enormous efforts by representatives of the United Nations and the European Community, the hostilities have begun to be replaced by peaceful negotiations in Geneva between the three main Bosnian ethnic groups, with the participation of representatives of Serbia and Croatia. The present Order was adopted by the Court when all parties to those negotiations had, on 30 July, accepted a constitutional agreement for a Union of Republics of Bosnia and Herzegovina and to its forming a part of an overall peace settlement — or, in other words, to the creation in that country of three Constituent Republics within the framework of an independent, sovereign Union. The Security Council in the first operative paragraph of resolution 859 (1993), adopted unanimously on 24 August 1993 (on the very eve of the oral hearings of 25-26 August 1993 and before the Court's present decision):

> "*Notes with appreciation* . . . the latest developments at the Geneva peace talks and *urges* the parties, in cooperation with the Co-Chairmen, to conclude as soon as possible a just and comprehensive political settlement freely agreed by all of them."

The Court, for its part, unfortunately made no reference at all to the need for both Parties to facilitate the achievement of a peace agreement in the Geneva negotiations, which is the most urgent and the most effective measure for the prevention of any possible commission of the crime of genocide in Bosnia and Herzegovina. As was stressed long ago by the Permanent Court of International Justice:

> "the judicial settlement of international disputes, with a view to which the Court has been established, is simply an alternative to the

> direct and friendly settlement of such disputes between the Parties; as consequently it is for the Court to facilitate, so far as is compatible with its Statute, such direct and friendly settlement . . ." (*Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J., Series A, No. 22*, p. 13).

This very important provision has been recognized by the present Court: see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), I.C.J. Reports 1986*, p. 143, para. 285). What is more, the Court has stressed that it "should refrain from any unnecessary act which might prove an obstacle to a negotiated settlement" *(ibid).* While the one-sided, unbalanced Order of the Court might not necessarily be "an obstacle to a negotiated settlement", it will obviously not facilitate its successful completion. The Court cannot be ignorant of the fact that representatives of Serbia, which is a part of the Federal Republic of Yugoslavia, have been invited to participate in the Geneva negotiations as well as the representatives of Croatia, and so that Yugoslavia — a Party in the present case before the Court — is not extraneous to those negotiations.

The immense sufferings of all the ethnic and religious segments of the population in Bosnia and Herzegovina — Muslims, Serbs, Croats and others — (and the severe hardships sustained by the population of Yugoslavia itself under the imposed sanctions) together, in my view, provided the Court with every reason to assert its moral authority — as was done recently by the Security Council — to encourage both sides in the present dispute to make a positive contribution to the success of the Geneva peace negotiations. Unfortunately, while quoting former decisions of the Security Council, some of which, in my view, are not pertinent to the indication of provisional measures in the present dispute, the Court, on the most vital issue for all sections of the population of Bosnia and Herzegovina, who might possibly become victims of the crime of genocide — cessation of hostilities and reaching a just and comprehensive political settlement — has preferred to remain silent.

(Signed) Nikolai K. TARASSOV.