

DISSENTING OPINION OF JUDGE PETRÉN

[Translation]

Having voted against the Order, I append this dissenting opinion.

In my view, the first question to which the Court should have attended was that of its own jurisdiction on the merits of the case, a question to which the Order does not advert until the last paragraph of the recitals.

In all cases, the Court obviously has a duty to satisfy itself as soon as possible that it has jurisdiction. The fact that the Indian Government denies the jurisdiction of the Court in the present case can only render the examination of that question even more urgent. There is no indication that the possibility of that Government's recognizing the Court's jurisdiction in the present case has been envisaged in the negotiations which, as mentioned in the letter dated 11 July 1973 from the Agent for Pakistan, are being carried on between the Governments of India and Pakistan. The fact that the Government of Pakistan has requested the indication of provisional measures does nothing to dispense the Court from the duty of settling the question of its jurisdiction even in the initial stage of the proceedings, if that should prove to be possible. In the absence of the Government of India, it is, in accordance with Article 53 of the Statute, incumbent upon the Court also to take into consideration such elements as militate in favour of the position adopted by that Government.

The arguments of the Government of Pakistan with regard to the jurisdiction of the Court were set forth at public hearings on 4, 5 and 26 June 1973. The reasons why the Government of India denies that jurisdiction have been presented in statements transmitted to the Court by letters from the Ambassador of India dated 23 and 28 May and 4 June 1973. The question of jurisdiction, as presented to the Court by the two Governments, does not appear to be enmeshed with the merits of the case. There is therefore reason to ask whether the Court, having taken cognizance of the arguments put forward by the two Governments, could not and should not have decided the question of its jurisdiction at the present early stage of the proceedings, with the aid of its own lights, instead of deferring consideration of this preliminary question to a new phase of the case by first inviting the two Governments to engage in written proceedings extending until 15 December 1973 and destined to be followed by further oral proceedings.

For the purpose of its decision in that connection, the Court, in my view, had to take the following elements into consideration.

The arguments of the two Governments on the subject of the Court's jurisdiction concerned *inter alia* the construction of the Convention of

9 December 1948 on the Prevention and Punishment of the Crime of Genocide, and in particular its jurisdictional clauses, as also the question whether Pakistan is a party to the General Act of 26 September 1928 for the Pacific Settlement of International Disputes and, if so, whether the jurisdiction of the Court could be founded upon that instrument. I am of the opinion that Article 63 of the Statute of the Court required the questions thus raised to be notified without delay to the States parties to the two international instruments in question. Those notifications, however, were not made, and the majority even opposed considering the question of notification in respect of the Genocide Convention before the Court had pronounced on the request of the Government of Pakistan for the indication of interim measures of protection. Given the mandatory character of the notifications provided for in Article 63 of the Statute, I do not believe that the Court may settle the question of its jurisdiction without having complied with the provisions of that Article of the Statute. In that, therefore, there exists a first obstacle to the Court's pronouncing upon its jurisdiction at the present stage of the proceedings.

Nor is it possible to pass over in silence the fact that the judge *ad hoc* chosen by the Government of Pakistan has ceased to sit in the case since 2 July 1973. On what questions the Court may deliberate in the absence of the judge *ad hoc* appointed by a Government to participate in the decision of a case is a question which, in my view, deserves the closest attention. In particular, I have grave doubts as to the possibility of the Court's settling the question of its jurisdiction in the absence of a judge *ad hoc*. In the present instance, it is true that this absence could not have prevented the Court from deferring consideration of the case in conformity with the request of the Government of Pakistan, but to my mind it would have constituted a further reason for considering that now was not the time to settle the question of jurisdiction.

That having been said, I am by no means convinced that it was necessary, for the information of the Court, to open the door to further pleadings on its jurisdiction as wide as the present Order has done. Furthermore, the time-limits fixed are such, in my view, as to justify some apprehension that the present case may exemplify the drawbacks that arise when different manners of settling an international dispute are confused. The attitudes of the two Governments in question give me the impression that it is much rather the intervention of the mediator than that of the international judge which would be more likely to help them resolve the series of disagreements between them. The judicial role of the Court does not, I feel, connote any consideration of problems from that angle.

Even so, as it is in my view necessary to allow States parties to the Genocide Convention and the General Act of 1928—provided they are notified of the existence of the above-mentioned questions—sufficient time to enable them to request to intervene in the proceedings, I was in a position to assent to the operative paragraph of the Order, the terms of

which concern solely the organization of the further proceedings on the question of the Court's jurisdiction.

If I have nevertheless voted against the Order, it is essentially on account of paragraphs 13 and 14. According to the letter of its Agent dated 11 July 1973, the Government of Pakistan has found it appropriate to ask the Court to postpone further consideration of its request for the indication of interim measures in order to facilitate negotiations; but there was nothing in that letter to indicate that the Government of Pakistan wished to withdraw its request for the indication of interim measures. Now in paragraph 13 of the Order, the Court expresses the view that it is of the essence of a request for interim measures of protection that it asks for a decision by the Court as a matter of urgency. It is consequently stated in paragraph 14 that, by the effect of the desire expressed by the Government of Pakistan that the further consideration of the request be deferred, the Court no longer has such a request before it. As the Government of Pakistan has not withdrawn its request for the indication of interim measures of protection, I am unable to assent to that conclusion.

(Signed) Sture PETRÉN.