SEPARATE OPINION OF JUDGE AJIBOLA

1. Introduction

I have voted in favour of the decision of the Court whereby it reaffirmed the provisional measures indicated in paragraph 52 of its Order of 8 April 1993, but I equally have some observations and amplifications to make on some aspects of the request which are explained below, in view of the apparently unique nature of the request, and the importance of the subject-matter to world peace and the development of the jurisprudence of this Court, especially as it relates to procedural matters in all cases of requests for the indication of provisional measures.

2. The Requests

On 27 July 1993, a request was filed by the Agent of Bosnia-Herzegovina in this Court — which was, in fact, its second request for the indication of provisional measures. The reasons for the filing of this second request were given in the Agent's letter attached to the request.

Mr. Rodoljub Etinski, Agent for the Federal Republic of Yugoslavia (Serbia and Montenegro) also filed with the Registry a request for the indication of provisional measures dated 9 August 1993.

It is not out of place to remind ourselves that the *determination* of the United Nations as stated in the Preamble of the Charter, is:

> "to save *succeeding generations* from the *scourge of war*, which *twice in our lifetime has brought untold sorrow to mankind*, and
>
> to reaffirm faith in *fundamental human rights*, in the *dignity and worth of the human person*, in the equal rights of *men and women* and of *nations large and small*, and
>
> to establish conditions under which *justice* and respect for the *obligations arising from treaties* and other sources of *international law* can be maintained . . ." (emphasis added).

These laudable declarations of the determination of the United Nations directed towards the maintenance of peace and security in the world cannot be seen as mere verbiage, unrelated to a firm resolve to give them effect through its main organs like the Security Council, the General Assembly, and of course, in this particular instance, the Court as its principal judicial

organ, that is thus seised of the matter in hand. The First World War ended with the establishment of the League of Nations, having as its judicial organ the Permanent Court of International Justice, both of which ceased to exist at the end of the Second World War.

The pioneering Member States that met in San Francisco to draft the United Nations Charter devoted a great deal of effort to ensuring that peace, security, justice and the pacific settlement of disputes would be ensured and thoroughly incorporated into the Charter. Hence they spelt out, in clear terms, some of their goals and aspirations to ensure the supremacy of international law, peace, security and justice among all nations.

Members were enjoined, as stated in the second part of the Preamble:

> "to practice *tolerance* and *live together* in peace with one another as good neighbours, and
>
> to unite our strength to maintain international peace and security, and
>
> to ensure, by the acceptance of principles and the institution of methods, that *armed force shall not be used*, save in the common interest . . ." (emphasis added).

It may perhaps be argued that the preambular part of the Charter is non-justiciable, and that it was in order to obviate this problem that many of the declarations, determinations, aims and objectives of the Member States were encapsulated in the first paragraph of the first Article, thus:

> "1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."

I have cited some of the provisions of the United Nations Charter referred to above, not without good reason and in order to highlight, for the purposes of my argument, the yearnings and aspirations of nations of the world seeking for peace at this crucial time through international law and the pacific settlement of international disputes. It is for all these reasons that I welcome and approve of the decision of the Court based on the provisions of the Genocide Convention. For the aforementioned reasons, I shall now proceed to touch on some pertinent aspects of Bosnia-

Herzegovina's request as well as the request of the Federal Republic of Yugoslavia (Serbia and Montenegro) for the indication of provisional measures.

3. Unique Nature of the Requests

In the recent history of the Court, it can be seen that there has been only one occasion on which the Court was called upon to respond to a second request for provisional measures. That was in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, when such a request was filed in the Registry of the Court on 25 June 1984. Nicaragua stated in its second request (pursuant to paragraph 41 (C) of the Order of the Court dated 10 May 1984), that it was occasioned by the alleged failure of the United States to comply with the aforementioned Order of the Court, and that the Court ought to make a second order to secure compliance with the first one. As in the present case, Nicaragua annexed to the request fresh evidence of breaches of the Court's Order. The Court did not entertain the second request, considering, as contained in the letter from the President of the Court dated 16 July 1984, that Nicaragua should await the outcome of the proceedings on jurisdiction which were then pending before the Court. This episode was referred to in paragraph 287 of the Court's 1986 Judgment. However, the Court, in paragraph 288 of the same Judgment, *re-emphasized*, in the light of its findings on the merits, the Order that had been made on 10 May 1984.

The other case that bears a resemblance to the one mentioned above was taken to the Security Council. This was the *Anglo-Iranian Oil Co.* case in which Iran ignored the Order of the Court made in July 1951. The Security Council decided that the United Kingdom must await the outcome of the proceedings on jurisdiction that were currently pending before the Court. Even though the Respondent in the present case has reserved its right to file a preliminary objection in relation to the jurisdiction of the Court, this has not as yet been done and there is no proceeding on jurisdiction pending before the Court as at the moment; otherwise such an application would perhaps have prevented the Court from entertaining this new request from the Applicant. On the contrary, the Respondent also filed its own request for an indication of provisional measures, as mentioned above. The Security Council is already firmly seised of this dispute and there have been many resolutions passed on it, perhaps more than any other single matter that has been treated by the Security Council. The Security Council, by resolution 819 (1993) of 16 April 1993 took note of the Order of the Court of 8 April 1993 and, in that resolution, reaffirmed its condemnation of all "violations" of international humanitarian law and

"ethnic cleansing" in particular. Both the Court and the Security Council have taken steps, I believe, to stop the ongoing acts of genocide in Bosnia.

4. HAS THE FIRST ORDER OF THE COURT BEEN COMPLIED WITH?

At the sitting of the Court on 26 August 1993, during the hearing of the requests for the indication of provisional measures in this case, I put a question to both Parties that was worded as follows:

> "The Court, on the first request for an indication of provisional measures presented to it by the Applicant in this case, issued on 8 April 1993 the following Order:
>
> 'THE COURT
>
> *Indicates*, pending its final decision in the proceedings instituted on 20 March 1993 by the Republic of Bosnia and Herzegovina against the Federal Republic of Yugoslavia (Serbia and Montenegro), the following provisional measures:
>
> A. (1) Unanimously,
>
> The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should immediately, in pursuance of its undertaking in 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;
>
> (2) By 13 votes to 1,
>
> The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should in particular ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group;
>
> . . . . . .
>
> B. Unanimously,
>
> The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Government of the Republic of Bosnia and Herzegovina should not take any action and

should ensure that no action is taken which may aggravate or extend the existing dispute over the prevention or punishment of the crime of genocide, or render it more difficult of solution.'

What steps have been taken by each Party to ensure compliance with this Order?"

Answers have been supplied by both Parties, but I am sorry to say that the answers do not convincingly suggest that the measures relating to acts of genocide which the Court indicated in its Order as quoted above have been complied with by either of the Parties.

If it can therefore be said that the first Order has not been complied with, will the Court not be justified in refraining from issuing a second such Order until the first set of measures has been implemented? Whatever may be the controversy on the legal effect of an order of the Court, has it not the power to refuse making any further order or orders until the first one has been complied with? Must the Court make orders in vain? Does it not fall within the inherent power of the Court to make an order or reject an application apart from invoking the provisions of Article 41 of the Statute as well as its powers under Section D of the Rules of Court, especially those contained in Articles 73, 74, 75 and 76 of those Rules? Can the Court not exercise its discretion as it deems fit, in relation to all matters of this nature? These are some of the questions that have engaged my mind since the most recent requests were filed in this Court. Returning to my first question as to whether the Court has the power to refuse to make any further order or orders until the first one is complied with, I think I should qualify that question by restricting such power of the Court to only similar requests to indicate provisional measures *ratione materiae* and *ratione personae.* I do not have in mind such requests as were presented to the Court in the Nicaragua case, where the Applicant was seeking an order of the Court to the effect:

"That, until such time as the United States ceases and desists from all activities that do not comply with the Order of 10 May 1984, the facilities of the Court shall not be available to the United States for the purpose of rendering a decision in its favour in any other pending or future case, and the United States shall not be permitted to invoke the Court's aid in any matter." (*I.C.J. Pleadings, Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America*), Request of the Republic of Nicaragua concerning implementation of the Court's Order of 10 May 1984 dated 25 June 1984.)

With due deference that was going rather too far, and I share the view of the Court as contained in the letter of 16 July 1984 (already referred to),

when it replied that it "considers that this somewhat unprecedented request is difficult to contemplate" (letter of 6 July 1984 from the President of the Court to the Agent of Nicaragua) and gave reasons with which I agree. In many domestic courts, especially in the common law countries, interlocutory applications are exclusively at the discretion of the court, and in most cases when the court is called upon to exercise such a discretion (which is a part of the inherent power of the court), "equity" plays a very large role, and an applicant who "wants equity must do equity" implying that that applicant "must come with clean hands". This means that, if an applicant wants the court to exercise its equitable discretion on a matter, he must first satisfy the court that the earlier order issued by the court has been complied with, otherwise the court may refuse to make any further order.

Fitzmaurice expressed his doubt as to whether the jurisdiction of the Court is inherent *per se*, and he felt that the whole issue is debatable as to whether the Court's jurisdiction to indicate provisional measures would normally or automatically form part of its inherent powers as an international tribunal in the absence of specific provisions such as Article 41 of the Statute of the Court. However, he concluded his exposition by expressing an ambivalent view in the following terms:

> "On that occasion the present writer expressed the view that in existing international conditions, the arguments *against* 'inherency' would prevail in any test case. He nevertheless indicated his belief that the arguments *for* are much weightier, and he sees no reason to change this conclusion." (Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. II, 1986, p. 774.)

However with regard to inherent powers under the Statute, he expressed his view as follows:

> "The jurisdiction to indicate interim measures of protection is, so far as the International Court is concerned, part of the incidental jurisdiction of the Court, the characteristic of which is that it does not depend on any direct consent given by the parties to its exercise, *but is an inherent* part of the standing *powers* of the Court under its Statute. Its exercise is therefore governed, not by the *consent of the parties* (except in a remote sense) but by the relevant provisions of the Statute and of the Rules of Court." (*Ibid.*, p. 533; emphasis added.)

One may argue that this is still an inherent power derived from the Statute and Rules of Court. Perhaps it is important to note that its jurisdiction is incidental, like all other incidental powers of other international adjudi-

cating tribunals. Therefore, once the Court is seised of a case in which it has jurisdiction prima facie, all of its incidental powers ought naturally to flow from that jurisdiction whether statutory or otherwise, like any other international tribunal, even though most of these powers, functions and jurisdiction are provided for in the Statute and Rules of Court.

The learned author went even further when he stated that:

> "As has been shown above, the power of the Court to indicate interim measures falls into the same category as its *compétence de la compétence.* Both are an exercise of incidental jurisdiction, necessary in the case of *compétence de la compétence* to enable the Court to function at all, and, in the case of the power to indicate interim measures, to prevent its decisions from being stultified . . . Yet it is established law that this power is part of the inherent powers of *all* international tribunals, irrespective of whether it has been expressly conferred on them or not." (Fitzmaurice, *op. cit.*, p. 542.)

This view of Sir Gerald Fitzmaurice was definitively affirmed in the *Nottebohm* case, where the Court clearly and positively claimed such an incidental power when it pointed out that:

> "Paragraph 6 of Article 36 merely adopted, in respect of the Court, a rule consistently accepted by general international law in the matter of international arbitration. Since the *Alabama* case, it has been generally recognized, following the earlier precedents, that, in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction." (*I.C.J. Reports 1953*, p. 119.)

Two possible theses may, therefore, emerge from the expression quoted above; since the issue of jurisdiction is an incidental one — like the power of the Court to indicate provisional measures — then it follows that such a power should likewise be a part of the inherent power of the Court. Again, since such power under international law is available to international arbitral tribunals, *a fortiori* it must also be available to the Court. Furthermore, going by the decision of the Court in the *Corfu Channel* case on proceedings in default of appearance, one may conclude that generally, in matters of procedure, what is not specifically prevented by the rules may be applied by the Court (Rosenne, *The Law and Practice of the International Court*, 1965, Vol. II, pp. 590-591, para. 244). There is support for the view that:

> "the failure of a State to comply with an interlocutory decision can lead to the automatic imposition by the Court itself of a sanction

> against that State, and will only bring it disadvantage . . . since the interlocutory decision in itself does not dispose of the substantive rights of the parties" (Rosenne, *op. cit.*, Vol. I, pp. 124-125).

The discretionary power of the Court, even though statutory, flows from Article 75 of the Rules of Court. Paragraph 1 of the Article makes it clear that *proprio motu*, the Court may at any time indicate provisional measures if the circumstances of the case so dictate and that such measures ought to be complied with by any or all the parties involved in the case. Paragraph 2 goes further to empower the Court to indicate measures that are in whole or part different from those requested by the parties, if in its discretion such measures ought to be taken or complied with by the parties. This Article gives the Court a wider discretionary power than does Article 41 of the Statute of the Court. It is an Article which to a great extent allows the Court to function as it ought to and in turn derives its validity from Article 30, paragraph 1, of the Statute of the Court which states that: "The Court shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure."

Apart, therefore, from the discretionary and inherent powers of the Court, these rule-making powers are necessary to enable the Court to function as a Court and to ensure that orders issued by it are obeyed. I believe that the Court thus has the power statutorily and inherently to ensure compliance with whatever interlocutory directives or orders it may make in any matter of which it is seised. If this power were not available to the Court or were denied to it, an absurd situation might occur, especially having regard to the provisions of Article 74, paragraph 3, whereby the Court may persistently be inundated with requests for indications of provisional measures by the same parties, when in fact an earlier order has not been complied with.

5. Is the Order Binding?

This question is difficult to answer. One would have expected such an apparently simple question to be answered positively, since in international arbitrations and cases heard by other adjudicating tribunals such orders, like their awards, are final and binding. The controversy as to whether an order of the Court has binding force stems from the wording of the text of Article 41 of the Statute and Article 94 of the Charter. Sir Hersch Lauterpacht regrets this situation and suggests adequate amendment. I would refer to his discussion of effectiveness of the law, when he said that:

> "This circumstance illustrates to some extent the difficulty and the degree of artificiality surrounding the subject of provisional measures — drawbacks which stem from the fact that according to the wording and, perhaps, the intention of the Statute no *legally binding* force attaches to Orders issued under Article 41 of the Statute. The latter statement is controversial. However, that very fact may suggest the necessity of amending the Statute with a view to removing what is either an ambiguity or, on the assumption that Orders under that Article *lack legal force*, a provision inappropriate to a legal instrument." (Sir Hersch Lauterpacht, *The Development of International Law by the International Court, 1958-1982*, pp. 112-113; emphasis added.)

What then is wrong with Article 41 of the Statute that makes it not legally binding? Is any such deficiency one of "omission" or "commission"? Is there really an ambiguity contained therein? How should it have been worded? After all, this is the main vehicle whereby all the requests for an indication of provisional measures of protection are being transported into the portals of justice at the Peace Palace. On the face of the text of the Article, there is nothing that specifically leads one to conclude that it lacks binding force. The first paragraph reads thus:

> "The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party."

If one looks into the jurisprudence of this Court, it will be seen that there has been no categorical pronouncement on this issue, but that on 19 August 1929, in the *Free Zones of Upper Savoy and the District of Gex* case, the Permanent Court of International Justice stated that, unlike the final judgment of the Court, orders of the Court have no "binding force" or "final effect" in the decision of any dispute. The relevant paragraph reads as follows:

> "and whereas, in contradistinction to judgments contemplated by Article 58 of the Statute, to which reference is made in Article 2, paragraph 1, of the Special Agreement, orders made by the Court, although as a general rule read in open Court, due notice having been given to the Agents, have no 'binding' force (Article 59 of the Statute) or 'final' effect (Article 60 of the Statute) in deciding the dispute brought by the Parties before the Court" (*P.C.I.J., Series A, No. 22*, p. 13).

Since then (about 64 years ago), the issue of whether the indication of provisional measures does or does not have legal binding force has continued to be in controversy.

However, I think that the time has come when this Court should make a definitive pronouncement on this issue. After all, the principle of *stare decisis* is not applicable in the Court. In fact a careful examination of Article 41, paragraph 1, will suggest that it is prima facie and patently devoid of any ambiguity. In the plain and ordinary meaning of the form of words employed, the use of the words "shall" and "power" is undoubtedly mandatory and imperative, giving the Court an indisputable prerogative to indicate provisional measures. The phrase "if it considers that circumstances so require" relates to the discretionary exercise of such power, to be used or applied in deserving cases. The reason why the power was given is clearly apparent in the later part of the Article; and that is to enable the Court to function as it should by preserving the "rights" of either party. Logic and common sense would consider it ridiculous and absurd for the Court to be unable to preserve the rights of the parties pending the final judgment.

If the Court is not sufficiently effective and truly empowered to preserve the status quo, what then is the essence of carrying litigation through to its final conclusion, leading to the giving of judgment? Such an absurdity would be like affirming that confidence is to be placed in the record of a judgment and not in the judge — *Absurdum est affirmare (re judicata) credendum esse non judici.* As pointed out earlier, Lauterpacht observed that "according to the wording and, perhaps, the intention of the Statute no legally binding force attaches to Orders". In the first case, I see nothing wrong prima facie in the wording of the Article. It is clear on the face of it, because the Article even envisages a situation of possible stultification of the function of the Court if it cannot exercise such a power of indication, when it refers to "any provisional measures which *ought* to be taken to preserve the respective rights of either party". It is even clear from the wording of the Article that there may be a situation in which any subsequent action of the Court will become illusory or an exercise in futility, possibly like the case in hand — or the Nicaragua case — if such an indication for provisional measures cannot be given immediately to arrest that ongoing situation.

Arguendo, one may also ask what is the point of giving a request for an indication of provisional measure urgent attention, a quick and immediate hearing and priority (in most cases leading to an order being made within one or two weeks), if in spite of all the effort put into it, the resulting order is to be considered not legally binding and ineffective? Note, for example, the situation of urgency as dictated by Article 74 of the Rules of Court which sounds like an application for *habeas corpus* in the common law countries. That Article reads:

"1. A request for the indication of provisional measures shall have *priority* over all other cases.

2. The Court, if it is not sitting when the request is made, shall be convened forthwith for the purpose of proceeding to a decision on the request as a matter of *urgency*." (Art. 74, paras. 1-2; emphasis added.)

There is another aspect of this matter which should be mentioned here. If it is agreed, and I think there is no doubt about this, that the jurisdiction to deal with a request for the indication of provisional measures is part of the incidental jurisdiction of the Court, it can therefore safely be asserted that an incidental order forms a *part* of the outcome of the adjudicating assignment of the Court which is the final goal or the *whole*. If the "whole" judgment is binding, why then should it not be the same with that "part" of the "whole"?

Concluding this part of my opinion on whether the Order of the Court is binding or not, I believe there is no reason why the Court's Order should not be binding on the Parties; otherwise the Court would not be empowered to make such orders in accordance with the provisions of the Statute and Rules of Court. The Court is empowered to make rules under Article 30 of the Statute; thus by evoking that Article, such orders made under the Rules are equally valid and binding. If the Court were to be even in the slightest doubt as to the force behind such power as is contained in the Statute, it is submitted that all the provisions in the Rules with regard to requests for an indication of provisional measures together confer upon it sufficient power to pronounce an order.

6. Consequence of Non-Compliance — Is the Order Enforceable?

If an order is not binding it is difficult to see how it can be enforced. This difficulty was prominently highlighted in the *United States Diplomatic and Consular Staff in Tehran* case (*Order of 15 December 1979, I.C.J. Reports 1979*, pp. 20-21, para. 47). In fact, this was the first important "test case" since the adoption of the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963, between two Members of the United Nations — the United States of America and Iran.

This case was filed in the Court by way of an Application by the United States of America on 29 November 1979 against the Government of Iran with regard to the dispute concerning the seizure and holding of hostages who were members of the United States Embassy in Tehran. A request for the indication of provisional measures was annexed to the Application

and both the Application and the request were aimed at securing the immediate release of the hostages. Even though the Government of Iran was notified, it refused to participate in the proceedings, but merely sent a telegram denying the jurisdiction of the Court. However, the Court exercised its power and discretion — correctly, in my view — and proceeded with the hearing of the request by the United States of America. Five provisional measures were indicated in an Order in which Part A (containing three measures) directed the Government of Iran to release the hostages, give back the Chancery and Consulates of the United States of America which had been occupied, afford all the diplomatic and consular personnel of the United States of America the full protection, privileges and immunities to which they were entitled under the aforementioned Vienna Convention, and permit the hostages to leave Iran. The rest of the measures are not all that relevant to my thesis here. The important point was that the Islamic Republic of Iran refused to carry out all or any of the measures ordered by the Court. The Court has no machinery for enforcement and relies only on the Security Council to ensure such enforcement under Article 94 of the Charter.

At this point, it is important to state the provision of Article 94 of the Charter, which reads:

> "1. Each Member of the United Nations undertakes to comply with the *decision* of the International Court of Justice in any case to which it is a party.
>
> 2. If any party to a case fails to perform the obligations incumbent upon it under a *judgment* rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment." (Emphasis added.)

The consequential effect and problem created by this Article with regard to justiciability and enforceability of orders for an indication of provisional measures of protection on matters pending before the Court are better perceived from the plea of Sir Gladwyn Jebb when the United Kingdom took its complaint to the Security Council — presumably under Article 94, paragraph 1 — in the *Anglo-Iranian Oil Co.* case, which is another classic example of difficulty with the enforcement of interim measures of protection, as indicated by the Court. In this case, like the later case concerning the *United States Diplomatic and Consular Staff in Tehran*, Iran refused to comply with the Order of the Court. But formally and legitimately, I believe, the United Kingdom presented its complaint to the Security Council under Articles *34* and *35* of the Charter of the United Nations.

If I pause here for a while, it may be safe to argue that even if matters of this nature — relating to orders of the Court — cannot be presented to the Security Council under Article 94, there is nothing to prevent the affected

State from taking its matter to the Security Council under Articles 34 and 35 of the Charter, so as to ensure that the order of the Court is not treated lightly, even though, and most regrettably, that may also prove ultimately futile at times. Because the statement of Sir Gladwyn made my point very adequately and directly, I feel I would do well to quote him here verbatim:

> "the Council has special *functions* in relation to *decisions* of the Court, both under *Article 94, paragraph 2, of the Charter*, and under *Article 41, paragraph 2*, of the Statue of the Court . . . and this must clearly imply that the Council has *the power* to deal with matters arising out of such interim measures . . . Now, it is established that a final judgment of the Court is binding on the parties; that, indeed, is expressly stated by *Articles 59 and 60 of the Statute* and Article 94, paragraph 1, of the Charter. *But, 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, we suggest, of the bindingness of the final decision that the interim measures intended to preserve its efficacy should equally be binding.*" (United Nations, *Official Records of the Security Council*, 559th meeting, 1 October 1951, S/PV.559, p. 20; emphasis added.)

This statement of Sir Gladwyn calls for some examination in view of the difficulties surrounding matters arising out of indication of provisional measures of protection by the Court. If by reference to Article 94, paragraph 2, of the Charter, Sir Gladwyn was referring to the power of the Security Council vis-à-vis the power of the Court to indicate provisional measures of protection in the form of an order, I do have some reservations. Article 94, paragraph 2, deals only with the judgment and not incidental orders or interlocutory matters. If the word *judgment* is meant to include an order of this nature under discussion, I must beg to differ. Here I take the view that those who drafted the Charter meant a final decision of the Court or perhaps a final judgment. If we think of the word decision as a generic term encompassing orders and judgments, then I think Article 94, paragraph 1, is better referred to since that paragraph deals with *decisions*. But there again, I wish to observe that paragraph 1 is somehow weak and too general because the use of the word "undertake" tends to imply an appeal to the "moral obligation" of a State. A more imperative word like "ought", "must", "shall" and "under obligation to" should perhaps have been employed. What again puzzles me with the wording of that section as finally adopted is the fact that the word "decision" was used in paragraph 1 and "judgment" used in paragraph 2.

It is my view that the word "decision" should preferably have been used in both cases, otherwise it may even be better to spell matters out by insert-

ing, in both provisions, the words "judgments or orders" which would elegantly demonstrate the desire to ensure that all the decisions of the Court are to be complied with. But as I have mentioned earlier, the complaint of the United Kingdom was brought under Articles 34 and 35, which to my mind, implied a cautious approach. Time constraints will not permit me to deal any further with Article 94, paragraphs 1 and 2, of the Charter, but it is sufficient to state that it is not adequately or elegantly worded to assist the Court in ensuring due compliance with its orders under discussion.

Sir Gladwyn also referred to the binding force of the decision of the Court under Articles 59 and 60 of the Statute of the Court. I generally agree with him on this point, even though I should quickly add that Article 59 of the Statute of the Court was negatively drafted, whereas there is no reason why such an Article should not be stated positively possibly by providing that "the decision of the Court has binding force between the Parties in respect of that particular case". The way it is drafted puts too much emphasis on *ratione personae* and *ratione materiae.* With regard to Article 60, I believe that that Article adequately strengthens the power and function of the Court, in order to ensure the finality of the settlement of any dispute that may be brought before it.

But the most important part of Sir Gladwyn's statement is the last two sentences quoted above. Definitively, there is no reason why a judgment should be delivered or handed down in such cases, if the order of the Court would be frustrated in advance, which, in effect, would make the judgment a mere exercise in futility. It strongly supports my view that the Court should not be seen to make any further order if and when the parties in dispute have not taken the necessary steps to ensure the compliance with the earlier order made by the Court. It is for this reason that I share the view of Rosenne when he states:

> "That law, the attitude of which to States is impersonal and not eclectic, is *ex hypothesi* binding on all States. *Lex vera, atque princeps, apta ad jubendum, et ad vetandum*! For this reason it is submitted that the obligation to comply with the decision of the Court cannot be regarded only as a 'moral obligation'." (Shabtai Rosenne, *The Law and Practice of the International Court*, 1965, Vol. I, p. 120.)

7. The Court and the Security Council

The Charter of the United Nations clearly provides that the Security Council gives effect to the possible enforcement of the decisions of the Court — Article 94 of the Charter. The Security Council has immense powers under Chapter VI and Chapter VII of the Charter, which in this

regard serves as its "executive function". However, a point was made repeatedly by Bosnia in the proceedings on the request for an indication of provisional measures of protection with regard to the arms embargo placed on it and its need for self-defence to prevent continuing acts of genocide. In Article I of the Genocide Convention the High Contracting Parties confirm *inter alia*:

> "that genocide, whether committed in time of peace or in time of war, is a crime under *international law* which they undertake to prevent and to punish" (emphasis added).

On self-defence, the Agent of Bosnia referred many times during the hearings, and in his earlier request, to Article 51 of the Charter of the United Nations. This is an important provision on self-defence which provides that:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

There is no doubt that the Security Council has been giving its careful consideration to the hostilities in Bosnia and, as a result of this, has passed many resolutions. For example, on 16 April 1993, just a week after the Court's Order, the Security Council promptly passed resolution 819 (1993) in which it took note of the Court's Order and reaffirmed its condemnation of all the violations of international humanitarian law, in particular the practice of "ethnic cleansing". By resolution 808 (1993) the Security Council has established an international tribunal for the prosecution of persons responsible for serious violations of humanitarian law committed in the territory of the former Yugoslavia. Just recently, on 24 August 1993, another resolution 859 (1993) was passed by the Security Council to ensure and reaffirm the territorial integrity of Bosnia-Herzegovina and its membership of the United Nations. All these resolutions leave one in no doubt that the Security Council has given and continues to give due consideration to international obligations under Chapters VI and VII of the Charter with regard to the hostilities going on in Bosnia.

Having said that, perhaps one can pause to see whether there is any positive juridical issue involved in this argument of Bosnia. The fourth request in its fresh request reads thus:

> "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."

In the first place, I find it difficult to understand this request. What form of measure can the Court indicate to enable Bosnia "to have the means 'to prevent' the commission of acts of genocide against its own People"? It must, however, be constantly borne in mind that the aim of indicating provisional measures of protection is "to preserve the respective rights of either party", even though one is aware of the requirement of Article I of the Genocide Convention.

Article IX of that Convention provides

> "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III . . ."

shall be submitted to the Court at the request of any of the parties.

On this particular fourth request of Bosnia, if it is asking for a declaratory judgment of the Court, which seems to me to be the purport of its request, and provided that such a request is entertainable by the Court, it must await the final hearing of the case on the merits. Furthermore, the question is whether the issue of genocide as provided for in Article I of the Convention is not exclusively a matter for the States which "undertake to prevent and to punish" it. Again, another pertinent question may be asked, namely: "Who are the 'Bosnian People'? Does this not include the Croats, Serbs, Muslims and Jews"? Has the request not missed its target since it is alleged therein that "violations" and "acts of genocide" are being directed against the Muslims? As to the power, function and obligations of the Court, I think that they have been adequately addressed and discharged by the Order issued on 8 April 1993, especially on the subject of the prevention of acts of genocide which is the subject-matter of the Applicant's request for provisional measures.

If, however, the issue of "prevention" is, as I suspect, overstretched to include the question of access by the Applicant to the means (weapons) "to prevent" the commission of acts of genocide, I would point out that the request is misconceived as far as the Court is concerned. It was the Security Council acting upon its powers under the Charter — and rightly

too — that on 25 September 1991 placed an embargo upon the provision of arms and military equipment to Yugoslavia (as it then was) with that State's consent. Even though the Applicant has argued, and I think there is an element of logic in its argument, that at that time (25 September 1991) the State of Bosnia and Herzegovina was not in existence and declared its independence only on 6 March 1992 and became a Member of the United Nations on 22 May 1992, and that the former State of Yugoslavia is no longer in existence, ever since its (Bosnia's) independence the same resolutions on embargo have been maintained. In this regard, the Security Council is now acting within its power under Chapter VII, and it is still seised of the matter. Had any indication been made by the Court on this particular request, and if the same were not complied with (as happened with respect to the Order of 8 April 1993), Bosnia might still have had to present its complaints to the Security Council, either under Articles 34 and 35 of the Charter, or under Article 94 upon which I have earlier expressed my opinion.

My conclusion is that an order, like a judgment (and being incidental to it) 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 — *Judicium non debet esse illusorium; suum effectum habere debet.*

The Court, as I would further point out, has this power under the Statute and Rules, so that it also forms a part of its inherent power under general international law. Otherwise it may be impeded from functioning as a Court. This is my reason for stating that the Court should have rejected or refused to issue the request for another Order in this case, unless and until the first Order of 8 April 1993 had been complied with by both Parties, and I therefore agree with the Court, when it reaffirms its first indication of provisional measures and re-emphasizes to both Parties that they should take all necessary steps to implement and comply with the first Order of the Court, made on 8 April 1993.

(Signed) Bola AJIBOLA.