SEPARATE OPINION OF JUDGE ODA

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I. Introduction

1. I entirely support the decision of the Court in dismissing the requests for the indication of provisional measures submitted on 29 April 1999 by the Federal Republic of Yugoslavia against ten respondent States — Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, the United Kingdom and the United States.

While favouring subparagraph (2) of the operative paragraph in which the Court ordered that the case be removed from the General List of the Court in the cases of Spain and the United States, I voted against subparagraph (2) of the operative paragraph in the other eight cases in which the Court ordered that it "*[r]eserves* the subsequent procedure for further decision" because I believe that those eight cases should also be removed from the General List of the Court.

2. I differ from the Court's reasoning on some aspects of the cases, not only on matters concerning the dismissal of the requests but also on some other matters relating to the Applications filed in the Registry of the Court by the Federal Republic of Yugoslavia on the same day, namely 29 April 1999. It is difficult, even impossible, for me to give a sufficient explanation of my position in the extremely limited time — if I may say so, an unreasonably short period of time, too short to do proper justice to the cases — that has been made available to the judges for preparing their opinions. I very much regret that this lack of time has given me no choice but to cover all ten cases in a single opinion. Certain parts of this opinion may thus not be relevant to a particular case.

II. The Status of the Federal Republic of Yugoslavia — A Preliminary Issue

3. I consider that the Federal Republic of Yugoslavia is not a Member of the United Nations and thus not a party to the Statute of the International Court of Justice.

Following the unrest in Yugoslavia in the early 1990s and the dissolution of the Socialist Federal Republic of Yugoslavia, some of its former Republics achieved independence and then applied for membership of the United Nations. On 22 May 1992, Bosnia and Herzegovina, Croatia and Slovenia became Members of the United Nations, followed on 8 April 1993 by the former Yugoslav Republic of Macedonia. However, the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership in the United Nations of the former Socialist Federal Republic of Yugoslavia was not recognized.

On 22 September 1992 the General Assembly, pursuant to Security Council resolution 757 (1992) of 30 May 1992 and Security Council resolution 777 (1992) of 19 September 1992, adopted resolution 47/1 stating that

"the Federal Republic of Yugoslavia (Serbia and Montenegro) can-

> not continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations"

and decided that it "should apply for membership in the United Nations". The letter addressed to the Permanent Representatives of Bosnia and Herzegovina and Croatia dated 29 September 1992 from the Under-Secretary-General, the Legal Counsel of the United Nations, stated that while the above-mentioned General Assembly resolution neither terminated nor suspended Yugoslavia's membership in the Organization,

> "the General Assembly has stated unequivocally that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot automatically continue the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations".

In fact, there seems to have been an understanding that this rather exceptional situation would be resolved by the admission of the Federal Republic of Yugoslavia to the United Nations as a new Member. However, no further developments have occurred and the Federal Republic of Yugoslavia has not been admitted to the United Nations, as a "peace-loving State[s] which accept[s] the obligations contained in the [United Nations] Charter" (United Nations Charter, Art. 4).

4. The Court is open to the States parties to its Statute (Art. 35). Only States parties to the Statute are allowed to bring cases before the Court. It therefore follows, in my view, that the Federal Republic of Yugoslavia, not being a Member of the United Nations and thus not a State party to the Statute of the Court, has no standing before the Court as an applicant State. The Applications presented by the Federal Republic of Yugoslavia should therefore be declared inadmissible for this reason alone and should be removed from the General List of the Court.

However, if I am not correct on this, and assuming, for the sake of argument, that the Federal Republic of Yugoslavia does in fact have standing before the Court, I shall now go on to discuss whether the Federal Republic of Yugoslavia can bring the present Applications on the basis of certain provisions of the Statute and of the Rules of Court, of the 1930 and 1931 instruments in the cases of Belgium and the Netherlands, and of the 1948 Genocide Convention.

III. Lack of the Court's Jurisdiction under Article 36, Paragraph 2, of the Statute and Article 38, Paragraph 5, of the Rules of Court

(1) No "Legal Dispute" within the Meaning of Article 36, Paragraph 2, of the Statute Exists between the Federal Republic of Yugoslavia and the Respondent State

5. The Applications of the Federal Republic of Yugoslavia refer to the acts of the ten respondent States by which the Federal Republic of Yugo-

slavia alleges that they have violated certain obligations as listed in the section of each Application entitled "Subject of the Dispute". The acts which are listed in the section of each Application entitled "Claim" may have occurred, but the fact alone that a State allegedly committed these acts or actions as described in the section "Facts upon Which the Claim is Based" cannot constitute the existence of a "legal dispute" between two States within the meaning of Article 36, paragraph 2, of the Statute.

The question of whether certain acts of a State which may infringe upon the rights and interests of another State should be considered as justifiable under international law may well be a legitimate issue to be raised, but not as a "legal dispute" in which both sides are to present arguments concerning their respective rights and duties under international law in their relations with each other. Certainly such a "legal dispute" between Yugoslavia and the respondent States had not existed when the Federal Republic of Yugoslavia filed the Applications to institute the proceedings in these cases. What did exist on 29 April 1999 was simply the action of bombing or armed attacks conducted by the NATO armed forces in which the military powers of each of the respondent States were alleged to have participated. The issues — but not the "legal disputes" — concerning the bombing and armed attacks should properly be dealt with by the Security Council under Chapters V, VI, VII and VIII of the Charter or, in some cases, by the General Assembly under Chapter IV. For this reason alone, the Application should, on the basis of Article 36, paragraph 2, of the Statute be declared inadmissible.

However, for the sake of argument, I shall proceed on the assumption that there exists between the Parties a "legal dispute" within the meaning of Article 36, paragraph 2, of the Statute.

(2) Article 38, Paragraph 5, of the Rules of Court

6. In its Applications against France, Germany, Italy, Spain and the United States, the Federal Republic of Yugoslavia invokes Article 38, paragraph 5, of the Rules of Court, in the hope that consent to the jurisdiction of the Court might be given by those States. However, France, Germany, Italy, Spain and the United States have given no such consent to the Court's jurisdiction and it is clear from their arguments in the oral hearings that they will not give it. There is thus no room for the Court to entertain these five Applications on the basis of Article 38, paragraph 5, of the Rules of Court. The concept of *forum prorogatum* does not apply in these five cases.

(3) Article 36, Paragraph 2, of the Statute of the Court

7. On 25 April 1999 the Federal Republic of Yugoslavia registered with the Secretariat of the United Nations its declaration recognizing the compulsory jurisdiction of the Court in accordance with Article 36, paragraph 2, of the Statute. The main point to be considered, even on the assumption that the registration of the declaration by the Federal Republic of Yugoslavia on 25 April 1999 was valid, is whether this declaration is valid in connection with the Applications of the Federal Republic of Yugoslavia against six respondent States (Belgium, Canada, the Netherlands, Portugal, Spain and the United Kingdom) which have accepted the Court's compulsory jurisdiction in their respective declarations under the same provision of the Statute.

8. The cases of Spain and the United Kingdom are different from the other four cases. In its declaration of 29 October 1990, Spain expressly excluded from the Court's jurisdiction "disputes in regard to which the other party or parties have accepted the compulsory jurisdiction of the Court less than 12 months prior to the filing of the application bringing the dispute before the Court" and the United Kingdom in its declaration of 1 January 1969 similarly excluded certain disputes from the Court's jurisdiction:

> "where the acceptance of the Court's compulsory jurisdiction on behalf of any other Party to the dispute was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court".

It is crystal clear that the Court cannot exercise jurisdiction to entertain these two Applications, one against Spain and the other against the United Kingdom, on the basis of Article 36, paragraph 2, of the Statute.

9. Belgium, Canada, the Netherlands and Portugal have accepted the compulsory jurisdiction of the Court in their respective declarations, deposited by Belgium on 17 June 1958, by Canada on 10 May 1994, by the Netherlands on 1 August 1956 and by Portugal on 19 December 1955. As no reservation directly relevant to the present issues has been included in the declarations of the four States mentioned above, it might be argued that the exercise of the Court's jurisdiction is justified under Article 36, paragraph 2, of the Statute in the cases of the Applications addressed to those four States. Literally interpreted, the declaration of the Federal Republic of Yugoslavia (assuming that the Federal Republic of Yugoslavia is indeed a party to the Statute of the Court and that the Federal Republic of Yugoslavia's declaration was legitimately registered) may be claimed as being valid in relation to other States which have made a similar declaration. However, I hold the view that acceptance by the Federal Republic of Yugoslavia of the Court's jurisdiction only a matter of days before it filed its Applications with the Court in these cases is not an act done *in good faith* and is contrary to the proper concept of acceptance of the compulsory jurisdiction of the Court under the "optional clause" in the Statute.

(4) The Optional Clause

10. Provisions equivalent to Article 36, paragraph 2, of the Statute of the International Court of Justice were first introduced in 1920 when the Permanent Court of International Justice was being planned. In the view of the Council of the League of Nations, which initiated the drafting of the Statute of the Permanent Court of International Justice in 1920, the time was not yet ripe for the international community to accept a general obligation to be bound by the judicial settlement of disputes. In fact, the consent of each State to accept such an obligation was deemed to be absolutely necessary. The arguments surrounding that problem during the preparation of the Statute of the Permanent Court of International Justice clearly reflected the still prevalent concept of national sovereignty as dominant in the international community. It was in that context that Article 36, paragraph 2, of the Statute was drafted as one of the cornerstones of the Permanent Court of International Justice. The International Court of Justice, operating under the United Nations system, inherited it as what is still Article 36, paragraph 2, now of the Statute of the present Court.

11. By 1974, the year of the appeal by the United Nations General Assembly for the revitalization of the Court (United Nations doc. A/RES/3232 (XXIX)), 45 out of 141 States parties to the Statute had accepted the compulsory jurisdiction of the Court under the "optional clause". Since then, the number of accepting States has not increased significantly, despite the increased number of States parties to the Statute. As of July 1998, the States parties to the Statute numbered 187. However, only 60 States out of that 187 have declared their acceptance of the compulsory jurisdiction of the Court. The number of States accepting the compulsory jurisdiction has never exceeded one-third of the total number of States that might have at any one time accepted the compulsory jurisdiction of the Court.

It is also a remarkable fact that, with the exception of the United Kingdom, no permanent member of the Security Council has, at the present time, accepted the compulsory jurisdiction of the Court. In fact, in October 1985, on the occasion of the loss of its case against Nicaragua (at the jurisdictional phase), the United States proceeded to withdraw the acceptance which it had maintained ever since the Court was set up in 1946. Earlier, France had withdrawn its acceptance, just after being brought before the Court by Australia/New Zealand in connection with its nuclear tests in the atmosphere in the South Pacific in 1973.

12. The making of a declaration is a unilateral act, which, far from being in the nature of a concession, is in fact to the State's advantage, in that it confers a right of action against States in a similar position. However, as the making of the declaration functions in the same way as an

offer to conclude an agreement and depends on reciprocity, the practical effectiveness of the system depends on the number of States which are willing to participate in it and on the relative breadth of the obligations which they are prepared to accept thereunder. The acceptance is commonly hedged with reservations and exclusions.

The United Kingdom in its 1958 declaration (revised in 1963 and 1969) excluded disputes

> "where the acceptance of the Court's compulsory jurisdiction on behalf of any other Party to the dispute was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court".

A similar 12-month exclusion clause is found in the following declarations: Hungary (1992), India (1974), Malta (1966), Mauritius (1968), New Zealand (1977), Philippines (1972), Poland (1996), Somalia (1963), Spain (1990). Cyprus has a six-month exclusion clause in its declaration (1988).

It is obvious that these States would, thanks to either a 12-month or a six-month exclusion clause, be in a position to withdraw their acceptance of the compulsory jurisdiction of the Court if faced with an application that they considered lacking in bona fides.

The United Kingdom's 1958 declaration also had a clause excluding "disputes in respect of which any other Party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purpose of the dispute". A similar clause is also now to be found in New Zealand's 1977 declaration.

13. The "optional clause" in effect plays a double role: one positive, in that it may on occasion enable a unilateral application to succeed, and the other negative, in that it may sometimes result in a respondent being brought to the Court against its will. Thus a State, by declaring its acceptance of the compulsory jurisdiction of the Court, may seek to acquire *locus standi* in a case in which the odds are in its favour, but on the other hand it may, where it feels placed at a disadvantage, try to release itself from the compulsory jurisdiction of the Court by the termination or amendment of its declaration.

It has always been the desire of States, when faced with an application that in their view clearly lacks bona fides, to escape from their acceptance of the compulsory jurisdiction of the Court. The fact remains — and this is what I want to stress — that the judicial settlement of international disputes still remains in the hands of those States that are genuinely willing to defer to the International Court of Justice.

14. All of these facts indicate that some States accept the compulsory jurisdiction of the Court out of their good will but on the understanding that other States have the same good intentions. If this good faith is lack-

ing, the system of acceptance of the compulsory jurisdiction of the Court cannot work in the manner in which the drafters of the Statute intended.

Past practice reveals, in cases brought unilaterally in which preliminary objections made by the respondent States were overcome, that there have been only a few cases in which the judgments on the merits were properly complied with. This indicates the reality of judicial settlement in the world community. If States are brought to the Court against their will, then no real settlement of the dispute will follow. I feel that, even if a 12-month or similar exclusion clause is not included in a State's declaration, all States should have the right to refuse to be drawn into a case that is obviously not brought bona fide.

15. Generally speaking, I also believe that there should be some means of excluding from the Court's jurisdiction applications which may not have bona fide intentions or motives and that some provision should be made for such exclusion in the basic concept of the declaration of acceptance of the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute. It should be noted that, as a basic concept of international judiciary, the cornerstone of the granting by sovereign States of jurisdiction to the International Court of Justice in a dispute has always been the consent of those States.

16. In my view, it would be extremely odd to have a situation where the Court apparently has prima facie jurisdiction only for those States (Belgium, Canada, the Netherlands and Portugal) that have simply failed to include in their declarations an exclusion clause protecting their interests, while Spain and the United Kingdom are, because of their exclusion clauses, released from the Court's jurisdiction in the present cases (which in fact cover exactly the same subject). I accordingly consider, in the light my finding in paragraph 9 above as to Yugoslavia's lack of good faith, that the Applications instituting proceedings against these four States also (namely, Belgium, Canada, the Netherlands and Portugal) should likewise be found inadmissible.

IV. Lack of the Court's Jurisdiction under the 1930 Convention between Belgium and Yugoslavia and the 1931 Treaty between the Netherlands and Yugoslavia

17. As late as the second round of oral hearings, which took place on 12 May 1999, the Federal Republic of Yugoslavia supplemented its Applications against Belgium and the Netherlands by invoking as additional grounds of jurisdiction of the Court, respectively, Article 4 of the 1930 Convention of Conciliation, Judicial Settlement and Arbitration

between Yugoslavia and Belgium, and Article 4 of the 1931 Treaty of Judicial Settlement, Arbitration and Conciliation between Yugoslavia and the Netherlands. Irrespective of the question of whether these instruments still remain valid in the present-day relations between the Federal Republic of Yugoslavia and the two respondent States, and whether the Federal Republic of Yugoslavia is entitled to invoke them as a basis of jurisdiction at such a late stage, I have to say that in my view the reliance on these instruments by the Federal Republic of Yugoslavia is totally unfounded.

18. These two instruments were among a number of treaties of a similar character concluded between a great number of States in the period after the establishment of the League of Nations; they were intended to bring together the various means of peaceful settlement of international disputes, namely judicial settlement, arbitration, conciliation, and other methods, into a systematized scheme of precedence among these various procedures. However, these treaties did not impose any new obligations on the States which became parties to them. Hence, the 1930 and 1931 instruments imposed no new obligations on the Contracting Parties in connection with the judicial settlement of disputes, over and above resort to the Permanent Court of International Justice provided for in its Statute, to which the Contracting Parties of the 1930 and 1931 instruments, respectively, were already signatories. (Belgium, the Netherlands, and Yugoslavia had, in their respective declarations, already accepted the compulsory jurisdiction of that Court.)

The provisions of Article 4 of these two instruments have never been interpreted as granting compulsory jurisdiction to the then existing Permanent Court of International Justice in addition to what had already been provided for in its Statute. It is also to be noted that, in both of these instruments, resort to any of the prescribed means of settlement of disputes could be had only after a dispute had failed to be settled through the normal diplomatic channels (cf. Article 1 of the respective instruments).

V. Lack of the Court's Jurisdiction under the Genocide Convention

(1) Preliminary Observations

19. The Court's Statute provides in Article 36, paragraph 1, that "[t]he jurisdiction of the Court comprises . . . all matters specially provided for . . . in treaties and conventions in force". The 1948 Genocide Convention is one of these "treaties and conventions in force" and its Article IX provides that

"[d]isputes between the Contracting Parties relating to the interpre-

> tation, application or fulfilment of the present Convention . . . shall be submitted to the International Court of Justice at the request of any of the parties to the dispute".

In all ten of its Applications, the Federal Republic of Yugoslavia, referring to the alleged breach of the obligation contained in the Genocide Convention, invoked Article IX of that Convention as a legal ground for jurisdiction of the Court.

I will not deal here with the question of whether the Federal Republic of Yugoslavia is now a party to the Genocide Convention and whether a State which is not a State party to the Statute is entitled to *locus standi* by relying on Article 36, paragraph 1, as quoted at the beginning of this paragraph.

I note that Portugal became a party to the Genocide Convention with effect from 10 May 1999. I also note that Spain and the United States have properly made their respective reservations in respect of Article IX of the Genocide Convention. Thus the applications of the Federal Republic of Yugoslavia invoking that Convention should — from the outset — be dismissed in the cases of Portugal, Spain and the United States.

(2) No Disputes relating to the Genocide Convention Exist between the Parties

20. The Federal Republic of Yugoslavia, in spite of enumerating various claims, did not establish any violation of the Genocide Convention for which any one of the ten respondent States could be held responsible as a party to that Convention and indicated no element of genocide as defined in Article II of the Genocide Convention in the bombing or military attacks in Yugoslavia by the NATO armed forces. The question in general as to whether or not the bombing or the military attack in the territory of Yugoslavia by the NATO armed forces does in fact constitute a violation of international law may well be an issue but is irrelevant when dealing with the Genocide Convention.

21. Even if acts of genocide for which the respondent States may be deemed to be responsible under the Genocide Convention had taken place in Yugoslavia, that would not mean that there were *disputes* between the applicant State and the respondent States concerning the interpretation, application or fulfilment of the Convention. The Applicant did not indicate the existence of such a dispute which might be submitted obligatorily to the Court by application of the Genocide Convention.

I have previously stated my interpretation of the meaning of the words "a dispute concerning the interpretation, application or fulfilment of the

Convention" in the declaration I appended to the Court's Judgment in the *Genocide* case and I repeat it here:

> "If any dispute were to be unilaterally submitted to the Court by one of the Contracting Parties to a treaty pursuant to the compromissory clause of that treaty, this would mean in essence that the dispute had arisen because of (i) the alleged *failure* of another Contracting Party *to fulfil the obligations imposed by that treaty* — a failure for which it is responsible — and (ii) the *infringement of the rights bestowed upon the former State by that treaty* due to that failure. The failure of the other State is itself a violation of the treaty but such a violation alone cannot be interpreted as constituting a dispute between the applicant State and the respondent State relating to that treaty unless it can be shown to have infringed such rights of the former State as are protected thereby." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, pp. 625-626.)

(3) General Character of the Genocide Convention

22. The Genocide Convention cannot be regarded as an orthodox type of international treaty, as orthodox treaties provide for a right on the part of one State and a corresponding obligation on the part of another State. I once described the unique character of the Genocide Convention. It may be pertinent to quote my previous writing in this respect:

> "4. The Genocide Convention is unique in having been adopted by the General Assembly in 1948 at a time when — due to the success of the Nuremburg Trials — the idea prevailed that an international criminal tribunal should be established for the punishment of criminal acts directed against human rights, including genocide; it is essentially directed *not* to the rights and obligations of States *but* to the protection of rights of individuals and groups of persons which have become recognized as universal.
>
> To be sure, the Contracting Parties to the Convention defined genocide as 'a crime under international law' (Art. I). The Convention binds the Contracting Parties to punish persons responsible for those acts, whoever they may be, and is thus directed to the punishment of persons committing genocide and genocidal acts (Art. IV). The Contracting Parties undertake 'to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention' (Art. V).
>
> As persons committing genocide or genocidal acts may possibly be 'constitutionally responsible rulers [or] public officials' (Art. IV),

the Convention contains a specific provision which allows '[a]ny Contracting Party [to] call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of [those acts]' (Art. VIII) and contemplates the establishment of an international penal tribunal (Art. VI).

Genocide is defined as 'a crime under international law which [the Contracting Parties] undertake to prevent and punish' (Art. I). Even if this general clause (which was subjected to criticism at the Sixth Committee in 1948 when it was felt by some delegates that it should have been placed in the preamble, but *not* in the main text) is to be interpreted as meaning specifically that the Contracting Parties are obliged 'to prevent and to punish' genocide and genocidal acts, these legal obligations are borne in a general manner *erga omnes* by the Contracting Parties in their relations with all the other Contracting Parties to the Convention — or, even, with the international community as a whole — but are *not* obligations in relation to any specific and particular signatory Contracting Party.

The failure of any Contracting Party 'to prevent and to punish' such a crime may only be rectified and remedied through (i) resort to a competent organ of the United Nations (Art. VIII) or (ii) resort to an international penal tribunal (Art. VI), but *not* by invoking the responsibility of States in inter-State relations before the International Court of Justice. This constitutes a unique character of the Convention which was produced in the post-war period in parallel with the emergence of the concept of the protection of human rights and humanity.

5. In this regard, some explanation of the dispute settlement provision of the Convention (Art. IX) may be pertinent. It reads as follows:

> '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 International Court of Justice at the request of any of the parties to the dispute'

and is unique as compared with the compromissory clauses found in other multilateral treaties which provide for submission to the International Court of Justice of such disputes between the Contracting Parties as relate to the *interpretation or application* of the treaties in question.

The construction of Article IX of the Genocide Convention is very uncertain as it incorporates specific references to '[d]isputes . . . relating to . . . fulfilment of the Convention' and to 'disputes relating to the responsibility of a State for genocide or [genocidal acts]' — ref-

erences which can hardly be understood in any meaningful sense as a compromissory clause.

The original draft of the Genocide Convention was drawn up by an *Ad Hoc* Committee on Genocide in the ECOSOC in April-May 1948, and contained an orthodox type of compromissory clause (*Official Records of the Economic and Social Council, Third Year, Seventh Session, Supplement No. 6*), which read:

> 'Disputes between the High Contracting Parties relating to the *interpretation or application* of this Convention shall be submitted to the International Court of Justice, *provided that* no dispute shall be submitted to the International Court of Justice involving an issue which has been referred to and is pending before or has been passed upon by a competent international criminal tribunal.' (Emphasis added.)

When this draft was taken up by the Sixth Committee of the General Assembly in its Third Session in October 1948, the addition of the two aforementioned references was proposed (*Official Records of the General Assembly, Third Session, Sixth Committee*, Annexes, p. 28: A/C6/258) without, in my view, the drafters having a clear picture of the new type of convention to be adopted. While some delegates understood that 'fulfilment' would not be different from 'application', a proposal to delete 'fulfilment' from the additions was rejected by 27 votes to 10, with 8 abstentions. However, another deletion of the words 'including [disputes] relating to the responsibility of a State for genocide or [genocidal acts]' was also rejected but only by 19 votes to 17, with 9 abstentions (*Official Records of the General Assembly, Third Session, Sixth Committee*, SR.104, p. 447). The *travaux préparatoires* of the Convention seem to confirm that there was some measure of confusion among the drafters, reflecting in particular the unique nature of their task in the prevailing spirit of the times.

How can one then interpret this reference to the 'responsibility of a State'? As far as I know such a reference has never been employed in any other treaty thereafter. It seems to be quite natural to assume that that reference would not have had any meaningful sense or otherwise would not have added anything to the clause providing for the submission to the Court of disputes relating to the *interpretation or application* of the Convention, because, in general, any inter-State dispute covered by a treaty *per se* always relates to the responsibility of a State and the singling-out of a reference to the responsibility of a State does not have any sense with regard to a compromissory clause." (*Application of the Convention on the Prevention and*

Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996 (II), declaration of Judge Oda, pp. 626-628.)

(4) Concluding Observations

23. In order to seise the Court of the present cases, excepting those concerning Portugal, Spain and the United States as referred to in paragraph 19 of this opinion, the Federal Republic of Yugoslavia would certainly have had to show that, applying the Genocide Convention to the situation in the territory of Federal Republic of Yugoslavia, the respondent States could indeed have been responsible for the failure of the fulfilment of the Convention in relation to the Federal Republic of Yugoslavia. But, more particularly, the Federal Republic of Yugoslavia would have to show that the respondent States have breached the rights of the Federal Republic of Yugoslavia as a Contracting Party (which by definition is a State) entitled to protection under that Convention. This, however, has not been established in the Applications and in fact the Genocide Convention is not intended to protect the rights of the Federal Republic of Yugoslavia as a State.

Even if, as alleged, the respondent States are responsible for certain results of the bombing or armed attacks by NATO armed forces in the territory of the Federal Republic of Yugoslavia, this fact alone does not mean that there is a "dispute relating to the interpretation, application or fulfilment of the Convention", as the respondent States did not violate the rights conferred upon the Federal Republic of Yugoslavia by the Convention. What is protected by the Convention is *not* the particular rights of any individual State (the Federal Republic of Yugoslavia in this case) *but* the status of human beings with human rights and the universal interest of the individual in general.

What the Federal Republic of Yugoslavia did in its Applications was to point to certain *facts* allegedly tantamount to genocide or genocidal acts and to submit *claims* alleged to have arisen out of these facts. This cannot be taken to indicate the existence of an inter-State dispute relating to the responsibility of a State which could have been made a basis for the Court's jurisdiction.

I accordingly conclude that the Applications citing the Genocide Convention as a basis of the Court's jurisdiction should be rejected.

VI. In the Present Circumstances the Requests for the Indication of Provisional Measures are Inadmissible

24. Having made observations on the Court's jurisdiction, I would like to make some comments on the institution of provisional measures.

Provisional measures which ought to be taken to preserve the respective rights of either party may be indicated by the Court "*if* it considers that the circumstances so require" (Statute, Art. 41, emphasis added). It thus falls within the discretion of the Court to grant provisional measures upon the request of the applicant State.

The items concerning the subject-matter of the dispute, the claim and the legal grounds on which the claim is based, are virtually identical throughout the Applications filed by the Federal Republic of Yugoslavia against the ten respondent States. If provisional measures were to be granted, but only in relation to certain of the ten respondent States, for the reason that there existed a prima facie basis of jurisdiction, while in the case of other respondent States the requests were dismissed totally because of the lack of the Court's jurisdiction to entertain the Applications, this would lead to an unreasonable result. For this reason alone, the requests for the indication of provisional measures by the applicant State are inadmissible throughout the ten cases.

VII. Removal of the Cases from the General List of the Court Due to the Lack of Jurisdiction

25. The Court has reached its decision to dismiss the requests for the indication of provisional measures in all ten cases on the sole ground that it lacks a prima facie basis of jurisdiction in these cases. If, at the provisional measures stage, the Court finds that it has prima facie jurisdiction, then it remains free, irrespective of whether or not it grants provisional measures, to proceed to the next phase.

26. In the past the Court, even after having affirmed that there could exist a prima facie basis of jurisdiction, still dismissed the requests for provisional measures in some cases for various reasons. In the *Interhandel* case, the *Passage through the Great Belt* case and the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie*, the Court considered that the circumstances of these cases were not such as to require the exercise of its power to indicate provisional measures. In the *Aegean Sea Continental Shelf* case, the Court did not find such a risk of irreparable prejudice to rights in issue before it as might require the exercise of its power to indicate provisional measures. In the 1990 case concerning the *Arbitral Award of 31 July 1989*, the Court dismissed the request of the Republic of Guinea-Bissau on the ground that the alleged rights sought to be made the subject of provisional measures were not the subject of the proceedings before the Court on the merits of the case.

Where the Court finds that there is a prima facie basis of jurisdiction, this does not, of course, necessarily lead it to determine that it eventually has jurisdiction in the case. In the *Anglo-Iranian Oil Co.* case and the

Interhandel case, the Court, after granting provisional measures, ultimately found that it had no jurisdiction to be seised of these cases.

27. In its past jurisprudence the Court has always found, as in those cases mentioned above and in spite of its ultimately negative response to the request for provisional measures, that there existed a prima facie basis of jurisdiction. There has been no previous case in which the Court did not recognize even a prima facie basis of jurisdiction, and the present cases concerning Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal and the United Kingdom are the first in the Court's jurisprudence in which the Court has dismissed a request for the indication of provisional measures due to the lack of prima facie jurisdiction.

The Court's findings at this stage of the present cases that there is not even a prima facie basis of jurisdiction in all eight of the cases mentioned above should be interpreted as a ruling that it has no jurisdiction whatsoever to entertain the Applications, without leaving any room to retain these cases and to deal with the issue of jurisdiction in the future.

28. In its Orders in the cases of Spain and the United States, the Court finds that the cases against them should be removed from the General List, as the Court manifestly lacks jurisdiction to entertain these two Applications. The Court concludes, however, that it should remain seised of the other eight cases on the ground that its finding that it lacks jurisdiction prima facie to entertain the respective Applications instituting proceedings against Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal and the United Kingdom in no way prejudges the question of jurisdiction in those eight cases.

It is my firm belief that, for all the reasons given above concerning the Court's lack of jurisdiction under (i) Article 36, paragraph 2, of the Statute, (ii) the provisions of the instruments of 1930 and 1931 between Yugoslavia and Belgium and the Netherlands, respectively, and (iii) the provisions of the Genocide Convention, and due to my interpretation of the Court's finding concerning the lack of prima facie basis of jurisdiction in the eight cases, as stated in the last sentence of paragraph 27 of this opinion, the Applications in not only the two cases but in all ten cases should be removed from the General List.

It would be contrary to judicial propriety to make a distinction between two groups of States, in what is essentially one case dealing with the same subject throughout, solely because of the difference in attitudes taken by the States towards the relevant documents which give the Court jurisdiction.

29. In conclusion I would like to express my sincere hope that the present situation in the territory of Yugoslavia, in the settlement of which the International Court of Justice as the principal *judicial* organ of the

United Nations has no role to play, will be resolved peacefully and in a way that satisfies all humanitarian aspects raised by this case.

(Signed) Shigeru ODA.