DECLARATION OF JUDGE ODA

1. I feel some disquiet at being dissociated from the great majority of the Court, particularly in view of my abhorrence of the appalling events which took place in Bosnia and Herzegovina in 1992-1993. It is, however, as a matter of legal conscience that I present my position that the Court should dismiss the Application filed by Bosnia and Herzegovina on 20 March 1993.

The main reason for my negative vote is my conviction that the Court lacks jurisdiction *ratione materiae*, as the Applicant, in its Application, did not assert the existence of a dispute with the Respondent under the Genocide Convention which could have led to the Court being seised of the present case.

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2. Bosnia and Herzegovina, which relies upon Article IX of the Genocide Convention as a basis for the Court's jurisdiction, has requested the Court to adjudge and declare principally that Yugoslavia (Serbia and Montenegro (hereinafter called "Yugoslavia")) has breached its legal obligations towards Bosnia and Herzegovina under the Genocide Convention, that Yugoslavia must immediately desist from its breaches of these obligations, and that Yugoslavia has to make reparation for the damages to persons and property and to the Bosnian economy and environment that have been caused by its violations of international law.

In my view, however, Bosnia and Herzegovina, in its Application, has not given any indication of opposing views regarding the *application or interpretation* of the Genocide Convention which may have existed at the time of filing of the Application, which alone can enable the Court to find that there is a dispute with Yugoslavia under that Convention.

3. 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.

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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 Nuremberg 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 to 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 or 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 pro-

duced 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]" — references 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.

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6. In order to seise the Court of the present case, Bosnia and Herzegovina would certainly have had to show that applying the Genocide Convention to the situation in the area of the former Yugoslavia, Yugoslavia could indeed have been responsible for the failure of the fulfilment of the Convention in relation to Bosnia and Herzegovina. But, more particularly, Bosnia and Herzegovina would have to show that Yugoslavia has breached the rights of *Bosnia and Herzegovina as a Contracting Party* (which by definition is a State) that should have been protected under the Convention. This, however, has not been shown in the Application and in fact the Convention is not intended to protect the rights of Bosnia and Herzegovina as a State. Yugoslavia might have been responsible for certain instances of genocide or genocidal acts committed by its public officials or surrogates in the territory of Bosnia and Herzegovina, but this fact alone does not mean that there is a "dispute" between the States relating to the responsibility of a State, as Yugoslavia did not violate the rights bestowed upon Bosnia and Herzegovina by the Convention. I would like to repeat and to emphasize that what should be protected by the Convention is *not* the particular rights of any individual State (Bosnia and Herzegovina in this case) *but* the status of human beings with human rights and the universal interest of the individual in general.

7. What Bosnia and Herzegovina did in its Application was to point to certain *facts* tantamount to genocide or genocidal acts which had allegedly been committed within its territory by the Government of Yugoslavia or by its agents or surrogates, and to submit *claims* alleged to have arisen out of these acts. 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.

Bosnia and Herzegovina certainly might have claimed "reparations for any damages to persons and property as well as to the Bosnian economy and environment caused by the . . . violations of international law" (Application, para. 135 *(r)*) — *not* under the Genocide Convention but *only* as a general issue of international law. (Bosnia and Herzegovina states that the claims to reparation for damages have been caused by the violations of *international law, not* by the Genocide Convention.) If this is the case, whether the present Court has jurisdiction over such claims under the Genocide Convention is quite a different problem and is irrelevant to the present case.

8. After all, Bosnia and Herzegovina does not appear to allege that it has a dispute with Yugoslavia relating to the interpretation or application of the Genocide Convention, although only such a dispute — and not the commission of genocide or genocidal acts which certainly are categorized as a crime under international law — can constitute a basis of the Court's jurisdiction under the Convention.

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9. Looking at the new concept of genocide emerging with the Second World War and the corresponding preparation of the Genocide Convention — a new type of treaty to deal with the rights of individuals as a whole, but not with the rights and obligations in the inter-State relations — I question whether the International Court of Justice is the appropriate forum for the airing of the questions relating to genocide or genocidal acts which Bosnia and Herzegovina has raised in the current proceedings. I am inclined to doubt whether international law, the Court, or the welfare of the unfortunate individuals concerned will actually benefit from the consideration of cases of this nature by the Court.

The establishment of an international penal tribunal as contemplated in the Convention is now, after half a century, about to be put into effect by the United Nations General Assembly thanks to the work of the International Law Commission. In addition, one month before the Application of Bosnia and Herzegovina in this case, it was decided on 22 February 1993 by Security Council resolution 808 (1993), that the International Criminal Tribunal for the Former Yugoslavia would be established "for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991" and that Tribunal established on 25 May 1993 pursuant to Security Council resolution 827 (1993) is presently in operation.

10. I would like to add one thing and that is that the Court should maintain a very strict position in connection with its jurisdiction. The

consensus of the sovereign States in dispute essentially constitutes the basis of that jurisdiction. Were we ever to relax the basic conditions, I would expect to see a flood of cases pouring into this judicial institution, the task of which is mainly the settlement of international disputes. Genocide is precisely the sort of issue that should be settled by any other appropriate organ of the United Nations as suggested in Article VIII of the Convention, or by the international penal tribunal under Article VI. This is, as I repeat, the main idea of the Genocide Convention.

I admit that the extremely vague and uncertain provision of Article IX of the Genocide Convention may leave room for the Court to allow itself to be seised of the present case, but consider that such a conclusion would be based on a misinterpretation of the real spirit of the Genocide Convention. Moreover, note should be taken in parallel of the repeated resolutions taken by the Security Council or the statements made by the President of the Security Council concerning Yugoslavia (which were made prior to the Dayton-Paris Agreement) and the current work of the International Criminal Tribunal for the Former Yugoslavia for the determination of criminal responsibility.

11. Finally, I would like to add that my vote against the decision on the jurisdiction of the Court does not in any way prejudge the position I may take during the merits phase with regard to my legal evaluation concerning the allegations of genocide committed in the former Yugoslavia which are covered by the Application of Bosnia and Herzegovina of 20 March 1993.

(Signed) Shigeru ODA.