

JOINT DECLARATION
OF JUDGES SHI AND VERESHCHETIN

We have voted in favour of paragraphs 1 (*a*), (*c*), 2 and 3 of the *dispositif* because we are persuaded that Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide affords an arguable legal basis for the Court's jurisdiction in this case. However, we regret that we were unable to vote for paragraph 1 (*b*) as we are disquieted by the statement of the Court, in paragraph 32 of the Judgment, that Article IX of the Genocide Convention "does not exclude any form of State responsibility". It is this disquiet that we wish briefly to explain.

The Convention on Genocide is essentially and primarily directed towards the punishment of persons committing genocide or genocidal acts and the prevention of the commission of such crimes by individuals. The *travaux préparatoires* show that it was during the last stage of the elaboration of the Convention that, by a very slim majority of 19 votes to 17 with 9 abstentions, the provision relating to the responsibility of States for genocide or genocidal acts was included in the dispute settlement clause of Article IX, without the concurrent introduction of necessary modifications into other articles of the Convention. As can be seen from the authoritative commentary to the Convention, published immediately after its adoption, "there were many doubts as to the actual meaning" of the reference to the responsibility of States (Nehemiah Robinson, *The Genocide Convention. Its Origin and Interpretation*, 1949, p. 42). As to the creation of a separate civil remedy applicable as between States, the same author observes that "since the Convention does not specifically refer to reparation, the parties to it did not undertake to have accepted the Court's compulsory jurisdiction in this question" (*ibid.*, p. 43).

In substance, the Convention remains an instrument relating to the criminal responsibility of individuals. The Parties undertake to punish persons committing genocide, "whether they are constitutionally responsible rulers, public officials or private individuals", and to enact the necessary legislation to this effect (Arts. IV and V). Persons charged with genocide or genocidal acts are to be tried "by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction . . ." (Art. VI). Such a tribunal was established (after the filing of the Application) specifically for the prosecution of persons responsible for serious violations of humanitarian law committed in the territory of the former Yugoslavia since 1991.

The determination of the international community to bring *individual perpetrators* of genocidal acts to justice, irrespective of their ethnicity or the position they occupy, points to the most appropriate course of action. We share the view expressed by Britain's Chief Prosecutor at Nuremberg, Hartley Shawcross, in a recent article in which he declared that

“There can be no reconciliation unless individual guilt for the appalling crimes of the last few years replaces the pernicious theory of collective guilt on which so much racial hatred hangs.” (*International Herald Tribune*, 23 May 1996, p. 8.)

Therefore, in our view, it might be argued that this Court is perhaps not the proper venue for the adjudication of the complaints which the Applicant has raised in the current proceedings.

While we consider that Article IX of the Genocide Convention, to which both the Applicant and the Respondent are parties, affords a basis for the jurisdiction of the Court to the extent that the subject-matter of the dispute relates to “the interpretation, application or fulfilment” of the Convention, and having, for this reason, voted for this Judgment, we nevertheless find ourselves obliged to express our concern over the above-mentioned substantial elements of this case.

(Signed) SHI Jiyuonq.

(Signed) Vladlen S. VERESHCHETIN.