

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,  
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE RELATIVE À L'APPLICATION  
DE LA CONVENTION POUR LA PRÉVENTION  
ET LA RÉPRESSION DU CRIME DE GÉNOCIDE

(BOSNIE-HERZÉGOVINE c. YUGOSLAVIE)

DEMANDES RECONVENTIONNELLES

**ORDONNANCE DU 17 DÉCEMBRE 1997**

**1997**

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,  
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING APPLICATION OF  
THE CONVENTION ON THE PREVENTION AND  
PUNISHMENT OF THE CRIME OF GENOCIDE

(BOSNIA AND HERZEGOVINA v. YUGOSLAVIA)

COUNTER-CLAIMS

**ORDER OF 17 DECEMBER 1997**

Mode officiel de citation:

*Application de la convention pour la prévention et la répression  
du crime de génocide, demandes reconventionnelles,  
ordonnance du 17 décembre 1997, C.I.J. Recueil 1997, p. 243*

---

Official citation:

*Application of the Convention on the Prevention and Punishment  
of the Crime of Genocide, Counter-claims, Order of 17 December 1997,  
I.C.J. Reports 1997, p. 243*

ISSN 0074-4441  
ISBN 92-1-070758-3

N° de vente: Sales number	<b>693</b>
------------------------------	------------

17 DÉCEMBRE 1997

ORDONNANCE

APPLICATION DE LA CONVENTION POUR LA PRÉVENTION  
ET LA RÉPRESSION DU CRIME DE GÉNOCIDE

(BOSNIE-HERZÉGOVINE c. YUGOSLAVIE)

DEMANDES RECONVENTIONNELLES

---

APPLICATION OF THE CONVENTION ON THE PREVENTION  
AND PUNISHMENT OF THE CRIME OF GENOCIDE

(BOSNIA AND HERZEGOVINA v. YUGOSLAVIA)

COUNTER-CLAIMS

17 DECEMBER 1997

ORDER

## INTERNATIONAL COURT OF JUSTICE

YEAR 1997

17 December 1997

1997  
17 December  
General List  
No. 91CASE CONCERNING APPLICATION OF  
THE CONVENTION ON THE PREVENTION AND  
PUNISHMENT OF THE CRIME OF GENOCIDE

(BOSNIA AND HERZEGOVINA v. YUGOSLAVIA)

## COUNTER-CLAIMS

## ORDER

*Present: President SCHWEBEL; Vice-President WEERAMANTRY; Judges ODA, BEDJAoui, GUILLAUME, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, PARRA-ARANGUREN, KOOIJMANS; Judges ad hoc LAUTERPACHT, KREĆA; Registrar VALENCIA-OSPINA.*

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Article 48 of the Statute of the Court and to Articles 31, 44, 45 and 80 of the Rules of Court,

*Makes the following Order:*

1. Whereas, on 20 March 1993, the Government of the Republic of Bosnia and Herzegovina (hereinafter called "Bosnia and Herzegovina") filed in the Registry of the Court an Application instituting proceedings against the Government of the Federal Republic of Yugoslavia (herein-

after called “Yugoslavia”) in respect of a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter called “the Genocide Convention”), adopted by the General Assembly of the United Nations on 9 December 1948, as well as various matters which Bosnia and Herzegovina claims are connected therewith; whereas, in its Application, Bosnia and Herzegovina invoked Article IX of the Genocide Convention as the basis of the jurisdiction of the Court; and, whereas at the end of its Application, it set out its claims as follows:

“Accordingly, while reserving the right to revise, supplement or amend this Application, and subject to the presentation to the Court of the relevant evidence and legal arguments, Bosnia and Herzegovina requests the Court to adjudge and declare as follows:

- (a) that Yugoslavia (Serbia and Montenegro) has breached, and is continuing to breach, its legal obligations toward the People and State of Bosnia and Herzegovina under Articles I, II (a), II (b), II (c), II (d), III (a), III (b), III (c), III (d), III (e), IV and V of the Genocide Convention;
- (b) that Yugoslavia (Serbia and Montenegro) has violated and is continuing to violate its legal obligations toward the People and State of Bosnia and Herzegovina under the four Geneva Conventions of 1949, their Additional Protocol I of 1977, the customary international laws of war including the Hague Regulations on Land Warfare of 1907, and other fundamental principles of international humanitarian law;
- (c) that Yugoslavia (Serbia and Montenegro) has violated and continues to violate Articles 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26 and 28 of the Universal Declaration of Human Rights with respect to the citizens of Bosnia and Herzegovina;
- (d) that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has killed, murdered, wounded, raped, robbed, tortured, kidnapped, illegally detained, and exterminated the citizens of Bosnia and Herzegovina, and is continuing to do so;
- (e) that in its treatment of the citizens of Bosnia and Herzegovina, Yugoslavia (Serbia and Montenegro) has violated, and is continuing to violate, its solemn obligations under Articles 1 (3), 55 and 56 of the United Nations Charter;
- (f) that Yugoslavia (Serbia and Montenegro) has used and is continuing to use force and the threat of force against Bosnia and Herzegovina in violation of Articles 2 (1), 2 (2), 2 (3), 2 (4), and 33 (1), of the United Nations Charter;

- (g) that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has used and is using force and the threat of force against Bosnia and Herzegovina;
- (h) that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has violated and is violating the sovereignty of Bosnia and Herzegovina by:
  - armed attacks against Bosnia and Herzegovina by air and land;
  - aerial trespass into Bosnian airspace;
  - efforts by direct and indirect means to coerce and intimidate the Government of Bosnia and Herzegovina;
- (i) that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has intervened and is intervening in the internal affairs of Bosnia and Herzegovina;
- (j) that Yugoslavia (Serbia and Montenegro), in recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Bosnia and Herzegovina by means of its agents and surrogates, has violated and is violating its express charter and treaty obligations to Bosnia and Herzegovina and, in particular, its charter and treaty obligations under Article 2 (4) of the United Nations Charter, as well as its obligations under general and customary international law;
- (k) that under the circumstances set forth above, Bosnia and Herzegovina has the sovereign right to defend itself and its people under United Nations Charter Article 51 and customary international law, including by means of immediately obtaining military weapons, equipment, supplies and troops from other States;
- (l) that under the circumstances set forth above, Bosnia and Herzegovina has the sovereign right under United Nations Charter Article 51 and customary international law to request the immediate assistance of any State to come to its defence, including by military means (weapons, equipment, supplies, troops, etc.);
- (m) that Security Council resolution 713 (1991), imposing a weapons embargo upon the former Yugoslavia, must be construed in a manner that shall not impair the inherent right of individual or collective self-defence of Bosnia and Herzegovina under the terms of United Nations Charter Article 51 and the rules of customary international law;

- (n) that all subsequent Security Council resolutions that refer to or reaffirm resolution 713 (1991) must be construed in a manner that shall not impair the inherent right of individual or collective self-defence of Bosnia and Herzegovina under the terms of United Nations Charter Article 51 and the rules of customary international law;
- (o) that Security Council resolution 713 (1991) and all subsequent Security Council resolutions referring thereto or reaffirming thereof must not be construed to impose an arms embargo upon Bosnia and Herzegovina, as required by Articles 24 (1) and 51 of the United Nations Charter and in accordance with the customary doctrine of *ultra vires*;
- (p) that pursuant to the right of collective self-defence recognized by United Nations Charter Article 51, all other States parties to the Charter have the right to come to the immediate defence of Bosnia and Herzegovina — at its request — including by means of immediately providing It with weapons, military equipment and supplies, and armed forces (soldiers, sailors, airpeople, etc.);
- (q) that Yugoslavia (Serbia and Montenegro) and its agents and surrogates are under an obligation to cease and desist immediately from its breaches of the foregoing legal obligations, and is under a particular duty to cease and desist immediately:
  - from its systematic practice of so-called ‘ethnic cleansing’ of the citizens and sovereign territory of Bosnia and Herzegovina;
  - from the murder, summary execution, torture, rape, kidnapping, mayhem, wounding, physical and mental abuse, and detention of the citizens of Bosnia and Herzegovina;
  - from the wanton devastation of villages, towns, districts, cities, and religious institutions in Bosnia and Herzegovina;
  - from the bombardment of civilian population centres in Bosnia and Herzegovina, and especially its capital, Sarajevo;
  - from continuing the siege of any civilian population centres in Bosnia and Herzegovina, and especially its capital, Sarajevo;
  - from the starvation of the civilian population in Bosnia and Herzegovina;
  - from the interruption of, interference with, or harassment of humanitarian relief supplies to the citizens of Bosnia and Herzegovina by the international community;

- from all use of force — whether direct or indirect, overt or covert — against Bosnia and Herzegovina, and from all threats of force against Bosnia and Herzegovina;
  - from all violations of the sovereignty, territorial integrity or political independence of Bosnia and Herzegovina, including all intervention, direct or indirect, in the internal affairs of Bosnia and Herzegovina;
  - from all support of any kind — including the provision of training, arms, ammunition, finances, supplies, assistance, direction or any other form of support — to any nation, group, organization, movement or individual engaged or planning to engage in military or paramilitary actions in or against Bosnia and Herzegovina;
- (r) that Yugoslavia (Serbia and Montenegro) has an obligation to pay Bosnia and Herzegovina, in its own right and as *parens patriae* for its citizens, reparations for damages to persons and property as well as to the Bosnian economy and environment caused by the foregoing violations of international law in a sum to be determined by the Court. Bosnia and Herzegovina reserves the right to introduce to the Court a precise evaluation of the damages caused by Yugoslavia (Serbia and Montenegro)”;

2. Whereas, on 20 March 1993, immediately after the filing of its Application, Bosnia and Herzegovina submitted a request for the indication of provisional measures under Article 41 of the Statute; whereas, on 1 April 1993, Yugoslavia submitted written observations on Bosnia and Herzegovina’s request for provisional measures, in which, in turn, it recommended the Court to order the application of provisional measures to Bosnia and Herzegovina; and whereas, by an Order dated 8 April 1993, the Court indicated certain provisional measures with a view to the protection of rights under the Genocide Convention; and whereas, on 27 July 1993, Bosnia and Herzegovina submitted a new request for the indication of provisional measures; whereas, on 10 August 1993, Yugoslavia also submitted a request for the indication of provisional measures; and whereas, the Court, by an Order dated 13 September 1993, reaffirmed the measures indicated in its Order of 8 April 1993 and declared that those measures should be immediately and effectively implemented;

3. Whereas, on 15 April 1994, within the time-limit laid down, as extended by Order of the Vice-President of the Court on 7 October 1993, Bosnia and Herzegovina filed its Memorial at the end of which it presented its submissions as follows:

“On the basis of the evidence and legal arguments presented in this Memorial, the Republic of Bosnia and Herzegovina,

Requests the International Court of Justice to adjudge and declare,

1. That the Federal Republic of Yugoslavia (Serbia and Montenegro), directly, or through the use of its surrogates, has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide, by destroying in part, and attempting to destroy in whole, national, ethnical or religious groups within the, but not limited to the, territory of the Republic of Bosnia and Herzegovina, including in particular the Muslim population, by

- killing members of the group;
- causing deliberate bodily or mental harm to members of the group;
- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- imposing measures intended to prevent births within the group;

2. That the Federal Republic of Yugoslavia (Serbia and Montenegro) has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by conspiring to commit genocide, by complicity in genocide, by attempting to commit genocide and by incitement to commit genocide;

3. That the Federal Republic of Yugoslavia (Serbia and Montenegro) has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by aiding and abetting individuals and groups engaged in acts of genocide;

4. That the Federal Republic of Yugoslavia (Serbia and Montenegro) has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by virtue of having failed to prevent and to punish acts of genocide;

5. That the Federal Republic of Yugoslavia (Serbia and Montenegro) must immediately cease the above conduct and take immediate and effective steps to ensure full compliance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

6. That the Federal Republic of Yugoslavia (Serbia and Montenegro) must wipe out the consequences of its international wrongful acts and must restore the situation existing before the violations of the Convention on the Prevention and Punishment of the Crime of Genocide were committed;

7. That, as a result of the international responsibility incurred for the above violations of the Convention on the Prevention and Punishment of the Crime of Genocide, the Federal Republic of Yugoslavia (Serbia and Montenegro) is required to pay, and the Republic

of Bosnia and Herzegovina is entitled to receive, in its own right and as *parens patriae* for its citizens, full compensation for the damages and losses caused, in the amount to be determined by the Court in a subsequent phase of the proceedings in this case.

The Republic of Bosnia and Herzegovina reserves its right to supplement or amend its submissions in the light of further pleadings.

The Republic of Bosnia and Herzegovina also respectfully draws the attention of the Court to the fact that it has not reiterated, at this point, several of the requests it made in its Application, on the formal assumption that the Federal Republic of Yugoslavia (Serbia and Montenegro) has accepted the jurisdiction of this Court under the terms of the *Convention on the Prevention and Punishment of the Crime of Genocide*. If the Respondent were to reconsider its acceptance of the jurisdiction of the Court under the terms of that Convention — which it is, in any event, not entitled to do — the Government of Bosnia and Herzegovina reserves its right to invoke also all or some of the other existing titles of jurisdiction and to revive all or some of its previous submissions and requests”;

4. Whereas, on 26 June 1995, within the time-limit laid down for the filing of the Counter-Memorial, as extended by Order of the President of the Court dated 21 March 1995, Yugoslavia, referring to Article 79, paragraph 1, of the Rules of Court, raised preliminary objections concerning, respectively, the admissibility of the Application and the jurisdiction of the Court to hear the case; and whereas, by its Judgment dated 11 July 1996, the Court dismissed these preliminary objections and found, on the one hand, that on the basis of Article IX of the *Genocide Convention* it had jurisdiction to adjudicate upon the dispute and, on the other hand, that the Application was admissible;

5. Whereas, on 22 July 1997, within the new time-limit laid down by Order of the President of the Court dated 23 July 1996, Yugoslavia filed its Counter-Memorial; whereas in the introduction to that Counter-Memorial, Yugoslavia indicated that it “included counter-claims”; and, whereas at the end of the Counter-Memorial, it presented its submissions as follows:

“The Federal Republic of Yugoslavia requests the International Court of Justice to adjudge and declare:

1. In view of the fact that no obligations established by the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide* have been violated with regard to Muslims and Croats

— since the acts alleged by the Applicant have not been committed at all, or not to the extent and in the way alleged by the Applicant, or

- if some have been committed, there was absolutely no intention of committing genocide, and/or
- they have not been directed specifically against the members of one ethnic or religious group, i.e., they have not been committed against individuals just because they belong to some ethnic or religious group,

consequently, they cannot be qualified as acts of genocide or other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and/or

2. In view of the fact that the acts alleged by the Applicant in its submissions cannot be attributed to the Federal Republic of Yugoslavia,

- since they have not been committed by the organs of the Federal Republic of Yugoslavia,
- since they have not been committed on the territory of the Federal Republic of Yugoslavia,
- since they have not been committed by the order or under control of the organs of the Federal Republic of Yugoslavia,
- since there is no other grounds based on the rules of international law to consider them as acts of the Federal Republic of Yugoslavia,

therefore the Court rejects all claims of the Applicant, and

3. Bosnia and Herzegovina is responsible for the acts of genocide committed against the Serbs in *Bosnia and Herzegovina* and for other violations of the obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,

- because it has incited acts of genocide by the ‘Islamic Declaration’, and in particular by the position contained in it that ‘there can be no peace or coexistence between “Islamic faith” and “non-Islamic” social and political institutions’,
- because it has incited acts of genocide by the *Novi Vox*, paper of the Muslim youth, and in particular by the verses of a ‘Patriotic Song’ which read as follows:
  - ‘Dear mother, I’m going to plant willows,  
We’ll hang Serbs from them.  
Dear mother, I’m going to sharpen knives,  
We’ll soon fill pits again.’
- because it has incited acts of genocide by the paper *Zmaj od Bosne*, and in particular by the sentence in an article published in it that ‘Each Muslim must name a Serb and take oath to kill him’;

- because public calls for the execution of Serbs were broadcast on radio ‘Hajat’ and thereby acts of genocide were incited;
- because the armed forces of Bosnia and Herzegovina, as well as other organs of Bosnia and Herzegovina have committed acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, against the Serbs in Bosnia and Herzegovina, which have been stated in Chapter Seven of the Counter-Memorial;
- because Bosnia and Herzegovina has not prevented the acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, against the Serbs on its territory, which have been stated in Chapter Seven of the Counter-Memorial.

4. Bosnia and Herzegovina has the obligation to punish the persons held responsible for the acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

5. Bosnia and Herzegovina is bound to take necessary measures so that the said acts would not be repeated in the future.

6. Bosnia and Herzegovina is bound to eliminate all consequences of the violation of the obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and provide adequate compensation”;

\* \* \*

6. Whereas, by a letter dated 28 July 1997, the Deputy-Agent of Bosnia and Herzegovina informed the Registrar that “the Applicant [was] of the opinion that the Counter-Claims submitted by the Respondent . . . [did] not meet the criterion of Article 80, paragraph 1, of the Rules of Court and should therefore not be joined to the original proceedings”; and the Deputy-Agent specified that, when the President of the Court met the Agents of the Parties under Article 31 of the Rules of Court, Bosnia and Herzegovina would ask for “an early date to hear the Parties according to Article 80, paragraph 3, of the Rules of Court”;

7. Whereas, on 22 September 1997, the President of the Court held a meeting with the Agents of the Parties in order to ascertain their views as to the further proceedings in the case; whereas the two Agents accepted that their respective Governments submit written observations on the question of the admissibility of the Yugoslav counter-claims; and whereas they contemplated that their Governments then be heard orally on the question;

8. Whereas, by a letter dated 26 September 1997, on the instructions of the Court, the Registrar invited the Government of Bosnia and Herze-

govina to specify in writing, not later than 10 October 1997, the legal basis on which it maintained that the counter-claims made by the Respondent did not meet the criterion laid down in Article 80, paragraph 1, of the Rules of Court; and whereas, in that letter, the Registrar specified that the Yugoslav Government would in turn be invited to submit its views on the question within two weeks of Bosnia and Herzegovina filing its observations; and whereas the Registrar sent a copy of that letter to Yugoslavia the same day;

9. Whereas, by a letter from its Deputy Agent dated 9 October 1997 and received in the Registry on 10 October 1997, Bosnia and Herzegovina submitted its observations on the Respondent's counter-claims to the Court; and whereas, by a letter dated 10 October 1997, the Registrar communicated a copy of those observations to the Yugoslav Government advising it that it might make known its own observations on the question within a time-limit expiring on 24 October 1997; and whereas on the same day the Registrar informed the Government of Bosnia and Herzegovina of this;

10. Whereas, in its written observations, Bosnia and Herzegovina maintains that "the alleged 'counter-claim' presented by Yugoslavia is not in accordance with the provisions of Article 80 of the Rules of Court"; and whereas it specifies that, although the counter-claim was presented in the Counter-Memorial and comes within the jurisdiction of the Court, conversely, it is not "directly connected . . . with the subject-matter of the initial proceedings";

11. Whereas, in order to establish the absence of such a connection in this case, Bosnia and Herzegovina invokes first the structure and content of Yugoslavia's Counter-Memorial; whereas it argues that the Counter-Memorial is divided into two completely autonomous parts, one in which Yugoslavia "attempts to reply to the accusations made in the Memorial of Bosnia and Herzegovina" and the other in which "Yugoslavia claims that Bosnia and Herzegovina itself is responsible for violations of the Genocide Convention"; whereas it argues that "the facts put before the Court by Yugoslavia, in the form of its 'counter-claim', are totally different from those on which the initial claim of Bosnia and Herzegovina is based" and whereas "the examination of each of the two sets of facts would be of no help in the judicial analysis of the other set and could not affect its outcome in any way whatsoever"; and whereas it asserts that, since Yugoslavia does not ask the Court, in its submissions in its Counter-Memorial, to find that there is any "kind of relationship, a legally significant one" to be established between the two claims, it recognizes in reality that "the judicial outcome of the one cannot determine or influence the outcome of the other in any manner whatsoever";

12. Whereas Bosnia and Herzegovina observes that, moreover, given the specific nature of the obligations embodied in the Genocide Convention, Yugoslavia could not have adopted any other position; whereas it

points to the *erga omnes* and non-reciprocal nature of those obligations; and whereas it infers from this that, within the system of the Convention, “no place remains for the logic of reciprocity”, so that

“it cannot be envisaged that the judicial finding of a violation of the Convention committed by a State could in the event be influenced by the fact that a second violation — of which the State in question is allegedly the victim — had been perpetrated”;

13. Whereas, for the purposes of confirming that its contentions are well founded, Bosnia and Herzegovina refers to scholarly opinion and infers from it that the counter-claim must, on the one hand, aim “to ‘counter’ the principal claim, i.e., to oppose it in order to block it or to reduce its effects” and, on the other hand, claim “something more”, in particular “a judgment against the applicant in the principal proceedings”; and whereas it submits that this is not the case as regards the Yugoslav “counter-claim” since, even if the allegation set out therein against Bosnia and Herzegovina were founded, “this could not in any way result in the total or partial dismissal (or ‘neutralization’) of Bosnia and Herzegovina’s original claim, nor — of course — in ‘something more’”;

14. Whereas Bosnia and Herzegovina refers also to the jurisprudence of the Court and of its predecessor; whereas it indicates that “a study of what happens in practice reveals no case of a counter-claim which did not have the objective of countering the principal claim, either to make it fail, or to reduce its scope and effects” and it submits that

“Yugoslavia’s so-called ‘counter-claim’ is not really one at all: in submitting its counter-claim the other Party does not counter the initial claim, but formulates a second, autonomous dispute relating to other facts, the settlement of which could in no way influence the solution of the first dispute brought before the Court by Bosnia and Herzegovina”;

15. Whereas, Bosnia and Herzegovina also maintains that when, as is the case here, a “counter-claim” raises a question which is independent of the initial claim, any joinder of these claims must be avoided on the grounds that this could have detrimental effects, on the one hand, on equality of the parties — since the Applicant could only respond once in writing, in its Reply, to the counter-claim — and, on the other hand, on the rights and interests of third States — since those third States would not be informed of the counter-claim;

16. Whereas at the end of its written observations Bosnia and Herzegovina argues that “the ‘counter-claim’ submitted by Yugoslavia in its Counter-Memorial is therefore not admissible, since any direct connection with the subject-matter of Bosnia and Herzegovina’s original claim

is totally lacking” whereas, it “requests the Court to decide — having heard the Parties as provided for in Article 80, paragraph 3, of the Rules of Court — that the ‘counter-claim’ in question should not be joined to the principal claim”; and whereas it “recognizes that Yugoslavia, should it so desire, may always submit to the Court an application instituting proceedings through the normal channels”;

17. Whereas, by a communication from its Agent dated 23 October 1997 and received in the Registry on 24 October 1997, Yugoslavia submitted to the Court its observations on the admissibility of the counter-claims set out in its Counter-Memorial, taking account of the observations submitted by Bosnia and Herzegovina; and whereas, by a letter dated 24 October 1997, the Registrar sent a copy of the observations of the Yugoslav Government to the Government of Bosnia and Herzegovina, informing it that, on the one hand, the Court would decide the remainder of the procedure on the basis of the documents presently before it and, on the other hand, that the Agents of the Parties would be advised of that decision in due course; and whereas, on the same day, the Registrar transmitted the same information to the Yugoslav Government;

18. Whereas, in its written observations, Yugoslavia points out that the original claim and the counter-claim are based on the same legal ground, that is to say the Genocide Convention and the general rules of State responsibility; whereas it submits that:

“The disputed facts of the claim and counter-claim are the facts of the same tragic conflict, i.e., civil war in Bosnia and Herzegovina, which happened in a single territorial and temporal setting, based on the same historical background and within the framework of the same political development”;

and from this it infers “all relevant facts which form the basis of claim and counter-claim are interrelated in such a way as to make a factual and legal connection relevant to the issue”;

19. Whereas Yugoslavia maintains that “there is a direct connection between Part Two of the Counter-Memorial, i.e., the counter-claim, and Part One of the Counter-Memorial, the defence of the Respondent”; whereas the counter-claim and the subject-matter of the claim “are directly connected”; whereas

“the facts on which the counter-claim is based and which are contained in Part Two . . . of the Counter-Memorial are of crucial importance to answer the question of attribution to the Respondents of acts alleged by the Applicant”;

and whereas the facts on which the counter-claim is based “are also relevant for qualification of the acts alleged by the Applicant as crimes of genocide”;

20. Whereas, in its written observations, Yugoslavia, refers, *inter alia*, to

“some identical facts . . . presented as a basis for denying the allegation of the Applicant which are, according to its view relevant for attribution of alleged acts to the Respondent and as a basis for the counter-claim”;

and whereas it explains in particular that “acts of direct and public incitement to commit genocide against the Serbs” for which it asks the Court to establish the responsibility of Bosnia and Herzegovina, operate also as a defence against the accusation made in the principal claim, in so far as such acts “strongly influenced the attitude of the Serb people in Bosnia and Herzegovina” and “are very relevant for deciding on whether the Serb people acted under the orders of the Yugoslav authorities . . . or spontaneously to protect itself”;

21. Whereas Yugoslavia moreover states that it “agrees with the Applicant that a breach of the Genocide Convention cannot serve as an excuse for another breach of the same Convention”, but “the two Parties are in dispute over existence of a breach of the Genocide Convention, i.e., genocide against the Muslim and non-Serb population”; whereas it notes that “for different reasons, the Respondent denies the existence of crimes of genocide against the Muslim and non-Serb population” and specifies that “one of the very relevant reasons is the absence of intent to commit genocide”; it maintains that

“the facts presented by Part Two . . . of the Counter-Memorial, which constitute the basis for the counter-claim, i.e., crimes of genocide committed against the Serb people in Bosnia and Herzegovina are part and parcel of the circumstances of the situation”

and are relevant “for identifying the motives and intentions of individuals who committed crimes vis-à-vis Muslims”; and whereas it submits that these facts, for which it asks the Court to establish the responsibility of Bosnia and Herzegovina, “served for proper qualification of the acts alleged by the Applicant”;

22. Whereas Yugoslavia alleges moreover that the Applicant, when it

“referred to *positions doctrinales* and *la jurisprudence internationale* regarding the direct connection between the counter-claim and subject-matter of the claim . . . failed to reach the end of development of the construction of Article 80, paragraph 1, of the Rules of Court”;

whereas it submits that “careful study of the practice of the Court reveals an important development of understanding of the said paragraph”, the Court having “departed from this [original] position” according to which “a counter-claim is directly connected with the subject-matter of the

claim of the other party when it serves for a rejection of the claim and for obtaining a judgment on the responsibility of the other party”; and whereas it notes that academic writings have after all emphasized “the lack of rigidity” which characterizes the treatment of counter-claims;

23. Whereas Yugoslavia also observes that “it seems that the Applicant is of the opinion that a counter-claim has to be limited exclusively to facts presented in [the main] claim”; whereas in order to establish that “this opinion is not based on the law”, it invokes Article 49, paragraph 2, of the Rules of Court according to which “[the] Counter-Memorial shall contain . . . any additional facts, if necessary”; whereas it infers from this that “if the Respondent is entitled to submit new facts by a Counter-Memorial, it can certainly do it by a counter-claim”; and whereas it notes that in the present case, the additional facts invoked as a basis for the counter-claim are, in any event, “relevant for rejection of [the] claim”;

24. Whereas at the end of its written observations Yugoslavia submits that “the counter-claim is directly connected with the subject-matter of the claim and the counter-claim meets the conditions of Article 80, paragraphs 1 and 2, of the Rules of Court”; and whereas it accordingly requests the Court “to reject all requests of Bosnia and Herzegovina submitted by its letter of 9 October 1997”;

25. Whereas, having received full and detailed written observations from each of the Parties, the Court is sufficiently well informed of the positions they hold with regard to the admissibility of the claims presented as counter-claims by Yugoslavia in its Counter-Memorial; and whereas, accordingly, it does not appear necessary to hear the Parties otherwise on the subject;

\* \* \*

26. Whereas it is now necessary to consider whether the Yugoslav claims in question constitute “counter-claims” within the meaning of Article 80 of the Rules of Court and, if so, whether they fulfil the conditions set out in that provision;

27. Whereas it is established that a counter-claim has a dual character in relation to the claim of the other party; whereas a counter-claim is independent of the principal claim in so far as it constitutes a separate “claim”, that is to say an autonomous legal act the object of which is to submit a new claim to the Court, and, whereas at the same time, it is linked to the principal claim, in so far as, formulated as a “counter” claim, it reacts to it; whereas the thrust of a counter-claim is thus to widen the original subject-matter of the dispute by pursuing objectives other than the mere dismissal of the claim of the Applicant in the main proceedings — for example, that a finding be made against the Applicant; and, whereas in this respect, the counter-claim is distinguishable from a defence on the merits;

28. Whereas, in Article 80 of its Rules, the Court did not confer a different meaning on the expression “counter-claim”; whereas the inclusion of Article 80 in Section D (“Incidental Proceedings”) of Part III (“Proceedings in Contentious Cases”) of the Rules of Court, and the provisions set out in that Article show that it does not apply to mere defences on the merits which the Court must hear in the normal exercise of its functions to decide the Applicant’s claims; and whereas the need to differentiate between counter-claims and defences in the scheme of the Rules of Court is moreover sufficiently clear from the jurisprudence of the Court:

“Whereas, moreover, if the Iranian Government considers the alleged activities of the United States in Iran legally to have a close connection with the subject-matter of the United States Application, it remains open to that Government under the Court’s Statute and Rules to present its own arguments to the Court regarding those activities either by way of defence in a Counter-Memorial or by way of a counter-claim filed under Article 80 of the Rules of Court . . .” (*United States Diplomatic and Consular Staff in Tehran, Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979, p. 15, para. 24*);

29. Whereas in the present case, although Submissions 1 and 2 in the Counter-Memorial of Yugoslavia relate exclusively to the dismissal of the claims of Bosnia and Herzegovina, Submissions 3 to 6, on the contrary, set out separate claims seeking relief beyond the dismissal of the claims of Bosnia and Herzegovina; and whereas such claims constitute “counter-claims” within the meaning of Article 80 of the Rules of Court;

30. Whereas, however, a claim should normally be made before the Court by means of an application instituting proceedings; whereas, although it is permitted for certain types of claim to be set out as incidental proceedings, that is to say, within the context of a case which is already in progress, this is merely in order to ensure better administration of justice, given the specific nature of the claims in question; whereas, as far as counter-claims are concerned, the idea is essentially to achieve a procedural economy whilst enabling the Court to have an overview of the respective claims of the parties and to decide them more consistently; and whereas the admissibility of the counter-claims must necessarily relate to the aims thus pursued and be subject to conditions designed to prevent abuse;

31. Whereas the Respondent cannot use a counter-claim as a means of referring to an international court claims which exceed the limits of its jurisdiction as recognized by the parties; and whereas the Respondent cannot use that means either to impose on the Applicant any claim it chooses, at the risk of infringing the Applicant’s rights and of compromising the proper administration of justice; and whereas it is for that reason that paragraph 1 of Article 80 of the Rules of Court requires that the counter-claim “comes within the jurisdiction of the Court” and “that

it is directly connected with the subject-matter of the claim of the other party”;

32. Whereas in the present case it is not disputed that the Yugoslav counter-claims were “made in the Counter-Memorial of the party presenting it, and . . . appear as part of the submissions of that party”, in accordance with Article 80, paragraph 2, of the Rules of Court; and whereas, although Bosnia and Herzegovina recognizes that these claims meet the jurisdictional requirement set out in paragraph 1 of that Article, it denies that they meet the requirement of being directly connected with the subject-matter of the claim, also set out in that Article;

33. Whereas the Rules of Court do not define what is meant by “directly connected”; whereas it is for the Court, in its sole discretion, to assess whether the counter-claim is sufficiently connected to the principal claim, taking account of the particular aspects of each case; and whereas, as a general rule, the degree of connection between the claims must be assessed both in fact and in law;

34. Whereas, in the present case, it emerges from the Parties’ submissions that their respective claims rest on facts of the same nature; whereas they form part of the same factual complex since all those facts are alleged to have occurred on the territory of Bosnia and Herzegovina and during the same period; and whereas Yugoslavia states, moreover, that it intends to rely on certain identical facts in order both to refute the allegations of Bosnia and Herzegovina and to obtain judgment against that State;

35. Whereas Bosnia and Herzegovina was right to point to the *erga omnes* character of the obligations flowing from the Genocide Convention (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996*, pp. 615-616, para. 31), and the Parties rightly recognized that in no case could one breach of the Convention serve as an excuse for another; and whereas, however, the argument drawn from the absence of reciprocity in the scheme of the Convention is not determinative as regards the assessment of whether there is a legal connection between the principal claim and the counter-claim, in so far the two Parties pursue, with their respective claims, the same legal aim, namely the establishment of legal responsibility for violations of the Genocide Convention;

36. Whereas in its Orders of 8 April and 13 September 1993, the Court considered the requests for the indication of provisional measures made by each of the Parties; and whereas, in its Order of 13 September 1993, it stated, *inter alia*, as follows:

“45. Whereas the measure requested by Yugoslavia would be appropriate to protect rights under the Genocide Convention, which are accordingly within the *prima facie* jurisdiction of the Court; whereas, on the evidence and information available to it, the Court

must also recognize the existence of some risk to the persons whose protection Yugoslavia seeks; whereas however the question for the Court is whether the circumstances are such as to 'require' the indication of provisional measures, in accordance with Article 41 of the Statute;

46. Whereas by paragraph 52 A of its Order of 8 April 1993 the Court, having indicated that Yugoslavia should take all measures within its power to prevent genocide, indicated what 'in particular' were the appropriate measures to be taken by Yugoslavia in the circumstances of the case, where the risk was of genocide not on Yugoslav territory but in Bosnia-Herzegovina; whereas furthermore, as the Court noted in paragraph 45 of its Order of 8 April 1993, both Yugoslavia and Bosnia-Herzegovina are under a clear obligation to do all in their power to prevent the commission of any acts of genocide, and by paragraph 52 B of that Order the Court indicated that both Bosnia-Herzegovina and Yugoslavia should not take any action and should ensure that no action is taken which might aggravate or extend the existing dispute over the prevention or punishment of the crime of genocide, or render it more difficult of solution; whereas the Court does not find that the circumstances, as they now present themselves to the Court, are such as to require a more specific indication of measures addressed to Bosnia-Herzegovina so as to recall to it both its undoubted obligations under the Genocide Convention, and the need to refrain from action of the kind contemplated by paragraph 52 B of the Court's Order of 8 April 1993" (*I.C.J. Reports 1993*, pp. 346-347);

37. Whereas in the light of the foregoing, the Court considers that the counter-claims submitted by Yugoslavia are directly connected with the subject-matter of Bosnia and Herzegovina's claims; and whereas, as counter-claims, they are therefore admissible and form part of the present proceedings;

\* \*

38. Whereas a decision given on the admissibility of a counter-claim taking account of the requirements of Article 80 of the Rules of Court in no way prejudices any question with which the Court would have to deal during the remainder of the proceedings;

39. Whereas in order to protect the rights which third States entitled to appear before the Court derive from the Statute, the Court instructs the Registrar to transmit a copy of this Order to them;

40. Whereas when, in accordance with the provisions of its Rules, the Court decides, in the interests of the proper administration of justice, to

rule on the respective claims of the Parties in a single set of proceedings, it must not, for all that, lose sight of the interest of the Applicant to have its claims decided within a reasonable time-period;

41. Whereas, during the meeting which the President of the Court held on 22 September 1997 with the Agents of the Parties (see paragraph 7 above), the Agent of Bosnia and Herzegovina indicated that his Government requested that the case be decided as soon as possible, was opposed to any further exchange of written pleadings on the merits and asked the Court immediately to set a date for the opening of the oral proceedings; whereas the Agent of Yugoslavia, conversely, made it known that, if the proceedings were to go forward, his Government wished to have a second round of written pleadings on the merits; whereas the two Agents were invited to express their views as to suitable time-limits to be fixed for the filing of further pleadings in the event that the Court decided that their submission was necessary; and whereas the Agent of Bosnia and Herzegovina specified, *inter alia*, that his Government would be in a position to present a Reply six months from the date of filing of the Counter-Memorial of Yugoslavia — that is, no later than 23 January 1998 — whether or not the Reply had to respond to the counter-claims made by Yugoslavia in its Counter-Memorial;

42. Whereas, taking into account the conclusions it has reached above regarding the admissibility of the Yugoslav counter-claims, the Court considers that it is necessary for Bosnia and Herzegovina to file a Reply and for Yugoslavia to file a Rejoinder relating to the claims of both Parties; and whereas it is necessary moreover, in order to ensure strict equality between the Parties, to reserve the right of Bosnia and Herzegovina to present its views in writing a second time on the Yugoslav counter-claims, in an additional pleading which may be the subject of a subsequent Order;

\* \* \*

43. For these reasons,

THE COURT,

(A) By thirteen votes to one,

*Finds* that the counter-claims submitted by Yugoslavia in its Counter-Memorial are admissible as such and form part of the current proceedings;

IN FAVOUR: *President* Schwebel; *Judges* Oda, Bedjaoui, Guillaume, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans; *Judges ad hoc* Lauterpacht, Kreča;

AGAINST: *Vice-President* Weeramantry;

(B) By thirteen votes to one,

*Directs* Bosnia and Herzegovina to submit a Reply and Yugoslavia to submit a Rejoinder relating to the claims of both Parties and *fixes* the following dates, accepted by the Parties, as time-limits for the filing of these pleadings:

For the Reply of Bosnia and Herzegovina, 23 January 1998;

For the Rejoinder of Yugoslavia, 23 July 1998;

IN FAVOUR: *President* Schwebel; *Judges* Oda, Bedjaoui, Guillaume, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans; *Judges ad hoc* Lauterpacht, Kreća;

AGAINST: *Vice-President* Weeramantry;

*Reserves* the subsequent procedure for further decision.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this seventeenth day of December, one thousand nine hundred and ninety-seven, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Bosnia and Herzegovina and the Government of the Federal Republic of Yugoslavia, respectively.

(*Signed*) Stephen M. SCHWEBEL,  
President.

(*Signed*) Eduardo VALENCIA-OSPINA,  
Registrar.

Judge *ad hoc* KREĆA appends a declaration to the Order of the Court.

Judge KOROMA and Judge *ad hoc* LAUTERPACHT append separate opinions to the Order of the Court.

Vice-President WEERAMANTRY appends a dissenting opinion to the Order of the Court.

(*Initialled*) S.M.S.

(*Initialled*) E.V.O.

## DECLARATION OF JUDGE KREĆA

Although I voted in favour of the operative parts of the Court's Order, I shall also make some observations on and amplifications to some aspects of the concept of a counter-claim and its application to this particular case.

1. The Order essentially qualifies a counter-claim as "independent", "an autonomous legal act" (para. 27) though, it seems to me, this is with a certain amount of caution (*reservatio mentalis*). That is to say, the Court states that the "counter-claim is independent of the principal claim in so far as it constitutes a separate 'claim'" (*ibid.*). The fact that the Applicant's claim is being qualified as the "principal" claim determines the counter-claim, by the logic of *argumentum a contrario*, as a non-principal claim, a lesser claim. It follows that the counter-claim is a response or, to put it another way, a secondary claim. Such qualification is exact in a very limited sense only.

It is created by the fact that the Respondent submits the claim against the Applicant in the litigation which had already been instituted against the Respondent. Therefore, the counter-claim (if we view the litigation exclusively as a series of acts which, according to a certain logic, follow each other, at certain time intervals), looks like a non-autonomous act, a secondary claim. However, if we consider the litigation in the only correct way, as a tripartite relationship in which all participants in the proceedings — the Applicant, the Respondent and the Court — have certain rights and obligations (Bulgarus: *Processus est actus trium personarum — actoris, rei judicis*), then we inevitably come to the conclusion that the counter-claim represents an autonomous claim made by the Respondent which, in the circumstances of the procedure in the case, is strongly connected to the claim. This link is the basis for the integration of two proceedings into one single proceeding.

The fact that the counter-claim is submitted after the establishment of the basic jurisdictional link does not mean, *ipso facto*, that the "counter-claim" is merely the reaction to the "claim" which established that link. The proof of that assertion lies in the very fact that the "counter-claim" changes the positions in the litigation of the parties to the dispute — the Respondent becomes the Applicant and vice versa. The very nature of the counter-claim — a claim which may be joined to the original claim or which amounts to the presentation of a fresh claim — implies the very opposite. In fact, as a rule a counter-claim has not a defensive but an offensive character except in cases of claims for compensation or preliminary claims.

Therefore, it seems to me that the autonomous nature of the counter-claim (its other characteristic being self-sufficiency) suggests that in relation to the counter-claim, the Applicant's claim is not the "principal" claim, but simply the initial or original claim.

2. It seems to me that the Court has been trying to pinpoint the relevant issues of a conceptual nature as a result of the incompleteness and lack of precision of Article 80 of the Rules of Court.

2.1. Article 80 of the Rules of Court tacitly proceeds from the assumption that a counter-claim is a general legal notion. One cannot explain in any other way the fact that neither the Statute of the International Court of Justice nor the Rules of Court define counter-claims; moreover, the text of the Statute does not contain the word "counter-claim" at all. Examining the notion of counter-claim in the light of Article 40 of the Rules of Court of 1922, Anzilotti says:

"There is a notion of counter-claims which is, essentially, common to all legal systems, even if the rules used to implement that notion differ in each of those legal systems: from a whole set of rules which are distinct as to their form, but have a common content, it is quite possible to distil that common content into a concept which may then be implemented in the form of rules particular to another legislative system." (D. Anzilotti, "La demande reconventionnelle en procédure internationale", *Journal du droit international*, Vol. 57, 1930, p. 867.) [Translation by the Registry.]

This concise wording expresses the substance of the *philosophie juridique synthétique* according to which legal notions have two aspects: logical and extensive. The logical aspect or the generic notion means a general notion which is familiar to all branches of law. On the other hand, the extensive side or the extensive notion is reduced to a set of legal prescriptions (*praescriptiones*) which makes the general notion specific within the limits of a given legal order (see T. Givanovitch, *Système de la philosophie juridique synthétique*, 1927, 1970).

The logical and the extensive aspects of the legal notion are in a state of dynamic unity — by adopting specific rules (*praescriptiones*) one enriches and crystallizes the logical, generic part of a legal notion which serves as a model and guiding rule for specific rules in appropriate branches of the law.

However, it seems to me that the concretization of the general notion in Article 80 of the Rules of Court has not been correctly carried out.

Article 80 of the Rules of Court deals with the abstract term "counter-claim". The interpretation of the wording in Article 80 allows for the conclusion that every claim made by the Respondent is a counter-claim. For instance, paragraph 1 of Article 80, stipulates:

“A counter-claim may be presented provided that it is directly connected with the subject-matter of the claim of the other party and that it comes within the jurisdiction of the Court.” (Emphasis added.)

It follows that there are two types of counter-claim: counter-claims which “may be presented” and counter-claims which “may not be presented”. In other words, every claim made by the Respondent may represent a counter-claim, with the only difference being that while a counter-claim which fulfils the conditions set out in that provision “may be presented”, those which do not fulfil them “may not be presented”. As an abstract term, the expression “counter-claim” used in Article 80 unites procedural and material meanings of the counter-claim. Contrary to Article 80 of the Rules of Court, the proposition put forward by four members of the Court (Judges Negulesco, Wang, Schücking and Fromageot) at the private meeting held by the Court on 29 May 1934 elegantly removed that dichotomy. That proposition, as quoted by the then President from a document circulated by Judges Negulesco, Wang, Schücking and Fromageot (see *P.C.I.J., Series D, No. 2, 4th Add.*, p. 263) reads:

“No claim may be included in the Counter-Case as a counter-claim unless it is directly connected with the subject of the application filed by the other party, and unless it comes within the jurisdiction of the Court.”

Certain elements of that dichotomy are not alien to this Order either. Paragraph 26 of the Order reads

“it is now necessary to consider whether the Yugoslav claims . . . constitute ‘counter-claims’ within the meaning of Article 80 of the Rules of Court and, if so, whether they fulfil the conditions set out in that provision”.

Does that mean that the “Yugoslav claims in question constitute ‘counter-claims’” *before* it has been established whether “they fulfil the conditions set out in that provision”?

2.2. In this connection, two relevant questions emerge:

- (i) If the Respondent’s claim fulfils the conditions stipulated in paragraph 1 of Article 80 of the Rules of Court, is it *ipso facto* a counter-claim within the meaning of Article 80 of the Rules of Court, i.e., is it automatically joined to the original claim or does the Court deliberate upon its joinder?

Article 80 of the Rules of Court has been built upon the notion of permissive joinder. Such a conclusion indisputably follows from the wording of paragraph 1 of the Article which stipulates that “[a] counter-claim may be presented” provided that the counter-claim fulfils two conditions:

(a) that it is directly connected with the subject-matter of the claim of the other party, and (b) that it comes within the jurisdiction of the Court. Therefore, the Respondent is entitled to submit a counter-claim, the submission of which is subject to the aforementioned conditions. It may be concluded from this that a claim made by the Respondent which fulfils the conditions stipulated in paragraph 1 of Article 80 of the Rules of Court is *ipso facto* a counter-claim within the meaning of Article 80, and that it is automatically joined to the original proceedings. This is also suggested by the wording of paragraph 2 of Article 80 which provides that “[a] counter-claim *shall be made* in the Counter-Memorial . . . and *shall appear as part of the submissions of that party*” (emphasis added).

Is that conclusion also valid in cases covered by paragraph 3 of Article 80 of the Rules of Court?

From the interpretation of the wording, it appears that, in the event of doubt as to the connection between the questions presented by way of counter-claim and the subject-matter of the claim of the other party, joinder of the counter-claim to the original proceedings is not automatically carried out, but is to be decided upon by the Court. The Court would therefore not be obliged to decide to join the claim of the Respondent to the original proceedings even if the conditions stipulated in paragraph 1 of Article 80 of Rules of Court were fulfilled, i.e., if the “direct connection” were not in doubt.

That option is hardly acceptable. Essentially, there is a possibility that some undetermined and, from the procedural point of view, unarticulated notion of doubt may alter the legal nature of the counter-claim incorporated into the basis of Article 80 of the Rules of Court.

“In the event of doubt” — is the doubt sufficient? Here we can distinguish two basic situations:

- (a) when the Court evaluates, *proprio motu*, the existence of a “connection”, doubt appears to be the psychological motive for the Court to assess the existence of the connection and to adopt a corresponding decision;
- (b) where there is doubt on the Applicant’s side in the original proceedings, that is obviously not sufficient on its own. It represents only the psychological, mental basis for the initiation of an appropriate action in the litigation. In substance, that is an objection, although the form in which it appears and the name given to it by the Applicant are not important. The importance lies in the material nature of the Applicant’s reaction to the Respondent’s “counter-claim”. In this particular case, the Applicant set out its approach to the admissibility of the “counter-claim” in the form of “observations”, although they were in fact objections. For, if the Applicant has a “doubt”, and does not express that doubt in an appropriate way, then the doubt itself is legally irrelevant. I understand the true

meaning of paragraph 3 of Article 80 to be that it *suspends* the automatic joinder of the Respondent's claim to the original proceedings until the doubt as to the relevant connection between the question presented by way of counter-claim and the subject-matter of the initial Applicant's claim is removed. Objections may be raised to this interpretation that it does not accord with the wording of paragraph 3 according to which "the Court shall . . . decide whether or not the question thus presented shall be joined to the original proceedings". This failure to accord may prove relevant if the decision of the Court that "the question thus presented shall be joined to the original proceedings" is understood as a decision which has a declaratory effect only. It seems to me that this is a way to preserve the original nature of the counter-claim, which is essentially the Respondent's right to increase the dimensions of a lawsuit by having his claims included in it under certain conditions. *A contrario*, from a right of the Respondent, the counter-claim is transformed into a question which the Court decides in its sole discretion, independently of the conditions stipulated in paragraph 1 of Article 80 of the Rules of Court. Such transformation reduces the complex character of the counter-claim to a question of procedural economy. It hardly needs saying that the very nature of the counter-claim does not allow such a reduction. The right to make a counter-claim derives from the principle of the equality of the parties on the one hand and the principle of material truth on the other hand. A counter-claim however does not only allow for better administration of justice in respect of procedural economy, but also in respect of the complex solution of conflicting relations between the Parties and the prevention of different trials (*ne variae judicetur*).

Such interpretation of paragraph 3 of Article 80 of the Rules of Court has a direct influence on the subject of the Court's decision in the event of a doubt as to the connection between the question presented by way of counter-claim and the subject-matter of the claim of the other party. If a claim made by the Respondent which fulfils the "direct connection" condition stipulated in paragraph 1 of Article 80 of the Rules of Court is qualified *ipso facto* as a counter-claim, then the Court, in proceedings instituted according to paragraph 3 of Article 80, *could not decide upon the admissibility of the counter-claim*, but only upon *the existence of a direct connection* between counter-claims submitted by the Respondent and the subject-matter of the Applicant's claims. If it finds that there exists such a connection, then this means, as was stated by the Permanent Court in the *Factory at Chorzów* case (*Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 38*), that the material condition required by the Rules as regards counter-claims is fulfilled, which implies joinder of the counter-claim to the original proceedings.

- (ii) Is the Court fully master of the proceedings conducted on the basis of paragraph 3 of Article 80 of the Rules of Court?

This question results from the fact that, in this particular case, the Court did not hear the Parties. The decision of the Court not to conduct hearings seems rational to me, because it rests upon the founded belief that, through the written observations of the Parties, it obtained a complete picture of all relevant matters, which enabled it to exercise its jurisdiction, on the basis of Article 80 of the Rules of Court.

Unfortunately, it should be said in the interest of truth that paragraph 3 of Article 80 of the Rules of Court does not favour such rational determination by the Court.

Paragraph 3 of Article 80 stipulates in imperative wording that, *inter alia*, “the Court shall, after hearing the parties, decide whether or not the question thus presented shall be joined to the original proceedings” (emphasis added). It is highly doubtful whether the exchange of written statements by the parties may be a substitute for “hearing”, since “hearing” as a term of the procedure before the Court denotes, in the sense of Article 43, paragraph 5, and Article 51 of the Statute, oral proceedings before the Court. The exchange of written statements by the parties would suffice for hearing the parties under Article 68 of the 1972 Rules of Court which, instead of the phrase “after hearing the parties”, contained the phrase “after due examination”, a phrase leaving room for liberal interpretation. It appears that paragraph 3 of Article 80 of the Rules of Court does not permit liberal interpretation.

For as Rosenne says, the phrase “after hearing the parties” means that:

“in future there will always be some oral proceedings in the event of doubt . . . as to the connection between the question presented by way of counter-claim and the subject-matter of the claim of the other party” (S. Rosenne, *Procedure in the International Court. A Commentary on the 1978 Rules of the International Court of Justice*, 1983, p. 171).

There are reasonable grounds for assuming that in future the Court may find itself in a situation where it has to choose between submission to rigid rules or flexibility, which opens the path to better administration of justice. Consequently, a revision of paragraph 3 of Article 80 of the Rules of Court seems desirable to me, in order that the rational determination of the Court might not be at variance with the, in this case unnecessarily, rigid rule of procedure.

3. In proceedings based on paragraph 3 of Article 80 of the Rules of Court the question of “direct connection” is of the utmost importance.

The term “direct connection” itself firmly establishes Anzilotti’s thesis that “the principal claim and the counter-claim are independent, though locked in the same procedural relationship” (D. Anzilotti, “La demande

reconventionnelle en procédure internationale”, *Journal du droit international*, Vol. 57, 1930, p. 875 [translation by the Registry]). Although somewhat broad and vague, it obviously does not mean identity or coincidence of the subject-matter of the application and the subject-matter of the counter-claim. For such a qualification, the meaning of the word “connection” is of basic importance (in this phrase, the word “direct” is only a condition of qualification, a factor which defines the quality of “connection”, as the main element of the phrase). A “connection” in the sense of a relationship or link may exist only between things which exist separately, in themselves, things having the properties of autonomy and apartness. *A contrario*, the question of either direct or indirect “connection” may not even be asked, for there are no such things between which the relationship or link is established. One thing cannot have a “connection” with itself, for in that case it would not be a separate thing, but just a relationship between things.

In qualifying the meaning of the term “direct connection” the Court has, in accordance with widespread opinion, assumed that “direct connection” represents connection in law and in fact. The Order determines, *inter alia*, that “as a general rule, the degree of connection between the claims must be assessed both in fact and in law” (para. 33). However, what is particularly significant is the fact that the Court, in weighing the relevance of “connection in law” and “connection in fact”, gives tacit preponderance to “connection in law”. The Court states *inter alia* that

“it emerges from the Parties’ submissions that their respective claims rest on facts of the same nature; whereas they form part of the same factual complex since all those facts are alleged to have occurred on the territory of Bosnia and Herzegovina and during the same period” (para. 34).

That means that the Court found that there was a direct connection between Yugoslavia’s counter-claim and Bosnia and Herzegovina’s original claim, despite the fact that Yugoslavia did not rely on identical facts in its counter-claim.

In my opinion, such a standpoint of the Court is valid and justified. It is possible to assume that in some cases, the links between the “claim” and the “counter-claim” in fact and in law are not equal, therefore one may ask the question whether the link in law is sufficient to constitute a “direct connection” in the sense of Article 80, and vice versa? In other words, whether we could, conditionally speaking, establish a certain kind of hierarchy in the mutual relationship between “connection in law” and “connection in fact”, meaning that one of these “connections” is more important, that it is preponderant over the other. Logically speaking, “connection in law” should be preponderant, if for no other reason than that, out of a single event, parties may initiate actions which are not com-

plementary. In fact, “connection in law” may appear as *differentia specifica* between “counter-claim” and “cross-claim”.

The standpoint that legal connection can always be considered to be a direct connection between the subject-matter of the claim and that of the counter-claim has support in the case-law of the Court. In the case concerning the *Diversion of Water from the Meuse* (1937), the Belgian counter-claim concerned questions different from those initiated by the Netherlands in its claim.

The Netherlands Government asked the Court to adjudge and declare that:

- “(a) the construction by Belgium of works which render it possible for a canal situated below Maastricht to be supplied with water taken from the Meuse elsewhere than at that town is contrary to the Treaty of May 12th, 1863;
- (b) the feeding of the Belgian section of the Zuid-Willemsvaart, of the Campine Canal, of the Hasselt branch of that canal and of the branch leading to Beverloo Camp, as also of the Turnhout Canal, through the Neerhaeren Lock with water taken from the Meuse elsewhere than at Maastricht, is contrary to the said Treaty;
- (c) Belgium’s project of feeding a section of the Hasselt Canal with water taken from the Meuse elsewhere than at Maastricht is contrary to the said Treaty;
- (d) Belgium’s project of feeding the section of the canal joining the Zuid-Willemsvaart to the Scheldt between Herenthals (Viersel) and Antwerp with water taken from the Meuse elsewhere than at Maastricht is contrary to the said Treaty” (*P.C.I.J., Series A/B, No. 70, Judgment, 1937, pp. 5-6*).

In its Counter-Memorial the Belgian Government asserted (1) that the Netherlands Government had committed a breach of the Treaty of 1863 by constructing the Bogharen barrage on the Meuse below Maastricht; (2) that the Juliana Canal constructed by the Netherlands alongside the Meuse below Maastricht from Limmel to Maasbracht was subject, as regards its water supply, to the same Treaty.

Therefore, there were two independent claims. What made those claims directly connected for the purpose of the Court procedure was their legal basis. All questions arising from the Netherlands’ claim and from Belgium’s counter-claim directly concerned the interpretation and application of the Treaty of 12 May 1863 or, to be precise, whether various actions of the Parties were in accordance with the relevant provisions of the Treaty. This fact led the Court to conclude that the counter-claim “is directly connected with the principal claim” and that “it was permissible to present it in the Counter-Memorial” (*P.C.I.J., Series A/B, No. 70, p. 28*).

The Court's reasoning was limited to that framework also in the *Factory at Chorzów* case (Merits), the *Asylum* case and in the provisional measures phase of the case concerning *United States Diplomatic and Consular Staff in Tehran*.

A preponderance of the "connection in law" over the strictly understood "facts of case" (if the word "fact" is meant in *lato sensu*, it includes law as well) is, in my opinion, a normal consequence of the relativity of the facts of the case. It is therefore justified to pose the question whether it has to do with "facts" or subjective perceptions of facts. Another well-respected authority on the counter-claim issue, Miaya de la Muela, justly observes:

"La reconvenición se basa en unos hechos constitutivos diferentes con los alegados por el actor para su pretensión, aunque con el grado de conexidad entre ambos conjuntos de hechos que exija el sistema procesal respectivo. Su diferencia de la excepción está en que la última se basa en hechos, casi siempre no alegados por el actor, pero que pretenden ser impeditivos o extintivos de los efectos producidos por los alegados en la demanda."<sup>1</sup> (A. Miaya de la Muela, "La reconvenición ante el Tribunal internacional de Justicia", *Estudios de derecho procesal en honor de Niceto Alcalá-Zamora y Castillo*, *Boletín mejicano de derecho comparado*, No. 24, 1975, p. 757.)

This is why, what are usually called the "facts" of the case should be understood as a "factual complex" or the "factual background" as an objective basis, the main features of which are represented as the facts of the case by the parties.

4. In this particular case, the existence of a "connection in law" is obvious. It results directly from the findings of the Court in the Judgment adopted on the occasion of the Respondent's preliminary objections. By its Judgment on the preliminary objections, the Court established the legal relationship between the Respondent and the Applicant on the one hand, and the Genocide Convention, on the other. The preliminary objections represented, according to their legal nature, a kind of counter-claim — a "preliminary" counter-claim — the basic purpose of which was to establish a relevant legal relationship between the parties in the litigation.

Questions initiated both in the Memorial and the Counter-Memorial are organically and inseparably connected to the Genocide Convention.

<sup>1</sup> "The counter-claim is based on some constituent facts differing from those alleged by the claimant in his claim, though with the degree of connection between both sets of facts required by the particular procedural system. It differs from the objection in that the latter is based on facts hardly ever alleged by the claimant, but which are advanced as being impedimental or extinctive to the effects produced by the allegations of the claim." [*Translation by the Registry.*]

The *sedes materiae* of the dispute between Bosnia and Herzegovina and the Federal Republic of Yugoslavia resides in the qualification of the acts ascribed by the Parties to each other, from the standpoint of the relevant provisions of the Convention. Moreover, in contrast to the factographic side of the case of the *Diversion of Water from the Meuse*, in which Belgium put forward questions of fact different from those mentioned by the Netherlands in its claim, there exists, in this particular case, a partial coincidence regarding the factual questions set out in the claim of Bosnia and Herzegovina, and in the counter-claim of the Federal Republic of Yugoslavia, but the Parties interpret them in different, in fact in diametrically opposed, ways.

As regards the form and reasoning, there are no substantial differences between the Memorial and the Counter-Memorial. Even a prima facie assessment shows that there is a substantial similarity regarding the form and content of the Memorial and Counter-Memorial, which frequently coincide, so that phenomenologically, regardless of the order of the submission of the documents, one could describe the Counter-Memorial as the inversion of the Memorial, and vice versa.

In such a state of affairs, Yugoslavia's counter-claim exceeds the usual framework of counter-claims encountered by the Court. That is to say, the substantial concentration of the Memorial and Counter-Memorial on the relevant event — the armed conflict in Bosnia and Herzegovina, and its consequences, and the opposing claims of the Parties which derive from different assessments of the factual and legal sides of that event, makes it possible to conclude that there is genuinely no distinction between the Applicant and the Respondent. The positions of the Parties in this dispute could be compared to the positions of parties in the case of a territorial dispute, both parties putting forward rival claims. So that, as was pointed out by the arbitrator Max Huber in the *Island of Palmas* case (1928) "each party is called upon to establish the arguments on which it relies in support of its claim . . . over the object in dispute" (*Reports of International Arbitral Awards*, Vol. II, p. 837).

(Signed) Milenko KREČA.

## SEPARATE OPINION OF JUDGE KOROMA

It is not without considerable misgivings that I have voted in favour of the Court's Order, not least because of my concern regarding its effect and perceived effect on the sound administration of justice particularly in a case where allegations of grave breaches of the Genocide Convention and other massive violation of human rights have been made.

On 20 March 1993, the Government of Bosnia and Herzegovina instituted proceedings against the Government of Yugoslavia in respect of a matter concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide as well as various matters which Bosnia and Herzegovina claims are connected thereto. Bosnia and Herzegovina invoked Article IX of the said Convention as the basis of the Court's jurisdiction. Immediately thereafter it submitted a request for the indication of provisional measures under Article 41 of the Statute of the Court.

On 1 April 1993, Yugoslavia submitted written observations on Bosnia and Herzegovina's request for provisional measures and in turn requested the Court to order the application of provisional measures to Bosnia-Herzegovina.

By an Order dated 8 April 1993, the Court granted interim measures of protection in the light of the gravity and urgency of the situation, so as to prevent irreparable damage to rights under the Genocide Convention. In reaching this decision, the Court appeared to have also taken into consideration the serious allegations of genocide that were made, the humanitarian aspect of the case as well as the need to ensure that Bosnia and Herzegovina survived as a State. On 27 July 1993, Bosnia and Herzegovina submitted a new request for the indication of provisional measures. On 10 August, Yugoslavia also submitted a request for the indication of provisional measures. By an Order dated 13 September 1993, the Court reaffirmed the measures indicated in its Order of 8 April 1993, declared that those measures should be immediately and effectively implemented and noted that:

“great suffering and loss of life has been sustained by the population of Bosnia-Herzegovina in circumstances which shock the conscience of mankind and flagrantly conflict with moral law and the spirit and aims of the United Nations” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 348, para. 52).

The Court also observed that since its previous Order:

“the grave risk which the Court then apprehended of action being taken which may aggravate or extend the existing dispute over the prevention and punishment of the crime of genocide, or render it more difficult of solution, has been deepened by the persistence of conflicts on the territory of Bosnia-Herzegovina and the commission of heinous acts in the course of those conflicts” (*I.C.J. Reports 1993*, p. 348, para. 53).

Following this reaffirmation of the Court’s previous Order, on 15 April 1994 within the time-limit laid down at its request, Bosnia and Herzegovina filed its Memorial and made the following submissions:

“On the basis of the evidence and legal arguments presented in this Memorial, the Republic of Bosnia and Herzegovina,

Requests the International Court of Justice to adjudge and declare [*inter alia*],

1. That the Federal Republic of Yugoslavia (Serbia and Montenegro), directly, or through the use of its surrogates, has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide, by destroying in part, and attempting to destroy in whole, national, ethnical or religious groups within the, but not limited to the, territory of the Republic of Bosnia and Herzegovina, including in particular the Muslim population, by

- killing members of the group;
- causing deliberate bodily or mental harm to members of the group;
- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- imposing measures intended to prevent births within the group.

. . . . .  
4. That the Federal Republic of Yugoslavia (Serbia and Montenegro) has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by virtue of having failed to prevent and to punish acts of genocide.”

On 21 March 1995, Yugoslavia invoked Article 79, paragraph 1, of the Rules of Court, and raised preliminary objections concerning, respectively, the admissibility of the Application and the jurisdiction of the Court to hear the case. By its Judgment dated 11 July 1996, the Court dismissed the preliminary objections and found that on the basis of

Article IX of the Genocide Convention it had jurisdiction to adjudicate upon the dispute and that the Application was admissible.

In the light of the foregoing, it thus took more than three years after the institution of proceedings alleging grave violations of the Genocide Convention for the Court to be in a position to declare that it had jurisdiction to adjudicate upon the matter and that the Application was admissible. As has been recognized above, in its consideration of and decision to grant interim measures of protection, the Court must have realized the urgency of the matter as well as the need to protect the rights of the individuals. This together with its consideration and its disposal of the preliminary objections raised by the Respondent were all in accordance with the Statute and Rules of Court. However, one could not have failed to observe that it took more than three years from the commencement of proceedings for the Court to be in a position even to declare that it is entitled to exercise its jurisdiction in a matter of such grave importance which had been submitted to it for consideration. Three years to find that it is competent to hear a matter in which the Court itself had noted the sustaining of "great suffering and loss of life" and "in circumstances which shock the conscience of mankind and flagrantly conflict with moral law and the spirit and aims of the United Nations"! (*I.C.J. Reports 1993*, p. 348, para. 52.) It had, moreover, in its Order of 8 April 1993 indicated that the Respondent should take all measures within its power to prevent genocide and that both Yugoslavia and Bosnia and Herzegovina were under a clear obligation to do all in their power to prevent the commission of any acts of genocide.

Following the Court's finding that it was entitled to exercise its jurisdictional function and that the Application was admissible, on 22 July 1997, Yugoslavia, within the time-limit laid down by the Court, filed its Counter-Memorial which "included counter-claims" in accordance with Article 80, paragraph 2, of the Rules of Court. The Yugoslav claims are also based on the 1948 Genocide Convention. However, and as recounted in the Order, the acts which Yugoslavia alleges Bosnia and Herzegovina committed in breach of the Convention are different from those it is accused of by Bosnia and Herzegovina. Furthermore the acts described in the Yugoslav claims are acts which were allegedly committed outside its territory against persons over whom it has no jurisdiction (in fact, these are acts which it is alleged were perpetrated on the territory of Bosnia and Herzegovina against part of its population); conversely, the acts charged by Bosnia and Herzegovina in its original claims are acts which are alleged to have been committed on its own territory and against some of its own nationals.

When the Counter-Memorial of Yugoslavia was sent to Bosnia and Herzegovina on 28 July 1997, Bosnia and Herzegovina indicated that it would not only request "a short time-limit to be set for the next phase of

the proceedings, but also . . . an early date to hear the Parties according to Article 80, paragraph 3, of the Rules of Court". Bosnia and Herzegovina contends that the counter-claims submitted by the Respondent on 22 July 1997 do not meet the criterion set out in Article 80, paragraph 1, of the Rules of Court, that they should therefore not be joined to the original proceedings and that, should Yugoslavia so desire, it could always submit to the Court an application instituting proceedings through the normal channels.

Yugoslavia, for its part, submitted that the counter-claims are directly connected with the subject-matter of Bosnia and Herzegovina's claim, are based on the same legal ground and fulfil the conditions laid down in Article 80, paragraphs 1 and 2, of the Rules of Court. It requested the Court to reject the requests of Bosnia and Herzegovina that the counter-claim did not fulfil the criterion laid down in the Rules of Court.

It was against this background that the Court considered this matter and came to the conclusion that part of the submissions of the Counter-Memorial of Yugoslavia constitute "counter-claims" within the meaning of Article 80 of the Rules of Court. The Court therefore found the counter-claims admissible and decided that they should be joined to the original proceedings. In accordance with this decision the Court directed Bosnia and Herzegovina to submit a Reply and Yugoslavia a Rejoinder relating to the claims of the two Parties and fixed the following dates as time-limits for the filing of these pleadings:

for the Reply of Bosnia and Herzegovina — 23 January 1998;

for the Rejoinder of Yugoslavia — 23 July 1998.

The Court also reserved the remainder of the proceedings.

After this latest decision, it is now four years after proceedings were instituted alleging grave breaches of the Genocide Convention and, even by dint of the Rules of Court regarding pleadings, the matter has still not reached a stage when it is ready for oral hearings. The admissibility and joinder of the counter-claims to the original claim in this matter thus have the effect of further prolonging what is otherwise a matter requiring urgent consideration by the Court in the interests of the sound administration of justice.

As the Court itself has acknowledged, the idea of a counter-claim is essentially to achieve procedural economy whilst enabling the Court to have an overview of the respective claims of both parties and to decide them more consistently. However, and as the Court has also pointed out, the admissibility of the counter-claims must of necessity relate to the aims thus pursued and be subject to conditions designed to prevent abuse, thus when in the interests of the proper administration of justice the Court is

required to rule on the respective claims of the parties in one sole set of proceedings, the Court must not, for all that, lose sight of the interests of the main Applicant to have its claim decided within a reasonable time period.

From this perspective, one cannot view with equanimity or fail to be concerned by the effect the Court's decision to join the counter-claims to the original Application at this stage would appear to have on the sound and proper administration of justice, and in particular on the interests of the Applicant to have its claim decided within a reasonable time-frame.

As we have noted above, this is not to say that all the steps taken so far, by both Parties and the Court, have not been in accordance with the Statute and Rules of Court. That the Court should maintain its judicial impartiality and objectivity at all times and ensure that the arguments of both sides to this dispute are given a fair hearing is beyond question. Nonetheless, the Court, in considering and applying Article 80, paragraph 3, of the Rules, should have carried out this exercise in such a way as to prevent further delay in this matter since that delay could give the appearance of further extending the gestation period of this case and the delay of justice.

Article 80, paragraph 3, of the Rules of Court provides as follows:

“In the event of doubt as to the connection between the question presented by way of counter-claim and the subject-matter of the claim of the other party the Court shall, after hearing the parties, decide whether or not the question thus presented shall be joined to the original proceedings.”

It is also my considered view that in exercising its discretion under this provision and before reaching its decision, the Court should have granted oral hearings to the Parties especially since, even according to the Parties' own submissions, their respective claims do not stem from the same facts, although those facts form part of the same factual complex in the eyes of the Court. The Order, *inter alia*, states that a counter-claim cannot be used to impose on the Applicant any claim the Respondent may choose, since this could entail the risk of infringing the Applicant's rights and of compromising the proper administration of justice. It therefore seems to me that the Court, in exercising its discretion under this provision, should have done so in such a way as to avoid further delay in such a serious matter and to avoid running the risk that its Order on the Respondent's claims might appear to compromise the proper administration of justice. I am convinced that this was not the Court's intention. However, in my view since the issue of counter-claims is not often visited by the Court, particularly where the Court is called upon to make a ruling, and since the Rules of Court aim, among other things, to simplify and expedite the

procedure of the Court, it is perhaps now not untimely for the relevant provisions of the Rules to be reviewed, and if necessary, adapted to a changing world as well as to the pace of events.

*(Signed)* Abdul G. KOROMA.

---

## SEPARATE OPINION OF JUDGE LAUTERPACHT

1. This opinion is written in implementation of my statement made at the provisional measures stage of this case regarding the role of an *ad hoc* judge:

“He has, I believe, the special obligation to endeavour to ensure that, so far as is reasonable, every relevant argument in favour of the party that has appointed him has been fully appreciated in the course of collegial consideration and, ultimately, is reflected — though not necessarily accepted — in any separate or dissenting opinion that he may write.” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 409, para. 6.)

2. The problem before the Court at this stage of the case is one of the admissibility of counter-claims filed by the Government of the Federal Republic of Yugoslavia (“Yugoslavia” hereinafter). While I agree with the Court’s Order in so far as it relates to the admissibility of the counter-claims, I have been concerned about the fact that the Court has not given the Parties the opportunity to develop their respective positions in oral argument.

## PROCEDURE

3. The justification for oral proceedings lies in Article 80, paragraph 3, of the Rules of Court which provides that:

“In the event of doubt as to the connection between the question presented by way of counter-claim and the subject-matter of the claim of the other party the Court shall, *after hearing the parties*, decide whether or not the question thus presented shall be joined to the original proceedings.” (Emphasis added.)

4. The Court has taken the view that the requirement of “hearing the parties” can, in the present case, be satisfied by giving each of them the opportunity of presenting its views in writing. The position taken by the Court is supported by its practice in respect of some, but not all, other matters covered by a similar requirement, for example, the nomination of *ad hoc* judges. Article 35, paragraph 4, of the Rules provides that: “In the event of any objection or doubt, the matter shall be decided by the Court,

if necessary after hearing the parties.” Again, in relation to the problem of appointing an *ad hoc* judge that arises when two or more parties may be in the same interest, Article 36, paragraph 2, provides that “the matter may be decided by the Court, if necessary after hearing the parties”. Likewise, Article 56, paragraph 2, relating to the authorization of the production of documents after the closure of the written proceedings, contains a similar formula, as does Article 67. In regard to these matters, the practice of the Court has been merely to give the parties the opportunity to present their views in writing.

5. Even so, that interpretation is not one that immediately springs to mind in respect of so substantial an issue as the admissibility of counter-claims. It is to be recalled that the Rule on counter-claims (Art. 80) appears immediately after the rule on preliminary objections (Art. 79) and that both are classed together in Section D of the Rules, under the heading “Incidental Proceedings”. A similar requirement of hearing the parties appears also in Article 79, paragraph 7, and has regularly been met by the holding of oral proceedings. Even if the Court retains a discretion to decide in a given case that such proceedings need not be held, the present case is one in which the relative merits and the complexity of the issues involved would certainly have warranted giving the parties the additional opportunity of commenting orally on each other’s arguments and the Court the opportunity of the more extended consideration of the matter that would have been involved in the holding of a hearing and in the deliberations that would then have followed — the more so as such a step would also have met the expressed expectations of the Parties.

6. The degree to which the decision of the Court not to hold such oral proceedings departs from the opinion of, amongst others, the most learned commentator on the Court’s procedure may be gathered from the terms in which the question is discussed by Professor Rosenne in the latest edition of his major work. As regards Article 80, paragraph 3, of the Rules he writes:

“Paragraph 3 corresponds to the last sentence in the previous Rules, with the substitution of ‘after hearing the parties’ for ‘after due examination’. This means that in future there will always be some oral proceedings in the event of doubt — by whom is not stated — as to the connection between the question presented by way of counter-claim and the subject-matter of the claim of the other party.” (*The Law and Practice of the International Court, 1920-1996*, 3rd ed., 1997, Vol. III, p. 1273.)

7. It is, therefore, to be hoped that when the Rules of Court next come to be revised, the opportunity will be taken to eliminate the cause of the present division of opinion by ensuring that the word “hearing” is used consistently to convey the idea of oral proceedings and that when the Court intends to retain a discretion to determine that the exchanges

between representatives of the parties are to be limited to written proceedings, it will adhere to such wording as is used elsewhere in the Rules (e.g. Arts. 46, para. 1, 53, paras. 1 and 2, 55 and 58, para. 2), namely “after ascertaining the views of the parties” or, as in Article 76, paragraph 3, after affording “the parties an opportunity of presenting their observations on the subject” or, as in Article 79, paragraph 3, “the other party may present a written statement of its observations”.

#### THE ADMISSIBILITY OF THE COUNTER-CLAIMS

8. The present consideration by the Court of the question of counter-claims is occasioned by the filing by Yugoslavia on 23 July 1997 of an extensive Counter-Memorial. This falls into two parts. The first part, of nearly 350 pages, may be described in general terms as containing “defences”. The second part, consisting of over 700 pages, sets out factually Yugoslavia’s allegations of genocide by Bosnia and Herzegovina (“Bosnia” hereinafter) against the Serbs in Bosnia and Herzegovina. Apart from a statement in the Introduction to the Counter-Memorial that it “includes counterclaims” and the inclusion as one of the three Submissions at the close of the Counter-Memorial of an elaboration of the statement that “Bosnia and Herzegovina is responsible for the acts of genocide committed against the Serbs in Bosnia and Herzegovina”, the Counter-Memorial contains no discussion of the legal aspects of the counter-claims. But even though the Counter-Memorial contains no reference to Article 80 of the Rules of Court and no argument that the matters covered in Part II of that pleading are “directly connected with the subject-matter of the claim” of Bosnia, it would have been unrealistic not to recognize that Part for what it is. Accordingly, on 28 July 1997, Bosnia addressed a letter to the Court expressing the opinion that the counter-claims “did not meet the criteria of Article 80, paragraph 1, of the Rules of Court and should therefore not be joined to the original proceedings”. Having then been requested by the Court to specify in writing “the legal ground on which this opinion is based”, Bosnia responded on 9 October 1997 with a letter to the Court in which it contended that the Yugoslav counter-claim was not admissible since, by reference to Article 80, paragraph 1, of the Rules of Court, “any direct connection with the subject-matter of Bosnia and Herzegovina’s original claim is totally lacking”. Though conceding that both claim and counter-claim are based on the same legal ground — the Genocide Convention — Bosnia contended that the two sets of allegations had nothing to do with one another:

“[it] is evident that the alleged victims are not the same . . . nor are the material perpetrators of the alleged atrocities the same . . . This means, then, that if the two claims were joined in the same proceedings before the Court, it would in any event have to verify separately the facts alleged *ex adverso* and consider separately whether, in regard to the Genocide Convention, they constitute unlawful conduct attributed, respectively, to one or the other Party . . .” (Letter to the Registrar from the Deputy-Agent of Bosnia and Herzegovina dated 9 October 1997, para. 3.)

9. Bosnia also requested the Court to decide that the counter-claim should not be joined to the principal claim, but expressly acknowledged that Yugoslavia was free to submit to the Court a separate application instituting proceedings in the normal way.

10. Yugoslavia, for its part, responded that there is a direct connection between Part II of its Counter-Memorial, i.e., the counter-claim, and the Bosnian claim. Yugoslavia pointed out, first, that the claim and counter-claim are based on the same legal grounds, namely the Genocide Convention and general rules of State responsibility. Secondly, it contended:

“The disputed facts of the claim and counter-claim are the facts of the same tragic conflict, i.e. civil war in Bosnia and Herzegovina, which happened in a single territorial and temporal setting, based on the same historical background and within the framework of the same political development. Due to that reason as well as to the same legal ground of the claim and counter-claim, all relevant facts which form the basis of claim and counter-claim are interrelated in such a way to make a factual and legal connection relevant to the issue.” (Statement of Yugoslavia concerning the admissibility of the counter-claim, 23 October 1997, para. 4.)

11. It thus appears that Bosnia supports what may be called a “restrictive” interpretation of the requirement of “direct connection”, while Yugoslavia advances a “broad” one. For Bosnia there must be an identity of the alleged victims as there must be of the material perpetrators; the judicial analysis of the facts in the counter-claim must have a relationship to, or must be of help in, the examination of the facts in the principal claim. For Yugoslavia it is sufficient that the counter-claim “raised the question of genocide of the Serbs as one relevant to contradicting facts presented by the Applicant as being relevant for attributing alleged acts to the Respondent”.

12. In the present case, the choice between these two approaches must depend to a large extent on the nature of the concept "genocide". Can what we conceive of as amounting to genocide be constituted by a single act of a horrific nature? Or can it only be constituted by a series of acts which, while individually being no more than murder or causing serious bodily harm to individuals or such like, are, when viewed cumulatively, evidence of a pattern of activity amounting to genocide?

13. The second alternative seems logically to be the more cogent. A single murder or other horrific act cannot be genocide. Only a series or accumulation of such acts, if they reveal collectively the necessary intent and are directed against a group identifiable in the manner foreseen in Article II of the Convention, will serve to constitute genocide — whereupon liability for the individual component crimes, as well as for the special crime of genocide, will fall not only upon the individuals directly responsible but also upon the State to which their acts are attributable.

14. Approached thus, it is not possible to require that the facts underlying a counter-claim in respect of genocide must have their direct connection with the individual and specific acts forming the basis of the principal claim of genocide. It is sufficient that the acts invoked as constituting the basis of the counter-claim should be directly connected with the principal claim by reason of their occurrence in the course of the same conflict. Indeed, it may be suggested that the policy underlying the prohibition of genocide favours this broader view since the particular obligations of respect for human rights embodied in the Genocide Convention are ones which rest with equal weight upon all persons involved. It is upon this basis that I agree with the conclusion of the Court that the Yugoslav counter-claim is admissible.

15. It is not necessary to repeat here the Court's analysis of its own jurisprudence, but it is appropriate to mention the support for this approach to be derived from the treatment of the analogous problem within national legal systems when counter-claims are brought against plaintiff States which would, were they sued directly as defendants, be able to plead State immunity. One may recall pertinent statements of two particularly distinguished United States judges. The first was made by J. Manton, of the United States Court of Appeals, Second Circuit:

"Claims arising out of the same transaction may be set off against a sovereign. The same transaction does not necessarily mean occurring at the same time. In *Moore v. New York Cotton Exchange* . . . the court said that the transaction may comprehend a series of many

occurrences depending not so much upon the immediateness of their connection as upon their logical relationship.” (*United States v. National City Bank of New York* (1936) 83 F. (2d), p. 236; *International Law Reports*, Vol. 8, p. 218, at p. 220.)

16. The second contribution was by Justice Frankfurter in the Supreme Court of the United States in a case in which the principal claim was by the Republic of China for the recovery of a deposit made in the defendant Bank by the Shanghai-Nanking Railway Administration, an official agency of the State. The Bank counter-claimed on defaulted Treasury Notes of the Republic of China owned by it. Justice Frankfurter said:

“It is recognized that a counterclaim based on the subject matter of a sovereign’s suit is allowed to cut into the doctrine of immunity. This is proof positive that the doctrine is not absolute, and that considerations of fair play must be taken into account in its application. But the limitation of ‘based on the subject matter’ is too indeterminate, indeed too capricious, to mark the bounds of the limitations on the doctrine of sovereign immunity. There is great diversity among courts on what is and what is not a claim ‘based on the subject matter of the suit’ or ‘growing out of the same transaction’ . . . No doubt the present counterclaims cannot fairly be deemed to be related to the Railway Agency’s deposit of funds except insofar as the transactions between the Republic of China and the petitioner may be regarded as aspects of a continuous business relationship. The point is that the ultimate thrust of the consideration of fair dealing which allows a setoff or counterclaim based on the same subject matter reaches the present situation.” (*National City Bank of New York v. Republic of China, et al.* (1955) 348 US 356; *International Law Reports*, Vol. 22, p. 210, at p. 215.)

17. Nothing in Article 9 (counter-claims) of the Draft Articles on Jurisdictional Immunities of States and their Property, adopted in 1991 by the International Law Commission of the United Nations, suggests that codification of the subject has led to any materially different conclusion:

“A State instituting a proceeding before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of any counter-claim arising out of the same legal relationship or facts as the principal claim.” (*Yearbook of the International Law Commission*, 1991, Vol. II, Part Two, p. 30.)

18. But determination that the Yugoslav counter-claim is directly connected with the subject-matter of the Bosnian claim cannot be the end of the matter. Each case must be looked at in the light of its own particular facts. The Court has an inherent power and duty to ensure the orderly and effective administration of justice. Cases should be heard with all deliberate speed. To these ends the Court enjoys a significant measure of discretion. It is not controlled by the letter of Article 80 of its Rules. It should be recalled that, in contrast with many of the Rules of the Court, Article 80 does not have its source in any obligatory provision of the Court's Statute. In Article 80 the Court is not laying down a procedure for the implementation of its statutory duty; it is only exercising the general power conferred on it by Article 30 of the Statute to "frame rules for carrying out its functions". The Court has seen the consideration of counter-claims as a possible aspect of its functions and so, of its own initiative, it has framed certain rules. But it is not rigidly or perpetually bound by these Rules. It is free, and, indeed, obliged, to apply them reasonably and to adjust their application to the circumstances of the case before it.

19. It would, therefore, have been open to the Court to have exercised its discretion in the present case by declining to join the otherwise admissible counter-claims to the principal claims. The principal factor that could have been invoked to justify the separation of the treatment of the claims and counter-claims is the immense additional complexity to which the treatment of the counter-claims simultaneously with the claims is bound to give rise. As stated above, a claim of genocide involves the establishment of a pattern or accumulation of individual crimes. Bosnia has in its Memorial alleged six categories of offences: the use of concentration camps; killing; torture; rape; expelling of people and destruction of property, homes, places of worship and cultural objects; and the creation of destructive living conditions — shelling, starvation and intimidation of the population. Yugoslavia has responded in detail to each of these allegations in Part I (the "defence" section) of its Counter-Memorial, as well as adding in Part II a detailed catalogue of the crimes alleged to have been committed by Bosnians and Croats against Serbians. The assessment of the allegations and responses, if approached other than on a fairly general level (a matter on which it is not appropriate to express any view at this stage of the case), could take months of hearings and deliberation. The annexes adduced by Bosnia in support of this part of its case are some 15 cm thick; and those adduced by Yugoslavia in connection with Part I of its Counter-Memorial are some 18 cm thick, while those adduced in support of Yugoslavia's counter-claims add about a further 14.5 cm. The bulk of paper in a case is not always a good guide to its true simplicity or complexity, but it is safe to say that nothing in the materials presented by the two Parties in this case suggests that the task

that will eventually face the Court when it comes to the merits will be other than an extremely heavy one.

20. The question is, however, whether the Court could exercise its discretion to defer the consideration of the material contained in the Yugoslav counter-claim until after it has disposed of the Bosnian claim without improperly depriving Yugoslavia of its right to deploy those defences that the latter thinks are necessary as a response to the Bosnian claim. The answer in this case is no. It appears from the Yugoslav Statement of 23 October 1997 in reply to Bosnia's Statement of 9 October 1997 that Yugoslavia considers that the material it has advanced in Part II of its Counter-Memorial (the "counter-claim" part) is also an essential ingredient of its defence to the principal Bosnian claim. It is impossible for the Court at this stage of the case to attempt to assess the extent to which the material in Part II of the Yugoslav Counter-Memorial is or is not proper for use as a defence to the Bosnian principal claim. Also, the Court cannot disregard the possibility that the Yugoslav Counter-Memorial is advancing a *tu quoque* argument.

21. One fact which might have affected the admissibility of the Yugoslav counter-claim is that some of the allegations of genocidal conduct are levelled not only against Bosnians but also against Croats, thus seemingly bringing into the case the question of the liability of a State not party to the proceedings. The Yugoslav Counter-Memorial does not grapple with the implications of this fact. However, the number of situations in which allegations are made against Croats would appear, at the present stage at any rate, to be too small to lead the Court to treat this feature by itself as sufficient to exclude the admissibility of the counter-claims a whole.

22. In short, reluctant though one may feel to see the complexity of this case magnified by the incorporation of the Yugoslav counter-claim, there appears to be no convincing basis on which it may be excluded — though the possibility is not to be excluded that some satisfactory solution might have been found if the Court had agreed to oral proceedings on this interlocutory, but nevertheless important, aspect of the case.

23. In conclusion, it is essential to appreciate that the difficulties which confront the Court are not of its own making nor, indeed, of the making of the Parties. The closer one approaches the problems posed by

the operation of the judicial settlement procedure contemplated by Article IX of the Genocide Convention, the more one is obliged to recognize that these problems are of an entirely different kind from those normally confronting an international tribunal of essentially civil, as opposed to criminal, jurisdiction. The difficulties are systemic and their solution cannot be rapidly achieved, whether by the Court or, perhaps more appropriately, by the parties to the Genocide Convention.

*(Signed)* Elihu LAUTERPACHT.

---

DISSENTING OPINION OF VICE-PRESIDENT  
WEERAMANTRY

The jurisprudence of the Court in regard to counter-claims is not well developed. There is no definition of the term "counter-claim" in the Rules, nor in the Court's decisions and, as has been noted in this connection:

"lack of rigidity is a feature of the manner in which States and the Court approach counter-claims. Some difficulty, indeed, is seen in extracting any general principles from these cases, unless it be that each case is to be treated on its merits."<sup>1</sup>

The Court's Order in this case ventures into new legal territory<sup>2</sup> and I have some concerns with the direction it takes, and with its juristic and practical implications.

It is therefore with much regret that I find myself unable to concur in the decision of my colleagues. I deeply appreciate the reasoning, so well stated in the Order, in regard to the expression "directly connected" as appearing in Article 80 of the Rules of Court but, in my view, the consideration of the matter in hand calls for a close examination of some other aspects as well.

My concerns may very broadly be formulated under three heads:

- (a) the meaning of the term "counter-claim";
- (b) the discretion of the Court in determining whether to accept a counter-claim; and
- (c) the involvement of a third State in the matters raised by the counter-claims.

Before dealing with these, I would like to make a few preliminary observations.

---

<sup>1</sup> Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996*, 3rd ed., 1997, Vol. III, p. 1276.

<sup>2</sup> The development of the topic of counter-claims in international law has tended to be somewhat slender (see A. D. Renteln, "Encountering Counterclaims", *Denver Journal of International Law and Policy*, Vol. 15, 1986-1987, pp. 379, 384-385, and the references therein). See, however, M. Pellonpää and D. D. Caron, *The UNCITRAL Arbitration Rules as Interpreted and Applied*, 1994, pp. 348-355, and G. H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal*, 1996, pp. 110-120, for a detailed discussion of counter-claims before that Tribunal.

It is common ground in this case that a breach of the Genocide Convention cannot be pleaded as an excuse or justification for another breach of the same Convention. Nobody has sought to argue otherwise, nor is any such argument even remotely conceivable.

Yet the question whether offences under the Convention are of such a nature that they can be used to counter each other arises, in the present case, in the context of the provision regarding counter-claims in Article 80 of the Rules of Court. That Article needs to be analysed to ascertain whether its provisions are such as to enable it to accommodate, as a “counter-claim”, the allegations that Yugoslavia seeks to join to the hearing of the original claim of Bosnia and Herzegovina.

An analysis of Article 80, paragraph 1, of these Rules, dealing with the presentation of a counter-claim, reveals three prerequisites to the presentation of a counter-claim.

In the first place, the matter in question must fall within the category of a “counter-claim”. If it does not, further enquiry is unnecessary, for without a “counter-claim”, the Article is not brought into operation.

Secondly, if it is in fact a counter-claim, it must be directly connected with the subject-matter of the claim of the other party.

Thirdly, it must come within the jurisdiction of the Court.

However, even if all these prior requisites are satisfied, joinder is not automatic, for the language of Article 80 only states that a counter-claim “*may be presented*” (emphasis added), provided the prescribed requisites are present. Whether that counter-claim *will be accepted* must still depend on the undoubted discretion of the Court as the master of its own procedure. There are many circumstances relevant to the exercise of that discretion, as will appear later in this opinion. Thus a fourth requisite that must be satisfied before the counter-claim is accepted is that the Court’s discretion must be exercised in the respondent’s favour.

The first requisite presents a problem, in the absence of an authoritative definition of a counter-claim, for the purposes of the Court’s jurisprudence<sup>3</sup>. We are thrown back upon what may be considered as the general and natural meaning of the term, and upon such general principles as we can gather from scrutinizing counter-claims as they are understood in legal systems across the world. Needless to say, a party’s

---

<sup>3</sup> In other contexts, such as arbitration under the UNCITRAL Rules, there have been attempts at a more precise delineation of the term.

characterization of its claim as a counter-claim is not determinative of this matter. It is a judicial question for determination by the Court. The question must first be asked whether the claim that is presented is a counter-claim such as is recognized in ordinary legal phraseology.

(A) THE MEANING OF THE TERM “COUNTER-CLAIM”

To my mind, a counter-claim is what its name implies — that it is a legal claim or factual situation alleged by the respondent that *counters* the claim set up by the applicant. The mere fact that it is a claim made by the respondent in the same proceedings is not enough. The mere fact that it pays back the plaintiff in the same coin, so to speak, does not make it a counter-claim. The juristic concept of a counter-claim has more to it than mere parallelism or reciprocity. There must be some point of intersection between the claims, which makes one exert an influence upon the judicial consequence of the other.

The ordinary meaning of the expression “counter-claim” lends support to this view. *The Concise Oxford Dictionary*<sup>4</sup> gives two meanings to the expression. The first is “a claim made against another claim”. Under this definition, the two claims in question should, in principle, be capable of being opposable to each other — whether by way of diminution of responsibility, or by monetary set-off, or in any other legally recognized manner. Failing this, one cannot be a counter-claim to the other.

The other meaning given to “counter-claim” is that it is “a claim made by a defendant in a suit against the plaintiff”. This meaning emphasizes another aspect, namely, that such claims are envisaged only in civil proceedings, for these expressions — “plaintiff”, “defendant” and “suit” — are quite clearly set in the context of civil claims. Crimes, by their very nature, do not fit within this definition.

*Black’s Law Dictionary*, on the same lines, gives a short definition of a counter-claim for the Anglo-American system as:

“A claim presented by a defendant in opposition to or deduction from the claim of the plaintiff. Fed. R. Civil P. 13. If established, such will defeat or diminish the plaintiff’s claim.”<sup>5</sup>

<sup>4</sup> 9th ed., 1995, p. 306.

<sup>5</sup> 6th ed., 1990, p. 349.

The understanding of the word "counter-claim" by those who inspired the drafting of Article 40 of the Rules in 1922 is also illuminating. To quote a verbatim record of the discussion at the 1922 preliminary session:

"M. WEISS (*translation*). — Are there not cases where a counter-claim may be regarded as a defence to the principal claim?

M. ANZILOTTI (*translation*). — *That is what we call a plea of counter-claim, but that would be a question to be decided by the Court in the particular case.*"<sup>6</sup>

The counter-claim was thus, according to the understanding of President Anzilotti, a claim which operated, at least *inter alia*, as a defence to the principal claim.

Another aspect of counter-claims, stressed by various writers on the subject, is that their object goes beyond the mere dismissal of the principal claim, to obtain something more<sup>7</sup>. This suggests that while the essential character of a counter-claim is to impinge on the original claim and thus weaken or destroy it, it may even go further. The attack upon the original claim would appear, however, to be one of its basic characteristics. Having regard to President Anzilotti's prominent contribution to the discussion leading to the drafting of the Rules of the Permanent Court of International Justice, his observations must carry great weight in our understanding of the rule relating to joinder of counter-claims as it presently stands.

At the meeting of the Permanent Court held on 28 May 1934 to consider Article 39 of the Rules then prevailing, which dealt *inter alia* with a counter-case presented by the respondent, Mr. Fromageot observed that the best definition of a counter-claim would be "a claim directly dependent on the facts of the main action"<sup>8</sup>, and Mr. Negulesco that, in using the expression "direct connection", the authors of the new text had in mind what was termed in English "the counter-claim", but had wished to exclude the cross action<sup>9</sup>.

A leading article on the subject, written shortly after the 1936 Rules, probably captures the contemporary understanding of these Rules, when it observes specifically that:

"counter-claim proceedings should have the objective of neutralizing the principal claim by means of a counter-attack, of having the prin-

<sup>6</sup> *P.C.I.J., Series D, No. 2, 4th Add.*, p. 262 (emphasis added).

<sup>7</sup> See D. Anzilotti, "La demande reconventionnelle en procédure internationale", *Journal du droit international*, Vol. 57, 1930, p. 867. See, to the same effect, Georges Scelle, "Report on Arbitration Proceedings", submitted to the International Law Commission in 1949, *Yearbook of the International Law Commission*, 1950, Vol. II, p. 137.

<sup>8</sup> *P.C.I.J., Series D, No. 2, 4th Add.*, p. 264.

<sup>9</sup> *Ibid.*

principal claim dismissed, and this objective necessarily includes requesting a judgment against the applicant in the principal proceedings”<sup>10</sup>.

As to the words “une demande reconventionnelle”, appearing in the French version of the Rules, it is useful to recall that at the same 1922 session, when the proposal to add “une demande reconventionnelle” was discussed, Lord Finlay observed: “There might be *une demande reconventionnelle* which, though in form a demand, was *really in the nature of a defence to the proceedings*.”<sup>11</sup>

I note also the statement in the *Corpus Juris Secundum* that “reconvention, in the civil law, is equivalent in general to a counter-claim; it is a demand that a defendant in a suit is permitted to engraft on the main action”<sup>12</sup>. The *Corpus* goes on to mention that “reconvention”, “reconventional demand”, and “demanding reconvention” are civil law terms.

Analogies in domestic jurisprudence are plentiful. The party responding to a claim for relief seeks, by presenting the counter-claim, to negate the claim or to reduce or mitigate it. The principal object of the exercise is to whittle down or destroy the claim presented. The party seeks alleviation of the legal consequences of its own action through reliance on countervailing circumstances constituting a claim, though of course it may seek more.

A claim that is autonomous and has no bearing on the determination of the initial claim does not thus qualify as a counter-claim. Especially would this be so of a vast catalogue of criminal acts which is advanced as a “counter-claim” to a vast catalogue of similar criminal acts alleged by the applicant. The juristic thread which is necessary to link the two as claim and counter-claim is lacking, for neither the second catalogue nor any component item thereof is an answer to the first catalogue or any of its component items. The two stand separate and distinct, as two separate and independent subjects of enquiry.

#### *The Inapplicability of the Concept to Criminal Offences*

Indeed, the concept of a counter-claim is a concept of the civil, as opposed to the criminal, law, for while civil acts and claims may be set

<sup>10</sup> R. Genet, “Les demandes reconventionnelles et la procédure de la C.P.J.I.”, *Revue de droit international et de législation comparée*, Vol. 19, 1938, p. 175 [translation by the Registry; cited by Bosnia].

<sup>11</sup> *P.C.I.J., Series D, No. 2, 4th Add.*, p. 262 (emphasis added).

<sup>12</sup> Vol. LXXX, p. 16.

off one against another, the intrinsic nature of a criminal wrong prevents the set-off of one criminal act against another. The impact of crime stretches far beyond the party actually injured, and the concept of one crime being set off or used as a counter-claim to another crime is totally alien to modern jurisprudence, domestic or international.

A murder cannot be set off against another murder, nor a rape against a rape. Crimes must be viewed against the jurisprudential background of the interests and rights of the community. Civil claims, by way of contrast, are viewed against the background of the rights of the individuals concerned. Moreover, civil claims, which are often quantified in monetary terms, are inherently capable of being set off one against the other. When the individual claimant is thus satisfied, the matter is at an end. In the field of crime, however, the wrong done to the community cannot be ended in this fashion by a set-off of one act of criminality against the other. Least of all can crime be counter-claimed against crime. Legitimate defences and extenuating circumstances may naturally be pleaded as an undoubted right of the respondent, but always within the scope of their proper function — such as denial of facts, denial of responsibility, mitigation of offence, and the like — never as a counter-claim which offsets or neutralizes the crime in the sense in which a counter-claim does in a civil context.

What I have observed thus far applies *a fortiori* to the international crime of genocide. An act of genocide by the applicant cannot be a counter-claim to an act of genocide by the respondent. Each act stands untouched by the other, in drawing upon itself the united condemnation of the international community.

On more than one occasion, this Court has stressed this aspect of genocide in the strongest terms. In its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, it observed:

“In such a convention, the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.”<sup>13</sup>

The Genocide Convention takes us beyond the realm of crimes against any particular State, and into the realm of crimes against humanity, where the notion of balancing of individual State interests is unthinkable.

<sup>13</sup> *I.C.J. Reports 1951*, p. 23.

This Court has therefore stressed more than once the *erga omnes* character of the rights and obligations flowing from the Convention, which makes the wrongdoers responsible to the international community as a whole<sup>14</sup>.

As Bosnia and Herzegovina argues, Yugoslavia's Counter-Memorial is in two parts. One part consists of a reply to the accusations contained in Bosnia and Herzegovina's Memorial. It consists, *inter alia*, of evidence and materials of the sort which a Court must necessarily take into account in determining the principal claim — material which every respondent to a charge of crime has an undoubted right to place before the Court. This material must, of course, be considered by the Court within the ambit of the present proceedings.

The second part, however, which is twice as voluminous, treads different ground. It proceeds from the defensive to the offensive and alleges that the complainant itself is guilty of the very same category of offences with which the Respondent is charged. An accused person is always entitled to make such allegations in separate proceedings if they can be proved, but not as a *counter-claim* to the original charge. The facts may be relevant by way of mitigation of the original charge, but not as the substance of an independent claim.

These allegations cannot therefore be considered to be a counter-claim within the meaning of Article 80, enabling it to be heard within the framework of the current case.

The Respondent pleads that the facts presented in Part Two, Chapter VII, of the Counter-Memorial, "i.e., crimes of genocide committed against the Serb people in Bosnia and Herzegovina are part and parcel of the circumstances of the situation"<sup>15</sup>. Even if this be so, they still remain separate acts of genocide. Even on the assumption that the acts of genocide alleged against Bosnia and Herzegovina are proved, the acts of genocide alleged against Yugoslavia do not lose their gravity.

The "counter-claim" of genocide necessarily depends on other facts than the genocide alleged by Bosnia, for the alleged murderers are different, the victims are different, the motivations are different, and the times and venues are not coincidental. In short, a separate fact-finding process is required for the enquiry into the claim and the enquiry into the "counter-claim". Each of these enquiries must be independently pursued, and will require independent evidence to be placed before the Court. The

---

<sup>14</sup> *Barcelona Traction, Light and Power Company, Limited, I.C.J. Reports 1970*, p. 32, para. 33; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, I.C.J. Reports 1996*, p. 22, para. 31.

<sup>15</sup> Statement of Yugoslavia concerning the admissibility of the counter-claim, 23 October 1997, p. 20, para. 6.4.

judicial conclusions reached in the one do not dilute or magnify the conclusions reached in the other.

(B) THE DISCRETION OF THE COURT

Circumstances exist in the present case which, in my view, should incline the Court, even if all the other prerequisites are satisfied, to use its discretion against the joinder of the Respondent's application to that of the Applicant.

In the first place, the case of the Applicant has been pending before this Court since 1993, and now, at the end of 1997, when the case is nearly ripe for hearing, the Applicant is entitled to an expeditious disposal of this matter. What is sought to be introduced by way of a counter-claim four years later, which is in reality another claim of the same magnitude as the claim of the Applicant, will necessarily have the effect of further delaying the hearing of the Applicant's claim.

Furthermore, not only will there be delay in bringing the allegations of the Respondent to a state of readiness for hearing, but the actual process of hearing will itself be prolonged. The claim of Bosnia and Herzegovina is complex enough already, with vast numbers of allegations of fact to be probed and proved. That itself is a task which would probably require several weeks, if not months, of hearing. To combine this massive set of allegations with a fresh set of allegations of like magnitude will considerably lengthen the time necessary for the hearing of the case. Delay in actual hearing, added to delay in preparation for hearing, could well defeat the ends of justice.

I note in this connection, the stress laid by the *International Encyclopedia of Comparative Law* (in its volume on "Civil Procedure" which surveys the cross action in numerous jurisdictions) upon the importance of the principle that the decision on the principal action should not be delayed by consideration of the cross action. In dealing with what it describes as, "The cross-action in cases of connexity of claim and counter-claim", it refers, with approval, to a procedure available in Germany, "by which plaintiff's well-founded, ripe complaint can proceed to judgment without regard to the cross action", thus stressing the importance of not permitting a principal claim, which is ripe for hearing, to be delayed by a cross or counter-claim<sup>16</sup>.

Moreover, in hearing the case, the Court would be moving from one set of allegations to the other, and would not be able to reach a conclu-

<sup>16</sup> *International Encyclopedia of Comparative Law*, Vol. XVI, "Civil Procedure", Mauro Cappelletti (ed.), pp. 66-67.

sion upon the case presented to it until it has heard the entire case against the Applicant. There will not be that concentration upon the subject-matter of either claim which would be requisite for the proper determination of a matter of this degree of complexity.

The Court will, in fact, be making one case out of two separate cases, each involving voluminous evidence in regard to a multitude of criminal acts, and, in the process, imposing an enormous procedural burden upon itself, with little corresponding benefit to either Party. It may be noted that the second part of the Yugoslavian Counter-Memorial, containing the allegations on which the "counter-claim" is based, runs to over 700 pages of material aimed at proving that Bosnia and Herzegovina was itself guilty of violations of the Genocide Convention. These 700 pages of allegations will need separate verification, quite independently of the verification required for the several allegations that are the substance of Bosnia and Herzegovina's claim.

After hearing the extensive evidence that will no doubt be offered by the Applicant, the Court would have to reserve its conclusions thereon until it heard the extensive evidence which would similarly be offered by the Respondent. From a practical point of view, this would hamper the process of decision-making upon the first set of facts for so long a period, that the impressions created by them upon the minds of the judges may well lose their freshness and immediacy. This can be very damaging to the process of fact-finding in a long drawn out enquiry.

There is also a question of principle involved here, because if this Application should be allowed, it could open the door to parties who seek to delay proceedings against themselves to file, when the case is nearly ready for hearing, what is, in effect, another case against the applicant, with a view to delaying the proceedings against itself. Where such an application comes years after the original claim, this could have damaging effects upon the due administration of international justice.

The claim of the Respondent, now put forward four years after the Applicant's claim, could always be heard by way of separate proceedings, if it were instituted as such. No prejudice is thereby caused to the Respondent, who can urge in such proceedings whatever contention, and adduce whatever evidence, it can in the present case.

The situation contemplated by Article 80 is quite distinct from that contemplated by Article 47 of the Rules which permits two or more separate cases to be joined. Had Yugoslavia filed a separate case on the subject-matter it now advances in its counter-claim, and had an order of joinder seemed appropriate by reason of common background, similar

circumstances, judicial economy, or other cogent reason, such an Order could well have been a course available to the Court and the Parties.

However, that is not the situation we face here. A different claim has been filed within the ambit of the same case.

In exercising its discretion, the Court also needs to bear in mind another aspect touching on the “equality of arms” of the Parties before it.

However great may be the magnitude of its subject-matter, the respondent to the counter-claim, namely the original applicant, has in general only one opportunity to state its position on the allegations made against itself, whereas the respondent to the original claim has the opportunity not only to file a counter-memorial, but also to file a rejoinder. When cases of this magnitude are joined, in the fashion requested by the Respondent in the present proceedings, this aspect of inequality can weigh rather heavily upon its adversary, especially in a case such as the present.

Indeed, this aspect attracted the attention of Mr. Negulesco, at the meeting of the Permanent Court of 28 May 1934, already referred to, Mr. Negulesco observed that:

“in a normal case before the Court, each party could file two written documents and could address the Court twice orally. On the contrary, in the case of counter-claims, the existing system, according to which the respondent raised a counter-claim in the Counter-Case only, allowed the applicant to file a single written document — the Reply — in regard to the claim, whereas the respondent could refer to the matter a second time, in his Rejoinder. M. Negulesco raised the question whether this inequality between the parties in the written proceedings in regard to a counter-claim was not inconsistent with the spirit of the Statute.”<sup>17</sup>

The Court has, in the present case, taken note of this aspect, in paragraph 42 of the Order, by providing Bosnia and Herzegovina with the right to provide its views a second time in an additional pleading, but this is an aspect that needs to be borne in mind whenever future counter-claims are involved. Moreover, it is an aspect that makes for further delay in bringing the conjoint case to a trial-ready state.

All these are circumstances that bear upon the exercise of the Court’s discretion in deciding whether to join a counter-claim to the original claim, even if all the other requisites are satisfied. In my view, they should have inclined the Court to use its discretion against joinder.

---

<sup>17</sup> *P.C.I.J., Series D, No. 2, 4th Add.*, p. 262.

## (C) THE INVOLVEMENT OF A THIRD STATE

Another consideration which I view as militating strongly against the Respondent's contention that its claim against Bosnia and Herzegovina should be joined to Bosnia and Herzegovina's claim against itself, is that the alleged counter-claim also involves the conduct of Croatia. A "counter-claim" between the immediate parties to litigation is one thing. But a counter-claim involving a third party is another. Both convenience and judicial economy could be adversely affected by the joinder to a claim of a "counter-claim" involving a third party.

Furthermore, from the standpoint of practical considerations, this introduces yet another element of delay. Croatia would have to be given notice of its involvement and would be entitled to file its response to whatever allegations are made against it. It would need time to do so, in addition to such time as is already involved in the joinder of the two claims. New witnesses may well be necessary, thus adding further complications to the already difficult task imposed on the Court of examining the allegations made by each Party against the other.

For these reasons, I consider that the joinder of a claim involving a third party, namely, Croatia, militates against the spirit and purpose of the Court's procedural provisions relating to counter-claims — and particularly so in the circumstances of this case.

\* \* \*

The considerations outlined above persuade me to the view that, in the present case, the course which would have been more in accordance with legal principle and practical convenience would have been to proceed to the hearing and completion of the Application of Bosnia and Herzegovina, leaving to Yugoslavia its undoubted right to make its counter-claim the subject of a separate proceeding. This rather long-delayed Application would then be brought to completion, and the way cleared for the hearing of the counter-claim as a case by itself which, in my view, it undoubtedly is. Both Parties would then have had the benefit of an expeditious hearing and a concentration of the Court's attention upon their respective claims and allegations, uncluttered by voluminous evidence extraneous to the particular subject-matter of each case.

(Signed) Christopher Gregory WEERAMANTRY.