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."[1]

The Court's Order in this case ventures into new legal territory[2] 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.

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

[2] 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[3]. 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

[3] 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*[4] 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."[5]

[4] 9th ed., 1995, p. 306.
[5] 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."[6]

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[7]. 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"[8], 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[9].

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-

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[6] *P.C.I.J., Series D, No. 2, 4th Add.*, p. 262 (emphasis added).

[7] 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.

[8] *P.C.I.J., Series D, No. 2, 4th Add.*, p. 264.

[9] *Ibid.*

cipal claim dismissed, and this objective necessarily includes requesting a judgment against the applicant in the principal proceedings" [10].

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.*" [11]

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" [12]. 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

[10] 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].

[11] *P.C.I.J., Series D, No. 2, 4th Add.*, p. 262 (emphasis added).

[12] 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."[13]

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.

[13] *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[14].

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"[15]. 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

[14] *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.

[15] 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[16].

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-

[16] *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."[17]

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.

[17] *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.