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 judicus*), 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 Maestricht 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 Maestricht, 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 Maestricht 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 Maestricht 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 reconvención 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."[1] (A. Miaja de la Muela, "La reconvención 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.

[1] "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 KREĆA.