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.