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.