(c) Case Analysis

Counterclaims Before the International Court of Justice: The *Genocide Convention* and *Oil Platforms* Decisions

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Keywords: counter-claims; International Court of Justice; Permanent Court of Justice; procedure.

Abstract: The provisions of the ICJ Rules of Court concerning counter-claims have fallen to be applied in two recent cases, in circumstances such the Court has had to examine the nature of a counter-claim and the conditions for its admission as such, and in particular the nature of the 'direct connection' with the subject-matter of the application, required by the Rules. In each case the counter-claim was admitted, over the dissent of some judges: these decisions are probably justified, even though some aspects of the reasoning may be criticised.

Only connect ...[1]

1. INTRODUCTION

In two recent decisions, the International Court of Justice has had to examine and interpret the provisions of its Rules concerning counter-claims. In the case concerning the *Genocide Convention*,[2] in which Bosnia and Herzegovina had accused Yugoslavia of violations of that Convention committed in the territory of Bosnia and Herzegovina, Yugoslavia, after first unsuccessfully challenging the jurisdiction of the Court under the Convention,[3] filed a counter-claim accusing Bosnia and Herzegovina of similar violations in its own territory. The *Oil Platforms* case[4] was brought by Iran against the United States on the grounds that that state had com-

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1. E.M. Forster, Howards End (1910).
2. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia (Serbia and Montenegro)), Counter-claims, Order of 17 December 1997, 1997 ICJ Rep. 243.
3. 1948 Convention on the Prevention and Punishment of the Crime of Genocide, reproduced *in* 78 UNTS 277 (1951).
4. Oil Platforms (Islamic Republic of Iran *v.* United States of America), Counter-claim, Order of 10 March 1998, 1998 ICJ Rep. (not yet published). The full text is available on Internet: http://www.icj-cij.org/icjwww/idocket/iop/iopframe.htm.

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mitted breaches of a treaty between the two states, inasmuch as US Navy warships had attacked and destroyed three offshore oil production complexes in the Gulf belonging to the National Iranian Oil Company. The United States also first challenged the jurisdiction of the Court, and on the rejection of its preliminary objections, filed a counter-claim alleging breaches of the same treaty by Iran, "in attacking vessels, laying mines in the Gulf and otherwise engaging in military actions in 1987-1988 that were dangerous and detrimental to maritime commerce".[5]

While this is by no means the first time that counter-claims have been presented in proceedings before the Court, it has not previously been necessary to consider in any depth the essential nature of a counter-claim as envisaged by the Rules of Court, the conditions of its admissibility as such, and the relationship of such a claim to the main claim, problems on which the guidance afforded by the applicable texts is no more than sketchy. The Court in the *Genocide Convention* case began its discussion of the applicable text, Article 80 of the 1978 Rules of Court, which requires that a counter-claim be "directly connected" with the subject-matter of the Applicant's claim, by observing that "the Rules of Court do not define what is meant by 'directly connected'".[6] There is however not even a definition in the Statute or the Rules of what are "counter-claims"; in order to have a provisional, pragmatic definition for working purposes, we may define them as claims presented, in the context of proceedings already instituted before the Court, by the respondent against the applicant, and which the respondent wishes to have determined by the Court along with the claims of the applicant in those proceedings.

It should however not be supposed that such lack of definition of terms in the Statute and Rules was a mere oversight. At the time that the Statute of the Permanent Court of International Justice was drafted, and when that Court first drew up, pursuant to Article 30 of that Statute, the Rules of Court for its implementation, it was appreciated that it would not be possible at that early stage to provide in advance a precise and detailed code of procedure. Despite the existence of precedents in the form of arbitration agreements and rules of procedure drawn up by arbitral tribunals, and the parallels that could, with caution, be drawn from the procedure of national courts, a certain amount of discretion or flexibility had to be left by the Statute to the judges, to be exercised by them both in the drawing up of the Rules of Court and in the subsequent implementation of the texts.[7] Little by little over the years many of the gaps have been filled, and the doubts resolved: for example, the preliminary objection procedure has been devised to respect the principle that the merits of a dispute may not be heard if it is contended that there is an absence of ju-

5. *Id.*
6. *See* Genocide Convention case, Order, *supra* note 2, para. 33.
7. Thus in 1936 a Committee of the Permanent Court of International Justice set up in the context of the revision of the Rules of Court proposed that "il serait préférable de laisser, comme par le passé, le développment de l'institution de l'action reconventionnelle à la jurisprudence de la Cour". *See* Acts and Documents Concerning the Organization of the Court, PCIJ (Ser. D) No. 2, 3rd addendum, at 781.

risdiction or the application is for some reason inadmissible, until those questions have been resolved; forms of procedure have been established for advisory proceedings; and on numerous minor points the practice of the Court has either been codified into the Rules, or recognized as established, so as to be followed and relied on.[8]

Inevitably this process has taken time: the number of cases before the two Courts has, in comparison with the docket of a national court, been so limited that the statistical chances of a particular text requiring interpretation – unless it be one which is necessarily applicable in all proceedings – have inevitably been small. Thus for example it was not until 1981 that the Court was faced with a problem of interpretation of a text which proved to be highly controversial and to raise much difficulty, namely Article 62 of the Statute, providing for intervention by a third state in proceedings when it has "an interest of a legal nature which may be affected" by the decision in the case.[9]

The pattern in relation to the provisions of the Rules of Court concerning counter-claims[10] has been different, in as much as counter-claims were made before the Permanent Court as early as 1928 in the case concerning the *Factory at Chórzow*,[11] and were subsequently advanced in the cases concerning *Diversion of Water From the Meuse*[12] *and Panevezys-Saldutiskis Railway*,[13] and before the International Court of Justice in the cases concerning *Asylum*[14] and *Rights of Nationals of the United States in Morocco*.[15] Yet none of those cases raised any major problem of interpretation or of principle: only in the *Asylum* case was there any substantial dispute between the parties as to the applicability or the meaning of the relevant texts,

8. The question to what extent the Court's practice in procedural matters is precedent-setting, so as to require respect when the same point arises in a subsequent case, is itself unsettled. However, questions of practice are to a large extent questions of interpretation of the text of the Statute and Rules of Court, and on normal principles of treaty-interpretation, an interpretation once adopted should not lightly be discarded.
9. *See* Continental Shelf case (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene, Judgment of 14 April 1981, 1981 ICJ Rep. 3; Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, Judgment of 21 March 1984, 1984 ICJ Rep. 3; Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment of 13 September 1990, 1990 ICJ Rep. 3, at 92; and Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Judgment of 11 September 1992, 1992 ICJ Rep. 351, at 609-610. The literature on the subject of intervention is immense, and of very varying quality...
10. 1922 PCIJ Rules of the Court, Art. 40; 1936 PCIJ Rules of the Court, Art. 63; 1946 ICJ Rules of the Court, Art. 63; 1972 ICJ Rules of the Court, Art. 68; and 1978 ICJ Rules of the Court, Art. 80.
11. The Factory at Chorzów (Claim for Indemnity) (Germany *v.* Polish Republic), Merits, Judgment No. 13 of 13 September 1928, 1928 PCIJ (Ser. A) No. 17, at 36 *et seq.*
12. Diversion of Water From the Meuse (The Netherlands *v.* Belgium), Judgment of 28 June 1937, 1937 PCIJ (Ser. A/B) No. 70, at 7, 28, and 32.
13. Panevezys-Saldutiskis Railway (Estonia *v.* Lithuania), Judgment of 28 February 1939, 1939 PCIJ (Ser. A/B) No. 76, at 7-8.
14. Asylum case (Colombia/Peru), Judgment of 20 November 1950, 1950 ICJ Rep. 266, at 270-271, 280-281, and 288.
15. Rights of Nationals of the United States in Morocco (United States of America *v.* Morocco), Judgment of 27 August 1952, 1952 ICJ Rep. 176, at 181 and 213.

and the Court settled the question without apparent difficulty, and without dissenting voices. Thus, as Vice-President Weeramantry has observed, "the jurisprudence of the Court in regard to counter-claims is not well developed".[16] It has hitherto not even been necessary to determine the question: what *is* a counter-claim in the procedures of the Court? – and even now, the pragmatic definition given above may suffice, provided it is added to the condition of compliance with the specific conditions of Article 80 of the Rules of Court. Two questions in this connection have lain dormant and unresolved in the text of the Rules, and finally presented themselves to the Court in the cases concerning the *Genocide Convention* and *Oil Platforms*.

The first question was that already referred to: what exactly is meant by the requirement, now in Article 80 of the Rules of Court, that a counter-claim may only be presented if it is "directly connected with the subject-matter of the claim of the other party"? The second question, dealt with in detail by only one member of the Court, is: what is the significance of the additional words of the article, requiring "that it comes within the jurisdiction of the Court"?

At first sight, it was not apparent why in either of the two recent cases the latter question should arise, since in each of them, as noted above, there had already been a finding by the Court, on the basis of a preliminary objection by the respondent state, that the Court had jurisdiction to entertain the claim.[17] In each of the cases the title of jurisdiction asserted in relation to the counter-claim was substantively identical to that relied on to found the claim, and already upheld in that context. Thus two potential difficulties in applying the text of Article 80 were absent. One might imagine that a ground of jurisdiction might be asserted by the respondent state in relation to its counter-claim which was totally different from that relied on by the applicant state, and this difference in itself might be asserted to involve non-compliance with Article 80;[18] and either title of jurisdiction might be challenged

16. *See* Genocide Convention case, Order, *supra* note 2, at 287 (Vice President Weeramantry, Dissenting Opinion).
17. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment of 11 July 1996, 1996 ICJ Rep. 595; and Oil Platforms, Preliminary Objections, Judgment of 12 December 1996, 1996 ICJ Rep. 803. This is less of a coincidence than might appear: in each case the Respondent delayed presenting its counter-claim until its attempts to have the case thrown out on jurisdictional grounds had failed. The resultant delay was however, for some members of the Court, a source of difficulty; *see infra*, at 224-225.
18. Judge Higgins, in her Separate Opinion in the Oil Platforms case, Order, *supra* note 4, rejected this view, by reference to the municipal-law analogy of counter-claims in tort brought in response to actions instituted in contract, but it may be questioned whether these are separate titles of jurisdiction in any sense analogous to that concept in international law. If the original proceedings were brought by special agreement, it must be at least doubtful whether a counter-claim falling outside the special agreement could be brought on the basis of another title of jurisdiction. *See* S. Rosenne, The Law and Practice of the International Court of Justice 1920-1996, Vol. II, at 959-960 (1997). Such a counter-claim would however probably lack any "direct connection" with the principal claim, in any event.

and thus require investigation by the Court before any question of the substantive compliance of the counter-claim with the Rules of Court could be examined.

2. THE REQUIREMENTS OF THE RULES OF THE PCIJ AND THE ICJ

The present text of the Rules of Court, Article 80(1), requires that a counter-claim be "directly connected with the subject-matter of the claim of the other party", and that it come "within the jurisdiction of the Court". These requirements were introduced into the Rules at different times.

2.1. The jurisdictional requirement

Of the two conditions of admissibility now stated in Article 80 of the Rules, that referring to jurisdiction was the first to be defined. During the Preliminary Session of the Permanent Court in 1922, when the Court came to discuss the draft rule concerning counter-memorials (then known as 'counter-cases'), Judge Anzilotti drew attention to the text which provided that the 'conclusions' in counter-cases "may include counter-claims".[19] He pointed out that:

> in the case of a special agreement, a counter-claim could not be submitted, and that, in the case of an application, a claim of this nature could only be submitted if it came within the conditions subject to which all the parties had accepted the compulsory jurisdiction of the Court.[20]

So far as special agreement cases are concerned, clearly what Judge Anzilotti meant was that counter-claims relating to matters outside the subject-matter of the special agreement could not be introduced; as the *Gabčíkovo/Nagymaros* case, for example, shows, claims by each party against the other will often be of the essence of the procedure for settlement of a dispute brought before the Court by special agreement,[21] so that which are 'claims' and which are 'counter-claims' may depend on the order of pleading, or be no more than a semantic question. In this context, the jurisdictional test and the 'connection' or subject-matter test, later introduced into the Rules, amount in effect to two statements of the same requirement. The purpose of the jurisdictional test was, primarily in relation to cases brought by ap-

19. Acts and Documents Concerning the Organization of the Court, PCIJ (Ser. D) No. 2, at 465 (Draft Article 41).
20. *Id.*, at 139-140.
21. As was pointed out by Judge Urrutia during the discussions in 1934. In response, Judge Anzilotti thought that "in the circumstances mentioned, it would not be a question of counter-claim but of reciprocal claims". *See* Acts and Documents Concerning the Organization of the Court, PCIJ (Ser. D) No. 2, 3rd addendum, at 109. In The Gabčíkovo/Nagymaros Project (Hungary/Slovakia), Judgment of 25 September 1997, 1997 ICJ Rep. 7, each party accused the other of breaches of the treaty between them, and each party sought reparation for such breaches.

plication, to prevent a state in the position of respondent from taking advantage of the jurisdictional nexus established by the application in conjunction with its underlying title of jurisdiction, in order to bring before the Court a matter to which that title would not have applied; the test would operate *a fortiori* in a case where jurisdiction was derived from a special agreement. Until 1936 it was not thought necessary to include in the Rules any further condition.

The condition as to jurisdiction has been maintained in the Rules of Court, though with slight linguistic changes, up to the most recent revision, that of 1978. Its inclusion however carries an important implication as to the nature of the counter-claims contemplated by the text. The meaning of the requirement that the counter-claim come 'within the jurisdiction of the Court' is apparently that a jurisdictional title must exist such that the claim presented as a counter-claim in proceedings already instituted could equally well have been brought before the Court by way of an application instituting separate proceedings.[22] This is clearly essential, by virtue of the principle that jurisdiction is derived solely from consent.[23] It follows that the fact that independent proceedings could have been brought cannot as such constitute an objection to the admissibility of a counter-claim. Counter-claims as an institution may be an exceptional procedure, the norm being that each claim by one state against another is the subject of separate proceedings brought by application or special agreement; but the institution of separate proceedings, and the bringing of a counter-claim, cannot be mutually exclusive alternatives.

However, the idea that all claims, even counter-claims responding to claims already before the Court, should in principle be brought by separate application, is to be found in the discussion of the Permanent Court in 1934, when it was even suggested that in the Rules of Court: "there should be a special article relating to counter-claims and [...] it should be provided there that such claims should be presented in the form of applications".[24] This proposal was not accepted, and it is submitted that its rejection was justified. It is inconsistent to require, as a condition of admission of a counter-claim in the context of existing proceedings, that counter-claims 'come within the jurisdiction of the Court', and at the same time to deny their admission as counter-claims within the context of proceedings already instituted. The reference to jurisdiction was retained in the PCIJ Rules, and in the revised text eventually adopted in 1936, the additional requirement of a 'direct connection' was added.

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22. Purely on a textual basis, one might read the requirement as referring to "jurisdiction" in what G. Fitzmaurice has referred to as the "field" sense, *i.e.*, as falling within "the general class of case in which a tribunal has jurisdiction". *See* Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 34 British Year Book of International Law 7 (1958), rather than in relation to the specific question raised in the counter-claim: but this does not seem to be sufficient, nor, indeed, what Anzilotti meant.
23. Unless it were understood that the institution of proceedings itself constituted consent to the determination of any counter-claim directly connected with the principal claim. *See infra*, at 204.
24. *See* Acts and Documents Concerning the Organization of the Court, PCIJ (Ser. D) No. 2, 3rd addendum, at 106.

2.2. The requirement of 'direct connection'

This requirement corresponds to a widespread, if not universal, parallel in municipal legal systems.

> In principle, all legal systems admit a cross-action where there exists an inter-relation of claim and counterclaim. Such is the case if both claims arise out of one and the same legal relationship, especially if the rights asserted by plaintiff and defendant are mutually exclusive.[25]

The terminology used in the 1936 Rules was that the counter-claim should be "directly connected with the subject of the application".[26] It was then not thought possible to *substitute* the condition of "direct connection" for that of jurisdiction, so as to render the latter condition superfluous. This historical sequence, and indeed the very terms of Article 80 of the Rules of Court, imply that the two conditions there stated for the admission of a counter-claim are cumulative, that both must be satisfied: the counter-claim must be "directly connected with the subject-matter of the claim of the other party" and must come "within the jurisdiction of the Court".

It follows that claims may exist which come within the jurisdiction of the Court but which are not 'directly connected' with the claim, in a case pending before the Court, of the party against which such other claims are to be brought. This of course hardly needs demonstration, since it is evident that a whole range of mutually unconnected claims may at the same moment exist between two states, of which some might be justiciable under one title of jurisdiction, e.g., a compromissory clause in a treaty, and some under another, e.g., a different treaty, or an optional-clause declaration.

However, it also follows that a claim by one state against another may be 'directly connected' with a claim pending before the Court brought by the latter state, yet jurisdiction may not exist for the Court to hear the claim as a counter-claim, i.e., direct connection does not necessarily imply jurisdiction. This view was however not shared by Hudson, who considered that "once established the jurisdiction of the Court would seem to extend to any claim directly connected with the subject of the application".[27] What are the implications of this approach, taken by one of the most

25. W. Blomeyer, *Types of Relief Available (Judicial Remedies), in* International Encyclopedia of Comparative Law, Vol. 16, at 66, para. 4-138. Blomeyer mentions a contemporary development in (the Federal Republic of) Germany whereby cross-actions are allowed in a wider class of cases, but as a corollary, in these "non-related" cases, "the decision in the principal action may not be delayed by consideration of the cross-action". This has been seen as a relevant parallel in the context of the relevance of delay resulting from a counter-claim before the ICJ. *See infra* Section 4.2. and Genocide Convention case, Order, *supra* note 3, at 293 (Vice-President Weeramantry, Dissenting Opinion).
26. *See* 1936 PCIJ Rules of Court, Art. 63.
27. M.O. Hudson, The Permanent Court of International Justice, 1920-1942, at 292-293 (1943).

https://doi.org/10.1017/S0922156599000072 Published online by Cambridge University Press

authoritative commentators on the Rules and procedure of the Permanent Court? One reading of it would be to suppose that the requirement that the counterclaim come within the jurisdiction of the Court means that it must be supportable on the basis of jurisdiction advanced to found the original claim, since only in that case could it be said that the original jurisdiction "would seem to extend", automatically, one may suppose, "to any claim directly connected with the subject of the application". In both the recent cases in which a decision was required on the admissibility of a counter-claim, the jurisdiction asserted in relation to the counter-claim was that created by the same treaty as that relied on by the original applicant to found jurisdiction, so that even on this reading of Hudson's interpretation the counter-claims would be admissible. However, in the *Oil Platforms* case there was a question as to which articles of the treaty could be the basis for claims to which the compromissory clause in the treaty would relate, since the counter-claims alleged breaches of articles not invoked by the applicant in support of its claim; this however was not a point taken up by the Court, but only by Judge Higgins.[28]

An alternative view of the relationship between jurisdiction and 'connection' would be that to bring proceedings before the Court is to accept the possibility that a counter-claim may be brought, and to accept that the Court should have jurisdiction to deal with it, provided that it is one 'directly connected' with the subject-matter of the claim. It is already a consequence of bringing a claim that the applicant may be exposed, for example, to a request by the respondent party for the indication of provisional measures to be taken by the applicant; in this case, however, the relevant texts are tolerably clear in providing for the possibility.[29] Had the provision as to jurisdiction been omitted from what is now Article 80 of the Rules, as Hudson in fact thought it could or should have been[30], such an interpretation of advance acceptance of the possibility of counter-claims might be tenable; it is difficult to square with the provision as it stands.

While the condition of 'direct connection' first appears in the 1936 Rules of the Permanent Court, the idea can in fact be traced further back. The records of the discussions of the Draft Rules in 1922 contain no *explicit* reference to the idea of connection between claim and counter-claim; but the first such reference, to be found in the discussions in 1934 leading up to the revision of the Rules completed in 1936, reveals that the question had been adverted to in 1922. Judge Schücking in 1934 raised the question whether the term 'counter-claim' covered "only claims arising out of the defence", or "could the respondent always bring a counter-claim in the Counter-Memorial, even if the counter-claim had no connection with the

28. *See infra*, Section 4.2.
29. 1978 Rules of Court, Art. 75, para. 2: "[w]hen a request for provisional measures has been made, the Court may indicate measures [...] that ought to be taken or complied with by the party which has itself made the request".
30. Hudson, *supra* note 27, at 292-293, considered it "quite unnecessary" as to "direct counter-claims".

principal claim?".[31] Judge Anzilotti recalled that the question had arisen in a case already heard (in fact the *Factory at Chorzów* case), and also that during the discussion on the preparation of the Rules in 1922:

> the attention of the Court was directed to the fact that, sometimes, a counter-claim constituted a means of defence, and that the Court could not in justice pass upon the principal claim without at the same time passing upon this plea of defence.[32]

A clear example of such a situation would be if the main claim were in respect of an act allegedly unlawful but which its author sought to justify as a counter-measure in response to a previous unlawful act by the complaining state, – provided, that is that the respondent state did not merely rely on the 'circumstance precluding unlawfulness' that its act was a counter-measure, but also itself sought reparation for the original wrongful act to which it had responded.

That example had not arisen in practice, but, as Judge Anzilotti recalled, similar considerations had been relevant in the case concerning the *Factory at Chórzow*.[33] The Polish counter-claim in that case was in fact a contention that the claim of Germany should be reduced by the value of certain rights and interests which, as a result of the Treaty of Versailles (Article 256) belonged to Poland and not to Germany.[34] The Court ruled that, having upheld its jurisdiction

> to decide as to the reparation due for the damage caused to the two companies by the attitude of the Polish Government towards them, [the Court] cannot dispense with an examination of the objections the aim of which is to show either that no such damage exists or that it is not so great as it is alleged to be by the Applicant. That being so, it seems natural on the same grounds also to accept jurisdiction to pass judgment on the submissions which Poland has made with a view to obtaining a reduction of the indemnity to an amount corresponding to the damage actually sustained.[35]

In view of Judge Anzilotti's recollection that during the initial discussions on the drafting of the Rules in 1922 the idea of connection between claim and counter-claim was touched on, the Registrar in 1934 consulted the records and read out a passage from the verbatim record of the meeting of 9 March 1922, not reproduced in the published record of the 1922 discussions. Referring to a proposal by Judge Beichmann to include the words "in so far as such [counter-]claims come within the competence of the Court"[36], Lord Finlay had, it was recorded, observed that

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31. Acts and Documents Concerning the Organization of the Court, PCIJ (Ser. D) No. 2, 3rd. addendum, *supra* note 7, at 105.
32. *Id.* The 1922 documents do not appear to reveal the discussion which Judge Anzilotti recalled.
33. *See* The Factory at Chorzów (Claim for Indemnity) (Germany v. Polish Republic), Jurisdiction, Judgment No. 8 of 26 July 1927, 1927 PCIJ (Ser. A) No. 9.
34. *Id.*
35. *Id.*, at 35. Note the repeated references to jurisdiction.
36. Acts and Documents Concerning the Organization of the Court, PCIJ (Ser. D) No. 2, at 140.

> there might be a demande reconventionnelle which, though in form a demand [*une demande*], was really in the nature of a defence to the proceeding. It might be so closely connected with it, that it would be very wrong for the Court to take cognisance of the claims without taking cognisance of the counter-claim. On the other hand, there may be cases where a totally new subject would be introduced which the Parties had never consented to refer to the Court, and that danger would be guarded against by the words proposed by M. Beichmann.[37]

It may be observed in this connection that the distinction between a counter-claim (*demande reconventionnelle*) and a defence is surely sharper than here presented. During the 1934 discussions Judge Negulesco presented an illuminating example:

> [s]uppose that, as a result of a collision between two vessels, belonging to different States, one of these States sued the other for damages on the ground that the latter was to blame; and that the respondent State brought a counter-claim for damages. In such a case the grounds for the respondent's action really constituted the defence to the main proceedings.[38]

Similarly, if state A brings proceedings against state B in respect of an allegedly unlawful act, and state B asserts that that act was not unlawful because it was a permitted counter-measure in response to an unlawful act by state B, then this is a simple defence. If the Court upholds state B's contention, the claim of state A will be dismissed. Clearly no rule of procedure could in justice deprive state B of the right to present this defence. But state B might go further, and ask for reparation for the injury caused by the allegedly wrongful act of state A. This would be a pure counter-claim; but its connection with the original claim would be as intimate as could be, since the Court, in order to rule on it, would have to decide exactly the issues it would have to decide to rule on the defence of state B, namely, was state A's act wrongful?[39] It could only be in exceptional circumstances that state B could be debarred from presenting such a counter-claim: e.g., if the Court was seised by way of a special agreement which provided for jurisdiction only to be exercised to determine the lawfulness of the conduct of the two states, and excluding any question of reparation.[40]

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37. *Id.*, PCIJ (Ser. D) No. 2, 3rd addendum, *supra* note 7, at 108.
38. *Id.*, at 111. Judge Negulesco referred in this connection to Lord Finlay's remarks in 1922, already quoted, *supra* note 37.
39. Separate issues might of course arise as to the extent of the injury, the means of reparation, etc.
40. How exceptional this would be emerges from the Court's treatment of the Special Agreement in the Corfu Channel case, Merits, Judgment of 9 April 1949, 1949 ICJ Rep. 4, at 24-26. An interesting question is raised by 'one-sided' or 'asynallagmatic' (the term is S. Rosenne's) compromissory clauses (like that, for example employed in the Icelandic Fisheries Jurisdiction cases (United Kingdom v. Iceland), Merits, Judgment of 25 July 1974, 1974 ICJ Rep. 3, and Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment of 25 July 1974, 1974 ICJ Rep. 175)): can the respondent, in proceedings instituted on the basis of such a clause, present a counter-claim? Rosenne is apparently of the view that this is possible. *See* Rosenne, *supra* note 18, at 935-936.

At a subsequent meeting in 1934 the Court voted in the affirmative on a motion proposed by Judge Anzilotti: "[d]oes the Court wish to maintain the principle that counter-claims directly connected with the principal claim may be presented in the Counter-Case?"[41]

Accordingly the Court adopted what became Article 63 of the 1936 Rules of Court, which imposed the conditions of jurisdiction and 'direct connection' and continued:

> [a]ny claim which is not directly connected with the subject of the original application must be put forward by means of a separate application and may form the subject of distinct proceedings or be joined by the Court to the original proceedings.

The Permanent Court thus envisaged three degrees of kinship between the original application and a purported counter-claim:

1) direct connection justifying inclusion in the Counter-Memorial;
2) indirect connection not justifying inclusion in the Counter-Memorial, but justifying joinder of two cases; and
3) total absence of any relevant connection.

Until 1978 this was the only provision for joinder of cases; Article 47 of the 1978 Rules conferred a general power on the Court to "direct that the proceedings in two or more cases be joined", but gave no indication of the circumstances that might be regarded as justifying joinder.[42]

The *travaux préparatoires* of the preparation of the 1946 Rules of the post-War Court have not been published, but it is evident on the face of those Rules that they were closely based on the 1936 Rules of the Permanent Court. In the case of Article 63 (so numbered in both texts), concerning counter-claims, the only major change[43] was the deletion of the provision that

> any claim which is not directly connected with the subject of the original application must be put forward by means of a separate application and may form the subject of distinct proceedings or be joined by the Court to the original proceedings,

and the substitution of the following

41. Acts and Documents Concerning the Organization of the Court, PCIJ (Ser. D) No. 2, 2nd addendum, at 115.
42. 1978 ICJ Rules of the Court, *supra* note 11. Joinder had in fact been effected by the PCIJ in the Eastern Greenland case and by the ICJ in the South West Africa case, Order of 20 May 1961, 1961 ICJ Rep. 13; and North Sea Continental Shelf cases (Federal Republic of Germany *v.* Denmark; Federal Republic of Germany *v.* The Netherlands), Order of 26 April 1968, 1968 ICJ Rep. 9.
43. In the first sentence of the text, "subject-matter of the application" was also substituted for "subject of the application".

> in the event of doubt as to the connection between the question presented by way of counter-claim and the subject-matter of the application, the Court shall, after due examination, direct whether or not the question thus presented shall be joined to the original proceedings.

2.3. The current Rule

The Rules of the present Court were revised on certain points in 1972, and substantially revised in 1978; again, no material relating to the revision process has been published. No change was made to Article 63 (renumbered Article 68) in 1972. In 1978, the relevant Rule became Article 80, and was subdivided into three paragraphs:

1. 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.
2. A counter-claim shall be made in the Counter-Memorial of the party presenting it, and shall appear as part of the submissions of that party.
3. 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.

The drafting of paragraph 1 was criticized by Judge *ad hoc* Kreča in his Declaration in the *Genocide Convention* case, principally on the ground that it suggests 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.[44]

The intention of the text is however clear: a respondent may 'present' whatever claim it likes; but only a counter-claim which fulfils the conditions of Article 80 will be dealt with by the Court as a counter-claim in the context of the proceedings already instituted. Judge Kreča also suggested that the reference to 'doubt' in paragraph 3 implied that

> [t]he Court would [...] 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

44. *See* Genocide Convention case, Order, *supra* note 2, at 265 (Judge Kreca, Declaration).

> of the Rules of Court were fulfilled, i.e., if the 'direct connection' were not in doubt",[45]

a conclusion which he recognizes is 'hardly acceptable'. His eventual conclusion is that

> 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.[46]

Since the question of direct connection determines the 'admissibility' of the counter-claim *as a counter-claim*, the distinction does not appear to be of practical significance.

3. JURISPRUDENCE OF THE PCIJ AND ICJ ON COUNTER-CLAIMS[47]

The decision of the Permanent Court in the *Chorzów Factory* case has already been mentioned. Poland in its counter-memorial put forward a submission which Germany regarded as a counter-claim, and so far from disputing its admissibility, Germany expressly accepted the jurisdiction of the Court to deal with it, and the Court referred to this as meeting the jurisdictional requirement (the only condition then stated in the Rules)[48]. It did however also note that the Polish submission was "juridically connected with the principal claim", and took the view that "the formal conditions required by the Rules as regards counter-claims are fulfilled in this case, as well as the material conditions"[49]. A clue to the meaning of 'juridical connection' is to be found in the dictum in that decision that

> the counter-claim is based on Article 256 of the Versailles Treaty, which article is the basis of the objection raised by the Respondent, *and [...], consequently it is juridically connected with the principal claim.*[50]

The clue is however unfortunately an obscure one: apparently what is meant is that Poland had presented Article 256 both as a defence on the merits and as the basis of a counter-claim, and that therefore the counter-claim was connected with the principal claim via the defence: in other words, this was the sort of counter-claim that

45. *Id.*, at 265.
46. *Id.*, at 266 (emphasis original).
47. *See also* the surveys in the separate opinion of Judge Oda and the dissenting opinion of Judge *ad hoc* Rigaux in the Oil Platforms case, Order, *supra* note 4; G. Guyomar, Commentaire du Règlement de la CIJ, 518-525; and Rosenne, *supra* note 18, at 1274-1276.
48. *See* Chorzów Factory case, *supra* note 11, at 36-37.
49. *Id.*, at 38.
50. *Id.* (emphasis added).

https://doi.org/10.1017/S0922156599000072 Published online by Cambridge University Press

could not but be examined, in justice to the respondent. In fact the Court found that the counter-claim was such only in form, being in nature an objection to the applicant's claim, and it was dismissed on the merits.

In the *Diversion of Water From the Meuse* case, for the first time a respondent state expressly asserted a counter-claim and referred to the relevant provision (Article 63) of the Rules of Court. The case was brought by The Netherlands against Belgium, and the latter state raised a counter-claim in its counter-memorial;[51] no challenge was made by The Netherlands to its admissibility, or to the question of jurisdiction, and the Court dealt with it as a counter-claim, indicating that "as that claim is directly connected with the principal claim, it was permissible to present it in the Counter-Memorial".[52]

A counter-claim was also presented by Lithuania, the respondent in the *Panevezys-Saldutiskis Railway* case,[53] but the Court did not have to deal with it as it dismissed the principal claim of Estonia on the grounds of non-exhaustion of local remedies. The Court does not appear to have envisaged the possibility that a counter-claim might be heard and determined even if the principal claim was rejected: this would not have been appropriate in the circumstances of the case, but cases could be imagined in which it might be the proper course of action.

In the *Asylum* case, the claim of Colombia was that Colombia, as the country granting asylum, was competent to qualify the offence (as political as otherwise) alleged against the person seeking asylum; Peru asserted "as a counter-claim, under Article 63 of the Rules of Court" that the grant of asylum by Colombia was contrary to the Havana Convention on Asylum. Colombia alleged that Peru's counter-claim was not admissible "because of its lack of direct connexion with the Application of the Colombian Government".[54] The Court rejected Colombia's contention, holding on the contrary that the connection "is so direct that certain conditions which are required to exist before a safe-conduct [for the asylum-seeker] can be demanded depend previously on facts which are raised by the counter-claim".[55]

Three submissions by way of counter-claim were also presented by the United States in the case concerning *Rights of Nationals of the United States in Morocco*, and the applicant state, France, made no objection or comment. The Court simply dealt successively in its judgment with the claims of France and the counter-claims of the United States (two of which were rejected, and one dealt with on its merits), without commenting on the question of compliance with the formal and material requirements for counterclaims.[56]

51. *See* Diversion of Water From the Meuse case, *supra* note 12, at 7.
52. *Id.*, at. 28.
53. *See* Panevezys-Saldutiskis Railway case, *supra* note 13, at 7.
54. *See* Asylum case, *supra* note 16, at 270-271.
55. *Id.*, at 280-281.
56. *See* Rights of Nationals of the United States in Morocco case, *supra* note 15, at 203-212 and 213.

4. THE TWO ORDERS OF 1997/1998

4.1. What is a counter-claim?

A purely pragmatic definition of a counter-claim has been adopted above, namely that it is a claim presented, in the context of proceedings already instituted before the Court, by the respondent against the applicant, and which the respondent seeks to have determined by the Court along with the claims of the applicant in those proceedings. Reserving for the present the specific conditions stated in the Rules of Court, which a counter-claim must fulfil if the Court is to join it to the original proceedings, is this a sufficient definition of a counter-claim for purposes of ICJ proceedings?

This is a question which exercised members of the Permanent Court when they were engaged in preparing and revising the Rules;[57] it was also raised directly by Bosnia and Herzegovina in the *Genocide Convention* case. It argued 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 reduce its effects, and, on the other hand, claim something more, in particular a judgment against the applicant in the principal proceedings.[58]

Specifically it objected 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.[59]

The Court however in its Order gave a significantly different definition of what it understood by a 'counter-claim'. Having observed that "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",[60] it continued:

> [w]hereas 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

57. *See, e.g.*, Judge Schücking in PCIJ (Ser. D), No. 2, 3rd. addendum, *supra* note 7, at 105; Judge Urrutia, *id.*, at 109; and Judge Negulesco on the distinction between 'counter-claim' and 'cross-action', *id.*, at 111.
58. *See* Genocide Convention case, Order, *supra* note 2, para. 13 (for simplicity, internal quotation marks have been omitted).
59. *Id.*, para. 14.
60. *Id.*, para. 26.

https://doi.org/10.1017/S0922156599000072 Published online by Cambridge University Press

> object of which is to submit a new claim[61] 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.[62]

Against the background of the Bosnian objection (which is in fact never really answered), the key element in this definition is that the counter-claim 'reacts to' the principal claim. For Bosnia and Herzegovina, such 'reaction' should consist in the fact that the effect of the counter-claim should be to 'block' the main claim or 'reduce its effects'. The Court does not seem to have required so far-reaching an impact, since if it had, it would apparently have been bound to uphold Bosnia's objection. In fact the Order says nothing more on the idea of a counter-claim as a 'reaction' to the principal claim; it goes on to address a different problem, namely to show that the Yugoslavian counter-claim could be clearly distinguished from a defence on the merits. Having disposed of that problem, by finding that some of the Yugoslav submissions "set out separate claims seeking relief beyond the dismissal of the claims of Bosnia and Herzegovina", and that "such claims constitute 'counter-claims' within the meaning of Article 80 of the Rules of Court".[63] It then proceeds to distinguish a counter-claim which is 'directly connected' to the subject-matter of the applicant's claim from one which is not. One has apparently to conclude that the question whether a purported counter-claim 'reacts' to the principal claim either depends simply on whether it is formulated as such (the pragmatic definition offered above), or is identical with the question whether the one is 'directly connected' with the other.

In the *Oil Platforms* case, the problem did not arise: the Court found that

> Iran does not dispute that the United States claim is presented not as a defense on the merits, but as a 'counter-claim' within the meaning of Article 80 of the Rules of Court.[64]

There was however in Iran's arguments an echo of the idea of a true counter-claim being at the same time a defence, inasmuch as it pointed out that "the United States did not attack the platforms because of any alleged Iranian attacks on vessels engaged in trade between Iran and the United States",[65] i.e., that the attacks were not counter-measures nor even acts of retaliation.

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61. In the French text, there is a distinction between the claim (*demande*) which submits a separate claim (*prétention*) to the Court. The English text blurs this distinction.
62. *See* Genocide Convention case, Order, *supra* note 2, paras. 26, 27.
63. *Id.*, para. 29.
64. *See* Oil Platforms case, Order, *supra* note 4, para. 32.
65. *Id.*, para. 17, quoting the Iranian pleading.

4.2. The question of jurisdiction

In the *Genocide Convention* case, the title of jurisdiction advanced by Bosnia-Herzegovina was Article IX of that Convention,[66] and the Court, in a judgment of 11 July 1996, had found that it had jurisdiction to adjudicate upon the dispute.[67] The Convention being a multilateral convention to which Bosnia-Herzegovina and Yugoslavia were, as the Court found, parties, it followed that if the Court had jurisdiction to entertain a claim by one of the two states as applicant against the other as respondent asserting a breach of the Convention, it necessarily had jurisdiction to entertain a claim by the respondent that the applicant had committed breaches of the Convention. The point is so obvious that Bosnia and Herzegovina recognized that the counter-claims met the jurisdictional requirement in paragraph 1 of Article 80,[68] and accordingly the Order of 17 December 1997 does not deal further with it, and in fact does not contain any express finding that the jurisdictional condition of Rules was complied with by the Yugoslavian counter-claim.[69]

It was noted above that the inclusion of the requirement of jurisdiction in Article 80 of the Rules implies that the fact that the counter-claim could have been brought before the Court by way of separate proceedings cannot be an objection to its presentation as a counter-claim. Yet the Court in its Order the *Genocide Convention* case stated as a principle of its approach that:

> a claim should normally be made before the Court by means of an application instituting proceedings;[...]although it is permitted for certain types of claims 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; [...] 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.[70]

The Court was of course applying the current Rules of Court, which do not contain merely the reference to jurisdiction, but the further requirement that there be a direct connection with "the subject-matter of the claim of the other party", and this must apparently be taken to justify the restrictive terms used by the Court, limiting counter-claims under Article 80 to "certain types of claims".

In the *Oil Platforms* case, Iran relied for jurisdiction on Article 21, paragraph 2, of a Treaty of Amity, Economic Relations, and Consular Rights of 15 August 1955

66. *See* Genocide Convention, Art. IX, *supra* note 3.
67. Genocide Convention case, Preliminary Objections, *supra* note 17.
68. *See* Genocide Convention case, Order, *supra* note 2, paras. 31 and 32.
69. Nor is the Court's judgment upholding jurisdiction mentioned in the recitals of the Order describing the procedural history of the case.
70. *See* Genocide Convention case, Order, *supra* note 2, para. 30.

between the United States and Iran.[71] However, in its judgment upholding jurisdiction, the Court found that it had jurisdiction "to entertain the claims made by the Islamic Republic of Iran under Article 10, paragraph 1",[72] of the Treaty, but not claims made by Iran under other articles of the Treaty. The counter-claim presented by the United States also invoked Article 21, paragraph 2, of the Treaty, but the texts of the Treaty which Iran was alleged to have violated were paragraphs 2 to 5, as well as paragraph 1, of Article 10.[73] The Court found that the facts alleged by the United States (attacks on US shipping) "are capable of falling within the scope of Article X, paragraph 1, of the 1955 Treaty as interpreted by the Court", that "the Court has jurisdiction to entertain the United States counter-claim in so far as the facts alleged may have prejudiced the freedoms guaranteed by Article X, paragraph 1";[74] and that "the counter-claim presented by the United States satisfies the conditions set forth in Article 80, paragraph 1, of the Rules of Court";[75] but, as pointed out in the separate opinion of Judge Higgins, it did not spell out whether this meant that it was satisfied that *all* the claims comprised in the counter-claim came within the jurisdiction of the Court, as required by the Rules, or only that the claim based on paragraph 1 of Article 10 met that condition.

Judge Higgins reads the decision as in effect confined to admitting the counter-claim of the United States to the extent that it alleged breaches of Article 10, para-

71. Art. 21(2) of the Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran, reproduced *in* 242 UNTS 93 (1955), reads "[a]ny dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means".
72. Oil Platforms case, Preliminary Objections, *supra* note 17.
73. Art. 10(1) of the Treaty of Amity, Economic Relations, and Consular Rights, *supra* note 71, provides that: "[b]etween the territories of the two High Contracting Parties there shall be freedom of commerce and navigation". Paras. 2 to 5 are as follows: "2. Vessels under the flag of either High Contracting Party, and carrying the papers required by its law in proof of nationality, shall be deemed to be vessels of that High Contracting Party both on the high seas and within the ports, places and waters of the other High Contracting Party. 3. Vessels of either High Contracting Party shall have liberty, on equal terms with vessels of the other High Contracting Party and on equal terms with the vessels of any third country, to come with their cargoes to all ports, places and waters of such other High Contracting Party open to foreign commerce and navigation. Such vessels and cargoes shall in all respects be accorded national treatment and most-favored-nation treatment within the ports, places and waters of such other High Contracting Party; but each High Contracting Party may reserve exclusive rights and privileges to its own vessels with respect to the coasting trade, inland navigation and national fisheries. 4. Vessels of either High Contracting Party shall be accorded national treatment and most-favored-nation treatment by the other High Contracting Party with respect to the right to carry all products that may be carried by vessel to or from the territories of such other High Contracting Party; and such products shall be accorded treatment no less favorable than that accorded like products carried in vessels of such other High Contracting Party, with respect to: (a) duties and charges of all kinds, (b) the administration of the customs, and (c) bounties drawbacks and other privileges of this nature. 5. Vessels of either High Contracting Party that are in distress shall be permitted to take refuge in the nearest port or haven of the other High Contracting Party, and shall receive friendly treatment and assistance".
74. *See* Oil Platforms case, Order, *supra* note 4, para. 36.
75. *Id.*, para. 40.

graph 1, even though, in the Court's thinking as interpreted by Judge Higgins, "paragraphs 2 to 6 still have relevance to the task of ascertaining the freedoms generated under paragraph 2".[76] She therefore explains why, in her view, "there is nothing in the Rules or practice of the Court to suggest that the *very identical* jurisdictional nexus must be established by a counter-claimant".[77] In support of this view, Judge Higgins referred to the *travaux préparatoires* of the successive versions of the Rules of Court the discussions of 1922, 1934, 1936, 1946, 1968, 1970, and 1972. As noted above, only the pre-war discussions are available to commentators, so that it is impossible to comment on Judge Higgins' view except to the extent that those discussions support that view.[78]

Judge *ad hoc* Rigaux also understood "les termes dans lesquels la Cour a affirmé sa compétence dans le paragraphe 36" of the Order as having left open the question whether "les demandes très variées introduites dans le contre-mémoire des Etats-Unis satisfaisaient *toutes* à [...] [la condition] de sa compétence".[79]

4.3. The question of 'direct connection'

4.3.1. The *Genocide Convention* case

The Court explained the existence in the Rules of Court of the double requirement of 'connection' and jurisdiction, as follows:

> [w]hereas 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.[80]

The justification for the jurisdictional requirement is tolerably clear, even without reference to the historical background indicated above. The justification, as here presented, for the 'connection' requirement, assuming for the sake of argument that (as was the case) there is a clear jurisdictional basis, is less easy to grasp. The refer-

76. *Id.*, (Judge Higgins, Separate Opinion).
77. *Id.* (emphasis original).
78. Which, it it is suggested, they do not entirely do. In the records of the PCIJ discussions, the Report of the Commission de Co-ordination of 14 May 1934, *supra* note 7, at 871, observes that the possibility of introducing counter-claims in a current case should not cause much inconvenience, "étant donné qu'elle [that possibility] était prévue seulement dans les limites de la compétence de la Cour telles qu'elles étaient établis pour les besoins de l'instance au cours de laquelle la demande serait faite".
79. *See* Oil Platforms case, Order, *supra* note 4 (Judge *ad hoc* Rigaux, Dissenting Opinion).
80. *See* Genocide Convention case, Order, *supra* note 2, para. 31.

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ence to the risk of "infringing the Applicant's rights"[81] is clearly a mere *petitio principii*: if one asks, What rights?, the answer can apparently only be, in the absence of any further indication, the right not to have any claim the respondent chooses brought before the Court in the context of the proceedings instituted by the applicant.

The reference to the possibility of "compromising the proper administration of justice"[82] is scarcely more helpful. It appears to be treated as a "given" that for the Court to determine in the same proceedings claims by A against B, and claims by B against A, which are not somehow 'directly connected', would be to compromise the proper administration of justice. One looks in vain for any indication *why* this should be so, other than because 'the Rule' says so, which is where the discussion began. In the preceding paragraph, the Court stated that

> 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[83]

and that "the admissibility of the counter-claims must necessarily [...] be subject to conditions designed to prevent abuse"; but this also does not help to determine in what such abuse might consist, other than the lack of a 'direct connection'.[84]

The Court further declared

> 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.[85]

It is not clear whether any particular significance should be attached to the emphasis, in this introductory phrase, on the idea of discretion: is the Court repudiating in advance any idea of precedent or consistency of jurisprudence on the question of 'connection'? It then stated that "as a general rule, the degree of connection between the claims must be assessed both in fact and in law".[86]

So far as the factual aspect is concerned, the Court continued:

> [w]hereas, in the present case, it emerges from the Parties' submissions that their respective claims rest on facts of the same nature.[87]

This however necessarily follows from the fact that Yugoslavia was alleging breaches of the same legal rules as those attributed to it by the claims of Bosnia.

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81. *Id.*
82. *Id.*
83. *Id.*, para. 30.
84. *Id.*
85. *Id.*, para. 33.
86. *Id.*
87. *Id.*, para. 34.

> [...] whereas they [sc. the claims] 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.[88]

One sees what is meant, but presumably the mere simultaneity of facts occurring on the same territory would be insufficient to make claims based on them "part of the same factual complex"[89] for the purposes of establishing a direct connection; if Yugoslavia had alleged that in the troubled areas of Bosnia one of its diplomats had been treated in a manner inconsistent with his immunities, the facts of the outrage would have fulfilled this test of the "factual complex", but it must be questionable whether a claim based on it would have been admissible as a counter-claim. The Court stated:

> 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 judgement against that State.[90]

This is to use the term 'identical' in rather a loose sense: what Yugoslavia evidently meant was acts of exactly the same nature as those relied on by Bosnia and Herzegovina to support its allegations of genocide, but committed by different perpetrators against different victims.

Turning to the law, the Court noted that: "the Parties rightly recognized that in no case could one breach of the [Genocide] Convention serve as an excuse for another",[91] an observation which is not strictly relevant, since Yugoslavia was clearly not advancing such an argument in support of its assertion of a 'direct connection'. Bosnia had however argued that, within the system of the Genocide Convention, "no place remains for the logic of reciprocity", so that a judicial finding of a violation of the Convention committed by a state could not be influenced by the fact that a second violation, of which the applicant state was the victim, had been perpetrated.[92] The Court on this point ruled that the argument was

> not determinative as regards the assessment of whether there is a legal connection between the principal claim and the counter-claim, in so far as the two Parties pursue, within their respective claims, the same legal aim, namely the establishment of legal responsibility for violations of the Genocide Convention.[93]

This test of 'the same legal aim' would operate to exclude the hypothesis just mentioned of a counter-claim based on an alleged infringement of diplomatic immunities.

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88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*, para. 35.
92. *Id.*, para. 12.
93. *Id.*, para. 35.

Thus, to sum up, in order to establish 'direct connection', a factual connection was seen by the Court in the circumstance that the facts relied on by each party coincided geographically, chronologically, and in nature; and a legal connection in the circumstances that each party alleged breaches of the same treaty. The Court regarded these circumstances as sufficient for the purpose of Article 80, paragraph 1, of the Rules; whether it regarded them as all necessary, so that no less degree of connection would suffice, remained to be seen.

The Court would in fact have found it difficult to reject Yugoslavia's counter-claim, in view of earlier action taken by the Court itself. The original proceedings had been instituted by Bosnia claiming unlawful acts, and in particular breaches of the Genocide Convention, constituting breaches of its obligations "toward the People and State of Bosnia and Herzegovina". Bosnia also requested the indication of provisional measures, and in response to this request Yugoslavia also requested the indication of measures. The Court did in fact indicate measures to be taken by both parties, by an order dated 8 April 1993,[94] and in a subsequent Order, the Court observed that "the measures requested by Yugoslavia would be appropriate to protect rights under the Genocide Convention, which are accordingly within the jurisdiction of the Court".[95] The basis for this indication was of course Article 41 of the Statute, which gives the Court power to indicate provisional measures "which ought to be taken to preserve the respective rights of either party".[96]

The 'rights' here referred to must however presumably be rights in issue in the proceedings; the Court could not indicate measures to protect alleged rights – of either party – which lacked any connection, direct or otherwise, with the subject-matter of the proceedings.[97] It could accordingly be said that the Court had impliedly accepted that the right of Yugoslavia to require that genocide not be committed against its nationals by Bosnia was already a part of the case before the Court, even before, or in the absence, of any counter-claim. To refuse a counter-claim asserting that right would therefore be, to say the least, inconsistent.

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94. Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina *v.* Yugoslavia (Serbia and Montenegro), Order on Request for the Indication of Provisional Measures, Order of 8 April 1993, 1993 ICJ Rep. 3, at 346-347.
95. Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina *v.* Yugoslavia (Serbia and Montenegro)), Order of 13 September 1993, 1993 ICJ Rep. 3, para. 45, quoted in par. 36 of the Order of 17 December 1997, *supra* note 2.
96. *See also* Art. 75(2) of the Rules, "when a request for [...] measures has been made, the Court may indicate measures [...] that ought to be taken or complied with by the party which has itself made the request".
97. This is established by the decision on the request for the indication of provisional measures in the case the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), Request for the Indication of Provisional Measures, Order of 2 March 1990, 1990 ICJ Rep. 70: the subject of the proceedings was the validity or otherwise of that arbitral award, but the measures requested were avowedly for the protection of the rights of the applicant in the maritime areas to which the award related. The request was rejected because "the alleged rights sought to be made the subject of provisional measures are not the subject of the proceedings before the Court on the merits of the case; [...]any such measures could not be measured by the Court's judgment on the merits". *Id.*, para. 26.

The fact remains that the counter-claim was not 'connected' with the claim in the sense that it constituted at the same time a defence to the claim, or (as Bosnia expressed it) operated to block the claim or reduce its effects. Despite the emphasis on counter-claims of this nature in the PCIJ *travaux préparatoires*, the Court evidently did not regard this as an essential element. The Court was in effect faced with the choice between two possible interpretations of the 'sufficient connection' criterion: either the connection should be required to be intrinsic, derived from the nature of the original claim and the counter-claim and the relation between them; or the matter could be one of practical convenience and economy of procedural means. Vice-President Weeramantry, in his dissenting opinion, argued strongly for the first approach;[98] but the majority of the Court preferred the second. It had in fact virtually done so already at the earlier stage of its argument in the Order, when it declined to accept the Bosnian contention that a counter-claim must 'react' to the principal claim by "opposing it in order to block it or reduce its effects", as explained above.[99]

The Vice-President's approach to the question of the proper criterion is in fact closer in some ways to the thinking of the Permanent Court as reflected in the discussions during the drafting and revision of the Rules, referred to above. Central to that thinking was the idea of the counter-claim that *must* be heard along with the principal claim, because it is identical with a defence on the merits to that claim: this is demonstrated by the examples given above of the maritime collision and the alleged counter-measures. The problem in 1997 was that the counter-claim asserted was not such that it would have been unthinkable to exclude it from consideration along with the principal claim; thus the first question was whether the Rules applied only to counter-claims of that category, or extended also to counter-claims the hearing of which along with the principal claim could be justified on practical grounds. In the *Genocide Convention* it was possible to become distracted by the nature of the wrongful acts alleged: since they were such that they could not be justified as counter-measures, it would follow that they could not be the basis of a counter-claim which would at the same time be a defence; but this would be irrelevant if counter-claims of a different nature were equally admissible, for example on grounds of practical convenience.

It is for that reason that it is, it is suggested, irrelevant to note, with Vice-President Weeramantry, the character of genocide as an international crime. The unwisdom of the use by the International Law Commission of this term in the notorious Article 19 of the Draft Articles of state Responsibility could hardly be better illustrated.[100] The essence of Vice-President Weeramantry's argument is that

98. *See* Genocide Convention case, Order, *supra* note 2, at 294-297 (Vice-President Weeramantry, Dissenting Opinion).
99. *Id.*
100. ILC Draft Articles on State Responsibility, reproduced *in* 37 ILM 440 (1998).

> 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 off one against another, the intrinsic nature of a criminal wrong prevents the set off of one criminal act against another. [...] A murder cannot be set off against another murder, nor a rape against a rape.[101]

This, it is suggested, is to take the analogy between an 'international crime' and a crime in international law to lengths not justified by the underlying principles and concepts. While the idea of injury to the community underlies both kinds of 'crime', the nature of the sanctions differs totally between the national and the international plane. Since the international community lacks centralized organs to prosecute international crimes of states, the only essential existing distinction between international delict and international crime lies in Article 40, paragraph 6, of the ILC Draft Articles on State Responsibility, the classification of the international crime as the breach, *par excellence*, of an international obligation *erga omnes*, so that every other state can claim to be injured by it.[102] That being so, it is at least conceivable in theory that the claim for reparation, or more specifically for compensation, by one state for an act of aggression committed against it, might be met by a counter-claim for compensation for an act of aggression attributed to the applicant state. The fact that aggression is qualified as an international crime would in such circumstances be irrelevant. For Judge Weeramantry, "an act of genocide by the applicant cannot be a counter-claim to an act of genocide by the respondent".[103] The Court puts the point more correctly: "the Parties rightly recognized that in no case could one breach of the [Genocide] convention serve as a excuse for another".[104]

It is essential not to confuse the notion of counter-claim with that of counter-measures.[105] As noted above, when a respondent state justifies its action as being a counter-measure in response to an initial internationally unlawful act by the applicant state, it may well present a counter-claim for reparation for that act. This is a particularly 'pure' example of a counter-claim, but not the only possible type of counter-claim.

4.3.2. The Oil Platforms *case*

The Court in the *Oil Platforms* case began by citing what it had said in the earlier case as to the justification for the requirements of Article 80 of the Rules of

101. *See* Genocide Convention case, Order, *supra* note 2, at 291-292.
102. *See* ILC Draft Articles, *supra* note 100.
103. *See* Genocide Convention Case, Order, *supra* note 2, at 292.
104. *Id.*, para. 35.
105. Thus it darkens counsel to refer to the impossibility of using a breach of the Genocide Convention as an excuse or justification for another breach, and to then continue: "[y]et the question whether offences under the Convention 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". *See* Genocide Convention case, Order, *supra* note 2, at 293 (Vice-President Weeramantry, Dissenting Opinion).

Court,[106] and also repeated what it had said about the Court's discretion to assess "whether the counter-claim is sufficiently connected to the principal claim", and the need to assess the "degree of connection" "both in fact and in law".[107] It then used virtually the same formula as in the previous case to establish that the parties' claims "rest on facts of the same nature"; that they

> form part of the same factual complex since the facts relied on – whether involving the destruction of oil platforms or ships – are alleged to have occurred in the Gulf during the same period.[108]

Furthermore, as regards legal connection,

> the United States indicates [...] that it intends to rely on the same facts and circumstances in order both to refute the allegations of Iran and to obtain judgment against that State;

and "the two Parties pursue the same legal aim, namely the establishment of legal responsibility for violations of the 1955 Treaty".[109]

The Court accordingly concluded: "the counter-claim presented by the United States is directly connected with the subject-matter of the claims of Iran", and that

> in the light of the foregoing, the Court considers that the counter-claim presented by the United States satisfies the conditions set forth in Article 80, paragraph 1, of the Rules of Court.[110]

The only difference in the circumstances relied on to establish 'direct connection' was that the chronological and geographical frame was somewhat wider, and the legal aim to establish breaches of different provisions of the relevant treaty. The question therefore remains open with what degree of flexibility these criteria of 'connection' will be applied.

5. OTHER PROCEDURAL QUESTIONS

5.1. The question of discretion

The terms of the Court's Orders, in particular that made in the *Genocide Convention* case, suggest that its interpretation of Article 80 of the Rules of Court was that if a counter-claim fulfils the conditions stipulated in that Article, then the Court has

106. *Id.*, para. 31.
107. *See* Oil Platforms case, Order, *supra* note 4, paras. 33 and 37.
108. *Id.*, para. 37.
109. *Id.*, para. 38.
110. *Id.*, paras. 39 and 40.

no choice but to admit it as a counter-claim and deal with it in the context of the proceedings in which it is, as such, presented. This is not specifically stated in either Order; but in the *Genocide Convention* Order the Court concludes its argument by saying that "the counter-claims submitted by Yugoslavia are directly connected with the subject-matter of Bosnia and Herzegovina's claims" and that "as counter-claims, they are *therefore* admissible and form part of the present proceedings",[111] and the latter phrase is repeated in the operative clause of the Order. The Order in the *Oil Platforms* case is worded slightly differently, recording, in successive paragraphs, that "the Court considers that the counter-claim presented by the United States is directly connected with the subject-matter of the claims of Iran", that "the counter-claim presented by the United States satisfies the conditions set forth in Article 80, paragraph 1, of the Rules of Court", and the decision that "for these reasons", "the counter-claim presented by the United States in its Counter-Memorial is admissible as such and forms part of the current proceedings".[112]

It is in the opinions annexed to the *Genocide Convention* Order, particularly those of the two judges *ad hoc,* that one finds more specific reference to the question. Judge Lauterpacht was firmly of the opinion that the Court did possess a discretion:

> [t]he 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 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 its 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 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.[113]

Vice-President Weeramantry was also of the opinion that the Court possessed a discretion: he indicated in his Dissenting Opinion that

> [c]ircumstances 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.[114]

He based this view in part on the terms of Article 80:

111. *See* Genocide Convention case, Order, *supra* note 2, para. 37 (emphasis added).
112. *See* Oil Platforms case, Order, *supra* note 4, paras. 39, 40, and 46.
113. *See* Genocide Convention case, Order, *supra* note 2, at 284, para. 18 (Judge Lauterpacht, Separate Opinion).
114. *Id.*, at 294.

> [h]owever, even if all these prior requisites [those of Article 80, para. 1] are satisfied, joinder is not automatic, for the language of Article 80 only states that a counter-claim *"may* be *presented"*, provided the prescribed requisites are present. Whether the counter-claim *will* be *accepted* must still depend on the undoubted discretion of the Court as the master of its own procedure. [...] Thus a fourth requisite that must be satisfied is that the Court's discretion must be exercised in the respondent's favour.[115]

One comment that may be made on this line of argument is that the PCIJ Rules also used the formula 'may include' or 'may be presented', but there is nothing in the published *travaux préparatoires* to suggest that there was an implied discretion of the Court: on the contrary, the whole discussion proceeded on the basis that the appropriate conditions needed to be carefully stated because their fulfilment would involve admission of the counter-claim as such.

Judge Kreča on the other hand, as already mentioned, found the idea that the Court would not be obliged to admit a counter-claim which complied with the conditions of Article 80 "hardly acceptable", and held that fulfilment of the material conditions required by the Rules "implies joinder of the counter-claim to the original proceedings".[116]

The Court must be taken to have rejected Judge Lauterpacht's approach, and was, it is suggested, right to do so. The distinction between rules implementing specific provisions of the Statute and Rules without direct basis in the Statute is superficially attractive but ultimately unconvincing. The question is not one of the 'reasonable application' of a Rule: if the text lays down certain conditions for the vailidity of a procedural step, states are entitled to act on the basis that those conditions are exhaustive, and that the Court does not preserve a residual discretion to 'adjust the application' of the Rule unless the Rules themselves say so.

5.2. The question of delay

The reference in the Order in the *Genocide Convention* case to the need to prevent abuse of the right to include a counter-claim in existing proceedings was taken up by, in particular, Judge Koroma, who was one of those judges concerned about the risk of delaying the eventual judgment on the merits if Yugoslavia's counter-claim were admitted. As noted above,[117] the Court had referred rather obscurely to the notion of "infringing the Applicant's rights", and Judge Koroma insisted that "the Court must not [...] lose sight of the interests of the main Applicant to have its claim decided within a reasonable time period".[118] He conceded that "this is not to say that all the steps taken so far, by both Parties and by the Court, have not been in accordance with the Statute and Rules of Court". He was however of the view that

115. *Id.*
116. *Id.*, at 264 (Judge Kreča, Declaration).
117. *See infra*, Section 4.3.1.
118. *See* Genocide Convention case, Order, *supra* note 2, at 276 (Judge Koroma, Separate Opinion).

https://doi.org/10.1017/S0922156599000072 Published online by Cambridge University Press

> 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.[119]

Judge Koroma makes no suggestion as to how this might have been done; but the thrust of his remarks seems to be that, in an extreme case, a counter-claim otherwise complying with the Rules might be excluded if it involved too much delay to the main proceedings. Thus the question is again whether or not the Court possesses a discretionary power to exclude counter-claims which fulfil the requirements of the Rules. It may also be observed that it is difficult to imagine a stronger case, on Judge Koroma's premises, for discretionary exclusion; yet Judge Koroma voted with the majority to admit the counter-claim.

Vice-President Weeramantry was also concerned about delay, and this was the principal reason why he considered that the Court should exercise the discretion that he believed it possessed to exclude the counter-claim. Apart from the practical complications, he observes that

> 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.[120]

He does not however suggest bad faith on the part of Yugoslavia; and it may be questioned whether it is right to exercise discretion against an applicant in good faith simply on the ground that the same procedural step might have been taken, or might in the future be taken, in bad faith.[121]

5.3. "After hearing the Parties"

Article 80, paragraph 3, of the Rules of Court provides that "in the event of doubt" as to the connection between the claim and the counter-claim,[122] the Court is to decide whether the question presented is or is not to be joined to the original proceedings, "after hearing the Parties". Does this imply the presentation of oral argu-

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119. *Id.*, at 276.
120. *Id.*, at 295 (Vice-President Weeramantry, Dissenting Opinion).
121. It should also be noted that Art. 80 of the Rules contains a time limitation on the filing of a counter-claim inasmuch as it requires a counter-claim to be presented in the Counter-Memorial (and indeed it is difficult to see how it could be filed earlier, that being the respondent's first pleading).
122. But not, curiously enough, in the event of doubt whether a counter-claim presenting a 'direct connection' comes within the jurisdiction of the Court, a point referred to by Iran in the Oil Platforms case, Order, *supra* note 4, para. 19, and adverted to by Judge Higgins in her Separate Opinion in that case.

ment on the point at a hearing; or does it merely mean that the Court must give the Parties an opportunity to present their contentions on the issue, orally or in writing as the Court may see fit?

Examination of the 1978 Rules of Court shows that there are a number of formulae used to convey the idea that a decision by the Court on a procedural issue must be on the basis of some input from the parties. The expression "after hearing the parties" is found in (in addition to Article 80, paragraph 3), Article 56, paragraph 2 (admission of new documents), Article 67, paragraph 1 (decision to order an enquiry or expert opinion), and Article 79, paragraph 7 (decision on preliminary objections); but in the last case it should be noted that paragraph 4 of Article 79 provides that "unless otherwise decided by the Court, the further proceedings shall be oral", and this presumably qualifies paragraph 7. Article 84, paragraph 2 (admission of intervention), directs the Court to "hear the State seeking to intervene and the Parties before deciding". Article 35, paragraph 4 (objections to a judge *ad hoc*) and Article 36, paragraph 2 (parties in the same interest), use the form "if necessary after hearing the parties". Article 31 is a general provision that "in every case submitted to the Court, the President shall *ascertain the views* of the parties with regard to questions of procedure"; and the expression "ascertain the views" is used in Article 17, paragraph 2 (composition of Chamber), Article 44, paragraph 3 (extension of time), Article 46, paragraph 1 (number and order of pleadings), Article 53, paragraph 1 (making pleadings available to third States), Article 55 (sitting elsewhere than at The Hague), and Article 58, paragraph 2 (oral procedure – with a cross-reference to Article 31). Article 76, paragraph 3 (modification of provisional measures), has another formula: "the Court shall afford the parties an opportunity of presenting their observations on the subject".

This varying terminology certainly suggests that there is a difference between "hearing the parties" and "ascertaining the views of the parties"; and that if the words "if necessary" are not included, the Court has no discretion to proceed otherwise than by hearing oral submissions. The practice, as observed by Judge *ad hoc* Lauterpacht in the *Genocide Convention* case, is more ambiguous.[123]

In neither of the two cases in 1997 did the Court proceed in this way. In the *Genocide Convention* case, the agents of the parties originally contemplated that there would first be an exchange of written arguments, and that their governments would then be "heard orally on the question", but they were subsequently informed that the Court "would decide the remainder of the procedure on the basis of the documents presently before it".[124] The Court then stated in its Order as follows:

> [w]hereas, 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

123. *See* Genocide Convention case, Order, *supra* note 2, at 278-279 (Judge *ad hoc* Lauterpacht, Separate Opinion).
124. *Id.*, paras. 7 and 17.

> Counter-Memorial: and whereas, accordingly, it does not appear necessary to hear the Parties otherwise on the subject.[125]

In the *Oil Platforms* case Iran made a specific request for a hearing "under Article 80 (3) in relation to the counter-claim",[126] and this was never withdrawn, but repeated in a formal document.[127] The United States submitted written observations on the admissibility of the counter-claim, "taking the observations submitted by Iran into consideration". The Court again informed the parties that it "would decide on future proceedings on the basis of the documents now before it",[128] and included in its Order a paragraph to the same effect as that quoted above, but with the addition, at the beginning of the text, of a specific reference to Article 80, paragraph 3, of the Rules.

In the *Genocide Convention* case, Judge Koroma expressed the view that "the Court should have granted oral hearings to the Parties", but he was more influenced by the nature of the claims than by considerations of respect for the terms of the Rules.[129] Judge *ad hoc* Kreča regarded the wording of Article 80, paragraph 3, as imperative, drawing attention, *inter alia*, to the change from the expression "after due examination" which had been used in the 1972 (and 1946) Rule on counter-claims.[130] Judge *ad hoc* Lauterpacht stated that "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",[131] an approach which he thought could be defended on the basis of practice in respect of some of the other Rules (mentioned above) in which the formula is used. Both Judges Kreča and Lauterpacht referred to the view of Rosenne that there would always be oral proceedings under Article 80, paragraph 3, in the event of doubt on the question of direct connection.[132] All three judges suggested that the Rule be revised.

In the *Oil Platforms* case, Judge Higgins was prepared to take a robust approach to the terms of Article 80, paragraph 3, holding that "oral submissions are neither required by the terms of Article 80, paragraph, 3, nor excluded".[133] Judge *ad hoc* Rigaux considered that the Court had a discretionary power to dispense with oral proceedings, but might take a different view in a subsequent case.[134] Judge Oda had

125. *Id.*, para. 25.
126. *See* Oil Platforms case, Order, *supra* note 4, para. 6.
127. *Id.*, para.11.
128. *Id.*, para. 21.
129. *See* Genocide Convention case, Order, *supra* note 2, at 276 (Judge Koroma, Separate Opinion)
130. *Id.*, at 267 (Judge Kreca, Declaration).
131. *Id.*, at 278, para. 4 (Judge *ad hoc* Lauterpacht, Separate opinion).
132. *See* Rosenne, *supra* note 18, at 1273.
133. *See* Oil Platforms case, Order, *supra* note 4 (Judge Higgins, Separate Opinion). Judge Higgins also drew attention to the in fact that the Court had dealt with the question of jurisdiction, despite the fact that this is not mentioned in para. 3.
134. *Id.* (Judge *ad hoc* Rigaux, Dissenting Opinion).

more fundamental reasons for considering that the procedure followed had been 'irregular'.[135]

What does not emerge from the available record is whether or not either party to either case would have wished to insist on a hearing, or indeed whether the parties were consulted on that point. With the greatest respect to the Court, the point is not whether the Court regarded itself as sufficiently well-informed of the parties' positions: assuming that the Rule is to be taken as meaning what it says, that the parties are to be heard (not 'if necessary', but as a general rule), then it is for each party to determine whether it is satisfied that it has been given sufficient opportunity of enlightening the Court. One must echo the *voeu* expressed by various judges that the Rule be re-examined or revised; but it is also to be hoped that the Court will in the future meticulously respect the rights it has itself conferred on the parties by its Rules.

5.4. The interests of third states

When in 1934 the Permanent Court was discussing the proposal that the Rules should require counter-claims to be presented by separate application, one of the considerations referred to was the interest of third states in being informed of proceedings before the Court: Article 40 of the Statute provided for notification to members of the League of Nations of the bringing of a case, but this provision would not as such apply to counter-claims.[136] No provision was included in the PCIJ Rules, nor in the Rules of the post-war Court, expressly providing for notification of counter-claims to third states. The point was however taken up in the two recent Orders, each of which contained the following paragraph:

> 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.[137]

No judge commented on this paragraph in a separate or dissenting opinion. Yet the rights of third states contemplated must presumably be the rights of intervention conferred by Article 62 and 63 of the Statute. For those concerned about the delay in deciding the case, the prospect of the further complication introduced by an application for permission to intervene would presumably be highly unwelcome!

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135. *Id.*, para. 5 (Judge Oda, Dissenting Opinion).
136. *See, e.g.*, the remarks of Judge Negulesco in PCIJ (Ser. D), No. 2, 3rd addendum, *supra* note 7, at 105, and the suggestion of Judge van Eysinga that Art. 42, para. 2, of the PCIJ Rules would cover the point, *id.*, at 106.
137. *See* Genocide Convention case, Order, *supra* note 2, para. 39; and Oil Platforms case, Order, *supra* note 4, para. 42. Whether or not the inclusion of this direction is necessary, it would seem to be harmless; though one might wonder whether, if the Court were convinced of the 'direct connection' between claim and counter-claim, it would feel that a separate notification to third states of the latter was essential.

6. CONCLUSION

The problem facing the Court as a result of the presentation of the Yugoslavian counter-claim in the *Genocide Convention* case was not so much one of procedural law as of political justice. Whatever the requirements of the Rules as to admissibility of counter-claims, to refuse to hear the counter-claim of Yugoslavia would undoubtedly mean that the Court would have to examine, and give judgment on, only part of the overall picture of what had been happening in the former Yugoslavia. No-one could doubt that there had been atrocities on both sides; no-one questioned the fact that, both legally and morally, the atrocities on one side afforded no justification whatsoever for the atrocities on the other. The second consideration, as Vice-President Weeramantry saw so clearly, pointed to a refusal by the Court to admit the counter-claim, and such a refusal was also recommended by considerations of ensuring speedy justice in a case of unusual human agony. Yet to make the atrocities committed on one side the subject of a judicial condemnation, while declining on purely procedural grounds even to examine the allegations of atrocities on the other, would not inspire confidence in international justice. Even the argument of delay was two-edged: if the counter-claim were excluded, Yugoslavia could bring separate proceedings, but unless the Court agreed to join them to the case instituted by Bosnia (which would involve, in effect, admitting the counter-claim by the back door), there would be a considerable time-lag between the judgment on Bosnia's assertions and that on Yugoslavia's.

In the circumstances it is understandable that the Court was ready to take a wide view both of the definition of a counter-claim for purposes of proceedings before it, and of the test of "direct connection" specifically laid down in its Rules. It did not accept the view that a counter-claim which could be heard in separate proceedings, without prejudicing the defence of the respondent in the original proceedings, should not benefit from the exceptional procedure of Article 80 of the Rules of Court. On a theoretical level, one might have thought that such a counter-claim might fall within the second degree of kinship impliedly identified by the Permanent Court,[138] and be appropriately handled, not as a counter-claim, but as a separate case susceptible of being joined to the original proceedings. Yet in the circumstances of the *Genocide Convention* case, this would have been an even less satisfactory solution, considered from the standpoint of avoidance of delay, and procedural justice: indeed, it may be that in virtually every conceivable case there is no room for any intermediate solution between totally separate proceedings and admission as a counter-claim.

Having taken this course in the *Genocide Convention* case, the Court was more or less obliged to admit the counter-claim of the United States in the *Oil Platforms* case also, since the terms in which it had defined the criteria for the existence of a 'direct connection' fitted the facts of that case, even if there was

138. *See supra*, Section 2.2.

less justification than in the *Genocide Convention* case for not obliging the Respondent to institute separate proceedings. The actual reasoning of the decisions, particularly that of the *Genocide Convention* Order, may be open to criticism; the Court considered (rightly, it is suggested) that the existing Rules do not give it any measure of discretion, and had therefore to find a way of squeezing past the textual restrictions something which they had, perhaps, been intended to keep out. Hard cases, it is said, make bad law; and to avoid the restrictions in the Rules being reduced to a dead letter, it would perhaps be desirable for the text to be revised to include some element of discretion of the Court to admit or deny admission to a counter-claim on the basis of considerations too difficult to foresee for them to be textually stipulated.