

INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING THE APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

(Bosnia and Herzegovina v Yugoslavia) ORDER ON COUNTER-CLAIMS

[1997] ICJ Reports

On 17 December 1997 the International Court of Justice held that counter-claims submitted by Yugoslavia are "admissible as such" and that they "form part of the current proceedings" in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*¹ (*Bosnia and Herzegovina v Yugoslavia*).

In its counter-claims (submitted on 22 July 1997 in its Counter-Memorial), Yugoslavia requested the Court to adjudge that "Bosnia and Herzegovina is responsible for the acts of genocide committed against the Serbs in Bosnia and Herzegovina" and that it "has the obligation to punish the persons held responsible" for these acts. It also asked the Court to rule that "Bosnia and Herzegovina is bound to take necessary measures so that the said acts would not be repeated" and "to eliminate all consequences of the violation" of the Genocide Convention.

This is the first time that the Court has ruled on the admissibility of counter-claims at a preliminary stage. In the past the Court adjudicated twice on counter-claims. In *Colombian-Peruvian Asylum Case*² and *Rights of Nationals of the United States of America in Morocco*³ it did so simultaneously with its final decision on the merits of the case. Noting that its decision in no way pre-judges whether Yugoslavia's counter-claims are well founded, the Court required the parties to further present their views on their respective claims.

¹ Hereafter the "Genocide Convention". The Convention was signed on 9 December 1948.

² [1950] International Court of Justice Reports 266.

³ [1952] International Court of Justice Reports 176.

Pursuant to the Rules of the Court (Article 80), 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. On 28 July 1997 Bosnia and Herzegovina challenged Yugoslavia's counter-claims, contending that they did not meet the criterion of Article 80. The Court consequently asked the parties to submit written observations on the issue. Having received these observations the Court found that it was sufficiently informed and that it was not necessary to hear the parties otherwise.

In its Order the Court specified that a counter-claim is "independent of the principal claim in so far as it constitutes a separate 'claim'" and that its thrust is "to widen the original subject-matter of the dispute by pursuing objectives other than the mere dismissal of the claim of the Applicant".

The Court found by 13 votes to 1 that Yugoslavia's counter-claims were admissible and formed part of the current proceedings because they were directly connected with the subject-matter of Bosnia and Herzegovina's claims, that they rested on facts of the same nature, and that they constituted separate claims seeking relief beyond the dismissal of the claims of Bosnia and Herzegovina.

Kreca J *ad hoc* appended a declaration to the Order. Koroma J and Lauterpacht J *ad hoc* appended separate opinions. Weeramantry V-P appended a dissenting opinion.

HISTORY OF THE DISPUTE

On 20 March 1993 Bosnia and Herzegovina filed an Application instituting proceedings against Yugoslavia in respect of a dispute concerning alleged violations of the Genocide Convention. As the basis of the jurisdiction of the Court, Bosnia and Herzegovina invoked Article IX of that Convention.

In its Application, Bosnia and Herzegovina, among other claims, requested that the Court adjudge and declare that Yugoslavia, through its agents and surrogates, "killed, murdered, wounded, raped, robbed, tortured, kidnapped, illegally detained, and exterminated the citizens of Bosnia and Herzegovina", and that it had to cease immediately this practice of so-called "ethnic cleansing" and pay reparations.

On 20 March 1993 Bosnia and Herzegovina also submitted a request for provisional measures (an interim injunction). Hearings were held on 1 and 2 April 1993, and by an Order dated 8 April 1993 the Court indicated that Yugoslavia "should immediately take all measures within its power to prevent commission of the crime of genocide" and that both Yugoslavia and Bosnia and Herzegovina "should not take any action which may aggravate or extend the existing dispute". The Court limited its provisional measures to requests falling within the jurisdiction conferred on it by the Genocide Convention.

On 27 July 1993 Bosnia and Herzegovina filed a second request for provisional measures, followed on 10 August 1993 by a request by Yugoslavia for provisional measures. Hearings were held on 25 and 26 August 1993 and by an Order dated 13 September 1993 the Court reaffirmed the measures indicated earlier, adding that they should be immediately and effectively implemented.

A preliminary objection to the jurisdiction of the Court was then raised by Yugoslavia. Hearings took place between 29 April and 3 May 1996 and on 11 July 1996 the Court delivered a Judgment dismissing the objection and holding that it had jurisdiction to adjudge the dispute.

In the Order of 17 December 1997 the Court, by 13 votes to 1, found that the counter-claims submitted by Yugoslavia in its Counter-Memorial were admissible as such and formed part of the current proceedings: per Schwebel P, Oda, Bedjaoui, Guillaume, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans JJ; Lauterpacht and Kreca JJ *ad hoc*; Weeramantry V-P dissenting.

The same majority of the Court directed Bosnia and Herzegovina to submit a Reply and Yugoslavia to submit a Rejoinder relating to the claims of both parties and fixed dates, accepted by the parties, as time-limits for the filing of these pleadings.⁴

⁴ On 22 January 1998 Schwebel P extended the date for the filing of the Reply by Bosnia and Herzegovina to 23 April 1998, and for the filing of the Rejoinder by Yugoslavia to 22 January 1999.

DECLARATION OF KRECA J AD HOC

Although Kreca *J ad hoc* voted in favor of the operative part of the Court's Order, he had some observations on certain aspects of the concept of a counter-claim and its application to this particular case.

Endorsing the qualification of a counter-claim as an independent legal act, he was of the opinion that the nature of the counter-claim suggested that in relation to the counter-claim, the applicant's claim was not the "principal", but simply the initial or original, claim.

He found that the concretisation of the general notion of counter-claim in Article 80 of the Rules of the Court had not been correctly carried out. This provision deals with the abstract term "counter-claim". The correct interpretation of the wording in Article 80 allowed for the conclusion that every claim made by the respondent was a counter-claim, namely, counter-claims which "may be presented" and counter-claims which "may not be presented". Only a claim made by the respondent which fulfilled the conditions stipulated in Article 80(1) of the Rules of the Court could be qualified as a counter-claim *stricto sensu*.

Kreca *J ad hoc* was of the opinion that a claim made by the respondent which fulfilled the conditions stipulated in Article 80(1) of the Rules of the Court was, *ipso facto*, a counter-claim within the meaning of Article 80, and that it should automatically be joined to the original proceedings.

In this particular case, the existence of a "connection in law" was obvious. It resulted directly from the findings of the Court in the Judgment of 11 July 1996 given on the respondent's preliminary objections. By the Judgment in the proceedings on the preliminary objections, the Court established the legal relationship between the respondent and the applicant, on the one hand, and the Genocide Convention, on the other.

Questions arising from both the Memorial and the Counter-Memorial were organically and inseparably connected to the Genocide Convention. The *sedes materiae* of the dispute between Bosnia and Herzegovina and Yugoslavia resided in the qualification of the acts ascribed by the parties to each other, from the standpoint of the Convention's relevant provisions.

On this basis “each party is called upon to establish the arguments on which it relies in support of its claim...over the object in dispute”, as arbitrator Huber pointed out in the *Island of Palmas Arbitration*.⁵

SEPARATE OPINION OF KOROMA J

In his separate opinion, Koroma J stated that he had voted in favor of the Order not without considerable misgivings, especially regarding its effect or perceived effect on the sound administration of justice. In his considered opinion, a counter-claim should not be allowed to be used in such a way as would appear to delay the administration of justice, particularly on such a grave issue as that concerning the present litigation between Bosnia and Herzegovina and Yugoslavia.

If the Rules of the Court appeared to put restraints on the Court, the Court should either exercise its discretion in the good administration of justice or propose that the Rules themselves be reviewed.

SEPARATE OPINION OF LAUTERPACHT J *AD HOC*

Lauterpacht *J ad hoc*, in a separate opinion, expressed concern about the fact that the Court had not held oral proceedings on the question of the admissibility of the counter-claims. He interpreted Article 80(3) of the Rules of the Court as requiring such proceedings when a question was raised as to the connection between the question presented by way of counter-claim and the subject matter of the claim. He noted that the parties had expressed their expectations that oral proceedings would take place.

As to the main question, whether Yugoslavia’s counter-claim was directly connected with the Bosnian claim, Lauterpacht *J ad hoc* agreed with the Order of the Court that a direct connection existed. Identifying the Bosnian interpretation of Article 80(1) as a “restrictive” one and the Yugoslav interpretation as a “broad” one, he considered that, having regard to the nature of the concept of genocide, it was not possible to insist that the facts underlying a counter-claim in respect of genocide be directly connected to the individual and specific acts forming the basis of the principal claim, provided that the counter-claim related to acts affected by the same treaty (the Genocide Convention) and occurred in the course of the same conflict.

⁵ (1928) 2 Reports of International Arbitral Awards 829, 837.

He referred to precedents in national law relating to the analogous problem of counter-claims in cases where a State is a plaintiff and, in particular, to *dicta* of judges to the effect that a transaction may comprehend a series of many occurrences depending, not so much upon the immediacy of their connection, as upon their logical relationship.

Lauterpacht *J ad hoc* pointed out that it would have been open to the Court, even in a case where the counter-claim was directly connected to the principal claim, to exercise its discretion to separate the examination of the counter-claim from the claim. He concluded, nonetheless, that the present case was not suitable for such a separation because of the difficulty in distinguishing between matters pleaded by Yugoslavia as defences and those pleaded as counter-claims. He also noted that some of the allegations made by Yugoslavia were directed against Croats, but concluded that the number of such allegations was too small to justify the Court in treating this consideration by itself as sufficient to exclude the admissibility of the counter-claim as a whole.

Finally, he drew attention to the systemic difficulty involved in the applications of the dispute settlement procedure of Article IX of the Genocide Convention to cases which are essentially of a criminal kind.

DISSENTING OPINION OF WEERAMANTRY V-P

Weeramantry V-P, in his dissenting opinion, expressed the view that the allegations of acts of genocide against Bosnia and Herzegovina did not properly come within the ambit of the term "counter-claim", as used in Article 80(1) of the Rules of the Court, and should not therefore be joined to the original claim. Such allegations were properly the subject of separate proceedings.

In view of the further delay that would inevitably result from the joinder of Yugoslavia's claim, he thought that the Court should exercise its discretion against such joinder. He also viewed the involvement of Croatia in the counter allegations as another reason for refusing to join them with the principal claim.