
Counter-claims and Obligations Erga Omnes before the International Court of Justice

Olivia Lopes Pegna*

Abstract

In December 1997 the International Court of Justice issued an order, for the first time, allowing a counter-claim. The Court found that the counter-claim submitted by Yugoslavia in the case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide was admissible under Article 80 para. 1 of the Rules. This raised the question whether a counter-claim may be presented in a case concerning the violation of an erga omnes obligation. The nature of counter-claims and their admissibility are analysed in this comment in relation to such cases. It is argued that counter-claims should be admitted before the Court only if built on defences on the merits and if strictly connected with the merits of the case in which they are raised. The author concludes that these conditions for the admissibility of a counter-claim cannot be fulfilled when the violation of an erga omnes obligation is alleged. The defensive character cannot be maintained as the Respondent State cannot invoke a previous violation of its rights committed by the Applicant in order to justify conduct that infringes an erga omnes obligation. Furthermore, connection in fact and in law is also lacking.

1 Introduction

The International Court of Justice has recently made two orders concerning the admissibility of counter-claims. The first, dated 17 December 1997, was in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*; the second, dated 10 March 1998, was in the case on *Oil Platforms (Islamic Republic of Iran v. United States of America)*.¹

* Ph.D candidate, University of Milan, Italy.

¹ For the texts of these cases see the Website of the ICJ, <<http://www.icj-cij.org>>. For a commentary see Arcari, 'Domande riconvenzionali nel processo di fronte alla Corte internazionale di giustizia', 81 *Rivista di diritto internazionale* (1998) 1042; Bekker, 'International Decisions', 92 *AJIL* (1998) 508.

In both of these cases the Court found that the counter-claims, respectively submitted by Yugoslavia and the United States in their counter-memorials, were admissible under Article 80 para. 1 of the Rules of the ICJ, which reads as follows:

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.

The first of these counter-claims raises a new problem.

On 20 March 1993 the Government of the Republic of Bosnia-Herzegovina had filed an Application requesting the Court to declare that Yugoslavia had violated, among other treaties, the Convention on the Prevention and Punishment of the Crime of Genocide,² to order Yugoslavia to cease such violations, and to declare that Yugoslavia was responsible under international law for damages incurred by such violations and should make reparation.³ In its counter-memorial Yugoslavia submitted to the Court a counter-claim alleging violations of the Genocide Convention on the part of the Government of Bosnia. Thus, for the first time a counter-claim has been submitted to the Court in a case concerning a violation of *erga omnes* obligations.

The present comment will analyse the question of the nature of counter-claims and their admissibility in relation to cases concerning the violation of this type of obligation. The purpose is to ascertain whether under Article 80 of the Rules of the Court the submission of counter-claims should be allowed when the claim concerns violations of *erga omnes* obligations.⁴

2 The Nature of Counter-claims in the Court's Procedure

Counter-claims were admitted before the Permanent Court of International Justice under Article 40 of the Rules of Procedure of 1922, which states:

Counter-Cases shall contain:

- (1) the affirmation or contestation of the facts stated in the Case;
- (2) a statement of additional facts, if any;
- (3) a statement of law;
- (4) conclusion based on the facts stated; *these conclusions may include counterclaims, in so far as the latter come within the jurisdiction of the Court; ...*⁵

It seems clear, from the *travaux préparatoires* of this text, that the concept of counter-claims envisaged by the proponents was a narrow one. Consistent with the idea that cases had to be brought before the Court either by special agreement or by application — as was required by Article 40 of the Statute — counter-claims could

² Hereinafter the Genocide Convention.

³ On 11 July 1996 the Court decided on the preliminary objections concerning its jurisdiction raised by Yugoslavia, affirming its jurisdiction solely on the basis of Article 9 of the Genocide Convention. See ICJ Reports (1996). For a commentary see Hippler Bello, 'International Decisions', 91 *AJIL* (1997) 121.

⁴ There is thus no need to analyse here one of the requirements set by Article 80, namely jurisdiction of the Court.

⁵ Emphasis added.

only exceptionally be submitted by the Respondent.⁶ Counter-claims had to be built on defences on the merits and were required to be strictly connected with the cases in which they were raised. The counter-claim was regarded as basically *a defence*, with the addition of ‘something more’.⁷

In the words of Anzilotti:

*L'élément commun aux diverses législations qui accueillent la notion de la demande reconventionnelle est que, par cette demande, le défendeur tend à obtenir en sa propre faveur, dans le même procès intenté par le demandeur quelque chose de plus que le rejet des prétentions du demandeur, de plus, par conséquent, que l'affirmation juridique sur laquelle se base le rejet. Telle est, sans doute, la demande reconventionnelle dont parle l'art. 40 du Règlement.*⁸

During the 1922 preliminary session Lord Finlay commented:

There might be *une demande reconventionnelle* which, though in form a demand, was really in the nature of a defence to the proceedings. It might be so closely connected with it, that it would be very wrong for the Court to take cognisance of the claim without taking cognisance of the counter-claim.⁹

During discussions on the revision of the Rules in the 1934 session, Anzilotti pointed out the practical advantage of admitting the submission of counter-claims in pending proceedings, in that ‘it enabled the respondent to demand, in the course of the same proceedings, what was due to him from the applicant *for a reason already pending*’, and observed that ‘it was in fact possible that a counter-claim would be so *closely bound up with the defence* that, if the respondent were bound to submit a special application, there would be a danger of placing the latter in a difficult position’.¹⁰

In the same session the introduction of the criterion of *direct connection* with the subject matter of the application was proposed.¹¹ The proponents explained that the intention was to make it clearer that counter-claims were admissible only when the grounds for the respondent’s action already constituted a defence to the main proceedings; the words of Lord Finlay were quoted. A suggested definition was ‘a claim

⁶ See PCIJ Series D, No. 2, add. 3, at 105 *et seq.*, and the comments by Anzilotti, ‘La riconvenzione nella procedura internazionale’, 8 *Rivista di diritto internazionale* (1929) 320; Genet, ‘Les demandes reconventionnelles et la procédure de la Cour Permanente de Justice Internationale’, 19 *Revue de droit international et de législation comparée* (1938) 160; Scerni, ‘La procédure de la Cour Permanente de Justice Internationale’, 65 *RdC* (III, 1938) 646.

⁷ Anzilotti, *supra* note 6; Genet, *supra* note 6, at 149; C. de Visscher, *Aspects récents du droit procédural de la Cour Internationale de Justice* (1966), at 113.

⁸ Anzilotti, ‘La demande reconventionnelle en procédure internationale’, 57 *Journal de droit international* (1930), at 857 *et seq.* (French translation of the article ‘La riconvenzione nella procedura internazionale’, *supra* note 6). ‘The common factor among the various legal systems that accept the notion of counter-claim is that, for this claim, the defendant seeks to obtain, in his own favour and in the same action as brought by the claimant, something more than rejection of the claimant’s demands, and therefore more than the legal statement on which rejection is based. This is presumably the counter-claim mentioned in Article 40 of the Rules.’

⁹ In PCIJ Series D, No. 2, add. 3, at 108.

¹⁰ *Ibid.*, at 106. Emphasis added.

¹¹ *Ibid.*, at 100.

directly dependent on the facts of the main action'.¹² As the defensive purpose was considered insufficient, a strict connection with the principal claim was also required in order to justify a joint treatment.¹³ Thus, Article 63 of the Rules was adopted, and is still in force (now as Article 80 of the 1978 Rules).

A narrow concept of counter-claims also emerges from the PCIJ's and the ICJ's earlier decisions. All the admitted counter-claims had the purpose of countering the principal claim; when pronouncing on their admissibility, the Court always ascertained the existence of a connection with the principal claim.

In the *Chorzów Factory* case (merits), the Permanent Court observed, with reference to the Polish Government's counter-claim:

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 that, consequently, it is juridically connected with the principal claim. . . . As regards the relationship existing between the German claims and the Polish submission in question, the Court thinks it well to add the following: Although in form a counter-claim, since its object is to obtain judgement against the Applicant for the delivery of certain things to the Respondent — in reality, having regard to the argument on which it is based, the submission constitutes an objection to German claim designed to obtain from Poland indemnity the amount of which is to be calculated, amongst other things, on the basis of the damage suffered by the *Oberschlesische*.¹⁴

In the *River Meuse* case (*Netherlands v. Belgium*) the Court admitted the counter-claim of the Belgian Government as the claim was 'directly connected with the principal claim'.¹⁵ In response to the alleged breaches of the Treaty establishing the regime for taking water from the Meuse between the Netherlands and Belgium, the Belgian Government had alleged that the Netherlands had committed violations of the same Treaty. It was submitted that, as a consequence of those violations, the Netherlands had 'rendered the proper application of the Treaty impossible', and that the Netherlands had lost its right to invoke the Treaty.

In the *Asylum* case (*Colombia v. Peru*) the question of admissibility of counter-claims was extensively discussed. The Government of Colombia contested the admissibility of Peru's counter-claim by arguing that it was not directly connected with the subject matter of the Application. In its view, this lack of connection resulted from the fact that the counter-claim raised 'new problems' and thus tended to 'shift the grounds of the dispute'.¹⁶

¹² *Ibid.*, at 112.

¹³ A distinction has been suggested between 'direct' counter-claims, namely those arising out of facts or transactions upon which the principal claim is based, and 'indirect' counter-claims, namely those arising out of facts or transactions different from those on which the principal claim is based. The distinction was present in the Draft convention on competence of courts in regard to foreign states, prepared by the Research in International Law group of the Harvard Law School, see 26 *AJIL* (1932) 490. It was also made later by authors with reference to PCIJ's and ICJ's procedure. See Hudson, *La Cour Permanente de Justice Internationale*, Paris, 1936, at 500; Genet, *supra* note 6, at 164; Hambro, 'The Jurisdiction of the International Court of Justice', 76 *RdC* (I, 1950), at 151–152; G. Guyomar, *Commentaire au règlement de la Cour Internationale de Justice* (1983) 521.

¹⁴ PCIJ Series A, No. 17, at 38. Emphasis added.

¹⁵ PCIJ Series A/B, No. 76, at 28.

¹⁶ ICJ Reports (1950), at 280.

The Court did not accept this view and stated:

It emerges clearly from the arguments of the Parties that the second submission of the Government of Colombia, which concerns the demand for a safe-conduct, *rests largely on the alleged regularity of the asylum, which is precisely what is disputed by the counter-claim*. The connexion is so direct that certain conditions which are required to exist before a safe-conduct can be demanded depend precisely on facts which are raised by the counter-claim. The direct connexion being thus clearly established, the sole objection to the admissibility of the counter-claim in its original form is therefore removed.¹⁷

Therefore the connection was asserted on the ground that the counter-claim was based on facts that, if ascertained, would have caused the rejection of the principal claim.

The same appears even more clearly in the *U.S. Nationals in Morocco* case (*French Republic v. United States of America*). With its counter-claim the Government of the United States requested the Court to adjudge and declare that the facts alleged by the French Government in its claim consisted in breaches of treaty rights of the United States and represented violations of international law. In this case no objection to the admissibility of the counter-claim was raised, and the Court proceeded to deal with all the submissions, without expressly evaluating the existence of a connection.¹⁸

In the case concerning *United States Diplomatic and Consular Staff in Teheran* (Provisional Measures) the Court stated that:

If the Iranian Government considers the alleged activities of the United States in Iran legally to have a close connection with the subject-matter of the United States Application, it remains open to that Government under the Court's Statute and Rules to present its own argument to the Court regarding those activities either by way of defence in a Counter-Memorial or by way of a counter-claim filed under Article 80 of the Rules of the Court.¹⁹

Thus, these arguments are considered to be the possible basis of a defence and also of a counter-claim.

In all of these cases, the defendant, by submitting a counter-claim, essentially aimed at 'countering' the principal claim, reducing or neutralizing it, alleging a counter-debt (*Chorzów Factory* case), contending the existence of a fact alleged by the applicant in its claim (*Asylum* case; *U.S. Nationals in Morocco* case), alleging termination of a treaty (*River Meuse* case), and so forth. Moreover, the facts that were invoked as a defence were at the basis of a claim. Counter-claims added something more to the defence insofar as the defendant requested findings against the applicant on the grounds of the facts alleged as defences. In each of these cases the Court admitted the counter-claim after ascertaining that it was closely connected with the case already pending.

The same may also be said of the counter-claim raised by the Government of the United States in the *Oil Platforms* case. On 2 November 1992 Iran filed an application instituting proceedings against the United States in respect of the dispute arising out of the attack and destruction of three offshore oil production complexes, owned by the

¹⁷ *Ibid.*, at 280–281. Emphasis added.

¹⁸ ICJ Reports (1952), at 178.

¹⁹ Order of 15 December 1979. ICJ Reports (1979), at 15.

National Iranian Oil Company, by several warships of the United States Navy in October 1987 and April 1988. Iran alleged the violation of the bilateral Treaty of Amity, Economic Relations and Consular Rights of 1955. In its counter-memorial, the Government of the United States set forth a counter-claim, alleging Iran's breaches of the same Treaty, and justified the direct connection of the counter-claim with the principal claim by stating:

the facts and circumstances that caused the United States to engage Iran's oil platforms — Iranian attacks on, and threats to, merchant shipping, including US shipping and US nationals — are at the heart of the US defence to Iran's claims ... these same facts and circumstances are likewise the basis of the US counterclaim.²⁰

In the order of 10 March 1998, the Court took into consideration the circumstances set out above by stating, *inter alia*, that 'the United States indicates, moreover, that it intends to rely on the same facts and circumstances in order both to refute the allegations of Iran and to obtain judgements against that State'.²¹

These cases also show the 'dual character' of counter-claims. In the Order of 17 December 1997 concerning the Genocide Convention the Court stressed this feature in the following terms:

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 object of which is to submit a new claim 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.²²

The Court then expressly observed that 'in Article 80 of its rules the Court did not confer a different meaning on the expression "counter-claim" ...'²³ and went on to stress the difference between *mere defences* and counter-claims,²⁴ declaring *inter alia* that 'the need to differentiate between counter-claims and defences in the scheme of the Rules of Court is moreover sufficiently clear from the jurisprudence of the Court'. The Court also referred to the passage quoted above from the *United States Diplomatic and Consular Staff in Teheran* case.

Thus, in the interpretation set forth by the Court, counter-claims are not something *else*, but something *more*, than a simple defence. For the counter-claim to be admissible

²⁰ See para. 24 of the Order. Emphasis added.

²¹ *Ibid.*, para. 38.

²² Para. 27 of the Order.

²³ *Ibid.*, para. 28.

²⁴ For the distinction between '*exceptions reconventionnelles*' and '*demandes reconventionnelles*' see Scerni, *supra* note 6, at 644–645; Genet, *supra* note 6, at 147; de Visscher, *supra* note 7. For this distinction with reference to set-off ('*compensation*'): see the decision of 13 July 1995, C-341/93, ECR, I-2053, of the Court of Justice of the European Communities, concerning Interpretation of Art. 6(3) of the 1968 Brussels Convention; see, in particular, the conclusions of the Advocate General.

the defensive purpose is not sufficient: as already observed, a direct connection between the counter-claims and the principal claim is also required.

As the Court reaffirmed in the Order on the Genocide Convention, the purpose (*ratio*) of admitting counter-claims is to achieve procedural economy, to ensure a better administration of justice, to have an overview of the respective claims of the parties in order to decide them more consistently, and to reach a just and coherent final decision.²⁵ A similar approach to counter-claims has been taken in international arbitral tribunals.²⁶ It is also widely used in internal legal systems.²⁷

It is for this purpose that para. 1 of Article 80 requires counter-claims to be directly connected with the subject-matter of the claim. Para. 3 of the same article states that:

In the event of doubt as to the connection between the question presented by way of counter-claim and the subject-matter of the claim of the other party the Court shall, after hearing the parties, decide whether or not the question thus presented shall be joined to the original proceedings.²⁸

Neither the text of Article 80 nor the *travaux préparatoires* provide us with a definition of what is intended by 'direct connection'. Ascertaining a connection is left to the discretion of the Court.²⁹ In exercising its judicial discretion on the admissibility of a counter-claim, the Court should undoubtedly follow the *ratio* described above.

In the two recent Orders on counter-claims the Court discussed the notion of 'direct connection' under Article 80. In both Orders the Court declared that:

whereas the Rules of Court do not define what is meant by 'directly connected' . . . , it is 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 . . . as a general rule, the degree of connection between the claims must be assessed both in fact and in law.³⁰

The Court considered that both counter-claims were directly connected with the subject-matter of the principal claims as they rested on 'facts of the same nature', formed part of the 'same factual complex', occurred in the same territory and in the

²⁵ See para. 30 of the Order. See also Genet, *supra* note 6, at 148.

²⁶ See Scelle, 'Arbitral Procedure', *Yearbook of the ILC* (1950) 137; Larschan and Mirfendereski, 'The Status of Counterclaims in International Law, With Particular Reference to International Arbitration Involving a Private Party and a Foreign State', 15 *Denver Journal of International Law and Policy* (1986) 11; Rentlen, 'Encountering Counterclaims', 15 *Denver Journal of International Law and Policy* (1986) 379.

²⁷ Legal systems may differ with regard to the degree of connection that is required between the counter-claim and the principal claim. However, the ground for admissibility (*ratio*) is the same, namely procedural economy and better administration of justice. See Blomeyer, 'Judicial Remedies of the Defendant', *International Encyclopedia of Comparative Law, Vol. IV Civil Procedure*, Ch. 4, at 63 *et seq.*; Rentlen, *supra* note 26, at 380.

²⁸ This power has to be distinguished from the general power of joinder of cases provided under Article 47 of the Rules. As the precedents of the two Courts show, this power is exercised only with the consent of parties and only with reference to cases pending between the same parties and relating to the same subject-matter, or parallel cases directed at the same object introduced by several applicants against a single respondent. See S. Rosenne, *The Law and Practice of the International Court*, Vol. II (1965), at 551; Guyomar, *supra* note 13, at 300 *et seq.*

²⁹ Anzilotti, *supra* note 8, at 870–871; Genet, *supra* note 6, at 165.

³⁰ Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-claim Order para. 33; Case concerning Oil Platforms, Counterclaim Order, para. 37.

same period; furthermore, the two parties intended to rely on certain identical facts in order both to refute the allegations of the applicant state and to obtain judgment against it, and pursued 'the same legal aim', namely the establishment of legal responsibility for violations of the same treaty (respectively, the Genocide Convention and the bilateral Treaty).³¹

3 Counter-claims and *Erga Omnes* Obligations

The distinction between obligations binding a state *vis-à-vis* another and obligations which bind each state with respect to all others, and are thus owed to 'a community of states' or to the 'international community as a whole' — *erga omnes* obligations — has been widely accepted,³² and has indeed been recognized in the ILC Draft Articles on State Responsibility.³³

The Court drew this distinction in its famous *obiter dictum* in the *Barcelona Traction* case, stating:

an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law . . . ; others are conferred by international instruments of a universal or quasi universal character.³⁴

As noted here by the Court, examples of *erga omnes* obligations may be found both in general international law and in treaty law. There are arguably many areas of concern to the international community, such as protection of human rights,

³¹ *Ibid.*, para. 38 and paras. 34–35, respectively.

³² Morelli, 'A proposito di norme internazionali cogenti', 51 *Rivista di diritto internazionale* (1968), at 114–115; Gaja, 'Ius Cogens beyond the Vienna Convention', 172 *RdC* (III, 1981), at 280–281; *Idem*, 'Obligations Erga Omnes, International Crimes and Jus Cogens: A Tentative Analysis of Three Related Concepts', in J. H. H. Weller, A. Cassese and M. Spinedi (eds), *International Crimes of States. A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (1989), at 151; F. Lattanzi, *Garanzie dei diritti dell'uomo nel diritto internazionale generale* (1983), at 125 *et seq.*; Annacker, 'The Legal Régime of Erga Omnes Obligations in International Law', 46 *Austrian Journal of Public and International Law* (1994), at 131 *et seq.*; A. de Hoogh, *Obligations Erga Omnes and International Crimes* (1996), at 49 *et seq.*; M. Ragazzi, *The Concept of International Obligations Erga Omnes* (1997).

³³ See Art. 40, paras 2(e)(ii), (iii), (f) and 3. See also Arangio-Ruiz, 'Fourth Report on State Responsibility Add. 1–3', *Yearbook of the ILC*, Vol. II, Part One (1992), at 34 *et seq.* and 43 *et seq.*

³⁴ ICJ Reports (1970), at 32. For a brief survey of further decisions by the Court adopting the same concept, see Thirlway, 'The Law and Procedure of the International Court of Justice', 60 *BYbIL* (1989), at 93 *et seq.*; Annacker, *supra* note 32, at 132 *et seq.*

peace-keeping, disarmament and arms control, and protection of the environment.³⁵ One of the features of this type of obligation is their 'indivisibility',³⁶ their 'non-bilateralizable structure',³⁷ their non-reciprocal character: their violation affects all other states (in case of obligations under general international law) or all other states that are party to the treaty that imposes these obligations.

It is for this reason that countermeasures cannot consist in a violation of an *erga omnes* obligation. When reacting to a breach of an obligation, the injured state cannot adopt a conduct consisting in a breach of an *erga omnes* obligation because in so acting it would injure also the rights of innocent states.³⁸ This legal structure is typical not only of peremptory norms (*jus cogens*),³⁹ but also of other norms of general international law and of a number of multilateral treaties.⁴⁰ This was accepted by the Court in its Order on the Genocide Convention, when it stated:

³⁵ Arangio-Ruiz, *supra* note 33, at 44; Lattanzi, *supra* note 32, at 126–127. In the field of environmental law see Picone, 'Obblighi reciproci ed *erga omnes* degli Stati nel campo della protezione internazionale dell'ambiente marino', in V. Starace (ed.), *Diritto Internazionale e protezione dell'ambiente marino* (1983), at 32 *et seq.*; Spinedi, 'Les conséquences juridiques d'un fait internationallement illicite causant un dommage à l'environnement', in F. Francioni and T. Scovazzi (eds), *International Responsibility for Environmental Harm* (1991), at 88 *et seq.*

³⁶ Lattanzi, *supra* note 32, at 125–126; Arangio-Ruiz, *supra* note 33, at 34.

³⁷ Annacker, *supra* note 32, at 136.

³⁸ Gaja, '*Jus cogens*', *supra* note 32, at 297; *Idem*, 'Obligations *Erga Omnes*', *supra* note 32, at 156; Lattanzi, *supra* note 32, at 314–315; Annacker, *supra* note 32, at 155 and 162.

³⁹ Many authors refers to *jus cogens* as a limit for countermeasures: see, among others, Fitzmaurice, 'General Principles of International Law Considered from the Standpoint of the Rule of Law', 92 *RdC* (II, 1957) 120; Simma, 'Reflections on Article 60 of the Vienna Convention', 20 *Österreichische Zeitschrift für Öffentliches Recht* (1970), at 12 and 15.

⁴⁰ Arangio-Ruiz, *supra* note 33, at 34. With reference to multilateral treaties see also Riphagen's draft Article 11, para.1(a) and (b), *Yearbook of the ILC*, Vol. II, Part One (1985) 12. In the International Law Commission, however, this view did not prevail and Article 50 of the Draft Articles on State Responsibility, adopted in 1996, prohibits, *inter alia*, countermeasures which consist in a 'conduct in contravention of a peremptory norm of general international law'. Gaja, 'Obligations *Erga Omnes*', *supra* note 32, at 156, note 18, had suggested a modification of the draft article 'in order to cover all *erga omnes* obligations'. Similar considerations had led to the adoption of para. 5 of Article 60 of the Vienna Convention on the Law of Treaties, which concerns suspension and termination of treaties as a consequence of its breach. Fitzmaurice, in his 'Second Report on the Law of Treaties', *Yearbook of the ILC*, Vol. II, Part One (1957), at 30 *et seq.*, had suggested that a violation of treaty obligations 'which are of a general public character requiring an absolute and integral performance' could not justify a suspension in their performance by the other parties. The solution finally adopted by the ILC seems more restrictive: Article 60 para. 5 of the Vienna Convention does not allow termination or suspension of the operation of a treaty as a consequence of its breach with regard to provisions relating to the protection of human persons contained in treaties of a humanitarian character. However, one could observe that, during the preparatory works, the prevailing opinion was that this exception to the rules on termination and suspension of treaties with reference to humanitarian treaties was justified by their *erga omnes* character. See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968*, at 352 *et seq.* and *Second Session, Vienna, 9 April–22 May 1969*, at 111 *et seq.* On this article see Barile, 'The Protection of Human Rights in Art. 60, Paragraph 5 of the Vienna Convention of the Law of Treaties', in *International Law at the Time of its Codification. Essays in Honour of Roberto Ago*, Vol. II (1987); Simma, *supra* note 39.

Whereas Bosnia and Herzegovina was right to point to the *erga omnes* character of the obligations flowing from the Genocide Convention, and Parties rightly recognised that in no case could one breach of the Convention serve as an excuse for another ...⁴¹

Therefore, in proceedings before the Court, the respondent state cannot invoke a previous violation of its rights committed by the Applicant in order to justify its own conduct that infringes an *erga omnes* obligation — not even if the previous violation also concerned an *erga omnes* obligation.

4 The Order concerning the Genocide Convention

The main argument of the Government of Bosnia in objecting to the admissibility of the counter-claim was that, due to the *erga omnes* character and the non-reciprocal nature of the obligations embodied in the Genocide Convention, even if the allegation set out in the counter-claim was founded, 'this could not in any way result in the total or partial dismissal (or neutralization) of Bosnia and Herzegovina's original claim, nor — of course — in "something more"'.⁴² For the Government of Bosnia '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 facts, the settlement of which could in no way influence the solution of the first dispute ...'.⁴³

It is interesting to note that Yugoslavia did not contend the requirement of the defensive character of the counter-claim, but maintained that the facts alleged in its counter-claim had also a defensive purpose as they were 'of crucial importance to answer the question of attribution to the Respondent of acts alleged by the Applicant' and 'served for a proper qualification of the acts alleged by the Applicant'.⁴⁴ For the Government of Yugoslavia, the alleged violations of the Genocide Convention by Bosnia and Herzegovina against the Serbs operated also as a defence against the accusations made in the principal claim because those acts 'strongly influenced the attitude of Serb people in Bosnia and Herzegovina' and were 'very relevant for deciding on whether the Serb people acted under the orders of the Yugoslav authorities ... or spontaneously to protect itself'.⁴⁵

Thus, while both parties agreed that, due to the *erga omnes* character of the obligations ensuing from the Genocide Convention, in no case could one breach justify, or serve as an excuse for, another.⁴⁶ Yugoslavia's argument indirectly leads to the same result: as Bosnia committed acts of genocide, the Serb population reacted 'spontaneously' 'to protect itself', and therefore the Government cannot be held responsible.

The Court accepted this line of argument by affirming that submissions 3 to 6 of the Counter-Memorial of Yugoslavia 'set out separate claims *seeking relief beyond the*

⁴¹ Para. 35.

⁴² See the Order on Genocide Convention, paras 12–13.

⁴³ *Ibid.*, para. 14.

⁴⁴ *Ibid.*, paras 19–21.

⁴⁵ *Ibid.*, para. 20.

⁴⁶ See the Order, paras 21 and 35.

dismissal of the claims of Bosnia and Herzegovina; and ... such claims constitute “counter-claims” within the meaning of Article 80 of the Rules of Court.⁴⁷

However, it cannot be argued that the facts alleged by Yugoslavia in its counter-claim directly serve to obtain partial or total rejection of the principal claim: from a procedural point of view they are not a ‘defence’, a ‘plea’, (*exception*, ‘*eccezione*’, ‘*Einrede*’), but are only directed to ‘infer’ that people acted without any order from the Government (they may be considered at least as ‘presumptions’). Were the facts found to be true, Yugoslavia’s lack of responsibility would not necessarily follow.

As the breaches allegedly committed by the Applicant cannot support the rejection of its claim, the further claim cannot be qualified as a counter-claim. The Court seems to have adopted here a very broad notion of ‘defence’. But, even if one admitted the existence of the defensive character of Yugoslavia’s counter-claim, further considerations should have led the Court to find that the counter-claim was inadmissible.

As noted above, the exercise of discretion by the Court in ascertaining the existence of connection should be guided by a consideration of whether joint treatment would allow the Court to achieve procedural economy and a better administration of justice. Judicial economy may justify a decision of both claims in the same proceedings in those cases where the claims require an evaluation of the same facts, of the same evidence, and so forth. A better administration of justice may also render the joint treatment of claims acceptable when there is a risk that two separate solutions may be incoherent, when the solution of one case affects the solution of the other, and so on. Otherwise the delays which inevitably arise as a result of the admission of the counter-claim would excessively penalize the Applicant.

No doubt, the facts alleged in Yugoslavia’s counter-claim are different from those alleged in the principal claim: there were different agents, different victims, different circumstances. A separate fact-finding process will be necessary, with separate inquiries and separate evidence to be assessed. Yugoslavia’s claim does not rest on the facts alleged in the principal claim, nor can it in any way influence the decision of the principal claim. Procedural economy would thus appear to be lacking; nor would the solution of the counter-claim permit a more coherent final decision. The decision on Yugoslavia’s claim cannot in any way affect the decision on Bosnia-Herzegovina’s. The delay that will necessarily result from the discussion of Yugoslavia’s claim cannot be justified by the probability of a more ‘coherent’ or ‘just’ final decision.

Therefore, in cases concerning this type of obligation the purpose of the admissibility of a counter-claim in pending proceedings seems to be non-existent. In fact, there is no apparent reason for dealing with the two claims simultaneously, as the decision on one does not affect the decision on the other.⁴⁸

The Court inferred the existence of a connection in law from the circumstances that the two Parties pursued ‘the same legal aim’, namely the establishment of legal

⁴⁷ *Ibid.*, para. 29. Emphasis added.

⁴⁸ Similar considerations, *inter alia*, brought Judge Weeramantry to vote against the Order on Genocide Convention; see his Dissenting Opinion.

responsibility for violations of the same treaty. In this regard a distinction should however be drawn between bilateral and most multilateral treaties. The alleged breaches of a bilateral treaty should properly be ascertained together. In this case the *ratio* underlying the admissibility of counter-claims seems respected. The apparent violation of a treaty obligation may be justified as a countermeasure. In fact, these treaties are usually inspired by the principle of reciprocity. Moreover, a complete evaluation of all the alleged violations of the same treaty in the same proceedings is to be considered expedient both for procedural economy and for a better decision.⁴⁹ Therefore, claims that are based on alleged violations of the same bilateral treaty may be considered as legally connected. This occurred in the *River Meuse* case as well as in the *Oil Platforms* case.

A completely different approach must be taken in relation to a multilateral treaty which imposes *erga omnes* obligations, in particular those of a humanitarian character: as already observed, these treaties are inconsistent with the principle of reciprocity. As the Court stated, with reference to the Genocide Convention:

The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. . . . In such a convention the contracting States do not have any interest of their own; they merely have, one and all, a common interest, namely the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.⁵⁰

Hence, the violation by each state is to be considered *per se*. There is no reason for a simultaneous examination.⁵¹

5 Conclusion

None of the conditions for the admissibility of a counter-claim before the Court may be found when the violation of an *erga omnes* obligation is alleged.

Moreover, when, as in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, notwithstanding the *erga omnes* character of the obligations, the Respondent submits a counter-claim and asserts its defensive character, in order to guarantee *effectiveness* to this principle, there should be a strict evaluation of the defensive purpose. Facts alleged should consist in a 'defence' aimed at obtaining the partial or total rejection of the principal claim.

In appraising the further requirement of a direct connection, the Court's discretion should be guided by the *ratio* underlying the admission of counter-claims in the Court proceedings: the facts alleged should be connected to those submitted by the Applicant, in so far as they can lead to a better administration of justice, or to a

⁴⁹ In certain aspects this case may be considered comparable with counter-claims arising out of the same contract as the principal claim, which are admissible in all legal systems.

⁵⁰ Opinion of 28 May 1951 on Reservations to the Genocide Convention, ICJ Reports (1951), at 23.

⁵¹ For the Court, 'the absence of reciprocity in the scheme of the Convention is not determinative as regards the assessment of whether there is a legal connection between the principal claim and the counter-claim'. Order on Genocide Convention, para. 35.

consistent final decision, without penalizing the Applicant through useless delays. Connection in fact and in law seems to be lacking when the solution of one case does not affect the solution of the other.

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