

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE RELATIVE À L'APPLICATION
DE LA CONVENTION POUR LA PRÉVENTION
ET LA RÉPRESSION DU CRIME DE GÉNOCIDE

(BOSNIE-HERZÉGOVINE c. YUGOSLAVIE)

DEMANDES RECONVENTIONNELLES

ORDONNANCE DU 17 DÉCEMBRE 1997

1997

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

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

(BOSNIA AND HERZEGOVINA v. YUGOSLAVIA)

COUNTER-CLAIMS

ORDER OF 17 DECEMBER 1997

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General List
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COUNTER-CLAIMS

ORDER

Present: President SCHWEBEL; Vice-President WEERAMANTRY; Judges ODA, BEDJAOUI, GUILLAUME, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, PARRA-ARANGUREN, KOOIJMANS; Judges ad hoc LAUTERPACHT, KREĆA; Registrar VALENCIA-OSPINA.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Article 48 of the Statute of the Court and to Articles 31, 44, 45 and 80 of the Rules of Court,

Makes the following Order:

1. Whereas, on 20 March 1993, the Government of the Republic of Bosnia and Herzegovina (hereinafter called "Bosnia and Herzegovina") filed in the Registry of the Court an Application instituting proceedings against the Government of the Federal Republic of Yugoslavia (herein-

after called “Yugoslavia”) in respect of a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter called “the Genocide Convention”), adopted by the General Assembly of the United Nations on 9 December 1948, as well as various matters which Bosnia and Herzegovina claims are connected therewith; whereas, in its Application, Bosnia and Herzegovina invoked Article IX of the Genocide Convention as the basis of the jurisdiction of the Court; and, whereas at the end of its Application, it set out its claims as follows:

“Accordingly, while reserving the right to revise, supplement or amend this Application, and subject to the presentation to the Court of the relevant evidence and legal arguments, Bosnia and Herzegovina requests the Court to adjudge and declare as follows:

- (a) that Yugoslavia (Serbia and Montenegro) has breached, and is continuing to breach, its legal obligations toward the People and State of Bosnia and Herzegovina under Articles I, II (a), II (b), II (c), II (d), III (a), III (b), III (c), III (d), III (e), IV and V of the Genocide Convention;
- (b) that Yugoslavia (Serbia and Montenegro) has violated and is continuing to violate its legal obligations toward the People and State of Bosnia and Herzegovina under the four Geneva Conventions of 1949, their Additional Protocol I of 1977, the customary international laws of war including the Hague Regulations on Land Warfare of 1907, and other fundamental principles of international humanitarian law;
- (c) that Yugoslavia (Serbia and Montenegro) has violated and continues to violate Articles 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26 and 28 of the Universal Declaration of Human Rights with respect to the citizens of Bosnia and Herzegovina;
- (d) that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has killed, murdered, wounded, raped, robbed, tortured, kidnapped, illegally detained, and exterminated the citizens of Bosnia and Herzegovina, and is continuing to do so;
- (e) that in its treatment of the citizens of Bosnia and Herzegovina, Yugoslavia (Serbia and Montenegro) has violated, and is continuing to violate, its solemn obligations under Articles 1 (3), 55 and 56 of the United Nations Charter;
- (f) that Yugoslavia (Serbia and Montenegro) has used and is continuing to use force and the threat of force against Bosnia and Herzegovina in violation of Articles 2 (1), 2 (2), 2 (3), 2 (4), and 33 (1), of the United Nations Charter;

- (g) that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has used and is using force and the threat of force against Bosnia and Herzegovina;
- (h) that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has violated and is violating the sovereignty of Bosnia and Herzegovina by:
 - armed attacks against Bosnia and Herzegovina by air and land;
 - aerial trespass into Bosnian airspace;
 - efforts by direct and indirect means to coerce and intimidate the Government of Bosnia and Herzegovina;
- (i) that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has intervened and is intervening in the internal affairs of Bosnia and Herzegovina;
- (j) that Yugoslavia (Serbia and Montenegro), in recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Bosnia and Herzegovina by means of its agents and surrogates, has violated and is violating its express charter and treaty obligations to Bosnia and Herzegovina and, in particular, its charter and treaty obligations under Article 2 (4) of the United Nations Charter, as well as its obligations under general and customary international law;
- (k) that under the circumstances set forth above, Bosnia and Herzegovina has the sovereign right to defend itself and its people under United Nations Charter Article 51 and customary international law, including by means of immediately obtaining military weapons, equipment, supplies and troops from other States;
- (l) that under the circumstances set forth above, Bosnia and Herzegovina has the sovereign right under United Nations Charter Article 51 and customary international law to request the immediate assistance of any State to come to its defence, including by military means (weapons, equipment, supplies, troops, etc.);
- (m) that Security Council resolution 713 (1991), imposing a weapons embargo upon the former Yugoslavia, must be construed in a manner that shall not impair the inherent right of individual or collective self-defence of Bosnia and Herzegovina under the terms of United Nations Charter Article 51 and the rules of customary international law;

- (n) that all subsequent Security Council resolutions that refer to or reaffirm resolution 713 (1991) must be construed in a manner that shall not impair the inherent right of individual or collective self-defence of Bosnia and Herzegovina under the terms of United Nations Charter Article 51 and the rules of customary international law;
- (o) that Security Council resolution 713 (1991) and all subsequent Security Council resolutions referring thereto or reaffirming thereof must not be construed to impose an arms embargo upon Bosnia and Herzegovina, as required by Articles 24 (1) and 51 of the United Nations Charter and in accordance with the customary doctrine of *ultra vires*;
- (p) that pursuant to the right of collective self-defence recognized by United Nations Charter Article 51, all other States parties to the Charter have the right to come to the immediate defence of Bosnia and Herzegovina — at its request — including by means of immediately providing It with weapons, military equipment and supplies, and armed forces (soldiers, sailors, airpeople, etc.);
- (q) that Yugoslavia (Serbia and Montenegro) and its agents and surrogates are under an obligation to cease and desist immediately from its breaches of the foregoing legal obligations, and is under a particular duty to cease and desist immediately:
 - from its systematic practice of so-called ‘ethnic cleansing’ of the citizens and sovereign territory of Bosnia and Herzegovina;
 - from the murder, summary execution, torture, rape, kidnapping, mayhem, wounding, physical and mental abuse, and detention of the citizens of Bosnia and Herzegovina;
 - from the wanton devastation of villages, towns, districts, cities, and religious institutions in Bosnia and Herzegovina;
 - from the bombardment of civilian population centres in Bosnia and Herzegovina, and especially its capital, Sarajevo;
 - from continuing the siege of any civilian population centres in Bosnia and Herzegovina, and especially its capital, Sarajevo;
 - from the starvation of the civilian population in Bosnia and Herzegovina;
 - from the interruption of, interference with, or harassment of humanitarian relief supplies to the citizens of Bosnia and Herzegovina by the international community;

- from all use of force — whether direct or indirect, overt or covert — against Bosnia and Herzegovina, and from all threats of force against Bosnia and Herzegovina;
 - from all violations of the sovereignty, territorial integrity or political independence of Bosnia and Herzegovina, including all intervention, direct or indirect, in the internal affairs of Bosnia and Herzegovina;
 - from all support of any kind — including the provision of training, arms, ammunition, finances, supplies, assistance, direction or any other form of support — to any nation, group, organization, movement or individual engaged or planning to engage in military or paramilitary actions in or against Bosnia and Herzegovina;
- (r) that Yugoslavia (Serbia and Montenegro) has an obligation to pay Bosnia and Herzegovina, in its own right and as *parens patriae* for its citizens, reparations for damages to persons and property as well as to the Bosnian economy and environment caused by the foregoing violations of international law in a sum to be determined by the Court. Bosnia and Herzegovina reserves the right to introduce to the Court a precise evaluation of the damages caused by Yugoslavia (Serbia and Montenegro)”;

2. Whereas, on 20 March 1993, immediately after the filing of its Application, Bosnia and Herzegovina submitted a request for the indication of provisional measures under Article 41 of the Statute; whereas, on 1 April 1993, Yugoslavia submitted written observations on Bosnia and Herzegovina’s request for provisional measures, in which, in turn, it recommended the Court to order the application of provisional measures to Bosnia and Herzegovina; and whereas, by an Order dated 8 April 1993, the Court indicated certain provisional measures with a view to the protection of rights under the Genocide Convention; and whereas, on 27 July 1993, Bosnia and Herzegovina submitted a new request for the indication of provisional measures; whereas, on 10 August 1993, Yugoslavia also submitted a request for the indication of provisional measures; and whereas, the Court, by an Order dated 13 September 1993, reaffirmed the measures indicated in its Order of 8 April 1993 and declared that those measures should be immediately and effectively implemented;

3. Whereas, on 15 April 1994, within the time-limit laid down, as extended by Order of the Vice-President of the Court on 7 October 1993, Bosnia and Herzegovina filed its Memorial at the end of which it presented its submissions as follows:

“On the basis of the evidence and legal arguments presented in this Memorial, the Republic of Bosnia and Herzegovina,

Requests the International Court of Justice to adjudge and declare,

1. That the Federal Republic of Yugoslavia (Serbia and Montenegro), directly, or through the use of its surrogates, has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide, by destroying in part, and attempting to destroy in whole, national, ethnical or religious groups within the, but not limited to the, territory of the Republic of Bosnia and Herzegovina, including in particular the Muslim population, by

- killing members of the group;
- causing deliberate bodily or mental harm to members of the group;
- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- imposing measures intended to prevent births within the group;

2. That the Federal Republic of Yugoslavia (Serbia and Montenegro) has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by conspiring to commit genocide, by complicity in genocide, by attempting to commit genocide and by incitement to commit genocide;

3. That the Federal Republic of Yugoslavia (Serbia and Montenegro) has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by aiding and abetting individuals and groups engaged in acts of genocide;

4. That the Federal Republic of Yugoslavia (Serbia and Montenegro) has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by virtue of having failed to prevent and to punish acts of genocide;

5. That the Federal Republic of Yugoslavia (Serbia and Montenegro) must immediately cease the above conduct and take immediate and effective steps to ensure full compliance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

6. That the Federal Republic of Yugoslavia (Serbia and Montenegro) must wipe out the consequences of its international wrongful acts and must restore the situation existing before the violations of the Convention on the Prevention and Punishment of the Crime of Genocide were committed;

7. That, as a result of the international responsibility incurred for the above violations of the Convention on the Prevention and Punishment of the Crime of Genocide, the Federal Republic of Yugoslavia (Serbia and Montenegro) is required to pay, and the Republic

of Bosnia and Herzegovina is entitled to receive, in its own right and as *parens patriae* for its citizens, full compensation for the damages and losses caused, in the amount to be determined by the Court in a subsequent phase of the proceedings in this case.

The Republic of Bosnia and Herzegovina reserves its right to supplement or amend its submissions in the light of further pleadings.

The Republic of Bosnia and Herzegovina also respectfully draws the attention of the Court to the fact that it has not reiterated, at this point, several of the requests it made in its Application, on the formal assumption that the Federal Republic of Yugoslavia (Serbia and Montenegro) has accepted the jurisdiction of this Court under the terms of the Convention on the Prevention and Punishment of the Crime of Genocide. If the Respondent were to reconsider its acceptance of the jurisdiction of the Court under the terms of that Convention — which it is, in any event, not entitled to do — the Government of Bosnia and Herzegovina reserves its right to invoke also all or some of the other existing titles of jurisdiction and to revive all or some of its previous submissions and requests”;

4. Whereas, on 26 June 1995, within the time-limit laid down for the filing of the Counter-Memorial, as extended by Order of the President of the Court dated 21 March 1995, Yugoslavia, referring to Article 79, paragraph 1, of the Rules of Court, raised preliminary objections concerning, respectively, the admissibility of the Application and the jurisdiction of the Court to hear the case; and whereas, by its Judgment dated 11 July 1996, the Court dismissed these preliminary objections and found, on the one hand, that on the basis of Article IX of the Genocide Convention it had jurisdiction to adjudicate upon the dispute and, on the other hand, that the Application was admissible;

5. Whereas, on 22 July 1997, within the new time-limit laid down by Order of the President of the Court dated 23 July 1996, Yugoslavia filed its Counter-Memorial; whereas in the introduction to that Counter-Memorial, Yugoslavia indicated that it “included counter-claims”; and, whereas at the end of the Counter-Memorial, it presented its submissions as follows:

“The Federal Republic of Yugoslavia requests the International Court of Justice to adjudge and declare:

1. In view of the fact that no obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide have been violated with regard to Muslims and Croats

— since the acts alleged by the Applicant have not been committed at all, or not to the extent and in the way alleged by the Applicant, or

- if some have been committed, there was absolutely no intention of committing genocide, and/or
- they have not been directed specifically against the members of one ethnic or religious group, i.e., they have not been committed against individuals just because they belong to some ethnic or religious group,

consequently, they cannot be qualified as acts of genocide or other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and/or

2. In view of the fact that the acts alleged by the Applicant in its submissions cannot be attributed to the Federal Republic of Yugoslavia,

- since they have not been committed by the organs of the Federal Republic of Yugoslavia,
- since they have not been committed on the territory of the Federal Republic of Yugoslavia,
- since they have not been committed by the order or under control of the organs of the Federal Republic of Yugoslavia,
- since there is no other grounds based on the rules of international law to consider them as acts of the Federal Republic of Yugoslavia,

therefore the Court rejects all claims of the Applicant, and

3. Bosnia and Herzegovina is responsible for the acts of genocide committed against the Serbs in Bosnia and Herzegovina and for other violations of the obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,

- because it has incited acts of genocide by the 'Islamic Declaration', and in particular by the position contained in it that 'there can be no peace or coexistence between "Islamic faith" and "non-Islamic" social and political institutions',
- because it has incited acts of genocide by the *Novi Vox*, paper of the Muslim youth, and in particular by the verses of a 'Patriotic Song' which read as follows:
 - 'Dear mother, I'm going to plant willows,
We'll hang Serbs from them.
Dear mother, I'm going to sharpen knives,
We'll soon fill pits again.'
- because it has incited acts of genocide by the paper *Zmaj od Bosne*, and in particular by the sentence in an article published in it that 'Each Muslim must name a Serb and take oath to kill him';

- because public calls for the execution of Serbs were broadcast on radio 'Hajat' and thereby acts of genocide were incited;
- because the armed forces of Bosnia and Herzegovina, as well as other organs of Bosnia and Herzegovina have committed acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, against the Serbs in Bosnia and Herzegovina, which have been stated in Chapter Seven of the Counter-Memorial;
- because Bosnia and Herzegovina has not prevented the acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, against the Serbs on its territory, which have been stated in Chapter Seven of the Counter-Memorial.

4. Bosnia and Herzegovina has the obligation to punish the persons held responsible for the acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

5. Bosnia and Herzegovina is bound to take necessary measures so that the said acts would not be repeated in the future.

6. Bosnia and Herzegovina is bound to eliminate all consequences of the violation of the obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and provide adequate compensation”;

* * *

6. Whereas, by a letter dated 28 July 1997, the Deputy-Agent of Bosnia and Herzegovina informed the Registrar that “the Applicant [was] of the opinion that the Counter-Claims submitted by the Respondent . . . [did] not meet the criterion of Article 80, paragraph 1, of the Rules of Court and should therefore not be joined to the original proceedings”; and the Deputy-Agent specified that, when the President of the Court met the Agents of the Parties under Article 31 of the Rules of Court, Bosnia and Herzegovina would ask for “an early date to hear the Parties according to Article 80, paragraph 3, of the Rules of Court”;

7. Whereas, on 22 September 1997, the President of the Court held a meeting with the Agents of the Parties in order to ascertain their views as to the further proceedings in the case; whereas the two Agents accepted that their respective Governments submit written observations on the question of the admissibility of the Yugoslav counter-claims; and whereas they contemplated that their Governments then be heard orally on the question;

8. Whereas, by a letter dated 26 September 1997, on the instructions of the Court, the Registrar invited the Government of Bosnia and Herze-

govina to specify in writing, not later than 10 October 1997, the legal basis on which it maintained that the counter-claims made by the Respondent did not meet the criterion laid down in Article 80, paragraph 1, of the Rules of Court; and whereas, in that letter, the Registrar specified that the Yugoslav Government would in turn be invited to submit its views on the question within two weeks of Bosnia and Herzegovina filing its observations; and whereas the Registrar sent a copy of that letter to Yugoslavia the same day;

9. Whereas, by a letter from its Deputy Agent dated 9 October 1997 and received in the Registry on 10 October 1997, Bosnia and Herzegovina submitted its observations on the Respondent's counter-claims to the Court; and whereas, by a letter dated 10 October 1997, the Registrar communicated a copy of those observations to the Yugoslav Government advising it that it might make known its own observations on the question within a time-limit expiring on 24 October 1997; and whereas on the same day the Registrar informed the Government of Bosnia and Herzegovina of this;

10. Whereas, in its written observations, Bosnia and Herzegovina maintains that "the alleged 'counter-claim' presented by Yugoslavia is not in accordance with the provisions of Article 80 of the Rules of Court"; and whereas it specifies that, although the counter-claim was presented in the Counter-Memorial and comes within the jurisdiction of the Court, conversely, it is not "directly connected . . . with the subject-matter of the initial proceedings";

11. Whereas, in order to establish the absence of such a connection in this case, Bosnia and Herzegovina invokes first the structure and content of Yugoslavia's Counter-Memorial; whereas it argues that the Counter-Memorial is divided into two completely autonomous parts, one in which Yugoslavia "attempts to reply to the accusations made in the Memorial of Bosnia and Herzegovina" and the other in which "Yugoslavia claims that Bosnia and Herzegovina itself is responsible for violations of the Genocide Convention"; whereas it argues that "the facts put before the Court by Yugoslavia, in the form of its 'counter-claim', are totally different from those on which the initial claim of Bosnia and Herzegovina is based" and whereas "the examination of each of the two sets of facts would be of no help in the judicial analysis of the other set and could not affect its outcome in any way whatsoever"; and whereas it asserts that, since Yugoslavia does not ask the Court, in its submissions in its Counter-Memorial, to find that there is any "kind of relationship, a legally significant one" to be established between the two claims, it recognizes in reality that "the judicial outcome of the one cannot determine or influence the outcome of the other in any manner whatsoever";

12. Whereas Bosnia and Herzegovina observes that, moreover, given the specific nature of the obligations embodied in the Genocide Convention, Yugoslavia could not have adopted any other position; whereas it

points to the *erga omnes* and non-reciprocal nature of those obligations; and whereas it infers from this that, within the system of the Convention, “no place remains for the logic of reciprocity”, so that

“it cannot be envisaged that the judicial finding of a violation of the Convention committed by a State could in the event be influenced by the fact that a second violation — of which the State in question is allegedly the victim — had been perpetrated”;

13. Whereas, for the purposes of confirming that its contentions are well founded, Bosnia and Herzegovina refers to scholarly opinion and infers from it 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 to reduce its effects” and, on the other hand, claim “something more”, in particular “a judgment against the applicant in the principal proceedings”; and whereas it submits that this is not the case as regards the Yugoslav “counter-claim” since, even if the allegation set out therein against Bosnia and Herzegovina were 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’”;

14. Whereas Bosnia and Herzegovina refers also to the jurisprudence of the Court and of its predecessor; whereas it indicates that “a study of what happens in practice reveals no case of a counter-claim which did not have the objective of countering the principal claim, either to make it fail, or to reduce its scope and effects” and it submits 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”;

15. Whereas, Bosnia and Herzegovina also maintains that when, as is the case here, a “counter-claim” raises a question which is independent of the initial claim, any joinder of these claims must be avoided on the grounds that this could have detrimental effects, on the one hand, on equality of the parties — since the Applicant could only respond once in writing, in its Reply, to the counter-claim — and, on the other hand, on the rights and interests of third States — since those third States would not be informed of the counter-claim;

16. Whereas at the end of its written observations Bosnia and Herzegovina argues that “the ‘counter-claim’ submitted by Yugoslavia in its Counter-Memorial is therefore not admissible, since any direct connection with the subject-matter of Bosnia and Herzegovina’s original claim

is totally lacking” whereas, it “requests the Court to decide — having heard the Parties as provided for in Article 80, paragraph 3, of the Rules of Court — that the ‘counter-claim’ in question should not be joined to the principal claim”; and whereas it “recognizes that Yugoslavia, should it so desire, may always submit to the Court an application instituting proceedings through the normal channels”;

17. Whereas, by a communication from its Agent dated 23 October 1997 and received in the Registry on 24 October 1997, Yugoslavia submitted to the Court its observations on the admissibility of the counter-claims set out in its Counter-Memorial, taking account of the observations submitted by Bosnia and Herzegovina; and whereas, by a letter dated 24 October 1997, the Registrar sent a copy of the observations of the Yugoslav Government to the Government of Bosnia and Herzegovina, informing it that, on the one hand, the Court would decide the remainder of the procedure on the basis of the documents presently before it and, on the other hand, that the Agents of the Parties would be advised of that decision in due course; and whereas, on the same day, the Registrar transmitted the same information to the Yugoslav Government;

18. Whereas, in its written observations, Yugoslavia points out that the original claim and the counter-claim are based on the same legal ground, that is to say the Genocide Convention and the general rules of State responsibility; whereas it submits that:

“The disputed facts of the claim and counter-claim are the facts of the same tragic conflict, i.e., civil war in Bosnia and Herzegovina, which happened in a single territorial and temporal setting, based on the same historical background and within the framework of the same political development”;

and from this it infers “all relevant facts which form the basis of claim and counter-claim are interrelated in such a way as to make a factual and legal connection relevant to the issue”;

19. Whereas Yugoslavia maintains that “there is a direct connection between Part Two of the Counter-Memorial, i.e., the counter-claim, and Part One of the Counter-Memorial, the defence of the Respondent”; whereas the counter-claim and the subject-matter of the claim “are directly connected”; whereas

“the facts on which the counter-claim is based and which are contained in Part Two . . . of the Counter-Memorial are of crucial importance to answer the question of attribution to the Respondents of acts alleged by the Applicant”;

and whereas the facts on which the counter-claim is based “are also relevant for qualification of the acts alleged by the Applicant as crimes of genocide”;

20. Whereas, in its written observations, Yugoslavia, refers, *inter alia*, to

“some identical facts . . . presented as a basis for denying the allegation of the Applicant which are, according to its view relevant for attribution of alleged acts to the Respondent and as a basis for the counter-claim”;

and whereas it explains in particular that “acts of direct and public incitement to commit genocide against the Serbs” for which it asks the Court to establish the responsibility of Bosnia and Herzegovina, operate also as a defence against the accusation made in the principal claim, in so far as such acts “strongly influenced the attitude of the Serb people in Bosnia and Herzegovina” and “are very relevant for deciding on whether the Serb people acted under the orders of the Yugoslav authorities . . . or spontaneously to protect itself”;

21. Whereas Yugoslavia moreover states that it “agrees with the Applicant that a breach of the Genocide Convention cannot serve as an excuse for another breach of the same Convention”, but “the two Parties are in dispute over existence of a breach of the Genocide Convention, i.e., genocide against the Muslim and non-Serb population”; whereas it notes that “for different reasons, the Respondent denies the existence of crimes of genocide against the Muslim and non-Serb population” and specifies that “one of the very relevant reasons is the absence of intent to commit genocide”; it maintains that

“the facts presented by Part Two . . . of the Counter-Memorial, which constitute the basis for the counter-claim, i.e., crimes of genocide committed against the Serb people in Bosnia and Herzegovina are part and parcel of the circumstances of the situation”

and are relevant “for identifying the motives and intentions of individuals who committed crimes vis-à-vis Muslims”; and whereas it submits that these facts, for which it asks the Court to establish the responsibility of Bosnia and Herzegovina, “served for proper qualification of the acts alleged by the Applicant”;

22. Whereas Yugoslavia alleges moreover that the Applicant, when it

“referred to *positions doctrinales* and *la jurisprudence internationale* regarding the direct connection between the counter-claim and subject-matter of the claim . . . failed to reach the end of development of the construction of Article 80, paragraph 1, of the Rules of Court”;

whereas it submits that “careful study of the practice of the Court reveals an important development of understanding of the said paragraph”, the Court having “departed from this [original] position” according to which “a counter-claim is directly connected with the subject-matter of the

claim of the other party when it serves for a rejection of the claim and for obtaining a judgment on the responsibility of the other party”; and whereas it notes that academic writings have after all emphasized “the lack of rigidity” which characterizes the treatment of counter-claims;

23. Whereas Yugoslavia also observes that “it seems that the Applicant is of the opinion that a counter-claim has to be limited exclusively to facts presented in [the main] claim”; whereas in order to establish that “this opinion is not based on the law”, it invokes Article 49, paragraph 2, of the Rules of Court according to which “[the] Counter-Memorial shall contain . . . any additional facts, if necessary”; whereas it infers from this that “if the Respondent is entitled to submit new facts by a Counter-Memorial, it can certainly do it by a counter-claim”; and whereas it notes that in the present case, the additional facts invoked as a basis for the counter-claim are, in any event, “relevant for rejection of [the] claim”;

24. Whereas at the end of its written observations Yugoslavia submits that “the counter-claim is directly connected with the subject-matter of the claim and the counter-claim meets the conditions of Article 80, paragraphs 1 and 2, of the Rules of Court”; and whereas it accordingly requests the Court “to reject all requests of Bosnia and Herzegovina submitted by its letter of 9 October 1997”;

25. Whereas, 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 Counter-Memorial; and whereas, accordingly, it does not appear necessary to hear the Parties otherwise on the subject;

* * *

26. Whereas 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 and, if so, whether they fulfil the conditions set out in that provision;

27. Whereas 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;

28. Whereas, in Article 80 of its Rules, the Court did not confer a different meaning on the expression “counter-claim”; whereas the inclusion of Article 80 in Section D (“Incidental Proceedings”) of Part III (“Proceedings in Contentious Cases”) of the Rules of Court, and the provisions set out in that Article show that it does not apply to mere defences on the merits which the Court must hear in the normal exercise of its functions to decide the Applicant’s claims; and whereas 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:

“Whereas, moreover, 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 arguments 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 Court . . .” (*United States Diplomatic and Consular Staff in Tehran, Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979, p. 15, para. 24*);

29. Whereas in the present case, although Submissions 1 and 2 in the Counter-Memorial of Yugoslavia relate exclusively to the dismissal of the claims of Bosnia and Herzegovina, Submissions 3 to 6, on the contrary, set out separate claims seeking relief beyond the dismissal of the claims of Bosnia and Herzegovina; and whereas such claims constitute “counter-claims” within the meaning of Article 80 of the Rules of Court;

30. Whereas, however, a claim should normally be made before the Court by means of an application instituting proceedings; whereas, although it is permitted for certain types of claim 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; whereas, 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; and whereas the admissibility of the counter-claims must necessarily relate to the aims thus pursued and be subject to conditions designed to prevent abuse;

31. Whereas 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”;

32. Whereas in the present case it is not disputed that the Yugoslav counter-claims were “made in the Counter-Memorial of the party presenting it, and . . . appear as part of the submissions of that party”, in accordance with Article 80, paragraph 2, of the Rules of Court; and whereas, although Bosnia and Herzegovina recognizes that these claims meet the jurisdictional requirement set out in paragraph 1 of that Article, it denies that they meet the requirement of being directly connected with the subject-matter of the claim, also set out in that Article;

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

34. Whereas, in the present case, it emerges from the Parties’ submissions that their respective claims rest on facts of the same nature; whereas they 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; 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 judgment against that State;

35. Whereas Bosnia and Herzegovina was right to point to the *erga omnes* character of the obligations flowing from the Genocide Convention (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996*, pp. 615-616, para. 31), and the Parties rightly recognized that in no case could one breach of the Convention serve as an excuse for another; and whereas, however, the argument drawn from 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, in so far the two Parties pursue, with their respective claims, the same legal aim, namely the establishment of legal responsibility for violations of the Genocide Convention;

36. Whereas in its Orders of 8 April and 13 September 1993, the Court considered the requests for the indication of provisional measures made by each of the Parties; and whereas, in its Order of 13 September 1993, it stated, *inter alia*, as follows:

“45. Whereas the measure requested by Yugoslavia would be appropriate to protect rights under the Genocide Convention, which are accordingly within the *prima facie* jurisdiction of the Court; whereas, on the evidence and information available to it, the Court

must also recognize the existence of some risk to the persons whose protection Yugoslavia seeks; whereas however the question for the Court is whether the circumstances are such as to 'require' the indication of provisional measures, in accordance with Article 41 of the Statute;

46. Whereas by paragraph 52 A of its Order of 8 April 1993 the Court, having indicated that Yugoslavia should take all measures within its power to prevent genocide, indicated what 'in particular' were the appropriate measures to be taken by Yugoslavia in the circumstances of the case, where the risk was of genocide not on Yugoslav territory but in Bosnia-Herzegovina; whereas furthermore, as the Court noted in paragraph 45 of its Order of 8 April 1993, both Yugoslavia and Bosnia-Herzegovina are under a clear obligation to do all in their power to prevent the commission of any acts of genocide, and by paragraph 52 B of that Order the Court indicated that both Bosnia-Herzegovina and Yugoslavia should not take any action and should ensure that no action is taken which might aggravate or extend the existing dispute over the prevention or punishment of the crime of genocide, or render it more difficult of solution; whereas the Court does not find that the circumstances, as they now present themselves to the Court, are such as to require a more specific indication of measures addressed to Bosnia-Herzegovina so as to recall to it both its undoubted obligations under the Genocide Convention, and the need to refrain from action of the kind contemplated by paragraph 52 B of the Court's Order of 8 April 1993" (*I.C.J. Reports 1993*, pp. 346-347);

37. Whereas in the light of the foregoing, the Court considers that the counter-claims submitted by Yugoslavia are directly connected with the subject-matter of Bosnia and Herzegovina's claims; and whereas, as counter-claims, they are therefore admissible and form part of the present proceedings;

* *

38. Whereas a decision given on the admissibility of a counter-claim taking account of the requirements of Article 80 of the Rules of Court in no way prejudices any question with which the Court would have to deal during the remainder of the proceedings;

39. 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;

40. Whereas when, in accordance with the provisions of its Rules, the Court decides, in the interests of the proper administration of justice, to

rule on the respective claims of the Parties in a single set of proceedings, it must not, for all that, lose sight of the interest of the Applicant to have its claims decided within a reasonable time-period;

41. Whereas, during the meeting which the President of the Court held on 22 September 1997 with the Agents of the Parties (see paragraph 7 above), the Agent of Bosnia and Herzegovina indicated that his Government requested that the case be decided as soon as possible, was opposed to any further exchange of written pleadings on the merits and asked the Court immediately to set a date for the opening of the oral proceedings; whereas the Agent of Yugoslavia, conversely, made it known that, if the proceedings were to go forward, his Government wished to have a second round of written pleadings on the merits; whereas the two Agents were invited to express their views as to suitable time-limits to be fixed for the filing of further pleadings in the event that the Court decided that their submission was necessary; and whereas the Agent of Bosnia and Herzegovina specified, *inter alia*, that his Government would be in a position to present a Reply six months from the date of filing of the Counter-Memorial of Yugoslavia — that is, no later than 23 January 1998 — whether or not the Reply had to respond to the counter-claims made by Yugoslavia in its Counter-Memorial;

42. Whereas, taking into account the conclusions it has reached above regarding the admissibility of the Yugoslav counter-claims, the Court considers that it is necessary for Bosnia and Herzegovina to file a Reply and for Yugoslavia to file a Rejoinder relating to the claims of both Parties; and whereas it is necessary moreover, in order to ensure strict equality between the Parties, to reserve the right of Bosnia and Herzegovina to present its views in writing a second time on the Yugoslav counter-claims, in an additional pleading which may be the subject of a subsequent Order;

* * *

43. For these reasons,

THE COURT,

(A) By thirteen votes to one,

Finds that the counter-claims submitted by Yugoslavia in its Counter-Memorial are admissible as such and form part of the current proceedings;

IN FAVOUR: *President* Schwebel; *Judges* Oda, Bedjaoui, Guillaume, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans; *Judges ad hoc* Lauterpacht, Kreća;

AGAINST: *Vice-President* Weeramantry;

(B) By thirteen votes to one,

Directs Bosnia and Herzegovina to submit a Reply and Yugoslavia to submit a Rejoinder relating to the claims of both Parties and *fixes* the following dates, accepted by the Parties, as time-limits for the filing of these pleadings:

For the Reply of Bosnia and Herzegovina, 23 January 1998;

For the Rejoinder of Yugoslavia, 23 July 1998;

IN FAVOUR: *President* Schwebel; *Judges* Oda, Bedjaoui, Guillaume, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans; *Judges ad hoc* Lauterpacht, Kreća;

AGAINST: *Vice-President* Weeramantry;

Reserves the subsequent procedure for further decision.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this seventeenth day of December, one thousand nine hundred and ninety-seven, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Bosnia and Herzegovina and the Government of the Federal Republic of Yugoslavia, respectively.

(*Signed*) Stephen M. SCHWEBEL,
President.

(*Signed*) Eduardo VALENCIA-OSPINA,
Registrar.

Judge *ad hoc* KREĆA appends a declaration to the Order of the Court.

Judge KOROMA and Judge *ad hoc* LAUTERPACHT append separate opinions to the Order of the Court.

Vice-President WEERAMANTRY appends a dissenting opinion to the Order of the Court.

(*Initialled*) S.M.S.

(*Initialled*) E.V.O.