

In studying a particular prominent preventive mechanism in detail, Sullivan provides insights on how global security techniques create and shape our world and how the law adjusts to them. Perhaps because such processes can appear boring and are technical, we do not pay attention to them, leaving room for this shaping of law to occur largely unnoticed. Or perhaps we do not consider it the role of the lawyer to inquire how practice shapes law. Nonetheless, whether or not we choose to pay attention to such practices, they shape and mould our world in crucial ways. It seems to the present author that the moulding that Sullivan brings to our attention is one that we should be wary of and that we should be alert to how global security practices subtly shape legal principles and judicial processes. All this has an impact on our understanding as international lawyers: Sullivan encourages lawyers to ask critical questions about seemingly technical matters and perhaps even dare to be an advocate, lest we unwittingly support and legitimize novel forms of collateral damage. Given their expertise, lawyers are uniquely placed to understand how law is (ideally) designed to work and to raise critical questions when transformations occur. Besides, one should not forget that academia has been highly influential in nudging the UNSC to shift towards targeted sanctions and in taking human rights issues seriously. Clearly, however, in the UNSC listing procedure, the hard work of human rights law is not done.

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Hadi Azari. ***La demande reconventionnelle devant la Cour internationale de Justice***. Paris: L'Harmattan, 2018. Pp. 462. €45. ISBN: 9782343135571.

In a field already densely populated (including, more recently, by the monumental *Max Planck Encyclopedia of International Procedural Law*¹), monographic works on the law governing the activity of the International Court of Justice (ICJ) belong to a genre that knows no crisis. Be it ad hoc judges or parties' non-appearance, preliminary exceptions or third party intervention, few powers of the ICJ and few aspects concerning its composition or its procedure have not been subjected to a careful dissection and evaluation in book-length form. While the main ingredients of these evaluations tend to be the same – a thorough examination of the rules governing a particular issue and of the practice relating to it, a contextual analysis of the role of the ICJ and of the dynamics guiding its activity and a comparison with other international tribunals – the focus can be different. Indeed, the genre has its variations, three of which stand out. Some books concentrate on the rules, providing a complete and systematically organized overview of the law and practice governing a particular issue. In other monographs, studies of the law governing a particular issue provide the backdrop to the analysis, but the authors' main interest lies in the underlying concepts and

powers – in particular, they aim to explore and explain the exercise of judicial power in light of how the ICJ operates and the variety of functions it performs. In yet other instances, a comparative approach is adopted: the procedure before the ICJ and those before other international tribunals are studied together with a view to detecting convergences and divergences as well as identifying the common principles applicable to international adjudication. While works falling into this latter category, based as they are on a comparative approach, are not works on the ICJ, strictly speaking, to the extent that they contribute insights, for example, into ICJ procedure, the difference is more a matter of perspective than of substance.

Hadi Azari's *La demande reconventionnelle* fits comfortably into the first of these categories. This monograph – the first on the topic in French² – offers an analytical exposition of the law governing counter-claims before the ICJ. Counter-claims feature in the rules and practice of a number of international courts and tribunals, and Azari does not hesitate to refer to the case law of the International Tribunal for the Law of Sea or the Court of Justice of the European Union as a source of inspiration for understanding certain problems or foreshadowing possible solutions (at 110, 153). But the book does not engage in a comparative analysis; the brief chapter dedicated to 'comparative law', which extends to both domestic and international procedural law, does not add much apart from offering a rapid overview of the conditions generally required for the admissibility of counter-claims, confirming the view, already held by Dionisio Anzilotti in 1930,³ that the power to file counter-claims may be regarded as reflecting a general principle of procedural law (at 99).

Nor is any real attempt made in the book to establish whether the regime of counter-claims, as developed in ICJ case law, tells us something about the way in which the ICJ interprets its judicial function or exercises the power to regulate its own procedure. More broadly, the author does not seek to shed light on the judicial policy of the ICJ or to inquire into the possible reasons behind this or that choice. Thus, we are told that the position of the Court on the conditions for the admissibility of counter-claims has evolved over time (at 187) – the major turning point being represented by the order of 17 December 1997 in the *Genocide Convention* case – but not why it evolved in this way.⁴ Indeed, by establishing that a counter-claim does not need to 'counter' the initial claim in order to be regarded as 'directly connected' to it, the 1997 decision relaxed the conditions for the admissibility of counter-claims. This decision has probably contributed to the increase in the number of counter-claims filed with the Court in the following years. The Court's change of position invites questions as to why the

¹ See H. Ruiz Fabri (ed.), *Max Planck Encyclopedia of International Procedural Law*, available at <https://opil.ouplaw.com/home/mpi>; see also M. Shaw, *Rosenne's Law and Practice of the International Court 1920–2015* (5th edn, 2016); A. Zimmermann and C. Tams (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, 2019).

² For a recent monograph in English, see C. Antonopoulos, *Counterclaims before the International Court of Justice* (2011).

³ Anzilotti, 'La demande reconventionnelle en procédure internationale', 57 *Clunet* (1930) 867.

⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)*, Order, 17 December 1997, ICJ Reports (1997) 243.

admissibility test was relaxed. However, these are not the kind of questions to which the book is intended to provide an answer.

The book is well structured, with three parts dedicated, respectively, to the notion of counter-claims, the conditions for their admissibility and the procedure for addressing them. It covers in an accessible way an impressively wide range of legal issues arising in connection to counter-claims and provides an extensive overview of the existing case law. In this respect, it is unfortunate that there is no explicit acknowledgement of the cut-off date for the study of the ICJ's case law; the significant order of 17 November 2017 on the counter-claims of Colombia in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*⁵ is only briefly mentioned in a couple of footnotes, leaving the impression of a last-minute addition (at 283, n. 623).

The approach of the book is descriptive rather than prescriptive; its purpose is to establish what the law governing counter-claims is rather than what it should be. Criticism of the ICJ's decisions, while not absent, is rare. These elements sometimes render the analysis flat and the style excessively pedagogical. Where the book is at its best is in its attempt to shed light on the uncertainties and grey areas still surrounding the legal regime of countermeasures. Given the limited case law available, there are many of these; some of which have been little studied so far. Azari engages carefully in this exercise, showing an appreciable amount of creativity both in identifying new problems or in offering new perspectives on some long-debated issues. His proposed solutions to these different problems, while certainly debatable, are generally well argued. They are based on a solid knowledge of the law and practice of the Court and tend to reflect, in an overall coherent way, a precise idea of the function performed by counter-claims – a point to which I will revert immediately. The result is a book that should appeal to practitioners and those interested in international dispute settlement as it provides a clear overview of the many problems – known and lesser known – characterizing the legal regime of counter-claims before the ICJ.

The instrument of counter-claims has a hybrid character: it is 'an autonomous legal act the object of which is to submit a new claim to the Court', but it is also 'linked to the principal claim, in so far as, formulated as a "counter" claim, it reacts to it'.⁶ In establishing the legal regime of counter-claims, Azari places greater emphasis on their autonomy. He is generally supportive of the position taken by the ICJ in 1997 when it recognized that, in order to be admissible, counter-claims do not necessarily have to have the effect of neutralizing, at least in part, the principal claim. According to the author, by interpreting broadly the requirement of a 'direct connection' between the principal claim and the counter-claim, the Court aligned its own conception of counter-claims with the general trend prevailing in states' domestic procedural law (at 131–132). Azari's work clarifies the implications of an autonomous approach to counter-claims with ample discussion. Being an autonomous act, in Azari's view,

⁵ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)*, Order, 15 November 2017, ICJ Reports (2017) 289.

⁶ *Genocide Convention*, *supra* note 5, at 256, para. 27.

many of the rules governing the principal claim should also apply to counter-claims. Thus, for instance, if, in the case of the principal claim, the date for determining the existence of a dispute, the jurisdiction of the Court or the admissibility of the claim is the date on which the application is submitted to the Court, then, in the case of counter-claims, the relevant date should be the one on which the counter-memorial is filed (at 283, 302).

Similarly, if the applicant withdraws its principal claim and asks for the discontinuance of the case, the consent of the respondent state is required in relation not only to the principal claim but also to the counter-claim, with the result that the respondent could consent to the discontinuance of the principal case but deny it regarding the case introduced by the counter-claim (at 176). Autonomy, according to Azari, also implies that the possibility to raise preliminary objections in respect to a counter-claim should not differ in substance from that recognized in relation to the principal claim: the applicant should therefore be able to raise objections to the jurisdiction of the Court or the admissibility of the counter-claim even after the Court has decided to entertain it pursuant to Article 80 of the Rules of Court – a decision, according to the author, that only requires the Court to assess its competence *prima facie* (at 205).⁷ Yet, given the importance that Azari attaches to the autonomous character of counter-claims, it is surprising that he adopts a restrictive approach towards assessing the jurisdictional basis of counter-claims, arguing that, unless a different solution is agreed upon by the applicant, the basis should be the same as that which the applicant relied on to found the Court's jurisdiction over the principal claim (at 293).

One of the risks of placing too much emphasis on the autonomy of counter-claims is that it transforms them into an instrument by which the respondent may seek to reshape the content of the case brought against it, to the detriment of the interests of the applicant and, in certain cases, of the good administration of justice. This may explain the importance attached by the author to the ICJ's ability to exercise control over the counter-claim. In particular, he devotes considerable energy to defending the view that the ICJ has the discretionary power to reject a counter-claim even if it finds that, under the circumstances of the case, the conditions for its admissibility are met (at 252–261).

While generally well argued, some of Azari's positions are unpersuasive. To say that the Court's assessment of its competence in the proceeding under Article 80 of the Rules of Court is only *prima facie* is not confirmed in the Court's practice.⁸ Moreover, in the case of provisional measures, while a *prima facie* assessment is justified by a sense of urgency, for counter-claims, reasons of judicial economy militate in favour of a full assessment of the objections raised by the applicant in the course of the incidental proceedings. Nor does this reviewer agree with the view that the Court should possess a discretionary power to decline to entertain counter-measures. While, admittedly, as also noted by other scholars,⁹ this view may find support in the text of

⁷ Rules of Court 1978, available at <https://www.icj-cij.org/en/rules>.

⁸ On this point, see Murphy, 'Counter-claims: Article 80 of the Rules', in Zimmermann and Tams, *supra* note 1, 1104, at 1128–1129.

⁹ See, e.g., Arcari, 'Counter-claims: International Court of Justice (ICJ)', in Ruiz Fabri, *supra* note 1, para 14.

Article 80 of the Rules of Court, it is hard to see the reasons for such a power. The Court already enjoys significant discretion in assessing whether the conditions for the admissibility of a counter-claim are satisfied. Recognizing the existence of a broader discretionary power, which the Court would be able to exercise in the absence of any clear criteria delimiting its scope of application, simply renders the whole procedure more uncertain.

Beyond the criticism one may offer of particular views, the main weakness of *La demande reconventionnelle* lies elsewhere. This book says a lot about counter-claims; it says too little about the ICJ. It is certainly important to establish that the counter-claim operates as an autonomous claim (at 419) and to draw from this a number of conclusions as to the legal regime governing it. But there is a risk that, amidst all the detail, the broader picture is lost. For instance, one might have expected to read about the implications of an 'autonomous' conception of counter-claim on the Court's activity; on whether such a conception enhances 'the effectiveness of the ICJ judicial function' (and how);¹⁰ on whether this autonomy has been coherently taken into account in the development of the legal regime of counter-claims; and on what factors may have influenced the Court's action in shaping this regime. This broader picture, which allows scholars and readers to grasp the dynamics influencing the Court's choices, is largely missing from Azari's account.

In many respects, the strengths and limits of Azari's book are those that can be observed also in other works belonging to the category of the books focusing primarily on the rules governing a particular aspect of the ICJ's activity. As Alain Pellet observes in the book's preface, books such as this make a useful contribution to the knowledge and practice of international law (at 15). Indeed, while the field is already crowded, commentaries, treatises or encyclopaedias certainly cannot compete with monographic works in terms of depth of analysis and coverage of the different problems. For scholars and practitioners interested in understanding the law and practice governing counter-claims before the ICJ, Azari's book is therefore destined to remain a useful point of reference in the years to come. By contrast, for those interested in understanding the dynamics governing the Court's activity or the differences between the Court's approach and that of other international tribunals, books such as this may be a disappointment. Their narrow perspective in analysing the Court's rules and practice diminishes their contribution to a full understanding of how the Court exercises its judicial power. It also makes them more vulnerable to the risk that, with the passing of time and the development of the Court's case law, the analysis contained therein becomes outdated.

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¹⁰ Arcari, *supra* note 9, para. 38.