JOINT OPINION OF JUDGES TOMKA, GAJA, SEBUTINDE, GEVORGIAN AND JUDGE *AD HOC* DAUDET

Requirements for the admissibility of counter-claims — Jurisdiction over counter-claims and direct connection with claim of the applicant — Discretion of the Court to entertain counter-claim — Juridical nature of counter-claim — Counter-claim as independent claim — Sequence of consideration of the requirements for counter-claim — Lapse of title of jurisdiction prior to the submission of counter-claim — Judgment in Nottebohm *not relevant for counter-claims — Counter-claims not within subject-matter of the dispute as earlier determined by the Court — Court has no jurisdiction over counter-claims in the present case — Bad faith of the applicant not to be presumed — Good and efficient administration of justice.*

1. The Court has found the first and second counter-claims presented by Colombia to be inadmissible. We agree with this conclusion, albeit on a different ground. The third and fourth counter-claims of Colombia have been found by the Court to be admissible; we respectfully disagree. In our view, all four counter-claims made by Colombia are inadmissible because none of them falls within the jurisdiction of the Court, which is one of the requirements to be met in order that the Court may entertain them.

2. The relevant provision on counter-claims is contained in Article 80, paragraph 1, of the Rules of Court, the Statute of the Court remaining silent on this matter.

Article 80, paragraph 1, of the Rules of Court, in its current version[1] reads as follows: "The Court may entertain a counter-claim only if it

[1] This version has been in force since 1 February 2001. Article 80 of the 1978 Rules of Court originally stated that "[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 provision on counter-claims appeared in the original Rules of Court adopted by the Permanent Court of International Justice ("PCIJ") on 24 March 1922. It was included in Article 40, describing what should be contained in the written pleadings of the parties. It provided that

"Counter-cases [in today's terminology Counter-Memorials] shall contain . . .

comes within the jurisdiction of the Court and is directly connected with the subject-matter of the claim of the other party."

3. This provision thus stipulates two conditions which must be met in order for a counter-claim to be found "admissible" by the Court. A counter-claim has to "come[. . .] within the jurisdiction of the Court"[2], that is the first condition. At the same time a counter-claim must be "directly connected with the subject-matter of the claim of the other party"[3]. The requirements for admissibility of a counter-claim under Article 80 of the Rules of Court are thus cumulative (Order, para. 20; see also *Certain Activities Carried Out by Nicaragua in the Border Area*

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conclusions based on the facts stated; these conclusions may include counter-claims, in so far as the latter come within the jurisdiction of the Court."

No change was made to this provision in the Revised Rules of Court, adopted by the PCIJ on 31 July 1926. It was in the Rules of Court adopted on 11 March 1936 that the provision on counter-claims was separated from the provision on written pleadings and revised. The 1936 Rules of Court contained a separate article on counter-claims, Article 63, which was included in Subsection II entitled "Occasional Rules" ("Règles particulières"), and formed part of Section I — Procedure before the Full Court, that Section being itself contained in Heading II — Contentious Procedure. Article 63 provided:

> "When proceedings have been instituted by means of an application, a counter-claim may be presented in the submissions of the Counter-Memorial, provided that such counter-claim is directly connected with the subject of the application and that it comes within the jurisdiction of the Court. Any claim which is not directly connected with the subject of the original application must be put forward by means of a separate application and may form the subject of distinct proceedings or be joined by the Court to the original proceedings."

When the International Court of Justice adopted, on 6 May 1946, its Rules of Court, a separate article on counter-claims remained as Article 63 in Subsection II (Occasional Rules). The first sentence remained in substance the same as that contained in the 1936 Rules of Court, applied by the PCIJ. The second sentence was, however, modified as follows:

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

No change was made to this provision on counter-claims in the 1972 Rules of Court, it just became Article 68, still in Subsection II (Occasional Rules).

[2] This requirement was already spelled out in the 1922 Rules of Court, adopted by the PCIJ.

[3] This requirement was for the first time expressly provided in Article 63 of the 1936 Rules of Court of the PCIJ which formulated it as "provided that such counter-claim is directly connected with the subject of the *application*" (emphasis added). No change to this formulation was made in 1946, except that the subject became subject-matter. The formulation remained the same in the 1972 version of the Rules. It was only in the 1978 Rules that the formulation was changed into "provided that it is directly connected with the subject-matter of the *claim* of the other party" (emphasis added).

(Costa Rica v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013*, p. 210, para. 27).

4. However, the Court is under no obligation to entertain a counter-claim even if the two requirements are satisfied. The verb "may" in the text of Article 80, paragraph 1, of the Rules of Court ("The Court may entertain a counter-claim") indicates that the Court enjoys a certain measure of discretion[4] to refuse to deal with a counter-claim. It is true that the Court has never refused to entertain a counter-claim if it satisfied the two requirements. But one cannot exclude that in an exceptional situation, when dealing with a counter-claim would not serve the sound (proper) and effective administration of justice, the Court may decline to entertain such a counter-claim, leaving it open to the respondent to file a new application instituting separate proceedings against the applicant in the original (first) case.

5. The Court has in the past stated that "a counter-claim has a dual character in relation to the claim of the other party" elaborating that it 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 . . . at the same time, it is linked to the principal claim, in so far as, formulated as a 'counter' claim, it reacts to it" (*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, I.C.J. Reports 1997*, p. 256, para. 27).

6. Leaving aside the rather infelicitous expression "principal claim", since Article 80 of the Rules of Court does not use it and there is no justification for distinguishing between claims which are "principal" and those which apparently are not, what is important in the Court's dictum is the fact that a counter-claim is *independent* of the claim of the other party and that it constitutes a *separate* claim. The fact that it reacts to the claim of the other party, so that it can be perceived as "linked" to that claim, does not make it subordinate to the latter. For that matter, a

[4] Judge *ad hoc* Lauterpacht expressed the view that "the Court enjoys a significant measure of discretion" (*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, I.C.J. Reports 1997*, p. 284, para. 18, separate opinion of Judge *ad hoc* Lauterpacht). Vice-President Weeramantry in that same case stressed that "even if all these prior requisites are satisfied, joinder is not automatic . . . Whether that counter-claim *will* be *accepted* must still depend on the undoubted discretion of the Court as the master of its own procedure" (*ibid.*, p. 288, dissenting opinion of Vice-President Weeramantry, emphasis in the original).

counter-claim may survive even after the applicant has withdrawn its claim or claims. Under Article 89, paragraph 2, of the Rules of Court, the respondent may oppose the discontinuance of the proceedings.

7. The Court in the above-quoted Order observed that "a claim should normally be made before the Court *[doit normalement être portée devant le juge]* by means of an application instituting proceedings" (*I.C.J. Reports 1997*, p. 257, para. 30). It further explained why "it is permitted for certain types of claim to be set out . . . within the context of a case which is already in progress" *(ibid.)*. The purpose of allowing such a claim to be made "is merely in order to ensure better administration of justice, given the specific nature of the claims in question" and in relation to counter-claims "to achieve a procedural economy" *(ibid.)*. The French text of that Order, which is the authoritative text, describes the purpose of permitting counter-claims even more categorically — counter-claims are permitted "aux *seules fins* d'assurer une meilleure administration de la justice" (*ibid.*, emphasis added).

8. The Court, however, also warned that "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" (*ibid.*, para. 31) and explained that "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'" *(ibid.)*.

9. The Court thus has to satisfy itself that the counter-claims come within its jurisdiction as recognized by the parties. The Court has done so in the present case but only in relation to the third and fourth counter-claims, having earlier concluded that the first and the second counter-claims lack a direct connection to the claims of Nicaragua.

10. The Court has reversed the order of consideration of the two requirements, provided for in Article 80, paragraph 1, of the Rules of Court. Although we accept that the Court, in examining these requirements, is not bound by the sequence in which they are set out in that Article (Order, para. 20, referring to the Court's pronouncement in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa* Rica along the San *Juan River (Nicaragua* v. *Costa Rica), Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013*, p. 210, para. 27), we consider that the more usual and logical approach is to start with consideration of the jurisdictional requirements. One may otherwise wonder what was the purpose of a lengthy exercise by the Rules Committee in 1999, resulting in the Court adopting, in 2000, amendments to Article 80. As far as paragraph 1 is concerned, the changes consisted, in part, in switching the order of the two requirements, starting with the jurisdictional

requirement and substituting "only if" for the previous "provided that".

11. In this case, in our view, it would have been more appropriate to start with a consideration of whether the Court possesses jurisdiction to adjudicate Colombia's counter-claims. We think that all four counter-claims are legally in the same position as far as the Court's jurisdiction is concerned. From this point of view, there is no difference between them.

12. The majority has, however, only determined that the Court has jurisdiction in relation to the third and fourth counter-claims. Having found the first and second counter-claims inadmissible for the lack of direct connection with the claims of Nicaragua, but not taking a position on whether they fall within the Court's jurisdiction, it left open the question whether Colombia may successfully bring these two claims before the Court by way of a new application. In our view, Colombia cannot do so, due to its denunciation of the Pact of Bogotá which, in accordance with Article LVI of the Pact, took effect on 27 November 2013. Since that date, the Pact of Bogotá ceased to be in force with respect to Colombia. Colombia not having accepted the Court's jurisdiction by a declaration under Article 36, paragraph 2, of the Statute of the Court, and not being any longer a party to the Pact of Bogotá, it cannot invoke any jurisdictional title as a basis for the Court's jurisdiction.

13. The Court has, in an expedient way, avoided the issue of its jurisdiction in respect of the first and second counter-claims made by Colombia. Had it considered that question, applying the same approach to the issue of its jurisdiction with regard to the third and fourth counter-claims, its conclusion would apparently have been that it has jurisdiction also over the first and second counter-claims which, however, are inadmissible because of the lack of direct connection with Nicaragua's claims. Such a conclusion by the Court on the existence of its jurisdiction in respect of the first and second counter-claims might have been perceived as an invitation to resubmit them by way of an application under Article 38 of the Rules of Court. But, as previously mentioned, such an application would have no prospects of success in view of the lack of any title of jurisdiction which Colombia could invoke.

14. This shows that the majority's approach to jurisdiction over Colombia's third and fourth counter-claims "is not free from legal difficulties" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 14, para. 18).

15. Even if one takes the view that the Court's jurisdiction, established at the date an application is filed, extends to the dispute between the parties, the counter-claims of Colombia in this case do not concern the same

dispute as that brought before the Court by Nicaragua in its Application. In the event that a counter-claim brings a new dispute, or widens the dispute already before the Court, and if the applicant raises an objection, the Court will have to ascertain whether there is a jurisdictional basis for the counter-claim. The Court has already determined in this case that the dispute between the Parties concerns "the alleged violations by Colombia of Nicaragua's rights in the maritime zones which, according to Nicaragua, the Court declared in its 2012 Judgment appertain to Nicaragua" (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 34, para. 79). None of the four claims presented by Colombia as counter-claims can be considered to be an aspect or part of the dispute brought by Nicaragua. Colombia's claims either widen the dispute or bring new disputes and therefore the Court lacks jurisdiction. In its 2016 Judgment, after recalling that

> "[t]he issues that the Parties identified for possible dialogue include fishing activities of the inhabitants of San Andrés, Providencia and Santa Catalina in waters that have been recognized as appertaining to Nicaragua by the Court, the protection of the Seaflower Biosphere Marine Reserve, and the fight against drug trafficking in the Caribbean Sea",

the Court noted that "the above-mentioned subject-matter for negotiation is different from the subject-matter of the dispute between the Parties" (*ibid.*, p. 38, paras. 97-98). The first three counter-claims concern those same issues, and thus, according to the 2016 Judgment, fall outside the subject-matter of the dispute of which the Court is seised. The fourth counter-claim also concerns a different dispute. The dispute regarding whether Colombia has violated Nicaragua's sovereign rights in its maritime zones is distinct from any dispute regarding whether Nicaragua, by adopting a system of straight baselines from which the breadth of the territorial sea is measured, has acted contrary to customary international law.

16. There is no reason for asserting that the jurisdiction of the Court over the identical claims of a party should depend on whether they are presented as counter-claims or separately, by means of an application, as claims, this second way being the manner in which — in the Court's view — they "should normally be made" (*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, I.C.J. Reports 1997*, p. 257, para. 30).

17. In the present case, the Respondent uses a counter-claim "route" to bring before the Court claims which otherwise could not have been

successfully raised, since the Court would have had no jurisdiction to consider them on the merits subsequent to Colombia's termination of its acceptance of the Court's jurisdiction under the Pact of Bogotá with effect from 27 November 2013.

18. We do not find the majority's reliance on the Court's pronouncement in the *Nottebohm* case (Order, para. 67) appropriate. The Judgment in that case is inapposite to the issue of jurisdiction over counter-claims. That Judgment started a line of jurisprudence of the Court on the critical date for the establishment of its jurisdiction when proceedings are instituted by a unilateral application (see e.g. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 28, para. 36; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 445, para. 95; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 18, para. 33). The decisive issue, according to that jurisprudence, is the fact that the application "is filed at a time when the law in force between the parties entails the compulsory jurisdiction of the Court" (*Nottebohm (Liechtenstein* v. *Guatemala), Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 123).

19. The Court in the present Order (Order, para. 67) quotes the following passage from the Judgment in the *Nottebohm* case:

> "When an Application is filed at a time when the law in force between the parties entails the compulsory jurisdiction of the Court . . . the filing of the Application is merely the condition required to enable the clause of compulsory jurisdiction to produce its effects in respect of the claim advanced in the Application. Once this condition has been satisfied, the Court must deal with the claim; it has jurisdiction to deal with all its aspects, whether they relate to jurisdiction, to admissibility or to the merits. An extrinsic fact such as the subsequent lapse of the Declaration, by reason of the expiry of the period or by denunciation, cannot deprive the Court of the jurisdiction already established." *(Ibid.)*

However, in this passage, when the Court wrote that it must deal with the claim "[o]nce this condition has been satisfied", what is meant by "this condition" is not jurisdiction, as the majority implies when it reasons that "[o]nce the Court has established jurisdiction to entertain a case, it has jurisdiction to deal with all its phases" *(ibid.)*. What the Court referred to in 1953 by the expression "[o]nce this condition has been satisfied" was the fact that the Application was "filed at a time when the law in force between the parties entails the compulsory jurisdiction of the Court". In other words, the two declarations made under Article 36, paragraph 2, of the Statute were in force when the Application instituting proceedings

was submitted to the Court. It is in this context that the opinion of the Court that "[o]nce this condition has been satisfied . . . it has jurisdiction to deal with all its aspects [i.e. the claim's aspects], whether they relate to jurisdiction, to admissibility or to the merits" must be understood. It would be rather bizarre for the Court to deal with jurisdiction "once the Court has established jurisdiction to entertain a case" (Order, para. 67), as the majority seems to suggest.

20. The Court in the *Nottebohm* case did not have to deal with counter-claims and in fact said nothing that is of relevance for the interpretation of Article 80, paragraph 1, of the Rules of Court. Its dictum is clearly focused on the Application instituting proceedings and the claim contained therein. As the Court explained, "the filing of the *Application* is merely the condition required to enable the clause of compulsory jurisdiction to produce its effects in respect of *the claim advanced in the Application*" (*ibid.*, emphasis added). And the Court continued:

> "Once this condition has been satisfied [i.e. that an application was filed at a time when the law in force between the parties entailed the compulsory jurisdiction of the Court], the Court must deal with the *claim*; it has jurisdiction to deal with all *its* [i.e. the claim's] aspects, whether they relate to jurisdiction, to admissibility or to the merits." (*Ibid.*, emphasis added.)

No reference to counter-claims is made, nor can it be implied.

21. The majority — by failing to appreciate the context and circumstances in which the Court's dictum in the *Nottebohm* case was pronounced — takes the view that "the lapse of the jurisdictional title invoked by an applicant in support of its claims subsequent to the filing of the application does not deprive the Court of its jurisdiction to entertain counter-claims filed on the same jurisdictional basis" *(ibid.)*. How can a claim, in the form of a counter-claim, be brought on a nonexistent jurisdictional basis, nonexistent due to the fact that it has lapsed? This position of the majority clearly contradicts the view of the Committee for the Revision of the Rules of Court, when it retained the condition that a counter-claim "comes within the jurisdiction of the Court". As has been noted, the Committee had explained that this "phrase meant that a counter-claimant could not introduce a matter which the Court *would not have had jurisdiction to deal with had it been the subject of an ordinary application to the Court*"[5].

[5] Separate opinion of Judge Higgins in *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998*, p. 219 (emphasis in the original).

22. The majority in support of its conclusion,

> "notes that the opposite approach would have the disadvantage of allowing the applicant, in some instances, to remove the basis of jurisdiction after an application has been filed and thus insulate itself from any counter-claims submitted in the same proceedings" (Order, para. 67).

Two remarks can be made. First, this is a purely speculative consideration. Never, in the more than 95-year history of adjudication before the World Court, has any *applicant* terminated or allowed to lapse a title of jurisdiction it relied on when instituting proceedings during their pendency. To the contrary, there are a number of examples when it was the *respondent* which terminated its acceptance of the Court's jurisdiction because an application was filed (or was to be filed against it), or in the aftermath of the Court's judgment. In some other instances, States which appeared before the Court as respondents subsequently restricted the scope of their acceptance of the Court's jurisdiction. Secondly, it would be a wrong move on the part of an applicant "to remove the basis of jurisdiction after an application has been filed and thus insulate itself from any counter-claims" *(ibid.)*, because such an action would cast serious doubts on whether the applicant is pursuing the litigation in good faith. As the Court has stated on several occasions, bad faith of States is not to be presumed (see e.g. *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 267, para. 150; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101). It is therefore rather unfortunate that the majority, in an effort to support its conclusion, has simply forgotten what the Court said in the past.

23. The jurisdiction of the Court is based on the consent of the parties (see e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 456, para. 120); it "exists only because and in so far as the parties have so desired" (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Counter-Claims, Order of 29 November 2001, I.C.J. Reports 2001*, p. 684, declaration of Judge *ad hoc* Verhoeven). Colombia withdrew its consent to the Court's jurisdiction with effect as of 27 November 2013. Almost three years later, on 17 November 2016, it brought before the Court some claims against Nicaragua, by way of counter-claims. It could hardly have complained if the Court dismissed all of them for lack of jurisdiction.

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We finally note that the Court's decision does not contribute to the good and efficient administration of justice. Filing of counter-claims has already resulted in a one year delay of these proceedings. It is highly likely that this case, brought before the Court in 2013, will be heard and adjudicated only some seven years later.

(*Signed*) Peter TOMKA.
(*Signed*) Giorgio GAJA.
(*Signed*) Julia SEBUTINDE.
(*Signed*) Kirill GEVORGIAN.
(*Signed*) Yves DAUDET.