SEPARATE OPINION OF JUDGE GREENWOOD

1. I have voted against the decision that the fourth counter-claim submitted by Colombia is admissible and, while I have voted with the majority in respect of the third counter-claim, my reasoning differs in certain respects from that in the Order. In this opinion, I shall endeavour briefly to explain the reasons for those differences.

2. According to Article 80, paragraph 1, of the Rules of Court, "[t]he Court may entertain a counter-claim only if it comes within the jurisdiction of the Court and is directly connected with the subject-matter of the claim of the other party". The two requirements laid down in the paragraph are cumulative. They are also distinct. There is, however, an important relationship between them which is not fully reflected in the present Order.

3. With regard to the requirement that the counter-claim "comes within the jurisdiction of the Court", the first issue raised by the present case is whether, as Colombia asserts, it is sufficient that the Court had jurisdiction over the principal claim at the time the Application was filed and that the counter-claim comes within the scope of the relevant jurisdictional instrument, or whether, as maintained by Nicaragua, it has to be established that the Court would have jurisdiction at the date that the counter-claim was filed had that counter-claim been brought on that day as a principal claim in a fresh application.

4. The issue is important in the present case, because the Pact of Bogotá, on which Nicaragua bases the jurisdiction of the Court over its principal claim, ceased to be in force between Colombia and Nicaragua on 27 November 2013, one day after Nicaragua filed its Application and nearly three years before Colombia presented its counter-claims. In its Judgment on preliminary objections of 17 March 2016 (*I.C.J. Reports 2016 (I)*, p. 3), the Court held that it had jurisdiction with regard to most of Nicaragua's principal claims, although not its claim that Colombia had violated the obligation not to use, or threaten to use, force. Neither Party has suggested a basis of jurisdiction other than the Pact of Bogotá.

5. The text of Article 80, paragraph 1, gives no clear indication regarding the date at which jurisdiction in respect of a counter-claim must be established. Nor has the matter come before the Court on any previous occasion. In its Judgment on preliminary objections in *Nottebohm* in

1953, however, the Court made an important statement of principle regarding the effects of a lapse in the basis for jurisdiction after the filing of an application. According to the Court,

> "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." (*Nottebohm (Liechtenstein* v. *Guatemala), Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 123.)

This statement was not about counter-claims (there were none in that case). The context was a Guatemalan argument that the Court lacked jurisdiction, because Guatemala's declaration accepting the jurisdiction of the Court had lapsed after the filing of the Application. Nevertheless, the basis on which the Court rejected Guatemala's argument is significant. As the Court explained, the filing of the Application, on a date when there is a basis for jurisdiction between the parties, is "the condition required to enable the clause of compulsory jurisdiction to produce its effects in respect of the claim advanced in the Application" and, once that condition is satisfied, the Court must deal with "all aspects" of the claim.

6. The question is what is meant by all the aspects of the claim. The Court in *Nottebohm* referred only to jurisdiction, admissibility and merits. Yet, as a matter of principle, the jurisdiction to deal with the claim itself must also embrace jurisdiction to deal with incidental proceedings, such as a request for provisional measures of protection (which may be made by either party). Like the majority of the Court, I consider that it also embraces jurisdiction to deal with a counter-claim. Although a counter-claim is an autonomous legal act, it is one which must have a direct connection with the subject-matter of the principal claim and is dealt with in Section D of the Rules of Court, entitled "incidental proceedings".

7. When a State exercises its right to file an application with the Court, it undertakes an action which, as the Court explained in *Nottebohm*, enables the jurisdictional instrument on which that State relies to produce its legal effects, and to continue to produce those legal effects irrespective of any subsequent lapse in, or change to, that jurisdictional basis. One of the effects which is produced is that the applicant is exposed to the possibility of a counter-claim by the respondent. In my opinion, that exposure continues whether or not the title of jurisdiction on which the applicant relied when it filed its application lapses or otherwise changes.

8. To hold otherwise, as Nicaragua has suggested, would change the very nature of a counter-claim. Instead of being an incidental step — autonomous but nevertheless possessing a direct connection with the principal claim — in the main proceedings, it would become a separate proceeding, linked to the principal claim only by a form of truncated joinder.

9. Moreover, the interpretation of Article 80 urged by Nicaragua risks producing considerable unfairness. Nicaragua filed its Application in the present case on the eve of the expiry of the Pact of Bogotá as a basis for jurisdiction between itself and Colombia. In Nicaragua's view, the fact that the Pact ceased to be in force between the two States on the following day does not affect the jurisdiction of the Court over all aspects of Nicaragua's claim but does operate to prevent any responsive counter-claim by Colombia. It is true that Colombia would have had only itself to blame for that situation; the Pact had ceased to have effect between Colombia and Nicaragua because Colombia had chosen to denounce it in November 2012 and that denunciation had taken effect on 27 November 2013. However, on Nicaragua's argument, the same consequences would have followed if it had been Nicaragua which had denounced the Pact but had nevertheless filed its Application on the last possible day. A reading of Article 80 of the Rules which would allow an applicant State that withdrew its acceptance of the jurisdiction of the Court immediately after filing an application to gain all the benefits of the *Nottebohm* principle with regard to its claims while avoiding the possibility of being subjected to a counter-claim permits a fundamental distortion of the principle of equality between the parties.

10. I am therefore in full agreement with the decision of the Court on the first jurisdictional issue. Where I differ is regarding the Court's treatment of the second jurisdictional issue in the case.

11. It is, of course, well established that a counter-claim must satisfy the various requirements, such as limitations *ratione temporis* and *ratione materiae*, in the relevant jurisdictional instrument. The Italian counter-claim in *Jurisdictional Immunities of the State (Germany* v. *Italy), Counter-Claim, Order of 6 July 2010, I.C.J. Reports 2010 (I)*, p. 310, was held inadmissible because it failed to satisfy the temporal requirements in the 1957 European Convention for the Peaceful Settlement of Disputes. In the present case, the Court has engaged (in paragraphs 69-76 of the Order) in a careful analysis of whether the third and fourth counter-claims concerned disputes of a juridical nature (as required by Article XXXI of the Pact) and whether each was a dispute which, in the opinion of the Parties, could not be settled by direct negotiations (as required by Article II of the Pact).

12. It is at this point, however, that the Court fails, in my opinion, properly to appreciate the relationship between the requirement of jurisdiction and the requirement that there be a direct connection between the counter-claim and the subject-matter of the principal claim. With regard to Colombia's third counter-claim, that direct connection seems to me to be of the closest possible kind. In effect, the subject-matter of the claim and the subject-matter of the counter-claim are one and the same. They arise out of the same dispute. Since the Court has already held, in its Judgment of 17 March 2016, that this dispute existed at the time the Application was filed (*I.C.J. Reports 2016 (I)*, pp. 31-34, paras. 67-79) and that it was one which the Parties did not contemplate settling by direct negotiations (*ibid.*, pp. 37-39, paras. 92-101), to examine these questions again in the present Order seems to me unnecessary and somewhat artificial. In reaching that conclusion, I am in no way suggesting that the Court can generally assume that if the requirements for jurisdiction laid down in the relevant jurisdictional instrument have been satisfied in respect of the principal claim, then they are met in respect of the counter-claim. That would plainly be wrong, as the analysis in *Jurisdictional Immunities* demonstrates. All I am saying is that, where the direct connection between the subject-matter of the claim and a counter-claim is as close as it is with the third counter-claim in this case, the analysis of the jurisdictional requirements in the context of the principal claim may make it unnecessary to engage in a separate analysis of the same requirements with regard to that counter-claim. Whether that is so will depend upon the specific requirements in the relevant jurisdictional instrument and the nature of the connection enjoyed by the counter-claim with the subject-matter of the principal claim.

13. Turning to the fourth counter-claim, I regret that I cannot agree with the Court's finding that this counter-claim is directly connected with the subject-matter of the principal claim (Order, para. 53). The Court finds such a direct connection in the fact that, while the principal claim concerns respect for Nicaragua's rights in the exclusive economic zone (EEZ), the counter-claim concerns the extent of that EEZ. It is true that a use of straight baselines which encloses a substantial amount of maritime space as internal waters may have the effect of pushing further out to sea the outer limit of the coastal State's EEZ, although Nicaragua denies that this is the case here (a matter on which it is both unnecessary and inappropriate to comment). However, the status of the area in which the incidents that lie at the heart of Nicaragua's claim and Colombia's third counter-claim are said to have taken place would not be affected by any decision regarding Nicaragua's baselines. I agree that there is a dispute between Colombia and Nicaragua regarding the latter's decree establishing a system of straight baselines, but that dispute is entirely separate and distinct from the dispute which has given rise to the princi-

pal claim and the third counter-claim and, in my opinion, the required connection between Colombia's fourth counter-claim and the subject-matter of the principal claim has simply not been made out. I have therefore voted against paragraph A (4) of the *dispositif*.

(*Signed*) Christopher GREENWOOD.