

DECLARATION OF JUDGE *AD HOC* GUILLAUME

[*Translation*]

*Counter-claims — Direct connection, in fact and in law, with the principal claims — Admissibility.*

1. After ruling on the admissibility of Nicaragua's first counter-claim, the Court declared the second and third counter-claims inadmissible. I did not feel compelled to oppose that solution; nevertheless, it represents, to my mind, a questionable development in the case law of the Court, for the reasons set out in this declaration.

2. Under Article 80 of the Rules of Court, the latter "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". In the present case, the Court declared Nicaragua's second and third counter-claims inadmissible in the absence of "a direct connection, either in fact or in law", between those claims and the principal claims of Costa Rica. It seems to me that this decision is difficult to reconcile with the Court's previous case law.

3. The Court has stated on several occasions that its Rules provide for the possibility of submitting counter-claims in the course of proceedings in order, 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" (*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). Consequently, the admissibility of counter-claims must "relate to the aims thus pursued and be subject to conditions designed to prevent abuse" (*ibid.*).

4. With that in mind, the Court, with a view to ensuring "better administration of justice" (*ibid.*), has, in several cases, examined whether "the counter-claim is sufficiently connected to the principal claim" (*ibid.*, p. 258, para. 33). It has stated that, "as a general rule, the degree of connection between the claims must be assessed both in fact and in law" (*ibid.*). In the majority of the cases brought before it to date, the Court has considered that that connection exists.

5. In the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, the Court was seised of an Application by Bosnia and Herzegovina seeking a ruling against Yugoslavia for violation of the United Nations Genocide Convention. Yugoslavia presented

counter-submissions to the Court that rested on “facts of the same nature” and “form[ed] part of the same factual complex . . . on the territory of Bosnia and Herzegovina and during the same period” (*I.C.J. Reports 1997*, p. 258, para. 34). Those submissions pursued the same legal aim, “namely the establishment of legal responsibility for violations of the Genocide Convention” (*ibid.*). Consequently, the Court considered them to be admissible.

6. In the case concerning *Oil Platforms* (*Islamic Republic of Iran v. United States of America*), *Counter-Claim, Order of 10 March 1998*, *I.C.J. Reports 1998*, p. 190), Iran complained of the destruction by the United States of offshore oil production complexes, asserting that this infringed provisions of the Treaty of Amity concluded by the two countries in 1955, as well as other provisions of international law. The United States submitted a counter-claim to the Court, seeking a ruling against Iran for attacks on vessels and mine laying in the Gulf. The Court observed that the claims concerned “facts of the same nature” and “form[ed] part of the same factual complex” (*ibid.*, p. 205, para. 38). It added that the Parties were pursuing the same legal aim, “namely the establishment of legal responsibility for violations of the 1955 Treaty” (*ibid.*). Consequently, it declared the counter-claim admissible.

7. In the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon v. Nigeria*), *Order of 30 June 1999*, *I.C.J. Reports 1999 (II)*, p. 983), Cameroon cited, in its Memorial, various incidents along the border, some of which raised, in its view, the question of Nigeria’s international responsibility. Nigeria submitted a counter-claim, seeking to have Cameroon ordered to make good the damage resulting from all of the border incidents reported in the file. The Court considered that this claim rested on facts that were of the same nature as those referred to in the Memorial of Cameroon and pursued the same legal aim: the establishment of responsibility. Consequently, the Court declared it admissible.

8. In the case concerning *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. 660), the Congo submitted an Application to the Court complaining of acts of aggression, the illegal exploitation of natural resources and acts of oppression committed by Uganda in Congolese territory in violation of international law. Uganda submitted three counter-claims. The first concerned acts of aggression attributed to the Congo. In this regard, the Court considered that the claims of the Parties rested on “facts of the same nature” (*ibid.*, p. 679, para. 38). It noted that the counter-claim “range[d] over a longer period than that covered by the . . . principal claim” (*ibid.*), but concerned “a conflict in existence between the two neighbouring States, in various forms and of variable intensity, since 1994” (*ibid.*) — i.e., more than four years before the events cited by the Congo. The Court concluded

that it related to the same factual complex, adding that the Parties were basing their claims on the same principles of international law and were therefore pursuing the same legal aims. Consequently, it declared those first counter-submissions admissible.

The Court ruled in the same way as regards the “attacks on Ugandan diplomatic premises and personnel in Kinshasa” (*I.C.J. Reports 2001*, p. 679, para. 40). Those acts of oppression had occurred immediately after the invasion alleged by the Congo, but had taken place thousands of kilometres from the location of the fighting. Nevertheless, the Court considered that the Parties’ claims formed part of the same factual complex. It also ruled that the Parties were pursuing the same legal aim (i.e., seeking to establish the responsibility of the other Party), despite the fact that the rules of international law relied on to that end were not identical. Again, the Court concluded, therefore, that the counter-claim was admissible.

In contrast, the Court considered that the third counter-claim — which concerned attempts to reach a settlement made several years after the conflict and which led to the conclusion of agreements that Uganda accused the Congo of violating — was inadmissible.

9. In the present case, Costa Rica makes two sets of submissions to the Court. It first requests the Court to declare that, by its conduct, Nicaragua has violated Costa Rica’s sovereignty and territorial integrity in the northern part of Isla Portillos, at the mouth of the San Juan River. It also asks the Court to declare that Nicaragua has breached “the obligation not to dredge, divert or alter the course of the San Juan, or conduct any other works on the San Juan, if this causes damage to Costa Rican territory (including the Colorado River), its environment, or to Costa Rican rights in accordance with the Cleveland Award” of 1888 interpreting the Treaty of Territorial Limits between Costa Rica and Nicaragua of 1858 (Order, para. 14).

10. In its second counter-claim, Nicaragua asks the Court to declare that it “has become the sole sovereign over the area formerly occupied by the Bay of San Juan del Norte” (*ibid.*, para. 15) at the mouth of the river. In its third claim, Nicaragua requests the Court to declare that it “has a right to free navigation on the Colorado Branch of the San Juan de Nicaragua River until the conditions of navigability existing at the time the 1858 Treaty was concluded are re-established” (*ibid.*).

11. Thus, it would appear that Costa Rica’s principal claims and Nicaragua’s counter-claims both “relate to a common river system” (*ibid.*, para. 36) posing various problems regarding alluviation, dredging, navigability and protection of the environment.

12. The second counter-claim concerns sovereignty over the Bay of San Juan del Norte at the mouth of the river, which Nicaragua claims has disappeared on account of the riverbed having shifted at the mouth of the river. Likewise, Costa Rica’s first principal claim concerns sovereignty

over part of Isla Portillos, which Costa Rica claims has been separated from the remainder of the island by a canal dug illegally by Nicaragua; Nicaragua, on the other hand, maintains that it simply dredged a natural channel that had become obstructed over the years. Thus, Nicaragua's second counter-claim concerns the same region as the first set of submissions made by Costa Rica, namely the mouth of the San Juan River, and raises similar issues relating to the alluviation of the river and changes in its course. Nevertheless, the Court observed that the claims of the Parties "do not relate to the same area" (Order, para. 34). It added: "Nicaragua's counter-claim refers to physical changes to the Bay of San Juan del Norte that apparently date to the nineteenth century. By contrast, Costa Rica's claims relate to alleged Nicaraguan conduct dating to 2010." (*Ibid.*) The Court stated that there was therefore a lack of temporal connection between the claims. It may be asked whether, in view of the Court's case law, those circumstances were, in themselves, such as to support the conclusion that there was no direct connection in fact between the second counter-claim and Costa Rica's first set of principal submissions.

13. Moreover, in both instances the Parties are relying, in support of their submissions, on the 1858 Treaty of Limits. In both cases, this involves provisions of the Treaty that were the subject of interpretative awards by President Cleveland and Mr. Alexander. It is true that, as the Court notes, Costa Rica also relies on various international conventions on the protection of the environment. However, it does so more in support of its submissions concerning Nicaragua's dredging of the San Juan than in support of its claims to sovereignty. Accordingly, it may be asked, whether the Parties were not pursuing the same legal aim: the establishment of territorial sovereignty on the basis of the 1858 Treaty.

14. In its third counter-claim, Nicaragua "asserts that Costa Rica is attempting to prevent Nicaragua from taking the measures needed — that is, the dredging works of which Costa Rica complains — to restore the navigability of the San Juan River" (*ibid.*, para. 29). It maintains that, "until the conditions of navigability existing at the time the 1858 Treaty was concluded are re-established", it "has a right to free navigation on the Colorado Branch of the San Juan de Nicaragua River" under Article V of the Treaty (*ibid.*, para. 15).

15. As regards the connection in fact between Nicaragua's third counter-claim and Costa Rica's second principal claim, the Court rightly noted that those two claims related to dredging activities in a common river system. It also observed that the claims made by Nicaragua concerning its navigational rights on the Colorado River stemmed from the steps allegedly taken by Costa Rica with a view to preventing Nicaragua from dredging the San Juan to improve its navigability. Nevertheless, the Court considered that there was no direct connection in fact between those claims, noting that the essence of Costa Rica's complaint was about the violation of its sovereignty and damage to the environment. However,

one might wonder about the validity of that reasoning, given that there is a direct connection between the dredging operations and the issue of navigability, both on the San Juan and on the Colorado, which is of concern to both Parties.

16. The same can be said for the connection in law between the third counter-claim and the principal claim concerning the dredging of the river. It is true, as the Court notes, that Costa Rica complains principally about the environmental damage that the dredging could cause in its territory. However, it also expresses concerns regarding the impact of that dredging on the navigability of the San Juan and the Colorado. It relies, in that regard, on the 1858 Treaty, as does Nicaragua. In that respect, the Parties pursue the same legal aim.

17. All in all, the Court seems, in the present case, to have wanted to move its case law in a restrictive direction. I fear it has gone too far. A fluvial basin constitutes a single entity, and the Court could have usefully addressed all of the issues raised in respect of that basin in a single set of proceedings.

*(Signed)* Gilbert GUILLAUME.

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