

DECLARATION OF VICE-PRESIDENT YUSUF

[Original English Text]

1. Under Article 80, paragraph 1, of the Rules of Court, two requirements must be met for the Court to be able to entertain a counter-claim at the same time as the principal claim, namely, 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”.

2. The Court has expounded the second limb of this test — the requisite direct connection — in the previous cases that dealt with the admissibility of counter-claims. The Court has not, however, elaborated on what is meant by the first limb — “comes within the jurisdiction of the Court” — in the context of Article 80. This lack of clarification of the jurisdictional requirement may give the impression that jurisdiction must in all cases be assessed *de novo* for each counter-claim. This is of course the case if the title of jurisdiction invoked for the counter-claims differs from that of the principal claim. However, as I will try to explain in this declaration, there is no need to do so where counter-claims have the same title of jurisdiction as the principal claim. Consequently, it was also unnecessary for the Court to examine whether a dispute existed between the Parties in the present proceedings.

I. JURISDICTION UNDER ARTICLE 80, PARAGRAPH 1,
OF THE RULES OF COURT

3. One of the principal points of disagreement between the Parties in this case relates to the jurisdiction required by Article 80. Colombia contended that jurisdiction under Article 80 means jurisdiction over the principal claim. In its view, “[s]ince the Court has found that it has jurisdiction over the main proceedings, jurisdiction is also established over the counter-claims”. Nicaragua, on the other hand, argued that counter-claims are autonomous legal acts for which jurisdiction must be assessed *de novo*.

4. Nicaragua is correct that counter-claims have been characterized by the Court as “an autonomous legal act the object of which is to submit a new claim to the Court . . . [and] 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” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos-*

nia and Herzegovina v. Yugoslavia), *Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 256, para. 27).

5. The autonomous nature of counter-claims is, however, just one aspect of their character. As the Court emphasized in its Order on counter-claims in the *Bosnian Genocide* case, counter-claims are intimately linked to the procedure initiated by the principal claim:

“[a counter-claim] is linked to the principal claim, in so far as, formulated as a ‘counter’ claim, it reacts to it . . . 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” (*ibid.*, pp. 256-257, paras. 27 and 30).

6. It is this second aspect of counter-claims — the intimate link with the principal claim — that allows the Court to achieve procedural economy by giving it a more thorough and detailed overview of all the facts relevant to the dispute that has been submitted to the Court. In this respect, the counter-claim is grafted onto the ongoing procedure that was initiated by the principal claim. One might say that counter-claims are functionally autonomous in that they are addressed separately from the principal claim, but that they are also incidental in that they must be affixed to the main proceedings.

7. In paragraph 67 of the present Order, the Court states that “[o]nce the Court has established jurisdiction to entertain a case, it has jurisdiction to deal with all its phases”, including incidental proceedings, such as counter-claims. As the Court notes, the subsequent lapse of jurisdiction cannot deprive the Court of the jurisdiction already established. The Court then continues to assess whether the third and fourth counter-claims submitted by Colombia fall within the jurisdiction of the Court on the basis of Article XXXI of the Pact of Bogotá.

8. I agree with much of this reasoning. The scope of jurisdiction of the Court in any given case is established according to the limits set forth in the instrument that founds the jurisdiction of the Court. The Court only has jurisdiction to address disputes within those limits. It is therefore imperative for the Court, when examining the admissibility of counter-claims that purport to be based on the same title of jurisdiction as the principal claim, to ensure that those counter-claims fall within the scope of the jurisdiction thus prescribed (*Jurisdictional Immunities of the State (Germany v. Italy), Counter-Claim, Order of 6 July 2010, I.C.J. Reports 2010 (I)*, pp. 316-321, paras. 17-31). The Court does not, however, have to establish its jurisdiction over the counter-claims *de novo*.

II. THE COURT'S EXAMINATION OF THE EXISTENCE OF A DISPUTE

9. The Court did not follow, in my view, this line of reasoning to its logical conclusion. The jurisdiction of the Court, for which the existence of a dispute is a necessary condition, has already been established by the Court in its Judgment on preliminary objections. It is therefore unnecessary for the Court to examine whether a "dispute" exists between the Parties, as the Court did in the present case in relation to the third and fourth counter-claims. A dispute has already been found to exist and that is sufficient to establish the Court's jurisdiction. The Court's enquiry at this stage of proceedings should simply be limited to ascertaining whether the counter-claims fall within the bounds of the jurisdiction that the Court has already found to exist under the Pact of Bogotá, and whether the counter-claims are directly connected, in law and in fact, to the principal claims.

10. This conclusion is not only logical but is also judicious. The requirement that a counter-claim be directly connected with the principal claim allows the Court to hear arguments related to another aspect of the dispute over which it has already asserted jurisdiction, thus enabling the Court to adjudicate in a holistic manner on the dispute brought before the Court. This is one aspect of the procedural economy afforded by counter-claims to which the Court referred in its Order in the *Bosnian Genocide* case, cited in paragraph 5 above. The Court does not need to ascertain the existence of a dispute anew.

11. The Court has most commonly addressed counter-claims that purport to be based on the same title of jurisdiction as the principal claim (see e.g. *Jurisdictional Immunities of the State (Germany v. Italy), Counter-Claim, Order of 6 July 2010, I.C.J. Reports 2010 (I)*, p. 316; *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. 678; *Oil Platforms (Islamic Republic of Iran v. United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998*, p. 203; and *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). However, Article 80 does not preclude the invocation of a title of jurisdiction different from that of the principal claim. It is when the Court is faced with reliance on a different title of jurisdiction, and in that kind of scenario only, that it will have to address the question of jurisdiction over the counter-claims separately from the question of jurisdiction over the principal claim. In such a case, jurisdiction over the principal claim will not be decisive in terms of jurisdiction

over a counter-claim based on some other title, and the validity of the jurisdictional basis of the counter-claims must be assessed at the moment such counter-claims are brought to the Court.

(Signed) Abdulqawi A. YUSUF.
