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Counter-Claims at the International Court of Justice

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A. Introduction

1 A “counter-claim” is “an autonomous legal act” by the Respondent in a contentious case before the Court, “the object of which is to submit a new claim to the Court,” one that is “linked to the principal claim, in so far as, formulated as a ‘counter’ claim, it reacts to” the principal claim.¹ A counter-claim is not a defence on the merits to the principal claim;² while it is a reaction to that claim, it is pursuing objectives other than simply dismissal of the principal claim.³ Hence, the reason for allowing a counter-claim to be included as part of an existing case is not because it assists in disposition of the principal claim but, rather, to assist in the disposition of two autonomous claims.⁴ The counter-claim is allowed to become a part of an existing case “in order to ensure better administration of justice, given the specific nature of the claims in

¹ *Application of the Genocide Convention (Bosnia and Herzegovina v. Yugoslavia)*, Order on the Counter-claims, ICJ Reports (1997), pp. 243, 256, para. 27.

² See Rosenne, S., ‘The International Court of Justice: Revision of Articles 79 and 80 of the Rules of Court,’ *Leiden J. Int’l L.* 14 (2001), pp. 77-87, p. 85

³ *Application of the Genocide Convention (Bosnia)*, *supra* fn. 1, p. 256 para. 27; see Anzilotti, D., ‘La demande reconventionnelle en procédure internationale’, p. 867 *et seq.*; Salerno, F., ‘La demande reconventionnelle dans la procédure de la Cour Internationale de Justice’, RGDIP 103 (1999), pp. 329-78 pp. 333 *et seq.*

⁴ *Application of the Genocide Convention (Bosnia)*, *supra* fn. 1., p. 874 *et seq.*

question” and “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.”⁵

2 The I.C.J. Statute does not directly address the issue of the Respondent filing a counter-claim against the Applicant. Art. 80 of the Rules, however, provides that the Court may entertain such a counter-claim in certain circumstances, as a part of the incidental proceedings of an existing case. The Court’s establishment of this rule is generally predicated on its authority under Article 48 of the Statute to “make orders for the conduct of the case”.

3 Counter-claims featured somewhat in the early life of the Court (in 1950-52), but then disappeared for several decades, only reemerging in several cases after 1997. Renewed interest in the use of counter-claims may be due to a desire by Respondents to present to the Court a more balanced perspective of the conduct of the two States before it, since inclusion of the counter-claim may force both the Court and the other party to confront certain facts and legal arguments that otherwise would not feature in the case. From the Court’s perspective, allowing a counter-claim in the proper circumstances promotes the value of judicial economy,⁶ since addressing the claim and counter-claim in a single proceeding may be more efficient than doing so in separate cases. At the same time, there are requirements that must be met before a counter-claim may be entertained, requirements designed to prevent a Respondent from using an unrelated counter-claim simply as a tactic for slowing down the disposition of principal claim and for detracting from a central focus on that claim.

4 In the normal course of any Respondent defending against a claim, the Respondent will assert a factual and legal position that ‘counters’ the position of the Applicant. Advancement of that position, however, is not regarded as a ‘counter-claim’ with the meaning of Art. 80 of the

⁵ *Ibid.*, p.257, para. 30; see Genet, R., ‘Les demandes reconventionnelles’, p. 145 *et seq.*, 148; Antonopoulos, C., *Counterclaims before the International Court of Justice* (2011), pp. 57 *et seq.*

⁶ See Rosenne, S., ‘The International Court of Justice: Revision of Articles 79 and 80 of the Rules of Court,’ *Leiden J. Int’l L.* 14 (2001), pp. 77-87, p. 87

Rules, and does not implicate the requirements and procedures discussed below.⁷ Indeed, the relatively limited practice of counter-claims may be because the Court, when rejecting any claim on the merits, concomitantly accepts the position of the Respondent in much the same way as it would if a closely-related counter-claim had been filed.⁸ A counter-claim only arises before the Court as part of a formal step taken by the Respondent. That step changes the possibilities of the case, for it invites the Court to issue a judgment directed against the Applicant, opening the door to a remedy against the very State that initiated the case.⁹

B. Historical Development of the Rule Dealing with Counter-Claims

I. P.C.I.J.

5 Like the I.C.J. Statute, the Statute of the P.C.I.J. did not address the issue of counter-claims. Art. 40 of the 1922 Rules of Court of the P.C.I.J., however, envisaged the possibility of “counter-claims” being filed as a part of a Respondent’s responsive pleading, insofar as they “come within the jurisdiction of the Court,”¹⁰ but provided no particular guidance on how such counter-claims should proceed. This initial and very cursory reference to counter-claims was not changed in the Rules of Court adopted in 1926 and 1931.¹¹ The issue was much further developed in Art. 63 of the 1936 Rules of the Court, which provided that counter-claims were limited to cases initiated by a unilateral application, must be filed with the Counter-Memorial, and must be “directly connected” to the subject-matter of the application.¹²

⁷ Genet, R., ‘Les demandes reconventionnelles’, p. 145 *et seq.*

⁸ See, e.g., *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment, ICJ Reports (1991), pp. 53, 75-76, para. 69(3) (rejecting the applicant’s position that the award was not binding and instead finding that the award was binding and must be applied by, *inter alia*, the Applicant).

⁹ Anzilotti, D., ‘La demande reconventionnelle en procédure internationale’, p. 874 *et seq.*

¹⁰ Rules of Court, adopted on 24 March 1922, PCIJ, Series D, No. 2, Art. 40.

¹¹ Guyomar, G., *Règlement*, p. 519.

¹² Rules of Court, adopted on 11 March 1936, PCIJ, Series D, No. 1, 3rd edn., Art. 63; Guyomar, G., *Règlement*, p. 522.

6 Counter-claims arose before the P.C.I.J. in three cases.¹³ In *Factory at Chorzów*, Poland filed a document that it titled a “counter-claim.” The Court regarded Poland’s submission as juridically connected to Germany’s claim (indeed, the concept of “direct connection” identified here influenced the later crafting of Art. 63 of the 1936 Rules), but the Court viewed Poland’s submission as simply an effort to offset the amount of compensation that might be paid to Germany. The Court assumed jurisdiction over Poland’s submission by virtue of its jurisdiction over Germany’s claim, but rejected the submission in the course of deciding in favor of Germany.¹⁴ It should be noted that, since the Rules of Court rather confusingly contemplated a Respondent filing a “counter-case,” which might include “counter-claims,” it may not have been clear to Poland what was meant by a true counter-claim.

7 In *Diversion of Water from the Meuse*, Belgium filed a counter-claim, over which the Court found (without objection from the Netherlands) that it had jurisdiction and further found that it was directly connected to the Netherlands’ claim.¹⁵ Nevertheless, on the merits, the Court rejected both the claim and counter-claim as unfounded.¹⁶ In *Panevezys-Saldutiskis Railway*, Lithuania advanced a counter-claim contingent on the Court finding Estonia’s claim admissible, which the Court did not. As such, the Court did not pass upon the counter-claim.¹⁷

II. I.C.J.

8 The 1946 Rules of Court addressed counter-claims in Art. 63, which generally (but not exactly) followed Art. 63 of the P.C.I.J. Rules of Court. Three counter-claims were filed under the 1946 formulation of the rule, all in the period of 1950-52. Norway filed a counter-claim in

¹³ For an analysis of the practice of the PCIJ, see Antonopoulos, C., *Counterclaims before the International Court of Justice* (2011), pp. 37-47.

¹⁴ *Factory at Chorzów (Germany/Poland)*, Judgment, PCIJ Reports (1928), Series A, No. 17, pp 34-39, 63-64; see Genet, R., ‘Les demandes reconventionnelles’, p. 161 *et seq.*; Anzilotti, D., ‘La demande reconventionnelle en procédure internationale’, p. 857 *et seq.*

¹⁵ Guyomar, G., *Règlement*, p. 522; Genet, R., ‘Les demandes reconventionnelles’, p. 168 *et seq.*

¹⁶ *Diversion of Water from the Meuse (Netherlands v. Belgium)*, Judgment, PCIJ Reports (1937), Ser. A/B, No. 70, pp. 28-32.

¹⁷ *Panevezys-Saldutiskis Railway (Estonia v. Lithuania)*, Judgment, PCIJ Reports (1939), Series A/B, No. 76, pp. 7-9, 22; see Guyomar, G., *Règlement*, p. 522.

1950 against the United Kingdom in *Fisheries Jurisdiction*; Peru filed a counter-claim in 1950 against Colombia in *Asylum*; and the United States filed a counter-claim in 1951 against Spain in *Rights of Nationals*.¹⁸

9 The 1972 Rules of Court renumbered the rule on counter-claims as Article 68, but no counter-claims were filed during the period that those rules were in force. The 1978 Rules of Court revised the text of the article on counter-claims and renumbered it as Art. 80. Four cases filed during the time that the 1978 Rules of Court were in force resulted in the filing of a counter-claim: Yugoslavia filed counter-claims in 1997 against Bosnia and Herzegovina in *Application of the Genocide Convention (Bosnia)*; the United States filed a counter-claim in 1997 against Iran in *Oil Platforms*; Nigeria filed counter-claims in 1999 against Cameroon in *Land and Maritime Boundary*; and Uganda filed counter-claims in 2001 against the Democratic Republic of the Congo in *Armed Activities on the Territory of the Congo*.

10 In 2000, the Court amended Art. 80 of the Rules to its present formulation,¹⁹ which applies to all cases submitted to the Court on or after 1 February 2001. As of 2011, two cases have included the filing of a counter-claim under the 2000 amendment: Italy filed a counter-claim in 2009 against Germany in *Jurisdictional Immunities of the State*; and Serbia filed a counter-claim in 2010 against Croatia in *Application of the Genocide Convention (Croatia)*.

11 The different versions of the rule address similar issues, but variations in the text mean that decisions reached by the Court in prior cases should be considered in light of the formulation of the rule on counter-claims in existence at that time. Further, some changes in the text provide a basis for how best to interpret the rule that is currently in force. For example, in the formulations of the rule prior to 1978, the text indicated that a counter-claim could only be made in cases that began by the filing of an application, which made clear that a counter-claim was not

¹⁸ Guyomar, G., *Règlement*, p. 522 *et seq.*

¹⁹ See Rosenne, S., 'The International Court of Justice: Revision of Articles 79 and 80 of the Rules of Court,' *Leiden J. Int'l L.* 14 (2001), pp. 77-87, pp. 83 *et seq.*

envisaged for a case initiated by a joint application of two States. The more recent formulations of the rule contain no such requirement. Though it is likely that the filing of a joint application by two States would already encompass whatever claims the two States wish to bring against each other, it is possible that developments in the case subsequent to the filing of the joint application might result in one of the States wishing to introduce a new “counter-claim” in response to the other State’s presentation of its claim. The change in formulation of the rule would appear to allow such a counter-claim, so long as the other requirements of Art. 80 of the Rules are met.

C. Issues of Interpretation

12 As indicated above, the Court’s rule on counter-claims has changed somewhat over time. Likewise, the application and interpretation of the rule by the Court in several cases has helped clarify and develop the meaning of the rule. This section addresses the key areas where the Court’s jurisprudence has shaped the regime on counter-claims.

I. Two Requirements in Order to Entertain the Counter-Claim

13 Art. 80, para.1 of the Rules allows the Court to entertain a “counter-claim.” The Rule does not define what is meant by “counter-claim” and whether that term, by itself, imposes certain limitations upon what may be filed. In his dissenting opinion with respect to Yugoslavia’s counter-claim in *Application of the Genocide Convention (Bosnia)*, Judge Weeramantry insisted that the term required that the counter-claim “counter” the principal claim, rather than simply be a parallel claim arising from circumstances linked in space and time to the principal claim. For Judge Weeramantry, there “must be some point of intersection between the two claims, which makes one exert an influence upon the judicial consequence of the other.”²⁰ The counter-claim

²⁰ *Application of the Genocide Convention (Bosnia)*, *supra* fn. 1, Diss. Op. Weeramantry, pp. 287, 289.

might go further than just impinging upon or weakening the principal claim by seeking reparation from the Applicant, but it still must “counter” the principal claim; a “claim that is autonomous and has no bearing on the determination of the initial claim does not thus qualify as a counter-claim.”²¹ In the context of that case, Yugoslavia’s counter-claim that Bosnia and Herzegovina committed acts of genocide could not possibly diminish, off-set or weaken any acts of genocide committed by Yugoslavia and thus, for Judge Weeramantry, Yugoslavia’s counter-claim was incapable of “countering” the principal claim.²²

14 Judge Weeramantry’s view, however, was not adopted by the Court. In that and subsequent cases, the Court has not viewed the term “counter-claim” as itself embodying particular constraints on the type of claim that may be filed with the Court. Instead, the Court has focused on the other language of Art. 80, para. 1 of the Rules, which provides that the Court may entertain a counter-claim “only if” two requirements are met: when the counter-claim “comes within the jurisdiction of the Court” and when the counter-claim is “directly connected with the subject matter of the claim of the other party.” The Court has characterized these two requirements both as requirements on the “admissibility of a counter-claim as such,” explaining that admissibility “in this context must be understood broadly to encompass both the jurisdictional requirement and the direct-connection requirement.”²³

15 The reason for the first requirement, relating to jurisdiction, is to preclude the Respondent from using the counter-claim “as a means of referring to an international court claims which exceed the limits of its jurisdiction as recognized by the parties.”²⁴ The reason for the second requirement, relating to “direct connection,” is to preclude the Respondent from using the

²¹ *Ibid.*, p. 291.

²² *Ibid.*, pp. 292-94.

²³ *Jurisdictional Immunities of the State (Germany v. Italy)*, Order on the Counter-Claim, ICJ Reports (2010), para. 14; *see also Oil Platforms (Iran v. United States)*, Order on the Counter-Claim, ICJ Reports (1998), pp. 190, 203, para. 33; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Order on the Counter-claims, ICJ Reports (2001), pp. 660, 678, para. 35.

²⁴ *Application of the Genocide Convention (Bosnia)*, *supra* fn. 1, ICJ Reports (1997), pp. 257-58, para. 31.

counter-claim as a “means either to impose on the Applicant any claim it chooses, at the risk of infringing the Applicant’s rights and of compromising the proper administration of justice.”²⁵

16 The use of “may entertain” rather than “shall entertain” makes clear that acceptance of the counter-claim as a part of the case, even if the counter-claim meets these two requirements, is wholly within the discretion of the Court; it still remains open for the Court to decline to address the counter-claim within the proceedings.²⁶ To date, the Court has not exercised such discretion; in each instance where it has found both requirements to have been met, the Court has allowed the counter-claim to proceed as part of the case.

17 The use of the word “only” makes clear that, if either of the two requirements is not satisfied, the Court should not entertain the counter-claim. Even if the Applicant does not object to the counter-claim, it appears that the Court must still consider whether the counter-claim meets these two requirements. Thus, in *Application of the Genocide Convention (Croatia)*, although Croatia indicated that it did not intend to raise objections to the admissibility of Serbia’s counter-claims, that alone did not dispose of the matter. Rather, the Court simply stated that it “does not consider that it is required to rule definitively *at this stage* on the question of whether the said claims fulfill the conditions set forth in Article 80, paragraph 1, of the Rules of Court.”²⁷ In its practice to date, whenever the Court has found one or the other requirement as not having been met, it has declined to allow the counter-claim to become a part of the case before it.

18 In the formulations of the rule prior to 2000, the two key requirements for the filing of a counter-claim – that it falls within the jurisdiction of the Court and that it be directly connected with the subject matter of the principal claim – were reversed. The current formulation, therefore, places somewhat greater emphasis on need for the counter-claim to fall within the

²⁵ *Ibid.*

²⁶ See Rosenne, S., *The Law and Practice of the International Court, 1920-2005* (2006), Vol. III, p. 1234; *but see* Antonopoulos, C., *Counterclaims before the International Court of Justice* (2011), p. 74 .

²⁷ *Application of the Genocide Convention (Croatia v. Serbia)*, ICJ Reports (2010), Order of 4 February (emphasis added).

jurisdiction of the Court; in the event that it does not, the question of whether it is directly connected to the principal claim becomes irrelevant. As it happens, even in the cases before the Court that arose under the prior formulation of the rule, the Court first determined whether it had jurisdiction over the counter-claim before proceeding to the issue of the connection with the principal claim.

II. Jurisdiction Over the Counter-Claim “As Such”

19 As indicated above, paragraph 1 of Art. 80 of the Rules provides that the counter-claim may be entertained only if it “comes within the jurisdiction of the Court.”

20 To the extent that the Applicant fails to object to the Court’s jurisdiction over the counter-claim at any point in the proceeding, the Court typically finds that jurisdiction exists with little if any discussion²⁸. Thus, in *U.S. Nationals in Morocco*, France invoked the compulsory jurisdiction of the Court to obtain a finding that a Treaty concluded between the United States and the Emperor of Morocco in September 1936 provided only for exemptions from local jurisdiction for U.S. nationals in Morocco in certain limited, specified cases. In its Counter-Memorial, the United States maintained by means of a counter-claim that it was entitled to more extensive benefits. In its Reply, France contested the merits of the U.S. position, but did not object to the jurisdiction of the Court over the U.S. counter-claim. The Court proceeded to deal with the counter-claim without any discussion of jurisdiction (or, for that matter, the connectivity of the counter-claim to the claim).²⁹ Similarly, when Nigeria filed its counter-claim against Cameroon, the latter indicated no objection of any kind, and the Court found without discussion that jurisdiction existed.³⁰

²⁸ Murphy, S., ‘Amplifying the World Court’s Jurisdiction through Counter-claims and Third Party Intervention’, *Geo. Wash. Univ. Int’l L. Rev.* 33 (2000-2001), pp. 5-30, p. 17.

²⁹ *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, Judgment, ICJ Reports (1952), pp. 176, 203-12; see Guyomar, *Règlement*, p. 524.

³⁰ *Land and Maritime Boundary (Cameroon v. Nigeria)*, Order on the Counter-claims, ICJ Reports (1999), pp. 983, 985.

21 The Applicant might object to the admissibility of the counter-claim, but not with respect to the jurisdictional requirement. Thus, in *Application of the Genocide Convention (Bosnia)*, Bosnia and Herzegovina invoked the compromissory clause of the Genocide Convention against Yugoslavia to advance its claim that Yugoslavia had committed acts of genocide in violation of the Convention. Yugoslavia invoked the same basis of jurisdiction to advance its counter-claim that Bosnia and Herzegovina had committed acts of genocide. Although Bosnia and Herzegovina objected to the connection of the counter-claim to the principal claim, it did not object to the Court's jurisdiction over the counter-claim. In the course of finding the counter-claim admissible, the Court simply noted the lack of any jurisdictional objection.³¹ Likewise, in the context of a claim by the Democratic Republic of the Congo (D.R.C.) based upon the Court's compulsory jurisdiction, the D.R.C. objected to the admissibility of Uganda's counter-claim on the issue of connectivity, but not with respect to jurisdiction.³² The Court noted that the D.R.C. "does not deny that Uganda's claims fulfill the 'jurisdictional' condition"³³ and proceeded to address solely the issue of connectivity in disposing of the D.R.C.'s objection.

22 The Applicant might object to the Court's jurisdiction, but only with respect to some aspects of the counter-claim. In *Asylum*, Peru advanced a counter-claim to the effect that Colombia acted unlawfully under the 1928 Convention on Asylum by granting asylum to Víctor Raúl Haya de la Torre. The Court's jurisdiction over the counter-claim as originally formulated was not challenged by Colombia and the Court proceeded based on an assumption that jurisdiction existed.³⁴ At the oral hearing in October 1950, however, Peru *amended* the counter-claim to include that "the maintenance of the asylum constitutes at the present time a violation of" the 1928 Convention. Colombia did object to the Court's jurisdiction over this addition, but

³¹ *Application of the Genocide Convention (Bosnia)*, *supra* fn. 1, ICJ Reports (1997), p.258, para. 32.

³² *Armed Activities on the Territory of the Congo*, *supra* fn. 23, ICJ Reports (2001), p. 666, para.8.

³³ *Ibid.*, p. 677, para. 30.

³⁴ *Asylum (Colombia/Peru)*, Judgment, ICJ Reports (1950), pp. 266, 280.

given the Court's ultimate disposition of the principal claim in favor of Colombia, the Court found it superfluous to address the jurisdictional objection.³⁵

23 The Applicant might also object to the Court's jurisdiction over the entire counter-claim. In *Jurisdictional Immunities of the State*, Italy sought to found the Court's jurisdiction over the counter-claim upon the 1957 European Convention for the Peaceful Settlement of Disputes. Art. 27(a) of the Convention stated that its provisions did not apply to facts or situations arising prior to the Convention's entry into force. Because Italy's counter-claim appeared to concern facts and situations that predated the Convention (harm to Italians committed by Nazi Germany between 1943 and 1945, and the waiver of claims contained in the 1947 Peace Treaty), Germany maintained that Italy's counter-claim fell outside the scope of the Court's jurisdiction. Italy sought to argue that its counter-claim actually concerned inadequate and incomplete efforts at reparation beginning with two 1961 Settlement Agreements and continuing to recent years. The Court, however, agreed with Germany that such later developments were not "new" situations post-dating the entry into force of the Convention; rather, they simply concerned the existence and scope of a German obligation to make reparation for violations that had occurred at a much earlier time.³⁶ Therefore the Court had no jurisdiction over the counter-claim and it was inadmissible.

24 Art. 80, para. 1 of the Rules does not require, by its terms, that the counter-claim be based upon the exact same jurisdictional basis upon which the principal claim arises.³⁷ As such, the text arguably leaves open the possibility that, for example, in a case brought based on the Court's jurisdiction under the compromissory clause of a treaty to interpret one provision of that treaty, the counter-claim might be based upon the Court's jurisdiction to interpret a different provision

³⁵ *Ibid.*, p. 288; see Guyomar, *Règlement*, p. 521 *et seq.*

³⁶ *Jurisdictional Immunities*, *supra* fn. 23, ICJ Reports (2010), paras. 26-31.

³⁷ See Thirlway, H., 'Counterclaims before the International Court of Justice: The *Genocide Convention* and *Oil Platforms Decisions*', *Leiden J. Int'l L.* 12 (1999), pp. 197-229, pp. 203 *et seq.*; Antonopoulos, C., *Counterclaims before the International Court of Justice* (2011), pp. 74-80.

of the same treaty. Further, in theory, the counter-claim might be based upon the Court's jurisdiction under a compromissory clause of an entirely different treaty, or upon an entirely different type of jurisdiction, such as invocation of the Court's compulsory jurisdiction.³⁸

25 In the *Oil Platforms* case, however, there is some suggestion that the jurisdictional basis available for a counter-claim might be limited to the existing jurisdiction over the principal claim. In that case, the Court's jurisdiction over Iran's claim was restricted by the Court, at the jurisdiction phase of the case, solely to the interpretation of Art. X, para. 1, of the 1955 U.S.-Iran Treaty of Amity, Economic Relations and Consular Rights.³⁹ That paragraph provides that "[b]etween the territories of the two High Contracting Parties there shall be freedom of commerce and navigation," whereas the other paragraphs of Art. X deal with various rights and privileges of vessels of the two parties. When the United States then filed its Counter-Memorial, it included a counter-claim concerning alleged Iranian attacks on shipping in the Persian Gulf, as well as the laying of mines and other military actions, in violation of Art. X *as a whole*, not just paragraph 1 of that article. Iran objected to the Court's jurisdiction over the counter-claim, asserting in part that the United States "seeks to widen the dispute to provisions of the Treaty of Amity ... which were never in question in the proceedings."⁴⁰ In response, the United States argued that the Court, under the 1978 formulation of the rule, should not reach the issue of jurisdiction at the preliminary stage; instead the only matter properly at issue under Art. 80 of the Rules was whether there was doubt that the counter-claim was directly connected to the principal claim.

26 In its Order on the counter-claim, the Court did not limit itself to the issue of connectivity; it squarely addressed the issue of jurisdiction "as such" over the counter-claim. The

³⁸ Genet, R., 'Les demandes reconventionnelles', p. 161 *et seq.*; Anzilotti, D., 'La demande reconventionnelle en procédure internationale', p. 868 *et seq.*

³⁹ *Oil Platforms (Iran v. United States)*, Preliminary Objections, ICJ Reports (1996), pp. 803, 821, para. 55.

⁴⁰ *Oil Platforms (Iran v. United States)*, *supra* fn. 23, ICJ Reports (1998), p. 196, para. 12.

Court first noted that, in its prior judgment on jurisdiction over Iran’s principal claim, it found that Art. X, para. 1, protected not just the immediate sale of goods, but also ancillary activities integrally related to such commerce.⁴¹ Then, the Court found that the activities at issue in the counter-claim “are capable of falling within the scope of Art. X, para. 1” and therefore “the Court has jurisdiction to entertain the United States counter-claim in so far as the facts alleged may have prejudiced the freedoms guaranteed by Art. X, para. 1.”⁴² In the *dispositif*, the Court then found that the counterclaim was “admissible as such and forms part of the current proceedings.”⁴³

27 In so doing, the Court may have limited the counter-claim to alleged violations arising under only Art. X, para. 1, not Art. X as a whole. If so, however, the Court did not explain exactly why the counter-claim was to be so limited, a step criticized by Judge Higgins in her separate opinion. According to Higgins:

In the first place, findings that reject the contentions of a party should be based on reasons. The disturbing tendency to offer conclusions but not reasons is not to be welcomed. In the second place, the inarticulate assumption that the jurisdictional basis established for a claim necessarily is the only jurisdictional basis for, and sets the limits to, a counter-claim, is open to challenge.

...

There is nothing in the Rules or practice of the Court to suggest that the *very identical* jurisdictional nexus must be established by a counter-claimant. The *travaux préparatoires* to the various formulations of what is now Article 80 of the Rules contain no suggestion whatever that this was thought of as a requirement. The rule on counter-claims has gone through successive changes. But neither in the discussions of 1922, nor of 1934, 1935, 1936,

⁴¹ *Ibid.*, p. 204, para. 35.

⁴² *Ibid.*, p. 204, para. 36.

⁴³ *Ibid.*, p. 206, para. 46(A).

nor again of 1946, 1968, 1970, 1972, does this thought anywhere appear.⁴⁴ Nor does the wording of Article 80, paragraph 1 of the Rules suggest this. It requires that a counter-claim “comes within the jurisdiction of the Court”, not that it “was within the jurisdiction established by the Court in respect of the claims of the applicant”.⁴⁵

29 If Judge Higgins’ interpretation of what the Court did is correct, then a counter-claim that is based upon a legal provision different from that upon which the principal claim is based may encounter difficulty, at least in circumstances where the Court has already passed upon and limited the scope of the principal claim. Such an approach would no doubt be influenced by the second admissibility requirement (discussed in Section C(III)), which is that the counter-claim must be directly connected with the subject matter of the principal claim. In many instances, the “connectivity” issue may also require a close relationship between the jurisdiction of the principal claim and the jurisdiction of the counter-claim.

30 However, it is not actually clear that the Court limited the U.S. counter-claim to Art. X, para. 1 of the 1955 Treaty. In the course of the subsequent merits phase, Iran remained concerned that portions of Art. X other than paragraph one were still part of the counter-claim, and hence objected that any portion of the counter-claim based upon those paragraphs should be regarded as inadmissible.⁴⁶ In addressing Iran’s objection the Court, in its 2003 judgment on the merits, did *not* assert that it had decided that the U.S. counter-claim was limited to Art. X, para. 1. Instead, the Court noted that the United States itself, in the submissions filed with its Rejoinder, “substantially narrowed the basis of its counter-claim” by only referring to Art. X, para. 1 thereby depriving Iran’s objection “of any object.”⁴⁷ In other words, the Court’s ultimate judgment strongly suggests that the 1998 Order of the Court did not restrict the counter-

⁴⁴ Genet, R., ‘Les demandes reconventionnelles’, p. 145 *et seq.*; Anzilotti, D., ‘La demande reconventionnelle en procédure internationale’, p. 859 *et seq.*

⁴⁵ *Oil Platforms (Iran v. United States)*, *supra* fn. 23, ICJ Reports (1998),, Sep. Op. Higgins, pp. 218-19.

⁴⁶ *See ibid.*, p. 209, para. 103.

⁴⁷ *Oil Platforms (Iran v. United States)*, Judgment, ICJ Reports (2003), pp. 161, 211-12, paras. 110-11.

claim to Art. X, para. 1; that “narrowing” only happened in March 2001 by the conduct of the United States itself when filing its Rejoinder.

31 In any event, in situations where the Court finds that the jurisdictional requirement has not been made, it refrains from moving on to the next requirement concerning direct connection of the counter-claim with the subject matter of the claim.⁴⁸ If the Court finds that the jurisdictional requirement has been met, it proceeds to the next requirement.

32 Importantly, a finding in favor of jurisdiction for purposes of Art. 80 of the Rules does not definitively resolve the Court’s jurisdiction over the counter-claim. The Court uses language in its Order to the effect that it has found admissibility under Art. 80 of the Rules “as such,”⁴⁹ by which it appears to mean that, on the facts as pled by the Respondent, the counter-claim *appears to fall* within the jurisdiction of the Court. Further, the Court includes language that the Order “in no way prejudices any question with which the Court would have to deal during the remainder of the proceedings.”⁵⁰ Although the Court has not characterized this approach to jurisdiction under Art. 80 of the Rules as a form of *prima facie* jurisdiction, akin to that used in the context of proceedings on interim measures of protection, it would appear to operate in much the same way. As discussed below in Section C(IX), the Applicant remains able, in the course of the “merits” phase of the case, to revisit the issue of jurisdiction in the context of all the facts and law developed during that phase, and to demonstrate to the Court that jurisdiction does not actually exist over the counter-claim.

III. Direct Connection with the Subject Matter of the Claim

33 Paragraph 1 of Art. 80 of the Rules also provides that the counter-claim may be entertained only if it “is directly connected with the subject-matter of the claim of the other

⁴⁸ See, e.g., *Jurisdictional Immunities*, *supra* fn. 23, ICJ Reports (2010), para. 32.

⁴⁹ See, e.g., *Armed Activities on the Territory of the Congo*, *supra* fn. 23, ICJ Reports (2001), p. 681, para. 45.

⁵⁰ See, e.g., *ibid.*, p. 681, para. 46.

party.”⁵¹ Art. 80 of the Rules provides no guidance as to how such a connection is to be assessed and application of this requirement appears to be more of an art than a rigid science. Indeed, signaling its considerable latitude when applying the requirement, the Court has stressed that “it is for the Court, in its sole discretion, to assess whether the counter-claim is sufficiently connected to the principal claim, taking into account the particular aspects of each case.”⁵²

34 In the event that no objection is made to the connection of the counter-claim to the claim, the Court nevertheless examines on its own such connectivity. Thus, in the *Land and Maritime Boundary* case, Cameroon did not object to Nigeria’s counter-claim, but the Court nevertheless discussed and determined that a connection existed.⁵³ In that instance, the Court was confronted with Cameroon’s claim that Nigeria had unlawfully occupied Cameroon’s territory in the Bakassi Peninsula and with Nigeria’s counter-claims that Cameroon had engaged in unlawful incursions into Nigerian territory along the same land border. The Court determined that Nigeria’s counter-claims were “directly connected” since they

rest on facts of the same nature as the corresponding claims of Cameroon, and ... all of those facts are alleged to have occurred along the frontier between the two States; ... the claims of in question of each of the Parties pursue the same legal aim, namely the establishment of legal responsibility and the determination of the reparation due on this account...⁵⁴

35 If the Respondent does object due to the lack of a “direct connection” between the principal claim and the counter-claim, the Court may readily dismiss that objection, as occurred in the *Asylum* case.⁵⁵ In that case, Colombia’s principal claim concerned Peru’s alleged

⁵¹ For a historical explanation of the “direct connection”-requirement see Antonopoulos, C., *Counterclaims before the International Court of Justice* (2011), pp. 119 *et seq.*

⁵² *Application of the Genocide Convention (Bosnia)*, *supra* fn. 1, ICJ Reports 1997, p.258, para. 33; *see also* Salerno, F., ‘Demande reconventionnelle’, pp. 360 *et seq.*

⁵³ *Land and Maritime Boundary*, *supra* fn. 30, ICJ Reports (1999), p. 985.

⁵⁴ *Ibid.*

⁵⁵ Guyomar, *Règlement*, p. 521 *et seq.*

obligation to allow for safe conduct of Víctor Raúl Haya de la Torre. Peru's counter-claim alleged that the asylum was not lawful under the Convention. Colombia challenged the admissibility of the counter-claim, arguing that it was not directly connected with the subject-matter of the Application. The Court rejected the objection, stating:

It emerges clearly from the arguments of the Parties that the second submission of the Government of Colombia, which concerns the demand for a safe conduct, rests largely on the alleged regularity of the asylum, which is precisely what is disputed by the counter-claim. The connexion is so direct that certain conditions which are required to exist before a safe-conduct can be demanded depend precisely on facts which are raised by the counter-claim. The direct connexion being thus clearly established, the sole objection to the admissibility of the counter-claim in its original form is therefore removed.⁵⁶

36 Yet in other instances, the counter-claim may not be essentially an inescapable component or “flip side” of the principal claim, in which case the Court must weigh the two Parties’ differing views as to what it is about the two claims that must “connect” and how “direct” the connection must be. The rule does not indicate whether the assessment of the “connection” concerns facts, concerns law, or concerns some combination of the two. Issues of admissibility before the Court typically depend on facts⁵⁷ not law, but in its jurisprudence on counter-claims, the Court has said that the existence of the “direct connection” must be considered “both in fact and in law,” and with regard to whether the parties are pursuing the same “legal aims.”⁵⁸

⁵⁶ *Asylum*, *supra* fn. 34, ICJ Reports (1950), p. 280.

⁵⁷ S. Rosenne, *The Law and Practice of the International Court of Justice, 1920-2005*, III (4th ed. 2006), p. 1235; see Salerno, ‘Demande reconventionnelle’, pp. 358 *et seq*

⁵⁸ *Armed Activities on the Territory of the Congo*, *supra* fn. 23, ICJ Reports (2001), p. 679, para. 38; see Genet, R., ‘Les demandes reconventionnelles’, p. 164 *et seq*; Antonopoulos, C., *Counterclaims before the International Court of Justice* (2011), p. 132.

37 As is the case for understanding the meaning of “counter-claim” (as discussed above in Section C(I), the Court does not approach the “connection” requirement as requiring that the counter-claim necessarily seek to diminish, off-set, or neutralize the principal claim. Some counter-claims may have that effect, but the lack of that element does not defeat the requisite connection to the principal claim. For example, in *Armed Activities on the Territory of the Congo*, the Court rejected the D.R.C.’s position that the arguments supporting the counter-claim “must both support the counter-claim and be pertinent for the purposes of rebutting the principal claim.”⁵⁹

38 Further, the factual “connection” or “complex” for comparing the principal claim and the counter-claim, as seen in the decisions of the Court, does not require that the underlying facts of the two claims be identical.⁶⁰ Indeed, in most situations, the facts supporting the claim and the counter-claim are not the same, but they are related. For the Court, that relationship appears to turn up on two key factors: the period of time during which the conduct at issue occurred and its geographic location. The period of time of the conduct at issue in the two claims need not be exactly the same; conduct relating to one claim might span a longer time period than the other. The geographic location also need not be exactly the same; the conduct at issue in the counter-claim might occur in a place not at issue in the principal claim. Nevertheless, a relationship in time and space does need to exist. The “legal connection” seems to turn on two further factors: the legal and non-legal instruments at issue, and the overall objective of addressing a particular legal relationship between the parties. In most instances, it seems important whether the conventional or customary law at issue with respect to both claims is largely or exclusively the same; invocation of an entirely new instrument in the counter-claim as having been violated may be a basis for denying a sufficient connection of that part of the counter-claim.

⁵⁹ *Armed Activities on the Territory of the Congo*, *supra* fn. 23, ICJ Reports (2001), p. 679, para. 38.

⁶⁰ See Thirlway, H., ‘Counterclaims before the International Court of Justice: The *Genocide Convention* and *Oil Platforms* Decisions’, *Leiden J. Int’l L.* 12 (1999), pp. 197-229, p. 218.

39 The standard is best understood as applied by the Court in specific cases. In *Application of the Genocide Convention (Bosnia)*, Bosnia and Herzegovina filed a claim that concerned allegations of wide-ranging conduct in the early 1990's in Bosnia and Herzegovina by Yugoslavia, including "ethnic cleansing," summary execution, bombardment of the civilian population, destruction of property, and other acts that constituted or related to genocide, all directed at Bosnia and Herzegovina's non-Serb population. In its Counter-Memorial, Yugoslavia advanced a counter-claim that Bosnia and Herzegovina was responsible in the same time period in Bosnia and Herzegovina of comparable acts of genocide, this time directed at Bosnian Serbs. Both the claim and counter-claim, therefore, involved conduct in the same place (Bosnia and Herzegovina) and in the same time frame (the early 1990's) that allegedly violated the same treaty (the Genocide Convention).

40 Bosnia and Herzegovina nevertheless objected to the admissibility of Yugoslavia's counter-claim as not "directly connected" to the principal claim, maintaining that the facts at issue in the counter-claim were "totally different" from those of the principal claim, and that the examination of one set of facts "would be of no help in the judicial analysis of the other set and could not affect its outcome in any way whatsoever."⁶¹ Moreover, as a legal matter, Bosnia and Herzegovina argued that *erga omnes* rights at issue in the Genocide Convention are inherently non-reciprocal in nature; there is nothing about the adherence or lack of adherence by one Party to the Convention that has any bearing on the obligations of a different Party.⁶² Bosnia and Herzegovina insisted that connectivity required some element of "countering" the principal claim by reducing or neutralizing its effects.⁶³

⁶¹ *Application of the Genocide Convention (Bosnia)*, *supra* fn. 1, ICJ Reports 1997, p.252, para. 11.

⁶² *Ibid.*, p. 252-53, para. 12; see Lopes Pegna, O., 'Counter-claims and Obligations Erga Omnes Before the International Court of Justice', EJIL 9, (1998), pp. 724-36, pp. 733 *et seq.*; Salerno, F., 'Demande reconventionnelle', pp. 352 *et seq.*

⁶³ *Application of the Genocide Convention (Bosnia)*, *supra* fn. 1, ICJ Reports 1997, p.252, paras. 13-14.

41 For its part, Yugoslavia maintained that there was no requirement that the exact same facts be at issue.⁶⁴ Further, Yugoslavia noted that both claims were based upon the same treaty and the same general rules of state responsibility, and that the facts of both concerned “the same tragic conflict, *i.e.*, civil war in Bosnia and Herzegovina, which happened in a single territorial and temporal setting, based on the same historical background and within the framework of the same political development.”⁶⁵ Moreover, Yugoslavia maintained that analyzing the facts of the counter-claim was “of crucial importance to answer the question of attribution to the Respondents of acts alleged by the Applicant”, since in some instances the identical facts were at issue with respect to allegations arising under both claims.⁶⁶ Finally, since a violation of the Convention involved assessing the intent of the underlying conduct, Yugoslavia argued that understanding the facts associated with the counter-claim was essential for understanding Yugoslavia’s intent in taking certain actions at certain times.⁶⁷

42 The Court rejected Bosnia and Herzegovina’s position and found the “direct connection” requirement to have been met. With respect to the facts, the Court stated:

[I]n the present case, it emerges from the Parties’ submissions that their respective claims rest on facts of the same nature; ... they form part of the same factual complex since all those facts are alleged to have occurred on the territory of Bosnia and Herzegovina and during the same time period; and ... Yugoslavia states, moreover, that it intends to rely on certain identical facts in order to refute the allegations of Bosnia and Herzegovina and to obtain judgment against that State.⁶⁸

43 Hence, the concept of a “factual complex” appears fairly broad in nature, capable of encompassing alleged conduct by one State against another State’s nationals in that other State

⁶⁴ *Ibid.*, p. 256, para. 23.

⁶⁵ *Ibid.*, p. 254, para. 17-18.

⁶⁶ *Ibid.*, pp. 254-55, paras. 19-20.

⁶⁷ *Ibid.*, p. 255, para. 21.

⁶⁸ *Ibid.*, p. 258, para. 34.

(here, the principal claim) and alleged conduct by that other State in its own territory against its own nationals (here the counter-claim).

44 With respect to the law, the Court in *Application of the Genocide Convention (Bosnia)* accepted that the *erga omnes* obligations at issue meant that one Party's breach could not possibly excuse that of the other Party, but even so,

the absence of reciprocity in the scheme of the Convention is not determinative as regards the assessment of whether there is a legal connection between the principal claim and the counter-claim, in so far the two Parties pursue, with their respective claims, the same legal aim, namely the establishment of legal responsibility for violations of the Genocide Convention.⁶⁹

45 The Court also noted that in its order on interim measures of protection, it had called upon both States, not just Yugoslavia, to adhere to their obligations under the Genocide Convention,⁷⁰ thus suggesting that there was a connection between the conduct of both parties with respect to the underlying dispute. When Serbia years later presented a similar set of facts in support of its counter-claim against Croatia (albeit this time with respect to the Krajina region of Croatia), Croatia did not contest the connection between the counter-claim and the claim.⁷¹

46 The issue of connectivity was also addressed in detail in the *Oil Platforms* case, decided just four months after *Application of the Genocide Convention (Bosnia)*. Iran's principal claim concerned U.S. attacks on three Iranian oil platforms in the Persian Gulf in 1987-88, which allegedly violated Article X, paragraph 1, of the 1955 U.S.-Iran Treaty of Amity, Economic

⁶⁹ *Ibid.*, p.258, para. 35. *Ad hoc* Judge Kreća took issue with calling the Applicant's claim the "principal" claim, given that the two claims were autonomous and non-hierarchical in nature; he would have preferred two terms "initial" or "original" claim. *Application of the Genocide Convention (Bosnia)*, *supra* fn. 1, Decl. Kreća, pp. 262-63, para. 1. The Court, however, has taken to referring to the "principal" claim and the "counter-claim."

⁷⁰ *Application of the Genocide Convention (Bosnia)*, *supra* fn. 1, ICJ Reports (1997), p.258-59, para. 36.

⁷¹ *Application of the Genocide Convention (Croatia v. Serbia)*, *supra* note 29, ICJ Reports (2010), Order of 4 February.

Relations and Consular Rights, which provides that “[b]etween the territories of the two High Contracting Parties there shall be freedom of commerce and navigation.”⁷²

47 The U.S. counter-claim was not focused on the oil platforms but, instead, on Iranian small-boat attacks and mine-laying that harmed U.S. and other vessels in the Persian Gulf in the same time period (the U.S. alleged that some gun boats were launched from Iran’s oil platforms). The United States identified seven specific incidents in 1987-88 involving such attacks or mine-laying, but reserved the ability to add further incidents as the proceedings progressed.⁷³ Iran contended that there was no direct connection between the counter-claim and the principal claim. As a factual link, according to Iran, the United States did not attack the three oil platforms because of the seven alleged Iranian attacks. As a legal link, six of the seven incidents did not involve vessels engaged in commerce or navigation “between” the two countries (*e.g.*, some of the attacks were against U.S. military vessels), while the seventh incident did not involve a U.S.-flagged vessel for which the United States was entitled to advance a claim.⁷⁴ The United States contested those views, but further argued that Iran’s attacks *generally* had an effect on shipping protected by Article X by creating threatening conditions for all merchant vessels operating in the Gulf, and that the U.S. attacks on the platforms in response to Iran’s threatening actions was at the heart of its defence against the principal claim.⁷⁵

48 The Court found that the necessary connection existed, stating:

[I]t emerges from the Parties’ submissions that their claims rest on facts of the same nature; ... they form part of the same factual complex since the facts relied on – whether involving the destruction of oil platforms or of ships – are alleged to have occurred in the Gulf during the same period; ... the United States indicates, moreover, that it intends to

⁷² *Oil Platforms (Iran v. United States)*, *supra* fn. 39, ICJ Reports (1996), p. 803.

⁷³ *Oil Platforms (Iran v. United States)*, *supra* fn. 23, ICJ Reports (1998), pp. 192-93, para. 4.

⁷⁴ *Ibid.*, pp. 197-98, paras. 16-18.

⁷⁵ *Ibid.*, pp. 201-02, paras. 24-25.

rely on the same facts and circumstances in order both to refute the allegations of Iran and to obtain judgment against that State; and ..., with their respective claims, the two Parties pursue the same legal aim, namely the establishment of legal responsibility for violations of the 1955 Treaty.⁷⁶

49 In *Armed Activities on the Territory of the Congo*, the D.R.C.'s claim concerned a series of alleged acts by Uganda that constituted armed aggression (including incursions into and occupation of D.R.C. territory, and support of irregular forces in the D.R.C.), violation of the laws of war, and the unlawful downing of a civilian aircraft. Uganda's counter-claim alleged that the D.R.C. had engaged in unlawful acts against Uganda, which the Court approached as falling into three categories: (1) alleged D.R.C. acts of aggression against Uganda; (2) alleged D.R.C. attacks upon Ugandan diplomatic premises and personnel in the D.R.C.'s capital, Kinshasa, as well as upon Ugandan nationals located there; and (3) alleged D.R.C. violations of the Lusaka Agreement of July 1999, which had attempted to end the armed conflict that had broken out among eight African nations in 1998.⁷⁷

50 With respect to the first category, the Court found that a direct connection existed. The Court found that the Parties' "respective claims relate to facts of the same nature, namely the use of force and support allegedly provided to armed groups," and that temporally both claims "concern a conflict in existence between the two neighboring States" since 1994 (even though Uganda's counter-claim ranged over a longer period than did the principal claim).⁷⁸ With regard to the legal connection, the Court noted that "each Party seeks to establish the other's responsibility based on the violation of the principle of the non-use of force" in Article 2(4) of

⁷⁶ *Ibid.*, p. 205, para. 38.

⁷⁷ *Armed Activities on the Territory of the Congo*, *supra* fn. 23, ICJ Reports (2001), p. 678, para. 37.

⁷⁸ *Ibid.*, p. 679, para. 38.

the U.N. Charter and in customary international law, as well as the principle of non-intervention; hence the Parties were “pursuing the same legal aims.”⁷⁹

51 With respect to the second category, the Court reached a similar conclusion, even though the conduct at issue in the counter-claim (attacks on Ugandan diplomatic premises and personnel, and on non-diplomatic persons in Kinshasa) was not in the same geographic region as the conduct at issue in the principal claim. Here the Court focused more on the temporal dimension of those attacks having allegedly occurred at the same time (August 1998) as the alleged Ugandan invasion of the D.R.C., which therefore placed them in the same factual complex⁸⁰ (the unstated assumption being that the alleged attacks were a response to that alleged invasion). Further, the Court noted that both parties were invoking rules on state responsibility and on the protection of persons and property, which demonstrated that they were “pursuing the same legal aims.”⁸¹ *Ad hoc* Judge Verhoeven voted against the Court’s decision, saying that the alleged attack on the diplomatic persons and property in Kinshasa “does not appear to me to throw any useful light for the Court on the armed aggression and unlawful occupation of part of its territory for which the Democratic Republic of the Congo claims to have suffered.... [T]he mere fact that this attack is part of a multifaceted history of conflict is not sufficient to justify the Respondent being authorized to seize the Court of this claim by way of counter-claim.”⁸²

52 The Court did not find the requisite connection with respect to the third category of Uganda’s counter-claims, since the alleged violation of the Lusaka Agreement concerned matters of dispute resolution, which was not within the subject matter of the principal claim. According to the Court, this part of Uganda’s counter-claims referred to the Congolese national dialogue, to the deployment of the United Nations Organization Mission in the Democratic Republic of the

⁷⁹

Ibid.

⁸⁰ *Ibid.*, 679, para. 40.

⁸¹ *Ibid.*

⁸² *Ibid.*, Dec. Verhoeven, pp. 684, 685.

Congo (MONUC) and to the disarmament and demobilization of armed groups ... [and] these questions, which relate to *methods for solving the conflict* in the region agreed at [a] multilateral level in a ceasefire accord ..., concern facts of a different nature from those relied on in the Congo's claims, which relate to acts for which Uganda was allegedly responsible *during that conflict*⁸³

53 Hence, the Court found that this part of Uganda's counter-claim was not part of the "factual complex" of the principal claim. Further, this part of the counter-claim concerned an alleged violation of legal rules (in the Lusaka Agreement) that were not presented in the D.R.C.'s claim, such that the parties were not pursuing the same legal aims with respect to this issue.⁸⁴

54 In the event that the Court finds there is no direct connection between the counter-claim (or portions thereof) and the principal claim, there is no indication in Art. 80 of the Rules as to what procedure the Court should then follow. In theory, the Court's discretion might include ordering that the counter-claim will henceforth be treated as a separate case on the Court's docket, though doing so would be an unusually robust exercise of the Court's discretion. In any event, the practice of the Court to date, once it finds no direct connection, has simply been to decline to entertain the counter-claim as a part of the case before the Court.

55 Doing so leaves the Respondent free to initiate an entirely new case before the Court against the other State based on the subject matter of the erstwhile counter-claim. Indeed, the 1936 Rules of Court, in Article 63, expressly stated as much, saying: "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." To date, however, no State that has advanced a counter-claim unsuccessfully has exercised this option. If such a new case were filed, there would appear to be

⁸³ *Armed Activities on the Territory of the Congo, supra* fn. 23, ICJ Reports (2001), p. 680, para. 42.
⁸⁴ *Ibid.*

two possibilities for how the Court could proceed, as signaled in the 1936 formulation. The Court could address the two cases in separate proceedings, or could formally or informally join the two cases in a single proceeding, pursuant to Article 47 of the Rules of Court. If the latter were to occur, and if the Court determined that it had jurisdiction over the new case, then the two claims would proceed in a fashion very similar to what would have otherwise occurred if the counter-claim had been admissible in the first proceeding.⁸⁵

IV. Filing the Counter-Claim With the Counter-Memorial

56 Para. 2 of Art. 80 of the Rules provides that the “counter-claim shall be made in the Counter-Memorial and shall appear as part of the submissions of that party.”⁸⁶ Since Art. 80 of the Rules is located in the portion of the Rules of Court that deal with incidental proceedings, it is generally accepted that the reference here is to Counter-Memorial *filed on the merits* of the principal claim, not a Counter-Memorial addressed to jurisdiction or admissibility. Thus, the expectation is that, after an application is filed, any objections by the Respondent to jurisdiction or admissibility of the principal claim would first be addressed by the Court (a process especially likely since those objections must be raised no later than three months after the filing of the Memorial, regardless of when the Counter-Memorial is scheduled thereafter to be filed). Only if the Court decides against those objections is the Respondent expected to file its Counter-Memorial on the merits, at which point it must file at the same time any counter-claim.⁸⁷ The rule does not permit filing of the counter-claim at either an earlier or later stage in the proceedings nor does it apparently permit the submission of a counter-claim orally. Moreover, the rule does not permit the filing of a “counter-counter-claim” by the Applicant, a step not attempted in any case filed to date before the Court.

⁸⁵ Genet, R., ‘Les demandes reconventionnelles’, p. 164 *et seq.*

⁸⁶ Antonopoulos, C., *Counterclaims before the International Court of Justice* (2011), pp. 135 *et seq.*

⁸⁷ Anzilotti, D., ‘La demande reconventionnelle en procédure internationale’, p. 874 *et seq.*

57 In some instances, in the course of filing preliminary objections on jurisdiction or admissibility, a Respondent has included a reservation to the effect that, if such objections are not sustained, the Respondent may decide to file a counter-claim at the merits stage. Though not required by the Rules of Court, such a reservation is an understandable precaution and, in any event, signals to the Court the intention of the Respondent in the event that the case moves forward.

58 Once a counter-claim has been filed in conjunction with the Counter-Memorial and has been found admissible, Art. 80 of the Rules does not address whether it should be notified to all States entitled to appear before the Court (as is done when an application initiating a case is filed with the Court, pursuant to Article 40, paragraph 3, of the Statute of the Court).⁸⁸ In the initial cases involving counter-claims before the International Court (*Asylum and Rights of U.S. Nationals in Morocco*), no such notification appears to have occurred. Nevertheless, since the decision on admissibility of the counter-claim in *Application of the Genocide Convention (Bosnia)*, a practice has developed whereby the Court instructs the Registrar of the Court to transmit a copy of the Court's Order on admissibility to those States⁸⁹ or its Order scheduling further pleadings in the event that admissibility is not challenged.⁹⁰ Doing so is an appropriate step, *inter alia*, to ensure that any State that believes it has interests at stake in the Court's adjudication of the counter-claim may seek to intervene in the proceeding, pursuant to Articles 62 or 63 of the Court's Statute.⁹¹ Even so, the Court does not transmit along with its Order the

⁸⁸ Anzilotti, D., 'La demande reconventionnelle en procédure internationale', p. 863 *et seq.*; Genet, R., 'Les demandes reconventionnelles', p. 145 *et seq.*; Salerno, F., 'Demande reconventionnelle', p. 345.

⁸⁹ See *Application of the Genocide Convention (Bosnia)*, *supra* fn. 1, ICJ Reports (1997), pp. 243, 259, para. 39; see also *Oil Platforms (Iran v. United States)*, *supra* fn. 23, ICJ Reports (1998), p. 205, para.42; *Land and Maritime Boundary*, *supra* fn. 30, ICJ Reports (1999), p. 986; *Armed Activities on the Territory of the Congo*, *supra* fn. 23, ICJ Reports (2001), p. 681, para. 47.

⁹⁰ *Application of the Genocide Convention (Croatia v. Serbia)*, *supra* note 29, ICJ Reports (2010), Order of 4 February.

⁹¹ Genet, R., 'Les demandes reconventionnelles', p. 159 *et seq.*; Anzilotti, D., 'La demande reconventionnelle en procédure internationale', p. 864.

portion of the Counter-Memorial advancing the counter-claim, so third States are left assessing the nature of the counter-claim from the Court's Order alone.⁹²

V. Counter-Claim as an Independent Claim and Not a Defence

59 Once the counter-claim is permitted, the language of Art. 80 of the Rules strongly indicates that the counter-claim operates as an independent claim, neither as a defence to the principal claim nor as a claim dependent on the principal claim.⁹³ Both paragraphs 1 and 2 of Art. 80 of the Rules refer to the Applicant as simply the “other party” to the counter-claim; it is no longer exclusively the “Applicant” in the proceeding. In the event that the principal claim fails on the merits, or is withdrawn, there is no direct effect upon the counter-claim, which will stand or fall on its own merits.

60 In *Application of the Genocide Convention (Bosnia)*, the Court confirmed that, although the counter-claim is a reaction to the principal claim, “a counter-claim 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.”⁹⁴ Further, the counter-claim widens “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,” and thus is “distinguishable from a defence on the merits.”⁹⁵ In the normal course of events, this means that a counter-claim (unlike a defence) will identify a violation of international law for which the other party is responsible and will seek reparation from the Court for that violation.⁹⁶ Hence, when Yugoslavia filed certain submissions as part of its counter-claim that related exclusively to dismissal of Bosnia and

⁹² For a discussion of the position of third states concerning the filing of a counter-claim see Antonopoulos, C., *Counterclaims before the International Court of Justice* (2011), pp. 103-109.

⁹³ Anzilotti, D., ‘La demande reconventionnelle en procédure internationale’, pp. 874 *et seq.*; see Antonopoulos, C., *Counterclaims before the International Court of Justice* (2011), pp. 60 *et seq.*

⁹⁴ *Application of the Genocide Convention (Bosnia)*, *supra* fn. 1, ICJ Reports (1997), pp. 243, 256, para. 27.

⁹⁵ *Ibid.*; see also *U.S. Diplomatic and Consular Staff in Tehran, (United States v. Iran)*, Order on Provisional Measures, pp. 7, 15, para.24 (distinguishing a defence from a counter-claim).

⁹⁶ *Armed Activities on the Territory of the Congo, supra* fn. 23, ICJ Reports (2001), pp. 676-77, para. 29.

Herzegovina's claims, those submissions were not viewed by the Court as "counter-claims" within the meaning of Art. 80 of the Rules.⁹⁷

VI. Other Party's Right to an Additional Pleading

61 Since the counter-claim is an independent claim, para. 2 of Art. 80 of the Rules establishes procedural equality as between the two claims, by making clear the right of the "other party" (*i.e.*, the Applicant) to "present its views in writing on the counter-claim, in an additional pleading". Thus, whatever schedule that may be set by the Court for addressing the merits of the principal claim in the case, which under Article 45 of the Rules of Court always allows the Respondent to file the final written pleading on the principal claim, the "other party" to the counter-claim will then be allowed to file a further written pleading that exclusively addresses its final views on the counter-claim. In this way, equal treatment is preserved as between the parties with the regards to their respective claims.⁹⁸

62 Thus, when the Court decided favorably on the admission of Yugoslavia's counter-claim in *Application of the Genocide Convention (Bosnia)*, it stated in its Order that "it is necessary moreover, in order to ensure strict equality between the parties, to reserve the right of Bosnia and Herzegovina to present its views in writing a second time on the Yugoslav counter-claims, in an additional pleading which may be the subject of a subsequent Order."⁹⁹ The same language was included in its Orders for *Oil Platforms*,¹⁰⁰ *Land, Island and Maritime Frontier Dispute (Cameroon v. Nigeria)*, *Armed Activities (D.R.C. v. Uganda)*,¹⁰¹ and *Application of the Genocide Convention (Croatia)*.¹⁰² Thereafter, the Applicants took advantage of this possibility to file a supplemental pleading. For example, in *Oil Platforms*, Iran filed its "Reply and Defence to

⁹⁷ *Application of the Genocide Convention (Bosnia)*, *supra* fn. 1, ICJ Reports (1997), p. 257, para. 29.

⁹⁸ Anzilotti, pp. 874 *et seq.*; Salerno, F., 'Demande reconventionnelle', pp. 374 *et seq.*

⁹⁹ *Ibid.*, pp. 243, 260, para. 42.

¹⁰⁰ *Oil Platforms (Iran v. United States)*, *supra* fn. 23, ICJ Reports (1998), p. 206, para. 45.

¹⁰¹ *Armed Activities on the Territory of the Congo*, *supra* fn. 23, ICJ Reports (2001), p. 681, para. 50.

¹⁰² *Application of the Genocide Convention (Croatia v. Serbia)*, *supra* note 29, ICJ Reports (2010), Order of 4 February.

Counter-Claim” in March 1999 addressing both the U.S. position on the claim and counter-claim; the United States filed its Rejoinder in March 2001 responding to those arguments; and then Iran filed a final “Further Response to the United States of America Counter-claim” in September 2001, which related solely to the counter-claim arguments made by the United States in its Rejoinder.

63 Although Art. 80, para. 2 of the Rules addresses only an additional pleading “in writing,” the same approach carries on through to the oral hearing. After the Respondent’s final oral statement (whether arising in a first or second round of the oral hearing), the “other party” is entitled to make an oral statement limited exclusively to its final views on the counter-claim. Thus, in *Oil Platforms*, at the end of the first round of the oral hearing, Iran was provided the opportunity to make an oral presentation limited solely to the U.S. counter-claim, and was again allowed that opportunity at the very end of the second round.¹⁰³

VII. Procedure for Deciding the Admissibility of the Counter-Claim

64 Art. 80, para. 3 of the Rules provides minimal guidance with respect to the procedure for deciding on the admissibility of the counter-claim.

The Respondent would normally explain, as a part of filing the counter-claim with the Counter-Memorial, why the counter-claim meets the two admissibility requirements. The President or Vice-President of the Court would then ascertain, in a meeting of the parties, whether the Applicant has objections to the admissibility of the counter-claim. As noted above, if there is no objection, the Court must still satisfy itself that the two requirements of paragraph one are met, a decision that apparently may be reached without receiving any further views from the parties, unless the Court “deems necessary” receiving such views per Art. 80, para. 3 of the Rules.

¹⁰³ *Oil Platforms (Iran v. United States)*, Verbatim Provisional Record, CR 2003/14 (28 Feb. 2003); *ibid.*, CR 2003/19 (7 March 2003).

65 In cases before the Permanent Court, such as *Factory at Chorzów*, and in the initial cases before the International Court, including the *Asylum* and *Rights of Nationals* cases, the Court did not dispose of issues concerning the admissibility of the counter-claim in a preliminary proceeding. Instead, such issues were folded into the pleadings on the merits relating to the principal claim. Conversely, the Court often has disposed of the admissibility of the counter-claim at a preliminary stage, pursuant to an Order addressing exclusively the admissibility of the counter-claim, whether or not the Respondent has objected to the admissibility of counter-claim. Thus, in *Land and Maritime Boundary*, Cameroon did not object to the admissibility of Nigeria's counter-claims, but the Court still issued an order indicating why the twin requirements of Art. 80 of the Rules had been met. Art. 80, para. 3 of the Rules however, does not require that the matter be disposed of at a preliminary stage.

66 If there is an objection by the Respondent to the admissibility of the counter-claim, Art. 80, para. 3 of the Rules provides that “the court shall take its decision thereon after hearing the parties.” Again, the rule does not expressly require that the matter be disposed of at a preliminary stage; the issue of admissibility could be addressed as part of the reply and rejoinder pleadings filed in relation to the merits of claim and counter-claim. Nevertheless, in recent years the Court has instead initiated an incidental proceeding, ordering the Applicant to comment in writing upon the admissibility of the counter-claim under Art. 80 of the Rules and the Respondent to react to those views in writing. Doing so has the advantage of determining at an early stage whether the counter-claim should be included as part of the case. The disadvantages are that: (1) initiation of an incidental proceeding slows down the process of dealing with the Applicant's claim; and (2) at such an early stage, it may be difficult to determine whether the counter-claim is directly connected to the principal claim, since all the relevant facts and law on that claim have not been fully developed through pleadings on the merits. In his separate opinion in *Oil Platforms*, Judge

Oda lamented this approach, which he viewed as an unfortunate departure from the Court's past practice.¹⁰⁴

67 May the Applicant solely object to the jurisdiction of the counter-claim during the incidental proceeding, leaving for a later phase a possible objection as to whether the counter-claim is "directly connected" to the principal claim? In *Jurisdictional Immunities of the State*, Germany immediately objected to the Court's jurisdiction over Italy's counter-claim, but did "not deem it useful at this stage of the proceedings to engage in a legal battle about the links between" the principal claim and the counter-claim.¹⁰⁵ Further, Germany asserted that there are other reasons as well that the counter-claim might be inadmissible and that "Germany reserves the right to raise such additional preliminary objections, if need be, at a later stage."¹⁰⁶ Italy responded by acknowledging "Germany's right to leave open for now the question of the direct connection," but expressed concern that doing so was not consistent with a prompt and efficient disposition of issues that Germany wished to raise.¹⁰⁷ Since the Court found that it had no jurisdiction over the counter-claim, the Court did not squarely address one way or the other whether it is permissible to challenge, in a preliminary phase, only the issue of jurisdiction.¹⁰⁸

68 Art. 80, para. 3 of the Rules is not clear as to whether "hearing the parties" requires that, whenever an Applicant objects, the Court should provide an opportunity for an *oral* hearing.¹⁰⁹ Prior to the 1978 version of the rule, there was no language at all addressing the issue of "hearing" the parties, referring instead to the Court simply engaging in "due examination" of the matter. The 1978 version of the Rule stated that "in the event of doubt as to the connection

¹⁰⁴ *Oil Platforms*, *supra* fn. 23, Sep. Op. Oda, p. 216, paras. 9-11.

¹⁰⁵ *Jurisdictional Immunities*, *supra* fn. 23, Preliminary Objections of Germany Regarding Italy's Counter-claim (10 March 2010), para. 3.

¹⁰⁶ *Ibid.*, para. 2.

¹⁰⁷ *Jurisdictional Immunities*, *supra* fn. 23, Observations of Italy on the Preliminary Objections of Germany Regarding Italy's Counter-claim (18 May 2010), paras. 4-6.

¹⁰⁸ *Jurisdictional Immunities*, *supra* fn. 23, ICJ Reports (2010), paras. 16, 32.

¹⁰⁹ See Thirlway, H., 'Counterclaims before the International Court of Justice: The *Genocide Convention* and *Oil Platforms* Decisions', *Leiden J. Int'l L.* 12 (1999), pp. 197-229, pp. 224 *et seq.*

between” the claim and counter-claim, “the Court shall, after hearing the parties, decide” the matter. That formulation of the rule applied in *Application of the Genocide Convention (Bosnia)*. After Yugoslavia’s counter-claim was filed, both parties apparently contemplated during a meeting with the President of the Court that they would submit written views to the Court on the counter-claims admissibility and then “be heard orally on the question.”¹¹⁰ The parties then submitted their written views. Thereafter, the Court decided, having received “full and detailed written observations,” that “it does not appear necessary to hear the Parties otherwise on the subject.”¹¹¹ Judge Koroma thought that the Court should have conducted an oral hearing,¹¹² as did *ad hoc* Judges Lauterpacht¹¹³ and Kreća, with the latter asserting that “‘hearing’ as a term of procedure before the Court denotes, in the sense of Article 43, paragraph 5, and Article 51 of the Statute, oral proceedings before the Court.”¹¹⁴ Their views, however, obviously were not persuasive to the Court.

69 In *Oil Platforms*, the 1978 formulation was also at issue. Iran requested an oral hearing on its objection to the admissibility of the counter-claim both in its meeting with the Court and in its written observations.¹¹⁵ By contrast, the United States argued that no hearing was required under Art. 80 of the Rules, or in the context of the circumstances of Iran’s particular objection, given that there was no “doubt” that the principal claim was connected to the counter-claim.¹¹⁶ Again, the Court decided that it was not necessary to hear further from the parties by means of an oral hearing.¹¹⁷ Judge Oda, in his separate opinion, questioned the propriety of finding a counter-claim admissible without having an oral hearing but, here too, his position was not accepted.¹¹⁸

¹¹⁰ *Application of the Genocide Convention (Bosnia)*, *supra* fn. 1, ICJ Reports (1997), p.251, para. 7.

¹¹¹ *Ibid.*, p. 256, para. 25; see also Salerno, F., ‘Demande reconventionnelle’, pp. 370 *et seq.*

¹¹² *Ibid.*, Sep. Op. Koroma, pp. 272, 276.

¹¹³ *Ibid.*, Decl. Lauterpacht, pp. 278, 278-80.

¹¹⁴ *Ibid.*, Dec. Kreća, p.267.

¹¹⁵ *Oil Platforms (Iran v. United States)*, *supra* fn. 23, ICJ Reports (1998), pp. 194-96, paras.7, 10-11.

¹¹⁶ *Ibid.*, pp. 202-03, para. 29.

¹¹⁷ *Ibid.*, p. 203, para. 31.

¹¹⁸ *Ibid.*, Sep. Op. Oda, p. 215, para. 9.

70 In 2000, the rule was changed to its present formulation, such that where an objection is raised or whenever the Court deems necessary, “the Court shall take its decision thereon after hearing the parties.” This formulation also does not expressly require an oral hearing. In *Jurisdictional Immunities of the State*, the Court received written pleadings from the parties with respect to Germany’s objection to the counter-claim and chose to decide the matter based solely on those pleadings.¹¹⁹ Judge Gaja, sitting as an *ad hoc* judge appointed by Italy, stated in his declaration that the wording introduced in 2000 “appears to imply that an oral hearing should be held” and that doing so “seems particularly justified when an objection relates to jurisdiction, given the impact of a decision on jurisdiction,” including the inability to bring the counter-claim as a separate case.¹²⁰ Similarly, Judge Cançado Trindade, the lone dissenter to the Court’s order, asserted that the Court “should” have held an oral hearing, though he did not indicate whether doing so was required under Art. 80, para. 3 of the Rules.¹²¹ Such arguments, however, were not viewed as persuasive by the other judges. As such, it appears that the Court does not regard Art. 80, para. 3 of the Rules, even under its current formulation, as requiring an oral hearing.

VIII. Withdrawal of the Counter-Claim

71 If no objection is made or if any objections are rejected by the Court, then the Court’s review of the counter-claim will proceed to the merits phase, in conjunction with its consideration of the merits of the principal claim. Prior to addressing the counter-claim on the merits, however, the Respondent is free to withdraw the counter-claim with the consent of the other party, in the same manner that any claim can be discontinued.¹²²

72 For example, in the case on *Application of the Genocide Convention (Bosnia)*, the 1997 counter-claims filed by Yugoslavia were deemed admissible by the Court. In 2001, however,

¹¹⁹ *Jurisdictional Immunities*, *supra* fn. 23, ICJ Reports (2010), para. 7.

¹²⁰ *Ibid.*, Decl. Gaja, p. 1.

¹²¹ *Ibid.*, Diss. Op. Cançado Trindade, paras. 30, 154.

¹²² Anzilotti, D., ‘La demande reconventionnelle en procédure internationale’, p. 876; Antonopoulos, C., *Counterclaims before the International Court of Justice* (2011), p. 154 *et seq.*

Yugoslavia notified the Court that it wished to withdraw the counter-claims. The Court notified Bosnia and Herzegovina, which indicated that it had no objection. The Court then allowed the counter-claims to be withdrawn.¹²³ In *Fisheries Jurisdiction*, Norway apparently initially “reserved” a counter-claim against the United Kingdom for costs associated with capturing U.K. vessels that were allegedly wrongfully fishing in Norwegian waters.¹²⁴ The Court decided the principal claim largely in favor of Norway, but without directly addressing the “counter-claim”; after the Court transmitted its 1951 judgment to Norway, Norway informed the Court that it no longer intended to assert its counter-claim.¹²⁵

IX. Objections to the Counter-Claim at the Merits Phase

73 As indicated above, often the counter-claim has been found admissible by the Court (*Jurisdictional Immunities of the State* being the primary exception). Unless the counter-claim is withdrawn, then the Court proceeds to the merits phase, where the parties are expected to plead to the merits of the counter-claim in conjunction with their pleadings on the merits of the principal claim.

74 Even at this “merits” stage, however, the Applicant is capable of challenging aspects of jurisdiction and admissibility of the counter-claim *other* than what was already decided in the context of the Art. 80 of the Rules incidental proceeding. Thus, at the merits phase of *Oil Platforms*, Iran contended that it was entitled to raise any objections to the jurisdiction of the Court over, and the admissibility of, the U.S. counter-claim that were not decided as a part of the Court’s 1998 order on admissibility under Art. 80 of the Rules. To that end, Iran challenged the U.S. counter-claim on grounds that: (1) it was not presented after the negotiations required under the 1955 Treaty compromissory clause; (2) the United States cannot espouse claims on behalf of

¹²³ *Application of the Genocide Convention (Bosnia)*, ICJ Reports (2001), pp. 572, 572-73.

¹²⁴ *Fisheries Jurisdiction (United Kingdom v. Norway)*, Counter-Memorial of Norway, Vol.I, ICJ Pleadings, pp. 214, 576.

¹²⁵ *Ibid.*, Vol. IV, ICJ Pleadings, p. 692.

other States or of non-U.S. entities, whose vessels or property were allegedly harmed; (3) the counter-claim extended beyond Article X(1) of the 1955 Treaty, the only provision over which the Court found it has jurisdiction; (4) the counter-claim concerned “freedom of navigation” issues, but the Court’s jurisdiction over the principal claim only concerned “freedom of commerce”; and (5) the United States could not broaden the scope of the counter-claim beyond what was expressed addressed in the submissions to its Counter-Memorial.¹²⁶

75 The United States argued that all issues of jurisdiction and admissibility were resolved with the Court’s order on the admissibility of the counter-claim under Art. 80 of the Rules. The Court did not accept that position, stating instead:

The Court considers that it is open to Iran at this stage of the proceedings to raise objections to the jurisdiction of the Court to entertain the counter-claim or to its admissibility, other than those addressed by the Order of 10 March 1998. When in that Order the Court ruled on the "admissibility" of the counter-claim, the task of the Court at that stage was only to verify whether or not the requirements laid down by Article 80 of the Rules were satisfied, namely, that there was a direct connection of the counter-claim with the subject-matter of the Iranian claims, and that, to the extent indicated in paragraph 102 above, the counter-claim fell within the jurisdiction of the Court. The Order of 10 March 1998 therefore does not address any other question relating to jurisdiction and admissibility, not directly linked to Article 80 of the Rules. This is clear from the terms of the Order, by which the Court found that the counter-claim was admissible "as such"; and in paragraph 41 of the Order the Court further stated that: "a decision given on the admissibility of a counter-claim taking account of the requirements set out in Article 80 of the Rules in no way prejudices any question which the Court will be called upon to hear

¹²⁶ *Oil Platforms (Iran v. United States)*, Judgment, ICJ Reports (2003), *supra* note 47, pp. 161, 209, para. 103.

during the remainder of the proceedings" (*ibid.*, p. 205, para. 41). The Court will therefore proceed to address the objections now presented by Iran to its jurisdiction to entertain the counter-claim and to the admissibility thereof.¹²⁷

76 Thus, the Court's view is that the decision reached on jurisdiction at the incidental proceedings phase is not a definitive view on the Court's jurisdiction over the counter-claim. In the context of the U.S. counter-claim, all the Court had decided in 1998 was that the facts pled by the United States "were facts capable of falling within the scope of Article X, paragraph 1, of the 1955 Treaty" and "that the Court had jurisdiction to entertain the United States counter-claim in so far as the facts alleged may have prejudiced the freedoms guaranteed by Article X, paragraph 1."¹²⁸ Likewise, any issues of admissibility other than the "direct connection" of the counter-claim to the claim may be raised at the merits phase. As it turned out, in *Oil Platforms* the Court then proceeded to reject each of Iran's objections to the Court's jurisdiction over or the admissibility of the counter-claim.¹²⁹

77 The same situation arose in *Armed Activities on the Territory of the Congo*. At the merits phase, the D.R.C. advanced several objections to the Court's jurisdiction over and the admissibility of Uganda's counter-claim. The Court permitted those objections, saying that the "enquiry under Article 80 as to admissibility is only in regard to the question whether a counter-claim is directly connected with the subject-matter of the principal claim; it is not an over-arching test of admissibility."¹³⁰ That statement is somewhat curious in that the Court's Art. 80 of the Rules analysis also concerns whether there is jurisdiction "as such" over the counter-claim, even in circumstances (such as this case) where no objection was made to jurisdiction in the Art.

¹²⁷ *Ibid.*, p. 210, para. 105.

¹²⁸ *Ibid.*, p. 208, para. 102, citing to *Oil Platforms (Iran v. United States)*, *supra* fn. 23, ICJ Reports (1998), p. 204, para. 36.

¹²⁹ *Oil Platforms (Iran v. United States)*, *supra* fn. 47, ICJ Reports (2003), pp. 210-14, paras. 106-118.

¹³⁰ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports (2005), pp. 168, 261, para. 273.

80 of the Rules proceeding. In any event, the D.R.C. was permitted to object to the admissibility of the counter-claim due to: waiver; the raising of new claims not specified in the Counter-Memorial; the inability to advance claims on behalf of non-nationals; and the failure to exhaust local remedies. In its Judgment on the merits, the Court rejected all of those objections and thus found the counter-claims admissible, except that it declared inadmissible a portion of Uganda's counter-claims which concerned "acts of maltreatment by [D.R.C.] troops of Ugandan nationals not enjoying diplomatic status who were present at Ndjili International Airport as they attempted to leave the country."¹³¹ With respect to those individuals, the Court found that Uganda had not established the nationality of the individuals so as to sustain the ability to bring a counter-claim premised on diplomatic protection of persons.¹³²

78 As occurred in both *Oil Platforms* and *Armed Activities on the Territory of the Congo*, one type of objection at the merits phase may be that the Respondent is expanding the counter-claim beyond the scope of what was pled in the Counter-Memorial. In that regard, the Court stated in *Oil Platforms* that the same rule applies to counter-claims as applies to claims. That is, the Court will seek to determine whether the new element is "a new claim" or whether it is merely "additional evidence relating to the original claim," bearing in mind that it "is well established in the Court's jurisprudence that the parties to a case cannot in the course of proceedings 'transform the dispute brought before the Court into a dispute that would be of a different nature.'"¹³³ Where a "new" counter-claim is being presented at the merits phase beyond what was identified in the Counter-Memorial, it appears that the Court will deem such a claim

¹³¹ *Ibid.*, p. 276, para. 332.

¹³² *Ibid.*, p. 276, para. 333.

¹³³ *Oil Platforms (Iran v. United States)*, *supra* fn. 47, ICJ Reports (2003), pp. 213-14, paras. 117, citing to *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, I.C.J. Reports (1992), p. 265, para. 63.

inadmissible. In both *Oil Platforms* and *Armed Activities on the Territory of the Congo*,¹³⁴ the Court did not view the introduction of new elements as transforming the counter-claim in those cases and therefore did not sustain the objection on this issue.

X. Disposition of the Counter-Claim on the Merits

79 If the counter-claim survives the initial Art. 80 of the Rules proceeding and then further survives any objections to jurisdiction or admissibility that may arise at the merits phase, and is not withdrawn along the way, the Court proceeds to decide the counter-claim on the merits. In each instance where the Court has done so, it first addresses and disposes of the principal claim before turning to the merits of the counter-claim. Both the claim and the counter-claim are then addressed in the same *dispositif* to the judgment.¹³⁵

80 In some instances, the counter-claim will be rejected on the merits. Thus, in *Rights of Nationals*, the Court rejected the U.S. submissions relating to the unlawfulness of the imposition of certain taxes and rejected the U.S. position that customs authorities, when valuing goods, cannot take into account their value in the local Moroccan market, stating that “the value of merchandise in the country of origin and its value in the local Moroccan market are both elements in the appraisal of its cash wholesale value delivered at the customhouse.”¹³⁶ In *Land and Maritime Boundary (Cameroon/Nigeria)*, the Court found that Nigeria had failed to prove the facts that would have supported its counter-claim, and further failed to establish that the conduct in question was attributable to Cameroon.¹³⁷ In *Oil Platforms*, the Court found that the United States had failed to prove that the alleged Iranian attacks on vessels in the Persian Gulf

¹³⁴ *Armed Activities on the Territory of the Congo*, *supra* fn. 127, ICJ Reports (2005), pp. 274-275, paras. 322-

27.

¹³⁵ Anzilotti, D., ‘La demande reconventionnelle en procédure internationale’, pp. 876 *et seq.*

¹³⁶ *Rights of Nationals of the United States of America in Morocco*, *supra* fn. 29, ICJ Reports (1952), p. 213.

¹³⁷ *Land and Maritime Boundary (Cameroon v. Nigeria)*, Judgment, ICJ Reports (2002), pp. 303, 453, para.

324.

violated the “freedom of commerce and navigation” obligations set forth in Article X(1) of the 1955 Treaty.¹³⁸

81 In other cases, the counter-claim may succeed on the merits, but be so closely associated with the principal claim that the existence of the counter-claim may not make much difference in the case. Thus, in the *Asylum* case, the Court agreed with the submission in Peru’s counter-claim that Colombia’s grant of asylum was not in accordance with the applicable asylum convention; however, in denying the principal claim by Colombia (seeking to exercise a right to grant asylum under that convention), the Court had already essentially reached that conclusion.¹³⁹

82 Yet is possible for a counter-claim to succeed and thereby result in a finding that would not otherwise be possible in the absence of the counter-claim. In *Armed Activities on the Territory of the Congo*, the Court rejected the first category of Uganda’s counter-claims to the effect that the D.R.C. had unlawfully used force against Uganda. The Court upheld, however, much of the second category of Uganda’s counter-claims, finding that the D.R.C. attacked the “Ugandan Embassy in Kinshasa, maltreated Ugandan diplomats and other individuals on the Embassy premises, maltreated Ugandan diplomats at Ndjili International Airport,” failed to protect those diplomats, and failed “to prevent archives and Ugandan property from being seized from the premises of the Ugandan Embassy,” all in violation of the Vienna Convention on Diplomatic Relations of 1961.¹⁴⁰ As such, the D.R.C. – the original Applicant in the case – was found to be under an obligation to make reparation to Uganda for the injury caused.¹⁴¹

D. Concluding Observations

¹³⁸ *Oil Platforms (Iran v. United States)*, *supra* fn. 47, ICJ Reports (2003), pp. 161, 217-18, paras. 121-22.

¹³⁹ *Asylum*, *supra* fn. 34, ICJ Reports (1950), p. 288.

¹⁴⁰ *Armed Activities on the Territory of the Congo*, *supra* fn. 127, ICJ Reports (2005), p. 282, para. 345(12).

¹⁴¹ *Ibid.*, p. 282, para. 345(13).

83 Given the considerable attention in the I.C.J. Statute and the Rules of the Court to the basic procedures for the filing of a claim by one State against another, it is remarkable that the Statute is silent on the issue of counter-claims, while the Rules are limited to a single article consisting of three short paragraphs. The explanation for such a lack of attention is probably threefold. First, though counter-claims have been available to Respondents throughout the life of the P.C.I.J. and I.C.J., to date they have been used quite sparingly. If counter-claims become a more significant feature of the Court's caseload, there may be calls for grounding the regime of counter-claims in the Statute and in more detailed provisions of the Rules. Second, when counter-claims are used by Respondents, it is possible to fold them into proceedings that already exist for the claim of the Applicant; in other words, the basic procedures used for claims are largely used *mutatis mutandis* for counter-claims, thereby obviating the need to develop detailed rules for the latter. Third, while there may be some areas of uncertainty in Art. 80 of the Rules, the Court through its jurisprudence has provided considerable content to the meaning of that article, as discussed above. As such, the regime of counter-claims is a good example of how the Court can develop – incrementally and over time – sensible procedures for handling its docket.

84 Overall, the current regime appears well-suited for balancing the interests of the Applicant and the Respondent. The Respondent is able to place before the Court its own grievances with respect to the Applicant's conduct, but is not able to derail the Applicant's claim by presenting matters unrelated to that claim or outside the Court's jurisdiction. The Applicant receives full notice of such grievances, is able to contest whether they are truly related to the Applicant's claim, and otherwise is able to litigate the merits of such grievances just as it would if the counter-claim had been brought as a stand-alone case. In none of the cases involving counter-claims does it appear that the filing of counter-claims had a pernicious effect on the case;

rather, in most instances it appears that they allowed the Court to receive a broader range of views on a broader range of issues than might otherwise have occurred.

85 As such, the real value of the regime of counter-claims is that it advances the Court's role as a central institution for the pacific settlement of disputes. Disputes often arise in a context where both sides believe the other has transgressed international legal norms. The regime of counter-claims allows the Court to consider both sides of the dispute in a single, integrated proceeding, thereby creating the opportunity for the Court to address the dispute in a more holistic fashion. States themselves may be recognizing the value of pursuing counter-claims, since many of the cases in which they have been filed date to just the past fifteen years. Given the value to litigants in "leveling the playing field" when they come before the Court, counter-claims may continue to be a significant feature of the Court's jurisprudence in the years to come.

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