SEPARATE OPINION OF JUDGE HIGGINS

I agree with the Court's finding that the counter-claim presented by the United States in its Counter-Memorial is admissible and now forms part of the current proceedings.

There is, however, one point which the Court has not at all addressed, while nevertheless apparently making a negative finding on it; and there are two further points which it seems to hold over for the merits, when arguably they should have been disposed of at this juncture.

As the present Order recalls, Iran instituted proceedings against the United States claiming breaches by the latter of Article I, Article IV, paragraph 1, and Article X, paragraph 1, of the Treaty of Amity of 1955. The Court, having heard the preliminary objections to its jurisdiction of the United States, in its Judgment of 12 December 1996 determined that it had jurisdiction "to entertain the claims made by the Islamic Republic of Iran under Article X, paragraph 1, of that Treaty". It found it did not have jurisdiction to entertain the claims under Article I and Article IV, paragraph 1.

On 23 June 1997 the United States presented both a defence to Iran's Memorial and the counter-claim which is the subject of the present Order. The United States contended that Iran, for its part, had engaged in actions which violated Article X of the Treaty. In Section 1 of its counter-claim it based its application on Article X, paragraph 1, of the Treaty. In Section 2 it based its application on "the remainder of Article X" and went on to refer particularly to acts it alleged constituted violations of Article X, paragraph 3. In its submissions the Court was asked to adjudge and declare that Iran had breached its obligations under Article X, generally.

In its reply to the Court's invitation to present its views on Iran's observations on the counter-claims (see paragraph 9 of this Order), the United States further referred at paragraph 39 to "paragraphs X (2) through X (5)". It both claimed violations of these provisions by reference to particular events and it objected that "Iran's jurisdictional arguments seek to force all of the US counter-claim into the confines of Article X (1) of the 1955 Treaty".

The Court's Order makes no reference whatsoever to these exchanges of the Parties save that it recalls in paragraph 26 that the United States did indeed make claims under Article X, paragraphs 2 to 5. However,

although the *dispositif* in paragraph A, as is customary, merely finds that the counter-claim is admissible, it seems from the text of the Order that this is only in relation to Article X, paragraph 1. In paragraph 34 the Court states that "its jurisdiction in the present case covers claims under Article X, paragraph 1, of the 1955 Treaty", the text of which it then cites. In paragraph 36 it finds that the counter-claim falls

> "within the scope of Article X, paragraph 1, of the 1955 Treaty as interpreted by the Court; and whereas 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 Article X, paragraph 1".

It may thus be that while Article X, paragraph 1, is the sole basis of jurisdiction identified by the Court, paragraphs 2 to 6 still have relevance to the task of ascertaining the freedoms guaranteed under paragraph 1.

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.

In both civil and common law domestic systems, as in the Rules of the Court, a defendant seeking to bring a counter-claim must show that the Court has jurisdiction to pronounce upon them. But it is not essential that the basis of jurisdiction in the claim and in the counter-claim be identical. It is sufficient that there is jurisdiction. (Indeed, were it otherwise, counter-claims in, for example, tort could never be brought, as they routinely are, to actions initiated in contract.)

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 of Court 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, nor again of 1946, 1968, 1970, 1972, does this thought anywhere appear.

Attention was focused on the one hand on the required "connection" and on the other on certain matters relating to jurisdiction, notably (in 1922) whether counter-claims were limited to compulsory jurisdiction cases and whether objections to counter-claim jurisdiction would be allowed. At no stage was it even proposed, much less accepted, that the jurisdictional basis for the claim and counter-claim must be identical.

Nor does the wording of Article 80, paragraph 1, 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".

Of course, the very requirement of a direct connection with the subject-matter of the claim is likely to bring a counter-claimant into the same general jurisdictional area, i.e., the same treaty may well form the basis of the claimed jurisdiction for the bringing of a counter-claim. But that is all.

The view of the Committee for the Revision of the Rules, when deciding to retain the phrase "and that it comes within the jurisdiction of the Court" from the old Rule, was that the phrase meant that a counter-claimant could not introduce a matter which the Court *would not have had jurisdiction to deal with had it been the subject of an ordinary application to the Court.*

And that remains the position under Article 80 of the present Rules of Court, which continues simply to require that a counter-claim "comes within the jurisdiction of the Court". The correct and necessary procedure in the present case would have been for the Court to enquire whether it would have had jurisdiction to deal with the claims of the United States, as they related to Article X, paragraphs 2 to 5, had they "been the subject of an ordinary application to the Court".

In its Judgment of 12 December 1996 (case concerning *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, I.C.J. Reports 1996,* p. 803) the Court established the methodology for doing this where there is contested jurisdiction under a treaty. The test is whether the facts as claimed by the applicant might give to a violation of a specified provision (whether the facts are in fact correct, whether they do constitute a violation, and if there is a defence, are then all matters for the merits). There is no reason why the Court should not have engaged in this exercise in relation to the counter-claim of the United States based on Article X, paragraphs 2 to 5, of the 1955 Treaty and thus to provide it with a reasoned response, one way or the other.

Iran, too, seems not really to expect any eligible counter-claim to be limited to matters falling under Article X, paragraph 1, of the Treaty of Amity. Its document of 18 November 1997, entitled "Request for Hearing in Relation to the United States Counter-Claim Pursuant to Article 80 (3) of the Rules of Court" is replete with arguments directed towards showing that the specific counter-claims of the United States are excluded by their facts from falling under Article X, paragraphs 3 to 5 (paras. 17, 19 *(b)*, 19 *(d)*, 19 *(e)*, 19 *(f)*, 21 and footnotes 21 and 24.)

Implicit in the Court's unexplained reliance on Article X, paragraph 1, as the apparent sole basis of jurisdiction is the thought that a counter-claim can only arise out of an initial claim, and therefore cannot be on a wider jurisdiction basis than the initial claim. But it is not a question of a counter-claimant being able to "expand" the jurisdiction initially established by the Court. The Court first establishes its jurisdiction by reference to the facts as alleged by the claimant. But that does not mean to say that it might not have jurisdiction in relation to allegations brought by the defendant under other clauses of the same treaty.

The Order which the Court issued on 17 December 1997 in respect of the *Genocide Convention* case (also concerning treaty-based jurisdiction) referred to the matter in the following terms:

> "Whereas the Respondent cannot use a counter-claim as a means of referring to an international court claims which exceed the limits of its jurisdiction *as recognized by the parties . . .*" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 257, para. 31; emphasis added).

What matters in a counter-claim is the jurisdiction mutually recognized by the parties under the Treaty — *not* the jurisdiction established by the Court in respect of particular facts initially alleged by the claimant. (It so happens in the *Genocide Convention* that the identical basis of jurisdiction was in issue for both parties, in relation to *erga omnes* obligations.)

The test in the *Genocide Convention* case of "jurisdiction as recognized by the parties" will only be met when the Court decides whether Article X, paragraphs 2 to 5, on the facts alleged by the Defendant, might sustain claims of violations by the Applicant. The Order, which is the vehicle for dealing with preliminary matters in the counter-claim, should have contained a reasoned decision on this point.

The matter may usefully be looked at in the following way. There either is, or is not, jurisdiction to sustain claims, on the basis of the facts alleged by the United States, in relation to Article X, paragraphs 2 to 5. If an initial claim could have been brought claiming breaches of these provisions, that cannot be taken away by virtue of the fact that the Court has already established its jurisdiction, in respect of another provision (Art. X, para. 1) in respect of claims articulated by Iran.

This would in effect revise treaty jurisdiction "as recognized by the parties" through a judicial finding on jurisdiction relating to an initial claimant under a particular provision.

If, *arguendo,* the treaty provisions of Article X, paragraphs 2 to 5, would have founded jurisdiction in an initial claim then presumably the United States could still bring a claim *de novo* even if it is not allowed to do so as a counter-claim under the Court's Order. Such a result is hardly consistent with the stated purpose of counter-claims, namely, convenience of court management. It underlines that what is required under Article 80, paragraph 1, of the Rules is that a counter-claim "comes within the jurisdiction of the Court" by reference to the normal jurisdictional principles rather than by reference to the particular basis of jurisdiction that the initial claimant happens to have relied on in relation to its own particular facts.

* *

If the United States might reasonably have expected a reasoned response to its claim that the Court has jurisdiction under Article X, paragraphs 2 to 5, as well as under Article X, paragraph 1, Iran might reasonably have expected that, on the basis of equality of treatment, this Order would have resolved two items on which it is in fact silent.

In the counter-claim the facts alleged concern destruction of vessels rather than oil platforms. The issue of whether Article X, paragraph 1, is restricted to commerce between the two Parties was fully canvassed as an issue relevant to jurisdiction in the jurisdictional phase of this case. In the event, the Court stated that it did "not have to enter into the question whether [Article X, paragraph 1] is restricted to commerce 'between' the Parties" as it was "not contested between them that oil exports from Iran to the United States were — to some degree — ongoing" (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, pp. 817-818, para. 44). And in the context of the counter-claim there is not agreement as to the existence that all the vessels were engaged in commerce between the Parties. Iran argues that in many of the incidents cited by the United States in its counter-claim, the vessels "were not (even arguably) engaged in commerce or even navigation between the territories of the High Contracting Parties" (Iranian Request, para. 21). It would seem that, in order to determine whether it has jurisdiction in respect of claims relating to damage to warships under Article X, paragraph 1, of the Treaty, the matter which it was not necessary to decide in 1996 must now be decided in 1998. Iran has treated this question as going to jurisdiction and as relevant to the conditions laid down in Article 80, paragraph 1, of the Rules of Court.

Parties to litigation should be treated in a comparable manner. But, from the silence of the Court in the present Order, it seems that what it saw as a jurisdictional question when determining United States preliminary objections to the main claim it treats as a matter for the merits when considering Iran's response to the counter-claim.

Second, Iran claims that those itemized vessels identified as warships are excluded from the reach of Article X, paragraph 1, by the terms of Article X, paragraph 2. This may or may not be correct in the particular context. But the silence of the Order on this question — which Iran clearly saw as relevant to the "direct connection" requirement in Article 80, paragraph 1, of the Rules, and thus as preliminary — means that Iran will perforce have to answer on the merits all contentions of fact and law relating to the claims concerning warships. The Court has not applied the same procedures, in determining the scope of its jurisdiction under the Treaty, to both of the Parties.

Undoubtedly, some of the difficulties stem from the terms of Article 80 itself. Paragraph 1 of Article 80 contains two requirements for counter-claims to be admissible — that they have a direct connection with the subject-matter of the claim and that they come within the jurisdiction of the Court. Paragraph 3 of Article 80 provides that the Court shall hear the parties "In the event of doubt as to the connection between the question presented by way of counter-claim and the subject-matter of the claim of the other party." No provision is made to hear the parties in the event of doubt as to whether the counter-claim comes within the jurisdiction of the Court. It might be thought that this was perhaps deliberate, and that the intention was that the Court would resolve any doubts as to its jurisdiction only when it got to the merits. This would be a sort of standing exception to Article 79, paragraph 6, of the Rules (or, put differently, a counter-claim where jurisdiction is contested would always and necessarily be treated as not having an exclusively preliminary character under Article 79, paragraph 7). In any event, the idea that "direct connection" within the meaning of Article 80, paragraph 1, should be disposed of as a preliminary matter, while the jurisdiction requirement in Article 80, paragraph 1, should be dealt with on the merits finds no support at all in the *travaux préparatoires* of the various versions of the Rules, including the present Rules. The failure of Article 80, paragraph 3, to "match" Article 80, paragraph 1, seems to have been inadvertent and there was no intention to distinguish between objections relating to "connection" and those to "jurisdiction".

What can be said is that the *travaux* do show that the Court has, since 1922, resolved to keep ample room for discretion in the handling of these

matters, on a case-by-case basis. In the exercise of this discretion the Court has determined that the reference in Article 80, paragraph 3, in case of doubt as to "connection", to the phrase "after hearing the parties" may be taken in a particular case as the receipt of written submissions[1]. Oral submissions are neither required by the terms of Article 80, paragraph 3, nor excluded. Further, the Court has also found sufficient freedom to decide, notwithstanding the apparently limiting terminology of Article 80, paragraph 3, that the Parties may be heard (whether in writing or orally) on the question of jurisdiction as well as on the question of connection.

The exception allowed in Article 79, paragraph 7, whereby preliminary matters are not disposed of at the preliminary phase, is to be used sparingly, lest the purpose underlying the 1978 alteration to that Article be negated. Further, the tests applied to Iran to see if its claims came under the 1955 Treaty should equally have been applied to the United States (i.e., to see, if on the facts alleged, a counter-claim could possibly lie under particular articles and clauses). The process by which certain claims of Iran were found not to be within the jurisdiction of the Court under the Treaty of Amity, and would thus not proceed to the merits, should be equally applied to the counter-claims of the United States to see whether or not they should advance in their entirety to the merits.

There is much to be said for three judicial principles. First, judicial conclusions should be justified by legal reasons. Second, matters going to jurisdiction should, whenever possible, be disposed of before proceeding to the merits. Third, parties to litigation are entitled to an equality of treatment (see, for example, *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, I.C.J. Reports 1964,* p. 25; *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v.* France) *Case, Order of 22 September 1995, I.C.J. Reports 1995*, p. 296).

(Signed) Rosalyn HIGGINS.

---

[1] This matter is raised in footnote 2 of Iran's Request and in the declaration of Judge *ad hoc* Kreća and the separate opinion of Judge *ad hoc* Lauterpacht in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, pp. 262-271 and 278-286, respectively.