

**JOINT DECLARATION OF VICE-PRESIDENT SEBUTINDE, JUDGES GÓMEZ ROBLEDO AND  
CLEVELAND, AND JUDGE *AD HOC* DAUDET**

1. In Section IV of today’s Order, entitled “Whether the Court should decline to entertain the counter-claims”, the Court addresses Ukraine’s argument that “even if the counter-claims of the Russian Federation could satisfy the requirements for admissibility, the Court should nevertheless refuse to entertain them in the ‘exceptional circumstances’ of the present case” (Order, para. 60). The Court then sets forth Ukraine’s views regarding why the exercise of such discretion would be appropriate in this case, as well as the Russian Federation’s contentions that Article 80, paragraph 1, of the Rules of Court does not allow for such discretion, and that even if it did, such discretion should not be exercised.

2. In paragraph 62 of the Order, the Court concludes:

“in the circumstances of the present case, the sound administration of justice and the interests of procedural economy call for the simultaneous consideration of those counter-claims and the principal claim (see *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *Counter-Claims*, *Order of 29 November 2001*, *I.C.J. Reports 2001*, p. 680, para. 44)”.

In our view, this language is best understood as recognizing that, in principle, such discretion is available under Article 80, paragraph 1.

3. Section IV presented the Court with two questions: first, whether Article 80, paragraph 1, affords the Court discretion not to entertain counter-claims in some circumstances and second, if so, whether the exercise of such discretion is appropriate in this case. Had the Court concluded that Article 80, paragraph 1, does not allow for such discretion, the Court would simply have stated this. There would have been no need for the Court to engage in any discussion of the application of the principle in the present case, either in setting forth the arguments of the Parties, or in considering them in paragraph 62 of the Order. By stepping over the question of the existence of discretion under the Rule and concluding that “the sound administration of justice and the interests of procedural economy call for the simultaneous consideration” of the claim and counter-claims “in the circumstances of the present case”, however, the Court rejects the application of discretion in the present case, without making any pronouncement about its existence. Unquestionably, the Court could and, in our opinion, should have been clearer in this regard. In our view, however, the only reasonable reading is that such discretion is, in principle, available under Article 80, paragraph 1.

4. This is also, in our view, the appropriate interpretation of Article 80, paragraph 1. As a number of current and former judges of this Court have observed, “in an exceptional situation, when dealing with a counter-claim would not serve the sound (proper) and effective administration of justice, the Court may decline to entertain such a counter-claim”<sup>1</sup>.

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<sup>1</sup> *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, *Counter-Claims*, *Order of 15 November 2017*, *I.C.J. Reports 2017*, joint opinion of Judges Tomka, Gaja, Sebutinde, Gevorgian and Judge *ad hoc* Daudet, p. 322, para. 4. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, *Counter-Claims*, *Order of 17 December 1997*, *I.C.J. Reports 1997*, separate opinion of Judge *ad hoc* Lauterpacht, p. 284, para. 18; *ibid.*, separate opinion of Vice-President Weeramantry, p. 294; Sean D. Murphy, “Counter-Claims Article 80 of the Rules”, in A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary*, Oxford University Press, 3rd ed. 2019, p. 1109.

5. Article 80, paragraph 1, provides that “[t]he Court *may* entertain a counter-claim *only if* it comes within the jurisdiction of the Court and is directly connected with the subject-matter of the claim of the other party” (emphasis added). This language makes clear that two requirements must be satisfied in order for the Court to entertain a counter-claim: (i) the Court must have jurisdiction, and (ii) the counter-claim must be directly connected with the claim of the opposing party. However, the use of the term “may” further indicates that even if these two criteria are satisfied, the Court is not required to exercise this authority. Indeed, the Court “may” entertain a counter-claim “only if” these requirements are met.

6. The significance of the choice of the term “may” rather than “shall” in paragraph 1 is underscored by the fact that Rule 80 otherwise employs the term “shall” throughout<sup>2</sup>. Accordingly, Article 80, paragraph 1, grants a certain measure of discretion to the Court to refuse to entertain a counter-claim even if it satisfies the two requirements under that provision.

7. In our view, such discretion is also essential for the sound administration of justice and the interest of judicial economy. As Judge *ad hoc* Lauterpacht observed in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Article 80 of the Rules is judge-made law, in which the Court is exercising the general power conferred upon it by Article 30 of the Statute to frame rules for carrying out its functions<sup>3</sup>. In order to ensure both that cases are heard with all deliberate speed and the orderly and effective administration of justice, the Court enjoys significant discretion “to apply [such rules] reasonably and to adjust their application to the circumstances of the case”<sup>4</sup>. In the same case, Vice-President Weeramantry underscored that the Court should exercise its discretion under Article 80, paragraph 1, *inter alia*, where entertaining a counter-claim could enable a respondent to unduly delay consideration of the applicant’s claims, in order to prevent “damaging effects upon the due administration of international justice”<sup>5</sup>.

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<sup>2</sup> See Art. 80, para. 2 (“A counter-claim *shall* be made in the Counter-Memorial and *shall* appear as part of the submissions contained therein. The right of the other party to present its views . . . *shall* be preserved” (emphasis added)); Art. 80, para. 3 (“Where an objection is raised . . . the Court *shall* take its decision . . .” (emphasis added)). Moreover, the present version of Article 80, paragraph 1, which has been in force since 1 February 2001, replaced the original text in the 1978 Rules of Court, which stated that “[a] counter-claim *may be presented* provided that it is directly connected with the subject-matter of the claim of the other party and that it comes within the jurisdiction of the Court” (emphasis added).

<sup>3</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997, separate opinion of Judge *ad hoc* Lauterpacht, p. 284, para. 18. See also M. N. Shaw (ed.), *Rosenne’s Law and Practice of the International Court: 1920–2015*, Brill/Nijhoff, 5th ed., 2016, Vol. III, para. 305 (Thus “the law on this subject is entirely judge-made law”).

<sup>4</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997, separate opinion of Judge *ad hoc* Lauterpacht, p. 284, para. 18:

“The Court has an inherent power and duty to ensure the orderly and effective administration of justice. Cases should be heard with all deliberate speed. To these ends the Court enjoys a significant measure of discretion. It is not controlled by the letter of Article 80 of its Rules. It should be recalled that, in contrast with many of the Rules of the Court, Article 80 does not have its source in any obligatory provision of the Court’s Statute. In Article 80 the Court is not laying down a procedure for the implementation of its statutory duty; it is only exercising the general power conferred on it by Article 30 of the Statute to ‘frame rules for carrying out its functions’. The Court has seen the consideration of counter-claims as a possible aspect of its functions and so, of its own initiative, it has framed certain rules. But it is not rigidly or perpetually bound by these Rules. It is free, and, indeed, obliged, to apply them reasonably and to adjust their application to the circumstances of the case before it.”

<sup>5</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997, dissenting opinion of Vice-President Weeramantry, pp. 294-295.

8. Various exceptional circumstances could arise in which consideration of a counter-claim that otherwise satisfied the requirements of Article 80, paragraph 1, would nevertheless be contrary to the sound administration of international justice. These could include circumstances where, for example, the counter-claim significantly expanded the case or would significantly delay the Court's ability to consider the case-in-chief.

9. Accordingly, we agree that Article 80, paragraph 1, is properly understood as preserving for the Court discretion to decline to entertain a counter-claim in circumstances when doing so would not serve judicial economy and the sound and effective administration of justice.

*(Signed)* Julia SEBUTINDE.

*(Signed)* Juan Manuel GÓMEZ ROBLEDO.

*(Signed)* Sarah H. CLEVELAND.

*(Signed)* Yves DAUDET.

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