DISSENTING OPINION OF JUDGE GÓMEZ ROBLEDO

[Translation]

Question of connection in law — The legal aim of the two Parties in the present case is not the same — Discretionary power of the Court.

1. To my regret, I had to vote against the Court's decision on the admissibility of Russia's counter-claims in this case, in paragraph 68, point A, for reasons I should like to set out briefly in this dissenting opinion.

2. In addressing Article 80 of its Rules in the past, the Court has developed clear and well-established jurisprudence on the criteria for ascertaining whether a principal claim and counter-claims are connected. While the text of Article 80 does not expressly define the concept of "directly connected", the Court has clarified it through a series of decisions. It has thus determined, first, that the connection must be established in fact: in this regard, the claims must concern the same factual complex, including the same geographical and temporal framework. Second, the Court has established that the connection must also exist in law: the parties must not only base their claims on the same legal rules and principles, but also, according to the Court, pursue the same "legal aim" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 258, para. 35; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998*, p. 205, para. 38; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Order of 30 June 1999, I.C.J. Reports 1999 (II)*, pp. 985-986; *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. 679, paras. 38 and 40).

3. While I can agree with the Court's decision regarding the connection in fact, and even with the first aspect of the connection in law, i.e. that the Parties must rely on the same legal rules and principles, I cannot subscribe to its reasoning on the second key aspect of the connection in law according to its jurisprudence, namely that the Parties must pursue *the same legal aim*. I consider that, in the present case, the Court has overlooked this vital element of the connection in law, despite having addressed it at length in its previous jurisprudence.

4. Hence in the past, the Court has sought to ascertain whether both parties intended to engage the international responsibility of the other by invoking the commission of an internationally wrongful act (*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*, p. 304, para. 45). But in the present case, following the 2024 Judgment on the preliminary objections, the legal aims of the two Parties are clearly no longer the same: Russia, through its counter-claims, is attempting to introduce a claim directed towards engaging Ukraine's responsibility, whereas the Court has limited the subject-matter of the dispute to Ukraine's claims seeking a purely declaratory judgment.

5. While the Court has always recognized the possibility of making a declaratory judgment (*Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece), Judgment, I.C.J. Reports 2011 (II)*, p. 662, para. 49, citing *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 37), there is no denying that, by its very nature, this type of judgment is fundamentally different

from a judgment on State responsibility and any ensuing reparations. A declaratory judgment was defined in the very early jurisprudence of the Permanent Court of International Justice (PCIJ), in the case concerning the *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*:

> "[A declaratory judgment] is to ensure recognition of a situation at law, once and for all and with binding force as between the Parties; so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned" (*Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, p. 20; see also *Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia), Judgment, I.C.J. Reports 2022 (II)*, pp. 635-636, para. 45).

6. In its Judgment on the preliminary objections, the Court underlined the exceptional nature of this case, in which Ukraine above all seeks a declaratory judgment, a kind of "certificate of good conduct", one might say, and nothing more. The only aspect of the dispute retained by the Court is that concerning Ukraine's request for a judicial finding that it has not committed genocide. The Court thus held that it lacked jurisdiction to entertain the submissions whereby Ukraine sought to invoke the responsibility of the Russian Federation for internationally wrongful acts, because those submissions fell outside the scope of the Genocide Convention (*Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine* v. *Russian Federation: 32 States intervening), Preliminary Objections, Judgment, I.C.J. Reports 2024 (II)*, pp. 395-396, paras. 53-55; pp. 420-421, paras. 146-147).

7. It therefore appears evident that the present case is being transformed in substance by the counter-claims of Russia. These have the effect of shifting the subject-matter of the dispute to Ukraine's responsibility for genocide, an aspect that would not, as such, have been subject to analysis by the Court in the absence of such counter-claims. In other words, through its counter-claims, the Russian Federation is engaging in a dispute concerning responsibility, going so far as to seek reparations for the violations it alleges.

8. Moreover, the need to differentiate between counter-claims and a defence is sufficiently clear from the jurisprudence of the Court (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 257, para. 28). In this regard, the dividing line between Russia's defence on the merits and the substance of its counter-claims seems to my mind tenuous, to say the least, which in itself raises the question whether these counter-claims can actually be characterized as such.

9. Lastly, I regret that the Court did not take this opportunity to consider the question of its power to decline to entertain counter-claims when justified by the procedural circumstances of the case. That was so in this instance, since these claims, far from contributing to procedural economy, will on the contrary lead to a substantial delay in the conduct of the proceedings, as is apparent from paragraph 68, point B, in the operative part of the Order. The Court has thus missed an opportunity to develop criteria for the sound administration of justice and to affirm that it has a margin of appreciation in this regard. Indeed, in my view, the Court is not bound to entertain a counter-claim, even when the two conditions for it do so are met. The use of the verb "may" in Article 80, paragraph 1, of the Rules indicates that it has some leeway, allowing it to decline to examine such a claim in certain circumstances (see in this regard *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 and Gevorgian, and Judge *ad hoc* Daudet, p. 322, para. 4).

10. It goes without saying that when the Court has a margin of appreciation or discretionary power in conducting its proceedings, it can but exercise it cautiously, while ensuring that the procedural rights of the parties or participants are respected. In its advisory function, for example, such caution has led the Court not to exercise its discretion to decline to respond to a request for an advisory opinion from 1946 to the present day. However, the Court never fails to recall in its advisory opinions that it has the discretion to do so.

11. In view of the foregoing, I consider that in this case the Court should not have overlooked the Applicant's interest in having its claims decided within a reasonable time period, which it appears to recognize, but almost reluctantly (Order, para. 65).

(Signed) Juan Manuel GÓMEZ ROBLEDO.

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