

DISSENTING OPINION OF JUDGE CLEVELAND

Respondent's submissions are not properly pursued as counter-claims to Ukraine's residual claim for declaration of non-responsibility under the Genocide Convention — Court fails to take into account the evolution of the dispute and the difference in character of the claim regarding lack of credible evidence and counter-claims alleging broad international responsibility — Rule 80, paragraph 1, must be applied consistently with the Court's restrictions on addition or amendment of claims — Counter-claims significantly expand the factual and legal scope and improperly transform and invert the subject of the dispute in a manner inconsistent with the Court's rules — Result is inconsistent with principles of procedural economy, the sound administration of justice and judicial propriety.

1. The Court's Order mechanically applies the twin requirements of a "direct connection" in fact and in law under Article 80, paragraph 1, of the Rules of Court to the Russian Federation's counter-claims and finds them satisfied. In so doing, the Court ignores the particular character of Ukraine's residual claim in the present case and its relationship with the counter-claims filed by the Russian Federation, as well as the fundamental nature of counter-claims under the Court's Rules. In my view, the Russian Federation's submissions are not properly pursued as counter-claims to the limited original claim that remains pending in this case. I therefore dissent from the Court's conclusion that the counter-claims are admissible as such (Order, operative para. 68(A)).

2. A proper appreciation of the question before the Court must start with an understanding of the origins and history of this case. As explained in the Court's 2024 Judgment on the preliminary objections¹, the President of the Russian Federation stated on 21 February 2022 that his country had recognized certain regions in Eastern Ukraine as newly independent States, in light of the "horror and genocide, which almost four million people are facing" (Preliminary Objections Judgment, p. 389, para. 30). On 24 February 2022, the Russian Federation commenced a "special military operation" in Ukraine (*ibid.*, para. 31), which has now been underway for nearly four years. The same day, the Russian Federation informed the Secretary-General of the United Nations "of the measures taken in accordance with Article 51 of the Charter of the United Nations in exercise of the right of self-defence" (*ibid.*, para. 33), providing a statement by the President that the purpose of the "special military operation" was "to protect people who have been subjected to abuse and genocide by the Kiev regime for eight years" (*ibid.*, para. 31).

3. On 26 February 2022, Ukraine instituted proceedings against the Russian Federation, requesting the Court to, *inter alia*, "[a]djudge and declare that, contrary to what the Russian Federation claims, no acts of genocide, as defined by Article III of the Genocide Convention, have been committed in the Luhansk and Donetsk oblasts of Ukraine" and accordingly that "the 'special military operation' declared and carried out by the Russian Federation on and after 24 February 2022 is based on a false claim of genocide and therefore has no basis in the Genocide Convention" (Application, para. 30 (a) and (d)).

4. In its Memorial, Ukraine clarified these claims as asking the Court to, *inter alia*:

¹ *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)*, p. 360 (hereinafter "Preliminary Objections Judgment").

- “(b) Adjudge and declare that there is no credible evidence that Ukraine is responsible for committing genocide in violation of the Genocide Convention in the Donetsk and Luhansk oblasts of Ukraine.
- (c) Adjudge and declare that the Russian Federation’s use of force in and against Ukraine beginning on 24 February 2022 violates Articles I and IV of the Genocide Convention.” (Memorial, para. 178 (b) and (c).)

Ukraine’s Application accordingly sought a determination by the Court that the “special military operation” was based on a false claim of genocide and that the Russian Federation thus could not lawfully take any action under the Genocide Convention in or against Ukraine aimed at preventing or punishing an alleged genocide. The request for a determination that “no acts of genocide . . . have been committed” (Application, para. 30) or that there is “no credible evidence” that Ukraine is responsible for committing genocide (Memorial, para. 178) was a necessary condition precedent to, and an integral part of, Ukraine’s central claim that the Russian Federation had acted contrary to the Genocide Convention by justifying its military operation on a false claim of genocide. In short, Ukraine’s claims, at their core, sought a determination of the Russian Federation’s international responsibility under the Genocide Convention.

5. In its Preliminary Objections Judgment, the Court determined that this dispute presented two “distinct” aspects: first, a request for a declaration that Ukraine has not committed genocide, or that there is “no credible evidence that Ukraine is responsible for committing genocide” under the Genocide Convention (Preliminary Objections Judgment, p. 395, para. 54); and second, a request that the Court declare ““that the Russian Federation cannot lawfully take any action under the Genocide Convention in or against Ukraine’ on the basis of its false claims” of genocide, and that “the Russian Federation’s use of force . . . violates Articles I and IV of the Genocide Convention” (*ibid.*, p. 396, para. 55).

6. The Court observed that the “first aspect” did “not seek to invoke the international responsibility of the Russian Federation for an internationally wrongful act” but sought a judicial finding that Ukraine itself has “not committed the wrongful acts that the Russian Federation has, falsely in Ukraine’s view, imputed to it” (Preliminary Objections Judgment, pp. 395-396, para. 54). The “second aspect”, however, sought “to invoke the international responsibility of the Russian Federation by imputing internationally wrongful conduct to it” (*ibid.*, p. 396, paras. 55-56). As a result, in the Court’s view, the two aspects were “fundamentally different in nature” (*ibid.*, p. 396, para. 56).

7. The Court then proceeded on the assumption that these two “aspects” of the dispute were severable and concluded that the Court lacked jurisdiction over the second aspect of the dispute while retaining jurisdiction over the first (Preliminary Objections Judgment, pp. 420-422, paras. 144-149). The Court thus excised Ukraine’s claims alleging the Russian Federation’s international responsibility for violations of the Genocide Convention.

8. As a result, Ukraine’s request for a determination that it is not responsible for committing genocide, which had been presented merely as a factual antecedent to its invocation of the Russian Federation’s responsibility under the Genocide Convention, was transformed from an accessory claim into a free-standing one. In essence, by way of an artificial severance of the claims, Ukraine was left in the posture of asserting a claim, not against the Respondent, but against itself.

9. Seven members of the Court critiqued this approach from various perspectives. Notably, in objecting to the “bifurcation of the dispute”², Judge Charlesworth observed that

“the second question — the lawfulness of the Russian Federation’s conduct — is premised on the first — the allegation of genocide being false. Indeed, in a way, Ukraine’s contention that the allegation against it was false is little more than a proposition in support of its claim that the Russian Federation’s conduct is unlawful”³.

10. Having improperly amputated Ukraine’s core claims in this manner, the Court now compounds this error by allowing the Russian Federation to assert counter-claims under the Genocide Convention that not only subsume this residual stump of Ukraine’s original claim, but twist the dispute back against Ukraine itself. As a result, the subject of the dispute is further transformed into one concerning Ukraine’s international responsibility under the Genocide Convention.

11. The asserted counter-claims, on their face, may superficially appear to satisfy the requirements of a “direct connection” in fact and in law under Article 80, paragraph 1. As the Court’s cursory analysis observes, both the residual claim and the would-be counter-claims address alleged conduct in the same time period and geographic region, and involving obligations under the same instrument (Order, paras. 51-52). The Court invokes the Russian Federation’s assertion that it “intends to rely, for the most part, on the same evidence” to refute Ukraine’s claim and to substantiate its counter-claims (*ibid.*, para. 55). Indeed, the claim and counter-claims quite atypically involve the conduct of the same party — Ukraine — a fact that the Court carefully avoids acknowledging or analysing. The counter-claims thus seemingly are on “all fours” with the Applicant’s claim that there is no credible evidence that Ukraine is responsible for genocide⁴.

12. Appearances, however, can be deceiving. While superficially seeming to mirror the Applicant’s claim, the counter-claims in fact massively broaden and transform the subject of the dispute and the nature of the case.

13. The majority overlooks a fundamental difference between the two sets of claims. Even as severed and reframed by the Court in its Preliminary Objections Judgment, Ukraine’s limited residual claim asks the Court to determine only that “no credible evidence exists” to support a finding of genocide against it (Memorial, para. 178). This original claim, formulated in the negative, seeks only a declaration of *non*-responsibility on the part of Ukraine, not a declaration of responsibility. The scope of the claim is limited to a determination of “whether there exists credible evidence that Ukraine is responsible for committing genocide” (Preliminary Objections Judgment, p. 402, para. 79). If such “credible evidence” exists, the Court could, at most, make a declaration to that effect; it could not make any definitive determination regarding Ukraine’s responsibility under the Convention. It could not find violations. Doing so would infringe the *non ultra petita* principle. As

² Preliminary Objections Judgment, separate opinion of Judge Charlesworth, p. 485, para. 6.

³ *Ibid.*, para. 5; see also Preliminary Objections Judgment, separate opinion of President Donoghue, p. 433, para. 29 (asserting that the Court should have found that it had jurisdiction over the more limited claims set out in the Application); *ibid.*, joint dissenting opinion of Judges Sebutinde and Robinson, p. 474, para. 47 (asserting that Court should have exercised jurisdiction over the whole case); *ibid.*, dissenting opinion of Vice-President Gevorgian, p. 435, paras. 3-4 (contending that the Court should have rejected jurisdiction over the entire case); *ibid.*, partly dissenting opinion of Judge Abraham, p. 456, para. 19 (same); *ibid.*, declaration of Judge Bennouna, p. 458, paras. 5-7 (same).

⁴ If this were indeed the case, the Russian Federation’s counter-claims would appear to actually constitute a defence to the original claim and thus be inadmissible. The Court’s jurisprudence has emphasized “the need to differentiate between counter-claims and defences” and that Article 80 “does not apply to mere defences on the merits”. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)* (hereinafter “*Bosnian Genocide*”), *Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 257, para 28.

the Court has unequivocally stated, “it is the duty of the Court . . . to abstain from deciding points not included in [the] submissions”⁵.

14. Establishing whether credible evidence exists to support a claim of genocide is the most preliminary step toward a finding of State responsibility for committing genocide under the Convention, and the elements that must be determined by conclusive proof in order to establish such responsibility are demanding⁶. Thus, while a determination that no credible evidence exists that Ukraine committed genocide would absolve Ukraine of responsibility for genocide, the converse is not true. A determination that there *is* credible evidence that Ukraine committed genocide would result in denial of Ukraine’s request for declaratory relief, but would not, in and of itself, constitute a determination of any responsibility on the part of Ukraine under the Convention.

15. The Russian Federation’s counter-claims, on the other hand, are about violations. They call upon the Court to determine Ukraine’s international responsibility for genocide and to find violations of numerous other obligations under the Genocide Convention. In so doing, both factually and legally they ask the Court to go far beyond assessing whether the evidence presented by the Parties clears the low evidentiary hurdle of “credibility” when evaluated in light of the definition of genocide under the Convention (see Preliminary Objections Judgment, p. 409, para. 103). Instead, the Russian Federation’s counter-claims require a determination of whether conclusive evidence exists to establish each and every element for a broad range of obligations under the Convention, including satisfaction of the *dolus specialis* requirement under Article II⁷.

16. Indeed, in place of a residual, accessory claim concerning “credible evidence of genocide”, the Russian Federation now asserts eight claims that Ukraine has violated its obligations, not only under Article I but also under Articles III, IV, V and VI of that Convention (Order, para. 29). Admitting the counter-claims thus further transforms the subject of the dispute into one that obligates the Court to determine Ukraine’s international responsibility with respect to whether Ukraine (1) has committed genocide; (2) has attempted to commit genocide; (3) is complicit in genocide; (4) conspired to commit genocide; (5) directly and publicly incited genocide; (6) failed to prevent genocide; (7) failed to investigate and punish persons for any acts enumerated in Article III of the Convention; and (8) failed to enact necessary legislation to give effect to the provisions of the Genocide Convention and to provide effective penalties for persons guilty of genocide or any of the acts enumerated in Article III (*ibid.*).

17. In addition, a finding by the Court that no credible evidence exists that Ukraine is responsible for committing genocide — the only claim of the Applicant — would not resolve the counter-claims now advanced by the Russian Federation. Violations of the Genocide Convention can occur without a determination of State responsibility for genocide itself⁸. For example, under the Court’s jurisprudence, violations of the duty to prevent genocide and the prohibition on complicity

⁵ *Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia/Peru) (Colombia v. Peru)*, Judgment, I.C.J. Reports 1950, p. 402.

⁶ See *Bosnian Genocide, Judgment, I.C.J. Reports 2007 (I)*, p. 129, para. 209 (“The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive”).

⁷ See *ibid.*, pp. 196-197, para. 373 (“The *dolus specialis*, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent.”)

⁸ See *Bosnian Genocide, Judgment, I.C.J. Reports 2007 (I)*, p. 219, para. 424, p. 226, para. 438, and pp. 237-238, para. 471 (concluding that, while acts of genocide occurred, they could not be attributed to Serbia but finding that Serbia violated its obligations to prevent genocide).

in genocide require a determination that genocide has occurred; yet attempt, incitement and the failure to investigate and punish other crimes under the Genocide Convention do not⁹.

18. Accordingly, the Russian Federation's second counter-claim, addressing attempt to commit genocide, and the fifth counter-claim, regarding incitement to genocide, do not require a determination that genocide itself has actually occurred. Nor do the seventh and eighth counter-claims — addressing responsibility for failure to investigate, punish and provide effective remedies for any acts enumerated in Article III of the Convention — necessarily require a finding of genocide. Indeed, under the seventh counter-claim alone, the Court could be obligated to determine, *inter alia*, whether Ukraine has failed to investigate and punish any person in the country who has engaged in direct and public incitement to genocide in violation of its obligations under the Convention.

19. The counter-claims in this case not only significantly exceed the factual and legal scope of the residual original claim, they also seek an entirely different character of relief — a determination of the State responsibility of Ukraine. In this regard, I recall that, although Ukraine's original Application included a request for a determination of the international responsibility of the Russian Federation, that aspect of the dispute was entirely eliminated by the Preliminary Objections Judgment (see *supra*, para. 7). Thus, the Respondent now seeks to assert eight claims to establish the international responsibility of the Applicant, where the Applicant has not asserted, and cannot assert, any such claim against the Respondent.

20. In short, having successfully excised any aspect of the dispute implicating its own international responsibility under the Genocide Convention, the Russian Federation now transforms the subject of the dispute into one regarding the international responsibility of Ukraine. As a result of today's Order, Ukraine, which initiated proceedings to seek to establish the Russian Federation's international responsibility for the "special military operation", is placed by this Court in the unconscionable position of both pursuing a declaration that it itself did not commit genocide, and defending itself against eight claims of State responsibility for genocide and related violations.

21. The Court, however, gives no meaningful consideration to the extent to which the counter-claims transform the nature of the claims and the subject of the dispute. It never even attempts to examine the extent to which the counter-claims involve significantly different matters of fact and law from the limited original claim. It simply observes that both the residual claim and counter-claims relate broadly to allegations under the Genocide Convention in a particular time and place (Order, paras. 49 and 51-53). Crucially, the Court also utterly fails to appreciate or confront the entirely different character of the counter-claims. To the contrary, the Court repeatedly mischaracterizes Ukraine's claim as seeking "to establish *whether Ukraine is responsible for violating its obligations under the Genocide Convention*" (Order, para. 57, emphasis added), and "whether [the] facts gave rise to *violations of obligations under the Genocide Convention*" (*ibid.*,

⁹ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015 (I), pp. 128-120, para. 441 ("It follows from the foregoing that Croatia has failed to substantiate its allegation that genocide was committed. Accordingly, no issue of responsibility under the Convention for the commission of genocide can arise in the present case. Nor can there be any question of responsibility for a failure to prevent genocide, a failure to punish genocide, or complicity in genocide"); *Bosnian Genocide, Judgment*, I.C.J. Reports 2007 (I), p. 119, para. 180 ("The Court observes that if a State is to be responsible because it has breached its obligation not to commit genocide, it must be shown that genocide as defined in the Convention has been committed. That will also be the case with conspiracy[,] . . . complicity . . . [and] the obligation to prevent genocide"); Convention on the Prevention and Punishment of the Crime of Genocide, Arts. IV-VI (setting out the obligation to investigate and punish "genocide or any of the other acts enumerated in article III", emphasis added).

But see C. J. Tams, L. Berster, and B. Schiffbauer, *The Genocide Convention: Article-by-Article Commentary*, 2023, pp. 185-186 and 189 (explaining that conspiracy to commit genocide, incitement to commit genocide, and attempting genocide are inchoate crimes under Article 3 of the Genocide Convention and thus do not require a finding that a genocide occurred).

para. 54, emphasis added). By erroneously portraying the original claim, as well as the counter-claims, as involving “violations” of the Convention, the Court mistakenly concludes that “the Applicant and the Respondent pursue . . . *the same legal aim*” (*ibid.*, para. 57, emphasis added) involving “*facts of the same nature*” (*ibid.*, para. 54, emphasis added). The Court thus also fails to comprehend the extent to which the vast expansion, transformation and inversion of the dispute will inject significant additional complexities into the case, delay the original proceedings and burden both the Court and the Parties. “[P]rocedural economy” will not be achieved from such a result (*ibid.*, para. 55)¹⁰.

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22. Some legal systems apply liberal rules for the assertion and amendment of claims and counter-claims¹¹. This Court’s Rules, however, constrain the freedom of an applicant to alter its claim, once brought. Article 38, paragraph 2, of the Rules of Court requires the application to “specify the precise nature of the claim”. The Court has interpreted this requirement to mean that a new claim not specified in the application cannot be admissible if it “transform[s]” the subject of the dispute originally submitted to the Court¹². Accordingly, “*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’”¹³. The Court has considered these requirements “essential from the point of view of legal security and the good administration of justice”¹⁴.

23. These principles necessarily apply to counter-claims. In order to be consistent with the Court’s Rules regarding pleadings, counter-claims likewise must not “transform the subject of the dispute originally brought before the Court” (Preliminary Objections Judgment, p. 400, para. 69). As the Court recognized in *Bosnian Genocide*, “the Respondent cannot use a counter-claim as a means . . . 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”¹⁵. Indeed, policing these pleading boundaries is central to the requirement in Article 80, paragraph 1, that counter-claims be “directly connected” to the original claim. As the Court has explained, this test must consider whether the facts

¹⁰ *Bosnian Genocide, Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 257, para. 30.

¹¹ In the United States federal courts, for example, as long as jurisdictional requirements are satisfied, a party may bring any claims or counter-claims that it has against an opposing party, regardless of how unrelated the claims may be. A party may also amend its claims or counter-claims to add any additional claims it has against the opposing party within a certain period of time. See U.S. Federal Rules of Civil Procedure, Rules 8, 13, 15 and 18.

¹² *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 266-67, paras. 69-70.

¹³ *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003*, p. 213, para. 117, citing *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 265, para. 63) (emphasis added). See also *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 656, para. 39; *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, pp. 447-448, para. 29, citing *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 266-267.

¹⁴ Preliminary Objection Judgment, p. 399, para. 67, quoting *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 267, para. 69.

¹⁵ *Bosnian Genocide, Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 257, para. 31; see also *Oil Platforms (Islamic Republic of Iran v. United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998*, p. 203, para. 33.

“are of the same nature in so far as they allege *similar types of conduct*” by the opposing party¹⁶, and whether, as a matter of law, the parties “pursue, with their respective claims, *the same legal aim*”¹⁷. In this manner, the Court’s restrictions on the proper scope of pleading necessarily establish the outer parameters of an acceptable counter-claim and guide whether a counter-claim is “directly connected” to the original claim within the meaning of Article 80, paragraph 1.

24. Whether claims and counter-claims assert the international responsibility of the opposing party is central to this inquiry. Thus, in the *Bosnian Genocide* case, the Court allowed counter-claims that sought “the same legal aim, *namely the establishment of legal responsibility* for violations of the Genocide Convention”¹⁸. In *Sovereign Rights*, the Court likewise observed that the claims and counter-claims pursued “the same legal aim . . . *since they are both seeking to establish the responsibility of the other*”¹⁹. That symmetry of legal aim, however, is not present here.

25. In its third preliminary objection in the present case, the Russian Federation took the position that Ukraine’s slight reframing of its submissions in the Memorial constituted an impermissible transformation of the dispute (Preliminary Objections Judgment, p. 398, para. 62). As noted above, the Court itself in the Preliminary Objections Judgment concluded that the “two aspects” of the original dispute asserted by Ukraine were “*fundamentally different in nature*” (see *supra*, paragraph 6; *ibid.*, p. 395, para. 53, and p. 396, para. 56 (emphasis added)). That “fundamental[] differen[ce]”, according to the Court, turned on the fact that the first aspect did “not seek to invoke the international responsibility of the Russian Federation for an internationally wrongful act attributable to that State” (*ibid.*, pp. 395-396, para. 54); while the second aspect *did* seek “to invoke the international responsibility of the Russian Federation by imputing internationally wrongful conduct to it” (see *supra*, paragraph 6; *ibid.*, p. 396, para. 56).

26. According to the Court’s prior Judgment in this case, therefore, a request for a declaration that a State did not breach its obligations (Ukraine’s claim) and a request to determine a State’s international responsibility (the Russian Federation’s counter-claims) are of a fundamentally different nature. Today’s majority, however, dismisses this critical aspect of counter-claims and the scope of Article 80, paragraph 1, mistakenly equating both claims as involving “violations” of the Genocide Convention and thus “the same legal aim” and “facts of the same nature” (Order, paras. 54 and 57; see also *supra*, paragraph 21). As a result, the Court fundamentally fails to appreciate how the counter-claims differ in character from the original claim and transform the subject of the dispute.

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¹⁶ *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. 303, para. 44 (emphasis added) (observing that the claims and counter-claims “allege similar types of conduct of the naval forces of one Party vis-à-vis nationals of the other Party”, i.e. “alleged harassment, intimidation, [and] coercive measures”).

¹⁷ *Bosnian Genocide, Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 258, para. 35 (emphasis added); *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.

¹⁸ *Bosnian Genocide, Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 258, para. 35 (emphasis added).

¹⁹ *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 (emphasis added).

27. Ordinarily, under the Genocide Convention, counter-claims are used to assert claims “counter” to those of the applicant²⁰. Thus, in the two prior cases involving counter-claims under the Genocide Convention, *Bosnian Genocide* and *Croatia v. Serbia*, the applicant asserted claims alleging the responsibility of the respondent under the Convention, and the respondent conversely asserted counter-claims alleging the responsibility of the applicant. In the present case, however, since Ukraine’s claim alleging the responsibility of the Russian Federation has been eliminated, both the residual claim and the counter-claim involve the conduct of the same party — the Applicant.

28. If the Russian Federation were the applicant, its counter-claims would assert ordinary claims against the respondent under the Convention, and Ukraine in turn would be allowed to assert counter-claims against the Russian Federation. However, the Court’s restrictions on the amendment of claims — which are governed by Ukraine’s residual claim for declaratory relief — will not allow Ukraine to now assert such a claim against the Russian Federation in the present case. In essence, when the counter-claims are considered together with the residual claim, the Russian Federation assumes a position tantamount to an original applicant, with its claims subsuming Ukraine’s as the case-in-chief, but to which Ukraine cannot assert a counter-claim in response.

29. As the Court has long recognized, “the Rules of Court do not define what is meant by ‘directly connected’”. Thus, “it is for the Court, in its sole discretion, to assess whether the counter-claim is sufficiently connected to the principal claim, taking account of the particular aspects of each case”²¹. In order to be consistent with the Court’s jurisprudence regarding the amendment of claims, this inquiry ought to take into account whether the counter-claims have a substantively meaningful direct connection in fact and in law, including how much the issues of fact and law would be expanded in the case and the resulting impact on the complexity and scope of the proceedings, as well as whether there is a direct connection in *character*, i.e. whether the counter-claims will fundamentally and inappropriately transform the nature of the dispute. Under the circumstances of this case, it is clear that they would. In my view, the test articulated by the Court under Article 80, paragraph 1, of the Rules is therefore not satisfied.

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30. Finally, as noted in today’s joint declaration, which I also sign, I welcome the Court’s suggestion in Section IV of the Order that Article 80, paragraph 1, grants a certain measure of discretion to the Court to refuse to entertain a counter-claim that satisfies the two requirements under that provision (Order, paras. 60-62). As a number of judges of this Court have recognized, “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”²².

²⁰ *Bosnian Genocide, Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 256, para. 27 (a counter-claim “is linked to the principal claim, in so far as, formulated as a ‘counter’ claim, it reacts to it”); see also Order, para. 26.

²¹ *Bosnian Genocide, Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 259, para. 33.

²² *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 *Bosnian Genocide, Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, separate opinion of Judge *ad hoc* Lauterpacht, p. 284, para. 18; *ibid.*, dissenting opinion of Vice-President Weeramantry, pp. 294-295.

31. I do not consider it necessary to resort to the question of discretion under Article 80, paragraph 1, because the counter-claims so transform the subject of the dispute as to place them beyond the boundaries of an acceptable counter-claim. If, however, the counter-claims could somehow be viewed as satisfying the requirements of Article 80, paragraph 1, the transformation of the nature of the case, and the resulting burdens on the Parties and the Court (see *supra*, paragraph 21) would, in my view, constitute a basis for exercising such discretion.

32. A determination that the counter-claims are not admissible would, of course, not leave the Russian Federation without alternatives. The Respondent would remain fully entitled to proceed against Ukraine with free-standing claims in a separate application. Attaching these claims to Ukraine's Application in its current form, however, runs contrary to the rules and procedures of this Court and the sound administration of international justice.

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33. In short, the Court's analysis of the question begins in the wrong place, fails to meaningfully consider the nature of the remaining original claim and counter-claims and the character of counter-claims under the Court's Rules, and thus yields the wrong conclusion. A proper examination of the direct connection between the counter-claims and the residual original claim in this case would have required an appreciation of the very unusual nature of what remains of Ukraine's original claims after the Court's ruling on the preliminary objections. Ukraine filed a very atypical case under the Genocide Convention. Its Application, together with the Court's decision to dismember the dispute at the preliminary objections phase, left Ukraine's case in a uniquely contorted posture, transformed from a dispute asserting the international responsibility of the Russian Federation into a self-standing claim for declaratory relief against itself. In my view these antecedent considerations, which are ignored by the Court, are directly relevant to the question of the relationship between Ukraine's residual claim and the counter-claims of the Russian Federation. The Court now compounds the error in its prior judgment by declaring admissible, as counter-claims, claims that would not only vastly expand the factual and legal issues in the case, but would subsume and invert the subject of the dispute, in a manner that is impermissible under the Court's own rules regarding the appropriate scope of claims.

34. Ukraine brought a case alleging the international responsibility of the Russian Federation under the Genocide Convention for the "special military operation". That dispute was transformed into a claim regarding Ukraine's non-responsibility for genocide, and today becomes eight claims alleging Ukraine's international responsibility for genocide. This inversion of the case does not serve the principles of procedural economy and raises serious questions of judicial propriety. I would uphold Ukraine's objection to the admissibility of the counter-claims and allow the Russian Federation to instigate a separate proceeding, should it so wish.

(Signed) Sarah H. CLEVELAND.
