SEPARATE OPINION OF JUDGE TLADI

I. INTRODUCTION

1. The Court has today decided that Russia's counter-claims are admissible and, accordingly, that it will entertain them. It goes without saying, but as the Court itself has said, its Order today is without prejudice to "other questions with which" it will "have to deal during the remainder of the proceedings", including the merits of the counter-claims. The Order of the Court addresses the arguments of the Parties in respect of the conditions laid down in Article 80 paragraph 1 of the Rules of Court, namely that the counter-claims must come within the jurisdiction of the Court and must be "directly connected with the subject-matter of the claim".

2. Ukraine had argued that, even if the two conditions in Article 80 (1) of the Rules are satisfied, the Court has a discretion not to entertain counter-claims in exceptional circumstances. Accordingly, in its view, in the circumstances of the current case, the Court should exercise its discretion and decline to entertain Russia's counter-claims. Assuming the correctness of the Court's decision in the current case, i.e. that Russia's counter-claims are admissible and therefore form part of the current proceedings, the Court could have addressed Ukraine's argument in one of several ways. The Court could have decided that it does possess a discretion under Article 80 (1) but that, in the present case, there are no compelling reasons that lead it to exercise that discretion. Alternatively, the Court could have decided that, once the conditions of Article 80 (1) of the Rules are satisfied, it does not have a discretion and must, therefore, entertain the counter-claims. Finally, the Court could have decided that it is unnecessary to address the question whether, in certain circumstances, it has a discretion not to entertain counter-claims. The implications of the latter option would be that, whether or not the Court has discretion, there are no circumstances in the present case that would lead it to not entertain Russia's counter-claims. Each of the three options would have the same effect in the present case, namely that the counter-claims would form part of the case.

3. Faced with the choices above, the Court adopts a most unsatisfactory pathway. Rather than make a choice, the Court decided, in a single-sentence paragraph (Order, para. 62) to address the matter as follows:

> "In the Court's view, 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)."

4. It is not clear, from this statement, whether the Court *(a)* takes the position that it has a discretion not to entertain counter-claims that satisfy the conditions of Article 80 (1) of its Rules, but that it chose not to exercise that discretion, *(b)* takes the position that it does not have discretion, or *(c)* has deemed it unnecessary to take a decision on the question whether there exists a discretion or not. I do not believe that, by paragraph 62 of its Order, the Court has opted for option *(a)* because the language in option *(a)* is not language of discretion. Put differently, paragraph 62 of the Order could reasonably be understood as implying that the conditions in Article 80 (1) animate the broad underlying objectives of "the sound administration of justice" and "the interests of procedural economy". At any rate, as I will try to illustrate below, the reliance on *Armed Activities on the Territory of the Congo* itself suggests a *proximity* to the view that the Court does not have a discretion. At the same time, I am not convinced that the Court has taken a decision that it does not have discretion, because otherwise paragraph 62 would have formed part of the analysis of the conditions of Article 80 (1) of the Rules of Court. Finally, I am also not convinced that the conclusion

reflects option *(c)*. Since the Court clearly raises the question of discretion and sets out the contradictory positions of the Parties, the sentence at paragraph 62 could, in my view, stand for option *(c)* only if there was an explicit statement that the Court was not taking a position.

5. In my opinion, the Court should have taken a clear decision on whether such a discretion exists or not. Alternatively, the Court could have made clear that it was not necessary in the current case to determine whether there exists a discretion — a conclusion that is perfectly acceptable in cases such as the current one, where the Court believes there are no compelling reasons that would lead it to exercise any discretion if such discretion existed. Since the Court has not done so, I feel compelled to share my view on the question of discretion.

II. ARTICLE 80 (1) DOES NOT PROVIDE THE COURT WITH A DISCRETION

6. Let me begin with two general statements. First, the standard texts that I have consulted on the question adopt the position that the Court does have a discretion[1]. Second, the Court has, to date, never decided not to entertain a counter-claim that satisfied the conditions in Article 80 paragraph 1 of its Rules. More importantly the Court has never suggested that it does have such a discretion.

1. The case for discretion

7. The main reason advanced for the view that the Court has a discretion even in the event that the conditions in Article 80 (1) of the Rules are satisfied is that the provision uses the word "may"[2]. If, so the argument goes, under Article 80 (1), the Court had no discretion, the Rules of Court would have provided that the "Court *shall* entertain a counter-claim if . . . ". In this connection, the point has been made that a simple search of the Rules of Court reveals that whenever the Rules use "may" to refer to the Court's powers and functions, it is in connection with a discretion of the Court. I am prepared to accept this position for argument's sake, although I have been able to find one or two provisions in the Rules of Court that are perhaps not so straightforward[3].

8. The second reason that has been advanced for the argument that the Court has a discretion is based on the underlying reason for counter-claims, namely the sound administration of justice and the interests of procedural economy. This argument was laid out in the joint opinion of

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[1] Sean D. Murphy, "Counter-Claims Article 80 of the Rules", in Andreas Zimmermann, Christian J. Tams et al. (eds.), *The Statute of the International Court of Justice: a commentary* (2019), p. 1109. See also Malcolm Shaw, *Rosenne's Law and Practice of the International Court of Justice: 1920-2015, Fifth edition* (2017), Vol. III, p. 1271, stating that the new version of the rule (Article 80) "places emphasis on the Court's discretionary power to entertain a counter-claim if the conditions set out in paragraph 1 are met". Although I have not been able to consult Constantine Antonopoulos, *Counterclaims before the International Court of Justice* (2011), according to Maurizio Arcari's entry "Counterclaim: International Court of Justice (ICJ)" in *Max Plank Encyclopedia of International Law* (2011, online), Antonopoulos adopts a position contrary to that of Murphy and Shaw — if this is correct, then I can say that I agree with Antonopoulos. Arcari himself seems to be non-committal on the question, see at paragraph 14 ("It remains open to question whether the discretionary power of the Court in this field can be pushed to the point of declining to entertain a counter-claim even when it meets both the requirements of jurisdiction and connection provided for in Article 80 (1)." Cf. Robert Kolb, *The International Court of Justice* (2013), p. 662, stating that the current text of Article 80 (1) "eliminate[s] all discretion". I, however, understand Kolb to mean that the Court has no discretion if the conditions *are not met* (rather than what is at issue here, namely discretion in the event that the conditions are met).

[2] This view was expressed in the joint opinion of Judges Tomka, Gaja, Sebutinde, Gevorgian and Judge *ad hoc* Daudet in *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. 322, para. 4. See also Murphy (fn. 1), p. 1109.

[3] See e.g. Article 48 of the Rules of Court ("Time-limits for the completion of steps in the proceedings *may* be fixed by assigning a specified period but shall always indicate definite dates." (Emphasis added.)). Although the text uses "may", I am doubtful that the Court has a discretion concerning whether or not to fix time-limits by assigning a specified period. There is, of course, a discretion in what the specified time period will be but not in the fixing of time-limits.

Judges Tomka, Gaja, Sebutinde, Gevorgian and Judge *ad hoc* Daudet (hereinafter the "Joint Opinion") as follows:

> "It is true that the Court has never refused to entertain a counter-claim if it satisfied the two requirements. But one cannot exclude that 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, leaving it open to the respondent to file a new application instituting separate proceedings against the applicant in the original (first) case."[4]

9. To the best of my knowledge these are the only arguments that have been made in support of the contention that the Court retains a discretion not to entertain a counter-claim even if the counter-claim satisfies the conditions of Article 80 (1) of the Rules of Court. I will therefore address each one in turn.

2. Evaluation of the case for discretion

2.1 On the word "may" in Article 80 (1)

10. First, it is true that the use of the word "may" ordinarily implies a discretion. However, what the proponents of the view that there is a discretion fail to point out is that Article 80 (1) does not provide that the "Court may entertain a counter-claim if the" conditions are satisfied. Rather, Article 80 (1) provides that the "Court may entertain a counter-claim *only if*" the conditions are met. The words "only if" in this context are not insignificant and it is surprising that proponents of the "discretion" view do not *at all* account for the significance of these two words. It is not accounted for either in Murphy's otherwise excellent entry in the Zimmermann and Tams *Commentary*, nor is it accounted for in the joint opinion of the esteemed Judges Tomka, Gaja, Sebutinde, Gevorgian and Daudet. Shaw, in *Rosenne's Law and Practice* does not even provide a reason for the discretion, stating only that the current drafting of Article 80 (1) "places emphasis on the . . . discretionary power" of the Court.

11. What then is the significance of the words "only if"? The word "may" when followed by "only if" does not imply discretion but only makes plain that the Court *may not* act if the conditions are not met. This is all that "may . . . only if" means. In other words, rather than give discretion, the effect of "only if" is to emphasize a lack of discretion, i.e. the inability of the Court to act if the conditions have not been satisfied[5]. That this is the implication seems even more evident from the French version of the text: "La Cour ne peut connaître d'une demande reconventionnelle que si celle-ci . . . ". This use of the negative "ne peut . . . que" serves to illustrate the lack of discretion.

12. In connection with this textual argument, it has also been suggested that the Rules of Court could have used "shall" to make clear that the Court does not have a discretion. This is true, but it is also true that if Article 80 (1) was meant to convey a discretion, this could have been made more clear in the drafting. For example, Article 80 (1) could simply have said: "The Court may entertain a counter-claim if", in other words without the "only" or, even clearer, Article 80 (1) could have added a third condition, e.g. "and if it would not be contrary to the interest of the sound administration of justice and procedural economy". At any rate, arguments about how the text could have been drafted do not, in my view, take the matter very far.

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[4] Joint opinion of Judges Tomka, Gaja, Sebutinde, Gevorgian and Judge *ad hoc* Daudet (fn. 2), p. 322, para. 4.

[5] See Kolb (fn. 1), p. 662.

13. As it turns out the phrase "may . . . only if" does appear elsewhere in the Rules of Court. Article 29, paragraph 1, provides as follows:

> "The Registrar *may* be removed from office *only if*, in the opinion of two-thirds of the Members of the Court composing it at the time of the decision to be taken, the incumbent has either become permanently incapacitated from exercising the Registrar's functions, or has committed a serious breach of duty." (Emphasis added.)

14. If "may . . . only if" was meant to indicate that the Court had a discretion, then that would mean that *even if* two-thirds of the Members of the Court were of the view that an incumbent Registrar had, for example, "become permanently incapacitated from exercising the Registrar's functions", the Court could still decide not to remove such a Registrar. I find that suggestion incredible.

15. On the basis of the above, to my mind, a plain reading of Article 80 (1) of the Rules of Court does not support the view that, in the event that its conditions are met, the Court can still decide not to entertain the counter-claims. The words "may . . . only if" simply mean that the Court cannot entertain a counter-claim if the two conditions specified in Article 80 (1) are not met.

2.2 Sound administration of justice and procedural economy argument

16. The argument, reflected in the Joint Opinion, that there may be reasons related to the sound administration of justice (or for that matter judicial economy), that could lead the Court to decline to entertain a counter-claim even if the two conditions are met is, for me, equally unconvincing. It should be recalled that Article 80 (1) of the Rules of Court and the conditions set out thereunder were developed by the Court on the basis of its jurisprudence, which is based on these two elements, i.e. sound administration of justice and judicial economy. In other words, to my mind, the conditions set out in Article 80 (1) of the Rules of Court are intended precisely to determine whether the counter-claims in question would further the sound administration of justice and judicial economy. The conditions in Article 80 (1) are thus not developed to be additional to the objectives of sound administration of justice and judicial economy but rather animate those objectives.

17. It is, to my mind, for this reason that the Court has given itself such a wide margin of appreciation in determining whether there is a "direct connection" between the counter-claims and the main claims. The Court has consistently recalled that "it is for [it], in its sole discretion, to assess whether the counter-claim is sufficiently connected to the principal claim"[6]. It is in the exercise of this wide margin of appreciation that the Court can take into account the objectives of sound administration of justice and judicial economy.

18. Paragraph 62 of the Court's Order is apparently based on *Armed Activities on the Territory of the Congo*[7]. Yet, the reasoning in that case, in particular the reference to the sound administration of justice and procedural economy there, appears to support the notion that these elements are built into the conditions set forth in Article 80 (1) of the Rules and does not support the view that the Court has a discretion even when those conditions have been satisfied. There the Court stated as follows:

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[6] *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. 33.

[7] Paragraph 62 of the Order.

> "Whereas, at the conclusion of its Written Observations, the Congo submitted in the further alternative that: 'it would not be appropriate, on the basis of considerations of expediency deriving from the requirements of the sound administration of justice, to join the Ugandan claims to the proceedings on the merits pursuant to Article 80, paragraph 3, of the Rules of Court'; and whereas the Court, having found that the first and second counter-claims submitted by Uganda are directly connected with the subject-matter of the Congo's claims, takes the view that, on the contrary, the sound administration of justice and the interests of procedural economy call for the simultaneous consideration of those counter-claims and the principal claims"[8].

19. In this paragraph, the Court assesses Congo's claim concerning the sound administration of justice and procedural economy, not as a standalone additional condition to be met, but rather as being connected to one of the conditions set forth in Article 80 (1) — "whereas the Court, having found that [the counter-claims are connected], takes the view that, on the contrary, the sound administration of justice and the interests of procedural economy call for the simultaneous consideration of those counter-claims and the principal claims". Thus, rather than supporting the view that there is a discretion, the quotation from *Armed Activities on the Territory of the Congo* is more consistent with the view that there is no discretion once the conditions have been satisfied.

III. CONCLUDING THOUGHTS

20. In my view, once the Court has determined that the conditions set forth in Article 80 (1) of the Rules of Court have been met, it has to entertain the relevant counter-claims. The excessively acontextual reliance on the word "may" to suggest that the Court has a discretion is unconvincing, as is the argument based on sound administration of justice and judicial economy, which are requirements on which the two conditions are based.

21. At the same time, I understand that a decision that the Court has no discretion may be a bridge too far at this stage. In the light of that, in my view, the Court should have made explicit that it is not making a decision either way since, even if it had a discretion, there are no circumstances in the current case that would have led it to exercise that discretion.

(Signed) Dire TLADI.

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[8] *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.