DECLARATION OF JUDGE ABRAHAM

[Translation]

No legal interest on the part of the United States of America — Question of the scope of Article 63, paragraph 2, of the Statute — Binding effect on intervening States may not go beyond that of the parties to the case — Principle of res judicata *(Article 59 of the Statute) — Interpretation as an element of the reasoning to be distinguished from instances where interpretation is the subject of the dispute — Article 63, paragraph 2, has full effect only in the latter case — Unlikely that the construction of the Convention which the Court will give in the present case will be binding on the intervening States.*

1. By this Order, the Court denies the United States the right to intervene under Article 63 of the Statute at the present stage of the proceedings, concerning solely the consideration of Russia's preliminary objections to the Application of Ukraine. That is because the United States, when becoming a State party to the Genocide Convention, entered a reservation excluding it from the effect of the compromissory clause in Article IX, and thus has no legal interest in the construction of that provision, which the Court is called upon to give for the purpose of its consideration of the preliminary objections.

I agree with this.

2. In passing, however, the Court touches on — without resolving — a delicate legal issue in the reasoning of its Order, namely the meaning and scope of Article 63, paragraph 2, of the Statute, which stipulates that if a State uses its right to intervene in a case where the construction of a multilateral convention to which it is party is in question, "the construction given by the judgment will be equally binding upon it".

I should like to present a few brief reflections on the meaning of this provision, which to my mind is anything but clear, and on the effects that it is likely to produce in the context of these proceedings.

3. The construction of a treaty "given by the judgment" — leaving aside for now the question of whether this phrase relates only to the operative clause or extends to the reasoning of the judgment — cannot have binding effect upon an intervening State unless and in so far as it produces such an effect upon the parties to the case themselves. That must be the starting-

point for any reflection on the meaning and scope of Article 63, paragraph 2.

Indeed, any interpretation of this provision that would result in an obligation being placed on the intervening State (in relation to the construction of the treaty at issue) which extends beyond those imposed on the parties to the case would encounter two insurmountable objections. First, it would lead to a "manifestly absurd or unreasonable" outcome, to paraphrase the Vienna Convention on the Law of Treaties. It is very hard to see why a judgment would produce, in any respect at all, and especially as regards the construction of a rule of law, a legally binding effect that is more extensive for an intervening State than for a party to the case. Second, the very text of this provision prevents it from being construed as imposing on the intervening State an obligation which is not imposed upon the parties. By providing that "the construction . . . will be equally binding upon [the intervening State]", Article 63, paragraph 2, postulates that the construction in question (as "given by the judgment") is also and in the first instance binding on the parties to the case.

4. This therefore brings us to the question of whether, and in what instances, the construction of a multilateral convention given by the Court in a judgment produces legally binding effects upon the parties to the case, regardless of whether any third State intervenes. Only where that question can be answered in the affirmative will the binding effect referred to in Article 63, paragraph 2, be produced.

5. The question of the binding nature, for the parties, of the construction of a treaty — or of any other rule of law — which the Court gives in a judgment is not always easy to resolve in each specific case. But the principles which must guide the answer are firmly established, in my view, and allow a definite conclusion to be reached in most instances.

6. In the first place, the answer to the question we are posing is not to be found in Article 63, paragraph 2, itself. The object of that provision is not to define or modify the binding nature of a construction in respect of the parties to the case. It postulates that such binding force exists, at least in some instances, but does not create it.

7. The answer is rather to be found in the general principles of law, in particular that of *res judicata*. This principle is expressed ("reflected", as the Court put it in 2016) in particular in Article 59 of the Statute, which provides that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case". As the Court wrote in its 2016 Judgment on the preliminary objections in the case concerning the *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia)*:

> "The decision of the Court is contained in the operative clause of the judgment. However, in order to ascertain what is covered by *res judicata*, it may be necessary to determine the meaning of the operative clause by reference to the reasoning set out in the judgment in question." (*Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 126, para. 61.)

It follows that when the Court, in order to settle a dispute concerning a particular situation (for instance, whether the respondent has disregarded certain treaty obligations by acting in a certain way in certain circumstances), interprets the treaty provision containing the obligation at issue in the reasoning of its judgment, that construction is not in itself binding for the parties to the case. It is only one element of the reasoning which, combined with others, leads the Court to adopt the operative clause which contains its decision, i.e. its ruling on the parties' submissions. It is that operative clause which possesses the force of *res judicata*.

8. This of course does not mean that the Court's construction of the treaty in the reasoning of its judgment is unimportant, for two main reasons. First, because it may be necessary to refer to the reasoning in order to clarify the scope of the operative clause, as the Court rightly pointed out in 2016. Second, and above all, because the construction of the treaty, once adopted by the Court in a case, will become part of its jurisprudence, and will therefore possess the specific authority that attaches to such jurisprudence. But the authority of jurisprudence must in no way be confused with that of *res judicata*: they are radically different in nature. The Court's jurisprudence draws its authority from the simple fact that, once established, it can be assumed that it will be applied in subsequent cases, between the same parties or other parties — without distinction — unless the Court decides to modify it, which it will do only if it sees compelling reasons for doing so, as it has said on numerous occasions. A State is never precluded from presenting to the Court an argument that runs counter to its jurisprudence as regards the construction of a convention (though I can hardly recommend it). It is not the binding nature of the interpretation previously given in a judgment of the Court which prevents the parties to a case from arguing for a different construction (because such binding force does not exist, subject to what I shall say in a moment); it is the prudence of wise counsel. This is just as true for the States that were parties to the case in which the Court handed down its judgment containing the interpretation at issue as it is for third States. It is in the interest of all States to align their arguments with the Court's jurisprudence; none are obliged to do so.

9. What I have said in the paragraphs above applies to a scenario where the Court interprets a treaty incidentally, in the reasoning of a judgment, in order to arrive at an operative clause which rules on the submissions concerning a particular situation (that situation forming the subject of the dispute

before the Court). But it does not apply in a different scenario: and one that is perfectly likely to occur, where the construction of a treaty is itself the subject of the dispute brought before the Court. In such a case, since the Court is being asked to resolve directly a difference of interpretation between the parties, the construction given will normally form part of the judgment's operative clause, and will acquire not only, for everyone, the authority of jurisprudence, but also, for the parties to the case, that of *res judicata*. This is where Article 63, paragraph 2, comes into play: if the interpreted treaty obliges States other than the parties to the case, and if one of those other States has exercised its right to intervene, the construction contained in the judgment, which is binding on the parties, will also be binding on the intervening State.

10. To summarize, the rule set forth in Article 63, paragraph 2, produces its full effects in instances where the subject of the case before the Court is itself the construction of a multilateral treaty (and only in those instances).

11. Such a conclusion is unsurprising if one considers the historical circumstances in which the provision at issue was conceived.

Its origin lies in Article 84 of the Hague Convention of 18 October 1907 on the Pacific Settlement of International Disputes, itself reproduced from Article 56 of the Convention of 28 July 1899. The text has remained almost unchanged, and was included in Article 63 of the Statute of the Permanent Court of International Justice, and then in Article 63 of the Statute of the present Court.

The context of its origin is helpful for a better understanding of the thinking behind it. At the end of the nineteenth century and the beginning of the twentieth, the purpose of inter-State arbitration in a significant number of cases was to have the arbitrator settle disputes over the construction of a treaty, so that it was not uncommon for the construction in question to be the very subject of the award and to appear in its operative clause. A few examples of such cases can still be found in the jurisprudence of the Permanent Court: for instance, in the interpretation of paragraph 4 of the Annex following Article 179 in the *Treaty of Neuilly* case, the operative part of the Judgment of 12 September 1924 presents the construction of the provision at issue which the Court considers to be correct. Cases such as this were often — though not necessarily — brought before an arbitral tribunal or the Court by means of a special agreement. The question of construction could just as well concern a bilateral agreement as a multilateral treaty (as in the aforementioned *Treaty of Neuilly* case). Further, it is clear that an arbitral tribunal offers less assurance than a permanent court in terms of the coherence and consistency of the jurisprudence: it is therefore understandable that, in a context where arbitration was the only means of achieving the binding settlement of disputes, those who initially designed the mechanism for intervention in cases involving the construction of a multilateral treaty were particularly anxious to avoid the serious risk of a lack of unity in the

interpretation of such a treaty, resulting from possible contradictions between arbitral awards, combined with the relative effect of each of them. All of this explains the idea of making the construction given in the award or judgment — which in cases where that is itself the subject, is undoubtedly binding on both parties to the proceedings — equally binding upon the intervening States. Hence the construction given by the arbitral or judicial body, in a sense incorporated into the treaty it has interpreted, will be imposed if not on all the parties to it, then at least on as many of them as possible.

12. The present inter-State dispute is of a quite different nature from that of the cases brought before the dispute resolution bodies more than a century ago.

This is largely due to the fact that the object of multilateral treaties has changed. They tend less and less to resolve particular situations directly, but are aimed far more often at setting forth abstract and general rules which may be applied to any number of subsequent concrete situations. The Genocide Convention is an example of this.

Consequently, while they have not necessarily disappeared, cases in which the courts are asked to interpret a treaty directly have become rare. Most often, the Court is led to interpret multilateral treaties which can (more or less) be characterized as "legislative" in an incidental manner, in the reasoning of its judgment, so as to arrive at a decision on a particular situation which is set forth in the operative clause. In such a case, Article 59 of the Statute prevents the construction from creating binding force in itself.

13. I admit that it may not always be obvious which of the two instances described above we are dealing with. In particular, I am not sure that the criterion should necessarily and exclusively be whether the construction is set out only in the reasoning, or also included in the operative part — since a purely formal criterion is rarely infallible. But we know that in distinguishing between legal categories, there are nearly always "grey areas" or doubtful cases: however, this does not justify setting aside the most firmly established of principles, such as that whereby a judgment is only binding "in respect of that particular case".

14. Let us return to the case at hand. The United States, seeking to respond to Russia's objection based on its reservation to Article IX of the Convention, declared that if it were allowed to intervene, it would in any event be bound by the Court's interpretation of the Convention, pursuant to Article 63, paragraph 2.

The Court replies (in paragraph 95 of its Order) that in making this Declaration, the United States "cannot overcome the fact that it has entered a reservation to Article IX of the Convention, which is thus not binding upon it". That is correct. It could have added that an interpretation cannot bind a State if it concerns a provision which does not itself bind the State in

question. Lastly, in my view, it might also have added — though it was certainly not obliged to do so — that owing to the nature of the case brought before the Court, it is highly unlikely that the construction it will give of the Genocide Convention in the reasoning of its judgment on the preliminary objections and, should the case go to the merits, of its judgment thereon, will possess the binding force referred to in Article 63, paragraph 2, in respect of any of the intervening States.

(Signed) Ronny ABRAHAM.