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INTRODUCTORY NOTE TO ARBITRAL AWARD OF OCT. 3, 1899 (GUY. V. VENEZ.) (DECISION ON JURISDICTION) (I.C.J.)

BY BRENDAN PLANT*

[December 18, 2020]

Introduction

On December 18, 2020, the International Court of Justice (ICJ) handed down its decision on the jurisdiction of the Court in the case concerning the *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*. By a 14–2 majority, the Court ruled that it has jurisdiction to decide certain elements of the application submitted unilaterally by Guyana against Venezuela, while it concluded unanimously that it lacks jurisdiction over other aspects of Guyana's application. Having established jurisdiction over certain elements of Guyana's application, the ICJ will now proceed to hear the merits of the claims.

Background

These proceedings mark the latest stage in a convoluted sequence of procedures, all tracing back to a long-standing territorial dispute concerning a large area of around 60,000 square miles, lying roughly between the Orinoco and Essequibo Rivers.

Venezuela has claimed sovereignty over this region as the successor to the Spanish Empire, from which it gained independence in 1810, on the basis that the Spanish discovered and effectively controlled the area. This claim was opposed first by the British, who claimed to have acquired valid title to this area (comprising the colony of British Guiana) from the Dutch under a treaty of cession, and later by Guyana when it became independent in 1960. In 1897, the United Kingdom and Venezuela agreed to submit their dispute over the location of the boundary between Venezuela and British Guiana to arbitration. The arbitral tribunal issued its award in 1899, granting the vast majority of the disputed territory to the United Kingdom, while allocating the entire mouth of the Orinoco River to Venezuela.[1] The boundary established by the 1899 Award was demarcated by a joint commission the following year, and the parties agreed to accept that line as their boundary. But in 1944, a letter written by a member of the legal team that had represented Venezuela in the arbitral proceedings was published posthumously in the *American Journal of International Law*.[2] This letter alleged impropriety on the part of the tribunal, and claimed that the Award was the result of a secret deal struck by certain members of the tribunal. In 1962, Venezuela announced that it considered the 1899 Award to be null and void, as it claimed that the decision was not the result of a fair legal process, but rather the outcome of a covert political deal. After talks between Venezuela and the United Kingdom, in 1966 the two states concluded the Agreement to Resolve the Controversy between Venezuela and the United Kingdom of Great Britain and Northern Ireland over the frontier between Venezuela and British Guiana (the Geneva Agreement).[3] In 1966, Guyana also became a party to the agreement, having attained independence from the United Kingdom.

Under the Geneva Agreement, the parties established a mechanism to settle the controversy between them. This mechanism comprised three distinct stages: first, the establishment of a Mixed Commission; failing that, the use of one of the means of peaceful settlement set out in Article 33 of the UN Charter as chosen by the parties themselves; and finally, if the parties did not agree on a means of settlement, the referral of that decision to the Secretary-General who, according to the terms of Article IV(2) of the Geneva Agreement, could choose other means "until the controversy has been resolved or until all the means of peaceful settlement . . . have been exhausted."

After the first two stages of the agreed process yielded no solution, the parties referred the decision on the means of settlement to the Secretary-General in 1983. The parties met over the course of the next six years to discuss possible solutions, until in 1990 then Secretary-General Javier Pérez de Cuéllar chose the good offices process as the appropriate means to seek a settlement. The good offices process operated until 2014, when Guyana asked the Secretary-General, Ban Ki-moon, to choose a means that would bring a definitive end to the controversy. In 2015, the Secretary-General informed the parties that he intended to refer the controversy to the ICJ for a final and binding decision unless the parties found a practical solution before the end of his tenure, and he extended

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good offices for another year. When António Guterres took office as Secretary-General, he extended the good offices process for one more year, before announcing on January 30, 2018 that, because significant progress had not been made, he had chosen the ICJ as the means to settle the controversy.

The Jurisdiction Proceedings

Within two months of the Secretary-General's announcement, on March 29, 2018, Guyana filed an application in the ICJ Registry to initiate proceedings before the Court, seeking to found the Court's jurisdiction on Article IV(2) of the Geneva Agreement.

In terms of procedure, these proceedings were notable in two key respects: first, because Venezuela decided not to participate in the formal proceedings; and second, because the Court was required to hold public hearings remotely for the first time due to the COVID-19 pandemic. The Government of Venezuela had indicated to the Court from the outset that that it would not participate in these proceedings, as it considered that the Court lacked jurisdiction to hear the case. But while Venezuela did not file any pleadings or appear at the oral hearings, it nevertheless sent various documents to the Court to communicate its views on the case and comments on Guyana's arguments. Despite the irregular manner of their submission, the Court decided to consider the Venezuelan materials, insofar as it considered it appropriate to do so, since it was valuable for the Court to know the views of both parties, however those views may have been expressed. At the same time, recalling its past practice, the Court was mindful to ensure that Venezuela did not profit from its non-participation.[4] As for the COVID-19 pandemic, the Court was prompted to hold public hearings remotely for the first time, making use of videoconferencing facilities to hear the presentation of oral arguments. To make provision for this new format, the ICJ amended Articles 59 and 94 of the Rules of Court on June 25, 2020, with immediate effect, such that the Court may, after consulting the parties, decide "for health, security or other compelling reasons" to hold a hearing entirely or in part by video link (Art 59(2) – a similar amendment has been made to Article 94 with respect to the Court's reading of a judgment).

As for the substantive aspect of the case, the Court's central task was to interpret the meaning and scope of Article IV(2) of the Geneva Agreement, in fulfilment of which the Court examined four closely related issues.

First, the Court considered whether the "controversy" that Guyana and Venezuela had agreed to resolve by concluding the Geneva Agreement referred only to the parties' specific dispute concerning the validity of the 1899 Arbitral Award, or whether it had a broader meaning that extended to include the legal implications of the Award's validity for the underlying boundary dispute between the parties. The Court decided that "controversy" bore the broader meaning in the context of the Geneva Agreement.[5]

Second, the Court considered whether, by agreeing Article IV(2), the parties had consented to settling their controversy by judicial means. The Article raised a novel issue since it permitted the decision to submit the dispute to the ICJ for adjudication to be made by a third party, rather than by the direct election of the parties themselves. In assessing this novelty, the Court examined two questions: first, whether the parties had conferred authority on the Secretary-General to choose the means to settle their controversy; and second, whether the parties accepted that the Secretary-General might exercise this authority to choose judicial settlement as the most appropriate means of dispute resolution. On the first issue, the Court concluded that the parties had, by agreeing Article IV(2), "conferred on the Secretary-General the authority to choose, by a decision which is binding on them, the means to be used for the settlement of their controversy."[6] With regard to the second point, the Court decided that the parties had accepted that the Secretary-General's choice might include judicial settlement, since the parties had authorized the Secretary-General to choose among the means listed in Article 33 of the UN Charter (in any order[7]) "until the controversy has been resolved." In the Court's view, this phrase suggests that the parties had authorized the Secretary-General to choose the most appropriate means to achieve a definitive resolution of the controversy, and that this choice must include the possibility of judicial settlement. Bearing in mind the object and purpose of the Geneva Agreement, the Court noted that its conclusion was not affected by the final phrase of the Article: "Or until all the means of peaceful settlement there contemplated have been exhausted."[8]

Third, after determining that the Secretary-General had acted in conformity with the authority conferred on him by Article IV(2), the Court then turned to the most significant and controversial issue: whether the Secretary-General's

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choice of the ICJ produced the legal effect of conferring jurisdiction over the controversy on the Court. In other words, given that the Court's jurisdiction is based on the consent of the parties and confined to the extent accepted by them, could the Secretary-General give the parties' consent to the ICJ's contentious jurisdiction? The Court noted that, since states are free to express their consent to the Court's jurisdiction in any form, the parties may express their consent via the particular mechanism established under Article IV(2). However, the Court must satisfy itself that "there is an unequivocal indication of the desire of the parties to a dispute to accept the jurisdiction of the Court in a voluntary and indisputable manner."[9] The Court reasoned that the Secretary-General's decision would not be effective if its implementation were contingent upon the further consent of the parties, and that it would be contrary to the object and purpose of the Geneva Agreement to interpret Article IV(2) in this manner. On this basis, the Court concluded that Guyana and Venezuela, by agreeing Article IV(2), consented to binding adjudication by the ICJ, having duly authorized the Secretary-General to make a decision that might include this very possibility.[10]

Finally, after confirming that it had been validly seized of this case, the Court excluded from its jurisdiction those elements of Guyana's Application that related to events occurring after the conclusion of the Geneva Agreement. Those elements were not part of the "controversy" that the parties agreed to resolve by concluding the Geneva Agreement, so they fell outside the temporal scope of the ICJ's jurisdiction.[11] Ultimately, the Court held that it "has jurisdiction to entertain Guyana's claims concerning the validity of the 1899 Award about the frontier between British Guiana and Venezuela and the related question of the definitive settlement of the dispute regarding the land boundary between the territories of the Parties."[12]

Conclusion

The ICJ's decision on jurisdiction has generally been well received as a significant step towards the final and peaceful resolution of the long-standing boundary dispute between Guyana and Venezuela. Several neighboring states and regional organizations have welcomed the ruling and expressed their support for completing the judicial settlement process before the ICJ.[13] Venezuela, on the other hand, rejected the Court's decision immediately, emphasizing that it never gave its consent to the Court's jurisdiction over the matter, and reiterating that it had never agreed to third-party settlement of its territorial dispute with Guyana.[14] It was on much the same basis that four of the ICJ judges disagreed with the Court's ruling. Judges Abraham, Bennouna, Gaja and Gevorgian all considered that the Court lacked jurisdiction since the terms of the Geneva Agreement did not provide a certain and unequivocal indication that the parties consented to judicial settlement by the ICJ. On this view, Article IV(2) of the Geneva Agreement could not properly be construed as a compromissory clause. According to Judges Abraham and Bennouna, the Court's interpretation of the Geneva Agreement focused excessively on the treaty's object and purpose, rather than on the ordinary meaning of its provisions, which indicates that the parties anticipated, and accepted, the possibility that their controversy might not be resolved even if the various dispute-settlement methods listed in the Charter were exhausted.[15]

Nevertheless, one of the key implications of this decision is that it appears to have expanded the range of methods by which states may be taken to have effectively conferred jurisdiction on the Court, as this decision represents the first instance in which the ICJ has established jurisdiction following the decision of a *third party* acting within the scope of authority delegated to it by the disputing states. Critics have expressed concern about the implications of this decision, fearing that any reference to Article 33 of the UN Charter in an existing treaty might yet be interpreted as an implicit compromissory clause.[16] However, the Court's decision pays close regard to the specific terms of the Geneva Agreement, and seems alert to the distinctive character of the dispute-settlement mechanism it creates.

While Venezuela has made a formal proposal to the Secretary-General that he revive direct negotiations, relations between the parties remain uneasy. On January 13, 2021, three weeks after the Court delivered its judgment, the Venezuelan President declared the establishment of a "strategic zone of national development," called the Territory for the Development of the Atlantic Front, spanning areas disputed by Guyana along with contested coastal waters.[17] One week after this zone was established, Venezuela seized two Guyanese fishing vessels, prompting objections from Guyana and a number of other regional actors, including Caricom[18] and the OAS.[19] These tensions are likely to complicate the Court's forthcoming work, just as they accentuate the importance of its completion.

Now that the Court has affirmed its jurisdiction over the Application, the Court may proceed to assess the merits of Guyana's claims concerning the validity and effect of the 1899 Award. The ICJ has given Guyana until March 8,

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2022 to file its written pleadings in the case. Although the merits phase offers Venezuela an opportunity to substantiate its contention that the 1899 Award is null and void, it seems unlikely that the Venezuelan Government will participate in these forthcoming proceedings, having repeatedly stated that this matter is not susceptible to judicial settlement.

ENDNOTES

1 Award regarding the Boundary between the Colony of British Guiana and the United States of Venezuela, October 3, 1899, RIAA, vol. XXVIII, pp. 331–40.

2 Severo Mallet-Prevost, Memorandum Left with Judge Schoenrich Not to be Made Public Except at His Discretion after My Death (1949) 43 A.J.I.L. 528–30.

3 Agreement to resolve the controversy over the frontier between Venezuela and British Guiana, signed at Geneva on February 17, 1966, U.N.T.S. No. 8192.

4 Arbitral Award of 3 Oct. 3, 1899 (Guy. v. Venez.), Judgment on Jurisdiction (Dec. 18, 2020), ¶¶ 23–28.

5 *Id.*, ¶¶ 64–65.

6 *Id.*, ¶ 74.

7 *Id.*, ¶ 99.

8 *Id.*, ¶ 86.

9 *Id.*, ¶ 113.

10 *Id.*, ¶ 115.

11 *Id.*, ¶¶ 135–36.

12 *Id.*, ¶ 137.

13 News reports indicate that officials from the United States and Bahamas have expressed support. For the United States, *see*: *US supports ICJ's decision to settle Guyana-Venezuela border dispute*, JAMAICA OBSERVER (Jan. 12, 2021), https://www.jamaicaobserver.com/news/us-supports-icj-s-decision-to-settle-guyana-venezuela-border-dispute_211915?profile=1031; for the Bahamas, *see*: *Bahamas supports Guyana in border controversy with Venezuela*, GUYANA CHRONICLE (Jan. 18, 2021), https://guyanachronicle.com/2021/01/18/bahamas-supports-guyana-in-border-controversy-with-venezuela.

14 *See* http://mppre.gob.ve/comunicado/venezuela-reafirma-cij-reconoce-jurisdiccion-controversia-guayana-esequiba.

15 Dissenting Opinion of Judge Abraham, ¶ 17; Dissenting Opinion of Judge Bennouna, ¶ 11.

16 Simón Gómez and Moisés A. Montiel Mogollón, *A Commentary on the Arbitral Award of 3 October 1899 (Guyana v. Venezuela) jurisdiction ruling: The road to hell is paved with good intentions*, OPINIO JURIS (Feb. 19, 2021), http://opiniojuris.org/2021/02/19/a-commentary-on-the-arbitral-award-of-3-october-1899-guyana-v-venezuela-jurisdiction-ruling-the-road-to-hell-is-paved-with-good-intentions.

17 This was established in Decree No. 4.415, published in the Official Gazette No. 42.046, dated January 13, 2021, http://www.mppre.gob.ve/en/2021/01/07/president-maduro-venezuelan-atlantic-front.

18 *Caricom concerned about Venezuela's plan to establish territory in disputed region of Guyana*, JAMAICA OBSERVER (Jan. 12, 2021), https://www.jamaicaobserver.com/latestnews/Caricom_concerned_about_Venezuelas_plan_to_establish_territory?profile=0.

19 Organization of American States, Statement from OAS General Secretariat on Illegal Detention of Guyanese Vessels by Venezuela (Jan. 27, 2021), https://www.oas.org/en/media_center/press_release.asp?sCodigo=E-004/21.

*Endnote 16 has been corrected since original publication. A separate notice detailing this change has also been published (DOI: https://doi.org/10.1017/ilm.2022.16).

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18 DECEMBER 2020

JUDGMENT

ARBITRAL AWARD OF 3 OCTOBER 1899

(GUYANA *v.* VENEZUELA)

SENTENCE ARBITRALE DU 3 OCTOBRE 1899

(GUYANA c. VENEZUELA)

18 DÉCEMBRE 2020

ARRÊT

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ARBITRAL AWARD OF 3 OCTOBER 1899

(GUYANA *v.* VENEZUELA)

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JUDGMENT

Present: *President* YUSUF; *Vice-President* XUE; *Judges* TOMKA, ABRAHAM, BENNOUNA, CANÇADO TRINDADE, DONOGHUE, GAJA, SEBUTINDE, BHANDARI, ROBINSON, CRAWFORD, GEVORGIAN, SALAM, IWASAWA; *Judge* ad hoc CHARLESWORTH;

Registrar GAUTIER.

In the case concerning the Arbitral Award of 3 October 1899,

between

the Co-operative Republic of Guyana, represented by

Hon. Carl B. Greenidge,

as Agent;

Sir Shridath Ramphal, OE, OCC, SC,

H.E. Ms Audrey Waddell, Ambassador, CCH, as Co-Agents;

Mr. Paul S. Reichler, Attorney at Law, Foley Hoag LLP, member of the Bars of the Supreme Court of the United States and the District of Columbia,

Mr. Alain Pellet, Emeritus Professor at the University Paris Nanterre, former Chairman of the International Law Commission, member of the Institut de droit international,

Mr. Philippe Sands, QC, Professor of International Law, University College London (UCL) and Barrister, Matrix Chambers, London,

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Mr. Payam Akhavan, LLM, SJD (Harvard University), Professor of International Law, McGill University, member of the Bar of the State of New York and the Law Society of Ontario, member of the Permanent Court of Arbitration,

as Counsel and Advocates;

Mr. Pierre d'Argent, *professeur ordinaire*, Catholic University of Louvain, member of the Institut de droit international, Foley Hoag LLP, member of the Bar of Brussels,

Ms Christina L. Beharry, Attorney at Law, Foley Hoag LLP, member of the Bars of the State of New York and the District of Columbia, member of the Law Society of Ontario,

Mr. Edward Craven, Barrister, Matrix Chambers, London,

Mr. Ludovic Legrand, Researcher, Centre de droit international de Nanterre (CEDIN) and Adviser in international law,

Ms Philippa Webb, Professor of Public International Law, King's College London, member of the Bars of England and Wales and the State of New York, Twenty Essex Chambers, London,

as Counsel;

H.E. Mr. Rashleigh E. Jackson, OR, former Minister for Foreign Affairs, Ms Gail Teixeira, Representative, People's Progressive Party/Civic,

H.E. Mr. Cedric Joseph, Ambassador, CCH,

H.E. Ms Elisabeth Harper, Ambassador, AA,

Ms Oneka Archer-Caulder, LLB, LEC, LLM, Legal Officer, Ministry of Foreign Affairs,

Ms Donnette Streete, LLB, LLM, Senior Foreign Service Officer, Ministry of Foreign Affairs,

Ms Dianna Khan, LLM, MA, Legal Officer, Ministry of Foreign Affairs,

Mr. Joshua Benn, LLB, LEC, Nippon Fellow, Legal Officer, Ministry of Foreign Affairs,
as Advisers;

Mr. Raymond McLeod, DOAR Inc.,
as Technical Adviser;

Mr. Oscar Norsworthy, Foley Hoag LLP,
as Assistant,

and

the Bolivarian Republic of Venezuela,

THE COURT,

composed as above,
after deliberation,

delivers the following Judgment:

1. On 29 March 2018, the Government of the Co-operative Republic of Guyana (hereinafter "Guyana") filed in the Registry of the Court an Application instituting proceedings against the Bolivarian Republic of Venezuela (hereinafter "Venezuela") with regard to a dispute concerning "the legal validity and binding effect of the Award regarding the Boundary between the Colony of British Guiana and the United States of Venezuela, of 3 October 1899".

In its Application, Guyana seeks to found the jurisdiction of the Court, under Article 36, paragraph 1, of the Statute of the Court, on Article IV, paragraph 2, of the "Agreement to Resolve the Controversy between Venezuela and the United Kingdom of Great Britain and Northern Ireland over the Frontier between Venezuela and British Guiana" signed at Geneva on 17 February 1966 (hereinafter the "Geneva Agreement"). It explains that, pursuant to this latter provision, Guyana and Venezuela "mutually conferred upon the Secretary-General of the United Nations

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the authority to choose the means of settlement of the controversy and, on 30 January 2018, the Secretary-General exercised his authority by choosing judicial settlement by the Court".

2. In accordance with Article 40, paragraph 2, of the Statute, the Registrar immediately communicated the Application to the Government of Venezuela. He also notified the Secretary-General of the United Nations of the filing of the Application by Guyana.

3. In addition, by letter dated 3 July 2018, the Registrar informed all Member States of the United Nations of the filing of the Application.

4. Pursuant to Article 40, paragraph 3, of the Statute, the Registrar notified the Member States of the United Nations, through the Secretary-General, of the filing of the Application, by transmission of the printed bilingual text of that document.

5. On 18 June 2018, at a meeting held, pursuant to Article 31 of the Rules of Court, by the President of the Court to ascertain the views of the Parties with regard to questions of procedure, the Vice-President of Venezuela, H.E. Ms Delcy Rodríguez Gómez, stated that her Government considered that the Court manifestly lacked jurisdiction to hear the case and that Venezuela had decided not to participate in the proceedings. She also handed to the President of the Court a letter dated 18 June 2018 from the President of Venezuela, H.E. Mr. Nicolás Maduro Moros, in which he stated, *inter alia*, that his country had "never accepted the jurisdiction of [the] Court . . . due to its historical tradition and fundamental institutions [and still less] would it accept the unilateral presentation of the request made by Guyana nor the form and content of the claims expressed therein". He further noted in the letter that not only had Venezuela not accepted the Court's jurisdiction "in relation with the controversy referred to in the so-called 'application' presented by Guyana", it also had not "accept[ed] the unilateral presentation of the mentioned dispute", adding that "there exists no basis that could establish . . . the Court's jurisdiction to consider Guyana's claims". The President of Venezuela continued as follows:

> "In the absence of any disposition in Article IV, paragraph 2 of the Geneva Accord of 1966 (or in Article 33 of the UN Charter, to which the said disposition makes reference) on (i) the Court's jurisdiction and (ii) the modalities for resorting to the Court, the establishment of the jurisdiction of the Court requires, according to a well-established practice, both the express consent granted by both parties to the controversy in order to subject themselves to the jurisdiction of the Court, as well as joint agreement of the Parties notifying the submission of the said dispute to the Court.
>
> The only object, purpose, and legal effect of the decision of January 30, 2018 of the United Nations Secretary-General, in accordance with paragraph 2, Article IV of the Geneva Accord, is to 'choose' a specific means for the friendly resolution of the controversy.
>
> On the other hand, the Court's jurisdiction in virtue of Article 36 of the Statute and the modalities to resort to it in accordance with Article 40 of the Statute, are not regulated by the Geneva Accord. In the absence of an agreement of the Parties expressing their consent to the jurisdiction of the Court under Article 36, and in the absence of an agreement by the Parties accepting that the dispute can be raised unilaterally, and not jointly, before the Court, as established by Article 40, there is no basis for the jurisdiction of the Court with regard to the so-called 'Guyana application'.
>
> Under these circumstances, and taking into account the aforementioned considerations, the Bolivarian Republic of Venezuela will not participate in the proceedings that the Cooperative Republic of Guyana intends to initiate through a unilateral action."

During the same meeting, Guyana expressed its wish for the Court to continue its consideration of the case.

6. By an Order of 19 June 2018, the Court held, pursuant to Article 79, paragraph 2, of the Rules of Court of 14 April 1978 as amended on 1 February 2001, that in the circumstances of the case, it was necessary first of all to resolve the question of its jurisdiction, and that this question should accordingly be separately determined before any proceedings on the merits.

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To that end, the Court decided that the written pleadings should first address the question of jurisdiction, and fixed 19 November 2018 and 18 April 2019 as the respective time-limits for the filing of a Memorial by Guyana and a Counter-Memorial by Venezuela. Guyana filed its Memorial within the time-limit prescribed.

7. The Court did not include upon the Bench a judge of the nationality of either of the Parties. Guyana proceeded to exercise the right conferred upon it by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case; it chose Ms Hilary Charlesworth. Following its decision not to participate in the proceedings (see paragraph 5 above), Venezuela, for its part, did not, at this stage, exercise its right to choose a judge *ad hoc* to sit in the case.

8. By a letter of 12 April 2019, the Minister of People's Power for Foreign Affairs of Venezuela, H.E. Mr. Jorge Alberto Arreaza Montserrat, confirmed the decision of his Government "not to participate in the written procedure". He recalled that, in a letter dated 18 June 2018 (see paragraph 5 above), the President of Venezuela, H.E. Mr. Nicolás Maduro Moros, had expressly informed the Court that Venezuela "would not participate in the proceedings initiated by . . . Guyana's suit, due to the manifest lack of a jurisdictional basis of the Court on [this] claim". He added, however, that "out of respect for the Court", Venezuela would provide the Court, "in a later timely moment, with information in order to assist [it] in the fulfillment of its [duty] as indicated in Article 53.2 of its Statute".

9. By a letter of 24 April 2019, Guyana indicated that it was of the opinion that, in the absence of a counter-memorial by Venezuela, the written phase of the proceedings should "be considered closed" and oral proceedings "should be scheduled as soon as possible".

10. By letters of 23 September 2019, the Parties were informed that the hearings on the question of the Court's jurisdiction would take place from 23 to 27 March 2020.

11. By a letter of 15 October 2019, the Registrar, referring to Venezuela's letter of 12 April 2019, informed the latter that, should it still intend to provide information to assist the Court, it should do so by 28 November 2019 at the latest.

12. On 28 November 2019, Venezuela submitted to the Court a document entitled "Memorandum of the Bolivarian Republic of Venezuela on the Application filed before the International Court of Justice by the Cooperative Republic of Guyana on March 29th, 2018" (hereinafter the "Memorandum"). This document was immediately communicated to Guyana by the Registry of the Court.

13. By a letter of 10 February 2020, H.E. Mr. Jorge Alberto Arreaza Monserrat, Minister of People's Power for Foreign Affairs of Venezuela, indicated that his Government did not intend to attend the hearings scheduled for March 2020.

14. By letters of 16 March 2020, the Parties were informed that, owing to the COVID-19 pandemic, the Court had decided to postpone the oral proceedings to a later date. On 19 May 2020, the Parties were further informed that the oral proceedings would take place by video link on 30 June 2020.

15. Pursuant to Article 53, paragraph 2, of its Rules, the Court, after ascertaining the views of the Parties, decided that copies of the Memorial of Guyana and documents annexed thereto would be made accessible to the public on the opening of the oral proceedings. It also decided, in light of the absence of objection by the Parties, that the Memorandum submitted on 28 November 2019 by Venezuela would be made public at the same time.

16. A public hearing on the question of the jurisdiction of the Court was held by video link on 30 June 2020, at which the Court heard the oral arguments of:

For Guyana: Sir Shridath Ramphal,

Mr. Payam Akhavan,

Mr. Paul Reichler,

Mr. Philippe Sands,

Mr. Alain Pellet.

17. At the hearing, a question was put to Guyana by a Member of the Court, to which a reply was given in writing, in accordance with Article 61, paragraph 4, of the Rules of Court. Venezuela was invited to submit any comments that it might wish to make on Guyana's reply, but no such submission was made.

18. By a letter of 24 July 2020, Venezuela transmitted written comments on the arguments presented by Guyana at the hearing of 30 June 2020, indicating that the comments were submitted "[i]n the framework of the assistance that Venezuela has offered to provide to the Court in the performance of its duty set forth in Article 53.2 of its Statute". By a letter of 3 August 2020, Guyana provided its views on this communication from Venezuela.

*

19. In the Application, the following claims were presented by Guyana: "Guyana requests the Court to adjudge and declare that:

> *(a)* The 1899 Award is valid and binding upon Guyana and Venezuela, and the boundary established by that Award and the 1905 Agreement is valid and binding upon Guyana and Venezuela;
>
> *(b)* Guyana enjoys full sovereignty over the territory between the Essequibo River and the boundary established by the 1899 Award and the 1905 Agreement, and Venezuela enjoys full sovereignty over the territory west of that boundary;
>
> Guyana and Venezuela are under an obligation to fully respect each other's sovereignty and territorial integrity in accordance with the boundary established by the 1899 Award and the 1905 Agreement;
>
> *(c)* Venezuela shall immediately withdraw from and cease its occupation of the eastern half of the Island of Ankoko, and each and every other territory which is recognized as Guyana's sovereign territory in accordance with the 1899 Award and 1905 Agreement;
>
> *(d)* Venezuela shall refrain from threatening or using force against any person and/or company licensed by Guyana to engage in economic or commercial activity in Guyanese territory as determined by the 1899 Award and 1905 Agreement, or in any maritime areas appurtenant to such territory over which Guyana has sovereignty or exercises sovereign rights, and shall not interfere with any Guyanese or Guyanese-authorized activities in those areas;
>
> *(e)* Venezuela is internationally responsible for violations of Guyana's sovereignty and sovereign rights, and for all injuries suffered by Guyana as a consequence."

20. In the written proceedings, the following submissions were presented on behalf of the Government of Guyana in its Memorial on the question of the jurisdiction of the Court:

"For these reasons, Guyana respectfully requests the Court:

1. to find that it has jurisdiction to hear the claims presented by Guyana, and that these claims are admissible; and
2. to proceed to the merits of the case."

21. At the oral proceedings, the following submissions were presented on behalf of the Government of Guyana at the hearing of 30 June 2020:

"On the basis of its Application of 29 March 2018, its Memorial of 19 November 2018, and its oral pleadings, Guyana respectfully requests the Court:

1. To find that it has jurisdiction to hear the claims presented by Guyana, and that these claims are admissible; and
2. To proceed to the merits of the case."

22. Since the Government of Venezuela filed no pleadings and did not appear at the oral proceedings, no formal submissions were presented by that Government. However, it is clear from the correspondence and the Memorandum received from Venezuela that it contends that the Court lacks jurisdiction to entertain the case.

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I. INTRODUCTION

23. The present case concerns a dispute between Guyana and Venezuela that has arisen as a result of the latter's contention that the Arbitral Award of 3 October 1899 regarding the boundary between the two Parties (hereinafter the "1899 Award" or the "Award") is null and void.

24. The Court wishes first of all to express its regret at the decision taken by Venezuela not to participate in the proceedings before it, as set out in the above-mentioned letters of 18 June 2018, 12 April 2019 and 10 February 2020 (see paragraphs 5, 8 and 13 above). In this regard, it recalls that, under Article 53 of its Statute, "[w]henever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim" and that "[t]he Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law".

25. The non-appearance of a party obviously has a negative impact on the sound administration of justice (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 23, para. 27, referring, *inter alia*, to *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 257, para. 15; *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973*, p. 54, para. 13). In particular, the non-appearing party forfeits the opportunity to submit evidence and arguments in support of its own case and to counter the allegations of its opponent. For this reason, the Court does not have the assistance it might have derived from this information, yet it must nevertheless proceed and make any necessary findings in the case.

26. The Court emphasizes that the non-participation of a party in the proceedings at any stage of the case cannot, in any circumstances, affect the validity of its judgment (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 23, para. 27). A judgment on jurisdiction, as on the merits, is final and binding on the parties under Articles 59 and 60 of the Statute (*ibid.*, p. 24, para. 27; *Corfu Channel (United Kingdom* v. *Albania), Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949*, p. 248). Should the examination of the present case extend beyond the current phase, Venezuela, which remains a Party to the proceedings, will be able, if it so wishes, to appear before the Court to present its arguments (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 142-143, para. 284).

27. The intention of Article 53 of the Statute is that in a case of non-appearance neither party should be placed at a disadvantage (*ibid.*, p. 26, para. 31). While there is no question of a judgment automatically in favour of the party appearing (*ibid.*, p. 24, para. 28), the party which declines to appear cannot be permitted to profit from its absence (*ibid.*, p. 26, para. 31).

28. Though formally absent from the proceedings, non-appearing parties sometimes submit to the Court letters and documents in ways and by means not contemplated by its Rules (*ibid.*, p. 25, para. 31). In this instance, Venezuela sent a Memorandum to the Court (see paragraph 12 above). It is valuable for the Court to know the views of both parties in whatever form those views may have been expressed (*ibid.*, p. 25, para. 31). The Court will therefore take account of Venezuela's Memorandum to the extent that it finds it appropriate in discharging its duty, under Article 53 of the Statute, to satisfy itself as to its jurisdiction to entertain the Application (*Aegean Sea Continental Shelf (Greece* v. *Turkey), Judgment, I.C.J. Reports 1978*, p. 7, para. 14).

II. HISTORICAL AND FACTUAL BACKGROUND

29. Located in the north-east of South America, Guyana is bordered by Venezuela to the west. At the time the present dispute arose, Guyana was still a British colony, known as British Guiana. It gained independence from the United Kingdom on 26 May 1966. The dispute between Guyana and Venezuela dates back to a series of events that took place during the second half of the nineteenth century.

30. The Court will begin by relating in chronological order the relevant events pertaining to the dispute between the two States.

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A. THE WASHINGTON TREATY AND THE 1899 AWARD

31. In the nineteenth century, the United Kingdom and Venezuela both claimed the territory comprising the area between the mouth of the Essequibo River in the east and the Orinoco River in the west.

32. In the 1890s, the United States of America encouraged both parties to submit their territorial claims to binding arbitration. The exchanges between the United Kingdom and Venezuela eventually led to the signing in Washington of a treaty of arbitration entitled the "Treaty between Great Britain and the United States of Venezuela Respecting the Settlement of the Boundary between the Colony of British Guiana and the United States of Venezuela" (hereinafter the "Washington Treaty") on 2 February 1897.

33. According to its preamble, the purpose of the Washington Treaty was to "provide for an amicable settlement of the question . . . concerning the boundary". Article I provided as follows:

> "An Arbitral Tribunal shall be immediately appointed to determine the boundary-line between the Colony of British Guiana and the United States of Venezuela."

Other provisions set out the arrangements for the arbitration, including the constitution of the tribunal, the place of arbitration and the applicable rules. Finally, according to Article XIII of the Washington Treaty,

> "[t]he High Contracting Parties engage[d] to consider the result of the proceedings of the Tribunal of Arbitration as a full, perfect, and final settlement of all the questions referred to the Arbitrators".

34. The arbitral tribunal established under this Treaty rendered its Award on 3 October 1899. The 1899 Award granted the entire mouth of the Orinoco River and the land on either side to Venezuela; it granted to the United Kingdom the land to the east extending to the Essequibo River. The following year, a joint Anglo-Venezuelan commission was charged with demarcating the boundary established by the 1899 Award. The commission carried out that task between November 1900 and June 1904. On 10 January 1905, after the boundary had been demarcated, the British and Venezuelan commissioners produced an official boundary map and signed an agreement accepting, *inter alia*, that the co-ordinates of the points listed were correct.

B. VENEZUELA'S REPUDIATION OF THE 1899 AWARD AND THE SEARCH FOR A SETTLEMENT OF THE DISPUTE

35. On 14 February 1962, Venezuela, through its Permanent Representative, informed the Secretary-General of the United Nations that it considered there to be a dispute between itself and the United Kingdom "concerning the demarcation of the frontier between Venezuela and British Guiana". In its letter to the Secretary-General, Venezuela stated as follows:

> "The award was the result of a political transaction carried out behind Venezuela's back and sacrificing its legitimate rights. The frontier was demarcated arbitrarily, and no account was taken of the specific rules of the arbitral agreement or of the relevant principles of international law.
>
> Venezuela cannot recognize an award made in such circumstances."

In a statement before the Fourth Committee of the United Nations General Assembly delivered shortly thereafter, on 22 February 1962, Venezuela reiterated its position.

36. The Government of the United Kingdom, for its part, asserted on 13 November 1962, in a statement before the Fourth Committee, that "the Western boundary of British Guiana with Venezuela [had been] finally settled by the award which the arbitral tribunal announced on 3 October 1899", and that it could not "agree that there [could] be any dispute over the question settled by the award". The United Kingdom also stated that it was prepared to discuss with Venezuela, through diplomatic channels, arrangements for a tripartite examination of the documentary material relevant to the 1899 Award.

37. On 16 November 1962, with the authorization of the representatives of the United Kingdom and Venezuela, the Chairman of the Fourth Committee declared that the Governments of the two States (the Government of the United Kingdom acting with the full concurrence of the Government of British Guiana) would examine the "documentary material" relating to the 1899 Award (hereinafter the "Tripartite Examination"). Experts appointed by

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the two Governments thus examined the archives of the United Kingdom in London and the Venezuelan archives in Caracas, searching for evidence relating to Venezuela's contention of nullity of the 1899 Award.

38. The Tripartite Examination took place from 1963 to 1965. It was completed on 3 August 1965 with the exchange of the experts' reports. While Venezuela's experts continued to consider the Award to be null and void, the experts of the United Kingdom were of the view that there was no evidence to support that position.

39. On 9 and 10 December 1965, the Ministers for Foreign Affairs of the United Kingdom and Venezuela and the new Prime Minister of British Guiana met in London to discuss a settlement of the dispute. However, at the close of the meeting, each party maintained its position on the matter. While the representative of Venezuela asserted that any proposal "which did not recognise that Venezuela extended to the River Essequibo would be unacceptable", the representative of British Guiana rejected any proposal that would "concern itself with the substantive issues".

C. THE SIGNING OF THE 1966 GENEVA AGREEMENT

40. Following the failure of the talks in London, the three delegations agreed to meet again in Geneva in February 1966. After two days of negotiations, they signed, on 17 February 1966, the Geneva Agreement, the English and Spanish texts of which are authoritative. In accordance with its Article VII, the Geneva Agreement entered into force on the same day that it was signed.

41. The Geneva Agreement was approved by the Venezuelan National Congress on 13 April 1966. It was published as a White Paper in the United Kingdom, i.e. as a policy position paper presented by the Government, and approved by the House of Assembly of British Guiana. It was officially transmitted to the Secretary-General of the United Nations on 2 May 1966 and registered with the United Nations Secretariat on 5 May 1966 (United Nations, *Treaty Series*, Vol. 561, No. 8192, p. 322).

42. On 26 May 1966, Guyana, having attained independence, became a party to the Geneva Agreement, alongside the Governments of the United Kingdom and Venezuela, in accordance with the provisions of Article VIII thereof.

43. The Geneva Agreement provides, first, for the establishment of a Mixed Commission to seek a settlement of the controversy between the parties (Articles I and II). Article I reads as follows:

> "A Mixed Commission shall be established with the task of seeking satisfactory solutions for the practical settlement of the controversy between Venezuela and the United Kingdom which has arisen as the result of the Venezuelan contention that the Arbitral Award of 1899 about the frontier between British Guiana and Venezuela is null and void."

In addition, Article IV, paragraph 1, states that, should this Commission fail in its task, the Governments of Guyana and Venezuela shall choose one of the means of peaceful settlement provided for in Article 33 of the United Nations Charter. In accordance with Article IV, paragraph 2, should those Governments fail to reach agreement, the decision as to the means of settlement shall be made by an appropriate international organ upon which they both agree, or, failing that, by the Secretary-General of the United Nations.

44. On 4 April 1966, by letters to the Ministers for Foreign Affairs of the United Kingdom and Venezuela, the Secretary-General of the United Nations, U Thant, acknowledged receipt of the Geneva Agreement and stated as follows:

> "I have taken note of the responsibilities which may fall to be discharged by the Secretary-General of the United Nations under Article IV (2) of the Agreement, and wish to inform you that I consider those responsibilities to be of a nature which may appropriately be discharged by the Secretary-General of the United Nations."

D. THE IMPLEMENTATION OF THE GENEVA AGREEMENT

1. The Mixed Commission (1966–1970)

45. The Mixed Commission was established in 1966, pursuant to Articles I and II of the Geneva Agreement. During the Commission's mandate, representatives from Guyana and Venezuela met on several occasions.

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46. A difference of interpretation regarding the Commission's mandate came to light from the time its work began. In Guyana's view, the task of the Mixed Commission was to find a practical solution to the legal question raised by Venezuela's contention of the nullity of the Award. According to Venezuela, however, the Commission was tasked with seeking practical solutions to the territorial controversy.

47. The discussions within the Mixed Commission took place against a backdrop of hostile actions which aggravated the controversy. Indeed, since the signature of the Geneva Agreement, both Parties have alleged multiple violations of their territorial sovereignty in the Essequibo region. The Mixed Commission reached the end of its mandate in 1970 without having arrived at a solution.

2. The 1970 Protocol of Port of Spain and the moratorium put in place

48. Since no solution was identified through the Mixed Commission, it fell to Venezuela and Guyana, under Article IV of the Geneva Agreement, to choose one of the means of peaceful settlement provided for in Article 33 of the United Nations Charter. However, in view of the disagreements between the Parties, a moratorium on the dispute settlement process was adopted in a protocol to the Geneva Agreement (hereinafter the "Protocol of Port of Spain" or the "Protocol"), signed on 18 June 1970, the same day that the Mixed Commission delivered its final report. Article III of the Protocol provided for the operation of Article IV of the Geneva Agreement to be suspended so long as the Protocol remained in force. The Protocol was, pursuant to its Article V, to remain in force for an initial period of twelve years, which could be renewed thereafter. According to Article I of the Protocol, both States agreed to promote mutual trust and to improve understanding between themselves.

49. In December 1981, Venezuela announced its intention to terminate the Protocol of Port of Spain. Consequently, the application of Article IV of the Geneva Agreement was resumed from 18 June 1982 in accordance with Article V, paragraph 3, of the Protocol.

50. Pursuant to Article IV, paragraph 1, of the Geneva Agreement, the Parties attempted to reach an agreement on the choice of one of the means of peaceful settlement provided for in Article 33 of the Charter. However, they failed to do so within the three-month time-limit set out in Article IV, paragraph 2. They also failed to agree on the choice of an appropriate international organ to decide on the means of settlement, as provided for in Article IV, paragraph 2, of the Geneva Agreement.

51. The Parties therefore proceeded to the next step, referring the decision on the means of settlement to the Secretary-General of the United Nations. In a letter dated 15 October 1982 to his Guyanese counterpart, the Minister for Foreign Affairs of Venezuela stated as follows:

> "Venezuela is convi[nced] that in order to comply with the provisions of Article IV (2) of the Geneva Agreement, the most appropriate international organ is the Secretary-General of the United Nations . . . Venezuela wishes to reaffirm its conviction that it would be most practical and appropriate to entrust the task of choosing the means of settlement directly to the Secretary-General of the United Nations. Since it is evident that no agreement exists between the parties in respect of the choice of an international organ to fulfil the functions provided for it in Article IV (2), it is obvious that this function now becomes the responsibility of the Secretary-General of the United Nations."

Later, in a letter dated 28 March 1983 to his Venezuelan counterpart, the Minister for Foreign Affairs of Guyana stated that,

> "proceeding regretfully on the basis that [Venezuela] is unwilling to seriously endeavour to reach agreement on any appropriate international organ whatsoever to choose the means of settlement, [Guyana] hereby agrees to proceed to the next stage and, accordingly, to refer the decision as to the means of settlement to [the] Secretary-General of the United Nations".

52. After the matter was referred to him by the Parties, the Secretary-General, Mr. Javier Pérez de Cuéllar, agreed by a letter of 31 March 1983 to undertake the responsibility conferred upon him under Article IV, paragraph 2, of the Geneva Agreement. Five months later, he sent the Under-Secretary-General for Special Political Affairs, Mr. Diego

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Cordovez, to Caracas and Georgetown in order to ascertain the positions of the Parties on the choice of the means of settlement of the controversy.

53. Between 1984 and 1989, the Parties held regular meetings and discussions at the diplomatic and ministerial levels. In view of the information provided by Mr. Cordovez, in early 1990 the Secretary-General chose the good offices process as the appropriate means of settlement.

3. From the good offices process (1990-2014 and 2017) to the seisin of the Court

54. Between 1990 and 2014, the good offices process was led by three Personal Representatives appointed by successive Secretaries-General: Mr. Alister McIntyre (1990-1999), Mr. Oliver Jackman (1999–2007) and Mr. Norman Girvan (2010–2014). The Parties, for their part, appointed facilitators to assist the different Personal Representatives in their work and to serve as a focal point with them. Regular meetings were held during this period between the representatives of both States and the Secretary-General, particularly in the margins of the annual session of the General Assembly.

55. In a letter to her Venezuelan counterpart dated 2 December 2014, the Minister for Foreign Affairs of Guyana observed that, after 25 years, the good offices process had not brought the Parties any closer to a resolution of the controversy. She stated that her Government was "reviewing the other options under Article 33 of the United Nations Charter, as provided for by the 1966 Geneva Agreement, that could serve to bring to an end the controversy". In response to that statement, on 29 December 2014, Venezuela invited the Government of Guyana to "agree, as soon as possible, [to] the designation of the Good Officer". On 8 June 2015, the Vice-President of Guyana asked the Secretary-General,

> "within the context of [his] responsibility . . . and more specifically, [his] mandate under the Geneva Agreement of 1966, to determine a means of . . . settlement which[,] in [his] judgement, w[ould] bring a definitive and conclusive end . . . to the controversy".

In a letter dated 9 July 2015, the President of Venezuela asked the Secretary-General "to commence the process of appointing a Good Officer".

56. In September 2015, during the 70th Session of the United Nations General Assembly, the Secretary-General, Mr. Ban Ki-moon, held a meeting with the Heads of State of Guyana and Venezuela. Thereafter, on 12 November 2015, the Secretary-General issued a document entitled "The Way Forward", in which he informed the Parties that "[i]f a practical solution to the controversy [were] not found before the end of his tenure, [he] intend[ed] to initiate the process to obtain a final and binding decision from the International Court of Justice".

57. In his statement of 16 December 2016, the Secretary-General said that he had decided to continue the good offices process for a further year, with a new Personal Representative with a strengthened mandate of mediation. He also announced that

> "[i]f, by the end of 2017, the Secretary-General concludes that significant progress has not been made toward arriving at a full agreement for the solution of the controversy, he will choose the International Court of Justice as the next means of settlement, unless both parties jointly request that he refrain from doing so".

58. The President of Venezuela, H.E. Mr. Nicolás Maduro Moros, replied to the Secretary-General in a letter of 17 December 2016, in which he underlined Venezuela's objection to "the intention . . . to recommend to the Parties that they resort to the Court", while at the same time stating its commitment to reaching a negotiated solution within the strict framework of the Geneva Agreement. In a letter dated 21 December 2016, the President of Guyana, H.E. Mr. David A. Granger, for his part, assured the President of Venezuela of his country's commitment

> "to fulfilling the highest expectations of the 'Good Office' process in the coming twelve-month period in accordance with the decision of the Secretary-General, to conclude a full settlement of the controversy and, should it become necessary, to thereafter resolve it by recourse to the International Court of Justice".

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He reaffirmed this position in a letter to the Secretary-General on 22 December 2016.

59. After taking office on 1 January 2017, the new Secretary-General, Mr. António Guterres, continued the good offices process for a final year, in conformity with his predecessor's decision. In this context, on 23 February 2017, he appointed Mr. Dag Nylander as his Personal Representative and gave him a strengthened mandate of mediation. Mr. Dag Nylander held several meetings and had a number of exchanges with the Parties. In letters dated 30 January 2018 to both Parties, the Secretary-General stated that he had "carefully analyzed the developments in the good offices process during the course of 2017" and announced:

> "Consequently, I have fulfilled the responsibility that has fallen to me within the framework set by my predecessor and, significant progress not having been made toward arriving at a full agreement for the solution of the controversy, have chosen the International Court of Justice as the means that is now to be used for its solution."

60. On 29 March 2018, Guyana filed its Application in the Registry of the Court (see paragraph 1 above).

III. INTERPRETATION OF THE GENEVA AGREEMENT

61. As described in paragraph 43 above, the Geneva Agreement establishes a three-stage process for settling the controversy between the Parties. The first step, set out in Article I, consists in establishing a Mixed Commission "with the task of seeking satisfactory solutions for the practical settlement of the controversy" arising from Venezuela's contention that the 1899 Award is null and void. Should the Mixed Commission fail to secure a full agreement on the resolution of the controversy within four years of the conclusion of the Geneva Agreement, Article IV provides for two additional steps in the dispute settlement process. That provision reads as follows:

> "(1) If, within a period of four years from the date of this Agreement, the Mixed Commission should not have arrived at a full agreement for the solution of the controversy it shall, in its final report, refer to the Government of Guyana and the Government of Venezuela any outstanding questions. Those Governments shall without delay choose one of the means of peaceful settlement provided in Article 33 of the Charter of the United Nations.
>
> (2) If, within three months of receiving the final report, the Government of Guyana and the Government of Venezuela should not have reached agreement regarding the choice of one of the means of settlement provided in Article 33 of the Charter of the United Nations, they shall refer the decision as to the means of settlement to an appropriate international organ upon which they both agree or, failing agreement on this point, to the Secretary-General of the United Nations. If the means so chosen do not lead to a solution of the controversy, the said organ or, as the case may be, the Secretary-General of the United Nations shall choose another of the means stipulated in Article 33 of the Charter of the United Nations, and so on until the controversy has been resolved or until all the means of peaceful settlement there contemplated have been exhausted."

62. According to Article 33 of the United Nations Charter:

> "1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.
>
> 2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means."

63. As already noted (see paragraph 50 above), the Parties failed to reach agreement on the choice of one of the means of peaceful settlement set out in Article 33 of the Charter, as provided for by Article IV, paragraph 1, of the Geneva Agreement. They then proceeded to the next step and referred this decision to the Secretary-General of the United Nations (see paragraph 51 above), pursuant to Article IV, paragraph 2, of the Agreement. The Court will interpret this provision in order to determine whether, in entrusting the decision as to the choice of one of the means of settlement provided for in Article 33 of the Charter to the Secretary-General, the Parties consented to settle their

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controversy by, *inter alia*, judicial means. If it finds that they did, the Court will have to determine whether this consent is subject to any conditions. As part of the interpretation of Article IV, paragraph 2, of the Geneva Agreement, the Court will first examine the use of the term "controversy" in this provision.

A. The "controversy" under the Geneva Agreement

64. For the purpose of identifying the "controversy" for the resolution of which the Geneva Agreement was concluded, the Court will examine the use of this term in this instrument. The Court observes that the Geneva Agreement uses the term "controversy" as a synonym for the word "dispute". According to the established case law of the Court, a dispute is "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11). In this regard, the Court notes that Article IV of the Washington Treaty used the term "controversy" when referring to the original dispute that was submitted to the arbitral tribunal established under the Treaty to determine the boundary line between the colony of British Guiana and the United States of Venezuela. The Court further notes that, in the conclusion and implementation of the Geneva Agreement, the parties have expressed divergent views as to the validity of the 1899 Award rendered by the tribunal and the implications of this question for their frontier. Thus, Article I of the Geneva Agreement defines the mandate of the Mixed Commission as seeking satisfactory solutions for the practical settlement of "the controversy between Venezuela and the United Kingdom which has arisen as the result of the Venezuelan contention that the Arbitral Award of 1899 about the frontier between British Guiana and Venezuela is null and void". That contention by Venezuela was consistently opposed by the United Kingdom in the period from 1962 until the adoption of the Geneva Agreement on 17 February 1966, and subsequently by Guyana after it became a party to the Geneva Agreement upon its independence, in accordance with Article VIII thereof.

65. It follows, in the view of the Court, that the object of the Geneva Agreement was to seek a solution to the frontier dispute between the parties that originated from their opposing views as to the validity of the 1899 Award. This is also indicated in the title of the Geneva Agreement, which is the "Agreement to Resolve the Controversy between Venezuela and the United Kingdom of Great Britain and Northern Ireland over the Frontier between Venezuela and British Guiana", and from the wording of the last paragraph of its preamble. The same idea is implicit in Article V, paragraph 1, of the Geneva Agreement which provides that

> "nothing contained in this Agreement shall be interpreted as a renunciation or diminution by the United Kingdom, British Guiana or Venezuela of any basis of claim to territorial sovereignty in the territories of Venezuela or British Guiana, or of any previously asserted rights of or claims to such territorial sovereignty, or as prejudicing their position as regards their recognition or non-recognition of a right of, claim or basis of claim by any of them to such territorial sovereignty".

By referring to the preservation of their respective rights and claims to such territorial sovereignty, the parties appear to have placed particular emphasis on the fact that the "controversy" referred to in the Geneva Agreement primarily relates to the dispute that has arisen as a result of Venezuela's contention that the 1899 Award is null and void and its implications for the boundary line between Guyana and Venezuela.

66. Consequently, the Court is of the opinion that the "controversy" that the parties agreed to settle through the mechanism established under the Geneva Agreement concerns the question of the validity of the 1899 Award, as well as its legal implications for the boundary line between Guyana and Venezuela.

B. Whether the Parties gave their consent to the judicial settlement of the controversy under Article IV, paragraph 2, of the Geneva Agreement

67. The Court notes that, unlike other provisions in treaties which refer directly to judicial settlement by the Court, Article IV, paragraph 2, of the Geneva Agreement refers to a decision by a third party with regard to the choice of the means of settlement. The Court must first ascertain whether the Parties conferred on that third party, in this instance the Secretary-General, the authority to choose, by a decision which is binding on them, the means of settlement of their controversy. To this end, it will interpret the first sentence of Article IV, paragraph 2, of the Geneva Agreement, which provides that "[the parties] shall refer the decision . . . to the Secretary-

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General". If it finds that this was their intention, the Court will then determine whether the Parties consented to the choice by the Secretary-General of judicial settlement. It will do so by interpreting the last sentence of this provision, which provides that the Secretary-General "shall choose another of the means stipulated in Article 33 of the Charter of the United Nations, and so on until the controversy has been resolved or until all the means of peaceful settlement there contemplated have been exhausted".

1. Whether the decision of the Secretary-General has a binding character

68. Guyana considers that the decision of the Secretary-General cannot be regarded as a mere recommendation. It argues that it is clear from the use of the term "shall" in the English text of Article IV, paragraph 2, of the Geneva Agreement ("shall refer the decision") that there is an ensuing obligation. It adds that the use of the term "decision" in English shows that the Secretary-General's authority to choose the means of settlement was intended to produce a legally binding effect.

69. In its Memorandum, Venezuela contends that the Secretary-General's decision can only be taken as a recommendation. It relies on the preamble to the Geneva Agreement to argue that Guyana's proposed interpretation is inconsistent with the object and purpose of this instrument because "[i]t is not just a question of settling the dispute, but of doing it by means of a practical, acceptable and satisfactory settlement agreed by the Parties". Venezuela further argues that a choice on the means of settlement to be used by the Parties is not in itself sufficient to "materialize the recourse to a specific means of settlement".

* *

70. To interpret the Geneva Agreement, the Court will apply the rules on treaty interpretation to be found in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (hereinafter the "Vienna Convention") (*Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 237, para. 47). Although that convention is not in force between the Parties and is not, in any event, applicable to instruments concluded before it entered into force, such as the Geneva Agreement, it is well established that these articles reflect rules of customary international law (*Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 116, para. 33).

71. In accordance with the rule of interpretation enshrined in Article 31, paragraph 1, of the Vienna Convention, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. These elements of interpretation are to be considered as a whole (*Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017*, p. 29, para. 64).

72. The first sentence of Article IV, paragraph 2, of the Geneva Agreement provides that the Parties "shall refer the decision . . . to the Secretary-General". The Court previously observed in its Judgment on the preliminary objections in the case concerning *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)* that the use of the word "shall" in the provisions of a convention should be interpreted as imposing an obligation on States parties to that convention (*I.C.J. Reports 2018 (I)*, p. 321, para. 92). The same applies to the paragraph of the Geneva Agreement cited above. The verb "refer" in the provision at hand conveys the idea of entrusting a matter to a third party. As regards the word "decision", it is not synonymous with "recommendation" and suggests the binding character of the action taken by the Secretary-General as to his choice of the means of settlement. These terms, taken together, indicate that the Parties made a legal commitment to comply with the decision of the third party on whom they conferred such authority, in this instance the Secretary-General of the United Nations.

73. As the Court has noted in a number of cases, the purpose of a treaty may be indicated in its title and preamble (see, for example, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 118, para. 39; *Certain Norwegian Loans (France* v. *Norway), Judgment, I.C.J. Reports 1957*, p. 24). In the present case, the Agreement is entitled "Agreement to Resolve the Controversy . . . over the Frontier

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between Venezuela and British Guiana" and its preamble states that it was concluded "to resolve" that controversy. The Agreement also refers, in Article I, to the task of "seeking satisfactory solutions for the practical settlement of the controversy". This indicates that the object and purpose of the Geneva Agreement is to ensure a definitive resolution of the controversy between the Parties.

74. In view of the foregoing, the Court considers that the Parties conferred on the Secretary-General the authority to choose, by a decision which is binding on them, the means to be used for the settlement of their controversy.

75. This conclusion is also supported by the position of Venezuela set out in its Exposition of Motives for the Draft Law Ratifying the Protocol of Port of Spain of 22 June 1970, in which it is stated that

> "the possibility existed that . . . an issue of such vital importance . . . as the determination of the means of dispute settlement, would have left the hands of the two directly interested Parties, to be decided by an international institution chosen by them, or failing that, by the Secretary-General of the United Nations".

76. In these proceedings, the Court need not, in principle, resort to the supplementary means of interpretation mentioned in Article 32 of the Vienna Convention. However, as in other cases, it may have recourse to these supplementary means, such as the circumstances in which the Geneva Agreement was concluded, in order to seek a possible confirmation of its interpretation of the text of the Geneva Agreement (see, for example, *Maritime Dispute (Peru* v. *Chile), Judgment, I.C.J. Reports 2014*, p. 30, para. 66; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 21, para. 40; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 27, para. 55).

77. In this regard, the Court observes that, in his statement of 17 March 1966 before the National Congress on the occasion of the ratification of the Geneva Agreement, the Venezuelan Minister for Foreign Affairs, Mr. Ignacio Iribarren Borges, in describing the discussions that had taken place at the Geneva Conference, asserted that "[t]he only role entrusted to the Secretary-General of the United Nations [was] to indicate to the parties the means of peaceful settlement of disputes . . . provided in Article 33". He went on to state that, having rejected the British proposal to entrust that role to the General Assembly of the United Nations, "Venezuela [had] then suggested giving this role to the Secretary-General".

78. For the Court, the circumstances in which the Geneva Agreement was concluded support the conclusion that the Parties conferred on the Secretary-General the authority to choose, by a decision which is binding on them, the means of settlement of their controversy.

2. Whether the Parties consented to the choice by the Secretary-General of judicial settlement

79. The Court now turns to the interpretation of the last sentence of Article IV, paragraph 2, of the Geneva Agreement, which provides that the Secretary-General

"shall choose another of the means stipulated in Article 33 of the Charter of the United Nations, and so on until the controversy has been resolved or until all the means of peaceful settlement there contemplated have been exhausted".

* *

80. According to Guyana, "[t]he unqualified *renvoi* to Article 33 empowers the Secretary-General to decide that the parties shall have recourse to judicial settlement". It adds that an interpretation of Article IV, paragraph 2, of the Geneva Agreement which excludes the possibility of judicial settlement would deprive the treaty of its effectiveness and would lock the Parties "into a never-ending process of diplomatic negotiation, where successful resolution could be permanently foreclosed by either one of them". The Applicant further contends that the circumstances surrounding the conclusion of the Geneva Agreement "confirm that the parties understood and accepted that their deliberate *renvoi* to Article 33 made it possible that the controversy ultimately would be resolved by judicial settlement".

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81. In its Memorandum, Venezuela acknowledges that Article 33 of the Charter includes judicial settlement. However, it argues that since Article I of the Geneva Agreement refers to "seeking satisfactory solutions for the practical settlement of the controversy", this excludes judicial settlement unless the Parties consent to resort to it by special agreement.

* *

82. Given that Article IV, paragraph 2, of the Geneva Agreement refers to Article 33 of the Charter of the United Nations, which includes judicial settlement as a means of dispute resolution, the Court considers that the Parties accepted the possibility of the controversy being settled by that means. It is of the opinion that if they had wished to exclude such a possibility, the Parties could have done so during their negotiations. Equally, instead of referring to Article 33 of the Charter, they could have set out the means of settlement envisaged while omitting judicial settlement, which they did not do either.

83. The Court notes that, according to the wording of Article IV, paragraph 2, of the Geneva Agreement, the Parties conferred on the Secretary-General the authority to choose among the means of dispute settlement provided for in Article 33 of the Charter "until the controversy has been resolved". It observes that Article 33 of the Charter includes, on the one hand, political and diplomatic means, and, on the other, adjudicatory means such as arbitration or judicial settlement. The willingness of the Parties to resolve their controversy definitively is indicated by the fact that the means listed include arbitration and judicial settlement, which are by nature binding. The phrase "and so on until the controversy has been resolved" also suggests that the Parties conferred on the Secretary-General the authority to choose the most appropriate means for a definitive resolution of the controversy. The Court considers that the Secretary-General's choice of a means that leads to the resolution of the controversy fulfils his responsibility under Article IV, paragraph 2, of the Geneva Agreement, in accordance with the object and purpose of that instrument.

84. In light of the above analysis, the Court concludes that the means of dispute settlement at the disposal of the Secretary-General, to which the Parties consented under Article IV, paragraph 2, of the Geneva Agreement, include judicial settlement.

85. It is recalled that, during the oral proceedings (see paragraph 17 above), the following question was put by a Member of the Court:

> "Article IV, paragraph 2, of the Geneva Agreement of 17 February 1966 concludes with an alternative, according to which either the controversy has been resolved or the means of peaceful settlement provided in Article 33 of the Charter of the United Nations have been exhausted. My question is the following: is it possible to conceive of a situation where all means of peaceful settlement have been exhausted without the controversy having been resolved?"

In its reply to that question, Guyana argued that a situation in which all the means of peaceful settlement had been exhausted without the controversy being resolved was inconceivable. In its view, "[t]he 1966 Geneva Agreement established a procedure to ensure that the controversy would be finally and completely resolved" and "[b]ecause arbitration and judicial settlement are among the means of settlement listed in Article 33, a final and complete resolution of the controversy . . . is ensured".

86. The Court notes that its conclusion that the Parties consented to judicial settlement under Article IV of the Geneva Agreement is not called into question by the phrase "or until all the means of peaceful settlement there contemplated have been exhausted" at paragraph 2 of that Article, which might suggest that the Parties had contemplated the possibility that the choice, by the Secretary-General, of the means provided for in Article 33 of the Charter, which include judicial settlement, would not lead to a resolution of the controversy. There are various reasons why a judicial decision, which has the force of *res judicata* and clarifies the rights and obligations of the parties, might not in fact lead to the final settlement of a dispute. It suffices for the Court to observe that, in this case, a judicial decision declaring the 1899 Award to be null and void without delimiting the boundary between the Parties might not lead to the definitive resolution of the controversy, which would be contrary to the object and purpose of the Geneva Agreement.

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87. In this regard, the Court notes that the joint statement on the ministerial conversations held in Geneva on 16 and 17 February 1966 between the Venezuelan Minister for Foreign Affairs, his British counterpart and the Prime Minister of British Guiana declares that "[a]s a consequence of the deliberations an agreement was reached whose stipulations will enable a definitive solution for [the] problems [relating to the relations between Venezuela and British Guiana]". Similarly, the Venezuelan law ratifying the Geneva Agreement of 13 April 1966 states as follows:

> "Every single part and all parts of the Agreement signed in Geneva on 17 February 1966 by the Governments of the Republic of Venezuela and [the] United Kingdom of Great Britain and Northern Ireland in consultation with the Government of British Guiana, in order to solve the issue between Venezuela and [the] United Kingdom over the border line with British Guiana have been approved for any relevant legal purposes."

88. In light of the above, the Court concludes that the Parties consented to the judicial settlement of their controversy.

C. Whether the consent given by the Parties to the judicial settlement of their controversy under Article IV, paragraph 2, of the Geneva Agreement is subject to any conditions

89. The Court observes that, in treaties by which parties consent to the judicial settlement of a dispute, it is not unusual for them to subject such consent to conditions which must be regarded as constituting the limits thereon (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 124-125, paras. 130–131; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 39, para. 88). The Court must therefore now ascertain whether the Parties' consent to the means of judicial settlement, as expressed in Article IV, paragraph 2, of the Geneva Agreement, is subject to certain conditions.

90. The Parties do not dispute that the Secretary-General is required to establish that the means previously chosen have not "le[d] to a solution of the controversy" before "choos[ing] another of the means stipulated in Article 33 of the Charter of the United Nations". The Court will therefore interpret only the terms of the second sentence of this provision, which provides that, if the means chosen do not lead to a resolution of the controversy, "the Secretary-General . . . shall choose another of the means stipulated in Article 33 of the Charter of the United Nations, *and so on until the controversy has been resolved or until all the means of peaceful settlement there contemplated have been exhausted*" (emphasis added).

* *

91. Guyana maintains that the Secretary-General's decision to choose the judicial means of settlement of the controversy constitutes a proper exercise of his authority under Article IV, paragraph 2, of the Geneva Agreement. It contends that the use of the definite article "the" (one of "the" means) is "indicative of comprehensiveness" and implies that the Secretary-General can choose any of those means without following a particular order. It adds that "[i]f the means were to be applied mechanically, in the order in which they appear in Article 33, the role of a third party in the 'decision as to the means' would be unnecessary".

92. While Guyana acknowledges that, in the past, some Secretaries-General have consulted with the Parties during the process of choosing the means of settlement, it emphasizes that consultation with the Parties to ascertain their willingness to participate in such a process in no way detracts from the Secretary-General's authority to decide unilaterally on the means of settlement to be used.

*

93. In its Memorandum, Venezuela contends that the Secretary-General's decision is not consistent with his mandate under Article IV, paragraph 2, of the Geneva Agreement. It argues that the proper exercise of those powers consists in following the order in which the means of settlement appear in Article 33 of the Charter. It bases this interpretation on the expression "and so on" (in the equally authoritative Spanish text: "y así sucesivamente"), which appears in the last sentence of Article IV, paragraph 2, of the Geneva Agreement.

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94. Venezuela adds that the practice whereby the Parties are consulted and give their consent to the choice contemplated by the Secretary-General must not be ignored.

* *

95. The Court must determine whether, under Article IV, paragraph 2, of the Geneva Agreement, the Parties' consent to the settlement of their controversy by judicial means is subject to the condition that the Secretary-General follow the order in which the means of settlement are listed in Article 33 of the United Nations Charter.

96. The Court observes that the use of the verb "choose" in Article IV, paragraph 2, of the Geneva Agreement, which denotes the action of deciding between a number of solutions, excludes the idea that it is necessary to follow the order in which the means of settlement appear in Article 33 of the Charter. In its view, the Parties understood the reference to a choice of "the" means and, should the first fail, of "another" of those means as signifying that any of those means could be chosen. The expression "and so on", on which Venezuela bases its argument ("y así sucesivamente" in the Spanish text), refers to a series of actions or events occurring in the same manner, and merely conveys the idea of decision-making continuing until the controversy is resolved or all the means of settlement are exhausted. Therefore, the ordinary meaning of this provision indicates that the Secretary-General is called upon to choose any of the means listed in Article 33 of the Charter but is not required to follow a particular order in doing so.

97. In the view of the Court, an interpretation of Article IV, paragraph 2, of the Geneva Agreement whereby the means of settlement should be applied successively, in the order in which they are listed in Article 33 of the Charter, could prove contradictory to the object and purpose of the Geneva Agreement for a number of reasons. First, the exhaustion of some means would render recourse to other means pointless. Moreover, such an interpretation would delay resolution of the controversy, since some means may be more effective than others in light of the circumstances surrounding the controversy between the Parties. In contrast, the flexibility and latitude afforded to the Secretary-General in the exercise of the decision-making authority conferred on him contribute to the aim of finding a practical, effective and definitive resolution of the controversy.

98. The Court also recalls that the Charter of the United Nations does not require the exhaustion of diplomatic negotiations as a precondition for the decision to resort to judicial settlement (see, for example, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 303, para. 56).

99. Furthermore, regarding the Parties' subsequent practice, the Court observes that both Guyana and Venezuela accepted that good offices were covered by the phrase "other peaceful means of their own choice", which appears at the end of the list of means set out in Article 33, paragraph 1, of the Charter. Yet both Parties welcomed the Secretary-General's decision to choose that means of settlement rather than begin with negotiation, enquiry or conciliation. In so doing, they acknowledged that the Secretary-General was not required to follow the order in which the means of settlement are listed in Article 33 of the Charter but instead had the authority to give preference to one means over another.

100. Regarding the question of consultation, the Court is of the view that nothing in Article IV, paragraph 2, of the Geneva Agreement requires the Secretary-General to consult with the Parties before choosing a means of settlement. It also observes that, although the successive Secretaries-General consulted with the Parties, it is clear from the various communications of the Secretaries-General (in particular the telegram of 31 August 1983 from the Secretary-General, Mr. Javier Pérez de Cuéllar, to the Minister for Foreign Affairs of Guyana) that the sole aim of such consultation was to gather information from the Parties in order to choose the most appropriate means of settlement.

*

101. The Court concludes that, having failed to reach an agreement, the Parties entrusted to the Secretary-General, pursuant to Article IV, paragraph 2, of the Geneva Agreement, the role of choosing any of the means of settlement set out in Article 33 of the Charter. In choosing the means of settlement, the Secretary-General is not required, under Article IV, paragraph 2, to follow a particular order or to consult with the Parties on that choice. Finally, the Parties also agreed to give effect to the decision of the Secretary-General.

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IV. JURISDICTION OF THE COURT

102. As the Court has established above (see paragraphs 82 to 88), by virtue of Article IV, paragraph 2, of the Geneva Agreement, the Parties accepted the possibility of the controversy being resolved by means of judicial settlement. The Court will therefore now examine whether, by choosing the International Court of Justice as the means of judicial settlement for the controversy between Guyana and Venezuela, the Secretary-General acted in accordance with Article IV, paragraph 2, of the Geneva Agreement. If it finds that he did, the Court will have to determine the legal effect of the decision of the Secretary-General of 30 January 2018 on the jurisdiction of the Court under Article 36, paragraph 1, of its Statute.

A. THE CONFORMITY OF THE DECISION OF THE SECRETARY-GENERAL OF 30 JANUARY 2018 WITH ARTICLE IV, PARAGRAPH 2, OF THE GENEVA AGREEMENT

103. The Court recalls that on 30 January 2018, the Secretary-General addressed two identical letters to the Presidents of Guyana and Venezuela in relation to the settlement of the controversy. The letter addressed to the President of Guyana reads as follows:

> "I have the honour to write to you regarding the controversy between the Co-operative Republic of Guyana and the Bolivarian Republic of Venezuela which has arisen as the result of the Venezuelan contention that the Arbitral Award of 1899 about the frontier between British Guiana and Venezuela is null and void ('the controversy').
>
> As you will be aware, Article IV, paragraph 2 of the Agreement to Resolve the Controversy between Venezuela and the United Kingdom of Great Britain and Northern Ireland over the Frontier between Venezuela and British Guiana, signed at Geneva on 17 February 1966 (the 'Geneva Agreement'), confers upon the Secretary-General of the United Nations the power and the responsibility to choose from among those means of peaceful settlement contemplated in Article 33 of the Charter of the United Nations, the means of settlement to be used for the resolution of the controversy.
>
> If the means so chosen does not lead to a solution of the controversy, Article IV, paragraph 2 of the Geneva Agreement goes on to confer upon the Secretary-General the responsibility to choose another means of peaceful settlement contemplated in Article 33 of the Charter.
>
> As you will also be aware, former Secretary-General Ban Ki-moon communicated to you and to the President of the Bolivarian Republic of Venezuela a framework for the resolution of the border controversy based on his conclusions on what would constitute the most appropriate next steps. Notably, he concluded that the Good Offices Process, which had been conducted since 1990, would continue for
>
> one final year, until the end of 2017, with a strengthened mandate of mediation. He also reached the conclusion that if, by the end of 2017, I, as his successor, concluded that significant progress had not been made toward arriving at a full agreement for the solution of the controversy, I would choose the International Court of Justice as the next means of settlement, unless the Governments of Guyana and Venezuela jointly requested that I refrain from doing so.
>
> In early 2017, I appointed a Personal Representative, Mr. Dag Halvor Nylander, who engaged in intensive high-level efforts to seek a negotiated settlement.
>
> Consistently with the framework set by my predecessor, I have carefully analyzed the developments in the good offices process during the course of 2017.
>
> Consequently, I have fulfilled the responsibility that has fallen to me within the framework set by my predecessor and, significant progress not having been made toward arriving at a full agreement for the solution of the controversy, have chosen the International Court of Justice as the means that is now to be used for its solution.
>
> At the same time, it is my considered view that your Government and that of the Bolivarian Republic of Venezuela could benefit from the continued good offices of the United Nations through a

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> complementary process established on the basis of my power under the Charter. A good offices process could be supportive in at least the different ways set out below.
>
> Firstly, should both Governments accept the offer of a complementary good offices process, I believe this process could contribute to the use of the selected means of peaceful settlement.
>
> In addition, should both Governments wish to attempt to resolve the controversy through direct negotiations, in parallel to a judicial process, a good offices process could contribute to such negotiations.
>
> Thirdly, as the bilateral relationship between your Government and that of the Bolivarian Republic of Venezuela is broader than the controversy, both Governments may wish to address through a good offices process any other important pending issues that would benefit from third-party facilitation.
>
> I trust that a complementary good offices process would also contribute to the continuation of the friendly and good-neighbourly relations that have characterized exchanges between the two countries.
>
> In closing, I should like to inform you that I will be making this way forward public. I have sent an identical letter to the President of the Bolivarian Republic of Venezuela, and I enclose a copy of that letter."

104. The Court first notes that, in taking his decision, the Secretary-General expressly relied upon Article IV, paragraph 2, of the Geneva Agreement. The Court further notes that, if the means of settlement previously chosen does not lead to a solution of the controversy, this provision calls upon the Secretary-General to choose another of the means of settlement provided for in Article 33 of the Charter of the United Nations, without requiring him to follow any particular sequence (see paragraph 101 above).

105. The Court is of the view that the means previously chosen by the Secretary-General "d[id] not lead to a solution of the controversy" within the terms of Article IV, paragraph 2. By 2014, the Parties had already been engaged in the good offices process within the framework of the Geneva Agreement for over twenty years, under the supervision of three Personal Representatives appointed by successive Secretaries-General, in order to find a solution to the controversy (see paragraph 54 above). As a result, in his decision of 30 January 2018, the Secretary-General stated that, no significant progress having been made towards arriving at a full agreement for the solution of the controversy in the good offices process, he had "chosen the International Court of Justice as the means that is now to be used for its solution", thereby fulfilling his responsibility to choose another means of settlement among those set out in Article 33 of the Charter of the United Nations.

106. Neither Article IV, paragraph 2, of the Geneva Agreement nor Article 33 of the Charter of the United Nations expressly mentions the International Court of Justice. However, the Court, being the "principal judicial organ of the United Nations" (Article 92 of the Charter of the United Nations), constitutes a means of "judicial settlement" within the meaning of Article 33 of the Charter. The Secretary-General could therefore choose the Court, on the basis of Article IV, paragraph 2, of the Geneva Agreement, as the judicial means of settlement of the controversy between the Parties.

107. Moreover, the circumstances surrounding the conclusion of the Geneva Agreement, which include ministerial statements and parliamentary debates (see *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 454, para. 49, and p. 457, para. 60; *Aegean Sea Continental Shelf (Greece* v. *Turkey), Judgment, I.C.J. Reports 1978*, p. 29, para. 69), indicate that recourse to the International Court of Justice was contemplated by the parties during their negotiations. In particular, the Court notes that, on the occasion of the ratification of the Agreement, the Minister for Foreign Affairs of Venezuela stated the following before the Venezuelan National Congress:

> "After some informal discussions, our Delegation chose to leave a proposal on the table similar to that third formula which had been rejected in London, adding to it recourse to the International Court of Justice. The Delegations of Great Britain and British Guiana, after studying in detail the

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> proposal, and even though they were receptive to it by the end, objected to the specific mention of recourse to arbitration and to the International Court of Justice. *The objection was bypassed by replacing that specific mention by referring to Article 33 of the United Nations Charter which includes those two procedures, that is arbitration and recourse to the International Court of Justice*, and the possibility of achieving an agreement was again on the table. It was on the basis of this Venezuelan proposal that the Geneva Agreement was reached. Far from this being an imposition, as has been maliciously said, or a British ploy which surprised the naivety of the Venezuelan Delegation, it is based on a Venezuelan proposal which was once rejected in London and has now been accepted in Geneva." (Emphasis added.)

The Court considers that the words of the Venezuelan Minister for Foreign Affairs demonstrate that the parties to the Geneva Agreement intended to include the possibility of recourse to the International Court of Justice when they agreed to the Secretary-General choosing among the means set out in Article 33 of the Charter of the United Nations.

108. In light of the foregoing, the Court is of the view that, by concluding the Geneva Agreement, both Parties accepted the possibility that, under Article IV, paragraph 2, of that instrument, the Secretary-General could choose judicial settlement by the International Court of Justice as one of the means listed in Article 33 of the Charter of the United Nations for the resolution of the controversy. The decision of the Secretary-General of 30 January 2018 was therefore taken in conformity with the terms of Article IV, paragraph 2, of the Geneva Agreement.

*

109. The Court observes that the fact that the Secretary-General invited Guyana and Venezuela, if they so wished, "to attempt to resolve the controversy through direct negotiations, in parallel to a judicial process" and his offer of good offices to that end do not affect the conformity of the decision with Article IV, paragraph 2, of the Geneva Agreement. The Court has already explained in the past that parallel attempts at settlement of a dispute by diplomatic means do not prevent it from being dealt with by the Court (see, for example, *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 20, para. 35). In the present case, the Secretary-General simply reminded the Parties that negotiations were a means of settlement that remained available to them while the dispute was pending before the Court.

B. THE LEGAL EFFECT OF THE DECISION OF THE SECRETARY-GENERAL OF 30 JANUARY 2018

110. The Court now turns to the legal effect of the decision of the Secretary-General on its jurisdiction under Article 36, paragraph 1, of its Statute, which provides that "[t]he jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force".

111. The Court recalls that "its jurisdiction is based on the consent of the parties and is confined to the extent accepted by them" (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 39, para. 88).

112. Both this Court and its predecessor have previously observed in a number of cases that the parties are not bound to express their consent to the Court's jurisdiction in any particular form (*ibid.*, p. 18, para. 21; see also *Corfu Channel (United Kingdom* v. *Albania), Preliminary Objection, Judgment, 1948, I.C.J. Reports 1947-1948*, p. 27; *Rights of Minorities in Upper Silesia (Minority Schools), Judgment No. 12, 1928, P.C.I.J., Series A, No. 15*, pp. 23-24). Consequently, there is nothing in the Court's Statute to prevent the Parties from expressing their consent through the mechanism established under Article IV, paragraph 2, of the Geneva Agreement.

113. The Court must however satisfy itself that there is an unequivocal indication of the desire of the parties to a dispute to accept the jurisdiction of the Court in a voluntary and indisputable manner (*Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 204, para. 62).

114. The Court recalls that Venezuela has argued that the Geneva Agreement is not sufficient in itself to found the jurisdiction of the Court and that the subsequent consent of the Parties is required even after the decision of the

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Secretary-General to choose the International Court of Justice as the means of judicial settlement. However, the decision taken by the Secretary-General in accordance with the authority conferred upon him under Article IV, paragraph 2, of the Geneva Agreement would not be effective (see paragraphs 74 to 78 above) if it were subject to the further consent of the Parties for its implementation. Moreover, an interpretation of Article IV, paragraph 2, that would subject the implementation of the decision of the Secretary-General to further consent by the Parties would be contrary to this provision and to the object and purpose of the Geneva Agreement, which is to ensure a definitive resolution of the controversy, since it would give either Party the power to delay indefinitely the resolution of the controversy by withholding such consent.

115. For all these reasons, the Court concludes that, by conferring on the Secretary-General the authority to choose the appropriate means of settlement of their controversy, including the possibility of recourse to judicial settlement by the International Court of Justice, Guyana and Venezuela consented to its jurisdiction. The text, the object and purpose of the Geneva Agreement, as well as the circumstances surrounding its conclusion, support this finding (see paragraph 108 above). It follows that the consent of the Parties to the jurisdiction of the Court is established in the circumstances of this case.

V. SEISIN OF THE COURT

116. The Court now turns to the question whether it has been validly seised by Guyana.

117. The seisin of the Court is, as observed in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain)*, "a procedural step independent of the basis of jurisdiction invoked and, as such, is governed by the Statute and the Rules of Court" (*Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 23, para. 43). Thus, for the Court to be able to entertain a case, the relevant basis of jurisdiction needs to be supplemented by the necessary act of seisin *(ibid.)*.

* *

118. Guyana submits that "[t]he decision of the Secretary-General is . . . a legal act materialising the parties' *a priori* consent to judicial settlement", therefore allowing the unilateral seisin of the Court by either Party to the dispute. The Applicant contends in particular that the seisin of the Court is independent of the basis of jurisdiction, and that Venezuela, having consented to the Court's jurisdiction, cannot object to Guyana's unilateral seisin of the Court.

119. In its Memorandum, Venezuela insists on the difference between Article IV of the Geneva Agreement and a compromissory clause. In Venezuela's view, in the absence of an explicit provision in the Geneva Agreement allowing the Court to be seised unilaterally, it must be presumed that the Court can only be validly seised by a "joint agreement" of the Parties.

* *

120. In the view of the Court, an agreement of the Parties to seise the Court jointly would only be necessary if they had not already consented to its jurisdiction. However, having concluded above that the consent of the Parties to the jurisdiction of the Court is established in the circumstances of this case, either Party could institute proceedings by way of a unilateral application under Article 40 of the Statute of the Court.

121. In light of the foregoing, the Court concludes that it has been validly seised of the dispute between the Parties by way of the Application of Guyana.

VI. SCOPE OF THE JURISDICTION OF THE COURT

122. Having concluded that it has jurisdiction to entertain Guyana's Application and that it is validly seised of this case, the Court must now ascertain whether all the claims advanced by Guyana fall within the scope of its jurisdiction.

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123. Guyana contends that the Court's jurisdiction *ratione materiae* extends to all the claims submitted in its Application, on the grounds that the Court's jurisdiction is determined by the text of the Geneva Agreement in light of its object and purpose and the Parties' practice thereunder.

124. Relying on the title and preamble of the Geneva Agreement, and its Article I, Guyana argues that the controversy encompasses the dispute between the Parties regarding the validity of the 1899 Award as well as "any dispute 'which has arisen *as a result of* the Venezuelan contention'" (emphasis added by Guyana) that the 1899 Award is "null and void". In Guyana's view, this comprises any territorial or maritime dispute between the Parties resulting from the Venezuelan contention of the nullity of the Award, including any claims concerning the responsibility of Venezuela for violations of Guyana's sovereignty.

125. Specifically, Guyana argues that the wording of the Geneva Agreement, notably Article I, presents the controversy as being the "result" of Venezuela's contention that the 1899 Award about the frontier between British Guiana and Venezuela is null and void. According to Guyana, since the 1899 Award delimited the boundary between Venezuela and the colony of British Guiana, the controversy between the Parties is territorial and the Court must therefore necessarily determine the boundary between Venezuela and Guyana, which implies first deciding whether the Award is valid. Guyana further argues that the Court would not be in a position to reach "a full agreement for the solution" of this dispute by addressing "*any* outstanding questions" (emphasis added by Guyana), which is the objective set forth under Article IV of the Geneva Agreement, without first ruling on the validity of the Award.

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126. In its Memorandum, Venezuela alleges that the question of the validity of the 1899 Award is not part of the controversy under the Geneva Agreement. According to Venezuela, the Geneva Agreement was adopted on the basis that the merits of the contention of nullity of the Award could not be discussed between the Parties as the "validity or nullity of an arbitral award is non-negotiable". Venezuela considers that "the subject-matter of the Geneva Agreement is the territorial dispute, not the validity or nullity of the 1899 Award".

127. Venezuela adds that a legal dispute such as one regarding the validity of the 1899 Award is not susceptible to a "practical" settlement. In its view, the "countless references to a practical, acceptable and satisfactory settlement" in the Geneva Agreement would be deprived of legal effect if the controversy contemplated thereunder were considered as including the question of the validity of the 1899 Award.

* *

128. The Court notes that, in its Application, Guyana has made certain claims concerning the validity of the 1899 Award and other claims arising from events that occurred after the conclusion of the Geneva Agreement (see paragraph 19 above). Consequently, the Court will first ascertain whether Guyana's claims in relation to the validity of the 1899 Award about the frontier between British Guiana and Venezuela fall within the subject-matter of the controversy that the Parties agreed to settle through the mechanism set out in Articles I to IV of the Geneva Agreement, and whether, as a consequence, the Court has jurisdiction *ratione materiae* to entertain them. Secondly, the Court will have to determine whether Guyana's claims arising from events that occurred after the conclusion of the Geneva Agreement fall within the scope of the Court's jurisdiction *ratione temporis*.

129. With regard to its jurisdiction *ratione materiae*, the Court recalls that Article I of the Geneva Agreement refers to the controversy that has arisen between the parties to the Geneva Agreement as a result of Venezuela's contention that the 1899 Award about the frontier between British Guiana and Venezuela is null and void (see paragraphs 64 to 66 above). As stated in paragraph 66 above, the subject-matter of the controversy which the parties agreed to settle under the Geneva Agreement relates to the validity of the 1899 Award and its implications for the land boundary between Guyana and Venezuela. The opposing views held by the parties to the Geneva Agreement on the validity of the 1899 Award is demonstrated by the use of the words "Venezuelan contention" in Article I of the Geneva Agreement. The word "contention", in accordance with the ordinary meaning to be given to it in the context of this

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provision, indicates that the alleged nullity of the 1899 Award was a point of disagreement between the parties to the Geneva Agreement for which solutions were to be sought. This in no way implies that the United Kingdom or Guyana accepted that contention before or after the conclusion of the Geneva Agreement. The Court therefore considers that, contrary to Venezuela's argument, the use of the word "contention" points to the opposing views between the parties to the Geneva Agreement regarding the validity of the 1899 Award.

130. This interpretation is consistent with the object and purpose of the Geneva Agreement, which was to ensure a definitive resolution of the dispute between Venezuela and the United Kingdom over the frontier between Venezuela and British Guiana, as indicated by its title and preamble (see paragraphs 64 to 66, and 73 above). Indeed, it would not be possible to resolve definitively the boundary dispute between the Parties without first deciding on the validity of the 1899 Award about the frontier between British Guiana and Venezuela.

131. This interpretation is also confirmed by the circumstances surrounding the conclusion of the Geneva Agreement. It may be recalled that the discussions between the parties as to the validity of the 1899 Award commenced with a Tripartite Examination of the documentary material relating to the Award, with the objective of assessing the Venezuelan claim with respect to its nullity. This was initiated by the Government of the United Kingdom, which asserted numerous times that it considered the Award to be valid and binding on the parties. As the Minister for Foreign Affairs of Venezuela reported, only two days before the Tripartite Examination concluded its work, the United Kingdom reaffirmed its position that the Award had settled the question of sovereignty in a valid and final manner.

132. In the discussions held on 9 and 10 December 1965 between British Guiana, the United Kingdom and Venezuela, which preceded the conclusion of the Geneva Agreement, the first item on the agenda was to "exchange [their] views on the experts' report on the examination of documents and discuss[] the consequences resulting therefrom", whereas the second item was "[t]o seek satisfactory solutions for the practical settlement of the controversy which has arisen as a result of the Venezuelan contention that the 1899 Award is null and void". During these discussions, Venezuela reasserted its conviction that "the only satisfactory solution of the frontier problem with British Guiana lay in the return of the territory which by right belonged to her", while the United Kingdom and British Guiana rejected the Venezuelan proposal on the basis that it implied that the 1899 Award was null and void and that there was no justification for that allegation. British Guiana reiterated in the discussions that "the first question under discussion was the validity of the 1899 Award" and that it "could not accept the Venezuelan contention that the 1899 Award was invalid". The United Kingdom recalled that "the two sides had been unable to agree on the question of the 1899 Award's validity". Finally, the representative of British Guiana said that "it had never been his understanding that the territorial claim would be discussed unless the invalidity of the 1899 Award had first been established".

133. It is on that basis that the subsequent meetings took place in Geneva in February 1966, culminating in the adoption of the Geneva Agreement. In a Note Verbale dated 25 February 1966, the United Kingdom Foreign Secretary stated to the British Ambassador to Venezuela that

> "[t]he Venezuelans also tried hard to get the preamble to the Agreement to reflect their fundamental position: first, that we were discussing the substantive issue of the frontier and not merely the validity of the 1899 Award and secondly, that this had been the basis for our talks both in London and in Geneva. With some difficulty I persuaded the Venezuelan Foreign Minister to accept a compromise wording which reflected the known positions of both sides."

134. The Court further notes that Venezuela's argument that the Geneva Agreement does not cover the question of the validity of the 1899 Award is contradicted by the statement of the Minister for Foreign Affairs of Venezuela before the Venezuelan National Congress shortly after the conclusion of the Geneva Agreement. He stated in particular that "[i]f the nullity of the Award of 1899, be it through agreement between the concerned Parties or through a decision by any competent international authority as per Agreement, is declared then the question will go back to its original state". This confirms that the parties to the Geneva Agreement understood that the question of the validity of the 1899 Award was central to the controversy that needed to be resolved under Article IV,

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paragraph 2, of the Geneva Agreement in order to reach a definitive settlement of the land boundary between Guyana and Venezuela.

135. The Court therefore concludes that Guyana's claims concerning the validity of the 1899 Award about the frontier between British Guiana and Venezuela and the related question of the definitive settlement of the land boundary dispute between Guyana and Venezuela fall within the subject-matter of the controversy that the Parties agreed to settle through the mechanism set out in Articles I to IV of the Geneva Agreement, in particular Article IV, paragraph 2, thereof, and that, as a consequence, the Court has jurisdiction *ratione materiae* to entertain these claims.

136. With respect to its jurisdiction *ratione temporis*, the Court notes that the scope of the dispute that the Parties agreed to settle through the mechanism set out in Articles I to IV of the Geneva Agreement is circumscribed by Article I thereof, which refers to "the controversy . . . which has arisen as the result of the Venezuelan contention that the Arbitral Award of 1899 . . . is null and void". The use of the present perfect tense in Article I indicates that the parties understood the controversy to mean the dispute which had crystallized between them at the time of the conclusion of the Geneva Agreement. This interpretation is not contradicted by the equally authoritative Spanish text of Article I of the Geneva Agreement, which refers to "la controversia entre Venezuela y el Reino Unido surgida como consecuencia de la contención venezolana de que el Laudo arbitral de 1899 sobre la frontera entre Venezuela y Guayana Británica es nulo e írrito". It is reinforced by the use of the definite article in the title of the Agreement ("Agreement to resolve *the* controversy"; in Spanish, "Acuerdo para resolver *la* controversia"), the reference in the preamble to the resolution of "any *outstanding* controversy" (in Spanish, "cualquiera controversia *pendiente*"), as well as the reference to the Agreement being reached "to resolve the *present* controversy" (in Spanish, "para resolver la *presente* controversia") (emphases added). The Court's jurisdiction is therefore limited *ratione temporis* to the claims of either Party that existed on the date the Geneva Agreement was signed, on 17 February 1966. Consequently, Guyana's claims arising from events that occurred after the signature of the Geneva Agreement do not fall within the scope of the jurisdiction of the Court *ratione temporis*.

137. In light of the foregoing, the Court concludes that it has jurisdiction to entertain Guyana's claims concerning the validity of the 1899 Award about the frontier between British Guiana and Venezuela and the related question of the definitive settlement of the dispute regarding the land boundary between the territories of the Parties.

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138. For these reasons,

THE COURT,

(1) By twelve votes to four,

Finds that it has jurisdiction to entertain the Application filed by the Co-operative Republic of Guyana on 29 March 2018 in so far as it concerns the validity of the Arbitral Award of 3 October 1899 and the related question of the definitive settlement of the land boundary dispute between the Co-operative Republic of Guyana and the Bolivarian Republic of Venezuela;

IN FAVOUR: *President* Yusuf; *Vice-President* Xue; *Judges* Tomka, Cançado Trindade, Donoghue, Sebutinde, Bhandari, Robinson, Crawford, Salam, Iwasawa; *Judge* ad hoc Charlesworth;

AGAINST: *Judges* Abraham, Bennouna, Gaja, Gevorgian;

(2) Unanimously,

Finds that it does not have jurisdiction to entertain the claims of the Co-operative Republic of Guyana arising from events that occurred after the signature of the Geneva Agreement.

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Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this eighteenth day of December, two thousand and twenty, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Co-operative Republic of Guyana and the Government of the Bolivarian Republic of Venezuela, respectively.

(Signed) Abdulqawi Ahmed YUSUF,
President.

(Signed) Philippe GAUTIER,
Registrar.

Judge TOMKA appends a declaration to the Judgment of the Court; Judges ABRAHAM and BENNOUNA append dissenting opinions to the Judgment of the Court; Judges GAJA and ROBINSON append declarations to the Judgment of the Court; Judge GEVORGIAN appends a dissenting opinion to the Judgment of the Court

(Initialled) A.A.Y.

(Initialled) Ph.G.

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DECLARATION OF JUDGE TOMKA

Geneva Agreement as agreement for the peaceful settlement of the dispute — Authority of the Secretary-General of the United Nations — Jurisdiction ratione materiae *concerns the frontier dispute — Issue of the validity of the 1899 Arbitral Award ripe for judicial determination —* Effet utile *of Article IV, paragraph 2, of the Geneva Agreement.*

Having voted in favour of the conclusions reached by the Court, I nevertheless wish to offer a few remarks on this case, which is rather unusual.

1. The Geneva Agreement is not a typical special agreement by which the parties ask the Court to resolve a particular dispute which already exists between them. Nor is Article IV, paragraph 2, of the Geneva Agreement a typical compromissory clause providing for dispute resolution by the Court should a dispute arise between the Parties in the future. Be that as it may, the Geneva Agreement is still an agreement on the peaceful settlement of the dispute between the Parties, as indicated by its official title which reads: "Agreement to Resolve the Controversy between Venezuela and the United Kingdom of Great Britain and Northern Ireland over the Frontier between Venezuela and British Guiana"[1]. The Agreement provides for a set of procedures and mechanisms aiming at the resolution of the dispute opposing Venezuela and Guyana. It assigns a particular role to the Secretary-General of the United Nations - which he accepted on 4 April 1966[2] — by authorizing him, under the conditions specified in Article IV, paragraph 2, to choose the means of settlement of the dispute. While unusual, such a role is not unprecedented in international practice[3].

2. I agree with the Court's conclusion that the Parties, by concluding the Geneva Agreement, consented to the jurisdiction of the International Court of Justice, should the Secretary-General of the United Nations decide to choose the Court as the means of settlement of the dispute in the exercise of his authority under Article IV, paragraph 2, thereof.

3. The Court's jurisdiction *ratione materiae*, being based on the Geneva Agreement, concerns the controversy over the frontier. This is again clearly indicated by the official title of the Agreement: "Agreement to Resolve the *Controversy . . . over the Frontier* between Venezuela and British Guiana". It is true that the issue of the validity of the 1899 Arbitral Award[4] is part and parcel of that controversy which, as Article I of the Geneva Agreement confirms, "has arisen as the result of the Venezuelan contention that the Arbitral Award of 1899 about the frontier between British Guiana and Venezuela is null and void".

4. Guyana, in its Application instituting proceedings, has focused on the issue of the validity of the 1899 Arbitral Award. It requests the Court, *inter alia*, to "adjudge and declare that:

> *(a)* The 1899 Award is valid and binding upon Guyana and Venezuela, and the boundary established by that Award and the 1905 Agreement is valid and binding upon Guyana and Venezuela;
>
> *(b)* Guyana enjoys full sovereignty over the territory between the Essequibo River and the boundary established by the 1899 Award and the 1905 Agreement, and Venezuela enjoys full sovereignty over the territory west of that boundary"[5].

5. It is on the basis of these submissions, as formulated by Guyana in its Application, that the Court has given in 2018 a title to the case, inscribed on its General List under No. 171 as "*Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela)*"[6].

6. By upholding its jurisdiction, the Court provides an opportunity for the Respondent to substantiate its contention that the 1899 Arbitral Award is null and void. Indeed, the question whether that Award is valid, as maintained by Guyana, or null and void, as contended by Venezuela, is a legal question *par excellence*. No other organ than a judicial one is more appropriate to determine it. Almost six decades of efforts to resolve the controversy between the Parties, caused by this Venezuelan contention, have shown that no agreement can ever be reached between them on the legal status of the 1899 Arbitral Award. The Secretary-General of the United Nations made a sound decision when he chose the principal judicial organ of the United Nations as a means of settlement of the controversy, in accordance with Article IV, paragraph 2, of the Geneva Agreement.

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7. It is important for the Parties to understand that, should the 1899 Arbitral Award be declared null and void by the Court, as argued by Venezuela, the Court will be in need of further submissions, in the form of evidence and arguments, about the course of the land boundary, in order for it to fully resolve the "controversy". Without these submissions, the Court will not be in a position to determine the course of the disputed boundary between the two countries. In such event, the Secretary-General of the United Nations may be called upon once again to exercise his authority under Article IV, paragraph 2, of the Geneva Agreement to choose another of the means of settlement provided in Article 33 of the Charter of the United Nations.

(Signed) Peter TOMKA.

ENDNOTES

1 United Nations, *Treaty Series (UNTS)*, Vol. 561, p. 321.

2 Letters dated 4 April 1966, from the Secretary-General of the United Nations to the Minister for Foreign Affairs of the Republic of Venezuela and the Minister of State for Foreign Affairs and Permanent Representative of the United Kingdom to the United Nations, Application of Guyana, Ann. 5.

3 See e.g. Article 33 of the Treaty of Peace with Roumania, signed at Paris on 10 February 1947, *UNTS*, Vol. 42, p. 3.

4 The text of the Award rendered by the Arbitral Tribunal on 3 October 1899 is reproduced in United Nations, *Reports of International Arbitral Awards*, Vol. XXVIII, pp. 333-339.

5 Application of Guyana, para. 55. It is rather unusual for the *Applicant* to ask the Court to determine over which territory the *Respondent* enjoys sovereignty.

6 *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela), Order of 19 June 2018, I.C.J. Reports 2018 (I)*, p. 402.

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DISSENTING OPINION OF JUDGE ABRAHAM

[Translation]

1. To my great regret, I am unable to subscribe to the conclusion reached by the majority of my colleagues in the present case, namely that there is a jurisdictional basis allowing the Court to entertain the dispute between Guyana and Venezuela, which is essentially a territorial dispute, of which it has been seised by the unilateral Application of Guyana.

2. According to the Judgment, the Court's jurisdiction results from a combination of three elements. The first is Article 36, paragraph 1, of the Statute, which extends the jurisdiction of the Court to "all cases which the parties refer to it and all matters specially provided for . . . in treaties and conventions in force". The second is Article IV, paragraph 2, of the Geneva Agreement of 17 February 1966, which is binding on the Parties to the present case, an agreement that is intended, according to its title, "to resolve the controversy . . . over the frontier between Venezuela and British Guiana". Article IV, paragraph 2, of this Agreement stipulates that if, by a certain date, the parties have not reached agreement on the choice of one of the means of dispute settlement provided for in Article 33 of the Charter of the United Nations, "they shall refer the decision as to the means of settlement to an appropriate international organ upon which they both agree or, failing agreement on this point, to the Secretary-General of the United Nations". Lastly, the third link in the majority's chain of reasoning is the Secretary-General's letter of 30 January 2018, addressed to both Parties, in which the Secretary-General announced that, on the basis of Article IV, paragraph 2, of the Geneva Agreement, he had "chosen the International Court of Justice as the next means that is now to be used for [the] solution [of the controversy]".

3. Are these three combined elements sufficient to confer jurisdiction on the Court to entertain the dispute between two neighbouring States, upon the unilateral application of one of them? I do not believe so, and I shall explain why.

4. I shall begin by mentioning all those points in the reasoning developed by the majority with which I am in agreement. That will then allow me to identify the precise moment beyond which I no longer feel able to support that reasoning.

5. First, there is no doubt — and nor is it contested — that when the Secretary-General (of the day) began to exercise the responsibility conferred on him by Article IV, paragraph 2, of the Agreement, i.e. in 1983, the conditions laid down in that instrument had been met. The Mixed Commission provided for by the Agreement had not succeeded in framing a solution to the controversy within four years from the date of the Agreement, and, within the time-limit set following the Commission's final report, the two parties had not reached agreement "regarding the choice of one of the means of settlement provided in Article 33 of the Charter of the United Nations". It was therefore up to the Secretary-General himself (the parties having also failed to agree on the choice of an international organ for the purpose) to choose one of the means of settlement provided for in Article 33. That is what the Secretary-General did in 1990, after ample consultation, by choosing the good offices process.

6. Secondly, once it had been established that the good offices process had failed, after very long and patient efforts to bring the parties together, namely at the beginning of 2018, it is indisputable that the Secretary-General had the authority under Article IV, paragraph 2, of the Geneva Agreement to choose "another of the means stipulated in Article 33".

7. The Secretary-General having chosen, by his letter of 30 January 2018, the International Court of Justice, it is necessary at this point in the reasoning to address two questions upon which — the Parties being in disagreement — the Court takes a stand in the present Judgment: is the International Court of Justice one of the means of settlement which the Secretary-General was at liberty to choose? And if so, was the Secretary-General able to choose this Court without having previously had recourse, unsuccessfully, to the other means set out in Article 33 of the Charter? On these two points, I agree with the position taken by the Judgment.

8. As we know, Article 33 of the Charter, to which Article IV of the Agreement refers, provides as means of settling disputes that may arise between States: negotiation, enquiry, mediation, conciliation, arbitration, judicial

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settlement, resort to regional agencies or arrangements, or "other peaceful means" chosen by the parties. The list in Article 33 therefore includes "judicial settlement". Recourse to the International Court of Justice being one of the procedures for "judicial settlement" — and indeed, in the context of the Charter, the principal among them — I see no reason to consider that the Secretary-General was prevented from choosing the Court as an appropriate means of settling the dispute between Guyana and Venezuela. That is what the Judgment says, and I fully concur with it on that point.

9. Further, there is nothing in the wording of Article IV, paragraph 2, of the Agreement — which provides that if a means chosen by the Secretary-General does not enable the dispute to be settled, the Secretary-General "shall choose another of the means stipulated in Article 33 . . . and so on until the controversy has been resolved or until all the means . . . there contemplated have been exhausted" — and I shall return to this text in due course — that obliges the Secretary-General to follow any particular order in choosing successive means from among those available to him. I deduce from this that the Secretary-General has a free hand in the order of his choices, and that he was therefore able, as he did in January 2018, to choose the Court as a means of settlement of the dispute, despite the fact that he had not previously had recourse to certain other means referred to in Article 33, such as conciliation or arbitration. The only obligation which Article IV, paragraph 2, imposes on the Secretary-General — provided he agrees to exercise the responsibility conferred upon him — is to choose a new means of settlement each time the means previously chosen proves unable to produce a solution, "and so on", as the Agreement puts it. In short, I take the view, like the majority of the Court, that the Secretary-General has performed the functions vested in him by Article IV, paragraph 2, without laying himself open to the least reproach.

10. Lastly, to conclude on those points where I agree with the majority, I believe that the Secretary-General's choice of a means of settlement is not a mere recommendation without binding effect, but that it creates obligations for both the parties involved. In this regard, the terms of Article IV of the Agreement seem to me to be sufficiently clear. In the absence of an agreement for the solution of the controversy within the Mixed Commission, the parties "shall without delay" choose one of the means of settlement listed in Article 33. If they fail to do so within three months, they "shall refer the decision as to the means of settlement" either to an international organ upon which they both agree or, failing that, to the Secretary-General. Everything therefore indicates that the Secretary-General's choice of a means of settlement constitutes a decision which imposes certain obligations on the parties.

11. The majority of the Court has considered that, taken together, the elements described above provide a sufficient basis for the jurisdiction of the Court to entertain Guyana's Application. I am not of that opinion. It is one thing to say that the choice of a means — in this instance, judicial settlement — by the Secretary-General creates obligations for the parties; it is quite another to see in Article IV, paragraph 2, of the Agreement, combined with the Secretary-General's decision, the expression of both parties' consent to the settlement of their dispute by the Court.

12. As the Judgment correctly points out, the jurisdiction of the Court is based on the consent of the parties, and while it is true that this consent is not subject to being expressed in any particular form, "[t]he Court must however satisfy itself that there is an unequivocal indication of the desire of the parties to a dispute to accept the jurisdiction of the Court in a voluntary and indisputable manner" (paragraph 113). I do not believe that to be the case in this instance.

I would first observe that, leaving aside judicial settlement for a moment, all the other means which the Secretary-General may choose from the list in Article 33 require, in order to be effective, an agreement between the parties following the Secretary-General's decision. Even arbitration, which has in common with judicial settlement that it results in a legally binding decision resolving the dispute, could only produce a settlement, should the Secretary-General have chosen that means, if the parties negotiate and conclude a special agreement, without which the arbitration process could not be implemented. In other words, if the Secretary-General had chosen arbitration, the parties would in my view have had to negotiate, in good faith, a special agreement allowing for the settlement of their dispute and conferring jurisdiction to that end on an arbitral tribunal; but the Secretary-General's decision, though binding on the parties, would not in itself have founded the jurisdiction of an arbitral tribunal, which would have derived its jurisdiction from the subsequent agreement between the parties.

13. There is to my mind no reason for the position to be different in the present case, where the Secretary-General has chosen judicial settlement.

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One clear difference does of course exist between the two situations: whereas an arbitral tribunal must be established by agreement of the parties, and its powers delimited by that agreement, the Court generally has no need, in practice, of any additional instrument (other than its Statute and Rules of Procedure) to be able to exercise its jurisdiction on the basis of a unilateral application. But while this difference may be a significant one in practice, it changes nothing in terms of the central question of the consent of the parties. I do not see, in the wording of Article IV, paragraph 2, of the Agreement, an unequivocal expression of consent by the parties to the jurisdiction of the Court, but only their acceptance of the idea that their dispute may ultimately be resolved by means of judicial settlement.

14. The Court rightly indicates that under Article IV, paragraph 2, "the Parties accepted the possibility of the controversy being settled by that means [judicial settlement]" (paragraph 82 of the Judgment). Up to that point, I would agree, but in my view it is not sufficient in order to establish the Parties' consent to jurisdiction.

I would add that in this instance a special agreement between the Parties following the Secretary-General's decision would have been particularly useful in order to delimit the subject-matter of the dispute submitted to the Court, which is not done clearly by the Geneva Agreement itself.

15. If the Court, in the present Judgment, finds the Parties' consent to its jurisdiction in the Agreement itself, the Secretary-General having chosen the Court as the means of settlement, it is — principally — because it gives paramount importance to the object and purpose of the Agreement in order to interpret it.

This approach is in itself a perfectly legitimate one, and the Judgment is right to point out that Articles 31 and 32 of the Vienna Convention on the Law of Treaties reflect the rules of customary international law on treaty interpretation.

16. However, I disagree with the Court as regards its understanding of the object and purpose of the Geneva Agreement. According to the Judgment, the Agreement aims to put in place a mechanism for settling the dispute such that, once all the provisions of the Agreement have been completely and correctly applied, that dispute will necessarily be resolved. The Court relies in particular, in this regard, on the title of the Agreement, which presents the latter as seeking "to resolve the controversy . . . over the frontier". From this it deduces that any interpretation of the Agreement which would have the effect, once the Agreement had been fully implemented, of allowing the dispute to remain in existence — without having been able to be resolved — should be ruled out, and that on the contrary preference should be given to an interpretation ensuring that, at the end of the process, the dispute will be resolved. That is why the Court believes it must reject any interpretation that would make the implementation of judicial settlement subject to "further consent by the Parties" after the decision of the Secretary-General: because such a requirement (which would suppose the conclusion of a special agreement or some other form of expression of consent) "would be contrary to this provision and to the object and purpose of the Geneva Agreement, which is to ensure a definitive resolution of the controversy" (paragraph 114).

17. To my mind, while it is plain to see that in concluding the Geneva Agreement, the parties intended to promote the settlement of their dispute and, in so far as possible, to enable such a settlement to be arrived at, they did not seek to establish a binding mechanism aimed at ensuring that such a resolution would be obtained, by negotiation if possible, or by judicial means if necessary. They therefore did not intend to give their consent in advance to judicial settlement.

Several provisions of the Geneva Agreement indicate very clearly, in my view, that the parties accepted the possibility that implementation of the Agreement would not necessarily result in the settlement of their dispute.

18. The first of these is Article IV, paragraph 1, which provides that it is normally for the parties themselves to choose one of the means of peaceful settlement listed in Article 33 of the Charter, should the Mixed Commission not have succeeded in finding a solution to the dispute. If the parties agree on the choice of a means other than judicial settlement (mediation or conciliation, for example), the subsequent application of the means thus chosen may fail to enable a settlement of the dispute to be achieved: the Geneva Agreement will then have been applied in full, and the dispute will still remain. The possibility of there being no settlement even after full implementation of the Agreement was therefore certainly contemplated by the parties.

In the present case, the Parties have not agreed on the choice of a means, and it is therefore Article IV, paragraph 2, which has come into play, with its special feature that, as part of this mechanism, the Secretary-General need not restrict himself to choosing one means, but, if that fails, must choose another "and so on".

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19. But even paragraph 2, as I understand it, contemplates and accepts the possibility that the dispute may not have been resolved at the end of the process.

It is indeed stipulated there that the Secretary-General must choose means of settlement one after another "and so on until the controversy has been resolved or until all the means of peaceful settlement there contemplated have been exhausted". If the parties' intention had been to give their consent in advance to judicial settlement, the text of Article IV, paragraph 2, would have ended with the words "has been resolved". In fact, the final phrase ("or until all the means of peaceful settlement . . . have been exhausted") is deprived of all effect if the interpretation adopted by the Court — agreeing with that of Guyana — is correct. If the parties, by the very conclusion of the Agreement, have given their consent to judicial settlement, and since the Secretary-General is obliged to choose successively, if need be, all the means set out in Article 33, including judicial settlement, the result is that at the end of the process, the dispute will necessarily have been resolved. Consequently, if the text of paragraph 2 had ended with "has been resolved", it would have had exactly the same meaning as that attributed to it by the Court in the present Judgment: this means that for the Court the final phrase of paragraph 2 is without effect, and it disregards it. The point is that this final part clearly indicates that it is possible, within the spirit in which the Agreement was drafted, that at the end of the process, the dispute could still remain; it therefore does not tally with the definition of the object and purpose of the Agreement as adopted by the Court, namely the establishment of a mechanism that will necessarily result in the settlement of the dispute.

The Judgment endeavours to respond to this objection in paragraph 86. But it does so in terms whose clarity — with all due respect to my colleagues — is not the principal feature, and which can only leave the reader perplexed.

20. Ultimately, having considered carefully all the arguments summoned by the Court in concluding that the Parties have consented to its jurisdiction to entertain their dispute on the basis of the unilateral application of one of them, I am unconvinced. I do not see in the Geneva Agreement the unequivocal indication of such consent. I believe that the Court should have declined jurisdiction.

(Signed) Ronny ABRAHAM.

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DISSENTING OPINION OF JUDGE BENNOUNA

Jurisdiction of the Court — Consent of the Parties in the light of the Statute and the Court's consistent jurisprudence — Interpretation of Article IV, paragraph 2, of the Geneva Agreement - Two alternatives provided for in Article IV, paragraph 2 — Subject-matter of the dispute — Power delegated by the Parties to the Secretary-General under Article IV, paragraph 2.

1. To my regret, I voted against the Court's decision that it has jurisdiction to entertain the Application instituting proceedings filed by Guyana on 29 March 2018 against Venezuela concerning the Arbitral Award of 3 October 1899. It is true that the administration of justice in this case was difficult, in particular because one of the Parties, Venezuela, has not appeared. But this was a further reason for the Court to be vigilant in ensuring that both Parties have clearly and unequivocally consented to its jurisdiction (*Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 204, para. 62). In this respect, the Parties' agreement must be well established, even though "neither the Statute nor the Rules require that this consent should be expressed in any particular form" (*Corfu Channel (United Kingdom* v. *Albania), Preliminary Objection, Judgment, 1948, I.C.J. Reports 1947-1948*, p. 27). However, in this case, the situation is the exact opposite, in so far as the text relied on by Guyana as the basis for the consent of the Parties clearly shows that they did not intend to confer jurisdiction on the Court to decide their dispute merely at the request of one of them.

2. In fact, Article IV of the Geneva Agreement of 17 February 1966 provides that, if the Parties fail to agree on one of the means of dispute settlement provided for in Article 33 of the Charter of the United Nations, they will refer that choice to the Secretary-General of the United Nations. According to Article IV, paragraph 2,

> "[i]f the means so chosen do not lead to a solution of the controversy . . . the Secretary-General of the United Nations shall choose another of the means stipulated in Article 33 of the Charter of the United Nations, and so on until the controversy has been resolved or until all the means of peaceful settlement there contemplated have been exhausted".

3. This is the text upon which Guyana has relied in order to consider that the Secretary-General's choice of the International Court of Justice, in his letters dated 30 January 2018, allowed it to seise the Court unilaterally of its dispute with Venezuela concerning the legal validity and binding effect of the Arbitral Award of 3 October 1899 regarding the boundary between the two countries.

4. The text of Article IV, paragraph 2, as reproduced above, makes clear that the Secretary-General is empowered by the Parties to choose successively the means of settlement provided for in Article 33 of the Charter until the dispute is resolved or until the means in question are exhausted. In the latter case, it would thus appear that the dispute remains unresolved, even though all the means for its settlement submitted to the Parties by the Secretary-General have been exhausted.

5. Mindful of the alternative provided for by this text, I put the following question to the delegation of Guyana during the hearings:

> "Article IV, paragraph 2, of the Geneva Agreement of 17 February 1966 concludes with an alternative, according to which either the controversy has been resolved or the means of peaceful settlement provided in Article 33 of the Charter of the United Nations have been exhausted. My question is the following: is it possible to conceive of a situation where all means of peaceful settlement have been exhausted without the controversy having been resolved?" (CR 2020/5, p. 70; paragraph 85 of the Judgment.)

6. Guyana, after stressing that its response was negative, has merely made a peremptory assertion that "the decision by the Secretary-General to select judicial settlement as the means of settlement – by the very nature of that means – eliminates any possibility that the controversy will not be resolved" ("Response of the Co-operative Republic of Guyana to the question posed by Judge Bennouna on 30 June 2020", 6 July 2020, p. 4, para. 14).

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7. Guyana has therefore carefully avoided giving meaning to the second alternative provided for in Article IV, paragraph 2, of the Geneva Agreement, whereby all the means of peaceful settlement under Article 33 of the Charter are exhausted, including judicial settlement.

8. Unfortunately, the Court itself, in interpreting Article IV, paragraph 2, has not allowed the terms of this second alternative to produce fully their effects, thereby departing from "one of the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence, namely that of effectiveness" (*Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 25, para. 51; see also *Aegean Sea Continental Shelf (Greece* v. *Turkey), Judgment, I.C.J. Reports 1978*, p. 22, para. 52; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 125-126, para. 133).

9. The Court has merely noted that the final phrase of Article IV, paragraph 2, does not call into question the consent of both Parties to judicial settlement (see paragraph 86 of the Judgment). According to the Court, "a judicial decision declaring the 1899 Award to be null and void without delimiting the boundary between the Parties might not lead to the definitive resolution of the controversy, which would be contrary to the object and purpose of the Geneva Agreement" (paragraph 86 of the Judgment). In this case, however, the Court has been seised of a specific dispute which arose in 1962, concerning the validity of the Arbitral Award of 3 October 1899, and not of another quite distinct dispute, concerning the delimitation of the land boundary between the two States, which had arisen in the nineteenth century and was settled with *res judicata* effect by the Arbitral Award of 3 October 1899. And even if the Court were to find that the 1899 Award was invalid, it would be for the two Parties, in any event, to draw the necessary conclusions as to the state of their border and the dispute that would still exist between them on that subject. And it is for them, if necessary, to choose the means of peaceful settlement of such a dispute.

10. Thus, by merging these two quite distinct disputes, which arose at different points in time, the Court has artificially come to declare itself competent under Article IV, paragraph 2, of the Geneva Agreement, to entertain Guyana's Application "in so far as it concerns the validity of the Arbitral Award of 3 October 1899 and the related question of the definitive settlement of the land boundary dispute" (see paragraph 138, point (1)). In doing so, the Court has engaged in an interpretation contrary to the ordinary meaning of Article IV, paragraph 2, of the Geneva Agreement, ignoring the alternative provided for in that provision. Thus, it has held that, by the first part of this provision, "the Parties conferred on the Secretary-General the authority to choose the most appropriate means for a definitive resolution of the controversy", including through arbitration and judicial settlement (see paragraphs 83-84 and 115). But is this sufficient to infer, as the Court blithely does, that the Parties have consented to its jurisdiction? That is what it does, however, in concluding that the Parties have consented by virtue of Article IV, paragraph 2, to judicial settlement, i.e. to settlement by the International Court of Justice, as chosen by the Secretary-General. But according to the ordinary meaning of Article IV, paragraph 2, the means of settlement under Article 33 of the Charter of the United Nations may be exhausted without the dispute being resolved. And that applies to the only dispute at issue here, as provided for by the Geneva Agreement, namely that concerning the validity of the Arbitral Award. In this regard, the authors of the text of the Agreement intended to confer on the Secretary-General the choice of the means provided for in Article 33 of the Charter, and not the possibility of consenting, in their place, to the jurisdiction of the Court.

11. After a formal exercise in interpretation, the Court concludes that "by conferring on the Secretary-General the authority to choose the appropriate means of settlement of their controversy, including the possibility of recourse to judicial settlement by the International Court of Justice, Guyana and Venezuela consented to its jurisdiction" (paragraph 115 of the Judgment). Such a delegation by the two States of their power to consent to the jurisdiction of the Court finds no clear and unequivocal basis in the text of the Geneva Agreement, which refers only to the choice of one of the means of settlement provided for in Article 33 of the Charter. In my opinion, it goes without saying that the choice of the International Court of Justice does not dispense with compliance with its Statute, which requires the prior consent of States to its jurisdiction. Indeed, in international practice, there is no precedent in which States can be said to have delegated to a third party, such as the Secretary-General, their power to consent to the Court's jurisdiction. But it is not just any delegation that is involved here! It would not be subject to any temporal limitation. It would open the possibility for the Secretary-General of the United Nations, simply by letter and at any time, to affirm the

Parties' consent for their dispute to be submitted to the Court merely at the request of one of them. It was only after more than 50 years, and six Secretaries-General later, that Mr. António Guterres addressed his letter to both Parties on 30 January 2018 (reproduced in paragraph 103 of the Judgment). It should be noted that he was apparently not convinced that the choice of the International Court of Justice automatically opened up the possibility for one or other Party to refer the matter directly to the Court. Indeed, he offered the Parties the benefit of his continued good offices, stating: "should both Governments accept the offer of a complementary good offices process, I believe this process could contribute to the use of the selected means of peaceful settlement" (paragraph 103 of the Judgment). This is surely to say that, once the means of settlement has been chosen, the Parties must still agree to implement it.

12. The Court has preferred to rely on the object and purpose of the Geneva Agreement, which seeks a definitive settlement of the dispute between the two Parties, using the means provided for in Article 33 of the Charter (paragraphs 73-74 and 114 of the Judgment). It has deduced from this that they have delegated to the Secretary-General the power to consent in their place to the jurisdiction of the Court. However, the pursuit of such an objective does not in itself imply that the Parties have delegated to the Secretary-General the power to consent in their stead to the jurisdiction of the International Court of Justice.

13. Finally, the Court should have been all the more attentive in examining its jurisdiction and in interpreting the Geneva Agreement, as this is a dispute with a high political and emotional impact, concerning as it does the validity of the Arbitral Award of 3 October 1899 regarding the boundary between Venezuela and Guyana, from a time when the latter was still a colony of the United Kingdom. In my view, it is only through a rigorous interpretation of the consent of the Parties to its jurisdiction that the Court will enhance its own credibility and the trust it enjoys among States parties to the Statute.

(Signed) Mohamed BENNOUNA.

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DECLARATION OF JUDGE GAJA

Obligation under a treaty to settle a dispute according to one of the means stipulated in Article 33 of the Charter of the United Nations — Referral to a decision of the Secretary-General of the United Nations on the choice of means of settlement — Decision implying an obligation for the Parties to resort to judicial settlement — Whether it confers jurisdiction on the Court — Need for the consent of both Parties — Object and purpose of the treaty.

1. While I concur with the view of the majority that the Parties are bound to submit their dispute to the Court in pursuance of Article IV, paragraph 2, of the 1966 Geneva Agreement, I do not share the opinion that, as a consequence of the decision of the Secretary-General of the United Nations, the Court has jurisdiction over the dispute irrespective of whether the Parties have given their consent to that effect.

2. According to Article IV of the Geneva Agreement, failing the choice by the Parties of "one of the means of peaceful settlement provided in Article 33 of the Charter of the United Nations", "the decision as to the means of settlement" to be used shall be referred to the Secretary-General. At first, he chose good offices. Article IV, paragraph 2, sets forth that, when "the means so chosen do not lead to a solution of the controversy", the Secretary-General "shall choose another of the means stipulated in Article 33 of the Charter of the United Nations". Accordingly, the Secretary-General, having considered that the good offices process had failed to settle the controversy, addressed on 30 January 2018 letters to both Parties by which he communicated that he had "chosen the International Court of Justice as the means that is now to be used for its solution" (Application of Guyana, Annex 7). In consequence, supposing that the decision of the Secretary-General was legitimate, as the Court rightly assessed, the Parties are now under an obligation to submit their dispute to the Court.

3. For the obligation to resort to judicial settlement to arise, there is no need for the Secretary-General's decision to be confirmed by an agreement between the Parties. However, the existence of an obligation for the Parties to comply with the Secretary-General's decision on the means of settlement to be used does not necessarily imply that the chosen means can be implemented without the consent of both Parties. Leaving judicial settlement aside for the moment, the implementation of any of the means listed in Article 33 of the Charter of the United Nations requires their agreement. For instance, resort to mediation implies, at the very minimum, an agreement of the parties on who is going to act as mediator. Similarly, recourse to arbitration requires an agreement of the parties on the appointment of the arbitrators and on conferring jurisdiction to the arbitral tribunal. With regard to judicial settlement, there is the possibility that jurisdiction be conferred on the Court without an agreement providing for additional specifications, for instance if the parties have made declarations under the optional clause covering the dispute. However, that does not necessarily lead to the conclusion that, when judicial settlement is chosen, no agreement is required for conferring jurisdiction on the Court.

4. Had the specific choice of judicial settlement been made directly by the parties, that choice could have been understood in the sense that it was sufficient to confer jurisdiction on the Court. When a compromissory clause does not specify whether it bestows jurisdiction on the Court or only binds the parties to conclude a special agreement for that purpose (as a *pactum de contrahendo*), the Court's jurisprudence tends to interpret the clause as conferring jurisdiction on the Court. Reference may be made, for example, to the Judgments in the *South West Africa* cases (*(Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 344) and in *United States Diplomatic and Consular Staff in Tehran* (*(United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 27, para. 52). The same approach may be detected in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (*(Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, pp. 18-19, para. 35) with regard to an agreement providing for the judicial settlement of an existing dispute.

5. The situation is different in the present case. Judicial settlement is certainly included in the reference to the list of the means to be resorted to under Article IV of the Geneva Agreement, but this provision is not a compromissory clause or a special agreement by which the Parties confer jurisdiction on the Court. The choice to resort to judicial settlement as the means for resolving the dispute results from the determination of a third party. The Parties have not yet expressed a common will to submit their dispute to the Court. They are bound to consent to the Court's

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jurisdiction, whatever form their consent will take. Only once the Parties have so agreed would there be a case "which the parties refer" to the Court according to Article 36, paragraph 1, of its Statute.

6. The decision of the Secretary-General was not based on consent to judicial settlement given by the Parties. In his letters to the Parties of 30 January 2018, he recalled that the choice of the Court as "the next means of settlement" had been announced by his predecessor "unless the Governments of Guyana and Venezuela jointly requested that I refrain from doing so". There is no reference to consent given by the Parties to judicial settlement of the controversy. Moreover, the Secretary-General observed that "a complementary good offices process", if accepted by the Parties, "could contribute to the use of the selected means of peaceful settlement". This suggests that the Secretary-General envisaged that a good offices process would assist the Parties in negotiating a special agreement for submitting the dispute to the Court.

7. As it appears from the title, the object and purpose of the Geneva Agreement is to "resolve the controversy . . . over the frontier between Venezuela and [Guyana]". This does not imply that, in order to achieve the object and purpose of the treaty, one of the means for settling the dispute should be interpreted in a way that would make it the only means that does not require for its implementation the consent of the Parties and moreover leads to a binding decision. In the Geneva Agreement, as well as in Article 33 of the Charter to which the treaty refers, recourse to the Court is an option that is not given any priority over other means of settlement.

8. It is true that if, notwithstanding the obligation to resort to judicial settlement, one of the Parties refrained from giving its consent to the conferral of jurisdiction on the Court, judicial settlement would fail. However, this is what is likely to occur with regard to whichever means of settlement that the Secretary-General may choose if the Parties do not agree to its implementation. The last sentence of Article IV, paragraph 2, of the Geneva Agreement reinforces the point that the choice of any of the means stipulated in Article 33 of the Charter, including recourse to the Court, does not necessarily lead to the settlement of the dispute. It envisages the possibility that the controversy may not be "resolved" even when "all the means of peaceful settlement there contemplated have been exhausted".

9. In conclusion, the Parties are, in my opinion, under an obligation to resort to judicial settlement and therefore to confer jurisdiction on the Court. Pending consent to that effect, the Court does not yet have jurisdiction on the dispute.

(Signed) Giorgio GAJA.

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DECLARATION OF JUDGE ROBINSON

1. I am in agreement with the finding in the *dispositif* of the Judgment. I wish however to make some brief comments on the case.

2. In the Geneva Agreement, sequence and stages are everything. The sequence follows a path along the stages of various means of settlement; in this process the failure of a particular means of settlement to resolve the controversy sets the stage for the employment of another means of settlement for the same purpose. In the circumstances of this case, this approach leads to two results. First, in the final stage, the means of settlement selected is such that it will resolve the controversy. Second, by the time the final stage of Article IV (2) has been reached, the Parties have consented to accept the means of settlement selected by the Secretary-General of the United Nations, that is, the International Court of Justice, thereby consenting to the jurisdiction of the Court over the controversy. This result has a special significance since the Geneva Agreement does not have the usual compromissory clause in a treaty empowering a party to submit to the Court a dispute concerning its interpretation or application. A compromissory clause reflects the consent of the parties to a treaty to the jurisdiction of the Court. However, it is settled that consent to the jurisdiction of the Court does not have to be expressed in a particular form. The Judgment itself makes this point in paragraph 112 as follows: "Both this Court and its predecessor have previously observed in a number of cases that the parties are not bound to express their consent to the Court's jurisdiction in any particular form." Consequently, in the instant case, the Court has to satisfy itself that, on the basis of the Geneva Agreement and any other relevant material, the Parties have consented to its jurisdiction.

3. Article I of the Geneva Agreement provides for the establishment of a Mixed Commission to find a solution for the practical settlement of the controversy between the two countries arising from Venezuela's argument that the Award of 1899 was null and void. Article II sets out the procedure for the establishment of the Mixed Commission and Article III provides that the Commission was to submit reports at six-month intervals over a period of four years.

4. Article IV (1) provides that, if within a period of four years the Mixed Commission had not arrived at "a full agreement for the solution of the controversy", it was to refer any outstanding questions to the two countries, which were obliged to choose one of the means of settlement in Article 33 of the Charter of the United Nations.

5. Then comes the important paragraph 2, which may be divided into two stages. In accordance with the first stage, failing agreement between the Parties within three months of receiving the final report on the choice of one of the means of settlement in Article 33, the Parties were obliged to "refer the decision as to the means of settlement to an appropriate international organ upon which they both agree or, failing agreement on this point, to the Secretary-General of the United Nations". Significantly, in the circumstances of this case, what has been referred to the Secretary-General is not simply the decision as to the means of settlement but rather, the decision as to the choice of the means of settlement. Since the Parties failed to agree on referring the decision as to the means of settlement to an appropriate international organ, that decision was referred to the Secretary-General. In the ordinary meaning of the word "decide", to decide a matter is to bring that matter to a definitive resolution. Thus, the effect of the referral of the decision as to the means of settlement to the Secretary-General is to confer on him the power to bring to a definitive resolution the question of the means of settlement. Implicit in the word "decision" is the notion of an outcome that is binding, and not merely recommendatory.

6. In the second stage of the process, paragraph 2 stipulates that, in the event that the means chosen by the Secretary-General does not lead to a solution of the controversy, he was obliged to "choose another of the means stipulated in Article 33 of the Charter of the United Nations, and so on until the controversy has been resolved or until all the means of peaceful settlement there contemplated have been exhausted". The means of good offices was employed by four Secretaries-General over a period of 27 years, without producing a solution to the controversy. Consequent on that failure, the Secretary-General, acting on the authority vested in him by the Parties, stated on 30 January 2018 that in light of the lack of progress in resolving the controversy, he had "chosen the International Court of Justice as the means to be used for the solution of the controversy". Four points may be made.

7. First, Articles I, II, III and IV establish a sequence in the use of various means for the settlement of the controversy. Following the failure of the various means of settlement in Articles I, II, III and the first stage of Article IV (2), we are left in the second stage of Article IV (2) with a Secretary-General on whom the Parties have conferred the power to make a binding decision as to the means of settlement.

8. Second, by agreeing in the first stage of Article IV (2) to refer the decision as to the means of settlement to the Secretary-General, the Parties not only empower and require the Secretary-General to make a decision on the choice of the means of the settlement, but also express their agreement with the choice made by the Secretary-General, and thereby confer, on the particular means selected by him: the International Court of Justice, jurisdiction over the controversy. The Court's jurisdiction is therefore established pursuant to Article 36 (1) of the Statute, which provides for its jurisdiction on the basis of "treaties", the Geneva Agreement being the relevant treaty. Thus, the Court has satisfied the requirement under Article 53 (2) of the Statute of ensuring that it has jurisdiction in a case where a party does not appear.

9. Third, a proper reading of Article IV (2), and indeed Article IV as a whole, does not yield the conclusion that the agreement of both Parties is needed for the institution of proceedings before the Court. That is so because, when in the first stage of Article IV (2) the Parties refer the decision as to the means of settlement to the Secretary-General, they are agreeing that the decision of the Secretary-General is binding on both of them; consequently, it is a decision on the basis of which either of them can unilaterally institute proceedings before the Court. Reading Article IV (2) as requiring the other Party to agree to the institution of proceedings would run counter to the object and purpose of the Agreement to find a solution for the controversy, since it is very likely that the other Party would not agree to such a course.

10. Thus, once the Secretary-General had identified the International Court of Justice as the means of settlement, it was perfectly proper for either Guyana or Venezuela to file an application before the Court in accordance with Article 40 (1) of the Statute. In this case, it was Guyana that filed an application.

11. Fourth, there is nothing in the second stage of Article IV (2) that obliges the Secretary-General to exhaust some or all of the non-judicial means of settlement in Article 33 before he is entitled to choose judicial settlement by the Court for the resolution of the controversy. Consequent on the failure of good offices to provide a solution, the Secretary-General was entitled and required to choose any other of the means in Article 33 in his search for a solution to the controversy. It is logical and understandable that, following the failure of good offices, used over a period of 27 years, the Secretary-General would choose a means of settlement that would produce a result that was binding on the Parties. In choosing the International Court of Justice, the Secretary-General settled on a means of settlement, the result of which would be binding on the Parties. This choice is consistent with the intention of the Parties in adopting the Geneva Agreement to provide for a dispute settlement procedure that would lead to a final and complete resolution of the controversy.

12. The real issue for the Court is whether, in choosing the International Court of Justice as a form of judicial settlement under Article 33 of the Charter, the Secretary-General acted within the scope of his powers under Article IV (2) of the Geneva Agreement. For example, was he obliged to choose a means of settlement other than judicial settlement, or was he obliged to choose a means of settlement in a particular order, and it was not the turn of judicial settlement to be chosen? The answer is no. The Secretary-General was empowered to "choose another of the means" of settlement in Article 33 of the Charter. He was left with the choice of any other means of settlement from the suite of means set out in Article 33. The second stage of Article IV (2) obliges the Secretary-General to "choose another of the means stipulated in Article 33 of the Charter of the United Nations, and so on until the controversy has been resolved or until all the means of peaceful settlement there contemplated have been exhausted". It has been argued that the Secretary-General may have recourse to all the means of settlement set out in Article 33 without the dispute being resolved. That argument is fallacious because the means of settlement included two that were capable of definitively resolving the dispute, namely arbitration and judicial settlement. Therefore, once the Secretary-General chose the International Court of Justice, there was no need for him to have recourse to any of the other means set out in Article 33, because the International Court of Justice as a judicial body would settle the dispute by arriving at a decision that would be binding on the Parties. Intriguing though the questions raised by that argument might be, the phrase "or until all the means of peaceful settlement there

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contemplated have been exhausted" having been rendered inoperative, has no practical consequences in the circumstances of this case.

13. In light of the foregoing, I respectfully disagree with the inclusion of paragraph 86 in the Judgment. In my view, the cautionary note sounded by the paragraph is not warranted in the circumstances of this case.

(Signed) Patrick L. ROBINSON.

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DISSENTING OPINION OF JUDGE GEVORGIAN

Disagreement with the Court's finding that the Court has jurisdiction — The Court has not established that Venezuela has provided unequivocal consent to the Court's jurisdiction — The Secretary-General's choice of means of settlement under Article IV (2) of the Geneva Agreement is not legally binding upon the Parties — The Court's textual analysis of Article IV (2) does not establish that the Secretary-General's choice is binding — The object and purpose of the Geneva Agreement is best understood as facilitating an agreed resolution of the dispute — The Court ignores language in the Geneva Agreement which contradicts its conclusion — The documents referred to by the Court do not support the view that the Secretary-General's choice of the means of settlement is legally binding – Other reasons given by the Court for finding the required consent are unconvincing.

1. I have joined the Court's unanimous finding that it lacks jurisdiction to entertain the claims of the Co-operative Republic of Guyana (hereinafter "Guyana") which arise from events that occurred after the signature of the Geneva Agreement. However, I disagree with the Court's conclusion that it has jurisdiction to entertain Guyana's Application in so far as it concerns the validity of the Arbitral Award of 3 October 1899 and "the related question of the definitive settlement of the land boundary dispute" between the Parties. In this opinion, I shall set forth the reasons for my disagreement with the Court's approach.

2. In my view, the Court's Judgment in this case undermines the fundamental principle of consent of the parties to its jurisdiction and is inconsistent with both the Court's Statute and its jurisprudence. In its prior judgments, the Court has established not only that the consent of the parties is required for it to exercise jurisdiction, as is provided in its Statute, but also that such consent must be "certain", "unequivocal" and "indisputable"[1]. The Court in its Judgment ignores this high threshold for finding consent, reaching the unprecedented decision to exercise jurisdiction on the basis of a treaty that does not even mention the Court, let alone contain a compromissory clause. This is especially problematic because one of the Parties has consistently refused to bring the present dispute before the Court, as was most recently demonstrated by its decision not to participate in the proceedings, though it presented a Memorandum with serious legal arguments that, in my view, did not receive due consideration from the Court. Moreover, in the context of this dispute, the Court should have taken into account that the case involves national interests of the highest order such as rights to large amounts of territory.

3. A key basis for the Court's flawed approach to the issue of consent is its finding that Article IV, paragraph 2 of the Geneva Agreement gives the Secretary-General of the United Nations the authority to issue a legally binding decision on the means of settlement to be employed by the Parties. In my view, this interpretation is not supported by the text of the Geneva Agreement or the Agreement's object and purpose. The Geneva Agreement was meant to assist the Parties in achieving an *agreed* resolution of their dispute, and not to subject the Parties to a particular form of dispute settlement against their will.

I. THE ALLEGEDLY BINDING NATURE OF THE SECRETARY-GENERAL's CHOICE OF THE COURT

4. In paragraph 74 of the Judgment, the Court concludes that "the Parties conferred on the Secretary-General the authority to choose, by a decision which is binding on them, the means to be used for the settlement of their controversy"[2]. This conclusion, in my view, is contrary to the text of the Geneva Agreement, which contains no indication whatsoever that the Secretary-General has the authority to make legally binding decisions. In this respect, moreover, the Court misinterprets the Geneva Agreement's object and purpose, ignoring key elements of the preamble and Article IV (2) which make absolutely clear that the true purpose of the Agreement is to facilitate "an agreed settlement"[3] to the Parties' dispute. The factors relied upon by the Court in support of its interpretation of the Geneva Agreement to me are not persuasive for the following reasons.

1. Text of the Geneva Agreement

5. In paragraph 72 of the Judgment, the Court analyses the provision in Article IV (2) that the Parties "shall refer the decision as to the means of settlement . . . to the Secretary-General" and makes a finding that the term "shall"

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"should be interpreted as imposing an obligation on States parties"; that the term "refer" "conveys the idea of entrusting a matter to a third party"; and that the term "decision" "is not synonymous with 'recommendation' and suggests the binding character of the action taken by the Secretary-General as to his choice of the means of settlement". On this basis, the Court arrives at the conclusion that "the Parties made a legal commitment to comply with the decision of the third party on whom they conferred such authority"[4]. I cannot agree with this interpretation, as the terms "shall" and "decision" do not necessarily indicate the creation of a legal obligation.

6. While the Court has previously found that the word "shall" imposes an obligation on State parties in the context of Article 4 (1) of the United Nations Convention against Transnational Organized Crime (also known as the "Palermo Convention")[5], the Court in the present case provides no reason to consider that this word should be given an identical construction in Article IV (2) of the Geneva Agreement. In fact, the Court has found, in other cases, that treaty provisions containing the word "shall" do *not* impose binding legal obligations upon the parties[6]. Moreover, the term "shall refer" does not necessarily indicate that the Parties entrusted a third party with the authority to make a legally binding decision.

7. While the Court now assumes that the word "decision" is "not synonymous with 'recommendation'", the Court itself has made clear, in past cases, that the term "decision" *can* in fact mean "recommendation", and therefore does not necessarily indicate a legal obligation of compliance. The Court observed with regard to "decisions" of the General Assembly under Article 18 of the United Nations Charter that "[t]hese 'decisions' . . . include certain recommendations" in addition to decisions with dispositive force and effect[7]. The Court thus acknowledged that the reference to "decisions" in Article 18 did not exclusively refer to legally binding decisions.

8. In sum, I am of the view that the Court's textual analysis of Article IV (2) does not establish that the Secretary-General's choice as to the means of settlement is legally binding upon the Parties.

2. Object and purpose of the Geneva Agreement

9. The Court also purports to rely on the object and purpose of the Geneva Agreement, which it characterizes in paragraph 73 of the Judgment as "ensur[ing] a definitive resolution of the controversy between the Parties"[8]. This interpretation of the Agreement's object and purpose, in my view, is flawed, as it ignores several relevant portions of the Agreement's preamble and text.

10. First, the Court omits any discussion of the fourth paragraph of the Geneva Agreement's preamble, which provides that any outstanding controversy between the parties should "be amicably resolved in a manner acceptable to both parties". This statement should not be taken to be a mere platitude. The Court recently observed, in *Ukraine* v. *Russia*, that "references to the 'amicable solution'" of a dispute in Articles 12 and 13 of International Convention on the Elimination of All Forms of Racial Discrimination (CERD) indicate that "the objective of the CERD Committee procedure is for the States concerned to reach an *agreed settlement* of their dispute"[9]. There is even greater reason to find that the objective of the Geneva Agreement is to reach an agreed settlement of the dispute, by a solution "acceptable to both parties".

11. Thus, I am of the view that the Geneva Agreement's true object and purpose is to assist the Parties in reaching an agreed resolution of the present dispute. If the object and purpose of the Geneva Agreement is so framed, the Secretary-General's role could be conceived of as similar to that of a conciliator entrusted with helping the Parties reach an agreed solution to the dispute rather than imposing a means of settlement on them.

12. A second significant flaw with the Court's approach to the object and purpose of the Geneva Agreement, in my view, is that it gives inadequate consideration to the second sentence of Article IV (2). That sentence provides:

> "If the means so chosen do not lead to a solution of the controversy, the said organ or, as the case may be, the Secretary-General of the United Nations shall choose another of the means stipulated in Article 33 of the Charter of the United Nations, and so on *until the controversy has been resolved or until all the means of peaceful settlement there contemplated have been exhausted*." (Emphasis added.)

13. This provision requires the Secretary-General to continue choosing from the means of settlement listed in Article 33 until one of two possible outcomes is reached: *either* (1) the controversy between the Parties is resolved,

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or (2) all the means of peaceful settlement contemplated in Article 33 have been exhausted. So, Article IV (2) contains no presumption that the controversy between the Parties will definitively be resolved.

14. This provision in Article IV (2), in my view, strongly indicates that the Parties, in concluding the Geneva Agreement, did not intend to subject themselves to a binding method of dispute resolution that would guarantee a definitive resolution of the controversy. If this had been their intent, they could have left out the final portion of Article IV (2), instead ending that provision with the phrase "and so on until the controversy has been resolved". Article IV (2) is better interpreted as requiring agreement by the Parties before the Secretary-General's choice of the means of settlement may be implemented. Such an interpretation would explain how the Secretary-General's choice of a binding means such as judicial settlement could leave the controversy unresolved, namely by allowing for the possibility that the Parties would fail to agree on the implementation of the Secretary-General's choice. Therefore, in my view, the final sentence of Article IV (2) provides additional evidence that the Geneva Agreement aims to facilitate an *agreed* resolution of the controversy, and not a resolution that is imposed upon the Parties by any third party.

15. In paragraph 86 of the Judgment, the Court provides an unconvincing alternative explanation for the language at the end of Article IV (2). It suggests that this language could account for a judicial decision which only partially addresses the Parties' dispute, but it admits that such a scenario would be contrary to what it considers the object and purpose of the Geneva Agreement[10]. In other words, rather than acknowledging that the text of Article IV (2) is inconsistent with its interpretation of the Agreement's object and purpose, the Court contends that the Parties chose to include language in Article IV (2) that would only come into play if the purpose of the Agreement were defeated.

16. In my view, this is a strained and implausible interpretation of Article IV (2). If the Parties had truly envisaged that the mechanism established by the Geneva Agreement would ensure a definitive resolution of the controversy, there would have been no reason for them to include language contemplating the Agreement's failure to achieve such a resolution. The Agreement's object and purpose consists of facilitating an agreed solution to the controversy.

3. Additional factors

A. Documents relied upon by the Court

17. The Court cites a number of documents promulgated after the conclusion of the Geneva Agreement in order to prove that the Parties (and Venezuela in particular) agreed with its interpretation of Article IV (2). In my view, none of these documents contains any acknowledgment that the Secretary-General's choice of means was meant to be legally binding upon the Parties. Rather than supporting the Court's position, the documents cited in the Judgment only further indicate that there has been no "unequivocal" and "indisputable" expression of consent to the Court's jurisdiction, as required by the Court's jurisprudence.

18. The Court first cites in paragraph 75 an excerpt from a document explaining Venezuela's motives for ratifying the Protocol of Port of Spain, which imposed a 12-year moratorium on the operation of Article IV of the Geneva Agreement. In this document, it is stated that

> "the possibility existed that . . . an issue of such vital importance . . . as the determination of the means of dispute settlement, would have left the hands of the two directly interested Parties, to be decided by an international institution chosen by them, or failing that, by the Secretary-General of the United Nations"[11].

19. Nothing in this statement indicates that Venezuela considered Article IV (2) to confer binding decision-making authority upon the Secretary-General. At most, it reflects Venezuela's understanding that, if Article IV (2) were to be implemented, the choice of the means of settlement would no longer be the object of *direct negotiations* between the Parties. Indeed, the same document cited by the Court elsewhere states that an "essential advantage" of the Protocol of Port of Spain is the fact that it "[a]voids our border dispute with Guyana from *leaving* (in a very short period, possibly three months) *direct negotiations* between the interested Parties to passing into the hands of third parties"[12]. Indeed, once the Parties referred the choice of means of settlement to the Secretary-General, they were no

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longer engaging in direct negotiations, but rather other forms of peaceful dispute settlement (such as good offices). This does not mean, however, that the Secretary-General had the authority to issue binding decisions.

20. The Court also cites, in paragraph 77, a statement made before the Venezuelan National Congress on 17 March 1966 by the then-Minister for Foreign Affairs of Venezuela, Mr. Ignacio Iribarren Borges on the occasion of the Geneva Agreement's ratification. The Minister is quoted as stating that "[t]he only role entrusted to the Secretary-General of the United Nations [was] to indicate to the parties the means of peaceful settlement of disputes . . . provided in Article 33"[13].

21. The Minister's statement does not support the argument that the Parties are bound by the Secretary-General's choice. If anything, this statement suggests that the Secretary-General was *not* viewed as capable of issuing binding decisions. The Court does not "indicate" solutions to a dispute, but issues a definitive ruling. It is a conciliator or mediator who indicates solutions to a dispute, with the ultimate decision being left to the parties.

22. The Court cites in paragraph 87 a joint statement issued by the Venezuelan and United Kingdom Ministers for Foreign Affairs, along with the Prime Minister of British Guiana. That statement, issued contemporaneously with the signing of the Geneva Agreement, states that "an agreement was reached whose stipulations will enable a definitive solution" to the controversy between the Parties[14]. Importantly, this joint statement does *not* state that the Geneva Agreement will "ensure" or "guarantee" a definitive solution of the controversy. Rather, use of the term "enable" indicates an understanding on the part of the Parties that the Geneva Agreement made a definitive solution *possible*. This again is consistent with an interpretation of the Agreement's object and purpose as facilitating an agreed solution to the controversy, rather than "ensur[ing] a definitive resolution" thereof.

23. In sum, I do not consider that any of the documents relied upon by the Court establish that the Parties understood the Secretary-General's choice of means of settlement to be binding.

B. FACTORS OMITTED BY THE COURT

24. In my view, the Court gives inadequate attention to the fact that, prior to the conclusion of the Geneva Agreement, Venezuela had manifested on several occasions its unwillingness to have issues related to its territory decided by third parties without its clear consent. In this respect, it should be noted that Venezuela had concluded, in 1939, a bilateral treaty with Colombia providing, in general, for submission of disputes to conciliation or judicial settlement. However, Article II of that treaty expressly excluded any disputes relating to the territorial integrity of the Parties from being submitted to third-party settlement[15]. A similar 1940 bilateral treaty between Venezuela and Brazil required, at Article IV, that the Parties attempt to conclude a special agreement before any disputes could be submitted to judicial settlement[16]. These treaties reflect Venezuela's unwillingness, prior to 1966, to subject itself to judicial settlement without its express consent, particularly with regard to territorial disputes, and should have been taken into account by the Court.

II. Other arguments concerning the Parties' alleged consent to judicial settlement by the Court

25. Apart from the supposedly binding nature of the Secretary-General's decision-making authority, the Court rests on two other arguments in attempting to demonstrate the Parties' consent to the Court's jurisdiction. First, it states in paragraph 82 that, by including a *renvoi* to Article 33 of the United Nations Charter (which in turn refers to judicial settlement) in Article IV (2), the Parties "accepted the possibility of the controversy being settled by that means"[17]. It adds that if the Parties had wished to exclude judicial settlement, they could have done so during their negotiations[18]. However, there is a significant difference between the Parties "accept[ing] the possibility" of recourse to judicial settlement and their unequivocal consent in advance to such settlement. Moreover, by the Court's own logic, if the Parties had wished to provide consent in advance to judicial settlement by the Court, without the need for further agreement between them, they could have included an express statement to this effect in Article IV (2). However, they chose not to do so.

26. Secondly, the Court suggests in paragraph 114 that Article IV (2)'s reference to the decision of the Secretary-General would be deprived of *effet utile* if that decision were subject to the further consent by the Parties for its implementation. However, this argument does not account for the possibility that the Secretary-General could have a non-

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binding role in the dispute settlement process, akin to that of a conciliator. While it is true that the Secretary-General's role only comes into play when the Parties have otherwise failed to agree on a means of settlement, this does not mean that his intervention in a non-legally binding capacity would necessarily be unhelpful. Article 33 of the United Nations Charter makes clear that negotiation is a form of dispute settlement separate from conciliation or mediation, indicating that there is distinct value to the latter procedures even if the third party in question is not empowered to issue binding decisions.

III. Conclusion

27. Given the foregoing, I am of the view that the Geneva Agreement contains no certain, unequivocal indication of the Parties' consent to the Court's jurisdiction, and therefore the Court has erred in finding that it has jurisdiction to entertain Guyana's Application.

28. The dangers of the Court's approach are well illustrated by its ultimate conclusion that the Court has jurisdiction over the question concerning the "definitive settlement of the land boundary dispute" between Guyana and Venezuela[19]. This would be a decision of potentially enormous significance for the Parties, and thus the fact that the Court bases its finding of jurisdiction to make this decision upon an instrument that contains no compromissory clause and does not even mention the Court is cause for concern.

29. Rather than basing itself upon an unequivocal, indisputable indication of Venezuela's consent, as its jurisprudence requires, the Court goes looking for reasons to exercise jurisdiction, relying in particular on the presumed intentions of the Parties and upon a series of statements that are, at best, of ambiguous meaning. The Court ignores language in the text of the Geneva Agreement that squarely contradicts its position and is unable to point to any express statement evidencing either consent to this Court's jurisdiction or an acknowledgment that the Secretary-General's choice of the means of settlement is legally binding. In my view, this approach is wrong and undermines the fundamental principle of consent by the parties to the jurisdiction of the Court.

(Signed) Kirill GEVORGIAN.

ENDNOTES

1 See *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France*), *Judgment, I.C.J. Reports 2008*, p. 204, para. 62.

2 See paragraph 74 of the present Judgment.

3 See *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 599, para. 109.

4 See paragraph 72 of the present Judgment.

5 *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, p. 321, para. 92.

6 *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1996*, pp. 812-814, paras. 24-28.

7 *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 163.

8 See paragraph 73 of the present Judgment.

9 *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 599, para. 109; emphasis added.

10 See paragraph 86 of the present Judgment.

11 See paragraph 75 of the present Judgment.

12 See Memorial of Guyana, Ann. 47, para. 8 *(b)*; emphasis added.

13 See paragraph 77 of the present Judgment.

14 See paragraph 87 of the present Judgment.

15 Treaty of non-aggression, conciliation, arbitration and judicial settlement, signed at Bogotá on 17 December 1939, United Nations, *Treaty Series (UNTS)*, Vol. 1257, Part Two, p. 463, Art. II.

16 Treaty for the pacific settlement of disputes, signed at Caracas on 30 March 1940, *UNTS*, Vol. 51, Part Two, p. 308, Art. IV.

17 See paragraph 82 of the present Judgment.

18 *Ibid*.

19 See paragraph 138 (1) of the present Judgment.

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