INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING

ARBITRAL AWARD OF 3 OCTOBER 1899

CO-OPERATIVE REPUBLIC OF GUYANA

v.

BOLIVARIAN REPUBLIC OF VENEZUELA

MEMORIAL OF GUYANA

VOLUME I

19 NOVEMBER 2018

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CHAPTER I
INTRODUCTION

1.1 The Cooperative Republic of Guyana ("Guyana") instituted these proceedings against the Bolivarian Republic of Venezuela ("Venezuela") by filing an Application to the Court on 29 March 2018. In its Application, Guyana asks the Court to resolve the controversy that has arisen as a result of Venezuela's contention, formally asserted for the first time at the United Nations in 1962, that the 1899 Arbitral Award Regarding the Boundary between the Colony of British Guiana and the United States of Venezuela (the "1899 Award" or the "Award) is "null and void". In regard to jurisdiction, Guyana invoked the 30 January 2018 decision of the United Nations Secretary-General, António Guterres, to choose the Court as the means of settlement for the controversy, pursuant to the authority conferred upon him by the agreement of the parties reflected in 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 ("Geneva Agreement").[1]

1.2 By an Order dated 19 June 2018, following a meeting with the parties at which Venezuela indicated that it would not participate in the proceedings, the Court decided that the question of its jurisdiction would be determined

[1] 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, 561 U.N.T.S. 323 (17 Feb. 1966) ("Geneva Agreement"). AG, Annex 4.

separately prior to any proceedings on the merits. Accordingly, the Court fixed the time limit for the filing of the Memorial on Jurisdiction by Guyana as 19 November 2018 and the time limit for the filing of the Counter-Memorial on Jurisdiction by Venezuela as 18 April 2019. This Memorial is submitted pursuant to that Order.

1.3 Guyana is a small developing country in the northeast mainland of South America. It was first colonized by the Netherlands in the seventeenth century. In 1814, the Netherlands ceded title to the territory (which then comprised three colonies) to the United Kingdom. In 1831, the colonies were consolidated in a single colony, British Guiana, which was thereafter administered as a British colony for the next 135 years. Guyana achieved its independence on 26 May 1966. It is now the third smallest nation by geographic area, and the second smallest by population, on the South American continent. By contrast, its neighbour Venezuela is more than four times larger by territory and has a population more than forty times greater. In addition to its superior size and population, Venezuela is endowed with abundant natural resources (which are reported to include the largest proven oil reserves of any country globally).[2]

1.4 Guyana's Application arises from Venezuela's repudiation of a binding arbitral award, rendered by an international arbitral tribunal of eminent jurists exercising jurisdiction pursuant to the 1897 "Treaty Between

[2] *See* World Atlas, "The World's Largest Oil Reserves by County" (23 Oct. 2018) *available at* https://www.worldatlas.com/articles/the-world-s-largest-oil-reserves-by-country.html (last accessed 3 Nov. 2018). MG, Vol. IV, Annex 134.

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" ("Washington Treaty").[3] The Washington Treaty, the validity of which has never been disputed, was concluded for the explicit purpose of achieving a "*full, perfect, and final settlement*" of the border between Venezuela and what was then British Guiana.[4]

1.5 Venezuela fully embraced the validity and effectiveness of the 1899 Award for more than half a century – including by embarking upon a joint demarcation of the boundary determined by the Tribunal and repeatedly insisting on strict adherence to the terms of the 1899 Award.[5] However, in 1962 Venezuela seized upon the advent of Guyana's independence to concoct an unfounded claim that the 1899 Award was null and void. On the footing of that abrupt reversal of its longstanding recognition of the validity and binding character of the 1899 Award and the resulting international boundary, Venezuela laid claim to more than two thirds of British Guiana's territory.

1.6 Shortly before Guyana attained independence in 1966, the United Kingdom, Venezuela and the Government of British Guiana concluded the Geneva Agreement. It was intended to establish a binding and effective mechanism for assuring that there would be a peaceful and permanent

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[3] 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, 5 U.K.T.S. 67 (2 Feb. 1897). AG, Annex 1.

[4] *Ibid.*, p. 76 (emphasis added).

[5] *See infra* paras. 1.22-1.28.

resolution of the controversy arising from Venezuela's sudden and unexpected repudiation of the 1899 Award four years earlier.

1.7 Today, more than half a century later, that controversy remains unresolved. The 52 years following the conclusion of the Geneva Agreement have seen the parties unsuccessfully attempt to resolve the controversy through a four-year Mixed Commission (1966-70), a twelve-year moratorium (1970-82), a seven-year process of consultations on a means of settlement (1983-90), and a twenty-seven-year Good Offices Process under the authority of the United Nations Secretary-General (1990-2017).

1.8 Finally, on 30 January 2018 Secretary-General António Guterres decided, pursuant to the authority vested in him by the parties in Article IV(2) of the Geneva Agreement, that the Good Offices Process had failed to achieve "significant progress … toward arriving at a full agreement for the solution of the controversy", and that, consequently, he had "chosen the International Court of Justice as the means that is now to be used for its solution."[6] Guyana's Application was made pursuant to the binding decision of the Secretary-General.

1.9 Throughout its existence as an independent State, Guyana has lived in the shadow of a claim to more than two thirds of its territory by its significantly larger, richer and more powerful neighbour. In recent years, the tenor of Venezuela's claims has become increasingly bellicose, imperilling

[6] *Letter* from Secretary-General of the United Nations to the President of the Cooperative Republic of Guyana (30 Jan. 2018), pp. 1-2. AG, Annex 7.

regional peace and security and blighting Guyana's development. Venezuela's territorial aspirations have also led to incursions into and occupation of Guyana's sovereign territory. Against this backdrop, there is an urgent need for an authoritative affirmation of the parties' international rights and obligations arising from the 1899 Award.

1.10 Since it emerged as a sovereign State after many decades of colonial rule, Guyana has consistently regarded the international rule of law as the bedrock of its relations with its neighbours. In accordance with its enduring respect for international law, Guyana therefore seeks an impartial and binding determination by the Court of the legal issues raised by Venezuela's repudiation of the 1899 Award, and an adjudication of its claims resulting from Venezuela's violations of its territorial integrity.

1.11 Guyana has brought its Application with the firm conviction that adherence to international agreements, respect for international judicial and arbitral awards, and respect for the inviolability of established territorial boundaries are crucial to maintaining amity between sovereign States.

1.12 Consistent with that conviction, Guyana's Application is founded on the mutual consent of the parties to the Court's exercise of jurisdiction, as enshrined in Article IV of the Geneva Agreement. It is made pursuant to a carefully considered decision by the United Nations Secretary-General to refer the controversy to the principal judicial organ of the United Nations. In so deciding, the Secretary-General has acted in accordance with the express terms of the procedures for the peaceful settlement of disputes agreed upon by the parties in Article IV(2). The jurisdiction of the Court – and its

preeminent suitability as a means of resolving this longstanding controversy – is clear and indisputable.

1.13 By denying the jurisdiction of the Court under the Geneva Agreement, Venezuela seeks to disregard its obligations under that treaty in order to repudiate its obligations arising from a binding arbitral award issued under another treaty. Guyana is confident that the Court, as the guardian of the international legal order, will not acquiesce in Venezuela's attempt to evade its international obligations in this way. As this Memorial will proceed to explain, there is nothing in the text of the 1966 Geneva Agreement or in the parties' subsequent conduct that calls into question the Secretary-General's authority to refer the controversy to the Court, or the Court's jurisdiction to determine Guyana's Application. Accordingly, Guyana requests that the Court accept the responsibility that has been solemnly entrusted to it by the parties and the Secretary-General under the binding framework of the Geneva Agreement.

I. The History of the Controversy

1.14 The discovery of gold in the area of the Upper Cuyuni River in the century led to diplomatic exchanges between the United Kingdom and Venezuela concerning the delimitation of a boundary line in the area. The United Kingdom and Venezuela both claimed the entire territory between the mouth of the Essequibo River in the east, and the Orinoco River in the west. By the latter part of the century, the conflicting territorial claims and differences over an agreed framework to determine the boundary raised the risk of armed conflict.

1.15 The United States encouraged both parties to resolve the conflict peacefully, and facilitated their agreement to submit their competing territorial claims to binding arbitration or judicial settlement. That agreement was enshrined in the Washington Treaty, signed by the United Kingdom and Venezuela. On 2 February 1897 the United Kingdom and Venezuela signed the Washington Treaty.[7] As the Preamble explained, the object and purpose of the Washington Treaty was:

> "… to provide for an amicable settlement of the question which has arisen between their respective Governments concerning the boundary between the Colony of British Guiana and the United States of Venezuela, hav[ing] resolved to submit to arbitration the question involved…."

1.16 To this end, Article I provided that:

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

1.17 Article II established the composition of the Arbitral Tribunal, which was made up of five eminent jurists. They included two senior British judges nominated by the Judicial Committee of Her Majesty's Privy Council, and two Justices of the United States Supreme Court (one nominated by the President of Venezuela and the other nominated by the Justices of the US Supreme Court). The fifth arbitrator and President of the Arbitral Tribunal,

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[7] 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, 5 U.K.T.S. 67 (2 Feb. 1897). AG, Annex 1. The instruments of ratification were subsequently exchanged on 14 June 1897.

the distinguished professor of international law Fyodor de Martens, was chosen by the four other arbitrators.

1.18 Article III of the Washington Treaty defined the jurisdiction of the Arbitral Tribunal in the following terms:

> "The Tribunal shall investigate and ascertain the extent of the territories belonging to, or that might lawfully be claimed by, the United Netherlands or by the Kingdom of Spain respectively at the time of the acquisition by Great Britain of the Colony of British Guiana, and shall determine the boundary-line between the Colony of British Guiana and the United States of Venezuela."

1.19 Article XIII made express provision for the binding force of the Award to be rendered by the Arbitral Tribunal:

> "The High Contracting Parties engage to consider the result of the proceeds of the Tribunal of Arbitration as a full, perfect, and final settlement of all the questions referred to the Arbitrators."

1.20 Following the establishment of the Arbitral Tribunal, the United Kingdom and Venezuela each submitted extensive written pleadings (including a detailed case and a detailed counter-case) together with several thousand pages of exhibits. Thereafter, between 15 June and 27 September 1899, the Arbitral Tribunal held a total of 54 oral hearings in Paris, at which the parties' respective factual and legal submissions were exhaustively articulated and explored.[8] Following a period of deliberations, the Arbitral

[8] A comprehensive record of the proceedings was published by Her Majesty's Stationery Office in 1899.

Tribunal delivered a unanimous Award on 3 October 1899. In light of the publication of voluminous records of the arguments of the parties and the copious evidence presented to the Arbitral Tribunal, and in line with practice at the time,[9] the Award itself was succinct.

1.21 The Award gave Venezuela the entire mouth of the Orinoco River, and the land on both sides. It gave the United Kingdom the land to the east extending to the Essequibo River – territory then considered less valuable than that awarded to Venezuela.

1.22 The outcome was acclaimed as a triumph by Venezuela. Typical was the comment of the Venezuelan Minister in London (the brother of the President) who had followed closely the proceedings in Paris and reported to his Government on 7 October 1899:

> "Greatly indeed did justice shine forth when in the determination of the frontier we were given the exclusive dominion over the Orinoco which was the principal aim which we sought to achieve through arbitration."[10]

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[9] For example, *see Award of the President of the United States under the Protocol concluded the eighteenth day of August, in the year one thousand eight hundred and ninety-four, between the Government of the Kingdom of Italy and the Government of the Republic of Colombia*, UNRIAA, Vol. XI, p. 394 (2 Mar. 1897). MG, Vol. II, Annex 2; *Award by His Majesty King Edward VII in the Argentine-Chile Boundary Case*, UNRIAA, Vol. IX, p. 37 (20 Nov. 1902). MG, Vol. II, Annex 5; His Majesty Victor Emmanuel's slightly longer two-and-a-quarter page, *Award of His Majesty The King of Italy with Regard to the Boundary Between the Colony of British Guiana and the United States of Brazil*, UNRIAA, Vol. XI, p. 21 (6 June 1904). MG, Vol. II, Annex 6.

[10] *Letter* from the Venezuelan Ambassador to the United Kingdom to the Venezuelan Minister of Foreign Affairs (7 Oct. 1899). MG, Vol. II, Annex 3.

1.23 The United States also hailed the Award for fulfilling the promise of the Washington Treaty to achieve a full, perfect and final determination of the disputed border. In his State of the Union Message to the United States Congress in December 1899, President William McKinley celebrated the Award and its acceptance by both parties. He observed that the Tribunal's decision had "*end*[*ed*] *a controversy which had existed for the greater part of the century*" and "*while not meeting the extreme contention of either party … appears to be equally satisfactory to both parties*."[11]

1.24 The following year, the United Kingdom and Venezuela embarked upon an extensive joint programme to achieve the physical demarcation of the border conclusively established by the Arbitral Award. A joint UK-Venezuelan Commission (the "Joint Commission") was established to carry out that task. Both States participated fully and without any reservation.

1.25 By 1905 the demarcation was completed. The Joint Commission produced an Official Boundary Map[12] and issued a Joint Declaration which recorded in relevant part:

> "… That they regard this Agreement as having a perfectly official character with respect to the acts and rights of both Governments in the territory demarcated; that they accept the

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[11] Government of the United States, *State of the Union Message to the United States Congress of President William McKinley* (5 Dec. 1899) (emphasis added). MG, Vol. II, Annex 4.

[12] Agreement Between the British and Venezuelan Boundary Commissioners with Regard to the Map of the Boundary (10 Jan. 1905) *reprinted in* Government of the Republic of Venezuela, Ministry of External Affairs, *Public Treaties and International Agreements of Venezuela, Vol. 3 (1920-25)* (1927). AG, Annex 3.

> points mentioned below as correct, the result of the mean of the observations and calculations made by both Commissioners together or separately, as follows….
>
> That the two maps mentioned in this Agreement, signed by both Commissioners, are exactly the same … containing all the enumerated details related to the demarcation, with the clear specification of the Boundary line according with the Arbitral Award of Paris."[13]

1.26 In the Joint Declaration, the Commissioners recommended a modification of the section of the direct line set in the award (from the source of the Wenamu River to Mount Roraima) to a more practical line that would follow the watershed of the rivers rather than cut them. Venezuela, however, refused to agree, insisting on strict adherence to the terms of the 1899 Award.[14]

1.27 The official acts of the Joint Commission were subsequently published in the official series as "The Acts of the Mixed Boundary Commission that constitute an international agreement" ("the 1905 Agreement") and filed under "Public Treaties and international agreements" of Venezuela.[15] Thereafter, both States worked together to maintain the border established by the Award.

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[13] *Ibid.*

[14] *Letter* from the Minister of Foreign Affairs of the Republic of Venezuela, to the U.K. Ambassador to Venezuela, No. CO 111/564 (12 Mar. 1908). MG, Vol. II, Annex 7.

[15] The 1905 Agreement was recorded in the official record of the Ministry of Foreign Affairs of Venezuela under "treaties and international agreements in force": Republic of Venezuela, Ministry of Foreign Affairs, *Public Treaties and International Agreements, Vol. III (1920-1925)* (1927), p. 604. MG, Vol. II, Annex 8.

1.28 In the 1930s and 1940s, Venezuela again affirmed the conclusive character of the border established by the Award and demarcated by the 1905 Agreement. In 1932, it insisted that any tri-point identifying the common terminal point of the Venezuela, Brazil and British Guiana boundaries must be in line with the strict legal obligations that arose from the Award.[16] In 1944, Venezuela's Minister of Foreign Affairs, Esteban Gil Borges, declared that the location of the boundary between Venezuela and British Guiana was "*chose jugée*" (*i.e. res judicata*) and that there was no reason to fear that Venezuela would ever seek to revise it.[17] Around the same time, the Venezuelan Ambassador to the United States explained how in the decades since the Award was delivered, Venezuela had "accepted the verdict of the arbitration for which we have so persistently asked".[18]

1.29 It was not until February 1962 – some 62 years after the Award was delivered but just three months after the Premier of British Guiana, Cheddi Jagan, pressed for a prompt grant of independence – that Venezuela first formally contended that the 1899 Award suffered from legal defects and was null and void. Contemporaneous diplomatic correspondence from the United States Ambassador to Venezuela explained the true reason for Venezuela's

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[16] The Venezuelan Government subsequently published the formal Exchange of Notes recording the demarcation of the tripoint in its official treaty series. Republic of Venezuela, Ministry of Foreign Affairs, *Public Treaties and International Agreements, Vol. V (1933-1936)* (1945), p. 548. MG, Vol. II, Annex 12.

[17] Government of United Kingdom, Foreign Office, *Minute by C.N. Brading*, No. FO 371/38814 (3 Oct. 1944). MG, Vol. II, Annex 10; *Letter* from the Ambassador of the United Kingdom to Venezuela, to J.V.T.W.T. Perowne, U.K. Foreign Office (3 Nov. 1944), pp. 1-2. MG, Vol. II, Annex 11.

[18] *Speech* by the Venezuelan Ambassador to the United States to the Pan-American Society of the United States (1944), p. 1. MG, Vol. II, Annex 9.

abrupt reversal of position. In light of its concerns about the possible rise of a politically unfriendly, leftist government in a newly independent Guyana, Venezuela wished to establish a "*cordon sanitaire*" between the two countries by procuring a situation whereby a major "slice of British Guiana would pass to Venezuela".[19]

1.30 In pursuit of that objective, Venezuela set about seeking to impugn the validity of the Award that it had hitherto respected, affirmed and upheld for more than six decades. To this end, Venezuela invoked a secret memorandum, purportedly authored in 1944 by Severo Mallet-Provost, a junior member of Venezuela's legal team at the 1899 arbitration, with alleged instructions that it not be published until after his death (which occurred in 1949). The memorandum was said to be drafted more than 45 years after the events it allegedly described, and in the same year that Venezuela presented Mr. Mallet-Provost with the Order of the Liberator "in testimony of the high estimation in which the Venezuelan people hold and will always hold him."[20]

1.31 The memorandum claimed that the Award was the product of a deal between the two British arbitrators and the President of the Tribunal. It did not claim the existence of – still less actually identify – any evidence to support such an assertion. Tellingly, Venezuela placed no reliance on the

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[19] *Foreign Service Despatch* from C. Allan Stewart, U.S. Ambassador to Venezuela, to the U.S. Department of State (15 May 1962), pp. 1-2 (emphasis added). MG, Vol. II, Annex 21.

[20] *Speech* by the Venezuelan Ambassador to the United States to the Pan-American Society of the United States (1944), p. 2. MG, Vol. II, Annex 9.

document until the advent of Guyana's independence, thirteen years after its alleged existence was first reported.

1.32 Venezuela's sudden and unjustifiable rejection of the Award (despite both parties' previous conduct, which was premised upon the Award's validity) threatened to interfere with Guyana's emergence as an independent State. Urgent talks were convened between Venezuela and the United Kingdom, with the participation of British Guiana. Venezuela stubbornly persisted in its new claim that the Award was null and void, while the United Kingdom and British Guiana maintained it was valid. Unable to reach agreement on this underlying issue, the parties focused on agreeing to a *means* of settlement that would assure a definitive resolution of the controversy.

1.33 This ultimately led to the conclusion of the Geneva Agreement, which established a legally binding mechanism for assuring a peaceful resolution of the controversy. The process, in its final stage, authorised the Secretary-General of the United Nations to decide which of "the means stipulated in Article 33 of the Charter of the United Nations" shall be used to resolve the controversy.

1.34 Notwithstanding the existence of the Geneva Agreement and its commitments thereunder, Venezuela has committed numerous violations of Guyana's sovereignty on the footing of its unfounded repudiation of the boundary established by the 1899 Award and delimited by the 1905 Agreement. Those violations are referred to in Chapter 2 and include (but are not limited to) the seizure and continued occupation of the eastern half of

Ankoko Island in the Cuyuni River, from 1966 to the present; numerous military incursions into Guyana's sovereign land, maritime and air space; the issuing of executive decrees proclaiming sovereignty over large swathes of Guyana's territory and maritime areas; and repeatedly seeking to discourage or obstruct Guyanese and foreign investors from undertaking investment projects in Guyana's territory and maritime space.

1.35 Against the backdrop of Venezuela's incessant and increasingly aggressive claims that the 1899 Award is void and that Venezuela is entitled to more than two thirds of Guyana's territory – and following the binding decision of the Secretary-General in accordance with Article IV(2) of the Geneva Agreement on 30 January 2018 – Guyana looks to the Court as the avenue for defending the validity and binding character of the 1899 Award, including its territorial integrity and sovereignty within the borders established thereby. In this regard, Guyana is confident that the Court will give effect to the consent of the parties, as expressed in Article IV(2), and to carry out its primary function of contributing to the maintenance of international peace and security through the fair and impartial application of international law.

II. Structure of the Memorial

1.36 Guyana's Memorial consists of four volumes. Volume I contains the main text of the Memorial. Volumes II-IV contain supporting documents.

1.37 Volume I consists of three chapters followed by Guyana's Submissions.

1.38 After this Introduction, **Chapter 2** addresses the facts relevant to the Court's jurisdiction, specifically the facts concerning the negotiation, conclusion and implementation of the Geneva Agreement. It begins in Section I by describing the events between 1962 and 1966 that led to the conclusion of the Geneva Agreement on 17 February 1966, approximately three months before Guyana became independent. Section II then sets out how the Geneva Agreement was implemented in the 52-year period between its conclusion in 1966 and the Secretary-General's decision on 30 January 2018 that the Court shall be the means of settlement of the controversy.

1.39 After that detailed exposition of the relevant facts, **Chapter 3** addresses the legal basis of the Court's jurisdiction in respect of Guyana's Application. After introducing the basis for the Court's jurisdiction, Section II explains the object and purpose of the Geneva Agreement, namely to establish a binding mechanism for ensuring a full, final and definitive resolution of the controversy resulting from Venezuela's challenge to the validity of the 1899 Award. The chapter then proceeds in Section III to address the interpretation of Article IV(2) of the Geneva Agreement, which established a three-stage settlement process that ultimately empowered the Secretary-General to make a binding decision that the Court shall be the next means of settlement of the controversy. Finally, Section IV addresses the basis of the Court's jurisdiction over Guyana's Application. It explains how, by virtue of the clear terms of Article IV(2) of the Geneva Agreement and the Secretary-General's decision dated 30 January 2018, the parties have unambiguously consented to the jurisdiction of the Court. It addresses Venezuela's erroneous conflation of the distinct concepts of jurisdiction and

seisin, before concluding by addressing the scope of the Court's jurisdiction *ratione materiae*.

1.40 The Memorial concludes with Guyana's Submissions.

CHAPTER II

THE FACTS RELATED TO THE COURT'S JURISDICTION

2.1 This Chapter sets out the facts pertaining to the negotiation, conclusion and implementation of the 1966 Geneva Agreement.

2.2 The Agreement came into being as a result of Venezuela's contention, in 1962, that the Arbitral Award of 3 October 1899, which fixed the boundary between Venezuela and British Guiana, was null and void. As discussed in **Section I** below, following Venezuela's contention, in February 1966, in particular, between 1962 and 1965, there were various exchanges and meetings between the parties to establish a procedure for resolving the issues raised by Venezuela's new position. The procedure was ultimately agreed, at Geneva. There, the parties agreed upon a three-stage settlement process to ensure the final settlement of the controversy if they failed to arrive at a full agreement through bilateral means.

- First, Article I of the Geneva Agreement established a Mixed Commission during a four-year period between 1966-70 with the task of seeking satisfactory solutions for the practical settlement of the controversy.

- Second, Article IV(1) provided that if the Mixed Commission failed to arrive at a full agreement, the parties shall choose one of the means of peaceful settlement under Article 33 of the U.N. Charter.

- Third, Article IV(2) provided that if the parties failed to agree, the decision as to the means of settlement shall be referred to an international organ upon which they agreed, or failing agreement, to the U.N. Secretary-General, whose decision shall be binding upon them.

In exchanges both before and after the conclusion of the Geneva Agreement, the parties confirmed their understanding that, under Article IV(2), the means of settlement chosen by the Secretary-General included judicial settlement by the Court.

2.3 As discussed in **Section II** below, the parties implemented the settlement procedures under the Geneva Agreement over a fifty-one-year period between 1966 and 2017. First, between 1966 and 1970, the Mixed Commission established under Article I attempted, but failed, to arrive at a satisfactory solution to the controversy. Second, following a twelve-year suspension of the Article IV(1) procedure, from 1970 to 1982,[21] the parties negotiated but failed to agree on one of the means of settlement under Article 33 of the U.N. Charter. Third, in 1983, failing agreement on an international organ to choose the means of settlement, the parties referred the decision to the U.N. Secretary-General, pursuant to Article IV(2). Following consultations with the parties, in 1990 Secretary-General Pérez de Cuellar chose a Good Offices Process as the means of settlement. In 2016, twenty-six years after that Process was initiated, and in the absence of any progress, Secretary-General Ban Ki-moon decided that unless there was significant

[21] This was pursuant to the Protocol of Port of Spain, *see infra* Section II(B).

progress on a full agreement to the controversy by the end of 2017, the Secretary-General would choose the International Court of Justice as the next means of settlement. In view of the continued failure of the Good Offices Process to make any progress, in January 2018 Secretary-General António Guterres exercised his authority under Article IV(2) and decided that the Court shall be the next means of settlement.

I. Negotiation and Conclusion of the Geneva Agreement: 1962-66

2.4 The Geneva Agreement emerged in the context of the debate at the United Nations General Assembly on the decolonization process in 1961-62. On 18 December 1961, the Premier of British Guiana, Dr. Cheddi Jagan, addressed the U.N. General Assembly Special Political and Decolonization (Fourth) Committee, calling for the prompt independence of the colony.[22] By 16 January 1962, the Permanent Representative of the United Kingdom had informed the U.N. Secretary-General of the United Kingdom's willingness "to discuss the date and the arrangements to be made for the achievement of independence by British Guiana."[23]

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[22] U.N. General Assembly, Fourth Committee, 16th Session, 1252nd Meeting, *Agenda item 39: Information from Non-Self-Governing Territories transmitted under Article 73 of the Charter*, U.N. Doc A/C.4/SR.1252 (18 Dec. 1961), p. 611. MG, Vol. II, Annex 14.

[23] *Letter* from the Permanent Representative of the United Kingdom to the United Nations to the Secretary-General of the United Nations (15 Jan. 1962), *reprinted in* U.N. General Assembly, Fourth Committee, 16th Session, *Information from Non-Self-Governing Territories transmitted under Article 73 of the Charter*, U.N. Doc A/C.4/520 (16 Jan. 1962). MG, Vol. II, Annex 15.

2.5 That same month, Venezuela asserted that the 1899 Award was "inequitable and questionable from a moral point of view", although it fell short of raising legal concerns.[24] This position would soon be transformed into a contention that the Award was, as a matter of international law, "null and void".

2.6 On 14 February 1962, Venezuela's Permanent Representative, Carlos Sosa Rodriguez, wrote to the U.N. Secretary-General. He asserted on behalf of Venezuela that: "there is a dispute between my country and the United Kingdom concerning the demarcation of the frontier between Venezuela and British Guiana".[25] He followed this with a statement in the Fourth Committee on 22 February 1962.[26] In a reversal of the position it had adopted for more than six decades, Venezuela now claimed that:

> "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.

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[24] U.S. Department of State, *Memorandum of Conversation*, No. 741D.00/1-1562 (15 Jan. 1962). MG, Vol. II, Annex 16.

[25] *Letter* from the Permanent Representative of Venezuela to the Secretary-General of the United Nations (14 Feb. 1962), *reprinted in* U.N. General Assembly, Fourth Committee, 16th Session, *Information from Non-Self-Governing Territories transmitted under Article 73 of the Charter*, U.N. Doc A/C.4/536 (15 Feb. 1962), para. 2. MG, Vol. II, Annex 17.

[26] *Statement* made by the Representative of Venezuela at the 1302nd meeting of the Fourth Committee on 22 February 1962, *reprinted in* U.N. General Assembly, Fourth Committee, 16th Session, *Information from Non-Self-Governing Territories transmitted under Article 73 of the Charter*, U.N. Doc A/C.4/540 (22 Feb. 1962), para. 49. MG, Vol. II, Annex 19.

> Venezuela cannot recognize an award made in such circumstances".[27]

2.7 Contemporaneous diplomatic dispatches indicate that Venezuela was concerned that, because of the suspected political leanings of Premier Jagan, an independent British Guiana would lead to a "Cuba on the South American Continent." The Venezuelan plan was to create a "cordon sanitaire" by persuading the United Kingdom to cede part of British Guiana's territory prior to the colony's independence.[28]

2.8 In response to this novel claim, the United Kingdom asserted that "there is no case to answer, because the matter was settled for all time over sixty years ago by international arbitration".[29] Venezuela, however, continued to agitate for territorial cession, threatening British Guiana's independence. On 4 April 1962, Venezuela's Chamber of Deputies condemned "the territorial theft to which [they] were subjected", and asserted

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[27] *Letter* from the Permanent Representative of Venezuela to the Secretary-General of the United Nations (14 Feb. 1962), *reprinted in* U.N. General Assembly, Fourth Committee, 16th Session, *Information from Non-Self-Governing Territories transmitted under Article 73 of the Charter*, U.N. Doc A/C.4/536 (15 Feb. 1962), paras. 16-17. MG, Vol. II, Annex 17.

[28] *Foreign Service Despatch* from C. Allan Stewart, U.S. Ambassador to Venezuela, to the U.S. Department of State (15 May 1962), para. 2. MG, Vol. II, Annex 21 ("President Betancourt [of Venezuela] professes to be greatly concerned about an independent British Guiana with Cheddi Jagan as Prime Minister. He suspects that Jagan is already too committed to communism and that his American wife exercises considerable influence over him.... This 'alarm' may be slightly simulated since Betancourt's solution of the border dispute presupposes a hostile Jagan. His plan: Through a series of conferences with the British before Guiana is awarded independence a cordon sanitaire would be set up between the present boundary line and one mutually agreed upon by [Venezuela and Britain]. Sovereignty of this slice of British Guiana would pass to Venezuela....") (emphasis in original).

[29] *Letter* from J. Cheetham, U.K. Foreign Office, to D. Busk, U.K. Ambassador to Venezuela, No. AV 1081/38 (21 Feb. 1962), para. 4. MG, Vol. II, Annex 18.

"an unwaiverable right over the territory taken through the arbitration award in 1899".[30] In these circumstances, the parties commenced discussions on a procedure to resolve the controversy arising from Venezuela's contention of nullity of the 1899 Award.

A. 1963 JOINT COMMUNIQUÉ AND TRIPARTITE EXAMINATION OF VENEZUELA'S CONTENTION: 1963-65

2.9 In November 1962, during deliberations before the Fourth Committee to the United Nations General Assembly, the United Kingdom Ambassador, Sir Colin Crowe, proposed to resolve the controversy through an examination of documentary material relating to the 1899 Award. He made clear, however, that this was "in no sense an offer to engage in substantive talks about [the] revision of the frontier. That we cannot do, for we consider that there is no justification for it".[31] The offer was intended only "to dispel any doubts which the Venezuelan Government may still have about the validity or propriety of the arbitral award".[32]

2.10 On 16 November 1962, the President of the Fourth Committee declared that the three governments (*i.e.* Venezuela, the United Kingdom and

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[30] Republic of Venezuela, Chamber of Deputies, *Agreement of 4 April 1962* (4 Apr. 1962). MG, Vol. II, Annex 20.

[31] *Statement* made by the Representative of the United Kingdom at the 349th meeting of the Special Political Committee on 13 November 1962, *reprinted in* U.N. General Assembly, Special Political Committee, 17th Session, *Question of Boundaries between Venezuela and the Territory of British Guiana*, U.N. Doc A/SPC/72 (13 Nov. 1962), p. 17. MG, Vol. II, Annex 24.

[32] *Ibid.*

British Guiana) would examine the documentary materials relating to the 1899 Award (the "Tripartite Examination").[33] The three parties each appointed experts for this purpose. The United Kingdom's expert, Sir Geoffrey Meade, also acted on behalf of British Guiana, at its request.[34] The Venezuelan experts examined the United Kingdom archives in London from 30 July to 11 September 1963.

2.11 On 5-7 November 1963, the Minister of Foreign Affairs of Venezuela and the Foreign Secretary of the United Kingdom met to review progress in the examination of the documentary material. A Joint Communiqué of 7 November 1963 noted that Venezuelan experts had examined documents in London, and that Meade would similarly travel to Caracas to examine materials in the Venezuelan archives.[35]

2.12 In February 1964, following Meade's trip to Caracas, the experts met in London, where Meade stated that "the Venezuelan authorities have been unable to supply a single shred of evidence" to support their contention of nullity.[36]

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[33] U.N. General Assembly, Special Political Committee, 17th Session, 350th Meeting, *Agenda item 88: Question of boundaries between Venezuela and the territory of British Guiana*, U.N. Doc A/SPC/SR.350 (16 Nov. 1962). MG, Vol. II, Annex 25.

[34] United Kingdom, Department of External Affairs, *Memorandum: Venezuelan Claim to British Guiana Territory*, No. CP(64)82 (25 Feb. 1964), para. 3. MG, Vol. II, Annex 26.

[35] *Ibid.*, p. 1.

[36] *Ibid.*, para. 9.

2.13 In February 1965, while the Tripartite Examination was still underway, Venezuela issued a new official map that labelled the territory west of the Essequibo River, comprising more than two-thirds of British Guiana's territory, as "*Zona en Reclamacion*".[37] On 4 March 1965, the United Kingdom responded that "Her Majesty's Government has no doubts over its sovereignty over this territory".[38]

2.14 The Tripartite Examination concluded on 3 August 1965, with the official exchange of the experts' reports at the Foreign Office in London. The reports were diametrically opposed to one another. Venezuela's experts claimed that the 1899 Award was "void". Meade and his colleagues concluded that there was no evidence whatsoever to support such a contention. In correspondence that followed, it was agreed that a further meeting would be held at the ministerial level in December 1965.

B. THE LONDON MEETING: 9-10 DECEMBER 1965

2.15 Prior to that meeting, in November 1965, it was decided at the British Guiana Constitutional Conference that British Guiana should proceed to independence on 26 May 1966. The need to resolve the controversy arising

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[37] Republic of Venezuela, *Official Map: Claim of Essequibo Territory* (1965). MG, Vol. II, Annex 27.

[38] *Statement* by Dr. I. Iribarren Borges, Minister of Foreign Affairs of Venezuela, to the National Congress of Venezuela (17 Mar. 1966), *reprinted in* Republic of Venezuela, Ministry of Foreign Affairs, *Claim of Guyana Esequiba: Documents 1962-1981* (1981) ("*Statement* by Dr. Borges, Minister of Foreign Affairs of Venezuela (17 Mar. 1966)"), p. 5 ("*El Gobierno de Su Majestad no duda de su soberanía sobre ese territorio*…"). MG, Vol. II, Annex 33.

from Venezuela's position on the validity of the Arbitral Award thus became more urgent. As an interim measure, it was decided that British troops should remain in place for some time after independence to protect the new State's territorial integrity.[39]

2.16 On 9-10 December 1965, the Ministers of Foreign Affairs of the United Kingdom (Michael Stewart) and Venezuela (Dr. Ignacio Iribarren Borges) and the new Prime Minister of British Guiana (Mr. L. Forbes Burnham) met in London to discuss "an end to the controversy that threatens to damage the traditionally cordial relations between Venezuela on the one hand and the United Kingdom and British Guiana on the other."[40] A Joint Communiqué of 10 December 1965 recorded that "[i]deas and proposals for a practical settlement of the controversy were exchanged".[41]

2.17 At the London meeting, the Venezuelan Minister of Foreign Affairs, Dr. Iribarren, made three proposals for resolution of the controversy:[42]

a. First, he proposed the return of "the territory which belonged to Venezuela by right". This was rejected by the United Kingdom

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[39] United Kingdom, Research Department, *Venezuela-Guyana Frontier Dispute*, Nos. DS(L)692, RRN 040/360/1 (10 May 1976), para. 23. MG, Vol. II, Annex 48.

[40] Government of the United Kingdom, *Record of Discussions between the Foreign Secretary, the Venezuelan Minister for Foreign Affairs and the Premier of British Guiana at the Foreign Office on 9 December, 1965*, No. AV 1081/326 (9 Dec. 1965), p. 7. MG, Vol. II, Annex 28.

[41] *Ibid.*

[42] *Ibid.*, pp. 3-4.

and British Guiana Ministers, who pointed out that any consideration of the substantive question of the frontier was "out of the question" and "wholly unacceptable".[43]

b. Second, he suggested joint administration of the Essequibo territory for ten years. This too was rejected, as British Guiana noted that it would involve a "surrender of sovereignty".[44]

c. Third, he proposed the establishment of a Mixed Commission to resolve the controversy by formulating plans for joint development, noting that: "If the commission could not reach agreement, they were to refer within three months to one or more mediators and if they failed to reach a satisfactory solution, within a prescribed time limit, they were to have recourse to international arbitration. The Treaty setting up the basis for this arbitration would have to be concluded within 18 months from 1 January, 1966".[45]

2.18 The Mixed Commission proposal was rejected by the Attorney-General of British Guiana, Mr. Shridath Ramphal, because it would "concern itself with the substantive issues which had been specifically excluded from the scope of the present discussions arising from the 1962 offer to examine documents".[46]

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[43] *Ibid.*

[44] *Ibid.*

[45] *Ibid.*

[46] *Ibid.*, p. 5.

2.19 For his part, Dr. Iribarren asserted that any proposal "which did not recognise that Venezuela extended to the River Essequibo would be unacceptable".[47] He revived his version of the Mixed Commission as one "for finding solutions by a series of conciliatory stages, and if necessary by recourse to arbitration by an impartial international body."[48] He observed that "Venezuela's willingness to submit to an arbitration tribunal represented a great concession on her part".[49] He further emphasized that: "the United Nations were not a court, and they had no power of decision. The dispute had already gone beyond that stage".[50]

2.20 The participants agreed that discussions would be continued in Geneva in February 1966.[51]

C. THE GENEVA MEETING: 16-17 FEBRUARY 1966

2.21 The Geneva meeting was held over two days, with discussions on 16 and 17 February 1966. The parties signed the Agreement shortly before midnight on 17 February.

2.22 The United Kingdom and British Guiana delegations were, as in London, composed of high level officials, including the United Kingdom

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[47] *Ibid.*, p. 6.

[48] *Ibid.*

[49] *Ibid.*

[50] *Ibid.*

[51] *Ibid.*

Foreign Secretary, Michael Stewart, and Premier L. Forbes Burnham of British Guiana.[52] The Venezuelan delegates included the Minister of Foreign Affairs, Dr. Iribarren, as well as "members of all parties represented in the Venezuelan Congress."[53] Mr. Stewart observed that "it became clear at an early stage that the Foreign Minister had instructions to work for an agreement of some kind."[54]

2.23 A detailed record of the negotiations is reflected in:

a. A note dated 25 February 1966 from the United Kingdom Foreign Secretary, Michael Stewart, to Sir Anthony Lincoln, the United Kingdom Ambassador in Venezuela.[55]

b. A statement of 17 March 1966 from the Venezuelan Minister of Foreign Affairs, Dr. Iribarren to the Venezuelan Congress, on the occasion of presenting the bill ratifying the Geneva Agreement.[56]

2.24 These records demonstrate the clear and unambiguous intention of the parties to agree on a procedure for the full and final resolution of the controversy. The relevant provisions of the final text of the agreement that they reached include, in particular, the Preamble, Article I regarding the

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[52] *Note Verbale* from the Foreign Secretary of the United Kingdom to the U.K. Ambassador to Venezuela, No. AV 1081/116 (25 Feb. 1966). MG, Vol. II, Annex 32.

[53] *Ibid.*, para. 2.

[54] *Ibid*.

[55] *Ibid*.

[56] *Statement* by Dr. Borges, Minister of Foreign Affairs of Venezuela (17 Mar. 1966). MG, Vol. II, Annex 33.

Mixed Commission, and Article IV regarding the procedures to be followed for arriving at a final settlement.

1. Preamble

2.25 The preamble of the Geneva Agreement provides:

> "The Government of the United Kingdom of Great Britain and Northern Ireland, in consultation with the Government of British Guiana, and the Government of Venezuela;
>
> Taking into account the forthcoming independence of British Guiana;
>
> Recognising that closer cooperation between British Guiana and Venezuela could bring benefit to both countries;
>
> Convinced that any outstanding controversy between the United Kingdom and British Guiana on the one hand and Venezuela on the other would prejudice the furtherance of such cooperation and should therefore be amicably resolved in a manner acceptable to both parties;
>
> In conformity with the agenda that was agreed for the governmental conversations concerning the controversy between Venezuela and the United Kingdom over the frontier with British Guiana, in accordance with the joint communiqué of 7 November, 1963, have reached the following agreement to resolve the present controversy."[57]

2.26 It will be recalled that in the 1963 Joint Communiqué that is referred to in the preamble's final paragraph, the United Kingdom made clear that the forthcoming Tripartite Examination was for the purpose of examining documentary materials related to the validity of the 1899 Arbitral Award, and

[57] Geneva Agreement, p. 1. AG, Annex 4.

not for determining (or re-determining) the frontier between Venezuela and British Guiana.

2.27 The United Kingdom Foreign Secretary, Michael Stewart, explained that Venezuela:

> "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".[58]

2. Article I (Mixed Commission)

2.28 At the Geneva meeting, Venezuela again proposed the establishment of a Mixed Commission as the initial means of settlement. This time, in contrast to the London meeting, the proposal found favour and was agreed upon. Article I provides that:

> "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."[59]

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[58] *Note Verbale* from the Foreign Secretary of the United Kingdom to the U.K. Ambassador to Venezuela, No. AV 1081/116 (25 Feb. 1966), para. 6. MG, Vol. II, Annex 32.

[59] Geneva Agreement, Art. I. AG, Annex 4. The Foreign Office Draft of 14 January 1966 had stated "A Mixed Commission shall be appointed at an early date to examine relations between British Guiana and Venezuela in accordance with Article III of this Agreement."

2.29 Article II sets out the procedure for establishment of the Mixed Commission and Article III provides that the Commission shall submit reports at six-month intervals. As indicated below in regard to Article IV(1), the Commission's mandate was limited to a four-year period. The United Kingdom wanted the Mixed Commission to have ten years to reach a full agreement on the solution to the controversy before triggering the "fall-back" position but Venezuela wanted a shorter period. Ultimately, it was "reduced by bargaining" to four years.[60]

3. Article IV

2.30 Article IV provides the means for resolving the controversy should the Mixed Commission fail to arrive at a full agreement. It manifests the intention of the parties to ensure that, unless other means of settlement were agreed, there would be a binding procedure for a final resolution of the controversy in the event the Mixed Commission did not agree upon a settlement.

2.31 The final text of Article IV provides:

> "(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

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Government of the United Kingdom, *Draft Agreement for the Establishment of a Mixed Commission* (14 Jan. 1966), Art. I. MG, Vol. II, Annex 29.

[60] *Note Verbale* from the Foreign Secretary of the United Kingdom to the U.K. Ambassador to Venezuela, No. AV 1081/116 (25 Feb. 1966), para. 6. MG, Vol. II, Annex 32.

> 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."

2.32 Contemporaneous internal communications reveal that the United Kingdom and British Guiana recognised "the value of having in reserve a fall-back position to meet a Venezuelan contention that the [M]ixed [C]ommission does not provide machinery for continuing the search for solutions to the 'political controversy'".[61]

2.33 The "fall-back" position was first proposed by Dr. Iribarren, Venezuela's Foreign Minister. He explained this at the time he presented the bill ratifying the Geneva Agreement to the National Congress of Venezuela on 17 March 1966. Referring to the 1965 London meeting, he recalled:

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[61] *Telegram* from the Governor of British Guiana to the Secretary of State for the Colonies of the United Kingdom, No. 93A (3 Feb. 1966), para. 6. MG, Vol. II, Annex 30.

> "I put forward a third Venezuelan proposal that would lead to the solution for the borderline issue in three consecutive stages, each with their respective timeframe, with the requirement that there had to be an end to the process: a) a Mixed Commission b) Mediation c) International Arbitration."[62]

2.34 According to the United Kingdom's Foreign Secretary, during the informal meetings on 16 February 1966 "the Venezuelans wished to use [the Mixed] Commission as an avenue leading ultimately to settlement of the controversy either by a fresh arbitration or by mediation."[63] On 16 February, the first day of the talks, the parties "seemed to be heading for deadlock"[64] in regard to identifying specific means of settlement. To break the impasse, Michael Stewart proposed that:

> "if the Mixed Commission could not settle the controversy, in the first instance the two Governments should seek to agree among themselves which of the means of settling disputes peacefully under Article 33 of the United Nations Charter should be applied to this controversy, and, failing agreement,

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[62] *Statement* by Dr. Borges, Minister of Foreign Affairs of Venezuela (17 Mar. 1966), p. 9 ("*presenté como tercera propuesta venezolana una fórmula que preveía la solución del problema fronterizo a través de tres etapas consecutivas con sus respectivos plazos, con la particularidad de que el proceso había de tener un final: a) Comisión Mixta; b) mediación; c) arbitraje internacional*"). MG, Vol. II, Annex 33.

[63] *Note Verbale* from the Foreign Secretary of the United Kingdom to the U.K. Ambassador to Venezuela, No. AV 1081/116 (25 Feb. 1966). MG, Vol. II, Annex 32. This was in contrast to the Foreign Office Draft that envisaged a Commission focused on enhancing economic cooperation as well as cooperation in trade, communication, educational and cultural exchanges and diplomatic and consular relations: Government of the United Kingdom, *Draft Agreement for the Establishment of a Mixed Commission* (14 Jan. 1966). MG, Vol. II, Annex 29.

[64] *Note Verbale* from the Foreign Secretary of the United Kingdom to the U.K. Ambassador to Venezuela, No. AV 1081/116 (25 Feb. 1966), para. 5. MG, Vol. II, Annex 32.

> the United Nations should be asked to choose a means for them". [65]

2.35 Mr. Stewart noted that "[b]y good fortune", it had been Venezuela that had introduced the idea of a reference to Article 33 of the U.N. Charter, in one of the drafts put forward during the afternoon of 16 February.[66] In what was considered "the turning point of the meeting",[67] Dr. Iribarren, Venezuela's head of delegation, asked that he be able to consider the matter overnight so he could seek instructions from his Government.

2.36 Dr. Iribarren's recollection of the negotiations is consistent with Mr. Stewart's account. According to Dr. Iribarren, Venezuela had made a proposal for recourse to the ICJ, similar to the "third formula" it had put forward at the London meeting in 1965. At Geneva, the United Kingdom and British Guiana were "receptive to it", but objected to listing the specific means of settlement. In Dr. Iribarren's words:

> "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 agreement was again on the table". [68]

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[65] *Ibid*.

[66] *Ibid*.

[67] *Ibid*.

[68] *Statement* by Dr. Borges, Minister of Foreign Affairs of Venezuela (17 Mar. 1966), p. 13 ("*Soslayada esta objeción, sustituyendo aquella mención específica por la referencia al artículo 33 de la Carta de las Naciones Unidas que incluye aquellos dos procedimientos del arbitraje y del recurso a la Corte Internacional de Justicia, se vio que había una posibilidad de lograr un acuerdo*"). MG, Vol. II, Annex 33.

2.37 On 17 February 1966, the two Foreign Ministers discussed formulae for Article IV(2) in regard to an authority that could choose the means of settlement if the parties could not agree on the specific means under Article 33 of the Charter.[69] Michael Stewart noted that it was Dr. Iribarren who proposed that the authority for choosing the means be conferred upon the U.N. Secretary-General:

> "In the formula finally agreed in Article IV of the Agreement ('an appropriate international organ', or, failing that, the Secretary General of the United Nations) we suggested the first and the Venezuelans the second alternative".[70]

2.38 In his statement to the National Congress of Venezuela, Dr. Iribarren emphasised his success in including the referral to the U.N. Secretary-General. He explained that Venezuela's first preference would have been to name the ICJ, but that, in order to reach agreement, he proposed that the Secretary-General be granted the authority to choose the means of settlement:

> "I must place it on the record that in the last discussions of the Geneva Agreement the British suggested entrusting the General Assembly of the United Nations to choose the means for a solution comprised in Article 33 of the Charter.
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> This proposal was discarded by Venezuela due to the following reasons:
>
> 1. Because it was not suitable to submit the specific role of choosing the means for the solution to an eminently political and deliberative body as is the General Assembly

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[69] *Note Verbale* from the Foreign Secretary of the United Kingdom to the U.K. Ambassador to Venezuela, No. AV 1081/116 (25 Feb. 1966), para. 6. MG, Vol. II, Annex 32.

[70] *Ibid.*

> of the United Nations. This procedure could lead to disproportionate delays since the introduction of outside political elements would be easy in what is a simple function of choosing the means of settlement;
>
> 2. Because the General Assembly of the United Nations only meets for ordinary sessions once a year, during a period of roughly three months, to deal with previously indicated matters in the Agenda and in extraordinary sessions by request of the majority of the members of the United Nations.

These reasons were presented by Venezuela and further suggested entrusting the International Court of Justice with the role of choosing the means of solution as a permanent body and exempt of the inconveniences mentioned above. Since this proposal was rejected by the British, Venezuela then suggested giving this role to the Secretary General of the United Nations."[71]

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[71] *Statement* by Dr. Borges, Minister of Foreign Affairs of Venezuela (17 Mar. 1966), p. 17 ("*Debo dejar constancia de que en las últimas etapas de discusión del Acuerdo de Ginebra, los británicos propusieron que la elección de los medios de solución previstos en el artículo 33 de la Carta, se encomendara a la Asamblea General de las Naciones Unidas. Esta propuesta fue desechada por Venezuela expresando las siguientes razones: 1. Porque no convenía someter esa función específica de escoger los medios de solución a un órgano eminentemente político y deliberante como la Asamblea General de las Naciones Unidas. Este procedimiento podría conducir a desmesuradas dilaciones porque fácilmente se introducirían elementos políticos extraños a la sencilla función de escoger los medios de solución; 2. Porque la Asamblea General de las Naciones Unidas sólo se reúne en sesiones ordinarias una vez por año, por un periodo de unos tres meses, para tratar asuntos previamente señalados en la Agenda, y en sesiones extraordinarias a solicitud del Consejo de Seguridad o de la mayoría de los miembros de las Naciones Unidas. Estas razones las expuso Venezuela, y propuso que se encomendara la función de escoger los medios de solución a la Corte Internacional de Justicia como órgano permanente y exento de los inconvenientes antes señalados. No habiendo sido aceptada esta propuesta por los británicos, Venezuela propuso encomendar aquella función al Secretario General de las Naciones Unidas*"). MG, Vol. II, Annex 33.

2.39 Dr. Iribarren further explained that Article IV empowered the U.N. Secretary-General to decide that the means of settlement shall be arbitration or judicial settlement, in the event none of the procedures that preceded the referral of the matter to him resulted in a final resolution of the controversy:

> "In conclusion, due to the Venezuelan objections accepted by Great Britain, there exists an unequivocal interpretation that the only person participating in the selection of the means of solution will be the Secretary General of the United Nations and not the Assembly.
>
> Last, and in compliance with Article 4, if no satisfactory solution for Venezuela is reached, the Award of 1899 should be revised through arbitration or a judicial recourse."[72]

2.40 The words of Dr. Iribarren reflect a clear and unambiguous understanding that, under Article IV(2) of the Geneva Agreement, the controversy may be resolved by the ICJ or arbitration, depending upon the decision of the U.N. Secretary General.

D. CONCLUSION OF THE GENEVA AGREEMENT: 1966

2.41 The Geneva Agreement was concluded and signed on 17 February 1966. According to Article VII, "This Agreement shall enter into force on the date of its signature." Dr. Iribarren, Michael Stewart and Prime Minister L. Forbes Burnham issued a Joint Statement noting that:

> "The agreement has been welcomed by the Ministers of the three countries since it provides the means to resolve the dispute which was harming relations between two neighbours

[72] *Ibid*., p. 19.

> and contains a basis of good will for future cooperation between Venezuela and British Guiana."[73]

2.42 The United Kingdom and British Guiana expressed satisfaction with the outcome of the Geneva meeting. In the words of Michael Stewart:

> "Legally, the Geneva Agreement has not prejudiced the position of either side: we and the Guyanese continue to regard the 1899 Award as valid, while in Venezuelan eyes it is null and void. Politically, it is an honourable compromise."[74]

2.43 He suggested, perhaps too optimistically, that "Venezuela can now look forward to definitive settlement of the controversy some time in the 1970s".[75]

2.44 Venezuela also viewed the Geneva Agreement as a success, not least because of the adoption of Venezuela's proposal in Article IV. As Dr. Iribarren stated before the National Congress of Venezuela:

> "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.
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> …

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[73] Minister of Foreign Affairs of Venezuela, Minister of Foreign Affairs of the United Kingdom, and Prime Minister of British Guiana, *Joint Statement on the Ministerial Conversations from Geneva on 16 and 17 February 1966* (17 Feb. 1966). MG, Vol. II, Annex 31.

[74] *Note Verbale* from the Foreign Secretary of the United Kingdom to the U.K. Ambassador to Venezuela, No. AV 1081/116 (25 Feb. 1966), para. 8. MG, Vol. II, Annex 32.

[75] *Ibid.*

> As a result of diplomatic dialogue and not from the monologue of victors, the Geneva Agreement means a new situation for the extreme positions from those demanding the return of the stolen territory by virtue of a null Award and those who harboured no doubts about their sovereignty over the territory and were not willing to take this matter to any tribunal".[76]

Following the Foreign Minister's presentation, the National Congress ratified the Geneva Agreement without reservation.

2.45 On 4 April 1966, the Secretary-General acknowledged receipt of the Geneva Agreement, and accepted his authority under Article IV(2):

> "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."[77]

2.46 On 21 April 1966, Lord Caradon, the United Kingdom's Permanent Representative to the UN, acknowledged the Secretary-General's letter with

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[76] *Statement* by Dr. Borges, Minister of Foreign Affairs of Venezuela (17 Mar. 1966), p. 13 ("*Lejos de haber sido éste, como se ha dicho maliciosamente, una imposición, o un artilugio británico que sorprendió la ingenuidad de la Delegación venezolana, está basado en una propuesta venezolana que rechazada terminantemente en Londres ha venido a ser aceptada en Ginebra. … Como fruto del dialogo diplomático, y no del monólogo de los vencedores, el Acuerdo de Ginebra lleva a una nueva situación las posiciones extremas de quien exige la devolución del territorio usurpado en virtud de un Laudo nulo, y la de quien argüía que no abrigando duda alguna sobre su soberanía acerca de ese territorio, no estaba dispuesto a llevar la causa a tribunal alguno*"). MG, Vol. II, Annex 33.

[77] *Letters* from Secretary-General U Thant to Dr. Ignacio Iribarren Borges Minster of Foreign Affairs of the Republic of Venezuela and The Rt. Hon. Lord Caradon Permanent Representative of the United Kingdom to the United Nations (4 Apr. 1966). AG, Annex 5.

gratitude and confirmed that it had been conveyed to the United Kingdom's Foreign Secretary and the Prime Minister of British Guiana.[78]

2.47 On 2 May 1966, the Permanent Representatives of the United Kingdom and Venezuela to the United Nations wrote to the Secretary-General formally transmitting the text of the Geneva Agreement.[79] They noted that it had been approved by the National Congress of Venezuela,[80] published in the United Kingdom as a White Paper, and formally approved by the House of Assembly of British Guiana. The letter also indicated that Venezuela and British Guiana had already appointed their representatives to the Mixed Commission. The letter recalled that "Your Excellency was good enough to state that you considered the responsibilities which might fall to be discharged by the Secretary-General of the United Nations under article IV (2) of the Agreement to be of a nature which might appropriately be discharged by the Secretary-General of the United Nations".[81] The Permanent Representatives asked for the Secretary-General to arrange

[78] *Letter* from the Permanent Representative of the United Kingdom to the United Nations to Secretary-General of the United Nations (21 Apr. 1966). MG, Vol. II, Annex 37.

[79] *Letter* from the Permanent Representatives of the United Kingdom and Venezuela to the United Nations to the Secretary-General of the United Nations, U.N. Doc A/6325 (3 May 1966). MG, Vol. II, Annex 38.

[80] Republic of Venezuela, *Law Ratifying the Geneva Agreement* (13 Apr. 1966). MG, Vol. II, Annex 35.

[81] *Letter* from the Permanent Representatives of the United Kingdom and Venezuela to the United Nations to the Secretary-General of the United Nations, U.N. Doc A/6325 (3 May 1966), p. 1. MG, Vol. II, Annex 38.

circulation of the letter and the text of the Geneva Agreement as a document of the General Assembly.[82]

2.48 On 5 May 1966, Venezuela registered the Geneva Agreement with the U.N. Treaty Section.[83] It expressed no objection to any part of the Agreement.

2.49 On 26 May 1966, just over three months after the conclusion of the Geneva Agreement, Guyana became independent, and acceded to the Agreement as a party in accordance with Article VIII, which provided that:

> "Upon the attainment of independence by British Guiana, the Government of Guyana shall thereafter be a party to this Agreement, in addition to the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Venezuela."[84]

[82] *Letter* from the Permanent Representatives of the United Kingdom and Venezuela to the United Nations to the Secretary-General of the United Nations, U.N. Doc A/6325 (3 May 1966). MG, Vol. II, Annex 38.

[83] *See* title page in the Geneva Agreement. AG, Annex 4.

[84] *Ibid*., Art. VIII.

II. Implementation of the Geneva Agreement: 1966 – 2018

A. ARTICLES I - III OF THE GENEVA AGREEMENT: THE MIXED COMMISSION: 1966-70

2.50 Pursuant to Articles I and II of the Agreement,[85] a Mixed Commission was established in 1966. Four representatives were appointed, two each by Guyana and Venezuela. Guyana's representatives were Sir Donald Jackson (a former Chief Justice of British Guiana) and Dr. Mohamed Shahabuddeen (at the time Solicitor General for Guyana, later a Judge of the ICJ). Venezuela's representatives were Luis Loreto (later, a Justice of the Supreme Court of Venezuela) and Gonzalo Garcia Bustillos (later, Minister of the General Secretariat of the Presidency of Venezuela). The Commission held numerous meetings during its four-year mandate. The minutes of its meetings were carefully recorded and signed, with copies attached to the Final Report and Interim Reports, which were signed by the four Commissioners and issued to both Governments.[86]

2.51 The parties disagreed on the mandate of the Commission under Article I. Guyana considered that its mandate was to find a practical solution

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[85] Article I provides: "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". Article II(1) provides: "Within two months of the entry into force of this Agreement, two representatives shall be appointed to the Mixed Commission by the Government of British Guiana and two by the Government of Venezuela". *Ibid*., Arts. I, II(1).

[86] Article III provides: "The Mixed Commission shall present interim reports at intervals of six months from the date of its first meeting". *Ibid*., Art. III.

to the legal question of Venezuela's contention of nullity. In Venezuela's view, instead of addressing the legal question of nullity, a "satisfactory solution[] for the practical settlement of the controversy" required the Mixed Commission to consider how much of the Essequibo territory Guyana should cede to Venezuela or subject to a "joint development" programme.[87] The Venezuelan Commissioners expressly recognized, however, that should the Commission fail to resolve the controversy:

> "The juridical examination of the question [of nullity] would[,] if necessary, be proceeded with, in time, by some international tribunal in accordance with article IV of the Geneva Agreement."[88]

2.52 The work of the Mixed Commission coincided with hostile Venezuelan actions. Notably, this included Venezuela's unlawful occupation of Guyana's eastern half of Ankoko Island in October 1966, including the building of military installations and an airstrip. Guyana immediately protested, stating that it:

> "regards the introduction of Venezuelan personnel both civilian and military into that part of the Ankoko island which is part of the State of Guyana as a violation of Guyana's

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[87] Cooperative Republic of Guyana, Ministry of Foreign Affairs, *Memorandum on the Guyana/Venezuela Boundary* (2 Nov. 1981), *reprinted in* U.N. General Assembly, 36th Session, *Review of the Implementation of the Declaration on the Strengthening of International Security*, U.N. Doc A/C.1/36/9 (9 Nov. 1981), pp. 7-8. MG, Vol. III, Annex 54.

[88] United Kingdom, Ministry of External Affairs, *First Interim Report of the Mixed Commission* (30 Dec. 1966), p. 3. MG, Vol. II, Annex 41.

> territorial sovereignty and a breach of the Geneva Agreement on 17th February, 1966"[89]

Despite Guyana's repeated protests, Venezuela's unlawful occupation continues to the present date.[90]

2.53 Two years later, by Decree dated July 1968, President Raúl Leoni of Venezuela claimed the territorial sea along the coast of Guyana up to the mouth of the Essequibo River.[91] Venezuela also issued threats against foreign investment in the Essequibo region. On 15 June 1968, the Venezuelan Ministry of Foreign Affairs placed a notice in *The Times* of *London* newspaper asserting that "Esequivo Guiana is claimed by our country, as by right belongs to it" and "publicly and categorically" stating that it does "not

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[89] *Note Verbale* from the Prime Minister and Minister of External Affairs of Guyana to the Minister of Foreign Relations of Venezuela, No. CP(66)603 (21 Oct. 1966). MG, Vol. II, Annex 40.

[90] *See e.g. Letter* from the Vice President and Minister of Foreign Affairs of the Cooperative Republic of Guyana to the Secretary-General of the United Nations (3 June 2016), referring to the "continued illegal occupation of Guyana's half of Ankoko island by the Venezuelan military." MG, Vol. IV, Annex 105. *See further* U.N. General Assembly, 37th Session, *Agenda item 9*, U.N. Doc. A/37/PV.16 (4 Oct. 1982), paras. 279, 282 ("Even as I speak now, Venezuela is in military occupation of territory belonging to Guyana. That territory was seized by force of arms in 1966. That act of aggression took place, moreover, a mere few months after the conclusion of the Geneva Agreement, which committed the parties, Venezuela included, to the search for a peaceful settlement. What is particularly significant is that that aggression did not take place while the British were still in the colony; the Venezuelans waited until after the British left in order to occupy part of our territory…. By sending its troops across that border in 1966, the Venezuelans signalled an intention to pressure Guyana by military means into redrawing that boundary"). MG, Vol. III, Annex 57.

[91] By note dated 19 July 1968, Guyana denounced a Decree by President Raúl Leoni which "purported to annex as part of the territorial waters and contiguous zone of Venezuela a belt of sea lying along the coast of Guyana between the mouth of the Essequibo River and Waini Point." *Note Verbale* from the Ministry of External Affairs of Cooperative Republic of Guyana to the Embassy of the Bolivarian Republic of Venezuela in Guyana (19 July 1968). MG, Vol. II, Annex 43.

recognize any type of such supposed concessions, either granted or to be granted by the Guyana Government over the territory stretching to the West of the Esequivo [sic] River."[92]

2.54 In 1970, the Commission ended its four-year mandate without "full agreement" or any agreement, for that matter.

B. SUSPENSION OF ARTICLE IV OF THE GENEVA AGREEMENT PURSUANT TO THE PROTOCOL OF PORT OF SPAIN: 1970-82

2.55 Following the failure of the Mixed Commission to arrive at a "full agreement," Article IV of the Geneva Agreement provided that the controversy was to be referred to the Governments of Guyana and Venezuela, to "choose one of the means of peaceful settlement provided in Article 33 of the Charter of the United Nations". It soon became clear, however, that they were unable to agree. Guyana, for its part, needed respite from Venezuelan threats against its territorial sovereignty. Accordingly, it welcomed the overture of the Prime Minister of Trinidad and Tobago, Dr. Eric Williams, who facilitated a "moratorium" in respect of the dispute settlement process, which was reflected in a Protocol to the Geneva Agreement ("Protocol of Port of Spain").

2.56 Pursuant to the 1970 Protocol,[93] the parties agreed to suspend the operation of Article IV[94] and "explore all possibilities of better understanding

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[92] Republic of Venezuela, Ministry of Foreign Affairs, *Communiqué* (14 May 1968). MG, Vol. II, Annex 42.

between them".[95] The Protocol was to "remain in force for an initial period of twelve years" and could be terminated by either State at the expiration of that initial period or of any period of renewal.[96] Both States further agreed that, during the moratorium, neither one would assert claims to sovereignty in the territory of the other.[97]

2.57 Four days after the signing of the Protocol, Venezuela's Minister of Foreign Affairs explained that an "essential advantage[]" for his country was 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".[98] He recognised that:

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[93] The Protocol was signed by Guyana, the United Kingdom of Great Britain and Northern Ireland and Venezuela on 18 June 1970. Its full title is: "Protocol to 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." Pursuant to Article VI of the Protocol, it came into force on the date of signature. Protocol to 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, 801 U.N.T.S. 183 (18 June 1970) ("Protocol of Port of Spain"). MG, Vol. II, Annex 46.

[94] Article III of the Protocol provides: "So long as this Protocol remains in force the operation of Article IV of the Geneva Agreement shall be suspended…." *Ibid*., Art. III.

[95] *Ibid*., Art. I. As set out in the Preamble of the Protocol, it reflected an understanding that "the promotion of mutual confidence and positive and friendly intercourse between Guyana and Venezuela will lead to an improvement in their relations befitting neighbouring and peace-loving nations." *Ibid*., p. 184.

[96] *Ibid*., Art. V.

[97] Article II of the Protocol provided: "no claim whatever arising out of the contention referred to in Article I of the Geneva Agreement shall be asserted by Guyana to territorial sovereignty in the territories of Venezuela or by Venezuela to territorial sovereignty in the territories of Guyana." *Ibid*., Art. II.

[98] Government of the Republic of Venezuela, *Exposition of Motives for the Draft Law Ratifying the Protocol of Port of Spain* (22 June 1970), *reprinted in* Republic of Venezuela,

> "in the absence of suspending the legal force of Article IV, the possibility existed that three months after the submission of the Final Report of the Mixed Commission, an issue of such vital importance for Venezuela 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".[99]

2.58 Guyana and Venezuela further agreed that each Government would "show restraint in its statements and actions so as to avoid bringing into discredit the honor, standing or authority of the other Government". They confirmed that "each Government would abstain from any statements, publications or other acts which could be detrimental to the economic development and progress of the other's State".[100]

2.59 Nonetheless, in 1981 – one year before expiration of the twelve-year moratorium – Venezuela resumed its campaign of intimidation against Guyana.[101] President Luis Herrera Campins "firmly ratifie[d] Venezuela's

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Ministry of Foreign Affairs, *Claim of Guyana Esequiba: Documents 1962-1981* (1981), para. 8. MG, Vol. II, Annex 47.

[99] *Ibid*., para. 4.

[100] Government of the Cooperative Republic of Guyana and Government of the Republic of Venezuela, *Minutes of certain matters dealt with by the Minister of State of Guyana and the Minister of External Relations of Venezuela in conversations held at Port-of-Spain* (June 1970), p. 1. MG, Vol. II, Annex 45. Described in the relevant minute as an "understanding between gentleman", this agreement was expressly referred to by Guyana before the UNGA in September 1981. U.N. General Assembly, 36th Session, *Agenda item 9*, U.N. Doc. A/36/PV.12 (24 Sept. 1981), para. 61. MG, Vol. II, Annex 53.

[101] *See* U.N. General Assembly, 36th Session, *Agenda item 9*, U.N. Doc. A/36/PV.12 (24 Sept. 1981), paras. 44, 58. MG, Vol. II, Annex 53.

claims to the Essequibo territory",[102] and Venezuela advised the international community that it would not recognize any form of co-operation for the development of Guyana in the Essequibo region.[103] In particular, Venezuela thwarted Guyana's Upper Mazaruni hydroelectric project, issuing a threat to the President of the World Bank, the major source of financing, that Venezuela "will recognise no right nor legal situation" arising from the project.[104]

2.60 On 18 December 1981, Venezuela formally notified Guyana of its decision to terminate the 1970 Protocol.[105] Accordingly, pursuant to Article V(3) of the Protocol, it was terminated on 18 June 1982.[106]

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[102] Cooperative Republic of Guyana, Ministry of Foreign Affairs, *Memorandum on the Guyana/Venezuela Boundary* (2 Nov. 1981), *reprinted in* U.N. General Assembly, 36th Session, *Review of the Implementation of the Declaration on the Strengthening of International Security*, U.N. Doc A/C.1/36/9 (9 Nov. 1981), p. 12. MG, Vol. III, Annex 54.

[103] At the UN Conference on New and Renewable Sources of Energy in August 1981, referred to at para. 59 of UN GA debates in September 1981, Guyana observed "[e]veryone knows that energy is critical in the process of development." U.N. General Assembly, 36th Session, *Agenda item 9*, U.N. Doc. A/36/PV.12 (24 Sept. 1981), para. 38. MG, Vol. II, Annex 53.

[104] *Letter* from the Minister of Foreign Affairs of the Republic of Venezuela to the President of the World Bank (8 June 1981), p. 3. MG, Vol. II, Annex 51. Venezuela gave maximum publicity to the document, issuing the text of its letter to the press and to representatives of the member States of the Bank, as observed in the *Letter* from the Vice President of the Cooperative Republic of Guyana to the President of the World Bank (19 Sept. 1981). MG, Vol. II, Annex 52.

[105] *Letter* from the Minster of Foreign Affairs of the Republic of Venezuela to the Minister of Foreign Affairs of the Cooperative Republic of Guyana (Dec. 1981). MG, Vol. III, Annex 55.

[106] Article V(3) provides: "This Protocol may be terminated at the expiration of the initial period or of any period of renewal if, at least six months before the date on which it may be terminated, either the Government of Guyana or the Government of Venezuela gives to the

C. THE PARTIES' FAILURE TO REACH AGREEMENT, UNDER ARTICLE IV(1) OF THE GENEVA AGREEMENT, "ON THE MEANS OF PEACEFUL SETTLEMENT PROVIDED IN ARTICLE 33 OF THE CHARTER": 1982

2.61 Article III of the Protocol of Port of Spain provided that, upon termination of the 12-year moratorium, implementation of Article IV of the Geneva Agreement would resume.[107] This was expressly acknowledged by Venezuela.[108]

2.62 As referred to above, Article IV of the Geneva Agreement provided for three stages. The first stage required the parties to attempt to reach agreement "on the means of peaceful settlement provided in Article 33 of the Charter" (Article IV(1)).[109] In the event of failure to reach agreement under

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other Governments parties to this Protocol a notice in writing to that effect [sic.]". Protocol of Port of Spain, Art. V(3). MG, Vol. II, Annex 46.

[107] Article III provides: "On the date when this Protocol ceases to be in force the functioning of that Article shall be resumed at the point at which it has been suspended, that is to say, as if the Final Report of the Mixed Commission had been submitted on that date…." *Ibid*., Art. III.

[108] *See Declaration* of the Minister of Foreign Affairs of the Republic of Venezuela (10 Apr. 1981), *reprinted in* Republic of Venezuela, Ministry of Foreign Affairs, *Claim of Guyana Esequiba: Documents 1962-1981* (1981) ("The immediate consequence of the termination of the Protocol of Port of Spain is the full reactivation of the procedures indicated in the Geneva Agreement from 1966"). MG, Vol. II, Annex 49; Republic of Venezuela, Ministry of Foreign Affairs, *Statement* (2 May 1981) ("The decision of the National Government not to continue to apply the Protocol of Spain after it has come to an end, expressed to Mr Burnham on the occasion of his visit to Caracas results in the provisions in Article IV of the Geneva Agreement coming into full force … it is also certain that the Agreement, after being approved by the Congress, became a Law of the Republic and it is an international commitment for Venezuela"). MG, Vol. II, Annex 50.

[109] Article IV(1) provides: "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

Article IV(1), Article IV(2) provided for two further stages of proceedings (the second and third stages). To begin with, the parties were to "refer the decision as to the means of settlement to an appropriate international organ upon which they both agree" (the second stage). However, "failing agreement on this point", the parties were to refer the decision as to the means of settlement "to the Secretary-General of the United Nations" (the third stage).

2.63 Accordingly, on the expiration of the 12-year moratorium, the parties first attempted to reach agreement "on the means of peaceful settlement provided in Article 33 of the Charter," as required by Article IV(1). But they were unable to reach agreement. Venezuela rejected Guyana's proposal of judicial settlement, and proposed diplomatic negotiations instead.[110] As explained by Guyana before the U.N. General Assembly on 4 October 1982:

> "Venezuela proposed negotiations, as was its sovereign right under the Agreement. Guyana, after the most careful consideration, proposed judicial settlement in accordance with its equally sovereign right. The Geneva Agreement gives no primacy whatsoever to negotiation. The choice of means has to be agreeable to both the parties; it is not the unilateral decision of one or the other. Guyana therefore rejects any insinuations of a reluctance to negotiate.
>
> I reiterate Guyana's commitment to a peaceful settlement with Venezuela and to a regime of peaceful, harmonious, good-neighbourly relations with Venezuela. We are a small, poor, militarily weak country. But we will not be bullied by

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delay choose one of the means of peaceful settlement provided in Article 33 of the Charter of the United Nations." Geneva Agreement, Art. IV(1). AG, Annex 4.

[110] Cooperative Republic of Guyana, Ministry of Foreign Affairs, *Press Release* (30 Mar. 1983). MG, Vol. III, Annex 62.

> Venezuela. We demand respect for our independence, our sovereignty and our territorial integrity." [111]

2.64 Pursuant to the second stage, Guyana proposed three alternative bodies as the "appropriate international organ" to choose the means of settlement, namely the ICJ, the U.N. General Assembly or the U.N. Security Council.[112] Venezuela rejected Guyana's proposals, expressing its preference for an immediate referral to the U.N. Secretary-General (as called for in the third stage). By letter dated 19 September 1982, Venezuela's Minister of Foreign Affairs stated that:

> "Venezuela has become convinced that the most appropriate international organ to choose a means of solution is the Secretary General of the United Nations, which organ accepted this responsibility by its note of April 4, 1966 subscribed to by U. Thant and whose role has been expressly agreed upon by the parties in the text itself of the Geneva Agreement."[113]

2.65 Venezuela reiterated its position in a letter dated 15 October 1982:

> "Venezuela is convicted [sic] 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

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[111] U.N. General Assembly, 37th Session, *Agenda item 9*, U.N. Doc. A/37/PV.16 (4 Oct. 1982), paras. 287-288. MG, Vol. III, Annex 57.

[112] *See* U.N. General Assembly, 37th Session, *Agenda item 9*, U.N. Doc. A/37/PV.26 (11 Oct. 1982), paras. 207-215. MG, Vol. III, Annex 58.

[113] *Letter* from the Minister of Foreign Affairs of the Republic of Venezuela to the Minister of Foreign Affairs of the Cooperative Republic of Guyana (19 Sept. 1982). MG, Vol. III, Annex 56.

> 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 [sic] 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."[114]

2.66 In view of Venezuela's stance, and the resulting impossibility of reaching agreement on any other international organ to choose the means of settlement, Guyana agreed by letter dated 28 March 1983 "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",[115] consistent with Article IV(2) of the Geneva Agreement.

D. REFERRAL OF THE CHOICE OF MEANS OF SETTLEMENT TO THE U.N. SECRETARY-GENERAL, IN CONFORMITY WITH ARTICLE IV(2) OF THE GENEVA AGREEMENT: 1983

2.67 In response to the parties' referral, Secretary-General Javier Pérez de Cuéllar accepted responsibility for choosing the means of settlement of the controversy, in conformity with his authority under Article IV(2) of the Geneva Agreement. By letter dated 31 March 1983, he stated that:

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[114] *Letter* from the Minister of Foreign Affairs of the Republic of Venezuela to the Minister of Foreign Affairs of the Cooperative Republic of Guyana (15 Oct. 1982), p. 2. MG, Vol. III, Annex 59.

[115] *See Letter* from the Minister of Foreign Affairs of the Cooperative Republic of Guyana to the Minister of Foreign Affairs of the Republic of Venezuela (28 Mar. 1983) ("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, hereby agrees to proceed to the next stage and, accordingly, to refer the decision as to the means of settlement to Secretary-General of the United Nations."). MG, Vol. III, Annex 61. *See further*, U.N. General Assembly, 38th Session, *Agenda item 9*, U.N. Doc. A/38/PV.20 (5 Oct. 1983), para. 221. MG, Vol. III, Annex 65.

> "Being now assured that it is the wish of the governments of both Guyana and Venezuela that I undertake the responsibility conferred on me in Article IV(2) of the Geneva Agreement, I shall, after due consideration, communicate to you and to the Government of Venezuela the conclusion I have reached in the discharge of that responsibility".[116]

2.68 On 31 August 1983, the Secretary-General issued a statement explaining that "in order to facilitate the discharge of his responsibility under the terms of Article IV (2) of the Agreement signed at Geneva", he had sent the Under-Secretary-General for Special Political Affairs, Diego Cordovez, to visit Caracas and Georgetown. This was "for the purpose of ascertaining the position which the parties might wish to provide relevant to a choice of means for a peaceful settlement".[117]

2.69 Mr. Cordovez subsequently reported, after his consultations with the parties, that both Guyana and Venezuela "have reaffirmed their readiness to cooperate fully with the Secretary-General in the discharge of his responsibility under the Geneva Agreement".[118] After taking Mr. Cordovez's report and the parties' views into account, the Secretary-General decided that

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[116] *Letter* from the Secretary-General of the United Nations to the Minister of Foreign Affairs of the Cooperative Republic of Guyana (31 Mar. 1983). MG, Vol. III, Annex 63.

[117] *Telegram* from the Secretary-General of the United Nations to the Minister of Foreign Affairs of the Cooperative Republic of Guyana (31 Aug. 1983), p. 2. MG, Vol. III, Annex 64.

[118] *Ibid*., p. 3. He further reported that he "conveyed to the Secretary-General the assurances of the governments of Guyana and Venezuela that they were determined to exert the utmost efforts to settle their controversy in an entirely peaceful and amicable manner." *See further* U.N. General Assembly, 39th Session, *Agenda item 9*, U.N. Doc. A/39/PV.19 (3 Oct. 1984), para. 134 (where Guyana noted that "The Secretary-General was prescient when he asked for and obtained from both countries assurances that we would do everything necessary 'in order to foster and maintain the most favourable climate for the effective application of the Geneva Agreement.'"). MG, Vol. III, Annex 66.

the means of settlement should be a "Good Offices Process" conducted by his Personal Representative.

E. THE GOOD OFFICES PROCESS: 1990-2014

2.70 Beginning in 1990, successive Secretaries-General exercised their authority under Article IV(2) of the Geneva Agreement by appointing eminent Personal Representatives to conduct the Good Offices Process:

a. From 1990-99, Professor Alister McIntyre of Grenada was appointed by Secretary-General Pérez de Cuéllar. He had previously served as Secretary-General of CARICOM, and was at the time serving as Vice-Chancellor of the University of the West Indies.

b. From 1999 - 2007, Oliver Jackman of Barbados was appointed by Secretary-General Kofi Annan as his "Personal Representative on the Border Controversy between Guyana and Venezuela".[119] He had a distinguished career in the diplomatic service (serving inter alia as Ambassador to the United States, and Permanent Representative to both the OAS and UN)120 and was elected as Judge on the Inter-American

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[119] U.N. Secretary-General, *Press Release: Oliver Jackman Appointed Personal Representative of Secretary-General in Border Controversy Between Guyana and Venezuela*, U.N. Doc SG/A/709 (26 Oct. 1999). MG, Vol. III, Annex 72.

[120] *Ibid.*

Court of Human Rights.[121] In 1980, he was decorated by Venezuela with the Order of Francisco de Miranda.[122]

c. Following Mr. Jackman's untimely death in January 2007, the Good Offices Process suffered a hiatus until the appointment of Professor Norman Girvan in 2010.[123] He was Secretary-General of the Association of Caribbean States between 2000 and 2004, a member of the U.N. Committee on Development Policy, and Professor Emeritus of the University of the West Indies.[124] He passed away in 2014.

2.71 Between 1990 and 2014, the Good Offices Process entailed significant engagement by both the U.N. and the parties. Facilitators, selected by Guyana and Venezuela respectively, were appointed to assist the Secretary-General's Personal Representative, and a practice was established to hold regular meetings between the Foreign Ministers and the U.N. Secretary-General during the annual meeting of the U.N. General Assembly,

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[121] *Ibid.*

[122] *Ibid*. Mr. Jackman had also served as the Chief Information Officer at the UN Economic Commission for Africa, a member of the Haitian Truth and Justice Commission, as well as a member of the Barbados Social Justice Commission and the Barbados Constitution Review Commission.

[123] *See* U.N. Secretary-General, *Press Release: Secretary-General Appoints Norman Girvan of Jamaica as Personal Representative on Border Controversy Between Guyana, Venezuela*, U.N. Doc. SG/A/1230-BIO/4183 (21 Apr. 2010). MG, Vol. III, Annex 76.

[124] *Ibid*. He also worked as Senior Officer and Consultant at the United Nations Centre on Transnational Corporations and as Senior Research Fellow of the United Nations African Institute for Development and Planning in Dakar, Senegal. In addition, he served as Chief Technical Director of Jamaica's National Planning Agency as well as serving on the Board of Directors of the Bank of Jamaica and in the Economic Council of the Cabinet of the Government of Jamaica.

in addition to regular visits of the Personal Representative to Caracas and Georgetown.

2.72 Consistent with their obligations under Article IV(2) of the Geneva Agreement, the parties continuously reaffirmed their commitment to the Good Offices Process, chosen by the Secretary-General pursuant to his authority under Article IV(2) as the means of settlement of the controversy. For example:

a. Following a meeting on 5 April 1993 attended by the Ministers of Foreign Affairs of Guyana and Venezuela, the U.N. Secretary-General and Professor McIntyre, a joint statement was issued in which:

> "The representatives of both countries reiterated their Governments' determination to achieve a peaceful settlement of the controversy, through the Good Offices of the Secretary General, in keeping with their deep and unswerving commitment to the peaceful resolution of issues within the framework of the 1966 Geneva Agreement."[125]

b. On 2 October 1996, before the U.N. General Assembly, the President of Venezuela stated that the controversy:

> "lies within the framework of the 1966 Geneva agreement signed by both countries in order to reach a practical and lasting solution to this dispute. In a spirit

[125] Government of the Cooperative Republic of Guyana and Government of the Republic of Venezuela, *Joint Statement* (5 Apr. 1993), p. 5. MG, Vol. III, Annex 67.

of dialogue and cooperation between the two parties, we appealed to the Secretary-General's good offices and are now applying one of the mechanisms for the peaceful settlement of disputes provided for in the United Nations Charter."[126]

c. On 23 July 1998, the Presidents of Venezuela and Guyana issued a Joint Communiqué which "reaffirmed their decision to continue to avail themselves of the McIntyre Process, in order to reach a final settlement as called for by the Geneva Agreement of 1966".[127]

2.73 Despite efforts over twenty-four years, the parties failed to make significant progress in arriving at a settlement of the controversy through the Good Offices Process. With the death of Professor Girvan in 2014, and the need for the appointment of yet another Personal Representative, it became increasingly apparent that the Good Offices Process was not going to resolve the controversy, and would have to be replaced by another means of settlement, in application of Article IV(2) of the Geneva Agreement.

F. VIOLATIONS OF GUYANA'S SOVEREIGNTY AND TERRITORIAL INTEGRITY

2.74 Despite its participation in the Good Offices Process, Venezuela engaged in hostile actions aimed at pressuring Guyana to cede the so-called

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[126] U.N. General Assembly, 51st Session, *Agenda item 9*, U.N. Doc. A/51/PV.19 (2 Oct. 1996), p. 14. MG, Vol. III, Annex 69.

[127] Government of the Cooperative Republic of Guyana and Government of the Republic of Venezuela, *Joint Communiqué* (23 July 1998). MG, Vol. III, Annex 70.

"Guayana Esequiba" territory west of the Essequibo River. As observed by Guyana in a letter to the U.N. Secretary-General:

> "during the twenty-five years of the Good Offices Process, Guyana has continued to face repeated threats and intimidation, military incursions and subversion, and a deliberate policy of stymieing its economic development".[128]

2.75 Military incursions by Venezuela became increasingly frequent during the last years of the Good Offices Process. For example[129]:

a. In November 2007, a Venezuelan General led some thirty soldiers into Guyana's territory on the Cuyuni River, supported by military helicopters, and used explosives to destroy Guyanese dredges. By a Note dated 15 November 2007, Guyana protested that it was "extremely disturbed by these unauthorized incursions into its territory and wishes to request that the operations by the Venezuelan armed forces on Guyana's territory and air space cease forthwith".[130]

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[128] *Letter* from the Vice President and Minister of Foreign Affairs of the Cooperative Republic of Guyana to the Secretary-General of the United Nations (3 June 2016). MG, Vol. IV, Annex 105.

[129] The map at Annex 125, shows the approximate locations of the incidents described in this paragraph. *See* Map of Violations of Guyana's Sovereignty and Territorial Integrity. MG, Vol. IV, Annex 125.

[130] *Note Verbale* from the Ministry of Foreign Affairs of the Cooperative Republic of Guyana to the Embassy of the Bolivarian Republic of Venezuela in Guyana, No. DG/2/11/2007 (15 Nov. 2007). MG, Vol. III, Annex 74.

b. In 2013, armed Venezuelan soldiers landed on Guyanese territory at Eteringbang.[131]

c. In June 2014, Venezuelan armed forces crossed into Guyana's territory at Bruk up Landing,[132] seized property and detained Guyanese citizens. By Note dated 1 July 2014, Guyana protested "these provocative acts committed by the Venezuelan military", noting "[t]hey are a violation of the territory of Guyana as well as the human rights of its people".[133]

2.76 Venezuela also continued to act in various ways to obstruct Guyana's economic development including by threatening potential investors.[134] More recent examples include:

a. In 2013, the Venezuelan Navy seized a research vessel, the RV Teknik Perdana, operating peacefully in Guyana's waters.135 The vessel had been contracted by Guyana's United States licensee, Anadarko Petroleum Corporation, and

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[131] D. Scott Chabrol, "Venezuelan soldiers weren't allowed entry-govt", *Demerara Waves* (13 Sept. 2013). MG, Vol. III, Annex 78.

[132] Bruk up is located on the Guyana side of the Amacuro river.

[133] *Note Verbale* from the Ministry of Foreign Affairs of the Cooperative Republic of Guyana to the Ministry of People's Power for External Relations of the Bolivarian Republic of Venezuela, No. 815/2014 (1 July 2014). MG, Vol. III, Annex 83.

[134] *See supra* Sections II(A) and (B).

[135] Referred in *Address* of the President of the Republic of Guyana to the U.N. General Assembly, 70th Session, U.N. Doc. A/70/PV.16 (29 Sept. 2015), p. 3. MG, Vol. III, Annex 99.

was conducting transitory seismic activities off Guyana's Essequibo coast. Venezuela's actions resulted in the cessation of all further exploration activities in Guyana's waters by the licensee.[136]

b. In 2014, Venezuela objected to a joint hydroelectric project planned by Guyana and Brazil in the Upper Mazarumi region.[137]

c. That same year, Venezuela warned Guyana to refrain from all economic activity west of the Essequibo River.[138]

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[136] *See Letter* from F. Patterson, Anadarko Petroleum Co., to R.M. Persaud, Minister of Natural Resources and the Environment of the Cooperative Republic of Guyana (20 Aug. 2014). MG, Vol. III, Annex 84.

[137] *See Note Verbale* from the Ministry of External Relations of the Bolivarian Republic of Venezuela to the Ministry of Foreign Affairs of the Cooperative Republic of Guyana, No. 000802 (8 Apr. 2014). MG, Vol. III, Annex 80; *Note Verbale* from the Ministry of Foreign Affairs of the Republic of Guyana to the Ministry of Foreign Affairs of the Bolivarian Republic of Venezuela, No. DG/07/04/2014 (14 Apr. 2014). MG, Vol. III, Annex 81; *Letter* from the Minister of Foreign Affairs of the Cooperative Republic of Guyana to the Secretary-General of the United Nations (15 Apr. 2014). MG, Vol. III, Annex 82.

[138] *Note Verbale* from the Ministry of the People's Power for External Relations of the Bolivarian Republic of Venezuela to the Ministry of Foreign Affairs of the Republic of Guyana, No. I.DDM. 005568 (22 Sept. 2014). MG, Vol. III, Annex 85.

G. EXHAUSTION OF THE GOOD OFFICES PROCESS AND DECISION OF THE U.N. SECRETARY-GENERAL THAT THE INTERNATIONAL COURT OF JUSTICE SHALL BE THE MEANS OF SETTLEMENT: 2014-18

1. The Lack of Progress Toward Settlement in the Good Offices Process: 2014-15

2.77 By 2014, Guyana concluded that, in light of the inability of the Good Offices Process to achieve a settlement of the controversy, it was time for the Secretary-General to choose another means of settlement under Article 33 of the U.N. Charter. In a letter dated 2 December 2014 to her Venezuelan counterpart, the Guyanese Foreign Minister stated that "after 25 years [the Good Office process] has brought us no closer to the resolution of the controversy… I am therefore writing to let you know that the Government of Guyana is presently reviewing the other options under Article 33."[139]

2.78 In its reply, Venezuela apparently concludes that it benefitted from the *status quo*, stating that the "[Good Offices] mechanism remains politically and legally appropriate" in addressing the controversy, which it noted has arisen with respect to "the Award of Paris of 1899 [being] null and void".[140] In a subsequent letter dated 19 June 2015, Venezuela defended the

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[139] *Letter* from the Minister of Foreign Affairs of the Cooperative Republic of Guyana to the Minister of the People's Power for External Relations of the Bolivarian Republic of Venezuela (2 Dec. 2014). MG, Vol. III, Annex 86. *See also* Caribbean Community (CARICOM), *Statement: Thirtieth Regular Meeting of Heads of Government, Guyana* (July 2009). MG, Vol. III, Annex 75.

[140] *Letter* from the Minister of the People's Power for External Relations of the Bolivarian Republic of Venezuela to the Minister of Foreign Affairs of the Republic of Guyana (29 Dec. 2014). MG, Vol. III, Annex 87.

Good Offices Process under the Geneva Agreement, the U.N. Charter, and the authority of the Secretary-General:

> "international law, in particularly [sic] the Geneva Agreement signed by our two nations on 17th February 1966 in accordance with the Charter of the United Nations, has authority over this territorial dispute….the Geneva Agreement continues to be implemented by the Secretary General of the United Nations through his high representatives who exercise the Good Offices that derive from the aforementioned Agreement…"[141]

2.79 Notwithstanding Venezuela's invocation of international law and the U.N. Charter, it continued to engage in actions that violated Guyana's sovereignty and territorial integrity. Notably, in May 2015, Venezuela issued a Decree asserting Venezuela's sovereignty and sovereign rights over Guyana's entire maritime area adjacent to the Essequibo coast, and authorising its navy to enforce jurisdiction.[142]

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[141] *Letter* from the Minister of the People's Power for External Relations of the Bolivarian Republic of Venezuela to the Minister of Foreign Affairs of the Republic of Guyana (19 June 2015). MG, Vol. III, Annex 95.

[142] Bolivarian Republic of Venezuela, Decree No. 1.787 (26 May 2015), published in *The Official Gazette of the Bolivarian Republic of Venezuela* (27 May 2015). MG, Vol. III, Annex 89. This was condemned by Guyana (*see e.g. Letter* from the Minister of Foreign Affairs of the Cooperative Republic of Guyana to the Secretary-General of the United Nations (8 June 2015). MG, Vol. III, Annex 90 and Caribbean Community (CARICOM), *Statement: Thirtieth Regular Meeting of Heads of Government, Guyana* (July 2009). MG, Vol. III, Annex 75. An amended Decree (No. 1859) was subsequently issued in July 2015. "New Venezuelan decree doesn't remove old claims – Granger", *Guyana Times* (9 July 2015). MG, Vol. III, Annex 97.

2.80 On 9 July 2015, Venezuelan President Nicolas Maduro wrote to the Secretary-General calling for the appointment of a new Personal Representative and the resumption of the Good Offices Process:[143]

> "Since the appointment of a Good Officer is an appropriate method for advancing towards a peaceful settlement of the territorial dispute, as provided in Article IV.2 of the Geneva Agreement…. [and] since the method of the good officer has not been exhausted, the appropriate course of action is to urge the Secretary-General of the United Nations to exercise the jurisdiction invested in him by the parties in the Geneva Agreement and nominate a new Good Officer …"

2.81 On 29 September 2015, President Granger of Guyana expressed to the U.N. General Assembly Guyana's view that, after twenty-five years of failure, the Good Offices Process was now exhausted, and that it was time to choose a new means of settlement:[144]

> "From the beginning of Guyana's independence … Venezuela has resorted to various stratagems to deprive us of our territory… Venezuela – more than four times the size of Guyana, with armed forces that are more than 40 times the size of our defence force – mindful of its superior wealth and military strength, but unmindful of its obligations as a Member of the United Nations, Union of South American nations and the Organisation of American States, has pursued a path of intimidation and aggression… We thank the United Nations and the Secretary-General for appointing various

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[143] *Letter* from the President of the Bolivarian Republic of Venezuela to the Secretary-General of United Nations (9 July 2015). MG, Vol. III, Annex 98.

[144] *Address* of the President of the Republic of Guyana to the U.N. General Assembly, 70th Session, U.N. Doc. A/70/PV.16 (29 Sept. 2015), pp. 3-4. MG, Vol. III, Annex 99. *See also* U.N. General Assembly, 37th Session, *Agenda item 9*, U.N. Doc. A/37/PV.16 (4 Oct. 1982), para. 281 ("By its behaviour since 1966 Venezuela has created not only an image but the reality of an aggressor country"). MG, Vol. III, Annex 57.

> officials during the past 25 years to use their good offices to help to resolve this controversy. We feel, however, that the process has now been exhausted. Guyana does not want this obnoxious territorial claim to obscure our country's prospects for peace and obstruct its potential growth for the next 50 years. We need a permanent solution if we are to avoid a fate of perpetual peril and penury, and we seek a juridical settlement to the controversy… The United Nations remains our best hope and prospect for peace, the best assurance of security for small States."[145]

2. U.N. Secretary-General's Consultations with the Parties: 2015-16

2.82 Secretary-General Ban Ki-moon held a meeting with the Presidents of Guyana and Venezuela at the 70th U.N. General Assembly in September 2015.[146] Later that year, he presented a proposal entitled "The Way Forward", for progressing towards a settlement of the controversy.[147] In accordance with that proposal, there were extensive consultations and meetings at the highest levels between the parties and the U.N. Secretary-General's *Chef de Cabinet*.[148]

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[145] *See further* Republic of Guyana, Ministry of Foreign Affairs, *Press Release* (17 Feb. 2018) (noting "The Mixed Commission ended in 1970. For 47 years after, Venezuela harassed Guyana's development, filibustered on settlement and steadily stepped up its militarism – territorially and at sea"). MG, Vol. IV, Annex 129.

[146] As noted by UNSG Ban Ki-moon in U.N. Secretary-General, *Note to Correspondents: The Controversy between Guyana and Venezuela* (16 Dec. 2016). MG, Vol. IV, Annex 111.

[147] *Letter* from Chef de Cabinet of the United Nations to the President of Guyana (12 Nov. 2015). MG, Vol. IV, Annex 100.

[148] *Letter* from the Minster of Foreign Affairs of the Cooperative Republic of Guyana to the Secretary-General of the United Nations (9 Nov. 2016). MG, Vol. IV, Annex 109. For example, in March 2016 meetings were held with the parties in Georgetown and Caracas, respectively, to attempt to arrive at an agreement (*See Letter* from the President of the Cooperative Republic of Guyana to the Secretary-General of the United Nations (26 Apr. 2016). MG, Vol. IV, Annex 103.

2.83 During this period, Venezuela's actions continued to reflect a pattern of hostility against Guyana. On 4 February 2016, around the time of the fiftieth anniversary of both the Geneva Agreement and Guyana's independence, the Foreign Minister of Venezuela made a statement at the U.N. purporting to "ratif[y] its rights over the Essequibo".[149] On 30 May 2016, a team of three Guyanese officials monitoring activities in the Essequibo region came under gunfire from the Venezuelan armed forces.[150]

2.84 On 26 April 2016, President Granger wrote to the Secretary-General expressing concern that Venezuela "evidently, is unwilling to accept any effective procedure for settlement of the controversy", and that "Guyana's security, development and well-being have been impaired". He urged that the Secretary-General "in the exercise of your authority under Article IV of the Geneva Agreement inform the parties of your choice of the procedure leading to the final and binding settlement of the controversy by the International Court of Justice".[151] In his statement before the U.N. General Assembly in September 2016, President Granger confirmed that:[152]

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[149] This was referred to by Hon. Carl Greenidge, Vice President and Minister of Foreign Affairs, in his statement before the National Assembly in February 2016. Government of the Cooperative Republic of Guyana, *Proceedings and Debates of the National Assembly of the First Session (2015-2016) of the Eleventh Parliament of Guyana under the Co-operative Republic of Guyana held in the Parliament Chamber, Public Buildings, Brickdam, Georgetown* (11 Feb. 2016). MG, Vol. IV, Annex 102; *Statement* of the Minster of Foreign Affairs of the Cooperative Republic of Guyana to the National Assembly (11 Feb. 2016). MG, Vol. IV, Annex 101.

[150] *Note Verbale* from the Ministry of Foreign Affairs of the Cooperative Republic of Guyana to the Ministry of People's Power for External Relations of the Bolivarian Republic of Venezuela, No. 1075/2016 (1 June 2016). MG, Vol. IV, Annex 104.

[151] *Letter* from the President of the Cooperative Republic of Guyana to the Secretary-General of the United Nations (26 Apr. 2016). MG, Vol. IV, Annex 103. *See also Letter* from the

> "Since my address last year, Venezuela has used every means to stall, as it has intensified its aggression against Guyana and thwarted all the Secretary-General's efforts to pursue a way forward, at least in terms of a process that would lead to a final resolution of the controversy. Guyana stands ready to have the International Court of Justice reach a final determination on the matter. We will work resolutely with the Secretary-General in his final months of office… In the Geneva Agreement of 1966, Venezuela agreed that the Secretary-General would determine the means of settlement of this controversy, including by judicial settlement."

3. U.N. Secretary-General's Decision to Continue the Good Offices Process for One Final Year: 15 December 2016

2.85 On 31 October 2016, Secretary-General Ban Ki-moon advised the parties that he was not convinced that he should appoint a new Personal Representative for the continuation of the Good Offices Process; instead, he reported, he intended to take stock of the progress achieved in the resolution of the controversy.[153]

2.86 In its reply dated 9 November 2016, Guyana noted that it had "made every effort to give the good offices process a final opportunity" but explained that "at this stage, five decades since the Geneva Agreement was

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Vice President and Minister of Foreign Affairs of the Cooperative Republic of Guyana to the Secretary-General of the United Nations (3 June 2016) (reiterating that recourse to the Court "is within your power under the 1966 Geneva Agreement"). MG, Vol. IV, Annex 105.

[152] *Address* of the President of the Republic of Guyana to the U.N. General Assembly, 71st Session, U.N. Doc A/71/PV.8 (20 Sept. 2016), p. 24. MG, Vol. IV, Annex 106.

[153] As recorded in the *Letter* from the Minster of Foreign Affairs of the Cooperative Republic of Guyana to the Secretary-General of the United Nations (9 Nov. 2016). MG, Vol. IV, Annex 109.

adopted, recourse to the Court offers the only solution that is compatible with Article IV".[154]

2.87 Commenting on an assertion made the previous month by the President of Venezuela– that the Geneva Agreement "exclude[s] a settlement in a legal forum" – Guyana explained that this assertion was not consistent with the express powers conferred upon the Secretary-General by Article IV, and contradicted Venezuela's own position during and after negotiation of the Geneva Agreement, including in the First Interim Report of the Mixed Commission (dated 30 December 1996) in which the parties agreed that "the juridical examination of the question would if necessary be proceeded with, in time, by some international tribunal in accordance with article IV of the Geneva Agreement".[155]

2.88 Referring to another Venezuelan statement the previous month accusing Guyana of "aggression" in conjunction with "imperial forces", and recent Venezuelan military incursions on its territory, Guyana further expressed its concern over a "situation of significant and alarming deterioration".[156] It stated that "without a clear signal that a final and binding decision will soon resolve this controversy, there is a serious risk of destabilization in the region", and that "a referral to the Court would have the effect of calming the situation".

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[154] *Ibid.*

[155] *Ibid*; United Kingdom, Ministry of External Affairs, *First Interim Report of the Mixed Commission* (30 Dec. 1966), p. 4. MG, Vol. II, Annex 41.

[156] *Letter* from the Minster of Foreign Affairs of the Cooperative Republic of Guyana to the Secretary-General of the United Nations (9 Nov. 2016). MG, Vol. IV, Annex 109.

2.89 An official Venezuelan communiqué issued that same month (November 2016) reiterated Venezuela's position that the Geneva Agreement is "the existing legal instrument deposited legally in the United Nations Organisation, and which governs this territorial controversy as the law between the Parties".[157]

2.90 On 15 December 2016 – thirty-three years after the parties had referred the decision on the means of settlement to Secretary-General Perez de Cuellar in 1983 – Secretary-General Ban Ki-moon decided that, for one more year the means of settlement of the controversy shall be the Good Offices Process; and that, if that Process fails to achieve "significant progress" toward a resolution of the controversy by the end of 2017, the next means of settlement shall be the International Court of Justice. His statement read as follows:

> "…The Geneva Agreement was signed with the aim of amicably resolving the controversy that had arisen as a result of the Venezuelan contention that the Arbitral Award of 1899 about the frontier between British Guiana and Venezuela is null and void. The 1966 Geneva Agreement confers on the Secretary-General of the United Nations the power to choose means of settlement of the controversy from among those that are contemplated in Article 33 of the United Nations Charter… the Good Offices Process will continue for one final year, with a new PRSG[158] with a strengthened mandate of mediation who will be appointed by the Secretary-General designate shortly after he takes office.

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[157] Ministry of the People's Power for External Relations of the Bolivarian Republic of Venezuela, *Communiqué* (12 Nov. 2016). MG, Vol. IV, Annex 110.

[158] *I.e*. Personal Representative of the Secretary-General.

> If, 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"[159]

2.91 In response, Venezuela "reaffirmed its commitment to a negotiated resolution of this dispute, and demanded that Guyana comply with the Good Offices process in good faith, which the UNSG has decided will continue for one final year, until the end of 2017, with a reinforced mandate of mediation".[160] Whilst indicating its preference for a process of negotiation, Venezuela reaffirmed that:

> "the Geneva Agreement, which grants to the Secretary General of the United Nations the power to choose the means of pacific settlement of disputes within Article 33 of the United Nations Charter, promotes a practical and friendly resolution acceptable to both parties through a process of negotiation".[161]

2.92 Guyana accepted the Secretary-General's decision, without qualification. In a letter to the Secretary-General, President Granger "assured him of Guyana's commitment to fulfilling the highest expectations of the decision in respect of both the Good Offices Process in the coming twelve-month period and recourse to the International Court of Justice thereafter, if

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[159] U.N. Secretary-General, *Note to Correspondents: The Controversy between Guyana and Venezuela* (16 Dec. 2016). MG, Vol. IV, Annex 111.

[160] Ministry of the People's Power for External Relations of the Bolivarian Republic of Venezuela, *Press Release: Venezuela celebrates UN decision to continue Good Offices to resolve dispute with Guyana over the Essequibo* (16 Dec. 2016). MG, Vol. IV, Annex 112.

[161] *Ibid.*

this becomes necessary", and thanked the Secretary-General for his role in "maintaining the peace between nations – large and small".[162]

2.93 President Granger also wrote to President Maduro confirming Guyana's "full acceptance of the 15 December 2016 decision of the Secretary-General of the United Nations on the 'Way Forward', pursuant to the authority conferred upon him by the signatories under Article IV (2) of the 1966 Geneva Agreement".[163]

2.94 In a statement before Guyana's Parliament on 20 December 2016, Guyana's Vice President and Foreign Minister, Carl Greenidge, further confirmed this position:

> "We have assured the Secretary-General of our acceptance of his decision and of our commitment to every effort to making it a success. We had of course lost faith in the 'good office' process essentially because of Venezuela's non-cooperation with it but we are willing to give it one last try facilitated by the Secretary-General's nominee. But of course it is a process

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[162] *Letter* from the President of the Cooperative Republic of Guyana to the Secretary-General of the United Nations (22 Dec. 2016). MG, Vol. IV, Annex 116. *See further* Government of Guyana, *Statement on the Decision by the United Nations Secretary-General* (16 Dec. 2016) (confirming *inter alia* "The Government of Guyana accepts the decision of the Secretary-General. We stand committed to using our best endeavours to fulfill its highest expectations. The Government will be writing formally to him as well as to the President of Venezuela to indicate our acceptance of this decision"). MG, Vol. IV, Annex 113.

[163] *Letter* from the President of the Cooperative Republic of Guyana to the President of the Bolivarian Republic of Venezuela (21 Dec. 2016) (The letter stated *inter alia*, "Guyana assures you of its 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"). MG, Vol. IV, Annex 115.

> that can only produce mutually satisfactory results if Venezuela cooperates fully to that end. As we say in Guyana 'one hand can't clap.' …. If they do not we will have readied ourselves for the International Court of Justice".[164]

4. U.N. Secretary General's Appointment of Mr. Dag Nylander as Personal Representative for the Final Year of the Good Offices Process: 2017

2.95 On assuming the position of U.N. Secretary-General in 2017, António Guterres continued the Good Offices Process for a final year, in conformity with his predecessor's decision.[165]

2.96 On 23 February 2017, he appointed Mr. Dag Nylander of Norway as the Personal Representative of the Secretary-General on the Border Controversy Between Guyana and Venezuela.[166] A jurist and distinguished diplomat, Mr. Nylander was the First Secretary at the Permanent Mission of Norway to the U.N. in New York from 2001 to 2004, and the Special Envoy of the Government of Norway to the Peace Process in Colombia from 2012 to 2016.[167]

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[164] "One hand can't clap' to resolve border controversy – Greenidge", *i News Guyana* (20 Dec. 2016). MG, Vol. IV, Annex 114.

[165] *Letter* from the Secretary-General of the United Nations to the President of the Cooperative Republic of Guyana (23 Feb. 2017). MG, Vol. IV, Annex 117.

[166] By letter dated 1 March 2017, Guyana welcomed Mr. Nylander's appointment and reiterated that it would provide full cooperation. *Letter* from the President of the Cooperative Republic of Guyana to the Secretary-General of the United Nations (1 Mar. 2017). MG, Vol. IV, Annex 118.

[167] *Letter* from the Secretary-General of the United Nations to the President of the Cooperative Republic of Guyana (23 Feb. 2017). MG, Vol. IV, Annex 117.

2.97 Mr. Nylander's terms of reference, issued by the Secretary-General, noted that pursuant to the Geneva Agreement:

> "Guyana and Venezuela have referred to the Secretary-General the decision as to the means of settlement of the controversy that arose as the result of the Venezuelan contention that the Arbitral Award of 1899 about the frontier between Venezuela and what is now Guyana is 'null and void'."[168]

2.98 The terms of reference specified that his mandate was to engage intensively with the Governments of both States, exploring and proposing options for the solution of the outstanding controversy, and "other relevant aspects of the bilateral relations between the parties, including maritime, environmental and cooperation issues".[169]

2.99 In the penultimate paragraph, Mr. Nylander was specifically directed that in his final Report:

> "the mediator will take into account the decision of the Secretary-General communicated to the parties on 15 December 2016, that he will choose the International Court of Justice as the next means of settlement of the controversy if significant progress is not achieved by the end of 2017."

[168] *Ibid.*

[169] *Ibid.*

5. No Significant Progress Made in 2017

2.100 Consistent with Mr. Nylander's terms of reference, meetings and exchanges were held with the parties during 2017.[170] Among them were three formal bilateral meetings at Greentree Estate in New York, held on 28-29 October, 19-20 November and 29-30 November. The Foreign Ministers of Guyana and Venezuela participated in these meetings with high-level delegations. Nevertheless, the Secretary-General concluded that there had been no significant progress toward a solution of the controversy.

2.101 During this period, notwithstanding the talks, Venezuela continued to threaten Guyana militarily. On 20 September 2017, President Granger expressed Guyana's concerns before the General Assembly:

> "We depend on our territorial and maritime resources for our country's development and for propelling our people out of poverty. After 51 years of Guyana's independence, the Venezuelan claim persists …
>
> This is a warning to the world, through the Assembly, that peace will be jeopardized in our region if justice does not prevail, not only within Venezuela, but also with regard to its border controversy with Guyana. Four Secretaries-General have been seized of the Venezuelans' claim. The choice has become one between a just and peaceful settlement in accordance with international law, and a Venezuelan posture of attrition that is increasingly blustering and militaristic. In

[170] For example, by letter dated 11 April 2017, President Granger informed the Secretary-General that Guyana was preparing to receive Mr. Nylander for discussions "later this week." President Granger stated, "I wish to reiterate my Government's commitment to cooperate with Ambassador Nylander in the execution of his mandate." *Letter* from the President of the Cooperative Republic of Guyana to the Secretary-General of the United Nations (11 Apr. 2017). MG, Vol. IV, Annex 119.

> this matter, protraction is the enemy of resolution and the ally of sustained conflict.
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> …
>
> Guyana has been working assiduously with the Secretary-General's personal representative and looks to the international community to ensure that Venezuela is not allowed to thwart the process of judicial settlement, which is the clear and agreed path to peace and justice".[171]

6. Decision of U.N. Secretary-General Antonio Guterres to Choose the Court as the Next Means of Settlement: 30 January 2018

2.102 On 30 January 2018, having received the final report of his Personal Representative on the Good Offices Process during 2017, U.N. Secretary-General Guterres issued a public statement.[172] In it he recorded his conclusion that the Process had failed to achieve progress toward a resolution of the controversy, and his decision that the next means of settlement under Article IV(2) of the Geneva Agreement and Article 33 of the U.N. Charter

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[171] *Address* of the President of the Republic of Guyana to the U.N. General Assembly, 72nd Session, U.N. Doc A/72/PV.7 (20 Sept. 2017). MG, Vol. IV, Annex 123. *See further* Commonwealth Secretariat, *Commonwealth Statement on Guyana* (14 Feb. 2018) (which noted "The Secretary-General recalled that at the September 2017 meeting of the Commonwealth Ministerial Group on Guyana, Ministers noted Guyana's concerns that this longstanding controversy has impacted on the country's economic development"). MG, Vol. IV, Annex 128.

[172] U.N. Secretary-General, *Statement attributable to the Spokesman for the Secretary-General on the border controversy between Guyana and Venezuela* (30 Jan. 2018). MG, Vol. IV, Annex 126.

shall be judicial settlement by the ICJ. The U.N. Secretary-General wrote letters to both parties to the same effect.[173]

2.103 In his public statement and letters to the parties, the Secretary-General observed that, under Article IV(2) of the Agreement, the parties had "conferred upon the Secretary-General the power and responsibility to choose a means of peaceful settlement from amongst those contemplated in Article 33 of the Charter of the United Nations", and that "if the means so chosen does not lead to a solution of the controversy, the Secretary-General is to choose another means of settlement".[174]

2.104 The Secretary-General then recalled the decision on the means for settlement of the controversy made by his predecessor, Ban Ki-moon, at the end of 2016:

> "Former Secretary-General Ban Ki-moon communicated to the parties on 15 December 2016 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, his successor, Secretary-General António Guterres,

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[173] *Letter* from Secretary-General of the United Nations to the President of the Republic of Guyana (30 Jan. 2018), noting that "an identical letter" had been sent to Venezuela. AG, Annex 7.

[174] U.N. Secretary-General, *Statement attributable to the Spokesman for the Secretary-General on the border controversy between Guyana and Venezuela* (30 Jan. 2018). MG, Vol. IV, Annex 126.

> concluded that significant progress had not been made towards arriving at a full agreement for the solution of the controversy, he would choose the International Court of Justice as the next means of settlement, unless the Governments of Guyana and Venezuela jointly requested that he refrain from doing so."[175]

2.105 Consistent with his predecessor's decision, the Secretary-General further recalled that he had appointed Mr. Nylander as his Personal Representative, and that throughout 2017, he had "engaged in intensive high-level efforts to seek a negotiated settlement to the controversy".[176]

2.106 The Secretary-General then announced his decision on the next means of settlement of the controversy:

> "The Secretary-General has carefully analysed developments in 2017 in the good offices process and has concluded that significant progress has not been made toward arriving at a full agreement for the solution of the controversy. Accordingly, the Secretary-General has fulfilled the responsibility that has fallen to him within the framework set by his predecessor in December 2016, and has chosen the International Court of Justice as the means to be used for the solution of the controversy."[177]

2.107 Thus, some fifty-two years after the signing of the Geneva Agreement in 1966, the U.N. Secretary-General decided, pursuant to his authority under Article IV(2), that the ICJ shall be the means for settlement of the controversy arising from Venezuela's contention that the Arbitral Award of

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[175] *Ibid.*

[176] *Ibid.*

[177] *Ibid.*

1899 is “null and void”. That decision was based squarely on the agreement of both parties, embedded in the 1966 Geneva Agreement.

2.108 As set out in the next Chapter, by authorising the Secretary-General to decide on the means of settlement the parties mutually consented to the Court’s jurisdiction to resolve the controversy, in the event of his decision that the means of settlement should be the ICJ. When he so decided, their consent to the Court’s jurisdiction became binding and irrevocable.

CHAPTER III

THE COURT HAS JURISDICTION OVER GUYANA'S CLAIMS

I. Introduction

3.1 Jurisdiction in this case is based on Article 36(1) of the Court's Statute pursuant to the mutual consent of Guyana and Venezuela to have this controversy resolved by the Court. Their consent is expressed in Article IV(2) of the 1966 Geneva Agreement.

3.2 Article 36(1) of the Court's Statute provides:

> "The 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."[178]

3.3 In the present case, the treaty relied upon by Guyana is the Geneva Agreement. It has been in force between the parties at all material times and continues to be in force today.[179] Both parties have always recognised this and recently confirmed it.[180]

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[178] Statute of the International Court of Justice, Art. 36(1).

[179] *See infra* paras. 3.8, 3.74.

[180] Government of the Bolivarian Republic of Venezuela, *Communiqué: The Bolivarian Republic of Venezuela pronounces on the territorial dispute with the Cooperative Republic of Guyana* (31 Jan. 2018), p. 1 ("Venezuela ratifies the full validity of the Geneva Agreement of February 17, 1966, signed and ratified between our country and the United Kingdom of Great Britain and Northern Ireland, in consultation with the Government of British Guiana, an international treaty that governs as Law the Territorial Controversy between the parties,

3.4 The object and purpose of the Geneva Agreement is set forth in its title: it is an "Agreement to resolve the controversy over the frontier between Venezuela and British Guiana". The "controversy" to be resolved is defined in Article I as "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." The "controversy" thus encompasses not only Venezuela's belated claim that the 1899 Arbitral Award is "null and void", but also any dispute "which has arisen *as a result of* the Venezuelan contention".[181]

3.5 The Geneva Agreement did not purport, in itself, to resolve the controversy. Rather, its purpose was to commit the parties to a detailed, failsafe procedure to assure that a definitive and binding resolution would be achieved. That procedure is set out in Articles I through IV.

3.6 As described in Chapter 2, Article I provides for direct negotiations by means of a Mixed Commission consisting of the parties' appointed representatives, while Articles II and III elaborate on the establishment and functioning of that Commission. Article IV(1) provides that, in case the Mixed Commission fails to settle the controversy within four years, the parties shall attempt to agree on another means of settlement of the controversy, from among those listed in Article 33 of the U.N. Charter. Article IV(2) then

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validly recognized and registered before the UN, the only way to the final solution of this opprobrious heritage of British colonialism."). MG, Vol. IV, Annex 127.

[181] Geneva Agreement, Art. I (emphasis added). AG, Annex 4.

provides that, if they are unable to agree upon the means of settlement, they will attempt to agree upon an appropriate international organ to choose the means; and, finally, to assure that the controversy is not left unresolved, Article IV(2) further provides that if the parties are unable to agree upon an international organ, the decision on the means of settlement to be pursued shall be made by the U.N. Secretary-General. To further assure a complete and final settlement, Article IV(2) empowers the Secretary-General, in case the means he has chosen fail to resolve the controversy, to continue choosing other means set out in Article 33 until a full settlement is achieved.

3.7 These procedures have been scrupulously followed by the parties and by the Secretary-General. Following the failure of the Mixed Commission to settle the controversy, and the inability of the parties to reach agreement on the means of settlement or on an international organ to make that decision, the choice of means fell to the Secretary-General under Article IV(2). As recounted in Chapter 2, for twenty-seven years, between 1990 and 2017, successive Secretaries-General exercised their authority under that Article by choosing "good offices" as the means of dispute settlement, and the parties duly engaged in a "good offices" process conducted by the Secretary-General's Special Representative. But, after more than a quarter century of fruitless effort, this means of settlement had failed to yield any substantial progress toward an agreement. Accordingly, on 30 January 2018, invoking his authority under Article IV(2), Secretary-General António Guterres decided that the "good offices" process had failed, and chose adjudication by the

International Court of Justice as the next means of settlement of the controversy.[182]

3.8 Guyana regrets that, notwithstanding the fact that Venezuela recognises that the Geneva Agreement is still in force, and that the Secretary-General is empowered by Article IV(2) to choose the means of settlement until a definitive resolution of the controversy is achieved, the Respondent State has indicated that it will not participate in these proceedings.[183] However, this does not deprive the Court of its jurisdiction, nor does it diminish in any way the binding force of the Court's decisions in this case. Guyana is conscious that if Venezuela does not avail itself of its procedural rights as a party to this case,[184] the Court has a duty, pursuant to Article 53 of its Statute, to assess issues of jurisdiction *proprio motu*.[185] In writing this Memorial, Guyana is conscious of its obligation to assist the Court in this task.

3.9 As set out in the remainder of this Chapter, Guyana considers that the Court's jurisdiction is firmly established over its claims – all of which, as set forth in the Application, have "arisen as the result of the Venezuelan contention that the Arbitral Award of 1899 about the frontier between British

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[182] *Letter* from Secretary-General of the United Nations to the President of the Republic of Guyana (30 Jan. 2018). AG, Annex 7. *See also supra* paras. 2.102-2.107.

[183] *Letter* from the President of the Bolivarian Republic of Venezuela to the President of the International Court of Justice (18 June 2018). MG, Vol. IV, Annex 132.

[184] The Courts' Order of 19 June 2018 which preserves Venezuela's right to appear.

[185] *Aegean Sea Continental Shelf (Greece v. Turkey)*, Jurisdiction, Judgment, I.C.J. Reports 1978, para. 15; *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment, I.C.J. Reports 1974, para. 6.

Guiana and Venezuela is null and void"[186] – and that all procedural and jurisdictional requirements have been satisfied. However, mindful of the additional burden Venezuela's non-appearance might impose on the Court, in this Chapter Guyana will consider and respond to the jurisdictional objections it believes Venezuela might have raised had it decided to take part in these proceedings. In so doing, Guyana will take into account, especially, the official statements Venezuela has made in questioning the Court's jurisdiction over this dispute.

3.10 In Section II, immediately below, Guyana underscores that the object and purpose of the Geneva Agreement – reflected primarily in its text but also in the circumstances surrounding its adoption, as well as the contemporaneous intentions of the parties and their subsequent conduct – was to assure a complete and definitive resolution to the "controversy… 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."[187] The procedures adopted in Articles I-IV were specifically intended to lead to a full and final settlement of this controversy, and to avoid a stalemate or permanent entrapment in endless negotiations.

3.11 Section III focuses specifically on Article IV(2) of the Geneva Agreement and its proper interpretation. It comprehensively reviews the text, and the intentions of the parties as reflected both in the negotiating history that led to their adoption of this key provision and their subsequent conduct

[186] Geneva Agreement, Art. I. AG, Annex 4.

[187] *Ibid*.

pursuant to it. In Guyana's view, the record conclusively demonstrates that the Secretary-General was fully authorized to decide on the means of settlement to be pursued by the parties, and to freely choose from among those means mentioned in Article 33 of the U.N. Charter, including judicial settlement by the ICJ; and that the parties are bound by his decision. In setting out its case on the meaning and consequences of Article IV(2), Guyana refutes the various objections Venezuela has made, publicly and in correspondence with the Court, to the Secretary-General's decision and his authority to make it.

3.12 Finally, in Section IV, Guyana demonstrates that, based on the Geneva Agreement, the referral to and decision by the Secretary-General, and Guyana's seisin of the Court by its Application of 29 March 2018: (i) the Court has jurisdiction in this case; and (ii) the scope of the Court's jurisdiction *rationae materiae* extends to all of the claims asserted in Guyana's Application.

II. Object and Purpose of the Geneva Agreement

3.13 As set forth in Chapter 2, in February 1962, after more than sixty years of accepting the 1899 Arbitral Award as legally valid and binding, Venezuela abruptly changed its position. On that date it formally asserted, for the first time, that the frontier was "demarcated arbitrarily" and therefore the Award was null and void.[188] As the United Kingdom began preparing British Guiana

[188] *Letter* from the Permanent Representative of Venezuela to the United Nations to the Secretary-General of the United Nations (14 Feb. 1962), *reprinted in* U.N. General Assembly, Fourth Committee, 16th Session, *Information from Non-Self-Governing Territories transmitted under Article 73 of the Charter*, U.N. Doc A/C.4/536 (15 Feb. 1962), paras. 16-17.

for independence, Venezuela threatened not to recognise the new State of Guyana, or to respect its boundaries, unless the United Kingdom agreed to repudiate the 1899 Arbitral Award and the 1905 Agreement by which the Joint UK-Venezuelan Commission had identified, demarcated and permanently fixed the boundary established by the Award.[189]

3.14 Negotiations between Venezuela and the United Kingdom, including representatives of British Guiana, led to a meeting of their senior officials at the Palace of the United Nations in Geneva on 16 and 17 February 1966.[190] The respective delegations were led by the Venezuelan Minister for Foreign Affairs (Dr. Ignacio Iribarren Borges), the British Secretary of State for Foreign and Commonwealth Affairs (Michael Stewart), and the Prime Minister of British Guiana (L. Forbes Burnham).

MG, Vol. II, Annex 17. *See also supra* paras. 1.29, 2.5-2.6. *Telegram* from the Ministry of Foreign Affairs of the Bolivarian Republic of Venezuela to the Secretary-General of the United Nations, *reprinted in* U.N. General Assembly, 17th Session, *Question of Boundaries Between Venezuela and the Territory of British Guiana*, U.N. Doc A/5168 and Add.l (18 Aug. 1962). MG, Vol. II, Annex 23.

[189] *See Letter* from the Permanent Representative of Venezuela to the United Nations to the Secretary-General of the United Nations (14 Feb. 1962), *reprinted in* U.N. General Assembly, Fourth Committee, 16th Session, *Information from Non-Self-Governing Territories transmitted under Article 73 of the Charter*, U.N. Doc A/C.4/536 (15 Feb. 1962). MG, Vol. II, Annex 17; *Statement* made by the Representative of Venezuela at the 1302nd meeting of the Fourth Committee on 22 February 1962, *reprinted in* U.N. General Assembly, Fourth Committee, 16th Session, *Information from Non-Self-Governing Territories transmitted under Article 73 of the Charter*, U.N. Doc A/C.4/540 (22 Feb. 1962). MG, Vol. II, Annex 19. *See also supra* para. 2.8.

[190] Government of the United Kingdom, *Record of Discussions between the Foreign Secretary, the Venezuelan Minister for Foreign Affairs and the Premier of British Guiana at the Foreign Office on 9 December, 1965*, No. AV 1081/326 (9 Dec. 1965), p. 7. MG, Vol. II, Annex 28.

3.15 The Geneva Agreement emerged from those negotiations. Its object and purpose is evident from its title: "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."[191]

3.16 The Oxford English Dictionary defines the verb "resolve" as "*to find a solution* to a problem."[192] Likewise, the use of the verb "*resolver*" in Spanish evidences that the purpose of the Agreement is to provide for an assured means of settlement of a controversy. The *Diccionario de la Lengua Española* defines "*resolver*" as "[*s*]*olucionar un problema, una duda, una dificultad o algo que los entraña*" ("To solve a problem, doubt or difficulty, or something that entails them").[193]

3.17 The last preambular paragraph of the Geneva Agreement confirms that it was concluded "to resolve the present *controversy*", that is, as specified in the title of the Agreement, the "controversy … over the frontier between Venezuela and British Guiana".[194] The Agreement is aimed at assuring a final resolution of this controversy. To that end, it provides for a successive set of procedures, including diplomatic negotiations by means of a Mixed Commission, as well as resort to binding and compulsory mechanisms in case the negotiations or any other means of settlement that are adopted do not

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[191] Geneva Agreement (emphasis added). AG, Annex 4.

[192] *Oxford English Dictionary* (7th ed., 2012), "Resolve" (emphasis added). MG, Vol. III, Annex 77.

[193] *Diccionario de la Lengua Española* (23d ed., 2014), "Resolver" (emphasis added). MG, Vol. III, Annex 79.

[194] Geneva Agreement (emphasis added). AG, Annex 4.

produce a final settlement. This is evident from Article IV(2), which provides that the "appropriate international organ" and/or the U.N. Secretary-General shall choose from among the means of dispute settlement in Article 33 of the U.N. Charter, which include arbitration and judicial settlement, "until the controversy has been resolved or until all the means of peaceful settlement there contemplated have been exhausted."[195]

3.18 In their Joint Statement issued upon the conclusion of the Geneva Agreement, the parties affirmed that:

> "As a consequence of the deliberations an agreement was reached whose stipulations will enable *a definitive solution* for these problems. The Governments have agreed to submit the text of the agreement to the Secretary General of the United Nations. The agreement has been welcomed by the Ministers of the three countries since it *provides the means to resolve the dispute* which was harming relations between two neighbours and contains a basis of good will for future cooperation between Venezuela and British Guiana."[196]

3.19 Venezuelan representatives promptly confirmed their understanding that the object and purpose of the Geneva Agreement was to establish a means for assuring a definitive resolution of the dispute over the validity of the 1899 Arbitral Award and the controversy arising from Venezuela's contention of invalidity. One month after the conclusion of the Agreement, on 17 March

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[195] *Ibid*., Art. IV(2).

[196] Minister of Foreign Affairs of Venezuela, Minister of Foreign Affairs of the United Kingdom, and Prime Minister of British Guiana, *Joint Statement on the Ministerial Conversations from Geneva on 16 and 17 February 1966* (17 Feb. 1966) *reprinted in* Republic of Venezuela, Ministry of Foreign Affairs, *Claim of Guyana Esequiba: Documents 1962-1981* (1981) (emphasis added). MG, Vol. II, Annex 31.

1966, the Foreign Minister of Venezuela, who negotiated the Agreement on behalf of Venezuela, declared to the Venezuelan Congress that: "[t]he most important point of the Geneva Agreement is the adoption of a procedure in case the negotiations carried out by the Mixed Commission cannot solve the controversy."[197] Later that year, the Acting Permanent Representative of Venezuela to the United Nations told the U.N. Special Committee on Decolonization (the Committee of 24) that it was Venezuela's position that "the United Kingdom agreed at Geneva, with Venezuela, that within the means provided for in the Charter for the peaceful settlement of disputes every effort shall be brought to bear until a final solution of the problem has been found."[198]

3.20 It follows from the text of the Geneva Agreement, and the intentions of the parties manifested in their contemporaneous statements, that the object and purpose of the Agreement was to provide a fail-proof mechanism by which the controversy would definitively be resolved. The procedure set out in the Agreement is self-contained within its own limits, so as to preclude endless re-opening of the matter by reference to other arrangements, and avoid interminable and fruitless negotiations. Its genius is not to allow any one of the parties unilaterally to block the resolution of the controversy. To the contrary, it mandates that, failing the other prescribed procedures, the Secretary-General of the United Nations shall decide on the means of settlement for the parties to pursue until a definitive resolution of the controversy is achieved. The means

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[197] *Statement* by Dr. Borges, Minister of Foreign Affairs of Venezuela (17 Mar. 1966), p. 16. (emphasis added). MG, Vol. II, Annex 33.

[198] *Letter* from F. Brown, U.K. Mission to the United Nations, to R. du Boulay, U.K. Foreign Office, No. 1082/77/66 (21 Mar. 1966), p. 3 (emphasis added). MG, Vol. II, Annex 34.

from which the Secretary-General is empowered to choose consist of all those listed in Article 33 of the U.N. Charter, which include judicial settlement.

III. Interpretation of Article IV(2) of the Geneva Agreement

3.21 The Geneva Agreement is a treaty, subject to and governed by the generally applicable rules of international law. In interpreting Article IV(2), it is therefore appropriate to "apply the rules on interpretation to be found in Articles 31 and 32 of the Vienna Convention, which [the Court] has consistently considered to be reflective of customary international law".[199] As the Court recalled in the *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* case:

> "Article 31, paragraph 1, of the Vienna Convention provides that '[a] treaty shall 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 — ordinary meaning, context and object and purpose — are to be considered as a whole."[200]

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[199] *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, Judgment, I.C.J. Reports 2017, p. 29, para. 63 (quoting *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, p. 116, para. 33); *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, p. 237, para. 47 (referring to *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (I), pp. 109-110, para. 160 and *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, pp. 21-22, para. 41); *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996 (II), p. 812, para. 23.

[200] *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, Judgment, I.C.J. Reports 2017, p. 29, para. 64.

3.22 Under Article 32 of the Vienna Convention and the Court's jurisprudence, recourse may also be had to supplementary means of interpretation, which include the *travaux préparatoires* and the circumstances of the Agreement's conclusion to confirm the meaning resulting from that process, or to remove ambiguity or obscurity, or to avoid a manifestly absurd or unreasonable result.[201]

3.23 As indicated in Chapter 2, the Geneva Agreement, in Article I, established an institutional framework (the Mixed Commission) through which the parties agreed to hold bilateral negotiations to "seek[] satisfactory solutions for the practical settlement of the controversy".[202] Recognizing, however, the possibility that negotiations might fail to produce a solution, the parties made express provision for the settlement of the controversy in the event the Mixed Commission failed to fully resolve it. Article IV of the Geneva Agreement provides:

> "(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 [of the Mixed Commission], the Government of Guyana and the

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[201] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 332 (23 May 1969), Art. 32. MG, Vol. II, Annex 44.

[202] Geneva Agreement, Art. I. AG, Annex 4. *See supra* paras. 2.28-2.29.

> 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."[203]

3.24 In his address to Congress on 17 March 1966, one month after the conclusion of the Geneva Agreement, Venezuela's Foreign Minister explained how the text of Article IV came to be adopted at the Geneva Conference:

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[203] The Spanish version of the Agreement provides:

> "*(1) Si dentro de un plazo de cuatro años contados a partir de la fecha de este Acuerdo, la Comisión Mixta no hubiere llegado a un acuerdo completo para la solución de la controversia, referirá al Gobierno de Venezuela y al Gobierno de Guayana en su Informe final cualesquiera cuestiones pendientes. Dichos Gobiernos escogerán sin demora uno de los medios de solución pacífica previstos en el Artículo 33 de la Carta de las Naciones Unidas.*
>
> *(2) Si dentro de los tres meses siguientes a la recepción del Informe final el Gobierno de Venezuela y el Gobierno de Guyana no hubieren llegado a un acuerdo con respecto a la elección de uno de los medios de solución previstos en el Artículo 33 de la Carta de las Naciones Unidas, referirán la decisión sobre los medios de solución a un órgano internacional apropiado que ambos Gobiernos acuerdem, o de no llegar a un acuerdo sobre este punto, al Secretario General de las Naciones Unidas. Si los medios así escogidos no conducen a una solución de la controversia, dicho órgano, o como puede ser el caso, el Secretario General de las Naciones Unidas, escogerán otro de los medios estipulados en el Artículo 33 de la Carta de las Naciones Unidas, y así sucesivamente, hasta que la controversia haya sido resuelta, o hasta que todos los medios de solución pacífica contemplados en dicho Artículo hayan sido agotados*."

> "I will not list each of the points from the discussion that arose as a result of the British rejection of the first proposal of Venezuela, which was countered by a proposal that Venezuela should, in an 'act of statesmanship and courage', renounce its claim. I then formulated a second Venezuelan proposal whereby over a period of time there could be a joint administration of the territory claimed by Venezuela, so long as our sovereignty over the territory was recognized. This proposal was also rejected. Finally, in an attempt to seek a respectable solution to this problem *I put forward a third Venezuelan proposal that would lead to the solution for the borderline issue in three consecutive stages, each with their respective timeframe, with the requirement that there had to be an end to the process: a) a Mixed Commission b) Mediation c) International Arbitration.*"[204]

3.25 It was this "third Venezuelan proposal," intended by Venezuela to "lead to a solution of the borderline issue," that was accepted by the United Kingdom at Geneva. It was then embodied in Article IV(2) of the Agreement.

A. THE SETTLEMENT PROCESS IN ARTICLE IV(2)

3.26 Article IV establishes a three-stage dispute settlement process leading to a final and definitive resolution of the controversy. It was described by the Venezuelan Foreign Minister as follows:

> "1. Governments will try to reach an agreement on the choice of one of the means to resolve disputes peacefully as foreseen in Article 33 of the United Nations Charter.

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[204] *Statement* by Dr. Borges, Minister of Foreign Affairs of Venezuela (17 Mar. 1966), p. 9. MG, Vol. II, Annex 33. *See also supra* para. 2.33. This is consistent with the British account, *see Note Verbale* from the Foreign Secretary of the United Kingdom to the U.K. Ambassador to Venezuela, No. AV 1081/116 (25 Feb. 1966), para. 5. MG, Vol. II, Annex 32.

> 2. Three months after the receipt of the final report of the Mixed Commission, where the Governments have failed to choose the means to resolve the controversy peacefully, the decision on the means of settlement will be referred to an appropriate international body that both Governments agree on.
>
> 3. A lack of agreement over the choice of the international body which is to chose the means of solution, this function will be carried out by the Secretary General of the United Nations."[205]

3.27 This three-stage process gives effect to the object and purpose of the Geneva Agreement by establishing a pathway leading to a definitive resolution of the controversy. As explained below, that agreed pathway leads to the International Court of Justice, in the event (i) the parties cannot agree on the means of settlement or (ii) on which international body should choose those means, and (iii) it falls to the Secretary-General to choose one of the means under Article 33 of the U.N. Charter and he chooses judicial settlement.

3.28 First, under Article IV(1), Guyana and Venezuela are given the opportunity to agree upon one of the means of settlement enumerated in Article 33 of the Charter. They must agree "without delay" (*i.e.* within three months of receiving the final report of the Mixed Commission). As to which means of settlement may be adopted, Article 33(1) of the Charter provides:

> "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,

[205] *Statement* by Dr. Borges, Minister of Foreign Affairs of Venezuela (17 Mar. 1966), p. 16. MG, Vol. II, Annex 33.

> resort to regional agencies or arrangements, or other peaceful means of their own choice."[206]

3.29 Second, Article IV(2) expressly makes provision in case Guyana and Venezuela are unable to agree on the means to settle the controversy: in such circumstance, they are to agree on an "appropriate international organ" to decide on the means of settlement.

3.30 Third, failing agreement on an "appropriate international organ", Article IV(2) provides again for a solution to avoid impasse. To that end, it vests the U.N. Secretary-General with the power to make "the decision as to the means of settlement". In the event the means of settlement chosen by the Secretary-General does not result in a definitive settlement of the controversy, Article IV(2) stipulates that he shall continue to choose from among the means of peaceful settlement in Article 33 of the Charter "until the controversy has been resolved or until all the means of peaceful settlement there contemplated have been exhausted."[207]

3.31 Venezuela does not disagree that the Secretary-General is empowered by Article IV(2) to choose the means of settlement. However, it argues that the means of settlement named in Article 33 must be applied successively, in the same order as they are listed in that Article, such that all means that are listed ahead of judicial settlement must be exhausted before the Secretary-General

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[206] U.N. Charter, Art. 33(1) (emphasis added).

[207] Geneva Agreement, Art. IV(2). AG, Annex 4.

may decide upon recourse to the Court. According to Venezuela's communiqué of 31 January 2018:

> "The Secretary General's communication goes beyond *the successive nature* of the means of peaceful settlement established by the Geneva Agreement as the established methodology for reaching an acceptable, practical and satisfactory solution to the dispute."[208]

3.32 This argument was repeated in a declaration by the Venezuelan National Assembly of 19 June 2018:

> "That the National Assembly, [the] only legitimate power of the people of Venezuela, in the face of the announcement of the Secretary-General of the United Nations Antonio Guterres made on January 30th 2018, in which it is proposed to forward the dispute between Venezuela and Guyana for the Essequibo region to the International Court of Justice, *in spite of not having been exhausted all non-jurisdictional means of peaceful solution foreseen in article 33* of the Charter of the United Nations, considers that this is a hasty decision that contradicts the very Geneva Agreement of 1966 which mentions in its article 1 'a practical Arrangement of the controversy'."[209]

3.33 This is an entirely implausible argument. Venezuela's "successive nature" interpretation does not accord with the text of Article IV, nor with the object and purpose of the Geneva Agreement, nor with parties' practice under the Agreement. As indicated, Article IV(1) provides that the parties "shall

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[208] Government of the Bolivarian Republic of Venezuela, *Communiqué: The Bolivarian Republic of Venezuela pronounces on the territorial dispute with the Cooperative Republic of Guyana* (31 Jan. 2018), p. 2 (emphasis added). MG, Vol. IV, Annex 127.

[209] Bolivarian Republic of Venezuela, National Assembly, *Parliamentary Agreement of Rejection of the Cooperative Republic of Guyana of Judizializing the Essequibo and Their Reaffirmation of the Venezuelan Sovereignty on Anacoco Island and the Atlantic Front* (19 June 2018), p. 1 (emphasis added). MG, Vol. IV, Annex 133.

without delay choose one of the means of peaceful settlement provided in Article 33 of the Charter of the United Nations." Article 33 provides a menu of options from which any one of them may be chosen, not a fixed order of sequence that requires choosing the first one listed before proceeding to the second, and so on.

3.34 Under the second and third stages of the three-stage process, if Guyana and Venezuela are unable to agree on "the choice of *one of the means* … they shall refer the decision as to *the means* …" to an appropriate international organ or the Secretary-General.[210] The reference to "one of the means" plainly encompasses *any one* of the means in Article 33. If 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. There is no indication in Article IV(2), or in the *travaux préparatoires*, or in contemporaneous statements made at the time of adoption, that the parties intended to limit the discretion of the Secretary-General to decide on the means of settlement of the controversy, except that he must choose from among the means listed in Article 33. Such an approach would produce absurd results. It would mean that the dispute would have to be referred, for example, to arbitration as a pre-condition to its being referred to the Court. Equally illogical, it would have to be referred to the Court before the parties could "resort to regional agencies or arrangements, or other peaceful means of their own choice".

[210] Geneva Agreement, Art. IV(2) (emphasis added). AG, Annex 4.

3.35 The practice of the parties further demonstrates that the means of settlement named in Article 33 were not intended to be applied sequentially. Both Venezuela and Guyana readily accepted the Secretary-General's decision that the first means of settlement to be employed was "good offices". Yet, pursuant to the 1982 Manila Declaration, the reference in Article 33 to "other peaceful means of their own choice" includes "good offices".[211] This means that the Secretary-General began to exercise his authority under Article IV(2) by choosing the *last* means of settlement named in Article 33, not the first. By Venezuela's (il)logic, he should have chosen judicial settlement *before* he chose "good offices". Indeed, if Venezuela were right, it would mean that the parties were precluded from pursuing *any* "other peaceful means of their own choice", including "good offices", before first exhausting "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, [or] resort to regional agencies or arrangements". That is patently absurd, and is not what Article IV provides.

3.36 Furthermore, strictly as a matter of textual interpretation, the use of the definite article "the" (one of <u>the</u> means) is indicative of comprehensiveness. The decision maker (*i.e.* the Secretary-General) can thus choose from among any of the means set out in Article 33. This is consistent with the longstanding approach adopted by the Court and its predecessor. In the *Polish War Vessels* case, the P.C.I.J. interpreted the words "*the* relevant decisions" of the Council of the League of Nations as "*all* decisions at which the Council might

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[211] U.N. General Assembly, Sixth Committee, 37th Session, *Manila Declaration on the Peaceful Settlement of International Disputes*, U.N. Doc A/RES/37/10 (15 Nov. 1982), Annex, para. 5. MG, Vol. III, Annex 60.

arrive".[212] In *Constitution of the Maritime Safety Committee*, the Court interpreted the words "*the* largest ship-owning nations"[213] as "*any one or more* of the eight largest ship-owning nations."[214] Likewise, in the *Territorial Dispute* between Libya and Chad, the Court was called upon to interpret the words "*the* frontiers between the territories of Tunisia, Algeria, French West Africa and French Equatorial Africa … and the territory of Libya".[215] The Court ruled that "the use of the definite article is to be explained by the intention to refer to *all* the frontiers between Libya and those neighbouring territories for whose international relations France was then responsible."[216]

3.37 In sum, there is nothing in the text of the Geneva Agreement, nor in the *travaux préparatoires*, nor in the practice of the parties to suggest that a "successive" approach is to be adopted, or that all means of settlement listed prior to judicial settlement must be exhausted before the Secretary-General may decide that the dispute shall be resolved by the Court. To the contrary, Article 33 lists the various means of peaceful settlement without limitation or exception, and it contains no hierarchy or order of preference. Nor does the Geneva Agreement purport to establish any hierarchy or order of preference. There is no basis for arguing that the choice of judicial settlement is subject to

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[212] *Access to, or Anchorage in, the Port of Danzig, of Polish War Vessels*, Advisory Opinion, 1931, P.C.I.J. Series A/B, No. 50, pp. 145-146 (emphasis added).

[213] *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, Advisory Opinion, I.C.J. Reports 1960, p. 154 (emphasis added).

[214] *Ibid*., p. 164 (emphasis added).

[215] *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, pp. 20-21, para. 39 (emphasis added).

[216] *Ibid*., p. 24, para. 48 (emphasis added).

the prior exhaustion of any or all non-judicial means. Rather, the choice of means is left exclusively to the discretion of the Secretary-General. As the Court noted in *Land and Maritime Boundary between Cameroon and Nigeria*, "[n]either in the Charter nor otherwise in international law is any general rule to be found to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the Court".[217]

3.38 In any event, by the time the Secretary-General decided that the means of settlement of the controversy between the parties would be the International Court of Justice, they had already engaged in a process of non-judicial means of dispute settlement for more than fifty years, encompassing:

a. A tripartite process of examining documents from 30 July 1963 to 3 October 1965;[218]

b. Negotiations between British Guiana, Venezuela and the United Kingdom, which eventually led to the adoption of the Geneva Agreement on 17 February 1966;[219]

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[217] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 303, para. 56. The Court went on to say that a "precondition of this type may be embodied and is often included in compromissory clauses of treaties." That is not the case here. There is no such precondition embodied in Article IV(2). Such direct negotiations as were required were embodied in Article I, and the four-year process during which the Mixed Commission attempted to settle the controversy by direct negotiations was exhausted.

[218] *See supra* paras. 2.9-2.14.

[219] *See supra* paras. 2.21-2.49.

c. A Mixed Commission which met on numerous occasions over a period of four years (from 1966 to 1970);[220]

d. A good offices process under the supervision of the U.N. Secretary-General for 26 years (from 1990 to 2016);[221] and

e. An enhanced good offices process for a final period of one year (from 2017 to 2018).[222]

3.39 As shown in Subsections B and C, below, there can be no question that the Secretary-General properly exercised his authority under Article IV(2) in deciding that the Court shall be the next means of settlement of this dispute.[223]

B. THE *RENVOI* TO ARTICLE 33 OF THE U.N. CHARTER AND ITS EFFECT

3.40 In its most recent statements, Venezuela suggests that the Secretary-General lacked the authority to choose the Court as the means to settle the controversy between the parties. In an official communiqué dated 31 January 2018, the Venezuelan Foreign Ministry declared that the Secretary-General's decision "exceeded the powers granted to his office, contravening the spirit, purpose and reason of the Geneva Agreement and the principle of equity

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[220] *See supra* paras. 2.50-2.54.

[221] *See supra* paras. 2.70-2.73, 2.77-2.84.

[222] *See supra* paras. 2.85-2.101.

[223] *See infra* Sections III(B) and (C).

concluded between the parties."[224] This view was reiterated by President Nicolas Maduro, in his letter to the Court of 18 June 2018, in which he insisted that the controversy must be resolved exclusively by "friendly negotiations":

> "Venezuela reiterates its most strict adherence to what has been legally established for the solution of this controversy through the Geneva Accord which binds the Parties to reaching a practical and mutually satisfying agreement *through friendly negotiations*."[225]

3.41 Venezuela's new interpretation of the Geneva Agreement – that diplomatic negotiations are the only means by which the controversy addressed by the Agreement may be resolved – contradicts its express terms, as well as the intentions of the parties when they negotiated and ratified the Agreement, and their subsequent statements about their understanding of the Agreement. Contrary to Venezuela's current position, the text of the Agreement, the *travaux préparatoires* and the subsequent conduct of the parties make it abundantly clear that the three-stage settlement process in Article IV(2) encompasses judicial settlement as one of the means to settle the dispute.

3.42 To be sure, Article I of the Geneva Agreement refers to friendly negotiations to achieve a "practical settlement" of the controversy. But that language addresses the role of the Mixed Commission. It does not describe the

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[224] Government of the Bolivarian Republic of Venezuela, *Communiqué: The Bolivarian Republic of Venezuela pronounces on the territorial dispute with the Cooperative Republic of Guyana* (31 Jan. 2018), p. 1. MG, Vol. IV, Annex 127.

[225] *Letter* from the President of the Bolivarian Republic of Venezuela to the President of the International Court of Justice (18 June 2018), p. 5 (emphasis added). MG, Vol. IV, Annex 132.

procedures to be followed in the event the Mixed Commission fails to achieve its objective. In contrast, Article IV addresses those procedures, and it refers to Article 33 no less than three times. On each occasion, it confirms that the parties or, as the case may be, the appropriate international organ or the U.N. Secretary-General, may choose any of the means of peaceful settlement enumerated in Article 33:

a. The Governments shall "choose one of the means of peaceful settlement provided in Article 33";

b. If they "should not have reached agreement regarding the choice of one of the means of settlement provided in Article 33"; and

c. "the Secretary-General of the United Nations shall choose another of the means stipulated in Article 33".

3.43 The unqualified *renvoi* to Article 33 empowers the Secretary General to decide that the parties shall have recourse to judicial settlement. The emphasis on the choice of "one of the means" or "another of the means" of settlement enumerated therein is not accidental. It serves the object and purpose of the Agreement, which is to definitively resolve the controversy. It allows the Secretary-General to determine which – of several possible – "means" shall be followed. An interpretation of Article IV(2) which excludes the possibility of judicial settlement would deprive the treaty of its effectiveness in assuring a definitive resolution of the controversy. Instead, it would lock the parties into a never-ending process of diplomatic negotiation,

where successful resolution could be permanently foreclosed by either one of them.

3.44 The *travaux préparatoires*, and more generally the circumstances leading up to, surrounding and attendant to 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, including, specifically, by the ICJ.

3.45 In May 1965, the Venezuelan Ambassador to the United Kingdom called on the British Secretary of State for Foreign and Commonwealth Affairs and suggested that "if Her Majesty's Government did not like the idea of joint commissions, his government would be prepared to take their claim to some international body such as one of the United Nations Committees or the International Court."[226]

3.46 During trilateral discussions in London on 9 and 10 December 1965, immediately preceding the Geneva Conference, the Venezuelan Minister of Foreign Affairs put forward a proposal for a time-bound mixed commission with subsequent recourse to binding third-party settlement, if the commission could not reach an agreement:

> "Dr. Iribarren then put forward another proposal. A mixed commission should be set up to solve the territorial controversy, to formulate plans for collaboration in the

[226] *Letter* from R.H.G. Edmonds, U.K. Foreign Office, to D. Busk, U.K. Ambassador to Venezuela (15 May 1962). MG, Vol. II, Annex 22.

> development of Essequiban Guyana and British Guiana, and to carry out these plans. If the commission could not reach agreement, they were to refer within three months to one or more mediators and if they failed to reach a satisfactory solution, within a prescribed time limit, *they were to have recourse to international arbitration*. The Treaty setting up the basis for this arbitration would have to be concluded within 18 months from 1 January 1966. Mr. Stewart promised to look at this proposal and closed the meeting."[227]

3.47 According to the contemporaneous official British record of the December 1965 meetings, the Minister of Foreign Affairs formally conveyed Venezuela's willingness to resolve the controversy by binding third-party settlement:

> "His own proposal for a mixed commission provided for finding solutions by a series of conciliatory stages, and if necessary by *recourse to arbitration by an impartial international body*. Venezuela's willingness to submit to an arbitration tribunal represented a great concession on her part."[228]

3.48 The U.K. was unwilling to accept Venezuela's proposal at the London meetings. Before adjourning, the parties agreed to continue their discussions at Geneva in February 1966.[229]

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[227] Government of the United Kingdom, *Record of Discussions between the Foreign Secretary, the Venezuelan Minister for Foreign Affairs and the Premier of British Guiana at the Foreign Office on 9 December*, No. AV 1081/326 (9 Dec. 1965), p. 4. MG, Vol. II, Annex 28. *See supra* paras. 2.15-2.20.

[228] Government of the United Kingdom, *Record of Discussions between the Foreign Secretary, the Venezuelan Minister for Foreign Affairs and the Premier of British Guiana at the Foreign Office on 9 December*, No. AV 1081/326 (9 Dec. 1965), p. 6. MG, Vol. II, Annex 28. *See supra* para. 2.19.

[229] *Ibid.*

3.49 When they reconvened in Geneva, a breakthrough was achieved. The British Secretary of State for Foreign and Commonwealth Affairs explained how it came about in a Note Verbale written very shortly after the meetings concluded:

> "After rapid lobbying of the Venezuelan Ambassador and consultation with my Guianese colleagues, I decided to modify the proposed recourse to the United Nations by suggesting that if the Mixed Commission could not settle the controversy, in the first instance the two Governments should seek to agree among themselves which of the means of settling disputes peacefully under Article 33 of the United Nations Charter should be applied to this controversy, and, failing agreement, the United Nations should be asked to choose a means for them. (By good fortune, it had been the Venezuelans themselves who had introduced the idea of Article 33 into one of the drafts which they had put forward during the afternoon). When I put the Article 33 proposal to the Venezuelan Foreign Minister at our session after dinner, he asked to consider it overnight before giving me his reply. That evening the Venezuelan Government was asked for fresh instructions. This was the turning point of the meeting."[230]

3.50 This is consistent with what Venezuela's Foreign Minister reported to the Venezuelan National Congress on the occasion of the ratification of the Geneva Agreement in March 1966. He confirmed that it was Venezuela itself that proposed including the *renvoi* to Article 33 of the Charter in Article IV(2) of the Agreement, and that this was expressly for the purpose of providing for binding third-party settlement, in the event the mixed commission was unable to settle the controversy. Dr. Iribarren explained that as a result of the *renvoi*

[230] *Note Verbale* from the Foreign Secretary of the United Kingdom to the U.K. Ambassador to Venezuela, No. AV 1081/116 (25 Feb. 1966), para. 5. MG, Vol. II, Annex 32. *See supra* paras. 2.35-2.36.

to Article 33, Article IV(2) provided not only for arbitration, but also for judicial settlement by the ICJ. He emphasized that it was *Venezuela* which had proposed this; and that "It was on the basis of *this Venezuelan proposal* that the Geneva Agreement was reached":

> "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 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*."[231]

3.51 It was thus Venezuela's contemporaneous understanding of Article IV(2) that it constituted the parties' agreement to accept binding third party settlement, including by the ICJ, in the event the mixed commission failed to settle the controversy. This was confirmed again, by Venezuela's representative on the Mixed Commission in a 30 December 1966 statement that, if the Commission were unable to resolve the controversy: "the juridical examination of the question [of nullity] would[,] if necessary, be proceeded with, in time, by some international tribunal in accordance with article IV of the Geneva Agreement."[232]

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[231] *Statement* by Dr. Borges, Minister of Foreign Affairs of Venezuela (17 Mar. 1966), p. 13 (emphasis added). MG, Vol. II, Annex 33.

[232] United Kingdom, Ministry of External Affairs, *First Interim Report of the Mixed Commission* (30 Dec. 1966), p. 3. MG, Vol. II, Annex 41. *See supra* para. 2.51.

3.52 These contemporaneous statements clearly show that the parties to the Geneva Agreement, and in particular Venezuela, intended for the *renvoi* to Article 33 of the U.N. Charter to encompass all the means of peaceful settlement named therein, including judicial settlement by the ICJ. It follows that under Article IV(2) of the Geneva Agreement, a referral of the controversy to the Court can occur in three circumstances: (i) by agreement between the parties; (ii) by the decision of an agreed "appropriate international organ"; (iii) or – as is the case here – by the decision of the U.N. Secretary-General.

C. THE REFERRAL OF THE DECISION ON MEANS OF SETTLEMENT TO THE U.N. SECRETARY-GENERAL

3.53 As set out in Chapter 2, soon after signing the Geneva Agreement the parties sought and obtained the agreement of the Secretary-General to exercise the authority conferred on him in Article IV(2) – to choose the means of settlement of the controversy – if and when they called upon him to do so. The Secretary-General formally agreed to accept that authority in a letter dated 4 April 1966, signed by Secretary-General U Thant:

> "I have the honour to acknowledge the receipt of the text of the Agreement signed at Geneva on 17 February 1966 by the Secretary of State for Foreign Affairs of the United Kingdom, by the Prime Minister of British Guiana and by the Minister for Foreign Affairs of Venezuela. 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."[233]

3.54 Guyana and Venezuela called upon the Secretary-General to discharge those responsibilities, in conformity with Article IV(2), in March 1983. By that time: (i) the Mixed Commission had failed to reach an agreement; (ii) the 12-year moratorium agreed at Port of Spain had expired; and (iii) the parties had failed to agree upon a means of settlement or an appropriate international organ to choose the means of settlement. In such circumstances, Venezuela insisted upon proceeding immediately to the U.N. Secretary-General for a decision on the means of settlement.[234] By letter dated 28 March 1983, Guyana agreed to Venezuela's proposal.[235] Secretary-General Javier Pérez de Cuéllar responded on 31 March 1983. Acknowledging that he had been asked to "undertake the responsibility conferred upon me in Article IV(2) of the Geneva Agreement", the Secretary-General advised that he would "after due consideration, communicate … the conclusion I have reached in the discharge of that responsibility".[236]

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[233] *Letters* from Secretary-General U Thant to Dr. Ignacio Iribarren Borges Minister of Foreign Affairs of the Republic of Venezuela and the Rt. Hon. Lord Caradon Permanent Representative of the United Kingdom to the United Nations (4 Apr. 1966). The Spanish text of this letter provides that: "*He tomado nota de las obligaciones que eventualmente pueden recaer en el Secretario General de las Naciones Unidas*…." (emphasis added). AG, Annex 5.

[234] *Letter* from the Minister of Foreign Affairs of the Republic of Venezuela to the Minister of Foreign Affairs of the Cooperative Republic of Guyana (19 Sept. 1982). MG, Vol. III, Annex 56. *See supra* paras. 2.63-2.65.

[235] *Letter* from the Minister of Foreign Affairs of the Cooperative Republic of Guyana to the Minister of Foreign Affairs of the Republic of Venezuela (28 Mar. 1983). MG, Vol. III, Annex 61. *See supra* para. 2.66.

[236] *Letter* from the Secretary-General of the United Nations to the Minister of Foreign Affairs of the Cooperative Republic of Guyana (31 Mar. 1983). MG, Vol. III, Annex 63.

3.55 As fully recounted in Chapter 2, Secretary-General Pérez de Cuéllar exercised his authority under Article IV(2) by deciding that the means of settlement initially to be pursued would be a Good Offices Process, and appointed a Personal Representative to facilitate a settlement of the controversy. Between 1990 and 2015, the Good Offices Process was employed by the Secretary-General and his various successors, who appointed their own Personal Representatives to conduct the process. At all times, the Secretary-General and the parties understood that in choosing and conducting the Good Offices Process the Secretary-General was exercising his authority under Article IV(2).

3.56 On 12 November 2015, by which time 25 years of the Good Offices Process had failed to achieve substantial progress toward a settlement of the controversy, Secretary-General Ban Ki-moon proposed a new approach that he called *The Way Forward.* This provided that "[i]f a practical solution to the controversy is not found before the end of his tenure [*i.e.*, by the end of 2016], the Secretary-General intends to initiate the process of obtaining a final and binding decision from the International Court of Justice."[237] A year later, in December 2016, just before he left office, the Secretary-General decided, in consultation with his successor, that the Good Offices Process should continue for one final year, but that "[i]f, by the end of 2017, the Secretary-General concludes that significant progress has not been made toward arriving at a full

[237] *Letter* from Chef de Cabinet of the United Nations to the President of Guyana (12 Nov. 2015), p. 2. MG, Vol. IV, Annex 100.

agreement for the solution of the controversy he will choose the International Court of Justice as the next means of settlement".[238]

3.57 In conformity with his predecessor's decision, on 23 February 2017, Secretary-General António Guterres appointed a Personal Representative to continue the Good Offices process for an additional year.[239] However, at the end of that year, following numerous meetings of the parties facilitated by his Personal Representative, he concluded that there still had been no significant progress toward a solution of the controversy.[240]

3.58 Based on this conclusion, Secretary-General Guterres issued a decision in conformity with Article IV(2) of the Geneva Agreement, which provided that the next means of settlement would be adjudication by the International Court of Justice. His decision was communicated in identical letters to the parties dated 30 January 2018, and a public statement issued on the same date.[241] The Secretary-General's letter to Guyana states that:

> "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

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[238] *See supra* para. 2.90. *See also* U.N. Secretary-General, *Note to Correspondents: The Controversy between Guyana and Venezuela* (16 Dec. 2016). MG, Vol. IV, Annex 111.

[239] *Letter* from the Secretary-General of the United Nations to the President of the Cooperative Republic of Guyana (23 Feb. 2017). MG, Vol. IV, Annex 117.

[240] *See supra* para. 2.90.

[241] *Letter* from Secretary-General of the United Nations to the President of the Republic of Guyana (30 Jan. 2018). AG, Annex 7. *See also* U.N. Secretary-General, *Statement attributable to the Spokesman for the Secretary-General on the border controversy between Guyana and Venezuela* (30 Jan. 2018). MG, Vol. IV, Annex 126.

> 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 next means that is now to be used for its solution."[242]

3.59 This decision was a proper exercise of the Secretary-General's authority under Article IV(2) of the Geneva Agreement, and his decision is therefore binding on the parties. In Article IV(2), they knowingly and deliberately vested in the Secretary-General the authority to decide upon the means of peaceful settlement to be pursued until the controversy is resolved, provided only that he choose the means from among those listed in Article 33 of the U.N. Charter, and they agreed to be bound by his decision. The language of Article IV(2) is mandatory:

> "If, within three months of receiving the final report [of the Mixed Commission], 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*

[242] *Letter* from Secretary-General of the United Nations to the President of the Republic of Guyana (30 Jan. 2018), p. 2. AG, Annex 7.

> *resolved* or until all the means of peaceful settlement there contemplated have been exhausted."[243]

3.60 The existence of an obligation is clear from the use of the term "shall", and it is consistent with the object and purpose of the Geneva Agreement.[244] Moreover, the use of the term "decision" reflects that the Secretary-General's authority to choose the means was intended to be – and is – binding on Guyana and Venezuela. There is a distinction in Article IV(2) between (i) the choice of means by the parties and, (ii) the referral of that choice to an "appropriate international organ" or the Secretary-General. In the first case, the parties have to agree on that choice; in the latter, the "international organ" or the Secretary-General may impose its or his choice upon them. Relegating the Secretary-General's decision to a mere recommendation (as Venezuela seeks to do), in the face of the plain words of Article IV(2), would be contrary to the clear and unambiguous text as well as the object and purpose of the Geneva Agreement and the contemporaneous intentions of the parties.

3.61 The word "decision" is usually reserved for binding instruments, as opposed to "recommendations" or even "resolutions," which are generally understood as terms that do not imply, as such and without more, binding consequences under international law.[245] The Court has consistently

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[243] Geneva Agreement, Art. IV(2) (emphasis added). AG, Annex 4.

[244] The Court has confirmed on a number of occasions that the use of "shall" entails in principle a binding obligation. *See Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018, para. 92 and *Somalia v. Kenya*, para. 55.

[245] *Whaling in the Antarctic (Australia v. Japan)*, Merits, Judgment, I.C.J. Reports 2014, para. 46.

interpreted the word "decision" as having binding force when considering, for example:

a. Resolutions of the U.N. General Assembly having "dispositive force and effect";[246]

b. Dispositive resolutions of the U.N. Security Council which were not adopted under the Chapter VII of the Charter;[247] and

c. Court orders prescribing provisional measures.[248]

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[246] *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, I.C.J. Reports 1962, p. 163 ("Thus, while it is the Security Council which, exclusively, may order coercive action, the functions and powers conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies and the making of recommendations; they are not merely hortatory. Article 18 deals with 'decisions' of the General Assembly 'on important questions'. These *'decisions' do indeed include certain recommendations, but others have dispositive force and effect.* Among these latter decisions, Article 18 includes suspension of rights and privileges of membership, expulsion of Members, 'and budgetary questions'. In connection with the suspension of rights and privileges of membership and expulsion from membership under Articles 5 and 6, it is the Security Council which *has only the power to recommend and it is the General Assembly which decides and whose decision determines status*.") (emphasis added).

[247] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, pp. 52-53, para. 113 ("It has been contended that Article 25 of the Charter applies only to enforcement measures adopted under Chapter VII of the Charter. It is not possible to find in the Charter any support for this view. Article 25 is not confined to decisions in regard to enforcement action but applies to 'the decisions of the Security Council' adopted in accordance with the Charter. Moreover, that Article is placed, not in Chapter VII, but immediately after Article 24 in that part of the Charter which deals with the functions and powers of the Security Council. If Article 25 had reference solely to decisions of the Security Council concerning enforcement action under Articles 41 and 42 of the Charter, that is to say, if it were only such decisions which had binding effect, then Article 25 would be superfluous, since this effect is secured by Articles 48 and 49 of the Charter.").

[248] *LaGrand (Germany v. United States of America)*, Merits, Judgment, I.C.J. Reports 2001, p. 506, para. 108 ("The question arises as to the meaning to be attributed to the words 'the decision of the International Court of Justice' in paragraph 1 of this Article. This wording

3.62 Beyond conferring on the Secretary-General the discretionary authority to choose the means of settlement, the Geneva Agreement depends upon his exercise of that authority in order to achieve its object and purpose, once the matter is referred to him for a decision. It is only by his exercise of the responsibility vested in him by the parties, and their compliance with his decision, that the object and purpose of the Agreement – the definitive resolution of the controversy – can be achieved. That this was their understanding and intention is clear from the text of Article IV(2) and the circumstances surrounding its negotiation and incorporation into the Geneva Agreement.

3.63 In the past, some Secretaries-General have consulted with the parties during the process of choosing the means of settlement. As described above, Secretary-General Pérez de Cuéllar engaged in consultations with Guyana and Venezuela in 1983 "to facilitate the discharge of his responsibility".[249] A diplomatic process, such as negotiation or good offices, requires the active participation of both parties, and cannot succeed if one of them opposes or refuses to engage with it. But consultation with the parties to ascertain their

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could be understood as referring not merely to the Court's judgments but to any decision rendered by it, thus including orders indicating provisional measures. It could also be interpreted to mean only judgments rendered by the Court as provided in paragraph 2 of Article 94. In this regard, the fact that in Articles 56 to 60 of the Court's Statute both the word 'decision' and the word 'judgment' are used does little to clarify the matter. Under the first interpretation of paragraph 1 of Article 94, the text of the paragraph would confirm the binding nature of provisional measures; whereas the second interpretation would in no way preclude their being accorded binding force under Article 41 of the Statute. The Court accordingly concludes that Article 94 of the Charter does not prevent orders made under Article 41 from having a binding character.").

[249] *Telegram* from the Secretary-General of the United Nations to the Minister of Foreign Affairs of the Cooperative Republic of Guyana (31 Aug. 1983). MG, Vol. III, Annex 64. *See supra* para. 2.67.

willingness to participate in such a process does not detract from the Secretary-General's authority under Article IV(2) to decide unilaterally, if he chooses to do so, on the means of settlement, including settlement by the ICJ.

3.64 The *travaux prépartoires* confirm that the parties understood that the Secretary-General's decision would be binding on them. Moreover, it is clear from more than three decades of practice that this is also how successive Secretaries-General understood their powers. At the Geneva Conference in February 1966, it was Venezuela that first proposed the Secretary-General as the ultimate decision-maker under the third stage of Article IV. An official British account of the Geneva Conference records that:

> "6. The 17th of February was spent in discussing formulae based on my proposal. The first problem was to decide to whom the Governments of Venezuela and British Guiana were to refer if they themselves were unable to decide which of the methods provided in Article 33 they should adopt. In the formula finally agreed in Article IV of the Agreement ('an appropriate international organ', or, failing that, the Secretary General of the United Nations) we suggested the first and the Venezuelans the second alternative." [250]

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[250] *Note Verbale* from the Foreign Secretary of the United Kingdom to the U.K. Ambassador to Venezuela, No. AV 1081/116 (25 Feb. 1966), para. 6. MG, Vol. II, Annex 32. *See also Airgram* from the United States Department of State to the Embassy of the United States in Venezuela, No. A-798 (18 Apr. 1966) ("Arguing that Venezuela went to Geneva without an admission from Great Britain that a dispute did in fact exist, Iribarren said that astute diplomacy had won for Venezuela an important victory. He pointed out that Venezuela had achieved a reduction of the period sought by the British for consideration of the problem from 30 years to four, and that Britain's suggestion that the problem be given over to the U.N. General Assembly if a satisfactory resolution could not be reached within the stipulated four-year period was eliminated *in favour of Venezuela's wish that the problem then be considered by the U.N. Secretary General.*") (emphasis added). MG, Vol. II, Annex 36.

3.65 In his statement to the Venezuelan Congress on 17 March 1966, the Minister of Foreign Affairs underscored that the role of the Secretary-General was to make the "*decision* on the means of settlement".[251] Reciting from Article 33 of the Charter, he explained that: "[t]he means are the following: negotiation, investigation, mediation, conciliation, arbitration, *judicial settlement* and recourse to regional organs or agreements. These are explicitly the procedures to be used up until the issue is solved or until these are depleted."[252]

3.66 The Venezuelan Foreign Minister further explained how the parties came to agree upon the role and authority of the Secretary-General:

> "I must place it on the record that in the last discussions of the Geneva Agreement the British suggested entrusting the General Assembly of the United Nations to choose the means for a solution comprised in Article 33 of the Charter.
>
> This proposal was discarded by Venezuela due to the following reasons:
>
> 1. Because it was not suitable to submit the specific role of choosing the means for the solution to an eminently political and deliberative body as is the General Assembly of the United Nations. This procedure could lead to disproportionate delays since the introduction of outside political elements would be easy in what is a simple function of choosing the means of settlement;

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[251] *Statement* by Dr. Borges, Minister of Foreign Affairs of Venezuela (17 Mar. 1966), p. 16 (emphasis added). MG, Vol. II, Annex 33.

[252] *Ibid*., p. 17 (emphasis added).

> 2. Because the General Assembly of the United Nations only meets for ordinary sessions once a year, during a period of roughly three months, to deal with previously indicated matters in the Agenda and in extraordinary sessions by request of the majority of the members of the United Nations.
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> These reasons were presented by Venezuela and further suggested entrusting the International Court of Justice with the role of choosing the means of solution as a permanent body and exempt of the inconveniences mentioned above. Since this proposal was rejected by the British, *Venezuela then suggested giving this role to the Secretary General of the United Nations.*
>
> In conclusion, due to the Venezuelan objections accepted by Great Britain, there exists an unequivocal interpretation that the only person participating in the selection of the means of solution will be the Secretary General of the United Nations and not the Assembly."[253]

3.67 In sum, it is clear from the text of the Geneva Agreement, the *travaux préparatoires* and contemporaneous statements by the parties themselves that they understood, intended and agreed: (i) that Article IV(2) empowers the Secretary-General to make a binding decision on the means of settlement to resolve the controversy, provided that the previous stages of dispute settlement

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[253] *Ibid*. (emphasis added). During the negotiations, it also proposed that the International Court of Justice should be the body to decide on the means of settlement. An early draft of Article IV provides that:

> "4. If the Parties should not have reached an agreement within a period of 3 months regarding the choice of one of the methods provided in Article 33 of the United Nations Charter, *they will request the International Court of Justice to choose one of the said means for peaceful settlement*. If the method chosen by the Court should not allow a solution of the controversy to be arrived at, the said Court shall choose another of the methods stipulated in Article 33 of the Charter, and so on successively, until the controversy shall have been resolved, or until all the methods of peaceful settlement there contemplated shall have been exhausted." Early Drafts of the Geneva Convention (undated) (emphasis added). MG, Vol. II, Annex 1.

under Article IV have failed (*i.e.* that the parties are unable to agree on the means of settlement and unable to agree on an "appropriate international organ" to choose the means); and (ii) that Article IV(2) empowers the Secretary-General to choose judicial settlement as the means of settlement of the controversy. Indeed, the record shows unequivocally that *it was Venezuela itself* that proposed both that the Secretary-General be empowered to decide upon the means of settlement, and that those means include judicial settlement by the Court.

3.68 Accordingly, by virtue of their consent to this process, as expressed in Article IV(2), and especially their consent to the authority of the Secretary-General to choose judicial settlement as the means to resolve the controversy, both parties are bound by the Secretary-General's decision.

IV. The Court Has Jurisdiction over This Dispute

3.69 In his letter to the President of the Court dated 18 June 2018, the President of Venezuela stated that "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 a joint agreement of the parties notifying the submission of the said dispute to the Court."[254] Venezuela's objections to jurisdiction thus fall broadly into two categories: (i) that it "did not accept the jurisdiction of the Court in relation to the

[254] *Letter* from the President of the Bolivarian Republic of Venezuela to the President of the International Court of Justice (18 June 2018), p. 4. MG, Vol. IV, Annex 132.

controversy" and (ii) that it "did not accept the unilateral presentation" of the dispute by Guyana.[255] Both objections are unfounded. Beyond the exercise by the Secretary-General of the authority conferred on him by the parties to choose the Court as the means of settlement, there is no further manifestation of consent by either party that is required to vest jurisdiction in the Court. Following the Secretary-General's decision, Guyana was endowed with the capacity to bring these proceedings, without more, by filing its Application. There was no requirement that Venezuela agree to that "presentation".

A. VENEZUELA'S CONSENT TO JURISDICTION

3.70 Venezuela argues that the Court's jurisdiction is "not regulated by the Geneva Accord" and that there is no "agreement of the Parties expressing their consent to the jurisdiction of the Court under Article 36" of the Court's Statute.[256] Venezuela is plainly mistaken.

3.71 It is a principle of general international law, to which Guyana fully subscribes, that "jurisdiction depends on the consent of States and, consequently, the Court may not compel a State to appear before it".[257] The Court's jurisdiction over States is governed by its Statute. Article 36(1) provides that:

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[255] *Ibid*., p. 3.

[256] *Ibid*., p. 4.

[257] *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 260, para. 53.

> "The 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."[258]

3.72 Article 36(1) enshrines the principle of consent. It endows the Court with jurisdiction when a particular dispute is referred to it by the parties, or when the dispute arises from a bilateral or multilateral convention in which the parties have provided in advance for recourse to the Court for dispute settlement. While consent to the Court's jurisdiction is in all cases indispensable, there are no rules governing, or limiting, the precise manner in which a State can express its consent. The consistent practice of the Court, and its predecessor, is that "[w]hile the consent of the parties confers jurisdiction on the Court, neither the Statute nor the Rules require that this consent should be expressed in any particular form."[259] In the *Minority Schools* case, for example, the Permanent Court of International Justice explained:

> "The acceptance by a State of the Court's jurisdiction in a particular case is not, under the Statute, subordinated to the observance of certain forms, such as, for instance, the previous conclusion of a special agreement. … And there seems to be no doubt that the consent of a State to the submission of a dispute to the Court may not only result from an express declaration,

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[258] Statute of the International Court of Justice, Art. 36(1).

[259] *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Preliminary Objections, Judgment, I.C.J. Reports 1948, p. 27. *See also Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgement, I.C.J. Reports 2008, p. 203, para. 60 ("[N]either the Statute of the Court nor its Rules require that the consent of the parties which thus confers jurisdiction on the Court be expressed in any particular form".).

> but may also be inferred from acts conclusively establishing it."[260]

3.73 Commentators concur that there are no formal requirements as to how consent to jurisdiction should be expressed. The fifth edition of *Rosenne's Law and Practice of the International Court* provides that:

> "*The Statute contains no provision regulating the form or manner in which the consent to confer jurisdiction on the Court should be expressed*. The silence of the Statute regarding the manner of expressing the consent stands in contrast to the rigidity of the application of the substantive demand for a consensual basis of jurisdiction, and has produced a radical transformation in the ways of expressing that consent. The language of Article 36, paragraph 1, of the Statute – all cases which the parties refer to the Court and all matters specially provided for in treaties and conventions in force – embodies the fundamental principle that the parties must agree to submit the matter to the Court, *without laying down any requirements as to the form of that agreement*."[261]

3.74 Consent depends not on the form of the agreement, but on whether it reflects an intention to confer jurisdiction on the Court. As the Court noted in *Chorzów Factory*, "[w]hen considering whether it has jurisdiction or not [over a dispute], the Court's aim is always to ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it."[262] Guyana submits that such an intention is manifest in the Geneva Agreement. Venezuela accepts that the Agreement is an international treaty that remains in force between the

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[260] *Rights of Minorities in Upper Silesia (Minority Schools) (Germany v Poland)*, Judgment, 1928, P.C.I.J. Series A, No. 15, pp. 23-24.

[261] M. Shaw, ROSENNE'S LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920-2015, Vol. II (5th ed., 2015), pp. 579-580, para. 155 (emphasis added). MG, Vol. III, Annex 88.

[262] *Factory at Chorzów*, Jurisdiction, Judgment, 1927, P.C.I.J. Series A, No. 9, p. 32.

parties "which governs as Law the territorial controversy on the Essequibo."[263] It has repeatedly reaffirmed that it is bound by the terms of the Agreement, the purpose of which is "to solve the issue" of the Guyana-Venezuela border.[264] It is therefore bound by the consent it has given to the exercise of jurisdiction by the Court in Article IV(2) of the Agreement.

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[263] *Note Verbale* from the Ministry of People's Power of Foreign Affairs of the Bolivarian Republic of Venezuela to the Embassy of the Cooperative Republic of Guyana in Venezuela, No. 000322 (28 Feb. 2018). MG, Vol. IV, Annex 130.

[264] Republic of Venezuela, *Law Ratifying the Geneva Agreement* (13 Apr. 1966) *reprinted in* Republic of Venezuela, Ministry of Foreign Affairs, *Claim of Guyana Esequiba: Documents 1962-1981* (1981). MG, Vol. II, Annex 35. *See also Statement* by Dr. Borges, Minister of Foreign Affairs of Venezuela (17 Mar. 1966), p. 13 ("As an essentially Venezuelan solution, the Geneva Agreement deserved the unanimous support of the Delegation which included the delegates of three parties of the government, three of the opposition and a senator of the independent group. They all vividly endorsed the signature which I, under the authorization of the President of the Republic, stamped on this transcendental instrument."). MG, Vol. II, Annex 33.; Republic of Venezuela, Ministry of Foreign Affairs, *Statement* (2 May 1981) *reprinted in* Republic of Venezuela, Ministry of Foreign Affairs, *Claim of Guyana Esequiba: Documents 1962-1981* (1981) ("The Geneva Agreement was approved, at that time, by determining the national consensus, which was expressed by a landslide majority after being submitted for consideration to the Congress and ratified by the Head of State at that moment, Dr. Raúl Leoni. It is true that then, just like now, some sectors and individuals expressed respectable arguments against the Agreement. However, it is also certain that the Agreement, after being approved by the Congress, became a Law of the Republic and it is an international commitment for Venezuela."). MG, Vol. II, Annex 50.; *Letter* from the Minister of the People's Power for External Relations of the Bolivarian Republic of Venezuela to the Minister of Foreign Affairs of the Republic of Guyana (19 June 2015) ("the Bolivarian Republic of Venezuela wishes to reiterate that international law, in particularly [sic] the Geneva Agreement signed by our two nations on 17th February 1966 in accordance with the Charter of the United Nations, has authority over this territorial dispute."). MG, Vol. III, Annex 95; Government of the Bolivarian Republic of Venezuela, *Communiqué: The Bolivarian Republic of Venezuela pronounces on the territorial dispute with the Cooperative Republic of Guyana* (31 Jan. 2018) ("Venezuela ratifies the full validity of the Geneva Agreement of February 17, 1966, signed and ratified between our country and the United Kingdom of Great Britain and Northern Ireland, in consultation with the Government of British Guiana, an international treaty that governs as Law the Territorial Controversy between the parties, validly recognized and registered before the UN, the only way to the final solution of this opprobrious heritage of the British colonialism."). MG, Vol. IV, Annex 127.

3.75 In Article IV(2) the parties gave their mutual consent for the Court to "resolve the controversy over the frontier between Venezuela and British Guiana," at the conclusion of a three-stage process, in the event of failure to resolve it at the first two stages. The consent of the parties manifested in Article IV(2), in conjunction with the *renvoi* to Article 33 of the U.N. Charter, is an unequivocal expression of acceptance by Guyana and Venezuela of judicial settlement by the Court, in the event the Secretary-General decides on judicial settlement as the means to be pursued by the parties to resolve the controversy.[265] It would also constitute the parties' consent to arbitration, if the Secretary General had chosen that means of settlement.

3.76 Indeed, as shown above, it was *Venezuela* which insisted upon the inclusion in Article IV(2) of the provision calling upon and empowering the Secretary-General to choose the means of settlement of the controversy, and to decide, specifically, that it shall be settled by the International Court of Justice. According to Venezuela's Foreign Minister and chief negotiator, the Venezuelan proposal for arbitral or judicial settlement – in the event negotiations or other means of settlement were unsuccessful – was "the basis" of the Agreement reached at Geneva.[266]

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[265] U.N. Charter, Arts. 33, 91. As the principal judicial organ of the U.N. and the only permanent public international law court of general jurisdiction, "judicial settlement" must encompass recourse to the ICJ.

[266] *Statement* by Dr. Borges, Minister of Foreign Affairs of Venezuela (17 Mar. 1966), p. 13. MG, Vol. II, Annex 33. *See supra* para. 3.50.

3.77 Article IV(2) of the Geneva Agreement thus operates as a compromissory clause, conferring jurisdiction on the Court provided that one of the following occurs:

a. The parties agree that the Court should resolve the dispute;

b. The parties agree on an "appropriate international organ" which then decides that judicial settlement by the Court will be the means to resolve the controversy; or

c. The Secretary-General decides that judicial settlement by the Court will be the means to resolve the controversy.

3.78 In this case, the decision of Secretary-General Guterres on 30 January 2018, by which he exercised the authority conferred on him by the parties in Article IV(2) in choosing the International Court of Justice as the means for settlement of the controversy, satisfies the third condition above.[267]

3.79 Guyana notes that it is not unusual for a dispute settlement clause in a bilateral or multilateral treaty to include certain pre-conditions requiring prior resort to other means, such as negotiation or political procedures, before jurisdiction may vest in the Court. For instance, Article 30(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) provides that:

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[267] *Letter* from Secretary-General of the United Nations to the President of the Republic of Guyana (30 Jan. 2018). AG, Annex 7.

> "Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court."[268]

3.80 This provision requires States parties to the Convention to first engage in negotiation, and then attempt, during a prescribed period, to agree on arbitration; it is only after negotiations are unsuccessful and the parties are unable to reach an arbitration agreement that one of them may invoke the Court's jurisdiction. As the Court explained in interpreting a similar (although not identical) dispute resolution clause in *Georgia v. Russia*, these are "preconditions to be fulfilled before the seisin of the Court."[269] As demonstrated above, all of the pre-conditions set out in Article IV(2) of the Geneva Agreement have been satisfied, and the parties themselves recognized this when, in 1983 – at Venezuela's insistence – they agreed to refer the

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[268] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), Art. 30(1). In a bilateral context, *see e.g.* Management and Cooperation Agreement between the Government of the Republic of Senegal and the Government of the Republic of Guinea-Bissau, 1903 U.N.T.S. 3 (14 Oct. 1993), Art. 9 ("Disputes concerning the present Agreement or the international agency shall be resolved initially by direct negotiations and, should these fail, after a period of six months, arbitration or by the International Court of Justice."). MG, Vol. III, Annex 68; Treaty of amity, commerce and navigation between Japan and the Republic of the Philippines and the Republic of the Philippines, 1001 U.N.T.S. 296 (9 Dec. 1960), Art. VIII(2) ("Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means."). MG, Vol. II, Annex 13.

[269] *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, p. 128, para. 141.

decision on means of settlement to the Secretary-General. As a consequence, the Secretary-General had the authority to decide upon the means of settlement of this controversy.[270]

3.81 The role of the Secretary-General under the Geneva Agreement is to be distinguished from cases where the Security Council has *recommended* that U.N. Member States should refer a dispute to the Court, including the *Corfu Channel* case and the *Aegean Sea Continental Shelf* case. In *Corfu Channel*, for example, the Security Council "recommend[ed] that the United Kingdom and Albanian Governments should immediately refer the dispute to the International Court of Justice in accordance with the provisions of the Statute of the Court."[271] In those circumstances, mere *recommendations* by a U.N. organ could not as such constitute consent to the Court's jurisdiction, absent their acceptance by the parties.

3.82 Here, in contrast, the Secretary-General's decision that the parties shall settle their dispute by recourse to the ICJ is not a mere recommendation, it is a binding *decision.* Most importantly, it is a decision that the parties mutually empowered the Secretary-General to make, and thus an unequivocal manifestation of consent – by both parties – to the Court's jurisdiction. This is a consent given *a priori* by the express terms of Article IV(2), as further evidenced in the *travaux préparatoires* and by the conduct of the parties.

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[270] *See supra* Section III.D and paras. 2.67-2.69.

[271] *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Application Instituting Proceedings, I.C.J. Reports 1962, Annex 2, p. 16.

There is no requirement for any supplementary agreement to implement the Secretary-General's decision.

3.83 In that regard, the Geneva Agreement may be compared with the Agreement concluded on 1 December 1926 between Greece and Turkey to overcome certain difficulties resulting from the application of the Treaty of Lausanne in respect of Moslem properties in Greece.[272] The Treaty provided that disputes were to be resolved, in the first instance, by a Mixed Commission consisting of Greek and Turkish representatives. Article 4 of the Treaty's Final Protocol stipulated that under certain conditions recourse was to be had to arbitration.[273] Differences of opinion arose in the Mixed Commission regarding the interpretation of Article 4, and the Commission requested the Council of the League of Nations to obtain an advisory opinion from the Permanent Court of International Justice.[274] The Court was asked to determine if it was within the Mixed Commission's mandate to decide whether the conditions for arbitration laid down by the Protocol were fulfilled. After examining the general structure of the Mixed Commission and its duties, and considering the intentions of the parties underlying the various instruments relating to the exchange of Greek and Turkish populations, the Court concluded that it was for the Mixed Commission alone to decide whether the conditions for arbitration were satisfied, and that the Commission itself could

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[272] *Interpretation of Greco-Turkish Agreement*, Advisory Opinion, 1928, P.C.I.J. Series B, No. 16, p. 8.

[273] *Ibid.*, p. 5.

[274] *Ibid.*, pp. 5-6.

refer a question to the arbitrator.[275] The Court's Opinion confirms that two States may confer upon a third party the task of deciding by what means a dispute should be resolved, and that when that third party so decides, in accordance with the requirements agreed, the decision as to means of settlement is binding upon them.

B. THE DISTINCTION BETWEEN JURISDICTION AND SEISIN

3.84 Venezuela has also challenged the Court's jurisdiction on the basis that there is no "joint agreement of the Parties notifying the submission of the … dispute to the Court."[276] It is further argued that there is no "agreement by the Parties accepting that the dispute can be raised unilaterally, and not jointly, before the Court, as established by Article 40".[277] This argument is misconceived in that it fails to recognise that jurisdiction and seisin are different concepts.

3.85 In *Qatar v. Bahrain* the Court emphasised that seisin – the procedural act by which proceedings are instituted – is independent of the basis of jurisdiction:

> "It is true that, as an act instituting proceedings, seisin is a procedural step independent of the basis of jurisdiction invoked and, as such, is governed by the Statute and the Rules of Court. However, the Court is unable to entertain a case so long as the

[275] *Ibid.*, p. 21.

[276] *Letter* from the President of the Bolivarian Republic of Venezuela to the President of the International Court of Justice (18 June 2018), p. 4. MG, Vol. IV, Annex 132.

[277] *Ibid.*

> relevant basis of jurisdiction has not been supplemented by the necessary act of seisin: from this point of view, the question of whether the Court was validly seised appears to be a question of jurisdiction."[278]

3.86 The Court was called upon to interpret paragraph 2 of the Doha Minutes, which provides that:

> "The good offices of the Custodian of the Two Holy Mosques, King Fahd Ben Abdul Aziz, shall continue between the two countries until the month of Shawwal 1411 A.H., corresponding to May 1991. Once that period has elapsed, the two parties may submit the matter to the International Court of Justice…."[279]

3.87 The Court ruled that this provision gave the parties the "option or right" to unilaterally seise the Court of the dispute as soon as the time-limit had expired (*i.e.* "[o]nce that period has elapsed"). The Court emphasised that:

> "Any other interpretation would encounter serious difficulties: it would deprive the phrase of its effect and could well, moreover, lead to an unreasonable result.
>
> In fact, the Court has difficulty in seeing why the 1990 Minutes, the object and purpose of which were to advance the settlement of the dispute by giving effect to the formal commitment of the Parties to refer it to the Court, would have been confined to opening up for them a possibility of joint action which not only had always existed but, moreover, had proved to be ineffective. On the contrary, the text assumes its full meaning if it is taken to be aimed, for the purpose of accelerating the dispute settlement process, at opening the way

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[278] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995, p. 23, para. 43.

[279] *Ibid.*, p. 17, para. 30.

> to a possible unilateral seisin of the Court in the event that the mediation of Saudi Arabia – sometimes referred to, as in the text under discussion, as 'good offices' – had failed to yield a positive result by May 1991."[280]

3.88 The Court's reasoning in *Qatar v. Bahrain* applies with equal force to the Geneva Agreement. In this case, the Secretary-General has been given the authority to decide which of the means of dispute settlement in Article 33 of the Charter shall be pursued by the parties to resolve the controversy. The decision of the Secretary-General is thus a legal act materialising the parties' *a priori* consent to judicial settlement. There can be no requirement for a separate agreement between Guyana and Venezuela because, as described above, both have already expressed their unequivocal consent to jurisdiction by virtue of Article IV(2). In sum, having consented to the Court's jurisdiction, Venezuela cannot validly object to Guyana's unilateral recourse to, and seisin of, the Court.

3.89 Moreover, requiring a separate agreement between the parties before either could initiate proceedings in the Court would defeat the very purpose of the Geneva Agreement. As explained above, the Agreement was intended by the parties to ensure that the controversy would be resolved, rather than continue indefinitely. If a separate agreement to confer jurisdiction on the

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[280] *Ibid.*, p. 19, para. 35. *See also Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Preliminary Objections, Judgment, I.C.J. Reports 1948, p. 28 ("The Security Council's recommendation has been relied upon to support opposite conclusions. But, in the first place, though this recommendation clearly indicates that the bringing of the case before the Court requires action on the part of the parties, it does not specify that this action must be taken jointly, and, in the second place, the method of submitting the case to the Court is regulated by the texts governing the working of the Court as was pointed out by the Security Council in its recommendation.").

Court were required, either party would be able to prevent resolution, even after all other means of settlement had failed, merely by refusing to agree to submission of the controversy to the Court. It was precisely to avoid such an outcome that they gave their consent, in advance, to judicial settlement if that was the means of settlement chosen by the Secretary-General.

C. THE SCOPE OF THE COURT'S JURISDICTION *RATIONE MATERIAE*

3.90 The scope of the Court's jurisdiction is determined by the text of the Geneva Agreement, understood in light of its purpose and the parties' practice under it.

3.91 As indicated above, the Geneva Agreement is an "Agreement to resolve the controversy over the frontier between Venezuela and British Guiana".[281]

3.92 Article 1 of the Agreement mandates the Mixed Commission to seek "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."[282] The other authoritative version of the same provision reads: "*soluciones satisfactorias para el arreglo práctico de la controversia entre Venezuela y el Reino Unido surgida como consecuencia de la contención venezolana de que el Laudo*

[281] *See supra* paras. 3.4, 3.13-3.20.

[282] Geneva Agreement, Art. I. AG, Annex 4.

arbitral de 1899 sobre la frontera entre Venezuela y Guayana Británica es nulo e irrito."

3.93 The "controversy" thus encompasses not only Venezuela's claim that the 1899 Arbitral Award is "null and void", but also any dispute "which has arisen *as a result of*, the Venezuelan contention". In the same vein, the Preamble of the Agreement indicates the intention of the parties to resolve "any" outstanding controversy.

3.94 This understanding is confirmed by the fact that the two authentic versions of the Geneva Agreement refer in the plural to the need of finding "satisfactory *solutions*" for the "settlement" of "the controversy … which has arisen as a result of the Venezuelan contention…." If the task of the Mixed Commission were limited to addressing the contention of nullity only, such use of the plural (*i.e.*, "solutions") would not make sense. Likewise, if the only issue to be addressed were the nullity contention, which is in essence a squarely juridical issue, one wonders why the parties envisaged a "*practical* settlement". The language employed plainly indicates the parties understood that the nullity contention had not only already entailed a whole range of contentious events between them in need of being settled, and that more of such events would likely *result* from Venezuela's contention and also be in need of settlement by means of the procedures established in Articles I through IV. The very progressivity of the latter, concluded during a decolonization process, makes particular sense for addressing a "controversy" consisting of new contentious events resulting from the nullity contention and faced by the newly independent Guyana.

3.95 Article V(2) further confirms that the parties envisioned the occurrence of later "acts and activities taking place while this Agreement is in force".[283] Those "acts and activities" are deemed neutral as far as the respective sovereignty claims are concerned, but they undoubtedly *result* from the nullity contention and are therefore part of the "controversy" to be definitively solved by the settlement procedure agreed by the parties. Because Article IV(2) entitles the Secretary-General to refer "the controversy" to any of the means of settlement stipulated in Article 33 of the U.N. Charter, such referral concerns "the controversy" in its entirety and is not limited to the disputed contention of nullity. Indeed, in his decision of 30 January 2018, the Secretary-General specified that he had chosen the ICJ as the means of settlement of "the controversy", not merely the question of whether the 1899 Arbitral Award is null and void.

3.96 This conclusion on the scope of the Court's jurisdiction under Article IV(2) and the Secretary-General's decision is supported by the reasoning of the Special Chamber of ITLOS in *Ghana v. Cote d'Ivoire.*[284] That was a boundary delimitation case in which Cote d'Ivoire sought to hold Ghana internationally responsible for alleged infringements of its maritime area. Jurisdiction was based on a Special Agreement between the two States to submit to ITLOS a "dispute *concerning* the delimitation of their maritime boundary in the Atlantic Ocean".[285] The Special Chamber concluded that "it

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[283] *Ibid.*, Art. V(2).

[284] *Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Judgment, Case No. 23, ITLOS Reports 2017.

[285] *Ibid.*, para. 547 (emphasis added).

would stretch the meaning of the words 'dispute concerning the delimitation of their maritime boundary' too much to interpret it in such a way that it included a dispute on international responsibility." However, in reaching this conclusion, the Special Chamber made clear that its decision turned on the parties' use of the word "concerning" to describe the dispute that they had submitted:

> "The Special Chamber concedes that the word 'concerning' may be understood to include within the scope of the dispute other issues which are not part of delimitation but are closely related thereto. It is evident that the dispute between Ghana and Cote d'Ivoire on international responsibility *arose out of the delimitation dispute between them*."[286]

3.97 Likewise, it is evident in the present case that the dispute between Guyana and Venezuela over Venezuela's infringements on Guyana's territory and maritime space arose out of the boundary dispute between them. The difference between the two cases is that in the present case the special agreement on which the Court's jurisdiction is based – the Geneva Agreement – defines the controversy that is subject to judicial settlement under Article IV(2) to include that "which has arisen as a result of the Venezuelan contention that the Arbitral Award of 1899" is "null and void". Plainly, Guyana's international responsibility claims have "arisen as a result of" its dispute with Venezuela over the alleged nullity of the Arbitral Award. This is sufficient, under the language of the Geneva Agreement (as contrasted with the language in the Special Agreement between Ghana and Cote d'Ivoire) to vest jurisdiction in the Court in regard to these claims.

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[286] *Ibid.*, para. 548 (emphasis added).

3.98 The *Corfu Channel* case offers an interesting parallel. There, jurisdiction was established on the basis of *forum prorogatum* and then perfected by special agreement between the parties. However, the Security Council resolution recommending that the parties immediately refer the dispute to the Court remained important for determining the *scope* of the dispute with which the Court was seised. In particular, the Court interpreted the special agreement as incorporating the aim of the Security Council's resolution, and what the Security Council "undoubtedly intended".[287] It gave "full effect" to the resolution in order "not [to] leave open the possibility of a further dispute".[288] Likewise, it is clear that the parties here intended to solve through the Geneva Agreement all aspects of the controversy resulting from Venezuela's contention of nullity, not leaving aside for further dispute between them events arising *as a result of* the nullity contention. The Court should thus give full effect to the decision of the Secretary-General that it shall be the means of settlement of the entire "controversy" between Guyana and Venezuela.[289]

3.99 Statements by Venezuela's Minister of Foreign Affairs confirm that Venezuela, too, considers "the controversy" to be resolved by the dispute settlement process defined in Article IV to include not only the challenge to the validity of the 1899 Arbitral Award, but also the disputes arising as a result of Venezuela's repudiation of it. In June 2015, Foreign Minister Delcy

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[287] *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits, Judgment, I.C.J. Reports 1949, p. 26.

[288] *Ibid.*, pp. 4, 26.

[289] *Letter* from Secretary-General of the United Nations to the President of the Republic of Guyana (30 Jan. 2018). AG, Annex 7.

Rodriguez issued a public statement criticizing Guyana for licensing oil drilling operations in the seabed adjacent to the Essequibo Coast: "It is unacceptable that the new Government of Guyana takes this position with a territory that is subject to controversy, and who has expressly recognized that this area of the sea is subject to an amicable settlement of territorial claims, as envisaged in the Treaty of Geneva. … The only appropriate channels to resolve this dispute are those of International Law, the Geneva Agreement and to continue with the Good Officer mechanism under the figure of the Secretary General of the United Nations."[290]

3.100 In numerous diplomatic notes to Guyana, Venezuela has reiterated its view that the controversy includes any disputes arising as a result of the alleged "nullity" of the 1899 Award. Some of these notes are incorporated in Annexes 107, 108 and 131. For example, on 8 November 2016, the Venezuelan Ministry of Foreign Affairs complained to its Guyanese counterpart that Guyana's licensing of oil drilling activities in waters adjacent to the coast between the land boundary terminus fixed by the Award (in the west) and the mouth of the Essequibo River (in the east) represent "violations of the provisions of the 1966 Geneva Agreement."[291] On the same date,

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[290] *See* the following three media reports: "Venezuela urges Guyana to enforce Treaty of Geneva on territorial dispute", *Caribflame* (11 June 2015), p. 2. MG, Vol. III, Annex 94; "Venezuela further urges peace, but maintains territorial claim" *Kaieteur News* (10 June 2015). MG, Vol. III, Annex 93; "Venezuela wants peaceful solution to border dispute" *Jamaica Observer* (9 June 2015). MG, Vol. III, Annex 92. A non-official Spanish version of Minister Rodriguez's statement can be found in "Minister Delcy Rodriguez, Official Statement: Guyana shows a dangerous Politics of Provocation Against the Bolivarian Venezuela of Peace", *Correo del Orinoco* (9 June 2015). MG, Vol. III, Annex 91.

[291] *Note Verbale* from the Ministry of People's Power for External Relations of the Bolivarian Republic of Venezuela to the Ministry of Foreign Affairs of the Cooperative Republic of

Venezuela responded to a protest by Guyana in regard to Venezuela's mapping exercises explaining these activities were not in violation of "the provisions of the 1966 Geneva Agreement."[292] Venezuela further declared: "For these reasons and in conformity with public international law, the Bolivarian Republic of Venezuela wishes to reiterate that the territorial controversy between Venezuela and Guyana is governed by the 1966 Geneva Agreement and is subject to the peaceful settlement of disputes to which the aforementioned bilateral international instrument refers."[293]

3.101 Venezuela has maintained its position regarding the scope of the controversy under the Geneva Agreement even after the Secretary-General's decision of 30 January 2018. On 28 February 2018, Venezuela protested the concessions by the Guyana Forestry Commission to two private companies "in the zone subject to territorial controversy in accordance with the existing Treaty in effect and registered in the United Nations Organisation: the Geneva Agreement of 1966."[294] Venezuela characterized the concessions as "a flagrant

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Guyana, No. 02013 (8 Nov. 2016) ("[*T*]*ales acciones violentarían lo pautado en el Acuerdo de Ginebra de 1966.*") (Translation by Guyana). MG, Vol. IV, Annex 107.

[292] *Note Verbale* from the Ministry of People's Power for External Relations of the Bolivarian Republic of Venezuela to the Ministry of Foreign Affairs of the Cooperative Republic of Guyana, No. 02014 (8 Nov. 2016) ("[*N*]*o violentan … los términos establecidos en el Acuerdo de Ginebra de 1966.*") (Translation by Guyana). MG, Vol. IV, Annex 108.

[293] *Ibid.* ("*Por tal razón, en concordancia con el Derecho Internacional Público, se ratifica que la controversia territorial entre Venezuela y Guyana se encuentra regida por el Acuerdo de Ginebra de 1966, y está sujeta a la solución pacífica de conflictos a que se alude en el referido instrumento bilateral internacional*.") (Translation by Guyana).

[294] *Note Verbale* from the Ministry of People's Power of Foreign Affairs of the Bolivarian Republic of Venezuela to the Embassy of the Cooperative Republic of Guyana in Venezuela, No. 000325 (28 Feb. 2018) ("[*E*]*n la zona sometida a controversia territorial conforme con el Tratado vigente y registrado en la Organización de las Naciones Unidas: Acuerdo de Ginebra de 1966.*") (Translation by Guyana). MG, Vol. IV, Annex 131.

violation" of the Agreement.[295] In a separate note issued on the same date, Venezuela protested Guyana's authorization of a seismic study in the maritime area adjacent to the Essequibo Coast on the ground that this action violated "the Geneva Agreement of 1966, [an] international treaty signed by Venezuela and Guyana which governs as Law for the territorial controversy over the Essequibo."[296]

3.102 Accordingly, there can be no doubt that, in the view of both parties, the "controversy" that is subject to the dispute settlement procedures of the Geneva Agreement consists not only of the contention of nullity of the 1899 Arbitral Award advanced by Venezuela, but any territorial or maritime dispute between the parties resulting from that contention.

3.103 In its Application,[297] and in the preceding Chapter of this Memorial,[298] Guyana has described the actions taken by Venezuela in violation of its territorial integrity since 1966 "as a result of [its] contention that the [1899 Award] is null and void".[299] All of these actions resulted directly from Venezuela's contention that the 1899 Award – and the boundary established in

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[295] *Ibid.* ("*una violación flagrante del Acuerdo de Ginebra de 1966*".) (Translation by Guyana).

[296] *Note Verbale* from the Ministry of People's Power of Foreign Affairs of the Bolivarian Republic of Venezuela to the Embassy of the Cooperative Republic of Guyana in Venezuela, No. 000322 (28 Feb. 2018) ("[*A*]*l Acuerdo de Ginebra de 1966, tratado internacional firmado por Venezuela y Guyana que rige como Ley de la controversia territorial sobre el Esequibo*.") (Translation by Guyana). MG, Vol. IV, Annex 130.

[297] AG, paras. 50-54.

[298] *See supra* paras. 2.74-2.76.

[299] Geneva Agreement, Art. I. AG, Annex 4.

accordance with the Award – is null and void. Accordingly, Guyana's claims based on these actions fall squarely within the controversy that is now, by virtue of Article IV(2) of the Geneva Agreement and the Secretary-General's decision of 30 January 2018, subject to the Court's jurisdiction *ratione materiae.*

* * *

3.104 In conclusion, the Court has jurisdiction over all parts of the claim that Guyana has submitted in its Application. The starting point for the establishment of jurisdiction is the text of Article IV(2) of the Geneva Agreement, which, as demonstrated above, is clear and unambiguous in expressing the mutual consent of Guyana and Venezuela to judicial settlement of this controversy, in the event the U.N. Secretary-General chooses that means of settlement.

3.105 The effect of the *renvoi* to Article 33 of the U.N. Charter is that the mutual expression of consent in Article IV(2) extends to adjudication by the Court. This interpretation reflects the object and purpose of the Geneva Agreement and the intentions of the parties as demonstrated in the *travaux préparatoires* and in their contemporaneous and subsequent official statements and actions. The mutual consent of Guyana and Venezuela to judicial settlement by the Court became effective upon the decision of Secretary-General Guterres on 30 January 2018. More than fifty years after the conclusion of the Geneva Agreement, it is not now open to Venezuela to renege on the binding commitments it made to resolve the controversy, including by judicial settlement.

3.106 On the basis of the foregoing, Guyana respectfully submits that the Court should determine that it has jurisdiction in regard to all of the claims set forth in the Application, and should proceed to hear the merits of Guyana's claims.

SUBMISSIONS

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.

19 November 2018

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Hon. Carl B. Greenidge
Vice President and Minister of Foreign Affairs
Cooperative Republic of Guyana
Agent

Certification

I certify that the annexes are true copies of the documents reproduced therein and that the translations into English are accurate translations of the documents annexed.

19 November 2018

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Hon. Carl B. Greenidge
Vice President and Minister of Foreign Affairs
Cooperative Republic of Guyana
Agent