Memorandum of the Bolivarian Republic of Venezuela on the Application filed before the International Court of Justice by the Cooperative Republic of Guyana on March 29th, 2018

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INTRODUCTION

1. The Cooperative Republic of Guyana has filed a unilateral application against the Bolivarian Republic of Venezuela with the International Court of Justice on March 29th, 2018. It requests the Court: 1) to declare the validity and binding nature of the Arbitral Award of October 3rd, 1899, and the called Agreement of January 10th, 1905, 2) to grant Guyana the entire territory in dispute and, 3) to impose on Venezuela purported related obligations.

2. In its Application, Guyana claims that the Court has jurisdiction on the basis of Article 36.1 of the Statute of the Court (which extends its jurisdiction, *inter alia*, to matters especially provided for in treaties and conventions in force). Guyana bases its claim that the Court has jurisdiction in the present case on the fact that the Secretary-General of the United Nations chose on January 30th, 2018 to choose the International Court of Justice as "the means that is now to be used" by the Parties to settle the dispute, object of the Geneva Agreement, dated February 17th, 1966. However, Venezuela did not consent to the Court's jurisdiction under Article 36.1 of the Statute in relation to the present dispute.

   According to paragraph 14 of the Application:

> "The Court has jurisdiction over the controversy addressed in this Application under Article 36, paragraph 1, of its Statute, pursuant to the mutual consent of Guyana and Venezuela, given by them in Article IV, paragraph 2, of the 1966 Geneva Agreement".

3. Guyana seeks to artificially justify the jurisdiction of the Court, claiming that in Article IV.2 of the Geneva Agreement, Guyana and Venezuela granted the UN Secretary-General the authority to choose the means of dispute settlement, which he would have done on January 30th, 2018. According to Guyana this should be interpreted as having the effect not only to designate the means of dispute settlement that should be used by the Parties, but also as (i) granting in and by itself the Court with jurisdiction, independently of the consent of the Parties and without any need to define in particular the scope of the dispute and the elements to be taken into account to settle it, and (ii) allowing unilateral application to the Court by one Party only. Guyana fails to mention any other legal basis of jurisdiction over the dispute.

4. On June 18th, 2018, a meeting convened by the President of the Court was held at the seat of the Court to determine the procedural course that should be given to the Application. At that meeting, the Executive Vice-President of Venezuela, Mrs. Delcy Rodriguez, handed over a letter by the President of the Republic, Mr. Nicolas Maduro Moros, to the President of the Court. After expressing his respect for the institution, President Maduro announced that Venezuela would not participate in the proceedings due to the manifest lack of a jurisdictional basis of the Court, offering once again to resume the negotiations in accordance with the letter and spirit of the Geneva Agreement.

Guyana's Application is ill-founded and the Court lacks jurisdiction

5. The Geneva Agreement requires a *settlement be amicably reached through a practical, acceptable, and satisfactory* solution *for both Parties*. The recourse to adjudication, including the International Court of Justice, is not possible without a specific provision in a special agreement (to be concluded) referring the case to the Court and specifying that the Court should settle the dispute in accordance with the Geneva Agreement, and not only on the basis of international law. Moreover, the scope of the dispute to be referred to the Court is not clearly defined which in this case shows even more the need for a special agreement to spell out the subject-matter of the dispute in order for the Court to have proper jurisdiction.

6. In any event, the Geneva Agreement does not constitute an agreement under Article 36.1 of the Statute of the Court: the effect of the Agreement is to have the UN Secretary-General deciding which means of settlement shall be used; on the other hand, the agreement itself does not grant jurisdiction to the Court. It is not a self-standing or a self-executing agreement as regards jurisdiction of the Court. The UN Secretary-General only designated "the means *to be* used for the solution of the controversy"; to materialize the choice of the UN Secretary-General, there is a need to comply with the Court's Statute, i.e. in the present case to conclude, in the absence of any other basis for jurisdiction, a special agreement.

7. It is the same situation as compromissory clauses obligating States to resort to arbitration. Such clauses are not enough to grant jurisdiction to

an arbitral tribunal. Jurisdiction requires an additional step to materialize the obligation to adjudicate, which is the conclusion of a special agreement.

8. In any case, even if Guyana were right -*quod non*- in claiming that Article IV.2 of the Geneva Agreement "operates as a compromissory clause conferring jurisdiction on the Court", Article IV.2 does not specify that it can be activated before the Court through a *unilateral* application, as some compromissory clauses expressly indicate. In the absence of any specification to the contrary in the Geneva Agreement, it must be presumed that there is a need for a *joint* agreement referring the case to the Court for it to have jurisdiction.

9. Guyana's application is based on a false foundation. Article IV.2 indicates only that the Secretary-General may choose among the means of dispute settlement listed in Article 33 of the UN Charter. But the Court itself has observed in its Judgment in *Aerial Incident of 10 August 1999* (*India v Pakistan*) (Jurisdiction) [2000] ICJ Rep. 12, para. 48, that Article 33 of the Charter is not a "specific provision of itself conferring compulsory jurisdiction on the Court". Therefore, the mere invocation of Article 33 is not a basis for the Court's jurisdiction. Guyana is forced to suggest, therefore, that a *choice* among the options contained in this "non-basis" of jurisdiction can transform it into a true basis for the Court's jurisdiction. This is absurd. A choice among negatives cannot generate a positive.

Venezuela's Memorandum and its Structure

10. By Order dated June 19th, 2018, the Court decided "that the written pleadings shall first be addressed to the question of the jurisdiction of the Court". For this purpose, it granted a period of five months to each Party: November 19th, 2018 as time limit to file a Memorial by Guyana, and April 18th, 2019 for Venezuela to submit a Counter-Memorial.

11. By note, dated April 12th, 2019, Venezuela confirmed to the Court its non-participation in the written proceedings and informed that, however,

> "out of respect for the Court and in accordance with the precedents, the Bolivarian Republic of Venezuela will facilitate in a later timely moment, with information in order to assist the Court in the fulfilment of its duty as indicated in Article 53.2 of its Statute".

12. In accordance with this diplomatic note, Venezuela submits the present Memorandum aimed at demonstrating the manifest lack of jurisdiction of the Court and the absence of Venezuela's consent to have this case adjudicated by the Court, as its own Statute requires.

13. The Memorandum is divided into three parts. The first part (I) presents the most relevant aspects of the Geneva Agreement, dated February 17th, 1966 (I.1), its application by the Parties until 2015 (I.2) and the facts leading to the letter of the UN Secretary-General dated January 30th, 2018 (I.3).

14. The second part (II) analyses Article IV.2 of the Geneva Agreement, which establishes the role of the UN Secretary-General, in its own context, considering its practice and the *travaux préparatoires* (II.1) and, next, it demonstrates that this provision, contrary to what Guyana claims, does not turn the choice of the Court by the UN Secretary-General into a legal basis providing the Court with unconsented jurisdiction (II.2).

15. The third part (III) highlights the discrepancy between the subject of the dispute under the Geneva Agreement and the subject-matter of the Application filed by Guyana (III.1) and it draws attention to the conduct of the Parties in relation to the territory under dispute (III.2) to conclude, finally, with a renewed invitation to negotiation, assisted by political means, in accordance with the correct application of the Geneva Agreement.

16. The Memorandum is accompanied by an Annex that chronologically documents and elaborates on the facts upon which the document is based.

PART I

I.1. 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," known as the *Geneva Agreement* of February 17th, 1966

17. The manner and terms of negotiation and conclusion of the Treaty of February 2nd, 1897, whereby the territorial dispute between the United Kingdom and Venezuela concerning sovereignty over the territory west of the centreline of the Essequibo River was submitted to arbitration, as well as the manner how the arbitration unfolded and the Award of October 3rd, 1899 was adopted were, from a historical perspective, an outrage that, when analysed in the light of the relevant international law in force today, should be null and void.

18. Nearly fifty years later, the testimony of one of the lawyers who had represented the interests of Venezuela revealed *new* facts that reactivated the assertion of the nullity of the 1899 Award. Based on these grounds, the Venezuelan title to the territory west of the Essequibo River was presented to the United Kingdom, which administered Guyana first as its colony and later as a non-autonomous territory.

19. The Venezuelan claim coincided with the independence process of Guyana, which extended to the territory east of the Essequibo River. In this specific context, a negotiation was opened that resulted in 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," known as the *Geneva Agreement*, concluded February 17th, 1966, three months before the independence of Guyana.

20. Article VIII of the Geneva Agreement provided that, once independent, Guyana would automatically become a party. Guyana achieved its independence and assumed all obligations contained in the Agreement. Venezuela proceeded to its recognition with an express reservation of its territorial claim over the territory west of the Essequibo River. The territorial dispute was therefore inextricably linked to the birth of Guyana as an independent State. Guyana cannot ignore now its pending condition or reduce it to the question of the validity of the 1899 Award on basis of a new interpretation of the Geneva Agreement.

21. This Agreement is the unquestionable regulatory framework for the settlement of the territorial dispute between Guyana and Venezuela over the Guayana Esequiba. This has been persistently upheld by Venezuela and it is revealing that, despite the constant disloyalty of Guyana to this Agreement, the latter decides to unilaterally use it now artificially as the exclusive basis of the Court's jurisdiction. It is manifest that Guyana's new interpretation of the Geneva Agreement does not correspond to its terms nor to the intention of the Parties.

22. The Geneva Agreement:

a) expressed the conviction that the pending dispute would prejudice a closer cooperation between British Guiana and Venezuela and "*should therefore be* "*amicably resolved in a manner acceptable to both parties*" (Preamble, third and fourth paragraphs, emphasis added);

b) confirmed the existence of a "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 I);

c) provided for the creation of a Mixed Commission "with the task of seeking satisfactory solutions for the *practical settlement* of the controversy" (Article I, emphasis added) and provided for a procedure to be followed in the event that, once elapsed a four-year term as from the date of the Agreement, the Commission "should not have arrived at a full agreement for the solution of the controversy" (Article IV.1). This finally should end with the intervention of the UN Secretary-General (Article IV.2). If the means chosen by him, from those provided for in Article 33 of the Charter of the United Nations, do not lead to a solution, the UN Secretary General should choose "another of the means stipulated in Article 33 (…) and *so on until the controversy has been resolved or until all the means of peaceful settlement there contemplated have been exhausted*" (Article IV.2, emphasis added);

d) in order to "facilitate the greatest possible measure of cooperation and mutual understanding", it froze on that date the basis for claiming "territorial sovereignty in the territories of Venezuela or British Guiana, or of any previously asserted rights," noting that it did not prejudge the position or rights of any of the Parties concerning the territorial sovereignty in the territories of Venezuela or British Guiana (Article V.1);

e) established the irrelevance of any act or activity carried out during the validity of the Agreement as a basis for or against the claim to territorial sovereignty or to create sovereign rights in said Territories (Article V.2).

I.2. Application of the Geneva Agreement between 1966 and 2015

23. The Geneva Agreement established, according to its explicit terms, a negotiation procedure for a *practical, acceptable and satisfactory settlement for both Parties* of the territorial dispute. According in particular to the preamble of the Agreement, the controversy between the Parties "should … be amicably resolved in a manner acceptable to both Parties". It is worth briefly reviewing its application since its entry into force (Article VII) to understand its meaning for the purpose of the Court's alleged jurisdiction in the present case.

24. The Mixed Commission, created in accordance with Article I of the Agreement, exhausted the four-year period granted to seek a satisfactory settlement of the dispute pursuant to Article IV.1, without achieving its objective. The three pages of its Final Report, incorporating as annexes the respective memoranda of the Parties, was delivered on June 18th, 1970. This document evinced the failure of the attempt.

25. The representatives of Guyana deliberately and systematically blocked the negotiation by introducing as a preliminary question the decision on the issue of the validity or nullity of the 1899 Award. This legal issue could have been addressed, as such, when the Geneva Agreement was negotiated. Instead, the Parties opted for seeking a practical settlement of the territorial dispute acceptable for both Parties. The Parties to the

Agreement therefore recognized the existence of a pending territorial dispute whose settlement depended on a process that should lead, following a comprehensive consideration of all the factors involved, to reciprocal, balanced, and, ultimately, equitable solution.

26. According to the last part of paragraph 1 of Article IV of the Agreement, the Governments of Guyana and Venezuela should choose "without delay" one of the means of peaceful settlement provided for in Article 33 of the Charter of the United Nations. However, on the same date that the Final Report of the Mixed Commission was presented, the Parties agreed in a protocol (Protocol of Port of Spain), to a twelve-year suspension, renewable for identical periods, of Article IV of the Geneva Agreement, in order to promote mutual trust and the improvement of their relations.

27. Guyana claims that, during that period, Venezuela launched intimidation campaigns and did not take initiatives aimed at meeting the objectives of the Protocol mentioned above. This is not correct. High level contacts took place during this period and the representatives of Guyana presented proposals for a practical settlement that included the transfer of important portions of territory southeast of Punta Playa. At the bilateral meeting held in Caracas between November 30th and December 3rd, 1977, the Guyanese Foreign Minister Wills tried to encourage Venezuela's involvement to finance the dam that Guyana planned to build in Alto Mazaruni, suggesting a number of hypotheses of rectification of the boundary line.

28. Certainly, Guyana would have preferred to keep Article IV of the Geneva Agreement in suspension for a new period of twelve years. However, on April 4th, 1981, on the occasion of the visit of the President of Guyana, Mr. Forbes Burnham, to Caracas, the President of Venezuela, Mr. Herrera Campins, informed that the suspension period would not be renewed.

29. Aware of Venezuela's decision not to extend the suspension of Article IV of the Geneva Agreement, Guyana initiated an international campaign to discredit Venezuela in international fora, presenting it as a rich, large and powerful country that coveted two thirds of a small newly independent state, on which it waged an economic warfare and against which it executed a policy of aggression. Venezuelan Foreign Minister Zambrano Velasco qualified this manoeuvre as "strident and aggressive".

30. Moreover, Guyana reaffirmed that the problem with Venezuela was limited to the Treaty of 1897 and the 1899 Award. A statement by the Venezuelan national government dated May 2nd, 1981 stated that, according to that explanation of the dispute, it was obvious that Guyana intended to

> "disregard the Geneva Agreement. Refusing to negotiate in accordance with the agreement involves not only neglecting the injustice committed against Venezuela, but also refusing to comply with the international commitments undertaken."

31. On December 11th, six months before the end of the suspension period of Article IV of the Geneva Agreement, Venezuela, in accordance with the provisions of Article V of the Protocol, notified its termination, thus

resuming the application of Article IV of the Agreement on June 18th, 1982. Although the attitude of Guyana did not make it easy, Article IV was once again reactivated and in force for both parties.

32. Venezuela and Guyana failed to agree on the choice of a means of settlement and to designate an "appropriate international organ" to proceed to do it, as provided for in the first subparagraph of Article IV.2 of the Agreement. Venezuela insisted on direct negotiations and Guyana insisted on submitting it to the International Court of Justice. Later, Venezuela proposed to entrust the UN Secretary-General with the choice of the means; Guyana committed it to the General Assembly, the Security Council or the International Court of Justice.

33. The purpose was to choose an acceptable means to both Parties. However, in light of the disagreement, Venezuela addressed the matter to the UN Secretary-General in 1983, as provided for in the first subparagraph *in fine* of Article IV.2 of the Geneva Agreement. In 1987, both Parties finally accepted the procedure of *good offices* and in 1989, the person - the *good officer*- in charge of its implementation.

34. As it can be observed from the dates (1983-1989), the letter of the UN Secretary-General, Javier Perez de Cuellar, was a laborious one, not only because of the dilatory policy of Guyana, but also because it required the consent of both Parties to the means of settlement and the person implementing them.

35. Between 1990 and 2014, the UN Secretary-General successively appointed Alister McIntyre (1990-1999), Oliver Jackman (2000-2007) and Norman Girvan (2010-2014) as Personal Representatives and *good*

officers. In addition, the Parties appointed successive representatives acting as *facilitators*, who maintained a regular relation between them and with the Personal Representatives of the UN Secretary-General. Foreign Ministers and Presidents of both Republics met with the UN Secretary-General, particularly during the annual debate of the UN General Assembly.

36. It is worth highlighting that the designation of the good officers always took place upon acceptance by both Parties.

I.3. From "The way forward" (2015) to the letter from the UN Secretary-General on January 30th, 2018

37. The demise in 2014 of the third and last good officer, Mr. Girvan, involved the appointment of a new one who may continue his labour, but Guyana put the matter off despite the invitation of Venezuela. Some new events strengthened its reluctance to negotiate: i) precisely in May 2015, Mr. David Granger wins the presidential elections, thus accentuating such reluctance to continue the negotiation through good offices; ii) Guyana had embarked upon an oil adventure as it began disposing in a unilateral manner big prospection concessions to transnational companies in non-delimited maritime spaces which are projected by the Guayana Esequiba land territory; iii) Guyana reinforces a victimhood position in an attempt to present Venezuela as an aggressor that hinders Guyana's development, thus trying to weaken Venezuela's stance. Therefore, Venezuela needed to resort once again to the Secretary General of the United Nations Organization on July 9th, 2015, requesting him to intercede so that the Parties proceed with the appointment of a new good officer.

38. The Geneva Agreement kept the issue of territorial sovereignty open and unsettled and Guyana never felt comfortable with it. For instance, Cheddi Jagan, who had been Prime Minister of British Guiana during the 1961-1964 period and many years later, in 1992, became president of the Republic, had opposed the Agreement, and in his book *The West on Trial: My Fight for Guyana Freedom* (Hansib Publications Ltd., 1966, reprinted in 1997) wrote that with the Agreement: "Recognition was thus given to the spurious Venezuelan territorial claim, and what was a closed case since 1899 was re-opened". This criticism remained in the minds of Guyanese politicians. The Agreement was *a thorn in the throat*, as President David Granger called it in 2015 (Interview in *Guyana Chronicle*, August 13th, 2015).

39. Guyana sought to boycott the Geneva Agreement since the very beginning, and ignored that its independence was recognized by Venezuela with an express reservation concerning its territorial limits. Guyana never opted for a serious negotiation based on political means. Its policy was aimed at gaining time, trying to establish its effective control of the land territory in dispute and exploiting its resources at the expense of Article V. The attention paid by Guyana to the procedure agreed in Geneva was purely formal in the hope that the mere passing of time would make the situation irreversible.

40. However, in the first years of the current century the detection of hydrocarbons in the continental shelf of the Guayana Esequiba increased the risks linked to the uncertainty of the situation as consequence of the absence of a final settlement of the dispute. This, combined with the death of the last good officer in 2014, made Guyana

change its mind and take the opportunity to make a leap in the dark with the financing by *Exxon Mobil* and other companies interested in the exploitation of these resources, even if it requires to grant licenses to operate in disputed areas or, now, the fabrication of an ill-founded Application.

41. Diplomatic Note 726/2015, of June 8th, 2015, of the Ministry of Foreign Affairs of Guyana, was symptomatic of the tense atmosphere that Guyana wanted to create by referring to:

> "the several recent actions initiated by the Government of the Bolivarian Republic of Venezuela in its attempts to coerce the Government of Guyana into accepting the spurious Venezuelan claim for invalidity of the Arbitral Award of 1899 which definitively settled the land boundary between Guyana and Venezuela is null and void simply because Venezuela has unilaterally declared it to be so"

Or denouncing:

> "the adventurism of Venezuela's unilateral and unfounded claim to Guyana's territory"

And requesting Venezuela:

> "to respect the International Treaty to which Venezuela was a signatory party and out of which was handed down the Arbitral Award of 1899 as a full perfect and final settlement of the boundary between Guyana and Venezuela".

These statements are a gross disregard and breach of the Geneva Agreement by Guyana: there is to date no final practical, acceptable and

satisfactory settlement of the dispute, as expressly stated in the Geneva Agreement which object and purpose is precisely to settle the dispute by finding a practical, acceptable and satisfactory solution to it.

42. The Note of June 8th, 2015 was the continuation of the policy of successive governments of Guyana to the effect to tighten the situation, block the negotiation of the settlement of the territorial dispute by political means (as the good offices were or mediation could be), and to force the judicial option at which Guyana aimed on the basis of an interested interpretation that the dispute was reduced to a ruling on the validity or nullity of the 1899 Award.

43. Since Mr. David Granger became President, Guyana adopted a particularly radical and hostile attitude towards negotiation, either direct or assisted by a third party, and considered only a judicial solution. The Note of June 8th deliberately encouraged a scenario of inchoated violence directed at the qualification of actions such as the promulgation by Venezuela of Decree No. 1.787 that created Maritime and Insular Operative Zones of Integral Defence as a threat to international peace.

44. Venezuela's reaction, reflected on the Diplomatic Note of June 9th, avoided escalating the situation invoking the spirit of cooperation and solidarity in sharp contrast with the manoeuvres of multinational companies such as *Exxon Mobil* behind Guyana's belligerent approaches.

45. The UN Secretary-General, in addition to consultations in New York and a personal meeting with the Presidents of Venezuela and Guyana, sent a technical mission on two occasions to Caracas and Georgetown;

as a result, the UN Secretary-General made a document entitled "The way forward".

46. Throughout the consultations, Venezuela affirmed and reiterated that:

a) Article IV.2 of the Geneva Agreement clearly established a successive and progressive course of means of peaceful settlement to the dispute, which objective is to reach a *practical, acceptable, and satisfactory settlement for both Parties* to the territorial dispute arisen as the result of the Venezuela's contention that the 1899 Award was null and void;

b) *Good offices* should not be regarded as a failure;

c) It was willing to accept, within the successive and progressive course of means provided for in Article IV.2 of the Geneva Agreement ("and so on…"), the addition of *mediation* to the good offices, a qualitative leap that could enable the mediator to make proposals on its own initiative, and not only be the thread connecting the proposals of the Parties;

d) The recourse to the International Court of Justice (and the same could be said of arbitration) did not seem the appropriate means to reach a *practical, acceptable and satisfactory settlement for both Parties*, as explicitly provided in the Geneva Agreement;

e) In any case, it was contrary to the letter and spirit of this Agreement and, particularly, of its Article IV.2, to bypass the political means mentioned in Article 33 of the United Nations Charter, and directly

unilaterally impose what should be the last resort once the Parties mutually agree on the failure of those means.

47. The President of Guyana welcomed the communication issued by Secretary General Ban Ki-moon of December 15th, 2016 and stated that on December 22nd, 2016, at a Christmas luncheon with the Guyanese armed forces (GDF) as follows:

> *"Last Friday, for the first time in 51 years, the Secretary-General has decided that that 51-year-old claim by Venezuela will go to the world court at the end of 2017 if the two countries Guyana and Venezuela do not agree to make some other arrangements. Well we have already decided that we have already waited 51 years too long. It is our territory and we will go to court to prove that it is our territory and you are there to back me up aren't you?", the President said to loud cheers and shouts of "yes" from the members of the Force",*

As described by a press release reporting the speech published in the official website of the Ministry of the Presidency of Guyana. One day earlier, on December 21st, 2016, President Granger had sent a communication to President Maduro whose thorough reading is worthwhile. In said communication, he anticipates Guyana's stance as he says that "*Guyana assures you its commitment to fulfilling the highest expectations of the Good Office' process*", as well as "*Guyana's determination to do all in its power to ensure that the means of settlement he has chosen will lead to a successful outcome*".

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48. “The way forward” document is a non-paper issued by the UN Secretary-General in February 2016. It provided that the UN Secretary-General, after consulting with the Parties, would appoint a Personal Representative to be intensively involved in the search for satisfactory and acceptable solutions, expecting the cooperation of both Parties, in good faith, through frequent and substantive meetings at the highest and at working levels. Acting in person or through his Personal Representative, the UN Secretary-General would make confidential and non-binding suggestions on any relevant aspect of their bilateral relation, including maritime and environmental aspects, in order to assist them in reaching an agreement.

49. As for its schedule, in March/April and in September 2016, the UN Secretary-General would meet with the Presidents of Venezuela and Guyana to assess the progress made and to strive for significant progress toward the settlement of the dispute. The UN Secretary-General would evaluate the progress made no later than November 2016. The Parties should aim to reach an acceptable mutual agreement by then. Otherwise, unless the Parties jointly requested the UN Secretary-General to postpone its decision for a year, the UN Secretary-General, based on its own assessment, would have the intention to choose the International Court of Justice as a means of settlement. Venezuela sent on March 15th, 2016 a communication to the Secretary General of the United Nations Organization explaining, based on the Geneva Agreement, the reasons preventing to resort to the judicial way, as well as various criticisms and observations to the document titled *The Way Forward* because it distorted and hindered the purpose of reaching a practical and mutually satisfactory settlement of the territorial contention.

50. The implementation of the schedule planned by the non-paper of the UN Secretary-General was delayed by one year (communiqué of the UN Secretary-General of December 15th, 2016) due to the difficulty to designate a good officer accepted by both Parties.

51. "The way forward" document and its *sequitur* in the communiqué of the UN Secretary-General of December 15th, 2016, was subject to numerous criticisms. First, the one-year period of *mediation* was too short to reach an agreement given the complexity of the issue; second, the announced recourse to judicial settlement which is inadequate and, in any case, premature, did not conform to the principles of *graduality and progressivity* enshrined in Article IV.2 of the Geneva Agreement; and, third, the terms in which the UN Secretary-General would try to lead the Parties before the International Court of Justice were ambiguous.

52. It should be stressed that by enriching good offices with mediation, the means of settlement was being transformed, moving a step further in the progressive course provided for in Article IV.2 of the Agreement, being the period of time of one year insufficient to achieve the objective pursued, namely the practical, satisfactory and acceptable settlement, for both Parties, of a dispute as complex and entrenched as that of the Guayana Esequiba.

53. Influenced by Guyana, and its view that the sole issue under dispute was the validity or nullity of an arbitral award, the UN Secretary-General anticipated the intention of choosing the International Justice Court as a means of settlement. This made previous *good offices* including the extremely short period considered for *mediation* a mere formality,

condemned beforehand to failure. Venezuela repeatedly expressed its disagreement with the provision stating that the extension of good offices with mediation for one year beyond December 2017 would depend on a *joint* request of the Parties.

54. If Guyana*'s* good faith in cooperating constructively in the search for a settlement by political means could already be called into question, it was foreseeable, as confirmed by the facts, that Guyana would reject any extension of the experimentation of such means, once the UN Secretary-General anticipated his intention to "choose the International Justice Court as the means of settlement in order to obtain a final and obligatory decision on the dispute" in the case that "satisfactory solutions for the practical settlement of the controversy, acceptable for both Parties, were not reached before December 2016" (finally December 2017).

55. The logical course of action, in accordance with the spirit and practice of the previous application of the Geneva Agreement, was that the UN Secretary-General would have opened consultations with both Parties on the choice of the means of settlement if at the end of a reasonable term, no mutually acceptable agreement had been reached and if the good offices with mediation did not offer a relative guarantee of progress. None of these steps were observed.

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56. In 2017, Guyana systematically rejected all the proposals made by Venezuela to advance in a negotiated settlement with the assistance of the Personal Representative of the UN Secretary-General. The intention of the UN Secretary-General to refer the dispute to the Court

encouraged the passivity of Guyana in the negotiating rounds and its persistence in the most radical positions requiring Venezuela to unconditionally accept the totality of its pretentions.

57. Parameters for assessing the extent to which a Party adopts a constructive attitude in the settlement process of the dispute include: 1) to abstain from any kind of unilateral initiative which could hinder the progress of the negotiation/mediation process; 2) to avoid public statements of its authorities which could have the same outcome; and 3) to be receptive to the proposals of the other Party and be willing to make concessions. In the case of Guyana, the principles that should characterize any negotiation in good faith were conspicuous by their absence.

58. Under the presidency of Mr. David Granger, Guyana adopted an attitude of radical hostility to any negotiation. In addition to exclusively betting on the judicial means, it insisted on: 1) Unilateral initiatives, concerning not only the land territory under dispute, but also the maritime spaces which are its projection and, even, that of the Venezuelan Delta Amacuro; 2) Offensive and discrediting public statements against the authorities of Venezuela, before the UN General Assembly, the Legislative Assembly of Guyana and other international instances, as well as press releases and statements; and, 3) Absolute disdain for the proposals of Venezuela at Greentree meetings (New York, 2017) convened by the Personal Representative of the UN Secretary-General, Mr. Dag Nylander.

59. Guyana seemed more interested, once again, in returning to the alleged military threat of Venezuela. On September 20th, 2017, its President,

Mr. David Granger, wanted to call the world's attention from the podium of the UN General Assembly, to a regional peace at risk:

> "The choice has become one between just and peaceful settlement in accordance with international law, and a Venezuelan posture of attrition that is increasingly more blustering and militaristic … Guyana has been working assiduously with the Secretary General's Personal Representative. Guyana looks to the international community to ensure that Venezuela is not allowed to thwart the process of judicial settlement which are the clear and agreed path to peace and justice"

With a speech of this nature, what would be expected in the Greentree meetings?

60. The attitude of Guyana has been characterized by the misrepresentation of the Venezuelan proposals, the interpretation of its own claims as being vested with undisputed rights, the deliberate disdain towards the position of the "other", the erroneous idea of the negotiation as the imposition of one's own points of view, ignoring that the commitment resulting from any negotiation in good faith requires the Parties to envisage abandoning their maximalist positions, and the use of a categorical language to dogmatically delegitimize the adversary. For Guyana, the only possible agreement was the one that implied the unconditional acceptance of all its pretentions by Venezuela. Such an attitude is not compatible with the Geneva Agreement requiring to find a practical, acceptable and satisfactory settlement to the dispute.

61. Guyana's self-interested interpretation of Article IV.2 of the Geneva Agreement cannot be accepted. And even if it could be accepted (*quod non*) that the political means were exhausted, this would not have (i) automatically created the legal basis, as required by the Statute of the Court, to find a basis for jurisdiction, or (ii) transformed the rationale for the settlement of the dispute as agreed in the Geneva Agreement in general and its Article IV.2 in particular, as it will be shown in the second part of this Memorandum.

PART II

II.1. Article IV.2 of the Geneva Agreement: text and context

62. The Geneva Agreement raises, for the purpose of assessing the jurisdiction of the Court, two main issues: (i) the first one concerns, on the one hand, the scope of the mandate granted to the UN Secretary-General by the Parties and, on the other, the rights and obligations of the Parties arising from the performance by the UN Secretary-General of the mandate granted; (ii) the second one concerns the subject-matter of the dispute.

63. In accordance with the general rule of interpretation of Article 31 of the Vienna Convention on the Law of Treaties of May 23rd, 1969, reflecting customary law, it is well-established that

a) According to paragraph 1 of above-mentioned article, a treaty clause should 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".

b) Paragraph 2 provides that for the purposes of interpretation the "context" shall comprise, first, "in addition to the text, including its preamble and annexes", as well as "...b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty".

c) Paragraph 3(b) adds that, together with the context, "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" shall be taken into account.

64. The *travaux préparatoires* and the circumstances of conclusion of the treaty are supplementary means to confirm the meaning resulting from the application of the general rule of interpretation or to determine it when the application of the general rule leaves it ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable, as provided in Article 32 of the Convention. Some consider these means to be more than supplementary and are integrated into the operation of the general rule for fixing the scope of a text.

65. Finally, in treaties, as in the case of the Geneva Agreement, authenticated in more than one language, the text is equally authoritative in each language, unless otherwise provided (Article 33 of the Convention).

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66. Applying these rules, the first point to be addressed is the text of the Geneva Agreement in its context. According to Article IV.2 of the Geneva Agreement, if the means chosen by the UN Secretary-General do not lead to a settlement of the dispute, the UN Secretary-General shall choose

> "another of the means stipulated in Article 33 of the Charter of the United Nations, and so on until the controversy has been

> resolved or until all the means of peaceful settlement there contemplated have been exhausted"

67. In his communication of January 30th, 2018, the UN Secretary-General chose the International Court of Justice as the means of settlement to the dispute "to be used" between Guyana and Venezuela, once he considered that the good offices had not produced significant progress. Guyana relies on this communication to establish the jurisdiction of the Court as the only basis of its unilateral Application.

68. This claim is futile. First, the UN Secretary-General's letter does not conform to the terms of his mandate under Article IV.2 of the Geneva Agreement and, second, in any case, even accepting, as a hypothesis, that the UN Secretary-General has correctly exercised the powers granted to him by the Parties, his choice does not in itself confer grounds on which to base the jurisdiction of the Court on a matter unilaterally submitted by one of them.

69. The only legal effect of the UN Secretary-General's letter, under article IV.2 of the Geneva Agreement, would be the choice of the International Court of Justice as a means of settlement succeeding the good offices with mediation elements referred to in the UN Secretary-General's communication of December 15th, 2016. However, neither Article IV.2 nor any other provision of the Geneva Agreement establishes, either explicitly or implicitly, the basis of jurisdiction of the Court under Article 36 of its Statute, nor the modalities of action under Article 40; in particular, in no part of the Agreement, the Parties agreed to accept that a party can without the consent of the other unilaterally bring the dispute before the Court.

70. In other words, the choice of the Court as a means of settlement by the UN Secretary-General does not give the Court more jurisdiction over the dispute, let alone authorize a party to initiate proceedings through unilateral action. For the Court to have jurisdiction, further action is required, that needs to be "fulfilled in accordance with the provisions of the Statute" [ICJ, *Corfu Channel,* ICJ Rep 1948, at 26]. Such course of action is legally dependent on *both* Parties' consent to the jurisdiction of the Court, to be expressed, and framed, by a special agreement to be concluded by them.

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71. Although judicial settlement (and arbitration) is mentioned in Article 33 of the Charter of the United Nations, together with other peaceful means of dispute settlement, which begins with negotiation, continues with inquiry, mediation and conciliation, and ends with recourse to regional bodies or agreements or other means that the Parties may choose, Article IV.2 of the Geneva Agreement refers to a *successive* experimentation of them, indicative of a certain preferred sequence. In any case, since the signature of the Geneva Agreement, good offices, which are not expressly mentioned in Article 33, are the only means that have been resorted to. In the letter of the Secretary-General of the United Nations dated December, 15th, 2016, elements of mediation were to be experimented along with the good offices for some moths of 2017 at Greentree meeting, but such elements did not count neither with the time nor with the willingness of Guyana to the negotiation.

72. In the preamble of the Agreement itself, the Parties declared their conviction that the application of the Agreement will settle the dispute

amicably in *a manner acceptable to both parties*, and Article I referred to the search of solutions for the *practical settlement* of the dispute. This excludes arbitral and judicial means, which are not expressly mentioned in any part, unless the Parties consent to them by special agreement. It is not just a question of settling the dispute, but of doing it by means of a practical, acceptable and satisfactory settlement agreed by the Parties.

73. This interpretation of the Geneva Agreement is fully consistent with the recent Judgment of the Court on jurisdiction in *Ukraine v. Russia*. The Court expressly decided that the objective to reach "an amicable solution of the matter", as contemplated in the treaty at stake in this case, means that the objective pursued by the Parties to the treaty "is for the States concerned to reach an agreed settlement of their dispute", ie "to settle a dispute by agreement", by contrast to recourse to adjudication (see paras 109 and 110 of the Court's Judgment on Preliminary Objections, dated 8 November 2019, in *Ukraine v. Russia*). The same applies in the present case.

74. In principle, the judicial or arbitral means are not the most appropriate to reach that practical, acceptable and satisfactory settlement to both Parties, which is configured as the object and purpose of the Geneva Agreement. Venezuela, therefore, has sound reasons, based both on the text of Article IV.2 itself and on the object and purpose of the Agreement, to insist on continuing entrusting the settlement of the dispute to a negotiation based on the political means set forth in Article 33 of the Charter of the United Nations. The principles of *graduality* and *progressivity* that must guide the settlement of the territorial dispute through political means are enshrined in Article IV.2; they are an

essential feature of the procedure established in the Agreement. It is clear that they have not been observed in this case.

75. Guyana affirms that the 28 years of Good Offices, plus the 52 years since the conclusion of the Geneva Agreement, have not allowed the dispute to be settled; therefore, it should have recourse to the Court. Guyana highlights the long period of time but had no interest in explaining the reasons why the dispute had not been settled yet by good offices.

76. The absence of a solution to the dispute is due to Guyana's unwillingness to cooperate in good faith in the application of good offices as an assistance means of negotiation of the parties in the search of a *practical*, *acceptable* and *satisfactory* settlement for both. Guyana has preferred to ignore the dispute, considering that the course of time played in favour of a consolidation of the effects of its unilateral initiatives on a territory that it occupies and controls *de facto*, and then to defraud the object and purpose of the Agreement by seeking to impose a judicial decision on the validity of the 1899 Award. This issue was not on the negotiating table, where Venezuela always maintained a political and multi-faceted approach to a dispute over territory that goes beyond the mere discussion on the validity or legal nullity of the arbitral award with which Guyana wanted to falsely close the issue sixty years ago.

77. The good offices began in 1989. Perhaps there have been too many years of good offices, although not as many as Guyana affirms considering the several pauses. Not a single year has been devoted to mediation or experimentation with the other means mentioned in Article

33 of the Charter of the United Nations, which would have reflected better the successive nature that the Parties agreed in Article IV.2 of the Agreement.

78. The Geneva Agreement does not establish a time limit to achieve that settlement, and it is that objective, namely the practical, acceptable and satisfactory settlement, which should guide the choice of the means. The Agreement only set a time limit for the work of the Mixed Commission. The choice of the political means assisting the Parties is open-ended and indefinite as long as the Parties so agree. In fact, good offices are not expressly set forth in Article 33 of the Charter and are covered by the generic reference to "other means" of choice. Good offices are not the only political means of settlement, but only the first and most elementary of them, the least intrusive in the necessary negotiation between the Parties.

79. The logical thing to do, within the natural and progressive sequence provided for in Article IV.2 of the Geneva Agreement, is to resort to mediation, if good offices are considered exhausted. Establishing a term to the mediation, as proposed by the UN Secretary-General, may be considered by the Parties provided that its duration is realistic. As mentioned above, this was not the case in "the way forward" proposed by the document of the UN Secretary-General in 2015.

II.2. Article IV.2 of the Geneva Agreement does not constitute a basis for jurisdiction under the Statute of the Court

80. It is a fundamental principle in the law applicable to the judicial settlement of disputes between States that no court can exercise

jurisdiction without the consent of the Parties, that is, with a clear and unequivocal manifestation of their willingness to accept such jurisdiction.

81. In order to have recourse to the International Court of Justice, it is required to have a specific basis of jurisdiction. The only one that Guyana invokes is the one that, in its opinion, is granted by the communication of the Secretary-General of the United Nations of January 30th, 2018, based, in turn, on a sweeping interpretation of Article IV.2 of the Geneva Agreement. There are no treaties to which Venezuela and Guyana are parties that provide a basis for a unilateral claim, and neither Guyana nor Venezuela has deposited declarations under the *optional clause* of Article 36.2 of the Statute. In these specific circumstances, the only way for Guyana's unilateral application to be accepted would require Venezuela to accept the jurisdiction of the Court over the subject of the claim, as *forum prorogatum*. Venezuela did not do it, and it will not do it.

82. Venezuela has not given its consent to the Court's jurisdiction. This follows from the correct application of the general rule of interpretation to the UN Secretary-General's communication of January 30th, 2018, communication allegedly made within the framework of the powers granted to him by the Parties in the last subparagraph of Article IV.2 of the Geneva Agreement. These documents must be interpreted on their own merits, in their specific context and circumstances.

83. Even if submission of the dispute to a court or tribunal were to be seen as possible under the Geneva Agreement, it would mean in any case that there is a need to settle the dispute in accordance with the Geneva

Agreement to specify the subject-matter of the dispute and the parameters to be taken into account beyond mere international law rules. This would require the conclusion of a special agreement.

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84. Venezuela does not exclude arbitral and judicial means as *ultima ratio*, once the failure of all political means available have been established by both Parties along with the UN Secretary-General and his Personal Representative. On the other hand, shortcuts, as those implied by Guyana, cannot be accepted, especially when they are not in conformity with a correctly interpreted Article IV.2 of the Agreement as Venezuela has demonstrated.

85. Resorting to judicial or arbitral means without prior verification that all available non-experimented or insufficiently experimented political means have been exhausted is not only a *leap* incompatible with the rule of the Geneva Agreement, but also, due to its very nature, the juridical means are not the most adequate, as it has been noted above, to satisfy the object and purpose of the Agreement. That said, an exhaustion of means in this case does not create basis of jurisdiction.

86. Arbitration or judicial settlement are means in which a third party *decides* for the Parties, and not only *assists* them, in the settlement of the dispute. Therefore, arbitration or judicial settlement can only ensure that the dispute is "amicably resolved in a manner acceptable to both parties" (preamble to the Geneva Agreement), if both Parties accept those means and negotiate a special agreement spelling out its purpose and the body or institution entrusted with the mission, the legal basis

and equity motivating their decision, as well as other aspects of the procedure, such as the language or languages used in order to respect the equality of the Parties. To submit, as Guyana does, that consultation and acceptance by both Parties is appropriate to embark on a diplomatic process and then unilaterally abandon them when it comes to a judicial process cannot be accepted.

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87. The UN Secretary-General's non paper ("The way forward") provided in one of its paragraphs that "*after the agreement of both parties* with the present proposal, the UN Secretary-General shall issue a detailed press release on the *agreed procedure*" (emphasis added). Consequently, the UN Secretary-General, in accordance with the previous practice in the implementation of the Agreement, cannot initiate the "way forward" without the consent of both Parties. Any choice made by the UN Secretary-General is not sufficient in and by itself to materialize the recourse to a specific means of settlement.

88. Venezuela gave its consent clarifying that it would not accept a decision choosing the International Court of Justice as the next means of settlement.

89. Considering his communication of January 30th, 2018, the UN Secretary-General incorrectly exercised his powers under Article IV.2 of the Agreement. He disdained the principle of balance of the Parties, in an unusual alignment with the position of one of them, and ignored

the practice in the application of the procedure, based not only on consultation but on acceptance by both Parties.

90. The UN Secretary-General has at no time pronounced himself on the effects of his letter and has not responded to the objections raised by Venezuela over these years. For the reasons stated above, it is clear that his communication can only be taken as a recommendation.

91. Even if the UN Secretary-General's letter were to be seen as being in conformity with the Geneva Agreement and/or that the UN Secretary-General were to be seen as having exercised his powers within the limits set out in Article IV.2 of the Agreement, the interpretation given by Guyana of Article IV.2 has no merits.

92. Guyana wants to read into the last subparagraph of Article IV.2 of the Geneva Agreement a sort of implicit *arbitration clause* which can be activated by a decision of the UN Secretary-General whenever he deems it convenient, allowing one of the Parties, on the basis of that decision, to infer from it the legal grounds of the jurisdiction of the Court and unilaterally initiate proceedings before it. This interpretation is clearly abusive and must be rejected in all its terms.

93. Venezuela considers that Article IV.2 of the Geneva Agreement does not grant the UN Secretary-General the prerogative intended by Guyana, regardless of the manner how he has exercised his role. Choosing the Court as a means of settlement by the UN Secretary-General cannot be conflated with the issue of its jurisdiction.

94. Neither Article IV.2 *in fine*, nor any other provision of the Agreement identifies the consent of Venezuela to grant the UN Secretary-General

the unprecedented power to decide with a binding nature the possibility for a unilateral submission of the dispute by Guyana to the International Court of Justice, nor grant one of the Parties the right to bring a claim, that is, to lodge a unilateral application. A choice on the means of settlement to be experimented by the Parties is not in itself sufficient to grant unconsented jurisdiction to any Court, in the present case the ICJ, let alone replace it. If Guyana were right, it would mean that the UN Secretary-General could choose *any* court and tribunal and that such a choice would suffice to grant jurisdiction to this court, independently of the rules governing its jurisdiction. That, of course, cannot be right.

95. The truth is that the UN Secretary-General did not intend to do so in his communication of January 30th, 2018: "...I have chosen -he says- the International Court of Justice as the next means to be used" for the resolution of the dispute. He adds:

> "if both Governments accepted the proposal for a complementary good offices process, I believe that such a process could contribute to the use of the chosen peaceful means of settlement".

96. The International Court of Justice is the principal judicial body of the United Nations. Resorting to it falls within the array of possibilities of the judicial settlement. However, it would be truly surprising, with regard to the Application filed by Guyana, that the Court would consider that Venezuela, by merely signing the Geneva Agreement: 1) unequivocally expressed its specific consent to the jurisdiction of the Court (and, in fact, according to Guyana's interpretation of Article IV.2, expressed its consent to the jurisdiction to *any* international or tribunal, so long as the UN Secretary-General chooses that court or tribunal);

and, 2) accepted that the submission of the dispute to the Court could be made by a unilateral application and not by a special agreement. Guyana's interpretation constitutes a redrafting and revision, not an interpretation, of Article IV.2. This provision does not expressly mention the Court, does not refer to consent to jurisdiction, and does not allow for unilateral application to the Court.

97. In the history of the Geneva Agreement application, it is well-established that Venezuela has always chosen the less intrusive political means of assistance to negotiate. There can be therefore no presumption of an intention to consent to unilateral action against it.

98. The judicial settlement cannot be better than arbitration in terms of the consent of the Parties on which an exercise of jurisdiction can be based. Should the hypothetical choice of arbitration by the UN Secretary-General as a means to address the solution to the dispute be deemed binding on the Parties, the Parties would have to negotiate a special agreement.

99. In addition, it is worth recalling that in Venezuelan constitutional law that special agreement, being a treaty that would delegate a decision on territorial sovereignty to a third party's decision, would also require a consultative referendum. Such a referendum did not take place.

100. There is an obvious, very substantial difference between Article IV.2 of the Geneva Agreement and *compromissory clauses* agreed to by States to resort to the Court. The Geneva Agreement, on the other hand, does not appear in the list as an agreement with compromissory clauses that the Court itself has been publishing.

101. Venezuela's practice confirms the inadmissibility of such implication, as the persistent and systematic exclusion of arbitral and judicial recourse to settle its international disputes has been a traditional feature of its foreign policy. It is difficult to find Venezuela on the list of countries that have signed treaties, protocols, or arbitration clauses submitting controversies to the Court. Venezuela has made reservations with regard to the clauses of this nature included in multilateral treaties, it has refrained from being a party to them, as well as from ratifying or adhering to optional protocols of acceptance of any kind of arbitral or judicial jurisdiction.

102. All of this confirms that Article IV.2 of the Geneva Agreement does not constitute and cannot be construed nor interpreted, in and by itself, as a *compromissory clause* allowing for a unilateral recourse to the Court.

103. Only a clear and positive acceptance by Venezuela, and not an artful revision through an apparent interpretation of Article IV.2 of the Geneva Agreement, could establish the Court's jurisdiction over Guyana's Application. In the absence of any basis for the Court's jurisdiction in the Geneva Agreement, Guyana's claim could only be considered, for the purposes of that jurisdiction, from the perspective of the *forum prorogatum*, an invitation for Venezuela to accept such jurisdiction once the claim has been filed. Only such acceptance by Venezuela would make the Court's jurisdiction viable. Once again, Venezuela reaffirms that it did not, does not, and will not accept the Court's jurisdiction in the present case.

PART III

III.1. The object of Guyana's Application does not correspond to the subject-matter of the dispute under the Geneva Agreement

104. In relation to the subject-matter of Guyana's Application, Guyana claims that its object is the validity or nullity of the 1899 Award (and the Agreement of 1905). In addition, it has sought to nourish its claim with a series of submissions allegedly linked to the declaration of validity requested, which clearly exceed the scope of jurisdiction, which in any cause is wrongly asserted on the basis unilaterally invoked by Guyana.

105. Guyana's interpretation is overstretched and wrong. A careful and *bona fide* reading of Article 1 of the Geneva Agreement shows that the dispute arises "*as the result* of the Venezuelan claim for invalidity of the Arbitral Award of 1899...is null and void" (emphasis added). The dispute has to do with the sovereignty over the territory itself, based on the Venezuelan claim for invalidity of the Award, which is not as such the subject of the dispute contemplated by the Geneva Agreement. The validity or nullity of the Award is not the core of the dispute. Were that the case, instead of the Geneva Agreement, a different Agreement would have been entered into containing an arbitration or judicial clause.

106. An award is either valid or null; there is no middle ground, and, under that strict legal perspective, there would be no room for a practical, acceptable and satisfactory settlement of the dispute, as required by the Geneva Agreement. The validity or nullity of an arbitral award is non-negotiable. Had the object of the Geneva Agreement be to settle this issue (which is a strict, legal and justiciable issue), the United Kingdom and British Guyana would not have, as they did, opposed the mention of arbitration or judicial means (not to say the Court) in the negotiation process leading to the conclusion of the Geneva Agreement.

107. Since the signature of the Geneva Agreement, contemporary Venezuelan actors (such as Carlos Sosa Rodriguez, an active participant in the negotiation of the Agreement) expressed their conviction that the solid ground for recourse against of the 1899 Award had led to set aside the issue of its validity or nullity when discussing the content of the Agreement to avoid jeopardizing its conclusion as consequence of the conflicting views of the Parties on the matter.

108. The note of Secretary of State of the Foreign Office, Michael Stewart, to the British Ambassador to Caracas, Anthony Lincoln, on February 25th, 1966, stated 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 commitment wording which reflected the known positions of both sides."

109. The contention of nullity of the 1899 Award triggered a substantive negotiation on the means to settle in a practical, acceptable and satisfactory manner the territorial dispute, and not a procedural examination of the merits of the contention. The Geneva Agreement was drafted and adopted on that basis. Without conceding it, the United Kingdom was well aware of the irregularities of the arbitration procedure and the resulting Award (which lacked motivation), and understood that it was necessary to seek a solution through diplomatic channels. In other words, the Geneva Agreement bypassed the question of the validity or nullity of the Award. Therefore, identifying the dispute as concerning the nullity of this Award, as Guyana does, ignores the spirit, the text, the content and the effects of the Agreement.

110. The core of the Geneva Agreement is the search for "satisfactory solutions for the *practical settlement* of the controversy" (emphasis added). This precision of the object and purpose is the *mantra* of the Agreement. The object and purpose of the Agreement was framed in the same terms under item 2 of the agenda agreed for the London talks (December 9th and 10th, 1965) and reiterated in the agenda of the Geneva talks (February 16th and 17th, 1966). To consider that the issue of the nullity or validity of the Award lies at the heart of the real dispute under the Geneva Agreement, as Guyana contends, would render the countless references to a practical, acceptable and satisfactory settlement pointless and absurd and would deprive them of any legal effect (*effet utile*).

111. The rationale of the Agreement shows that, given the Venezuelan contention of nullity of the Award, the Parties had to accept a

negotiation assisted by third parties on the territorial dispute in order to reach a *practical, satisfactory and acceptable* settlement.

112. The null and void nature of the Award is a Venezuelan contention which the Parties took note in order to deal with the territorial dispute deriving from such contention, and to which a satisfactory settlement for both Parties must be sought in accordance with the procedure provided in the Geneva Agreement.

113. It is worth recalling that the Venezuelan Minister of Foreign Relations, Iribarren Borges, was willing to take the real dispute, namely the *territorial dispute*, to arbitration or to the International Court of Justice, not the *validity or nullity* of the 1899 Award. This explains the British-Guyanese reluctance to mention these means in the Geneva Agreement and their desire for not referring to them explicitly in the articles regulating them. Therefore, Guyana cannot have it both ways today, i.e. having a *court* deciding on the *validity or nullity* of the 1899 Award. This claim does not correspond to what was agreed in Geneva in 1966: the subject-matter of the Geneva Agreement is the territorial dispute, not the validity or nullity of the 1899 Award; and the Parties decided to exclude any explicit reference to adjudication in the Agreement.

114. There are a number of lessons that arise from the *travaux préparatoires* of the Geneva Agreement:

1) Venezuela wished to reach, as soon as possible, a settlement to the territorial dispute with the United Kingdom (and Guyana) on the boundaries with British Guiana;

2) It is Venezuela that, in order to reach that settlement, did not rule out, on the contrary, it proposed, as a last resort, arbitration and judicial settlement, if a practical settlement could not be reached within a Mixed Commission or other political means of settlement, such as mediation (whose duration was intended to be limited to avoid its indefinite duration);

3) the United Kingdom and Guyana, following a dilatory policy, did not wish to see arbitration or judicial settlement expressly mentioned in the Agreement; instead, they preferred a generic reference to the means provided in Article 33 of the Charter of the United Nations;

4) the attitude of United Kingdom and British Guyana could not be explained if the matter was to decide on the validity of the 1899 Award;

5) the proposal of the Venezuela's Foreign Minister, Iribarren Borges, to consider arbitration or judicial settlement as a last resort was always concerned with the territorial dispute arising from a contention - the nullity of the Arbitral Award - which is not on the negotiating table of the Agreement; and,

6) the Venezuelan Minister understood that arbitration or judicial settlement did not operate mechanically or unilaterally but were subjected to an agreement negotiated between the Parties, making equity a fundamental source of decision, in accordance with an imperative of substantial justice. The object of the arbitration that Iribarren Borges proposed as a final settlement becomes even more evident when he observed: "there may be a solution other than arbitration: they might agree to make a division of the territory".

115. The reality is that those who now seek to find in Article IV.2 of the Geneva Agreement an unconditional consent by Venezuela to the jurisdiction of the Court, rejected at the time any mention, not only of the Court, but also of arbitration or judicial settlement. They were aware that resorting to the Court to settle the territorial dispute through the means envisaged in the Agreement implied the revision of the 1899 Award. Venezuela expressly addressed this matter in London and Geneva in terms of a historic justice, morality, equitable rectification. In those negotiations, Venezuela, which is now accused of dilatory tactics, was then the driving force behind proposals in search of final and substantive settlement, within a reasonable time.

III.2. The conduct of the Parties in the territory under dispute

116. The narrative of Guyana's Application seriously disregards the facts and deliberately omits the many actions implemented by Venezuela in its favour and in favour of its people within the framework of a policy of regional integration and solidarity, as stated in Guyana Report to the World Trade Organization of July 28th, 2015. It is worth mentioning that under the presidency of Hugo Chavez a policy was adopted not to impede the implementation of projects by Guyana to the west of the Essequibo when their action had a positive social impact.

117. The accounts of the events that have occurred since the signature of the Geneva Agreement in 1966 reveals Guyana's recurrent recourse to accusations of threats and aggression by Venezuela, before the Security Council and other international fora, in order to multilateralize the

situation and avoid compliance with its obligations under the Agreement.

118. This policy was particularly perceptible in the early 1980s, when Guyana reacted with hostility to Venezuela's decision not to renew the Protocol of Port of Spain and to block Guyanese projects west of the Essequibo of great strategic and environmental importance, such as the *Alto Mazaruni* hydroelectric dam. A policy further intensified due to the oil issue when Mr. David Granger became President of Guyana in 2015.

119. President Granger's speeches in different scenarios (his formal speeches in the general debate of the UN General Assembly, and in regional and sub-regional fora), some of which are included in the narrative of Guyana's Application, falsely present Venezuela as an aggressor State against a poor country. It is a historical fact that Venezuela has never engaged in a war. The facts presented in Guyana's Application are a paradigmatic example of what is now called *post-truth*, the deliberate distortion of a reality to manipulate beliefs and emotions.

120. Victimhood has been one of the recurrent strategies of Guyana's political action, trying to discredit Venezuela with false accusations and seeking international solidarity, fabricating the accusation that the Venezuela's claim was a giant obstacle to the full exercise of its right to development. The insulting terms used by the Guyanese authorities are not in line with the policies of solidarity and integration encouraged and carried out with the sacrifice of domestic policies by Venezuela; in particular, the bilateral oil supply agreement. There have been no aggressive actions from Venezuela towards Guyana; on the contrary, it has contributed to the development of the Guyanese economy,

promoting a message of Latin American and Caribbean brotherhood and support for its integration.

121. The small number and trivial nature of the alleged illicit acts that Guyana attributes to Venezuela demonstrate Guyana's exaggerations of the events that, even if happened, lack of entity to support its accusations. Moreover, these accusations are incorrectly premised on a territorial sovereignty that not only is disputed but also, even if admitted, constitute minor incidents in *de facto* neighbourhood relations.

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122. According to Article V.2 of the Geneva Agreement:

> "No acts or activities taking place while this Agreement is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty... or create any rights of sovereignty..."

123. It is obvious, however, that Guyana's occupation of the territory claimed by Venezuela has given rise to Guyanese activities whose real impact is unquestionable. It is logical that Venezuela has been interested in obtaining the fullest knowledge of the reality on the ground, both in terms of demography and infrastructure, exploitation of resources and conservation of the environment. It would have been desirable to agree on a mechanism for joint action - or at least consultation - on what is done and how is done in a territory whose sovereignty is under dispute. Article V.2 refers to "the territories of Venezuela or British Guiana".

124. In relation to the land territory under dispute, Venezuela deems important the respect and protection of the natural *habitat* of the indigenous populations, the conservation of its flora and fauna and a development characterized by sustainability. Unfortunately, Guyana's administration has not followed these policies. It suffices to mention that Guyana is one of the few States in the world that, as today (September, 21st, 2019), is not a party to the Convention on Wetlands (Ramsar Convention, 1971).

125. The treatment of indigenous peoples both in the Venezuelan Constitution and in practice is an example to the world. The indigenous populations of the Essequibo keep natural links with those of the Delta Amacuro. Constitutionally, Venezuela is obliged to protect indigenous peoples and has therefore defined a policy of protection of the ancestral lands, identity, culture and traditions of these populations and of their environment, in the face of the threat posed by the intensive exploitation of their resources by transnational companies that have obtained concessions from the Guyanese Government, unable to apply adequate safeguards and controls.

126. The Guayana Esequiba population had to be consulted within the framework of the decolonization process, especially when there was a Venezuelan claim pending over that territory. It was not consulted. Indigenous peoples have raised their voices and asked Venezuela in the past for greater political participation and legal action to protect their rights as indigenous cultures. In any case, there is no international norm that prohibits Venezuela from providing the indigenous population of the Essequibo with a right of option to the Venezuelan nationality, or providing them with communal rights over the lands that its legislation

recognizes to other indigenous populations, anticipating that they will become effective on the day when the Guayana Esequiba is recognized as Venezuelan territory.

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127. The Geneva Agreement is the backbone of the means agreed to by the Parties to reach a practical and reasonable settlement of the territorial dispute. Its solution is decisive in the attribution of maritime spaces which are the projection over the coast, in accordance with the well-established principle in international law that "the land dominates the sea" and, as a logical sequence, in its delimitation with respect to the maritime areas of the other Party, a matter that goes beyond the scope of the Agreement. Guyana has been adopting unilateral decisions involving maritime spaces of territory under dispute. A risky and destabilizing conduct regardless of its high aspirations over the Essequibo.

128. A particularly serious expression of its reckless policy has included the concessions licenses for the exploration and eventual exploitation of hydrocarbon deposits on large blocks of the continental shelf that ignored Venezuela's neighbourhood. The delimitation of some of these blocks and the exploration licenses granted by Guyana are located in areas that are the immediate projection of the Delta Amacuro. These areas, independently of the attribution of sovereignty over the Guayana Esequiba, penetrates Venezuelan spaces. Not only does Guyana ignore the maritime dimension of the territorial dispute, but also seeks to unilaterally deny Venezuela its Atlantic condition. This series of unilateral actions by Guyana is incompatible with the provisions of the

Manila Declaration (res. 37/10 of November 15th, 1982, Article 5) and with the Principles and Guidelines for International Negotiations adopted by the UN General Assembly (res. 53/101, Article 2.e), which reflect general rules of international law.

129. For its part, Venezuela has proceeded with caution. Logically, Guyana's behaviour has been subject to a diplomatic protest time and time again. Venezuela has also addressed the corresponding warning letters to the licensee companies. These protests began in 1965, even before Guyana became a sovereign State, over the concessions made by the United Kingdom in the waters of the Essequibo coastal front. They were reiterated in the last decade of the twentieth century and have multiplied in the present century with only one exception. In 2017 Guyanese concessions and exploration activities spiked, however, this time Venezuela refrained from protesting so as not to disrupt the experimentation of the formula proposed by the UN Secretary-General combining for the first time good offices with mediation elements.

130. In some cases, Venezuelan naval units have approached platforms or exploration ships to verify that they were operating under a Guyanese license and to inform them that those waters were Venezuelan or under dispute, and they could be sanctioned. There was even an arrest in 2013. This is what Guyana impertinently portrays and denounces as being hostile, interfering and even aggressive acts by Venezuela.

131. There have been no major incidents other than the exchange of diplomatic notes and statements from one Party to the other. However, it should be noted that the blocks opened by Guyana for oil exploration and exploitation have an *aggressive* nature, as they are not limited to the

maritime projection of the Essequibo coast, but penetrate the maritime projection of the Delta del Orinoco, disturbing the Atlantic condition of Venezuela. The profile of the blocks is even more dangerous as licenses and exploration activities move westwards. Once those activities have been successful and plans are adopted for immediate extractive operations, the result is a *perfect storm*. The geopolitical interest of the United States in dominating these spaces, coupled with the economic interest of its large energy consortia - the first of them, *Exxon Mobil* - and Guyana's interest in laying its own development on the foundations of this resource operates at unison.

132. Unlike Venezuela, Guyana is a party to the United Nations Convention on the Law of the Sea (UNCLOS) and, therefore, it should know that, in case of pending delimitation of maritime areas, what is needed is to reach provisional practical arrangements that, without prejudging the final delimitation, favours a climate of understanding and cooperation. Equidistance does not appear in any part of the UNCLOS, or in the general norms of international law, as a rule of subsidiary or transitory application, in absence of agreement. Equidistance application is even less clear when there are detrimental effects to one of the parties involved in the delimitation.

133. If Venezuela were to act as Guyana does, in complete disdain of the disputed nature of the territory west of the Essequibo River, it would have to draw a provisional line from the median of the mouth of the river.

CONCLUSION

134. Guyana, which rejected the mere mention of arbitration and judicial settlement in the Geneva Agreement, has become a defender of (unilateral) recourse to the International Court of Justice, manipulating its spirit and object. Should the Court assert its jurisdiction over Guyana's claims, then the Geneva Agreement will be terminated without having satisfied the ultimate purpose that motivated its conclusion, namely, a practical, acceptable and satisfactory settlement of the territorial dispute. Deciding on the validity of the 1899 Award will not serve this purpose. On the contrary, it will make its settlement more difficult.

135. Besides, it will involve the Court in a breach of the Geneva Agreement. In addition, it would, in any event, entail that the Court cannot settle the dispute under the terms of the Geneva Agreement, since the Court is not in a position, as a Court and on the sole basis of Guyana's Application, to reach a practical, acceptable and satisfactory solution to the dispute. As a result, any judgment of the Court on the merits of Guyana's Application (whatever its legal conclusions) would not settle the dispute as contemplated in the Geneva Agreement.

136. If Venezuela were now to insist on the responsibility of the United Kingdom for its colonial and imperialist policy, under which it organized the fraudulent so-called arbitration, Venezuela, which actually holds the status of 'victim' that Guyana claims today for itself - disregarding history and eluding the commitment to an amicable

negotiation with which it was born because it was undertaken before rising as an independent republic in 1966-, would have to be treated as such victim by Guyana. But Guyana has preferred to back British imperialism with the Arbitral Award which motivated the Venezuelan contention about its nullity and voidance in the Geneva Agreement. With the Arbitral Award, the United Kingdom sought the plundering of Venezuela over the territory of Guayana Esequiba, and its heir, Guyana, is well aware of that.

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138. Venezuela is not going to resort to force, not only because it is prohibited by international law but also because of its own regional policy of peace, integration, and solidarity. Venezuela once again invites Guyana to the negotiating table in the fraternal and supportive spirit that has always animated its policy of good neighbourliness and integration. The treatment of the dispute by Venezuela will always be in

accordance with the principles of the UN Charter and the maintenance of peace.