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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2020

Public sitting

held on Tuesday 30 June 2020, at 2 p.m., at the Peace Palace,

President Yusuf presiding,

***in the case concerning the* Arbitral Award of 3 October 1899**
(Guyana *v.* Venezuela)

VERBATIM RECORD

ANNÉE 2020

Audience publique

tenue le mardi 30 juin 2020, à 14 heures, au Palais de la Paix,

sous la présidence de M. Yusuf, président,

***en l'affaire de la* Sentence arbitrale du 3 octobre 1899**
(Guyana c. Venezuela)

COMPTE RENDU

Present:	President	Yusuf
	Vice-President	Xue
	Judges	Tomka
		Abraham
		Bennouna
		Cançado Trindade
		Donoghue
		Gaja
		Sebutinde
		Bhandari
		Robinson
		Crawford
		Gevorgian
		Salam
		Iwasawa
	Judge *ad hoc*	Charlesworth
	Registrar	Gautier

Présents : M. Yusuf, président
Mme Xue, vice-présidente
MM. Tomka
Abraham
Bennouna
Cançado Trindade
Mme Donoghue
M. Gaja
Mme Sebutinde
MM. Bhandari
Robinson
Crawford
Gevorgian
Salam
Iwasawa, juges
Mme Charlesworth, juge *ad hoc*

M. Gautier, greffier

The Government of the Co-operative Republic of Guyana is represented by:

Hon. Carl B. Greenidge,

as Agent;

Sir Shridath Ramphal, OE, OCC, SC,

H.E. Ms Audrey Waddell, Ambassador, CCH,

as Co-Agents;

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

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

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

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

as Counsel and Advocates;

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

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

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

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

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

as Counsel;

H.E. Mr. Rashleigh E. Jackson, OR, former Minister for Foreign Affairs,

Ms Gail Teixeira, Representative, People's Progressive Party/Civic,

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

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comme coagents ;

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M. Philippe Sands, QC, professeur de droit international au University College London (UCL), avocat, Matrix Chambers (Londres),

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

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

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

as Advisers;

Mr. Raymond McLeod, DOAR Inc.,

as Technical Adviser;

Mr. Oscar Norsworthy, Foley Hoag LLP,

as Assistant.

S. Exc. Mme Elisabeth Harper, ambassadrice, CCH,

Mme Oneka Archer-Caulder, LLB, LEC, LLM, juriste au ministère des affaires étrangères,

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M. Josha Benn, LLB, LEC, *Nippon Fellow*, juriste au ministère des affaires étrangères,

comme conseillers ;

M. Raymond McLeod, DOAR Inc.,

comme conseiller technique ;

M. Oscar Norsworthy, Foley Hoag LLP,

comme assistant.

The PRESIDENT: Please be seated. The sitting is open. The Court meets today in very exceptional circumstances for its first hearing in the case concerning the *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela)*. We are all struggling to cope with the effects of the COVID-19 pandemic and trying to get on with our lives and our work in the midst of these unprecedented challenges faced by humanity due to the virus.

The work of the Court, like that of many other institutions, has been affected by the pandemic and the measures taken by various governments to combat it, especially the air travel restrictions. However, the Court has continued to discharge its judicial functions by organizing remote meetings and deliberations and by preparing itself for the remote hearing of some of the cases that were initially scheduled to be heard in person. This is the first of those remote hearings.

The Court has, therefore, had to adapt its methods of work to these challenging times to ensure the continued availability of its services to all States for the settlement of international disputes. Members of the Court and the staff of the Court have made strenuous efforts to make sure that hearings like the one today may take place despite the COVID-19 pandemic. In addition to adapting its methods of work and deploying the technology necessary for holding remote meetings and hearings, the Court has amended its Rules.

On 22 June 2020, the Court amended Article 59 of the Rules to add a new paragraph which makes it clear that for health, security or other compelling reasons the Court may decide to hold a hearing entirely or in part by video link. The Court also amended paragraph 2 of Article 94 to provide that the reading of the Court's Judgment in a case may take place by video link when necessary for health, security or other compelling reasons. In both cases, the sitting of the Court will be accessible to the public by webstreaming and any interested person can follow our proceedings today either in the original language from the floor or through the interpretation to the other language.

While every effort has been made to ensure the smooth conduct of this hearing, there are certain inherent difficulties with video link and remote simultaneous interpretation technology. In the event that we experience a loss of audio input from the remote participants, I might have to interrupt the hearing briefly to allow the technical team to re-establish the connection.

In view of the current COVID-19 pandemic, the Court has opted for a mix of physical and virtual presence during the hearing. We believe that this format works well for the Court. Therefore,

the following judges are present with me in the Great Hall of Justice: Vice-President Xue, Judges Tomka, Abraham, Bennouna, Sebutinde, Crawford, Gevorgian and Iwasawa; while Judges Cançado Trindade, Donoghue, Gaja, Bhandari, Robinson, Salam and Judge *ad hoc* Charlesworth are participating remotely in the hearing. Judge *ad hoc* Charlesworth will make her solemn declaration by video link in a moment.

All judges participating in the hearing, whether in person or remotely, are part of the composition of the Court in this case.

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Before we start our oral proceedings today, I would like to pay solemn tribute, on behalf of the Court, to the memory of two distinguished figures of the United Nations system and of international law who have recently passed away: Mr. Javier Pérez de Cuéllar, former Secretary-General of the United Nations who left us on 4 March, and Mr. Thomas Mensah, former judge *ad hoc* at the Court, who died on 7 April.

Born in Lima on 19 January 1920, Mr. Pérez de Cuéllar had recently celebrated his 100th birthday. His lifetime spanned the twentieth century and the history of the United Nations.

A lawyer and graduate of the law faculty of the Catholic University of Lima, and a distinguished diplomat, Mr. Pérez de Cuéllar served his country and the United Nations in many capacities. Having represented his country in the Security Council in 1973 and 1974, he was appointed Special Representative of the Secretary-General in Cyprus, a post he held until December 1977. In 1979, Mr. Pérez de Cuéllar was appointed as United Nations Under-Secretary-General for Special Political Affairs.

Elected Secretary-General of the United Nations for a five-year term beginning on 1 January 1982, Mr. Pérez de Cuéllar was re-elected in 1986 for a second term of office, which ended on 31 December 1991.

Javier Pérez de Cuéllar was a tireless broker of peace. Through his diplomatic talents and perseverance, he contributed to the resolution of major crises and the settlement of some highly complex conflicts, from the ceasefire that ended the first Gulf War, to the withdrawal of Soviet troops

from Afghanistan, to the conclusion of a peace agreement in El Salvador, and the implementation of the peace process in Namibia that led to its independence. As Secretary-General, Mr. Pérez de Cuéllar made several visits to the seat of the Court here in The Hague and always underscored the unique role of the International Court of Justice in the peaceful settlement of international disputes.

As President of the Court, and on behalf of the Members of the Court, the Registrar and the entire Registry staff, I would like to extend our sincere condolences to the Peruvian people and Government and the family and friends of Mr. Pérez de Cuéllar.

I would now like to pay tribute to the memory of Mr. Thomas Mensah, former judge *ad hoc* of the Court.

Thomas Aboagye Mensah, of Ghanaian nationality, was born in Kumasi, Ghana, on 12 May 1932. After graduating from the University of Ghana in 1956, he continued his studies abroad, earning a first-class degree in law at the University of London in 1959, followed by a Master of Laws (LLM) degree in 1962 and a Doctor of the Science of Law (JSD) degree in 1964 from Yale University in the United States. Having taught law from 1963 to 1968 in Ghana, Mr. Mensah embarked on an illustrious international legal career, which led him from the International Atomic Energy Agency (IAEA) to the Secretariat of the International Maritime Organization (IMO), where he served for more than twenty years as Legal Counsel and later as Assistant Secretary-General.

In 1996, when the new International Tribunal for the Law of the Sea (ITLOS) began its functions in Hamburg, he was elected as one of its judges and then chosen by colleagues to serve as the Tribunal's first president. Under his stewardship, the Tribunal adopted rules and established procedures that have continued to serve it ever since.

In 2012, he was chosen as judge *ad hoc* at our Court, in the case concerning *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*.

Judge Mensah was a Member of the Institut de droit international, a Titular Member of the Comité Maritime International, a Member of the Advisory Council of the British Institute of International and Comparative Law, and a Member of the Standing Committee on Maritime Arbitration at the International Chamber of Commerce.

Judge Thomas Mensah was not only admired for his intellectual acuity, as one of the world's leading arbitrators on the settlement of international maritime disputes, and for his great sense of

humanity, but was also well-liked for his humour, genial spirit and conviviality. He was one of the most prominent personalities involved in the peaceful settlement of international disputes in the past quarter of a century.

As President of the Court, and on behalf of the Members of the Court, the Registrar and the entire Registry staff, I would like to extend our sincere condolences to the Ghanaian people and Government, and the family and friends of Judge Thomas Mensah.

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I invite you to please observe a minute of silence in memory of Mr. Javier Pérez de Cuéllar and Mr. Thomas Mensah.

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The PRESIDENT: Please be seated. I now turn to the proceedings in the case concerning the *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela).* I shall recall the principal steps of the procedure in the case.

On 29 March 2018, Guyana filed in the Registry of the Court an Application instituting proceedings against Venezuela with regard to a dispute concerning "the legal validity and binding effect of the Award Regarding the Boundary between the Colony of British Guiana and the United States of Venezuela, of 3 October 1899".

In its Application, Guyana seeks to found the jurisdiction of the Court, under Article 36, paragraph 1, of the Statute of the Court, on Article 4, 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 — to which I will refer as the "Geneva Agreement" — and the decision of the Secretary-General of the United Nations taken on 30 January 2018, to choose, pursuant to the above-mentioned provision, the Court as the means of settlement of the controversy.

On 18 June 2018, at a meeting held by the President of the Court, pursuant to Article 31 of the Rules of Court, to ascertain the views of the Parties with regard to questions of procedure, the Vice-President of Venezuela, H.E. Ms Delcy Rodríguez Gómez, stated that her Government considered that the Court manifestly lacks jurisdiction to hear the case and that Venezuela had decided not to take part in the proceedings. She also handed to the President of the Court a letter dated 18 June 2018 from the President of Venezuela, H.E. Mr. Nicolás Maduro Moros, communicating the position of Venezuela. I will now kindly ask the Registrar of the Court, Mr. Philippe Gautier, to read out the relevant excerpts of the letter of the President of Venezuela dated 18 June 2018. Mr. Registrar, you have the floor:

The REGISTRAR: Thank you, Mr. President.

> "Your excellency, very respectfully, we inform that given that Venezuela did not accept the jurisdiction of the Court in relation with the controversy referred to in the so-called 'application' presented by Guyana, and that furthermore, it did not accept the unilateral presentation of the mentioned dispute, there exists no basis that could establish, even in prima facie, the Court's jurisdiction to consider Guyana's claims.
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> . . . . . .
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> Under these circumstances, and taking into account the aforementioned considerations, the Bolivarian Republic of Venezuela will not participate in the proceedings that the Cooperative Republic of Guyana intends to initiate through a unilateral action."

The PRESIDENT: I thank the Registrar.

By an Order of 19 June 2018, the Court considered, pursuant to Article 79, paragraph 2, of the Rules of Court of 14 April 1978 as amended on 1 February 2001, that, in the circumstances of the case, it had to resolve first of all the question of its jurisdiction, and that this question should accordingly be separately determined before any proceedings on the merits. The Court thus decided that the written pleadings should first address the question of its jurisdiction and it fixed 19 November 2018 and 18 April 2019 as the respective time-limits for the filing of a Memorial by Guyana and a Counter-Memorial by Venezuela. Guyana filed its Memorial within the time-limit prescribed.

By a letter of 12 April 2019, the Minister of People's Power for Foreign Affairs of Venezuela confirmed the decision of his Government "not to participate in the written procedure" and stated that Venezuela would, at an opportune moment in due course, provide the Court with information in order to assist it "in the fulfilment of its [obligations] as indicated in Article 53 [paragraph] 2 of its Statute".

On 28 November 2019, Venezuela submitted to the Court a document called "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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At this juncture, I should recall that the Court does not include upon the Bench a judge of the nationality of either of the Parties. Guyana availed itself of the right conferred upon it by Article 31, paragraph 3, of the Statute, to choose a judge *ad hoc*, and chose Ms Hilary Charlesworth. In line with its decision not to participate in the current proceedings, Venezuela has not availed itself of the right conferred upon it by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* in this case.

Article 20 of the Statute provides that "[e]very Member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously". Pursuant to Article 31, paragraph 6, of the Statute, that same provision applies to judges *ad hoc*. Notwithstanding that Ms Charlesworth has been a judge *ad hoc* and made a solemn declaration in a previous case, Article 8, paragraph 3, of the Rules of Court provides that a judge *ad hoc* must make a further solemn declaration in relation to any case in which he or she is participating. Before inviting Ms Charlesworth to make her solemn declaration, I shall first, in accordance with custom, say a few words about her career and qualifications.

Ms Hilary Charlesworth, of Australian nationality, is the Laureate Professor at Melbourne Law School. She is also a Distinguished Professor and Director of the Centre for International Governance and Justice at the Australian National University in Canberra. She has taught at numerous academic institutions around the world, including Harvard Law School, New York University and Université Paris I (Panthéon-Sorbonne), and she has lectured at the Hague Academy

of International Law. In 2011, she was elected as an Associate Member of the Institut de droit international.

From 2011 to 2014, she sat as judge *ad hoc* in the case concerning *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening)* at our Court.

Ms Charlesworth is the author of many publications in the field of public international law, and she serves on the editorial board of numerous international legal journals.

I shall now invite Ms Charlesworth to make the solemn declaration prescribed by the Statute, and I request all those present to rise. Ms Charlesworth, could you please turn on your microphone first? Ms Charlesworth, I do not think that we can hear you. Can you try again now? No, I do not think we can hear you, Ms Charlesworth. Can you turn on your microphone? Ms Charlesworth, please try again now. No, we cannot hear you. I think that we can all sit down and wait for a minute for Ms Charlesworth to try again and maybe the technicians can help her.

Ms CHARLESWORTH: Hello, is that working?

The PRESIDENT: Yes, now. It is all right. Thank you, Ms Charlesworth. You can make your solemn declaration now.

Ms CHARLESWORTH: Thank you, Mr. President.

> "I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously."

The PRESIDENT: I thank you. Please be seated. I take note of the solemn declaration made by Ms Charlesworth and declare her duly installed as judge *ad hoc* in the case concerning the *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela)*.

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After ascertaining the views of the Parties, the Court decided, pursuant to Article 53, paragraph 2, of its Rules, that copies of the Memorial of Guyana and documents annexed thereto would be made accessible to the public on the opening of the oral proceedings. The Court also decided, in light of the absence of an objection from Venezuela, that Venezuela's "Memorandum"

submitted on 28 November 2019 would be made public at the same time. In accordance with the Court's practice, these documents and their annexes will be put on the Court's website from today.

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I would now like to welcome the delegation of Guyana to this hearing. The delegation of Guyana will be participating in the hearing by video link. I note the remote attendance at the hearing of the Agent, Co-Agent, counsel and advocates of Guyana.

In accordance with the arrangements for the organization of the proceedings which have been decided by the Court and in light of Venezuela's decision not to attend the hearing, Guyana now has three hours to present its oral arguments. In this sitting, Guyana may, if required, avail itself of a short extension beyond 5 p.m., in view of the time taken up by the opening part of these oral proceedings.

I now give the floor to the Co-Agent of Guyana, His Excellency Sir Shridath Ramphal. Sir Shridath Ramphal, you have the floor.

Sir Shridath RAMPHAL:

INTRODUCTION AND STRUCTURE OF ORAL ARGUMENT

Mr. President, distinguished Members of the Court,

1. Good day! Guyana commends, acclaims — and thanks — this honourable court on this "virtual" hearing which proclaims to the world a message from the Court that, COVID-19 notwithstanding, this fountain of global justice continues to spring forth. It is a privilege to be the first to address you as the Court breaks new procedural ground. I and my colleagues who appear before you on behalf of the State of Guyana shall remain conscious of this element of novelty throughout the hearing and we shall be ready to adapt to it as the Court deems fit.

No word of introduction from me can be adequate, Mr. President and eminent Judges, without impressing, at the very outset, the singular importance of this case to ***all*** the people of Guyana — whose collective patrimony is at the very centre of this hearing and who are united in defence of their sovereignty and the territorial integrity of their homeland. Guyana's official and representative

delegation has been notified to the Court. Especially joining from the Ministry of Foreign Affairs in Georgetown are our Agent, the Honourable Carl Greenidge; our Co-Agent Ambassador Audrey Waddell; Opposition Representative Ms Gail Teixeira; Former Foreign Minister Rashleigh Jackson and Ambassadors Cedric Joseph and Elisabeth Harper. Many, many other Guyanese are with us "virtually" today, watching these proceedings, mindful of their significance for the future of our Guyanese nation — among them, prominently, our "first people" whose birthright is inviolable.

2. I, myself, was born in what was the colony of British Guiana on 3 October 1928. Three decades earlier, on that exact date — on 3 October 1899 — the land boundaries of my birthplace had been affirmed — definitively settled, in Paris, by the Award of an international ***arbitral*** tribunal of high distinction.

3. Upon Guyana's independence in 1966, I had the honour to serve as its first Attorney General and so to draft a Constitution the first words of which were that Guyana shall be "a sovereign democratic State". And that first Article of the Constitution of the newly independent Guyana went on to say: "The territory of Guyana shall comprise all the areas that immediately before 26th May, 1966, were comprised in the former Colony of British Guiana."

4. As Guyana's Co-Agent in these proceedings, I consider myself to have a rather special responsibility. Let me try to convey succinctly, in these very words, how and why we are here today.

5. That day in Paris, at the end of the nineteenth century, is now a long time away. One hundred and twenty years have passed since international law spoke. During that time, colonialism in British Guiana came to an end and Guyana has now enjoyed morethan fifty years of independence. That might suggest a rather ordered past, given that the boundary was definitively settled a long time ago. But that would be wrong. In a word, we are here because contrary to international law and to the binding Award of 1899, the Bolivarian Republic of Venezuela, our neighbour to the west, has cultivated a nationalist passion to disavow that day in Paris and lay a claim to almost three quarters of Guyana.

6. It was not always so. The arbitral proceeding in Paris was after all instigated at the behest of Venezuela; and Venezuela enjoyed — and continues to enjoy — the gains brought to them by the Arbitral Award. Yet, the process that brings us here is rooted in Venezuela's repudiation of that

Award, repudiation more than six decades after it was handed down — at a time that seemed propitious to it — the very eve of Guyana's independence in the 1960s.

7. Paris 1899 was the very fulfilment of Venezuela's early (and quite understandable) wish that the border between themselves and Britain's colony of British Guiana should not be left to negotiation with the imperial power but should be determined by international arbitration. In this, they were supported by the United States — supported to the extent of threats from Washington *of war* with Britain if the matter ***of the border*** was not settled. Britain eventually concurred. By the Treaty of Washington in 1897, brokered by the United States and concluded between Britain and Venezuela, Venezuela would have the arbitration that it demanded.

8. That Treaty of Washington left nothing to chance. The parties agreed specifically to consider the result of the arbitration "as a full, perfect and final settlement of all the questions referred to the Arbitrators". In short, imperial Britain would have to abide by the conclusion of Paris; and so, of course, would Venezuela.

9. And so it did. For six decades. Until 1962, when the Government of Venezuela formally denounced the Arbitral Award of 1899 for the first time, and reasserted ***its*** original pre-Award claim, which amounted, as I have said, to almost three quarters of British Guiana's — and now, of course, Guyana's — sovereign territory.

10. From the time that contention was first made, in 1962, the United Kingdom, British Guiana and then sovereign and independent Guyana vigorously rejected it and affirmed, in the strongest possible terms, the validity of the Award and the international boundary ***that it established***.

11. Between 1962 and 1965, the parties engaged one another in a series of talks in which each tried to persuade the other of the correctness of their position, with no progress toward a resolution. But these talks did set the stage for a final round of meetings in Geneva, in February 1966. On the eve of independence, Guyana participated in that Conference. I did so personally, as our country's Attorney General, and Guyana became a full party to the Geneva Agreement on attaining independence three months later — with its borders intact. As Guyana will show in these proceedings, Article IV, paragraph 2, of that agreement clearly provided that where other means of resolution of Venezuela's contention of "nullity" failed, "the Secretary-General of the

United Nations shall choose another of the means stipulated in Article 33 of the Charter of the United Nations". At the Geneva Conference, it was Venezuela that affirmed ***that*** procedure.

12. This is the background to the case that is now before the Court, and I hope that you Mr. President, and honourable Members of the Court, will regard it all as somewhat helpful context for the matter you are called upon to decide at this stage of the proceedings.

13. That matter, this hearing, is really about the Court's "jurisdiction" — jurisdiction specifically, to consider the claims asserted in Guyana's Application: most importantly, its submission that the Arbitral Award of 3 October 1899 continues to be valid and binding on the Parties.

14. Guyana's case, as you will have seen from its Memorial on jurisdiction, and as you will hear from its advocates today, is based on the plain text of the 1966 Geneva Agreement, by which the Parties expressly consented

(i) to accept the decision of the United Nations Secretary-General on the means of settlement of their dispute over the validity of the 1899 Arbitral Award — including judicial settlement by this Court; and

(ii) that the dispute shall be settled by the International Court of Justice, if that be the means of settlement chosen by the Secretary-General.

15. It is unfortunate that Venezuela has chosen not to participate in these hearings. Undoubtedly, it would have been more helpful to the Court for both Parties to appear, to fully present their arguments in the first round and respond to each other in the second. But, at least, the Court has not been left to speculate as to what Venezuela might have said, had it appeared in this Great Hall of Justice. By the date fixed by the Court (namely 18 April 2019), Venezuela failed to file its Counter-Memorial; but it promised "information in order to assist the Court" and on 28 November 2019, it submitted a 56-page Memorandum to the Court, accompanied by a 155-page Annex, setting out the bases for its objections to the Court's jurisdiction — and very much more besides.

16. Guyana will respond today to all of Venezuela's contentions regarding the Court's jurisdiction, as they appear in those written documents, and we will demonstrate beyond any doubt that they are entirely without foundation and that the Court unquestionably has jurisdiction to proceed to the merits phase of the case and adjudicate Guyana's claims.

17. Mr. President, after almost sixty years of Venezuela trying and failing to despoil the sanctity of the Treaty of Washington and to nullify the Paris Award, the Secretary-General of the United Nations indicated to the Presidents of Guyana and Venezuela in these words:

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

That is why we are here — attended by the faith of the people of Guyana in this International Court of Justice and in the rule of law.

18. Mr. President, Members of the Court, it remains for me only to outline the scheme of presentations that will follow for Guyana. They are as follows:

— Professor Payam Akhavan will address the Court on the origin of the dispute and the circumstances leading to the conclusion of the 1966 Geneva Agreement.

— Mr. Paul Reichler will then follow with a careful textual analysis of the Geneva Agreement and its dispute resolution provisions, including its conferral on the Secretary-General of the authority to make a final and binding decision on the means of dispute settlement that the parties are obligated to pursue, including, if he so decides, judicial settlement by ***this*** Court.

— Professor Philippe Sands will follow him with a review of the implementation of the Geneva Agreement, including the parties' reaffirmations of it and the Secretary-General's acceptance of the authority conferred upon him, and the manner in which he exercised that authority. And finally,

— Professor Alain Pellet will address the Secretary-General's ultimate decision that the dispute over the validity of the 1899 Arbitral Award shall be settled by the International Court of Justice, and the consent of the parties, including Venezuela, to judicial settlement of the dispute by the ICJ.

19.I thank you, Mr. President, and honourable Members of the Court, and I ask that you now call Professor Akhavan to the podium. Thank you.

The PRESIDENT: I thank the Co-Agent of Guyana for his statement. I now invite Professor Payam Akhavan to take the floor. You have the floor.

Mr. AKHAVAN:

THE CIRCUMSTANCES LEADING TO THE CONCLUSION OF THE 1966 GENEVA AGREEMENT

Introduction

1. Mr. President, distinguished Members of the Court. I am honoured to appear on behalf of Guyana in this proceeding on jurisdiction. I will be addressing the circumstances leading to the conclusion of the 1966 Geneva Agreement to Resolve the Controversy over the Frontier between Venezuela and British Guiana (the "Geneva Agreement"). It is Article IV, paragraph 2, of that Agreement, in combination with the 30 January 2018 decision of the United Nations Secretary-General, which establishes the Court's jurisdiction.

2. The history of the controversy demonstrates that the dispute between the Parties was, and remains, about the legal validity and binding force of the 1899 Arbitral Award. Beginning in 1962, Venezuela claimed that the Award was null and void, whereas the United Kingdom and Guyana have maintained that it is valid and fully binding and effective. The Parties held "clearly opposite views"[1] on the validity of the 1899 Award, and that was the dispute dividing them. As Mr. Reichler will explain, the object and purpose of the Geneva Agreement was to obtain a final and binding resolution of that dispute.

3. My speech will consist of three parts. *First*, I will provide an overview of the 1899 Award that established the boundary between British Guiana and Venezuela. *Second*, I will address Venezuela's contention beginning in 1962 that the 1899 Award is null and void; this was the basis for its repudiation of the boundary and its claim to almost three quarters of Guyana's territory. *Third*, I will address the Parties' exchanges between 1963 and 1965 to resolve the controversy, leading to their meeting at Geneva in February 1966, which resulted in the Agreement that Mr. Reichler will address in detail.

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[1] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016 (II)*, p. 833.

The 1899 Arbitral Award

4. The territory of present-day Guyana comprises the Dutch settlements of Berbice, Demerara and Essequibo, established in the early seventeenth century. These settlements were recognized by Spain in the 1648 Treaty of Münster, forming part of the Peace of Westphalia that ended the Thirty Years' War. In 1814, the Netherlands ceded these territories to Britain; in 1831, they were consolidated into the colony of British Guiana.

5. Upon Venezuela's independence in 1810, the boundary had not yet been determined. By 1840 however, with the discovery of gold in the Upper Cuyuni River, Venezuela had proposed the conclusion of a treaty, claiming the Essequibo River as its boundary with British Guiana. For its part, Britain's claim extended to the prized mouth of the Orinoco River.

6. By 1895, the boundary dispute had escalated into a diplomatic crisis between Britain and the United States. The "Monroe Doctrine" strongly opposed "British expansion in the Americas"[2]. By 1897, under threat of war with the United States, Britain agreed to arbitration to resolve the boundary dispute. It was, in the words of one historian, "one of the most momentous episodes in the history of Anglo-American relations in general and of Anglo-American rivalries in Latin America in particular"[3]. This was a notable instance of peaceful dispute settlement in an historical period when recourse to war was "a continuation of politics by other means"[4].

7. The Washington Treaty between Great Britain and the United States of Venezuela was concluded on 2 February 1897. The preamble set out its object and purpose as "an amicable settlement of . . . the boundary between the Colony of British Guiana and the United States of Venezuela". Article I provided for the creation of an arbitral tribunal and Article III defined its jurisdiction to "determine the boundary-line between the Colony of British Guiana and the United States of Venezuela". Article XIII further stipulated that "[t]he High Contracting Parties

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[2] Letter from the Permanent Representative of Venezuela to the Secretary-General of the United Nations (14 Feb. 1962), reprinted in United Nations General Assembly, Fourth Committee, 16th Session, *Information from Non-Self-Governing Territories transmitted under Article 73 of the Charter*, UN doc. A/C.4/536 (15 Feb. 1962), Memorial of the Co-operative Republic of Guyana (MG), Vol. II, Ann. 17, para. 8.

[3] R. A. Humphreys (1967), "Anglo-American Rivalries and the Venezuela Crisis of 1895", Presidential Address to the Royal Historical Society, 10 Dec. 1966, *Transactions of the Royal Historical Society*, Vol. 17, pp. 131-164.

[4] Carl von Clausewitz, *On War*, Michael Howard and Peter Paret, eds. and trans., Princeton, New Jersey: Princeton University Press, 1976, revised 1984.

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".

8. Pursuant to Article II, the Tribunal comprised five eminent jurists, namely: two British judges, the Lord Chief Justice of England and a Lord Justice of Appeal of the English High Court; two American judges, the Chief Justice and another Justice of the Supreme Court of the United States; and, as President chosen by the four arbitrators, the renowned Russian jurist, Fyodor de Martens. Among his contributions to international law, in 1899 alone, Professor de Martens chaired the Hague Peace Conference, which established the Permanent Court of Arbitration; introduced the so-called "Martens Clause" into the 1899 Hague Convention on the Laws and Customs of War; and delivered the Arbitral Award that resolved the boundary dispute between British Guiana and Venezuela.

9. The Tribunal over which Professor de Martens presided held 54 meetings. The parties presented a massive volume of documents on *effectivités*, covering three hundred years of Spanish, Dutch and British rule in the disputed territories. On 3 October 1899, after extensive deliberations, the Tribunal established the boundary in a unanimous Award.

10. The result was widely hailed as a "victory for Venezuela"[5]. The Venezuelan Minister in London described it to his Minister for Foreign Affairs in these words: "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."[6]

11. The following year, in 1900, Britain and Venezuela established a Joint Commission to undertake the physical demarcation of the boundary. By 1905, after years of arduous work, the boundary was demarcated with pillars and geographic features, stretching 825 kilometres from the Caribbean coast to the trijunction point with Brazil in the Amazon basin. The Commission produced an Official Boundary Map "with the clear specification of the Boundary line according with the Arbitral Award of Paris". This map appears at tab 2 of the judges' folder. The 1905 map was

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[5] Statement made by the Representative of the United Kingdom at the 349th meeting of the Special Political Committee on 13 November 1962, reprinted in United Nations General Assembly, Special Political Committee, 17th Session, *Question of Boundaries between Venezuela and the Territory of British Guiana*, UN doc. A/SPC/72 (13 Nov. 1962), MG, Vol. II, Ann. 24, p. 9.

[6] Letter from the Venezuelan Ambassador to the United Kingdom, to the Venezuelan Minister for Foreign Affairs (7 Oct. 1899), MG, Vol. II, Ann. 3 (second page).

exceptionally accurate. It followed 15,440 points from the monument at Punta Playa in the north to the top of Mount Roraima in the south[7]. Those points are confirmed by modern satellite imagery.

12. In the years that followed, the 1899 Award was fully respected by both Parties. In 1932, a tripartite agreement confirmed the point of convergence of the boundaries of Venezuela, Brazil and British Guiana, concluded by exchanges of Notes among the three neighbouring States[8]. In 1944, Venezuela reconfirmed that the boundary was a *"chose jugée"*[9], and that it had "accepted the verdict of the arbitration for which we have so persistently asked"[10].

Venezuela's contention of nullity in 1962

13. The boundary stood uncontested for more than sixty years. Then, in 1962, during the decolonization period, while Guyana was moving toward its independence, Venezuela suddenly repudiated the 1899 Award[11].

14. On 14 December 1960, the United Nations had adopted resolution 1514 — the Declaration on the Granting of Independence to Colonial Countries and Peoples. A year later, on 18 December 1961, the Premier of British Guiana, Dr. Cheddi Jagan, petitioned the Special Political and Decolonization Committee of the General Assembly — the Fourth Committee — to bring about "the immediate political independence of his country"[12]. On 15 January 1962, the United Kingdom informed the Committee that it was willing to hold a constitutional conference on the independence of British Guiana[13].

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[7] *Mapa Integrado de América del Sur* — Integrated Map of South America of the Panamerican Institute of Geography and History, available at: https://www.ipgh.org/mapa-integrado-panamericano.html.

[8] Republic of Venezuela, Ministry of Foreign Affairs, *Public Treaties and International Agreements, Vol. V (1933-1936)* (1945), p. 548, MG, Vol. II, Ann. 12.

[9] Government of United Kingdom, Foreign Office, Minute by C. N. Brading, No. FO 371/38814 (3 Oct. 1944), MG, Vol. II, Ann. 10.

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

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

[12] United Nations General Assembly, Fourth Committee, 16th Session, 1252nd Meeting, *Agenda item 39: Information from Non-Self-Governing Territories transmitted under Article 73 of the Charter*, UN doc. A/C.4/SR.1252 (18 Dec. 1961), MG, Vol. I, Ann. 14.

[13] 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 United Nations General Assembly, Fourth Committee, 16th Session, *Information from Non-Self-Governing Territories transmitted under Article 73 of the Charter*, UN doc. A/C.4/520 (16 Jan. 1962), MG, Vol. II, Ann. 15.

15. On the same day, Venezuela conveyed to the United States its intention to demand a revision of the 1899 Award "so that Venezuela might realize the recovery of its territory"[14]. This new policy, Venezuela noted, "was based on the fact that . . . British Guiana's independence had been introduced . . . unexpectedly . . . and had been immediately supported by the communist . . . countries"[15]. Contemporaneous diplomatic dispatches confirm that Venezuelan President Betancourt was concerned about British Guiana becoming a "Cuba on the South American Continent"; he had a plan to create a *cordon sanitaire* by persuading the United Kingdom to cede a major "slice of British Guiana . . . to Venezuela" prior to independence[16]. It was Venezuela's view that "the possibility of achieving a revision [of the boundary] is better while British Guiana is still a colony"[17].

16. On 14 February 1962, Venezuela wrote to the United Nations Fourth Committee. Contrary to its unequivocal conduct during the previous six decades, it referred to a "long-standing dispute" on "demarcation of the frontier"[18]. It claimed for the first time that it could not recognize the 1899 Award because it was allegedly an Anglo-Russian "political transaction carried out behind Venezuela's back" by the Russian President of the Tribunal, acting in collusion with the two British arbitrators[19].

17. The only "evidence" invoked by Venezuela was a document published posthumously, allegedly written in 1944 by Mr. Severo Mallet-Prevost — an American lawyer who had served as junior counsel to Venezuela 45 years earlier in 1899. It was published upon his death in the July 1949 issue of the American Journal of International Law, 13 years before it was invoked by Venezuela in 1962[20]. The memorandum did not identify, let alone produce, any evidence in support of the Anglo-Russian conspiracy theory.

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[14] United States Department of State, *Memorandum of Conversation*, No. 741D.00/1-1562 (15 Jan. 1962), MG, Vol. II, Ann. 16.

[15] *Ibid*.

[16] Foreign Service Despatch from C. Allan Stewart, United States Ambassador to Venezuela, to the United States Department of State (15 May 1962), MG, Vol. II, Ann. 21.

[17] United States Department of State, *Memorandum of Conversation*, No. 741D.00/1-1562 (15 Jan. 1962), MG, Vol. II, Ann. 16.

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

[19] *Ibid*., paras. 16-17.

[20] *Ibid*., para. 15.

18. Thus, on 22 February 1962, Venezuela sought to reopen its territorial claim in 1899, before the United Nations Fourth Committee[21], based on the Mallet-Prevost memorandum[22]. Venezuela claimed for the first time that it "cannot recognize the validity" of the Award[23]; it called for negotiations to rectify what it portrayed as an "injustice"[24].

19. The United Kingdom categorically rejected Venezuela's contention of nullity. A Note from the Foreign Office dated 21 February 1962, made clear that "there is no case to answer, because the matter was settled for all time over sixty years ago by international arbitration"[25]. Another Note, dated 15 May 1962, reported that the Venezuelan Foreign Minister, Dr. Ignacio Iribarren Borges, had expressed his Government's determination to press its territorial claim, either before "the United Nations Committees or the International Court" of Justice[26].

20. On 13 November 1962, following a statement by Dr. Iribarren before the Fourth Committee, pressing Venezuela's contention of nullity, the United Kingdom representative, Mr. Colin Crowe, made a proposal for resolution of the controversy. He stated that, while "[t]he British Government does not accept that there is any frontier dispute to discuss", it hoped "that this problem can be finally disposed of now so that British Guiana can move forward [to independence] without any shadow of doubt about its frontiers". In this context, the United Kingdom offered "to discuss with the Venezuelan Government, through diplomatic channels, arrangements for a tripartite Venezuela–British Guiana–United Kingdom examination of the voluminous documentary material relevant to this question". Such a process, Mr. Crowe emphasized, would establish that "there is no justification whatsoever for re-opening the frontier question". He made it very clear that this was not

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[21] Statement made by the Representative of Venezuela at the 1302nd meeting of the Fourth Committee on 22 Feb. 1962, reprinted in United Nations General Assembly, Fourth Committee, 16th Session, *Information from Non-Self-Governing Territories transmitted under Article 73 of the Charter*, UN doc. A/C.4/540 (22 Feb. 1962), MG, Vol. II, Ann. 19, para. 33.

[22] *Ibid*., paras. 38-47.

[23] *Ibid*., para. 48.

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

[25] Letter from J. Cheetham, United Kingdom Foreign Office, to D. Busk, United Kingdom Ambassador to Venezuela, No. AV 1081/38 (21 Feb. 1962), MG, Vol. II, Ann. 18.

[26] Letter from R.H.G. Edmonds, United Kingdom Foreign Office, to D. Busk, United Kingdom Ambassador to Venezuela (15 May 1962), MG, Vol. II, Ann. 22.

"an offer to engage in substantive talks about revision of the frontier" because it had been finally settled by the 1899 Award[27].

21. Venezuela accepted the British proposal. On 16 November 1962, the Chairman of the Fourth Committee noted the tripartite agreement to "examine the documentary material" on the boundary question "through diplomatic channels". He concluded that there was no need for further debate within the United Nations[28].

The 1963 Joint Communiqué and tripartite examination of Venezuela's contention: 1963-1965

22. The "tripartite examination" was conducted by experts appointed by the parties. The United Kingdom reiterated that its purpose was "not the revision of the frontier"; it was intended only "to dispel any doubt" by Venezuela "about the validity or propriety of the arbitral award"[29].

23. Between 30 July and 11 September 1963, the Venezuelan experts conducted an exhaustive examination of British documents in London. Subsequently, in November 1963, at the request of the Venezuelan Foreign Minister, Dr. Iribarren, meetings were held with the British Foreign Secretary in London to review progress. The ministers issued a joint communiqué. They declared that the next step would be for Sir Geoffrey Meade, the expert acting on behalf of both British Guiana and the United Kingdom, to visit Caracas to examine documentary material available in the Venezuelan Archives[30].

24. In December 1963, Sir Geoffrey travelled to Caracas to examine materials produced by the Venezuelan Government[31]. A British memorandum dated 25 February 1964 observed that "the

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

[28] United Nations General Assembly, Special Political Committee, 17th Session, 350th Meeting, *Agenda item 88: Question of boundaries between Venezuela and the territory of British Guiana*, UN doc. A/SPC/SR.350 (16 Nov. 1962), MG, Vol. II, Ann. 25.

[29] 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, Ann. 26, para. 1; Statement made by the Representative of the United Kingdom at the 349th meeting of the Special Political Committee on 13 Nov. 1962, reprinted in United Nations General Assembly, Special Political Committee, 17th Session, *Question of Boundaries between Venezuela and the Territory of British Guiana*, UN doc. A/SPC/72 (13 Nov. 1962), p. 17, MG, Vol. II, Ann. 24.

[30] 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, Ann. 26, p. 1.

[31] 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, Ann. 26, paras. 2-4.

Venezuelan authorities have been unable to supply a single shred of evidence" to support their contention of nullity[32].

25. The tripartite examination was concluded on 3 August 1965 with the exchange of the experts' reports. The United Kingdom and British Guiana held that there was no evidence whatsoever to justify Venezuela's contention of nullity; but Venezuela continued to insist that the Award was null and void.

26. Irrespective of this process, by 1965, Venezuela began to issue official maps depicting so-called "Guayana Esequiba" as the "Zona en Reclamación"; territory to be "reclaimed" from British Guiana. One such map is in tab 3 of the judges' folder. Venezuela maintains that claim to this day.

27. The sketch-map at tab 4 of the judges' folder demonstrates that Venezuela's claim constitutes more than 70 per cent of Guyana's territory.

The London meeting: 9-10 December 1965

28. By November 1965, it was decided at the British Guiana Constitutional Conference that the date of independence would be 26 May 1966. The need to affirm the 1899 boundary became more urgent. The Guyanese feared that, with the British departure, the Venezuelan military might invade and occupy the Essequibo region. It was agreed, therefore, that British troops would remain for some time to protect the new State's territorial integrity[33].

29. In this context, between 9 and 10 December 1965, the Ministers for Foreign Affairs of the United Kingdom and Venezuela met at the Foreign Office in London, in the presence of the Prime Minister of British Guiana, Mr. Forbes Burnham. The meeting was in "continuation at Ministerial level of governmental conversations concerning the controversy . . . in accordance with the Joint Communiqué of 7 November 1963"[34]. The first Agenda item was an "[e]xchange of views on the experts' report on the examination of documents and discussions of the consequences resulting

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[32] 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, Ann. 26, para. 9.

[33] MG, para. 2.15; United Kingdom, Research Department, *Venezuela-Guyana Frontier Dispute*, Nos. DS (L) 692, RRN 040/360/1 (10 May 1976), para. 23, MG, Vol. II, Ann. 48.

[34] 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, Ann. 28.

therefrom". The second Agenda item was "[t]o seek satisfactory solutions for the practical settlement of the controversy which has arisen as a result of the Venezuelan contention that the 1899 Award is null and void"[35].

30. The United Kingdom Foreign Secretary, Mr. Michael Stewart, recalled that Venezuela's contention "was aimed at the validity of the 1899 Award". In regard to Agenda Item 1, he enquired if the tripartite examination had satisfied Venezuela that "there was no substance in their allegations concerning the Award's validity". The Venezuelan Foreign Minister, Dr. Iribarren, responded that the conclusions of the British experts' report "were completely unacceptable"; in his view "the only satisfactory solution of the frontier problem with British Guiana lay in the return of the territory which by right belonged to [Venezuela]"[36].

31. Mr. Stewart clarified that Agenda Item 2 on "satisfactory solutions" could only be interpreted "in the narrow context of the controversy over the validity of the 1899 Award". He recalled that the 13 November 1962 British offer of a tripartite examination had made clear that "[a]ny consideration of the substantive question of the frontier was out of the question".

32. Given Britain's categorical rejection of the contention of nullity, Venezuela was eager to establish an agreed procedure for resolution of the controversy. To this end, Dr. Iribarren proposed a three-stage settlement process; the first would be a Mixed Commission to attempt a bilateral resolution of the dispute; the next would be mediation; and finally, there would be "recourse to international arbitration"[37].

33. On 10 December 1965, the second day of the London meeting, the Attorney General of British Guiana, Mr. Shridath Ramphal, began by emphasizing once more that the Agenda "ruled out the question of discussion on the substantive issue of the frontier"; he stated categorically that "British Guiana could not accept that the 1899 Award was invalid"[38]. Mr. Burnham, too, made clear that the territorial claim could not be at issue "unless the invalidity of the 1899 Award had first been established"[39].

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[35] *Ibid*.

[36] *Ibid*.

[37] *Ibid*.

[38] *Ibid*.

[39] *Ibid*.

34. Faced with this obvious deadlock, Dr. Iribarren once again focused on an agreed procedure for dispute settlement: "Venezuela had come to the conference table", he explained, "not to discuss positions already established . . . but . . . in full consciousness of the necessity . . . to reach a solution of the territorial problem"[40]. He emphasized that "[h]is 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", he added, "represented a great concession on her part"[41].

35. Mr. President, Venezuela's Memorandum of 28 November 2019 observes that "[a]n award is either valid or null; there is no middle ground . . . The validity or nullity of an arbitral award is non-negotiable." Guyana agrees; and that was exactly the position of the parties at the December 1965 London meeting. One side insisted on the validity and binding force of the 1899 Award, while the other claimed that it was null and void.

36. Faced with this impasse, they decided on 10 December 1965 that the "discussions should be continued in Geneva in the week beginning 13 February 1966"[42]. Those discussions produced an agreed procedure for resolution of the dispute, under the 1966 Geneva Agreement, which Mr. Reichler will now address.

37. Mr. President, distinguished Members of the Court, that concludes my presentation. I thank you for your kind attention and ask that you call on Mr. Reichler.

The PRESIDENT: I thank Professor Akhavan. I will now give the floor to the next speaker, Mr. Reichler. You have the floor.

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[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), MG, Vol. II, Ann. 28, p 3.

[41] 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 10 December, 1965*, No. AV 1081/326 (10 Dec. 1965), MG, Vol. II, Ann. 28, p. 6.

[42] *Ibid*.

Mr. REICHLER:

THE 1966 GENEVA AGREEMENT

1. Mr. President, Members of the Court, good afternoon. It is an honour for me to appear before you, and a privilege to speak on behalf of Guyana. We take this opportunity to express our deepest wishes for your health and safety, and we thank you for protecting ours, by allowing us to appear before you electronically.

2. Mr. President, it is Guyana's contention that the Court has jurisdiction over its claims in this proceeding, and that your jurisdiction is derived from two sources in combination: first, the Agreement to Resolve the Controversy over the Frontier between Venezuela and British Guiana, signed at Geneva on 17 February 1966; and second, the decision of the Secretary-General of the United Nations, pursuant to Article IV (2) of that Agreement, that the controversy shall be resolved by the International Court of Justice.

3. I will address the first of these sources of your jurisdiction, the 1966 Geneva Agreement. Professor Pellet will address the second source, the decision of the Secretary-General. In between, Professor Sands will cover the period between 1966 and 2018, and the way the Geneva Agreement was faithfully implemented by the Parties, and by the Secretary-General, during that 52-year period, in strict accordance with its terms.

4. My presentation on the 1966 Agreement is in three parts. First, I will review the terms of the Agreement, in order to establish their ordinary meaning, in their context, and in light of the treaty's object and purpose, consistent with the customary law principles codified in Article 31 of the Vienna Convention on the Law of Treaties. Second — after perhaps a coffee-break, if the President deems that that is the appropriate time — I will call your attention to the negotiation and ratification of the treaty, including, especially, the contemporaneous statements of the Parties as to its meaning. Third, I will compare Guyana's reading of the text with Venezuela's current reading of it, as set out in its Memorandum of 28 November 2019, and demonstrate that Venezuela's current interpretation is erroneous, illogical and completely contrary to the way Venezuela itself understood the same text in 1966 and for decades thereafter.

A. The text

5. I begin with the text of the 1966 Agreement, which is at tab 5 of your judges' folders. The object and purpose of the Agreement is reflected in its title. This tells us it is an "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"[43]. The object and purpose of the Agreement is further reflected in the preamble, paragraph 5, which declares that the parties have "reached the following Agreement to resolve the present controversy", which it, like the title, describes as "the controversy between Venezuela and the United Kingdom over the frontier with British Guiana"[44].

6. Article I further defines the "controversy between Venezuela and the United Kingdom" that the Agreement purports to resolve, as 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"[45].

7. This text unambiguously establishes that the object and purpose of the 1966 Agreement was to resolve the controversy that arose as a result of Venezuela's contention that the Arbitral Award of 1899 about the frontier between British Guiana and Venezuela is null and void.

8. As Professor Akhavan has explained, Venezuela's contention was formally made for the first time in 1962, more than sixty years after the Arbitral Award was issued. This novel Venezuelan contention was immediately and emphatically rejected by Britain and British Guiana. However, in 1963, amidst concern about a possible armed conflict with Venezuela upon British Guiana's forthcoming independence, the United Kingdom agreed to engage with Venezuela in a mutual examination of archival documents pertaining to the validity of the 1899 Award. This process continued through the end of 1965, with each side holding fast to its initial position. *This* is the controversy they took with them to Geneva in February 1966, as Professor Akhavan has recounted,

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[43] 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, United Nations, *Treaty Series (UNTS)*, Vol. 561, p. 323 (17 Feb. 1966) (hereinafter "Geneva Agreement"): Application of the Co-operative Republic of Guyana (AG), Ann. 4.

[44] Geneva Agreement, preamble, AG, Ann. 4.

[45] Geneva Agreement, preamble, AG, Ann. 4.

and which they agreed at Geneva to resolve. None of these facts about the antecedents to the Geneva Agreement are disputed by Venezuela in its written submissions in this case.

9. Beginning with its first Article, Article I, the Geneva Agreement sets out the procedures agreed by the parties to resolve the controversy over the validity of the Arbitral Award. The first three Articles — Articles I, II and III — establish a mechanism by which the parties agreed, in the first instance, to attempt to resolve the controversy diplomatically, through a Mixed Commission. By its text, Article I mandated the Mixed Commission to seek "satisfactory solutions for the practical settlement of the controversy between Venezuela and the United Kingdom".

10. Article II then provided that the Mixed Commission would consist of two representatives of each party, to be appointed within two months of the Agreement's entry into force. And Article III required the Commission to issue interim reports every six months.

11. The Geneva Agreement does not end there, after Article III. Although the parties agreed to seek a "practical settlement" in the first instance, they did not presume that they would be successful, especially after three years of failed negotiations leading up to Geneva that had seen no narrowing of their differences whatsoever. To the contrary, they agreed at Geneva on another procedure to assure a definitive resolution of the controversy, in the event that the Mixed Commission failed to do so. This procedure was set out in Article IV.

12. Article IV is divided into two parts. It begins with Article IV (1). This provides that, if the Mixed Commission has not arrived at "a full agreement for the solution of the controversy" within four years, it shall refer "any outstanding questions" to the Governments of Guyana and Venezuela; and that the two Governments shall, without delay, "choose one of the peaceful means of settlement provided in Article 33 of the Charter of the United Nations"[46].

13. Two key facts in regard to Article IV (1) are undisputed by the Parties in these proceedings. First, the Mixed Commission did not arrive at an agreement for the solution of the controversy. Second, the two Governments did not reach an agreement on a means of peaceful settlement under Article 33 of the Charter. Venezuela has helpfully confirmed these facts in its Memorandum of 28 November 2019, which is at tab 6 of your folders. At paragraph 24, Venezuela acknowledged that

[46] Geneva Agreement, Article IV (1), AG, Ann. 4.

"[t]he 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"[47]. And, at paragraph 32, Venezuela wrote that "Venezuela and Guyana failed to agree on the choice of a means of settlement"[48].

14. But neither of these failures was able to prevent the resolution of the controversy, because, in Article IV (2), the parties foresaw that this very situation might arise, and established a fail-safe procedure for resolving the controversy in the event of an impasse under Article IV (1).

15. According to Article IV (2) of the 1966 Agreement, which is, again, at tab 5, if the parties are unable to reach agreement on a means of settlement under Article 33 of the Charter, they are required to refer "the decision as to the means of settlement", either to "an appropriate international organ upon which they both agree, or failing agreement on this point, to the Secretary-General of the United Nations"[49].

16. In regard to this aspect of Article IV (2), the parties agree on three more key facts. First, that they failed to reach agreement on "an 'appropriate international organ' to choose the means of settlement". Second, in compliance with Article IV (2), they did, jointly, refer the decision as to the means of settlement to the Secretary-General. And third, that the Secretary-General formally accepted the Parties' conveyance of authority to him to decide on the means of settlement under Article 33 of the Charter, and he agreed to exercise the responsibilities conferred upon him.

17. The Parties' agreements on these three facts are confirmed in Venezuela's Memorandum of 28 November 2019, at paragraph 32, which acknowledges their failure to agree on an "appropriate international organ"[50], and in the Annex to that Memorandum, which is at tab 7 of the folders, at pages 35 and 36. As shown on your screens now, Venezuela here confirms that, because of the Parties' failure to reach agreement on an "appropriate international organ", "there is an unequivocal

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[47] Memorandum of the Bolivarian Republic of Venezuela on the Application filed before the International Court of Justice by the Co-operative Republic of Guyana on March 29th, 2018 (MV), para. 24.

[48] MV, para. 32.

[49] Geneva Agreement, Article IV (2), AG, Ann. 4.

[50] MV, para. 32.

interpretation that the selection of the means of settlement will be made only by the Secretary General of the United Nations"[51]. And, further:

> "In a letter dated April 4th, 1966, the Secretary General of the United Nations, U Thant, accepted the functions attributed to him by Article IV.2 of the Geneva Agreement, considering that 'those functions are of such nature that they can be properly performed by the Secretary General of the United Nations'."[52]

18. In addition to providing that, failing an agreement on an appropriate international organ, the Secretary-General would decide on the means of settlement of the parties' controversy, Article IV (2) further provided that,

> "[i]f the means so chosen do not lead to a solution of the controversy . . . the Secretary-General of the United Nations shall choose another of the means stipulated in Article 33 of the Charter of the United Nations, and so on until the controversy has been resolved, or until all the means of peaceful settlement there contemplated have been exhausted"[53].

19. And, in relation to this provision, there are four more pertinent facts that are agreed by the parties. These will be addressed in greater detail by Professor Sands and Professor Pellet. For present purposes, it will suffice simply to identify those facts. First, the Secretary-General decided that the first means of peaceful settlement would be his good offices. Second, that choice, and the Secretary-General's authority to make it under Article IV (2), were not contested by either Party; indeed, they were positively accepted by Venezuela. Third, the good offices process took place, and continued for 27 years, under four successive Secretaries-General, but it failed to resolve the controversy. Fourth, after determining that the good offices process had failed to resolve the controversy, Secretary-General António Guterres expressly invoked his authority under Article IV (2) and decided that the next means of peaceful settlement of the controversy, under Article 33 of the Charter, shall be judicial settlement by the International Court of Justice. These four facts are all acknowledged by Venezuela in its Memorandum at paragraphs 33, 34-37, 48-50, 54, 67 and 69.

20. With all of these facts undisputed, the question now before the Court is this: under the terms of the 1966 Geneva Agreement, is a decision by the Secretary-General choosing the Court as the means of peaceful settlement of the controversy binding upon the parties, or are the parties

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[51] MV, Annex, p. 35.

[52] MV, Annex, p. 36.

[53] Geneva Agreement, Art. IV (2), AG, Ann. 4.

required first to express their agreement with the Secretary-General's decision before it becomes binding on them?

21. A review of the Geneva Agreement's terms, in their context, and in light of the agreement's object and purpose, makes clear that the answer to this question can only be that the Secretary-General's decision on the means of settlement is binding upon the parties, without the need for their further agreement. Article IV (2) states expressly that, if the parties are unable to agree on the means of settlement, or on an appropriate international organ to choose the means of settlement: "they shall refer *the decision* on the means of settlement . . . to the Secretary-General of the United Nations"[54]. This makes clear that the Secretary-General was conferred with the power to make a "decision" on the means of settlement. What is also notable is what Article IV (2) does not say. It does not say that the "decision" of the Secretary-General is subject to the subsequent agreement of the parties, or that such agreement is required for his decision to be final or binding upon them.

22. The absence of any language subjecting the Secretary-General's decision to the parties' agreement is conclusive in its own right. But it takes on added significance when it is compared to the text regarding other, prior stages of the settlement process laid out in Article IV. For example, as underscored on this slide, Article IV (1) requires that, upon the Mixed Commission's failure to resolve the controversy, the parties shall together, that is, by agreement, choose the means of settlement under Article 33. Article IV (2) then provides that, if the parties "should not have reached agreement" on the means of settlement, they must refer the "decision" as to the means of settlement to an appropriate international organ "upon which they both agree"[55]. Failing that agreement, they must refer the "decision" to the Secretary-General. In this manner, the parties to the 1966 Agreement provided that, whenever the agreement of the parties is required to advance to the next stage in the dispute settlement process, the Agreement says so expressly. In this context, the only logical explanation for the absence of any requirement that the parties agree to the Secretary-General's decision on the means of settlement, is that this was deliberate: the parties' agreement was not required because the Secretary-General's decision was intended to be final and binding, and not subject to their subsequent approval.

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[54] Geneva Agreement, Art. IV (2), AG, Ann. 4.

[55] Geneva Agreement, Art. IV (2), AG, Ann. 4.

23. In fact, by agreement of the parties, the Secretary-General was entrusted not only with the power to decide on the means of settlement, but with the duty to make a choice in order to resolve the controversy: Article IV (2) specifies that the Secretary-General "*shall* choose". The language is mandatory; it creates mandatory "responsibilities" for the Secretary-General, as Secretary-General U Thant recognized in his letter to the parties of 4 April 1966. In that letter, which is at tab 8 of your folders, in both English and Spanish, he formally accepted those responsibilities, which he considered to be "of a nature . . . which may appropriately be discharged by the Secretary-General of the United Nations"[56]. The Secretary-General's letter thus constitutes an express acceptance of obligations in writing, within the meaning of Article 35 of the 1969 Vienna Convention and general international law. That power and that duty, duly accepted by the Secretary-General and which are therefore part of United Nations law, are limited only by the requirement that the Secretary-General choose one of the means of settlement enumerated by Article 33.

24. Even more to the point, the context, and the object and purpose of the Agreement, also make it perfectly clear that the Secretary-General's decision was intended to be binding upon the parties, without need for their subsequent approval. Article IV (2) was included in the Agreement precisely to ensure that there would be a final and complete resolution to the controversy, if the parties themselves failed to agree on the means of settlement. The responsibilities of the Secretary-General under Article IV (2) are engaged when there is no agreement between the parties; to suggest, as Venezuela now does, that the binding character of his decision on the means of settlement is conditioned on the parties' agreement with that decision, when they actually agreed to empower him to break their deadlock and avoid a permanent impasse, stands the Geneva Agreement on its head; it defeats its very object and purpose.

25. Article IV ends with the words: "until the controversy has been resolved"[57]. The terms of the Agreement make it plain that the Parties did not intend for the controversy to remain unresolved. Their object and purpose was precisely to avoid a permanent impasse. This is reflected in the title of the Agreement, "to resolve the controversy", and the preambular language that the parties "have

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[56] Letters of Secretary-General U Thant to Dr. Ignacio Iribarren Borges, Minister for Foreign Affairs of the Bolivarian Republic of Venezuela, and the Rt. Hon. Lord Caradon, Permanent Representative of the United Kingdom to the United Nations, 4 Apr.1966, AG, Ann. 5.

[57] Geneva Agreement, Art. IV (2), AG, Ann. 4.

reached the following agreement to resolve the present controversy"[58]. If, to the contrary, the parties had left themselves free to disregard the "decision" of the Secretary-General on the means of settlement, there would have been no assurance that the controversy would ever be resolved. Either party, by simply refusing to accept the Secretary-General's decision, could have single-handedly prevented the resolution of the controversy, and thwarted the object and purpose of the 1966 Agreement.

B. The negotiations and contemporaneous statements of the Parties

26. This is confirmed by the negotiations that resulted in the 1966 Agreement, and the contemporaneous statements of the parties as to its meaning, to which I will now turn. To be sure, it is not necessary in these proceedings to invoke the *travaux préparatoires* or the conduct of the parties, given the plain meaning of the terms of the Agreement. But it may still be worthwhile to examine them, if only to confirm that the terms of the Agreement mean exactly what they say, that is, that the parties empowered the Secretary-General to "decide" on the means of settlement of their controversy, that his "decision" would be binding on them, and that he was to continue to exercise his power to choose the means of settlement until a final resolution of the controversy was achieved.

Mr. President, this might be an appropriate place, if you deem it convenient, to take the afternoon coffee-break. If not, I am pleased to continue.

The PRESIDENT: Please continue. We will observe a coffee-break at the end of the second part of your presentation.

Mr. REICHLER: Thank you, Mr. President, I shall.

27. This is reflected, first, in the Joint Statement issued by the parties on 17 February 1966, immediately upon conclusion of the Geneva Agreement. This document is at tab 9 of your folders. It begins: "As a consequence of the deliberations an agreement was reached whose stipulations *will*

[58] Geneva Agreement, preamble, AG, Ann. 4.

enable a definitive solution of these problems" and it concludes that the Agreement "provides *the means to resolve* the dispute which was harming relations between two neighbours"[59].

28. The purpose of Article IV (2) and the negotiations leading to its adoption, were described contemporaneously by the Foreign Minister of Venezuela, who led Venezuela's delegation in Geneva, in his address to the Venezuelan National Congress calling for ratification of the Agreement, on 17 March 1966. The address is at tab 10 of your folders.

29. As you can see there, Foreign Minister Iribarren underscored that Venezuela's objective at Geneva was to obtain an agreement that would assure a complete, final and binding resolution of the controversy. He had little faith that this would be accomplished by further negotiations, given the firmly entrenched positions of the parties on the validity of the 1899 Arbitral Award[60]. This is why, he explained, when the United Kingdom proposed that the Mixed Commission be given ten years to reach an agreement resolving the controversy, Venezuela responded that the Commission should have a very limited life of only three months, before advancing to the next stage of the dispute settlement process. The parties ultimately agreed on a four-year mandate for the Commission, as a compromise[61].

30. The Venezuelan Foreign Minister explained to the National Congress that his main goal in the negotiations was to make sure that if, as expected, the Mixed Commission failed to resolve the controversy diplomatically, it would not remain unresolved indefinitely, but would be submitted to binding international dispute settlement, so that a definitive solution would ultimately be achieved.

31. In the speech he gave urging ratification of the Agreement, he described precisely how this goal was to be achieved:

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[59] Minister for Foreign Affairs of Venezuela, Minister for 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, Ann. 31.

[60] Statement by Dr. I. Iribarren Borges, Minister for Foreign Affairs of Venezuela, to the National Congress of Venezuela (17 Mar. 1966), reprinted in *Republic of Venezuela, Ministry of Foreign Affairs, Claim of Guayana Esequiba: Documents 1962-1981* (1981) ("Statement by Dr. Borges, Minister for Foreign Affairs of Venezuela (17 Mar. 1966)"), p. 1 ("United Kingdom still would not enter negotiations whose aim would be the revision of the Award which they considered intangible"), MG, Vol. II, Ann. 33.

[61] See 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. 4 ("Dr. Iribarren then put forward another proposal. A mixed commission should be set up . . . If the commission could not reach agreement, they were to refer within three months to one or more mediators"), MG, Vol. II, Ann. 28; Note Verbale from the Foreign Secretary of the United Kingdom to the United Kingdom's Ambassador to Venezuela, No. AV 1081/116 (25 Feb. 1966), para. 6 ("My suggested term for the Mixed Commission the previous evening had been ten years: this was reduced by bargaining to four"), MG, Vol. II, Ann. 32.

> "Finally, in an attempt to seek a respectable solution to the problem, I put forward a third Venezuelan proposal that would lead to the solution for the borderline issue in three [successive] 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].

32. This "third Venezuelan proposal" was rejected by the British at the London meeting in December 1965. But, according to the Foreign Minister, he made the same proposal in slightly different language at Geneva, which the United Kingdom and British Guiana ultimately came to accept. He explained the final stage of negotiations and the resulting agreement in the following terms:

> "In conclusion, due to 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.*"[63]

33. The Foreign Minister left no doubt about what Venezuela intended, and the parties understood, by his insistence that "judicial recourse" be authorized under the 1966 Agreement.

> "After some informal discussions, our Delegation chose to leave a proposal on the table similar to [the] third formula which had been rejected in London, adding to it recourse to the International Court of Justice.
>
> The delegations of Great Britain and British Guiana, after studying in detail the proposal . . . objected to the specific mention of recourse to arbitration and to the International Court of Justice.
>
> The objection was bypassed by replacing that specific intention 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.*"[64]

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[62] Statement by Dr. I. Iribarren Borges, Minister for Foreign Affairs of Venezuela, to the National Congress of Venezuela (17 Mar. 1966), MG, Vol. II, Ann. 33, p. 9; emphasis added.

[63] Statement by Dr. I. Iribarren Borges, Minister for Foreign Affairs of Venezuela, to the National Congress of Venezuela (17 Mar. 1966), MG, Vol. II, Ann. 33, p. 17; emphasis added.

[64] Statement by Dr. I. Iribarren Borges, Minister for Foreign Affairs of Venezuela, to the National Congress of Venezuela (17 Mar. 1966), MG, Vol. II, Ann. 33, p. 13; emphasis added.

Thus, it was Venezuela which proposed that Article IV be drafted so as to assure a definitive resolution of the controversy — ultimately, if so decided by the Secretary-General — by arbitration or recourse to the International Court of Justice.

34. There is thus no doubt, Mr. President, from either the terms of the Agreement, the negotiating history or the contemporaneous statements by the parties immediately following its conclusion, that Article IV (2) was intended to assure that there would be a final resolution of the border controversy, that the Secretary-General was empowered to decide on the means of settlement to be employed, choosing from among those listed in Article 33 of the Charter, and that the parties understood and intended that, if the Secretary-General so decided, the controversy would be settled by the International Court of Justice.

35. This was Venezuela's understanding of the Geneva Agreement, and of Article IV (2) in particular, at the time it signed and ratified the Agreement in 1966: that the Secretary-General was empowered to decide on the means of settlement, including recourse to the International Court of Justice, and his decision would be final and binding on the parties, ensuring that there would be a definitive resolution of the controversy over the validity of the 1899 Arbitral Award. Indeed, as the Foreign Minister of Venezuela himself emphasized: "It was on the basis of this Venezuelan proposal that the Geneva Agreement was reached."[65]

C. Venezuela's current reading of the Agreement

36. That was how Venezuela understood the Agreement in 1966. Venezuela's current reading of the Agreement, to which I will now turn, is completely at odds with the interpretation given by its Foreign Minister, who negotiated and agreed to its terms, and explained their meaning to the National Congress upon ratification. This current reading is set out in three documents that Venezuela has submitted to the Court.

The PRESIDENT: Mr. Reichler, I think that we can stop here. It is an appropriate moment for the Court to observe a coffee-break of 10 minutes.

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[65] Statement by Dr. I. Iribarren Borges, Minister for Foreign Affairs of Venezuela, to the National Congress of Venezuela (17 Mar. 1966), MG, Vol. II, Ann. 33, p. 13.

Mr. REICHLER: Thank you very much, Mr. President. I wish you a good coffee and I hope that it is real and not virtual.

The PRESIDENT: It will be a real one! We will ask all of those who have joined us virtually maybe to have their coffees, but not to go away. We will be back in 10 minutes.

Mr. REICHLER: Thank you, Mr. President.

The PRESIDENT: The meeting is adjourned.

The Court adjourned from 3.55 to 4.05 p.m.

The PRESIDENT: Please be seated. The sitting is resumed. I will now invite Mr. Reichler to continue with his presentation. You have the floor, Mr. Reichler.

Mr. REICHLER: Thank you very much, Mr. President. I was about to begin the third and final part of my presentation, which addresses Venezuela's current reading of the Geneva Agreement.

Their current reading is set out in three documents that Venezuela has submitted to the Court: a letter from President Nicolás Maduro, dated 18 June 2018; the Memorandum submitted on 28 November 2019; and the Annex that accompanied that Memorandum. Notably, Venezuela has not submitted any contemporaneous documents to the Court and, although its written pleadings occasionally quote from purported archival documents, none are provided, and no full or formal citations are given. In sum, Venezuela offers no *evidence* to support its assertions. There are only arguments. Three of them, to be exact. And they are all demonstrably wrong.

37. The first argument, which is set out in President Maduro's letter, at tab 11 of your folders, is that the Geneva Agreement provides for the resolution of the controversy between the Parties only by means of "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*."[66]

[66] 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, Ann. 132, p. 5; emphasis added.

38. Guyana, of course, welcomes President Maduro's commitment to the Geneva Agreement and his acknowledgment that it binds the Parties. However, his understanding of the Agreement appears to end at Article III. As we have seen, the first three Articles do indeed provide for friendly negotiations, through the vehicle of a Mixed Commission, "with the task of seeking satisfactory solutions for the practical settlement of the controversy"[67].

39. But, with respect, Venezuela's current reading of the Agreement ends too soon. It is like they stopped reading the Book of Genesis after the fifth day, before the first humans were created. Maybe the planet would have been better off, but that is not where the story ends. Likewise, the Geneva Agreement does not end after Article III. President Maduro's letter completely ignores Article IV. As we have seen, that Article establishes the procedure for resolving the controversy if the "friendly negotiations" conducted by the Mixed Commission are unable to produce an agreement. Venezuela itself acknowledges this in its Memorandum of 28 November 2019, at paragraph 22 *(c)*, where it states, without equivocation, that the efforts of the Mixed Commission to seek "satisfactory solutions for . . . practical settlement of the controversy", if unsuccessful after four years "finally should end with the intervention of the UN Secretary-General"[68].

40. Venezuela's second argument, apparently intended as a fallback in anticipated failure of its first one, is that Venezuela, "in order to reach a 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*"[69]. In this passage, at paragraph 114 of its Memorandum, Venezuela suggests that judicial settlement is only possible under the 1966 Agreement "as a last resort", which it goes on to define as after each of the other non-judicial means of settlement identified in Article 33 of the Charter has first been utilized.

41. To this end, Venezuela complains, at paragraph 46, that

> "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"[70].

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[67] Geneva Agreement, Art. I, AG, Ann. 4.

[68] MV, para. 22 *(c)*.

[69] MV, para 114 (2).

[70] MV, para. 46 *(e)*.

According to Venezuela, at paragraph 71 of its Memorandum, in reference to the means mentioned in Article 33: "Article IV.2 refers to a *successive* experimentation of them, indicative of a certain preferred sequence."[71]

42. No, Mr. President, it does not! There is nothing in Article IV (2) of the Geneva Agreement, or in Article 33 of the Charter, that requires the Secretary-General to choose the means of settlement of the controversy in any particular order, or to exhaust every one of the other means of settlement listed in Article 33 before he may choose adjudication by the Court. To the contrary, the only limitations on the power of the Secretary-General to decide on the means of settlement are: first, he must choose from among the means that are listed in Article 33; and second, if the means first chosen fail to resolve the controversy, he must choose another means from among those listed in Article 33, until the controversy is resolved, or, until all the means listed in Article 33 are exhausted. There is no requirement whatsoever in Article IV (2) or in Article 33 that he choose the means of settlement in any particular order. On Venezuela's approach, the Secretary-General could only decide on settlement by the Court after recourse to arbitration, which is absurd.

43. Indeed, Venezuela even refutes its own argument. It acknowledges that the first means of settlement actually chosen by the Secretary-General was "good offices", and that this was consistent with Article IV (2)[72]. But then, at paragraph 78 of its Memorandum, it characterizes "good offices" as "covered by the generic reference to 'other means' of choice", which are the last means listed in Article 33, not the first[73]. So, instead of choosing the means of settlement in succession, starting from the first one listed, the Secretary-General began at the end of the list, and Venezuela made no protest. It accepted that the choice of means was left entirely to the Secretary-General's discretion, subject only to the requirement that the means chosen were among those enumerated in Article 33. He did not, therefore, choose adjudication "premature[ly]", as Venezuela erroneously contends[74].

44. This brings us to Venezuela's third and final argument. I alluded to this one previously. They suggest that, even if the Secretary-General was empowered to decide upon the International

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[71] MV, para. 71; emphasis in the original.

[72] MV, paras. 33, 71.

[73] MV, para. 78.

[74] MV, para. 51.

Court of Justice as the means of settlement, and even if he could make this decision before exhausting the other means listed in Article 33 of the Charter, his decision was not binding upon the Parties, because it required their mutual consent before it could take effect. For Venezuela, absent the Parties' agreement, the Secretary-General's decision, in their exact words, "can only be taken as a recommendation"[75].

45. This is an entirely new reading of Article IV (2). As we have already seen, it is inconsistent with the text of that Article — which refers explicitly to the Secretary-General's choice of the means of settlement as a "decision", not a mere recommendation. Venezuela's current reading is also contrary to what its Foreign Minister, in 1966, understood as the authority that the Parties vested in the Secretary-General under Article IV (2). That contemporaneous understanding can be found not only in the Foreign Minister's address to the National Congress, from which I quoted previously, but in Venezuela's own Annex to its Memorandum of 28 November 2019, on page 35, at tab 7: "[T]here is an unequivocal interpretation that the selection of the means of settlement will be made only by the Secretary General of the United Nations." Plainly, the Foreign Minister did not understand there to be a need for a special agreement by the Parties following a decision by the Secretary-General that the means of settlement of the controversy shall be the International Court of Justice.

46. It is not surprising, then, that Venezuela makes no reference to either the text of Article IV (2) or the contemporaneous statements of its Foreign Minister in support of its unsupportable argument that the only power the Secretary-General was given was to make a mere recommendation, and that any such proposal would be contingent on the Parties' subsequent approval.

47. In the absence of any support for its argument, Venezuela attempts to manufacture some, by attributing a false "understanding" of Article IV (2) to Foreign Minister Iribarren, one that he never uttered and is contrary to what he actually did say. Venezuela erroneously argues, at paragraph 114 of its Memorandum, that

> "the Venezuelan Minister understood that arbitration or judicial settlement did not operate mechanically or unilaterally but were subjected to an agreement negotiated [by]

[75] MV, para. 90.

> the Parties, making equity a fundamental source of decision, in accordance with an imperative of substantial ***justice***"[76].

48. Tellingly, there are no quotes around these words in Venezuela's Memorandum. Nor are there any citations. Nor do these words, or words to the same or similar effect, appear anywhere in the Foreign Minister's contemporaneous statements. Venezuela's argument is exactly the opposite of what the Foreign Minister did say, that "the only person participating in the selection of the means of solution will be the Secretary General of the United Nations"[77].

49. Mr. President, it is helpful that Venezuela has set out in detail its objections to the Court's exercise of jurisdiction in this case, even if it did so in an untimely manner and without complying with the Rules of Court or the Court's Order of 19 June 2018. It remains, however, that by submitting those objections in written form, in its letter of 18 June 2018, and more elaborately in its Memorandum and Annex of 28 November 2019, Venezuela has provided the Court with its arguments, and it has enabled Guyana to respond to them, and demonstrate that none of these objections to jurisdiction has any merit whatsoever. In Guyana's submission, the Court should therefore reject them and proceed to the merits of the case.

50. Mr. President, Members of the Court, this concludes my presentation. I thank you for your kind courtesy and patient attention. And I ask that you call Professor Sands to the podium.

The PRESIDENT: I thank Mr. Reichler for his statement and I now invite Professor Philippe Sands to take the floor. You have the floor.

Mr. SANDS:

THE IMPLEMENTATION OF THE GENEVA AGREEMENT AND THE SELECTION OF THE COURT AS THE MEANS OF SETTLEMENT OF THE CONTROVERSY

I. Introduction

1. Mr. President, Members of the Court, it is a privilege to appear before you on behalf of the Co-operative Republic of Guyana, even if it is from Hampstead in London. In this speech, I will explain how the conditions established by the Geneva Agreement were fulfilled between the signing

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[76] MV, para. 114 (6).

[77] Statement by Dr. I. Iribarren Borges, Minister for Foreign Affairs of Venezuela, to the National Congress of Venezuela (17 Mar. 1966), MG, Vol. II, Ann. 33, p. 17.

of the Agreement in 1966, and the decision of the Secretary-General of the United Nations, some 52 years later, to choose this Court as the next means of settling the controversy.

2. The survey of events, across more than half a century, is fully set out in our written pleading[78], so I can be concise. I will make four points. First, all the conditions established by the Geneva Agreement have been properly implemented. Second, in accordance with those conditions, from 1983 the Secretary-General of the United Nations was entrusted by the Parties with responsibility to select the means of settlement of the controversy. Third, after more than 25 years of unsuccessful attempts to resolve the controversy through a good offices process (including a final year with a strengthened mandate of mediation), in 2018, the Secretary-General selected the Court as the means of settlement. The decision, his decision, was carefully considered, unimpeachable, lawful, and fully effective. Fourth, the Secretary-General's decision was appropriate and inevitable; it was a recognition of the need to bring a fair and final end to a long-standing and destabilizing controversy.

II. The Mixed Commission (1966-1970)

3. I begin with the implementation of the Geneva Agreement, following its signature. In 1966, a Mixed Commission was established, in accordance with Articles I and II of the Agreement; as Mr. Reichler has explained, it comprised two representatives from each party and its task was to seek "satisfactory solutions for the practical settlement of the controversy" arising from Venezuela's contention of nullity[79].

4. The members of the Commission were eminently qualified to perform that role: Guyana's representatives were the former Chief Justice of British Guiana, Sir Donald Jackson, and the Solicitor General of Guyana, Dr. Mohamed Shahabuddeen (who, of course, later served as a judge at this Court and then at the International Criminal Tribunal for the former Yugoslavia (ICTY)). Venezuela's two representatives were no less illustrious: Luis Loreto (who would serve as a Justice of the Supreme Court of Venezuela) and Dr. Gonzalo Garcia Bustillos (who became Venezuela's

[78] MG, Vol. I, paras. 2.50-2.108.

[79] 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, *UNTS*, Vol. 561, p. 323 (17 Feb. 1966), Application of the Co-operative Republic of Guyana (AG), Ann. 4.

Ambassador to Cuba and to the Organization of American States, and then Minister of the General Secretariat of the Presidency of Venezuela). Between 1966 and 1970, the Commission held 16 meetings, and the Commissioners published biannual reports. Yet the work yielded no progress towards a practical solution. This was largely due to the parties' inability to agree on the Commission's mandate: Guyana focused on Venezuela's contention of nullity of the Arbitral Award, whereas Venezuela addressed how much of Guyana's Essequibo territory should be relinquished to it or subjected to a programme of what he called "joint development"[80]. As Dr. Shahabuddeen put it, the process failed "because of Venezuela's deliberate refusal to recognise the plain meaning of Article I of the Geneva Agreement"; and this made it "impossible to grapple with the main burden of the task entrusted to the Mixed Commission"[81].

5. The Venezuelan Commissioners fully understood what failure entailed. In 1966, they explicitly acknowledged that if the Commission was unable to resolve the controversy then — and you will find the words at tab 13 of your folders — "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"[82].

6. The Commission's progress was further impeded by Venezuela's open hostility towards Guyana. In October 1966, for example, Venezuelan armed forces invaded and occupied Guyana's half of Ankoko Island, and they then constructed military installations and even an airfield. Guyana protested against this flagrant breach of its sovereignty[83]. Within two years of the invasion of Ankoko Island, the President of Venezuela, Raúl Leoni, issued a decree purporting to annex Guyana's

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[80] Co-operative Republic of Guyana, Ministry of Foreign Affairs, *Memorandum on the Guyana/Venezuela Boundary* (2 Nov. 1981), reprinted in United Nations General Assembly, 36th Session, Review of the Implementation of the Declaration on the Strengthening of International Security, UN doc A/C/1/36/9 (9 Nov. 1981), pp. 7-8, MG, Vol. III, Ann. 54.

[81] *Minutes of the Third Meeting, XI Session of the Mixed Commission* (16 Feb. 1970), p. 5.

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

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

territorial sea up to the mouth of the Essequibo River[84]. Guyana again protested[85]. To this day, still now, Ankoko Island remains under unlawful Venezuelan occupation, and Venezuela claims the maritime area off the coast of Guyana as its own.

7. In 1970, with the failure of the Mixed Commission to reach agreement, Article IV (1) of the Geneva Agreement became applicable. You will find it at tab 12. This required the Governments of Guyana and Venezuela to "without delay choose one of the means of peaceful settlement provided in Article 33 of the Charter of the United Nations"[86].

8. Guyana and Venezuela were not able to reach agreement. In view of the impasse, the Prime Minister of Trinidad and Tobago, Dr. Eric Williams, moved to a moratorium on the dispute resolution process under Article IV of the Geneva Agreement. Guyana welcomed the initiative, given Venezuela's escalating threats, which undermined Guyana's stability, development and territorial integrity.

III. The Protocol of Port of Spain (1970-1982)

9. On 18 June 1970, the parties concluded the Protocol of Port of Spain. Venezuela and Guyana agreed to "suspend[]" the operation of Article IV for an initial term of 12 years. During that period, they agreed to "explore all possibilities of better understanding between them and between their peoples".

10. Four days after the Protocol entered into force, Venezuela acknowledged "the lack of any progress at the Mixed Commission", and what it called "the sad but unquestionable deterioration in relations between Venezuela and Guyana". An official Venezuelan memorandum described the

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[84] 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 the Co-operative Republic of Guyana to the Embassy of the Bolivarian Republic of Venezuela in Guyana (19 July 1968), MG, Vol. II, Ann. 43.

[85] Note Verbale from the Ministry of External Affairs of the Co-operative Republic of Guyana to the Embassy of the Bolivarian Republic of Venezuela in Guyana (19 July 1968), MG, Vol. II, Ann. 43.

[86] 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, *UNTS*, Vol. 561, p. 323 (17 Feb. 1966), AG, Ann. 4.

Protocol of Port of Spain as a "happy outcome" and "a compromise" that was "closer to Venezuela's original proposal than that of Guyana"[87].

11. By Article II of the Protocol of Port of Spain, Guyana and Venezuela agreed to refrain from making assertions of sovereignty over the territory of the other, while the Protocol was in force. Nevertheless, in November 1981 Venezuela did reassert its "claims to the Essequibo territory"[88], and sought to deter international investment in Guyana's Essequibo region. Following Venezuela's formal notice of termination, on 18 June 1982 the Protocol of Port of Spain expired. As Venezuela's Foreign Minister explained, this allowed "the full reactivation of the procedures indicated in the Geneva Agreement"[89].

IV. Events following the expiry of the Protocol of Port of Spain

12. So, we move to Article III of the Protocol which provided that upon its expiry, the functioning of Article IV of the Geneva Agreement "shall be resumed at the point at which it has been suspended". In mid-1982, Guyana and Venezuela were therefore once more required by Article IV (1) of the Geneva Agreement to choose "one of the means of peaceful settlement provided in Article 33".

13. The parties were not able to reach agreement. For its part, Guyana proposed judicial settlement; Venezuela insisted on diplomatic negotiation[90]. With no consensus, Article IV (2) required the parties to "refer the decision as to the means of settlement to an appropriate international organ upon which they both agree". Guyana proposed three possible bodies as the "appropriate international organ": the International Court of Justice, the United Nations General Assembly, or the

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[87] 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, Ministry of Foreign Affairs, Claim of Guayana Esequiba, Documents 1962-1981 (1981), MG, Vol. II, Ann. 47.

[88] Co-operative Republic of Guyana, Ministry of Foreign Affairs, *Memorandum on the Guyana/Venezuela Boundary* (2 Nov. 1981), reprinted in United Nations General Assembly, 36th Session, *Review of the Implementation of the Declaration on the Strengthening of International Security*, UN doc. A/C.1/36/9 (9 Nov. 1981), p. 12, MG, Vol. III, Ann. 54.

[89] Declaration of the Minister for Foreign Affairs of the Bolivarian Republic of Venezuela (10 Apr. 1981), reprinted in Republic of Venezuela, Ministry of Foreign Affairs, Claim of Guayana Esequiba: Documents 1962-1981 (1981), MG, Vol. II, Ann. 49.

[90] Co-operative Republic of Guyana, Ministry of Foreign Affairs, *Press Release* (30 Mar. 1983), MG, Vol. III, Ann. 62; United Nations General Assembly, 37th Session, *Agenda item 9*, UN doc. A/37/PV.16 (4 Oct. 1982), paras. 287-288, MG, Vol. III, Ann. 57.

United Nations Security Council[91]. Venezuela rejected all three bodies. In September 1982 it explained, as you will see at tab 14, that

> "Venezuela has become convinced that the most appropriate international organ to choose a means of settlement is the Secretary General of the United Nations, which organ accepted this responsibility . . . and *whose role has been expressly agreed upon by the parties in the text itself of the Geneva Agreement*"[92].

14. One month later, Venezuela reiterated, as you will see at tab 15, that

> "in order to comply with the provisions of Article IV (2) of the Geneva Agreement . . . Venezuela wishes to reaffirm its conviction that it would be most practical and appropriate to entrust the task of choosing the means of settlement directly to the Secretary General . . .
>
> Since it is evident that no agreement exists between the parties in respect of the choice of an international organ to fulfil the functions provided for it in Article IV (2), *it is obvious that this function now becomes the responsibility of the Secretary General of the United Nations*."[93]

15. In the absence of agreement, Article IV (2) required the parties to refer the decision to the Secretary-General. This was clearly understood by both parties[94]. On 31 March 1983, Secretary-General Javier Pérez de Cuéllar — whose memory, Mr. President, you so graciously evoked — confirmed that both Governments had asked him to act under Article IV (2), and that he would inform the parties on how he would discharge that responsibility[95].

16. In August 1983, the Secretary-General, Mr. Pérez de Cuéllar, despatched the Under-Secretary-General for Special Political Affairs, Diego Cordovez, to visit the two countries. During the meetings, both parties "reaffirmed their readiness to cooperate fully with the Secretary-General in the discharge of his responsibility under the Geneva Agreement". They also provided "a wide range of information" which was "most carefully studied" to ensure that "the choice of the means of settlement will facilitate a definitive and durable resolution of the controversy"[96].

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[91] See United Nations General Assembly, 37th Session, *Agenda item 9*, UN doc A/37/PV/.26 (11 Oct. 1982), paras. 212-215, MG, Vol. III, Ann. 58.

[92] Letter from the Minister for Foreign Affairs of the Bolivarian Republic of Venezuela to the Minister for Foreign Affairs of the Co-operative Republic of Guyana (19 Sept. 1982), MG, Vol. III, Ann. 56.

[93] Letter from the Minister for Foreign Affairs of the Republic of Venezuela to the Minister for Foreign Affairs of the Co-operative Republic of Guyana (15 Oct. 1982), MG, Vol. III, Ann. 59.

[94] Letter from the Minister for Foreign Affairs of the Co-operative Republic of Guyana to the Minister for Foreign Affairs of the Republic of Venezuela (28 Mar. 1983), MG, Vol. III, Ann. 61.

[95] Letter from the Secretary-General of the United Nations to the Minister for Foreign Affairs of the Co-operative Republic of Guyana (31 Mar. 1983), MG, Vol. III, Ann. 63.

[96] Telegram from the Secretary-General of the United Nations to the Minister for Foreign Affairs of the Co-operative Republic of Guyana (31 Aug. 1983), p. 2, MG, Vol. III, Ann. 64.

17. For five years, between 1984 and 1989, the parties engaged in regular meetings and discussions at the diplomatic and ministerial levels, as Mr. Cordovez assisted the Secretary-General under Article IV (2). In early 1990, the Secretary-General, Mr. Pérez de Cuéllar, decided that a "good offices process" would be used as the first means of settlement, to be conducted by his Personal Representative.

18. You will have noted that a "good offices process" is not explicitly listed in Article 33 of the United Nations Charter. Nevertheless, as Venezuela expressly acknowledges in its recent Memorandum in respect of these proceedings[97], it does fall under the residual category of "other peaceful means" of dispute settlement. Thus, as Venezuela now recognizes, the Secretary-General did not begin with the means in the order they are set out in Article 33, namely "negotiation, enquiry, mediation, conciliation", etc. Yet, it is noteworthy that Venezuela did not object to the Secretary-General's choice of good offices on that basis, or indeed on any other basis. To the contrary, Venezuela welcomed the Secretary-General's decision[98]. It is common ground that, in taking his decision, the Secretary-General acted in full compliance with the powers and responsibility conferred upon him by the parties under Article IV (2) of the Geneva Agreement. Venezuela accepted the choice he took, including its reasons, its rationale and its basis under the Agreement.

V. The good offices process (1990-2014)

19. From 1990 onwards, successive Secretaries-General appointed a series of distinguished "personal representatives" to conduct the good offices process. The first was Professor Sir Alister McIntyre of Grenada, former Secretary-General of CARICOM, a renowned academic and statesman. He served until 1999, when he was succeeded by Oliver Jackman of Barbados, a distinguished jurist, diplomat and a judge of the Inter-American Court of Human Rights, who served for eight years until his death in 2007. Professor Norman Girvan of Jamaica, the former Secretary General of the Association of Caribbean States, served as the third personal representative, from 2010 until his death in 2014.

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[97] See MV, para. 78.

[98] See MV, para. 33.

20. Over 24 years, from 1990 to 2014, the parties and successive personal representatives and Secretaries-General engaged in intensive efforts to reach a satisfactory resolution of the controversy through the good offices process. Those endeavours included annual meetings between the parties' Foreign Ministers and the Secretary-General himself.

21. Throughout this entire period Guyana and Venezuela repeatedly reaffirmed their commitment to the process mandated by the Geneva Agreement. In 1993, for example, the Parties issued a joint statement — you will see it at tab 16 of your folders — in which they "reiterated" their "deep and unswerving commitment to the peaceful resolution of issues within the framework of the 1966 Geneva Agreement"[99]. In 1998, five years later, they issued a further joint statement — you will find it at tab 17 — to express their appreciation for the efforts of the Secretary-General's Personal Representative and to "reaffirm[] their decision to continue to avail themselves of the [Good Offices] Process, in order to reach a final settlement as called for by the Geneva Agreement"[100].

22. Notwithstanding its repeated assertions of its commitment to a peaceful resolution, they are bound to say that the good offices process was, unfortunately, marred by armed military incursions from Venezuela into Guyanese territory on numerous occasions: this happened in 2007[101], in 2013[102] and in 2014[103]. This resulted in the unlawful seizure and destruction of Guyanese property, and the unlawful detention and abduction of Guyanese citizens. Again, Venezuela objected to investment and infrastructure projects in the Essequibo region, which of course undermined Guyana's development[104].

23. By 2014 the Parties were no closer to a resolution than they had been when the Secretary-General was first entrusted with selecting the means of settlement, some 31 years earlier.

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[99] Government of the Co-operative Republic of Guyana and Government of the Bolivarian Republic of Venezuela, *Joint Statement* (5 Apr. 1993). MG, Vol. III, Ann. 67.

[100] Government of the Co-operative Republic of Guyana and Government of the Bolivarian Republic of Venezuela, *Joint Communiqué* (23 July 1998), p. 3. MG, Vol. III, Ann. 70.

[101] See Note Verbale from the Ministry of Foreign Affairs of the Co-operative 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, Ann. 74.

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

[103] Note Verbale from the Ministry of Foreign Affairs of the Co-operative 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, Ann. 83.

[104] See MG, para. 2.76.

Five decades had now passed since the Geneva Agreement, with no meaningful progress. In the face of such failure, and confronted by a renewed Venezuelan campaign of threats, Guyana concluded there was no point in continuing the good office process. It proposed, reasonably, that the Secretary-General should use other means of settlement, as provided by Article IV (2) of the Geneva Agreement, with its *renvoi* to Article 33.

24. And so, on 2 December 2014, Guyana notified Venezuela of its proposal[105]. Venezuela recognized that the controversy must be resolved in accordance with the Geneva Agreement[106].

VI. Events in 2015-2016

25. In September 2015, United Nations Secretary-General Ban Ki-moon met with the President of Guyana and the President of Venezuela. He wrote to the Parties to outline proposals for what he called "The Way Forward". He explained that if a practical solution was not found before the end of his tenure, he "intend[ed] to initiate the process to obtain a final and binding decision from the International Court of Justice". Until then, the Secretary-General pledged, he would "do his utmost to assist the parties" to reach an agreement through the ongoing good offices process[107].

26. Following his announcement, the Parties and the Secretary-General's Chef de Cabinet met on several occasions. Regrettably, these were once more overshadowed by Venezuelan threats. In February 2016, for example, Venezuela's Foreign Minister reasserted "rights over the Essequibo" in a statement to the United Nations[108]. In May of that year, Guyanese officials monitoring the Essequibo region of Guyana were shot at by Venezuelan armed forces[109]. Multiple other military

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[105] Letter from the Minister for Foreign Affairs of the Co-operative 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, Ann. 86.

[106] 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, Ann. 95.

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

[108] This was referred to by the Hon. Carl Greenridge, Vice-President and Minister for Foreign Affairs, in a statement before the National Assembly in February 2016. Government of the Co-operative 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, Ann. 102; statement of the Minister for Foreign Affairs of the Co-operative Republic of Guyana to the National Assembly (11 Feb. 2016), MG, Vol. IV, Ann. 101.

[109] Note Verbale from the Ministry of Foreign Affairs of the Co-operative Republic of Guyana to the Ministry of People's Power of External Relations of the Bolivarian Republic of Venezuela, No. 1075/2016 (1 June 2016), MG, Vol. IV, Ann. 104.

incursions into Guyana's territory were reported[110]. You will find all of the evidence set out in full in the written pleadings[111].

27. Against a backdrop of escalating tensions, on 15 December 2016, Secretary-General Ban Ki-moon stated that it had proved impossible "to bridge the differences between the parties"; he announced what he called "an extensive stocktaking" of the good offices process. It would continue, in his words, "for one final year", with a new personal representative and "a strengthened mandate of mediation". Thereafter, and significantly, the Secretary-General of the United Nations set out a clear condition to underpin a time-limited extension — you will find his words at tab 18 of the judges' folder:

> "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."[112]

28. Secretary-General Ban Ki-moon added at the time that his successor, Mr. António Guterres, had "expressed his concurrence with [the decision]"[113]. It was apparent that the decision was taken on the basis of advice given by the United Nations Legal Adviser.

29. In response, Venezuela expressed a preference for further negotiation. Nevertheless, it recognized that — you will find its words at tab 19 — "the Geneva Agreement . . . 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"[114].

30. For its part, Guyana, acting in accordance with the Geneva Agreement, complied with the Secretary-General's decision and pledged to engage wholeheartedly in the final year of the good offices process with an enhanced mandate of mediation[115].

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[110] Letter from the Minister for Foreign Affairs of the Co-operative Republic of Guyana to the Secretary-General of the United Nations (9 Nov. 2016), MG, Vol. IV, Ann. 109.

[111] MG, paras. 2.83-2.84.

[112] United Nations Secretary-General, *Note to Correspondents: The Controversy between Guyana and Venezuela* (16 Dec. 2016), MG, Vol. IV, Ann. 111.

[113] *Ibid.*

[114] 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, Ann. 112.

[115] Letter from the President of the Co-operative Republic of Guyana to the Secretary-General of the United Nations (22 Dec. 2016). MG, Vol. IV, Ann. 116. See also Government of Guyana, Statement on the Decision by the United Nations Secretary-General (16 Dec. 2016), MG, Vol. IV, Ann. 113.

VII. The final year of the good offices process with an enhanced mandate of mediation

31. And so we reach the final year of that process. On 1 January 2017, António Guterres succeeded Ban Ki-moon as United Nations Secretary-General. One month later the new Secretary-General appointed the distinguished Norwegian diplomat and jurist, Dag Nylander, as his Personal Representative. Detailed terms of reference were agreed, and he undertook to keep the Secretary-General "fully abreast" of the good offices process[116].

32. Numerous meetings and exchanges took place throughout the year of 2017. This included three rounds of intensive, multi-day, formal, bilateral and confidential meetings in Greentree, New York, attended by senior delegations, including the Parties' foreign ministers. Mr. President, I pause for a moment to indicate that we have noted what Venezuela asserts in its Memorandum as regards Guyana's attitude and approach to the Greentree meetings[117]. That claim is neither accurate nor fair, but since it was agreed by all that what passed at the Greentree meetings would be kept strictly confidential, we have nothing further to add. What matters most — and this is a matter of public record — is the conclusion of the Secretary-General: despite a full year of intensive efforts, there was no discernible progress towards a resolution of the controversy arising from Venezuela's contention of nullity.

Decision of the Secretary-General to choose the Court as the next means of settlement

33. And so, on 30 January 2018, consistent with what he had communicated to the Parties on 15 December 2016, the Secretary-General issued a public statement and sent letters to each of the Parties. He announced that he had chosen the Court as the next means of settlement. Despite the intensive efforts, the Secretary General had concluded, and the words are to be found at tab 20 of your folder,

> "*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 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*."[118]

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[116] Letter from the Secretary-General of the United Nations to the President of the Co-operative Republic of Guyana (23 Feb. 2017). MG, Vol. IV, Ann. 117.

[117] MV, para. 58, and the Annex, pp. 143-146.

[118] United Nations 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, Ann. 126.

VIII. Conclusion

34. Mr. President, Members of the Court, the record is clear. More than fifty years have passed since the signing of the Geneva Agreement. Four years were fruitlessly spent before a Mixed Commission, from 1966 to 1970. Twelve years were then spent on an equally unavailing suspension of the Geneva Agreement, from 1970 to 1982. Thirty-seven years ago this week, Guyana and Venezuela jointly entrusted the Secretary-General with exclusive, unfettered and irrevocable responsibility for selecting "the means of settlement" of the controversy. After six years of further discussions between the Parties and the Secretary-General's representative, the good offices process was established in 1990, with an enhanced mandate of mediation for the year 2017. That means of settlement ran its course for more than a quarter of a century. It has produced no progress whatsoever. Nothing. *Rien*.

35. The existence, basis, validity and nature of the Secretary-General's right to select that process has never been called into doubt. To the contrary, Venezuela and Guyana have repeatedly and consistently reaffirmed the Secretary-General's exclusive responsibility and right under the Geneva Agreement to select the means of settlement. Venezuela has never previously disputed the Secretary-General's discretion to select the means of settlement from those listed in Article 33 of the United Nations Charter.

36. The good offices bore no fruit. In 2018, the Secretary-General concluded that "significant progress" had not been made towards resolving the controversy. We say that conclusion was reasonable and it was justified. In those circumstances, the Secretary-General was plainly entitled — and indeed we say positively required by the words of Article IV (2) of the Geneva Agreement — to "choose another of the means stipulated in Article 33 of the Charter of the United Nations". Another, in the singular.

37. The Secretary-General's choice of judicial resolution by the Court was reasonable. It was based on legal advice, and it was and is, lawful. The Secretary-General simply could not be expected to go on forever and ever with a hopeless and useless exercise. He did not take an impermissible "shortcut[]", as Venezuela puts it in its recent Memorandum[119]. Rather, after decades of futile negotiations and mediation, the Secretary-General concluded, in the exercise of the responsibility,

[119] MV, para. 84.

rights and discretion granted to him by the Geneva Agreement, that the next means of settlement shall be judicial resolution by an independent tribunal applying the rules of international law. The Secretary-General proceeded with the utmost care and deliberation. He had a number of options available to him. He chose this Court, the principal judicial organ of the United Nations. That was a first. It was a reasonable choice, it was a sensible choice, and it fell fully within the discretion conferred upon him by the Parties under Article IV (2) of the Geneva Agreement.

38. Mr. President, Guyana expresses the hope that the Court will not undercut the Secretary-General's careful and deliberative approach, one that was intended to assist in the process of bringing a long-standing dispute to an end. Guyana invites the Court to give effect to the Secretary-General's binding decision under the Geneva Agreement, to confirm that the Secretary-General acted lawfully and correctly. Guyana has full faith in the Court, acting under Article IV of the Geneva Agreement, and applying established principles of international law, to confirm that the Secretary-General got it right.

39. Mr. President, Members of the Court, I thank you for your very kind courtesy and patient attention, and ask you to call on Professor Pellet to come to the podium, to address in more detail the legal basis for the decision taken by the Secretary-General, its lawfulness and its binding effect, and the jurisdiction this Court plainly has.

The PRESIDENT: I thank Professor Sands for his statement and I now invite Professor Alain Pellet to take the floor. You have the floor.

M. PELLET : Thank you very much, Mr. President. Monsieur le président, Mesdames et Messieurs de la Cour, bon après-midi.

LE CONSENTEMENT DU VENEZUELA, LE CARACTERE OBLIGATOIRE DE LA DECISION DU SECRETAIRE GENERAL ET REMARQUES SUR LA PORTEE DU DIFFEREND

1. Monsieur le président, il est toujours un peu frustrant de plaider face à des fauteuils vides — au moins l'innovation «électronique» nous épargne cette frustration ! Mais une autre la remplace puisque nous sommes privés de la solennité et des pompes du grand hall de justice de La Haye !

2. L'affaire qui vous est soumise est à la fois de grande importance — c'est la stabilité des situations juridiques et territoriales qui est en cause — et fort simple, car les faits de la cause parlent

d'eux-mêmes. Comme mes collègues et amis l'ont montré, il suffit en effet de lire le texte de l'article IV de l'accord de Genève du 17 février 1966 (qui est reproduit à l'onglet n° 21 des dossiers des juges), et de se référer aux travaux préparatoires et à ses suites pour qu'il ne puisse faire aucun doute que vous avez compétence dans la présente espèce. Je peux donc, moi aussi, être relativement bref pour rappeler[120] que la décision du Secrétaire général des Nations Unies de renvoyer les Parties devant la Cour afin de régler définitivement leur différend est juridiquement obligatoire et que le Venezuela a pleinement consenti à ce qu'il en soit ainsi (I.). Cela étant fait, je reviendrai, encore plus brièvement, sur l'objet du litige qui vous est soumis (II.).

I. Le Venezuela a donné son consentement à la saisine de la Cour

3. Monsieur le président, dans la lettre qu'il vous a adressée le 18 juin 2018 (et qui se trouve à l'onglet n° 23 des dossiers des juges), le président de la République bolivarienne du Venezuela conteste la compétence de la Cour au prétexte que son pays ne l'aurait pas acceptée. A l'appui de cette prétention, il donne des explications qui peuvent sans doute se résumer ainsi :

1) bien qu'il s'agisse d'un traité, l'accord de Genève de 1966 ne serait qu'un arrangement par lequel le Guyana et le Venezuela se seraient engagés uniquement à rechercher une solution amiable ; et
2) la décision du Secrétaire général des Nations Unies du 30 janvier 2018 ne constituerait qu'une recommandation faite aux Parties de saisir la CIJ, recommandation qui serait dénuée de toute valeur obligatoire.

Dès lors, faute de consentement de la part du Venezuela, la Cour n'aurait pas compétence pour se prononcer sur la requête que le Guyana vous a soumise le 29 mars 2018. Ces explications, passablement confuses, ont été reprises dans le «mémorandum» que le défendeur a fait parvenir au greffier de la Cour le 28 novembre 2019[121]. Elles y sont assorties de la conclusion suivante :

> «A supposer même qu'il soit permis de le porter devant une cour ou un tribunal sur le fondement de l'accord de Genève, le différend ne pourra, de toute façon, être réglé dans le respect de cet accord que si l'on précise quel en est l'objet et quels sont les paramètres qu'il y a lieu de prendre en compte, au-delà des simples règles du droit international. Cela nécessiterait la conclusion d'un compromis.»[122]

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[120] Voir mémoire du Guyana (MG), p. 120-142.

[121] «Mémorandum», par. 62-103. Voir aussi le communiqué du Gouvernement du Venezuela, 17 juin 2020.

[122] *Ibid*, par. 83.

4. Je ne pense pas qu'il soit utile de s'appesantir sur le principe du consentement des Etats à la compétence de la Cour : le Guyana ne le conteste en aucune façon évidemment. Et il suffit de constater qu'en l'espèce le consentement des deux Parties résulte de la mise en œuvre des dispositions du fameux article IV, paragraphe 2, de l'accord de 1966, dont le Venezuela reconnaît le caractère obligatoire.

5. Il résulte de cette disposition que, faute de règlement du différend par un moyen choisi par les Parties ou par «un organisme international compétent», le Secrétaire général a été chargé par les Parties de *«choisir»* — de «choisir» pas de «proposer» — «un autre des moyens stipulés à l'Article 33 de la Charte des Nations Unies» ; il en résulte un engagement ferme de celles-ci d'accepter ce choix (A.). Le Secrétaire général a choisi ; cette décision s'impose au Venezuela (B.) et constitue, en l'espèce, le fondement de votre compétence (C.).

A. L'engagement conditionnel des Parties d'accepter la compétence de la Cour

6. Monsieur le président, l'article IV, paragraphe 2, de l'accord de 1966 constitue, sans aucun doute, un engagement — un engagement conditionnel mais un engagement — pris par les Parties d'accepter la compétence de la Cour. On peut le relire rapidement :

— la première longue phrase de cette disposition ne prête pas à controverse ; le Venezuela ne conteste pas que les deux gouvernements ne sont pas parvenus à un accord sur le choix d'un moyen de règlement pas davantage que pour s'en remettre à un organisme international compétent autre que le Secrétaire général des Nations Unies[123] ;

— il n'est pas non plus contesté que celui-ci a choisi d'offrir d'abord ses bons offices aux Parties et, en renforçant les pouvoirs de son représentant[124], de pratiquer une médiation ;

— quoiqu'il en soit, ces premières tentatives de règlement ont échoué, comme l'a montré à nouveau Philippe Sands il y a quelques instants ;

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[123] Voir *infra*, par. 10-12.

[124] Voir notamment la lettre en date du 15 décembre 2016 adressée à S. Exc. M. David Arthur Granger, président de la République du Guyana, par M. Ban Ki-moon, Secrétaire général de l'Organisation des Nations Unies (requête du Guyana (RG), annexe 6), et la lettre en date du 30 janvier 2018 adressée à S. Exc. M. David Arthur Granger, président de la République du Guyana, par M. António Guterres, Secrétaire général de l'Organisation des Nations Unies (RG, annexe 7). Voir aussi «mémorandum», par. 51-55, 57, 69, 71 et 77.

conformément au texte de l'article IV, paragraphe 2, il appartenait dès lors au Secrétaire général de *choisir* — «choisir», toujours — «un autre des moyens stipulés à l'Article 33 de la Charte des Nations Unies».

7. Le Venezuela admet que l'accord de 1966 est «un accord juridiquement contraignant, et déposé valablement auprès des Nations Unies, qui régit, sans équivoque, le différend territorial entre le Guyana et le Venezuela»[125]. En revanche, la Partie vénézuélienne semble considérer que tous les moyens stipulés à l'article 33 de la Charte doivent être épuisés successivement dans l'ordre de leur énumération[126] — comme Paul Reichler l'a assez longuement expliqué.

8. Cette interprétation n'est pas tenable, comme l'a démontré mon prédécesseur. Nul besoin donc de le répéter.

B. La décision du Secrétaire général est obligatoire pour les Parties

9. Mais, Monsieur le président, l'article IV n'aurait aucun sens si les Parties pouvaient récuser le choix effectué par le Secrétaire général des Nations Unies. Cette interprétation, qui découle du texte même de cette disposition, est conforme aussi bien à l'objet qu'au but de l'accord de 1966 ou au contexte dans lequel se situe l'article IV. Le paragraphe 1 prévoit également qu'en amont les deux gouvernements doivent choisir «sans retard *un des moyens* de règlement pacifique énoncé à l'Article 33 de la Charte des Nations Unies». Il s'agissait déjà d'un choix, commun mais discrétionnaire, pouvant se porter indifféremment sur l'un (et sur un seul) des modes de règlement mentionnés dans la Charte. Pour parvenir à ce résultat, il serait absurde d'exclure le recours à l'arbitrage ou au règlement judiciaire qui sont, assurément, les moyens les plus efficaces et les plus sûrs pour aboutir à la solution définitive du différend.

10. Et le fait que, par le protocole de 1970, les deux Parties soient convenues de suspendre ces délais ne change rien pour ce qui est de l'interprétation du traité de 1966 ; celui-ci a été conçu en vue d'aboutir à un règlement final du différend ; le protocole n'a fait qu'en suspendre l'application. Ceci est sans incidence sur son interprétation comme cela résulte clairement de son article III, que vous

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[125] Lettre adressée au président de la Cour internationale de Justice, M. Abdulqawi Ahmed Yusuf, par le président de la République du Venezuela, M. Nicolas Maduro Moros, en date du 18 juin 2018 ; voir aussi déclaration du ministre des affaires étrangères de la République du Venezuela, 2 mai 1981 (MG, annexe 50).

[126] Voir le communiqué du Gouvernement de la République bolivarienne du Venezuela, 31 janvier 2018 (MG, annexe 127), et «mémorandum», par. 85.

trouverez à l'onglet n° 21 des dossiers des juges, et aux termes duquel : «A la date à laquelle le présent Protocole cessera d'être en vigueur, l'application [de l'Article IV de l'Accord de Genève] sera reprise au point où elle aura été suspendue.» Le Venezuela lui-même l'a du reste expressément rappelé lorsqu'il a fait part, en 1981, de son intention de ne pas renouveler le protocole : «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.»[127]

11. Alors qu'il ne conteste pas que l'accord de 1966 est obligatoire, le Venezuela prétend que les lettres du Secrétaire général des Nations Unies aux chefs d'Etat des deux Parties, en date du 30 janvier 2018, ne sont pas constitutives d'une décision. Et le président Maduro d'affirmer, dans la lettre du 18 juin 2018 que j'ai citée tout à l'heure, que la seule obligation à laquelle seraient tenues les Parties est d'«arriver à une solution pratique et mutuellement satisfaisante, par le biais des négociations amicales». Une telle analyse fait fi aussi bien du texte que du contexte dans lequel les lettres du 30 janvier 2018 sont intervenues et revient à vider de toute substance à la fois l'accord de 1966 et la décision du Secrétaire général de cette même année 2018.

12. Je note d'ailleurs la contradiction flagrante qui existe entre cette affirmation, que reprend le «mémorandum»[128] et qui est incompatible avec le texte de ces instruments et une autre affirmation, contenue également aussi bien dans la lettre du chef de l'Etat vénézuélien que dans le «mémorandum», selon laquelle

> «[l]e seul objet et propos et effet juridique de la décision du Secrétaire général de l'Organisation des Nations Unies du 30 janvier 2018, conformément au paragraphe 2 de l'article IV de l'Accord de Genève, est de «choisir» un mécanisme particulier de règlement des différends pour arriver à une solution amiable du différend».

Et c'est très exactement ce qu'a fait le Secrétaire général. L'exigence d'un nouvel accord des Parties pour saisir la Cour aurait pour effet de soumettre cette saisine au bon vouloir d'une seule d'entre elles qui pourrait ainsi empêcher indéfiniment le règlement du différend, qui est pourtant l'objet même de l'accord de 1966.

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[127] Déclaration du ministre des affaires étrangères de la République du Venezuela, 10 avril 1981 (MG, annexe 49, p. 2) ; voir aussi la déclaration du ministre des affaires étrangères de la République du Venezuela, 2 mai 1981 (MG, annexe 50).

[128] Voir «mémorandum», par. 72.

13. Cette pétition de principe néglige en outre un important élément contractuel : conformément au paragraphe 1 de l'article IV, il est prévu que les deux gouvernements ««choisiront» («shall choose») sans retard un des moyens de règlement pacifique énoncés à l'Article 33» ; et, aux termes du début du paragraphe 2, ils doivent parvenir «*à un accord* sur le choix» de l'un de ces moyens. Ils sont ensuite invités à «se mettre d'accord» et à «s'entendre» sur le «choix» d'un organisme international compétent. Dans toutes ces hypothèses, c'est aux Parties qu'il appartient de *choisir* par accord *un* mode de règlement et de «*s'entendre* sur ce point». Mais rien de tel si elles n'y parviennent pas ; dans ce cas, les deux gouvernements «*s'en remettront, pour ce choix,* ... au Secrétaire général de l'Organisation des Nations Unies» et c'est encore plus net en anglais : «they *shall* refer the decision [la décision] to the Secretary-General». Jusque-là, on recherche l'accord des Parties ; et «si les moyens *ainsi choisis* ne mènent pas à une solution du différend», «le Secrétaire général *choisira (shall choose)* un autre des moyens stipulés à l'Article 33». Ici, par contraste, il n'est plus question d'accord des Parties ; le Secrétaire général doit *choisir*, et choisir seul — le sens du mot est clair***. C***omme le confirme le contexte très clair, choisir, c'est *décider*.

14. Dans sa lettre du 18 juin 2018, le président de la République bolivarienne du Venezuela a souligné que son pays «n'a jamais accepté la juridiction de cette honorable Cour internationale de Justice, pour des raisons de tradition historique et d'institutions fondamentales»[129]. Comme le montre la liste figurant à l'onglet n° 24 des dossiers des juges, le Venezuela est partie à au moins 15 conventions internationales en vigueur comportant des clauses de juridiction obligatoire de la CIJ auxquelles il n'a fait aucune réserve ; il est également lié par deux traités bilatéraux prévoyant la compétence de la Cour (conclus il est vrai du temps de la Cour permanente mais toujours en vigueur). Ceci donne à penser que la «tradition historique» de refus de la compétence obligatoire des juridictions internationales et les «institutions fondamentales» dont se prévaut le Venezuela ne sont pas très fermement établies…

15. Je relève également en passant que, contrairement à ce qu'allègue le président Maduro — toujours dans sa lettre du 18 juin 2018 —, le titre du traité de 1966 ne se réfère pas à «la conclusion d'une solution *amiable*» («un arreglo *amistosamente*») : en anglais comme en espagnol, il s'agit d'un

[129] Voir aussi *ibid.*, par. 101.

«Accord tendant à régler» — sans autre précision — «le différend entre le Venezuela et le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord relatif à la frontière entre le Venezuela et la Guyane britannique» — en anglais : «Agreement to *Resolve* the Controversy» ; en espagnol : «Acuerdo para *resolver* la controversia», tout ceci, sans autre précision ni condition ou critère particuliers. Au demeurant, «[l]e recours à un règlement judiciaire des différends juridiques, particulièrement le renvoi à la Cour internationale de Justice, ne devrait pas être considéré comme un acte d'inimitié entre États», comme cela résulte de la déclaration de Manille[130]. Et les Parties à l'accord de Genève de 1966 ne l'ont pas considéré comme tel : l'article IV de cet instrument se réfère à deux reprises aux moyens de règlement pacifique des différends énoncés à l'article 33 de la Charte des Nations Unies, dont l'énumération inclut le règlement judiciaire.

16. En constatant qu'«aucun progrès significatif [n'avait] été réalisé en vue d'un accord complet sur le règlement du différend» et en retenant «la Cour internationale de Justice comme moyen d'atteindre cet objectif»[131], le Secrétaire général s'est pleinement acquitté du rôle que lui confie l'article IV, paragraphe 2, de l'accord de 1966 et sa décision ouvre aux Parties la possibilité de saisir la Cour et constitue le fondement de sa compétence dans la présente affaire.

C. La décision du Secrétaire général établit la compétence de la Cour

17. Monsieur le président, le «mémorandum» ajoute à ceux qui figurent dans la lettre du président Maduro un autre argument, un peu plus sophistiqué mais guère plus convaincant :

> «Choisir le moyen de règlement que les Parties devront expérimenter ne suffit pas en soi pour donner compétence à une juridiction — en l'occurrence la Cour — en l'absence de consentement, et peut encore moins remplacer ce consentement. Donner raison au Guyana reviendrait à dire que le Secrétaire général de l'ONU pourrait recourir à n'importe quelle juridiction et que son choix suffirait pour que celle-ci devienne compétente, quelles que soient les règles régissant sa compétence. Cela ne peut évidemment pas être juste.»[132]

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[130] Déclaration de Manille sur le règlement pacifique des différends internationaux (A/37/590), annexée à la résolution 37/10 de l'Assemblée générale des Nations Unies, 15 novembre 1982 ; voir aussi les résolutions 3232 (XXIV) du 12 novembre 1974 («Examen du rôle de la Cour internationale de Justice») et 3283 (XXIX) du 12 décembre 1974 («Règlement pacifique des différends internationaux») ou IDI, résolution, session Neuchâtel, 1959, «Compétence obligatoire des instances judiciaires et arbitrales internationales», par. 1.

[131] Lettre en date du 30 janvier 2018 adressée à S. Exc. M. David Arthur Granger, président de la République du Guyana, par M. António Guterres, Secrétaire général de l'Organisation des Nations Unies (RG, annexe 7).

[132] «Mémorandum», par. 94 ; voir aussi par. 102.

18. Chacun le sait, Monsieur le président : «La Cour, exerçant une juridiction internationale, n'est pas tenue d'attacher à des considérations de forme la même importance qu'elles pourraient avoir dans le droit interne.»[133] Cette constatation vaut tout particulièrement lorsqu'il s'agit de l'expression du consentement étatique à votre juridiction.

19. Dès son premier arrêt, rendu le 25 mars 1948 dans l'affaire du *Détroit de Corfou*, la Cour a fermement considéré que «ni le Statut ni le Règlement n'exigent que ce consentement s'exprime dans une forme déterminée»[134] et, au contraire, que «rien ne s'oppose à ce que … l'acceptation de la juridiction … se fasse par deux actes séparés et successifs»[135]. La Cour ne s'est jamais départie de cette jurisprudence[136].

20. Conformément au *dictum* de la CPJI dans l'affaire des *Droits de minorités en Haute-Silésie* : «L'acceptation, par un État, de la juridiction de la Cour dans un cas particulier, n'est pas, selon le Statut, soumise à l'observation de certaines formes, comme, par exemple, l'établissement d'un compromis formel préalable.»[137]

21. Seule importe *l'intention* de l'Etat de conférer compétence à la Cour. Et, en la présente espèce, l'attitude de l'Etat défendeur, telle qu'elle s'est manifestée par l'adoption de l'accord de 1966 doit, sans aucun doute, «être regardée comme une «manifestation non équivoque» de la volonté de cet Etat — en l'occurrence le Venezuela — d'accepter de manière «volontaire, indiscutable» la compétence de la Cour»[138].

22. Certes, comme je l'ai dit, l'article IV ne suffit pas à entraîner cette compétence ; celle-ci n'est établie que parce que le Secrétaire général a, par sa décision, longuement murie, du 30 janvier 2018, choisi le forum de la Cour de céans en vue du règlement du différend, conformément à la

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[133] *Concessions Mavrommatis en Palestine, arrêt n° 2, 1924, C.P.J.I. série A n° 2*, p. 34. Voir aussi, *Cameroun septentrional (Cameroun c. Royaume-Uni), exceptions préliminaires, arrêt, C.I.J. Recueil 1963*, p. 28 ; *Certaines terres à phosphates à Nauru (Nauru c. Australie), exceptions préliminaires, arrêt, C.I.J. Recueil 1992*, p. 265, par. 65 ; *Application de la convention pour la prévention et la répression du crime de génocide (Croatie c. Serbie), exceptions préliminaires, arrêt, C.I.J. Recueil 2008*, p. 439, par. 82.

[134] *Détroit de Corfou (Royaume-Uni c. Albanie), exception préliminaire, arrêt, 1948, C.I.J. Recueil 1947-1948*, p. 27.

[135] *Ibid*., p. 28.

[136] *Activités armées sur le territoire du Congo (nouvelle requête : 2002) (République démocratique du Congo c. Rwanda), compétence et recevabilité, arrêt, C.I.J. Recueil 2006*, p. 118, par. 21 ; voir aussi *Droits de minorités en Haute-Silésie (écoles minoritaires), arrêt n° 12, 1928, C.P.J.I. série A n°* 15, p. 23.

[137] *Droits de minorités en Haute-Silésie (écoles minoritaires), arrêt n° 12, 1928, C.P.J.I. série A n° 15*, p. 23-24.

[138] *Ibid.*, p. 24.

mission dont les Parties l'avaient investi par l'accord de Genève. La combinaison de ces deux instruments ainsi conçus, le second réalisant la condition (volontaire) imposée par le premier, constitue le ferme fondement de votre compétence dès lors que votre haute juridiction a été saisie par l'une des Parties.

23. A cet égard, l'affaire de l'*Interprétation de l'accord gréco-turc du 1er décembre 1926*, évoquée dans notre mémoire[139], n'est pas sans intérêt. Cette affaire, d'une part, illustre la possibilité pour les Etats de s'accorder pour confier à un tiers la responsabilité de choisir les modalités de règlement du différend les opposant. Et, d'autre part, cette affaire établit que le choix opéré par le tiers investi de cette responsabilité est obligatoire pour les parties.

24. Le rejet par le Venezuela de la compétence de la Cour contraste de manière frappante avec la position qui était la sienne lors de la conclusion de l'accord de 1966. Comme l'a rappelé tout à l'heure le professeur Akhavan, le ministre des affaires étrangères de l'époque, M. Ignacio Iribarren Borges a expliqué, lorsqu'il a présenté cet instrument en vue de sa ratification par le Congrès vénézuélien, que, lors de la conférence de Genève, le Venezuela avait insisté pour inclure le recours à la CIJ parmi les modes de règlement envisagés, mais que la Grande-Bretagne et le Guyana, alors britannique, s'étaient opposés à ce qu'il en soit fait une mention expresse[140]. Dans ce même discours au Congrès, le ministre a également souligné que, durant les négociations, le Venezuela avait écarté la proposition britannique de donner à l'Assemblée générale un rôle dans le choix de la procédure de règlement et insisté pour que ce choix relève de la compétence exclusive du Secrétaire général[141].

25. Ces positions ont été réitérées par le Venezuela lorsqu'il s'est opposé au renouvellement du protocole de Port of Spain de 1970 qui suspendait l'application de l'accord de 1966[142]. En particulier M. Iribarren Borges déclara à cette occasion :

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[139] MG, par. 3.83.

[140] Voir aussi la déclaration du ministre des affaires étrangères de la République du Venezuela, M. Borges, 17 mars 1966, p. 16 ; les italiques sont de nous (MG, vol. II, annexe 33, p. 17).

[141] *Ibid.*

[142] Lettre en date du 19 septembre 1982 adressée au ministre des affaires étrangères de la République du Guyana par le ministre des affaires étrangères de la République du Venezuela (MG, annexe 56) ; lettre adressée au ministre des affaires étrangères de la République du Guyana par le ministre des affaires étrangères de la République du Venezuela, décembre 1981 (MG, annexe 55).

> «Since it is evident that no agreement exists between the parties in respect of the choice of an international organ to fulfil the functions provided for it in Article IV (2), it is obvious that this function now becomes the responsibility of the Secretary General of the United Nations.»[143]

26. Même conviction de la part des secrétaires généraux des Nations Unies successifs qui ont eu à connaître de l'affaire qu'il s'agisse de U Thant[144], de Javier Perez de Cuellar[145], de M. Ban Ki-moon[146] ou de M. António Guterres[147].

27. Faisant mine de résumer la position du Guyana, le président du Venezuela écrit dans sa lettre du 18 juin 2018 :

> «Les allégations du Guyana reposent sur deux éléments concomitants : *a)* un consentement présumé accordé par le Venezuela à la juridiction de cette honorable Cour, prétendument enregistrée dans l'accord de Genève ... ; et *b)* la décision du Secrétaire général des Nations Unies de proposer la Cour internationale de Justice.»

28. A quelques mots près, cela reflète effectivement notre thèse. Mais ces mots sont d'une importance capitale : d'une part, le consentement du Venezuela n'a pas été «présumé accordé» à la compétence de la Cour, il y a été *donné* et est, *effectivement*, enregistré dans l'accord de Genève ; d'autre part, le Secrétaire général n'a pas «*proposé* la Cour internationale de Justice», il l'a choisie ***;*** il a *décidé*, conformément à la mission qui lui avait été confiée d'accord partie, que votre haute juridiction constituait le forum approprié pour régler complètement et définitivement le différend opposant le Guyana et le Venezuela suite à la remise en cause par celui-ci de la validité de la sentence de 1899.

II. Remarques sur l'objet du différend soumis à la Cour

29. Mesdames et Messieurs les juges, il ne fait assurément aucun doute que vous avez compétence pour vous prononcer sur la requête dont le Guyana vous a saisis. A titre de codicille, je

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[143] Lettre en date du 15 octobre 1982 adressée au ministre des affaires étrangères de la République du Guyana par le ministre des affaires étrangères de la République du Venezuela (MG, annexe 59).

[144] Lettre en date du 4 avril 1966 adressée à M. Ignacio Iribarren Borges, ministre des affaires étrangères de la République du Venezuela, par U Thant, Secrétaire général de l'Organisation des Nations Unies (RG, annexe 5).

[145] Lettre en date du 31 mars 1983 adressée au ministre des affaires étrangères de la République du Guyana par M. Javier Perez de Cuellar, Secrétaire général des Nations Unies (MG, annexe 63).

[146] Lettre en date du 15 décembre 2016 adressée à S. Exc. M. David Arthur Granger, président de la République du Guyana, par M. Ban Ki-moon, Secrétaire général de l'Organisation des Nations Unies (RG, annexe 6).

[147] Lettre en date du 30 janvier 2018 adressée à S. Exc. M. David Arthur Granger, président de la République du Guyana, par M. António Guterres, Secrétaire général de l'Organisation des Nations Unies (RG, annexe 7). Voir aussi la déclaration du porte-parole du Secrétaire général des Nations Unies en date du 30 janvier 2018 (disponible uniquement en anglais et en espagnol : https://www.un.org/sg/en/content/sg/statement/2018-01-30/statement-attributable-spokesman-secretary-general-border (SG/SM/18879-ICJ/630).

souhaite cependant, avec votre permission Monsieur le président — je serai très bref — ajouter quelques remarques sur l'*objet* de ce différend. Je le fais par précaution, pour marquer l'importance que le Guyana attache à un règlement non seulement définitif, mais aussi complet, de l'ensemble du litige engendré par la remise en cause par le Venezuela de la sentence de 1899.

30. A cet égard, la position vénézuélienne est, pour le moins, passablement ambiguë. Alors que, comme le précise l'article premier de l'accord de Genève, le différend trouve son origine dans «la position du Venezuela, qui soutient que la sentence arbitrale de 1899 relative à la frontière entre la Guyane britannique et le Venezuela est nulle et non avenue», le Venezuela affirme maintenant que «[t]he validity or nullity of the Award is not the core of the dispute»[148] ; «the real dispute, [being] namely the *territorial dispute* . . . not the *validity or nullity* of the 1899 Award»[149]. En outre, cette affirmation contredit complètement l'interprétation qu'avait donnée le ministre vénézuélien des affaires étrangères en 1966 selon laquelle : «in accordance with article 4 [of the 1966 Agreement], the so-called Award of 1899 . . . must be reviewed through arbitration or the judicial appeal»[150]. En effet, si l'article premier identifie le «différend» comme étant «survenu … du fait de la position du Venezuela, qui soutient que la sentence arbitrale de 1899» relative à la frontière entre la Guyane britannique et le Venezuela est nulle et non avenue, on voit mal comment on pourrait soutenir maintenant que la sentence ne fait pas partie du différend, comme s'y obstine nouvellement le Venezuela.

31. Ce différend est présenté par l'accord de 1966 comme «résultant» de la remise en cause de la sentence arbitrale de 1899 qui délimitait la frontière entre le Venezuela et la colonie de la Guyane britannique. Il s'agit donc bien d'un différend territorial, ce qui implique, Mesdames et Messieurs de la Cour, que vous définissiez définitivement la frontière entre les deux pays — mais ce qui implique aussi, nécessairement, que vous décidiez à titre liminaire, si la sentence est valide ou non. Si elle l'est, ce que croit fermement le Guyana, la frontière est celle qu'elle décrit ; si elle ne l'était pas, il vous appartiendrait de la déterminer *de novo* — mais nous pensons que ce ne sera pas

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[148] «Mémorandum», par. 105.

[149] *Ibid.*, par. 113.

[150] Cité dans le «mémorandum» vénézuélien comme provenant de la déclaration de M. Iribarren Borges, ministre des affaires étrangères du Venezuela, du 17 mars 1966 [telle que reproduite à la page 35 de l'annexe au «mémorandum» — souligné dans le texte].

le cas car la validité de la sentence ne fait aucun doute. De toute manière, cette question est sans incidence sur votre compétence qui, seule, nous intéresse ici. Cela étant, il ne semble pas que les Parties soient en réel désaccord sur la portée de leur différend ; elles le considèrent toutes deux comme «territorial» — étant entendu que son règlement passe inévitablement par une décision portant sur la validité de la sentence de 1899 avec *toutes* les conséquences en résultant[151].

32. De façon tout à fait explicite, la déclaration ministérielle vénézuélienne de 1981 au sujet de la terminaison du protocole de 1970, qui suspendait l'accord de 1966 et qui figure à l'onglet n° 22 dans vos dossiers, montre clairement que, dans l'esprit du Venezuela, il ne faisait aucun doute que le différend concernait à la fois la validité de la sentence de 1899 et l'ensemble des conséquences liées à cette contestation :

> «The Geneva Agreement imposes a duty on the concerned Parties to seek satisfactory solutions for the practical settlement of the issue. That is why, Venezuela, from the beginning, has been willing to consider all the problems related to this matter, whether marine, political, cultural, economic or social and not to restrict it to just the examination of the nullity of the inexistent Award of 1899 . . . »[152].

33. Les Parties n'ayant pu résoudre le différend ainsi défini par la négociation en dépit des bons offices puis de la médiation du Secrétaire général des Nations Unies, il appartient maintenant à la Cour de céans de se prononcer sur la validité de la sentence et sur l'ensemble des questions résultant de la remise en cause de cette sentence par le Venezuela. Ce n'est qu'ainsi qu'elle réglera définitivement et complètement le différend qui lui est soumis.

34. Cette position est conforme à la lettre et à l'esprit de l'accord de Genève dont le préambule vise «*tout différend* en suspens entre le Royaume-Uni et la Guyane britannique»[153]. Il s'agit de «rechercher *des* solutions satisfaisantes» («*des* solutions» au pluriel et non pas *une* solution), «des solutions» donc, «pour le règlement pratique du différend survenu entre le Venezuela et le Royaume-Uni du fait de la position du Venezuela, qui soutient que la sentence arbitrale de 1899 relative à la frontière entre la Guyane britannique et le Venezuela est nulle et non avenue» — pas «le différend relatif à la validité de la sentence», pas «le différend relatif à la délimitation de la frontière» mais celui, plus vaste et qui les englobe, qui est «survenu … du fait de la position du Venezuela»

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[151] Voir déclaration du ministre des affaires étrangères de la République du Venezuela, M. Borges, 17 mars 1966, p. 16 ; les italiques sont de nous (MG, vol. II, annexe 33).

[152] Déclaration du ministre des affaires étrangères de la République du Venezuela, 2 mai 1981 (MG, annexe 50).

[153] Les italiques sont de nous.

remettant en cause la validité de la sentence. L'objectif est de parvenir «à un accord *complet* sur la solution» de ce différend en répondant à «*toutes* les questions en suspens» comme le spécifie l'article IV. Ceci est évidemment conforme à la mission de la Cour qui «est de régler les différends qui lui sont soumis» conformément au droit international — et il lui appartient de les régler complètement[154]. Elle ne peut pas le faire sans se prononcer, à titre préliminaire, sur la validité de la sentence.

35. Il en résulte aussi que les réticences qu'il vous est arrivé de manifester dans le passé à l'égard de requêtes portant simultanément sur des délimitations frontalières et des questions de responsabilité[155] n'ont pas lieu d'être en la présente occurrence : c'est bien *un* différend *global* résultant de la contestation d'une sentence arbitrale rendue il y a plus de 120 ans qu'il vous est demandé de régler dans sa totalité.

36. Monsieur le président, nous nous sommes efforcés d'informer la Cour «de tous les moyens de fait et de droit sur lesquels les Parties se fondent en ce qui concerne sa compétence» conformément aux instructions qui ont été adressées aux deux Etats par l'ordonnance du 19 juin 2018. Dans toute la mesure possible, nous avons tenu compte des arguments que le Venezuela a formulés çà et là en dehors de votre prétoire tout en regrettant sa présence (ou plutôt son absence !) fantomatique... — même virtuelle, cette présence eût été très bienvenue !

37. Monsieur le président, Mesdames et Messieurs de la Cour, je vous remercie de votre attention, et, en l'absence de la Partie vénézuélienne, je vous prie, Monsieur le président, de bien vouloir appeler à cette barre virtuelle Sir Sridath Ramphal, coagent de la République du Guyana pour la lecture de nos conclusions finales. Thank you very much.

The PRESIDENT: Je remercie le professeur Pellet. I now invite the Co-Agent of Guyana, H.E. Sir Shridath Ramphal, to read the submissions of the Government of Guyana. You have the floor.

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[154] Voir, par exemple, *Usine de Chorzów, compétence, arrêt n° 8, 1927, C.P.J.I. série A n° 9*, p. 25 ; *Détroit de Corfou (Royaume-Uni c. Albanie), fond, arrêt, C.I.J. Recueil 1949*, p. 26 ; ou *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), fond, arrêt, C.I.J. Recueil 1986*, p. 142, par. 283.

[155] Cf. *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria), exceptions préliminaires, arrêt, C.I.J. Recueil 1998*, p. 315, par. 90. Voir aussi différend relatif à la *Délimitation de la frontière maritime entre le Ghana et la Côte d'Ivoire dans l'océan Atlantique (Ghana/Côte d'Ivoire)*, *TIDM Recueil 2017*, p. 79, par. 248.

Sir Shridath RAMPHAL:

GUYANA'S SUBMISSIONS

1. Mr. President, eminent Judges of the Court, I will now close Guyana's oral pleadings by reading the final submissions:

> "On the basis of its Application of 29 March 2018, its Memorial of 19 November 2018, and its oral pleadings, Guyana respectfully requests the Court:
>
> 1. To find that it has jurisdiction to hear the claims presented by Guyana, and that these claims are admissible; and
>
> 2. To proceed to the merits of the case."

2. It remains only for me, on behalf of Guyana, to thank you, Mr. President, and Judges, for your patient hearing of our submissions in the novel conditions of our virtual hearing — and I end where I began: repeating Guyana's gratitude to the Court for your dauntless embrace of new technologies to render justice under law.

3. I take this opportunity to thank as well the Registrar and his entire staff, the outstanding interpreters, and especially the technical personnel who quite literally made this hearing possible.

4. Mr. President, history will commend the International Court of Justice of 2020 for your resolution in discharge of your high functions as "the principal judicial organ of the United Nations". It is an honour to be associated with this historic occasion. Thank you, Mr. President.

The PRESIDENT: I thank the Co-Agent of Guyana. The Court takes note of the final submissions which you have just read on behalf of your Government. Before the end of this sitting, I would like to give the floor to Judge Bennouna, who wishes to put a question to Guyana. M. le juge Bennouna, vous avez la parole.

M. le juge BENNOUNA : Je vous remercie, Monsieur le président. Ma question, vous venez de le dire, s'adresse à la délégation du Guyana. Elle est ainsi formulée :

> «Le paragraphe 2 de l'article IV de l'accord de Genève du 17 février 1966 se conclut par une alternative selon laquelle soit que la controverse a été résolue soit que tous les moyens de règlement pacifique prévus à l'article 33 de la Charte des Nations Unies ont été épuisés. Ma question est la suivante : Est-il possible de concevoir une situation où tous les moyens de règlement pacifique ont été épuisés sans que la controverse n'ait été résolue ?»

Je vous remercie, Monsieur le président.

The PRESIDENT: I thank Judge Bennouna. The written text of this question will be communicated to Guyana as soon as possible. Guyana is invited to provide its written reply to the question no later than Monday 6 July at 6 p.m. This brings the present sitting to an end. I would like to thank the Agent and Co-Agents, counsel and advocates of Guyana for their statements. In accordance with the usual practice, I shall request the Agent and Co-Agents of Guyana to remain at the Court's disposal to provide any additional information the Court may require. With this proviso, I declare closed the oral proceedings on the question of the Court's jurisdiction in the case concerning the *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela)*. The Court will now retire for deliberation. The Parties will be advised in due course as to the date on which the Court will deliver its Judgment. Since the Court has no other business before it today, the sitting is declared closed.

The Court rose at 5.35 p.m.

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