DISSENTING OPINION OF JUDGE BENNOUNA

[Original English Text]

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

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

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

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

3. This is the text upon which Guyana has relied in order to consider that the Secretary-General's choice of the International Court of Justice, in his letters dated 30 January 2018, allowed it to seise the Court unilaterally of its dispute with Venezuela concerning the legal validity and bind-

ing effect of the Arbitral Award of 3 October 1899 regarding the boundary between the two countries.

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

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

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

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

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

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

9. The Court has merely noted that the final phrase of Article IV, paragraph 2, does not call into question the consent of both Parties to judicial settlement (see paragraph 86 of the Judgment). According to the Court, "a judicial decision declaring the 1899 Award to be null and void without

delimiting the boundary between the Parties might not lead to the definitive resolution of the controversy, which would be contrary to the object and purpose of the Geneva Agreement" (*I.C.J. Reports 2011 (I)*, pp. 125-126, para. 133). In this case, however, the Court has been seised of a specific dispute which arose in 1962, concerning the validity of the Arbitral Award of 3 October 1899, and not of another quite distinct dispute, concerning the delimitation of the land boundary between the two States, which had arisen in the nineteenth century and was settled with *res judicata* effect by the Arbitral Award of 3 October 1899. And even if the Court were to find that the 1899 Award was invalid, it would be for the two Parties, in any event, to draw the necessary conclusions as to the state of their border and the dispute that would still exist between them on that subject. And it is for them, if necessary, to choose the means of peaceful settlement of such a dispute.

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

11. After a formal exercise in interpretation, the Court concludes that "by conferring on the Secretary-General the authority to choose the appropriate means of settlement of their controversy, including the possibility of recourse to judicial settlement by the International Court of Justice, Guyana and Venezuela consented to its jurisdiction" (*ibid.*, para. 115). Such a delegation by the two States of their power to consent

to the jurisdiction of the Court finds no clear and unequivocal basis in the text of the Geneva Agreement, which refers only to the choice of one of the means of settlement provided for in Article 33 of the Charter. In my opinion, it goes without saying that the choice of the International Court of Justice does not dispense with compliance with its Statute, which requires the prior consent of States to its jurisdiction. Indeed, in international practice, there is no precedent in which States can be said to have delegated to a third party, such as the Secretary-General, their power to consent to the Court's jurisdiction. But it is not just any delegation that is involved here! It would not be subject to any temporal limitation. It would open the possibility for the Secretary-General of the United Nations, simply by letter and at any time, to affirm the Parties' consent for their dispute to be submitted to the Court merely at the request of one of them. It was only after more than 50 years, and six Secretaries-General later, that Mr. António Guterres addressed his letter to both Parties on 30 January 2018 (reproduced in paragraph 103 of the Judgment). It should be noted that he was apparently not convinced that the choice of the International Court of Justice automatically opened up the possibility for one or other Party to refer the matter directly to the Court. Indeed, he offered the Parties the benefit of his continued good offices, stating: "should both Governments accept the offer of a complementary good offices process, I believe this process could contribute to the use of the selected means of peaceful settlement" (Judgment, para. 103). This is surely to say that, once the means of settlement has been chosen, the Parties must still agree to implement it.

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

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

(Signed) Mohamed BENNOUNA.