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El caso de Guyana c. Venezuela ante la Corte Internacional de Justicia: el efecto vinculante del consentimiento manifestado en un tratado para someterse a la competencia contenciosa de la Corte Internacional de Justicia

Trabajo de suficiencia profesional para obtener el título de **Abogado**

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1. Resumen

La resolución elegida para desarrollar el presente trabajo es la sentencia de la Corte Internacional de Justicia del 18 de diciembre de 2020, acerca de su competencia en el caso de la validez y efecto vinculante del Laudo Arbitral del 3 de octubre de 1899, que delimitó la frontera entre la hoy República Cooperativa de Guyana (en adelante, "**Guyana**") y la hoy República Bolivariana de Venezuela (en adelante, "**Venezuela**"), en el marco de la controversia de éstos respecto del río Esequibo y su orilla por el lado Este.

La Corte Internacional de Justicia, a través de su sentencia, se declaró competente para conocer la demanda planteada por Guyana, toda vez que consideró el origen voluntario del sometimiento de las partes a su jurisdicción en el Acuerdo de Ginebra de 1966, así como sostuvo que la controversia se encontraba cristalizada en un tratado vigente. La corte emitió esta resolución a pesar de la manifiesta negativa de Venezuela de participar en el proceso por considerar que no expresó su consentimiento para someter la controversia a la jurisdicción de la Corte.

La sentencia en cuestión plantea un debate en torno al consentimiento del Estado y si acaso Venezuela lo expresó cuando aceptó que el Secretario General de las Naciones Unidas decidiera el medio de solución de controversias.

Palabras clave: consentimiento, Secretario General de las Naciones Unidas, Guyana, Venezuela, Corte Internacional de Justicia, efecto vinculante, medios de solución de controversia, arreglo judicial, Acuerdo de Ginebra de 1966.

Abstract

The decision chosen to elaborate this paper is the International Court of Justice's Judgment of 18 December 2020 on the question of jurisdiction and/or admissibility regarding the validity and binding effect of the Arbitral Award of 3 October 1899, which marked the border between the countries which as of today are named as the Co-operative Republic of Guyana (hereinafter referred to as "**Guyana**") and the Bolivarian Republic of Venezuela (hereinafter referred to as "**Venezuela**") within the controversy of these States regarding the Essequibo river and its East shore.

The International Court of Justice, through its Judgment, found that it has jurisdiction to entertain the application filed by Guyana because of the voluntary origin of the parties' submission to such jurisdiction, written down in the 1966 Geneva Agreement; and because the court considered that the controversy was crystallized in a treaty in force. The court issued this decision in spite of the evident refusal of Venezuela to take part in the process for considering it did not express its consent to submit the controversy to the court's jurisdiction.

This Judgment raises discussions around the concept of consent and whether Venezuela did express its consent to be bound by the United Nations Secretary General's choosing of the means of dispute settlement.

Key words: consent, United Nations Secretary General, Guyana, Venezuela, International Court of Justice, binding effect, means of dispute settlement, judicial settlement, 1966 Geneva Agreement.

2. Índice de contenido

3. Introducción

El 18 de diciembre de 2020 se marcó un hito en la controversia territorial que Venezuela y Guyana han mantenido intermitentemente incluso por más años de los que Guyana tiene como república independiente. La Corte Internacional de Justicia se declaró competente -en virtud del principio *kompetenz-kompetenz*, reconocido en el Estatuto de la Corte- para conocerla y, consecuentemente, resolverla de manera definitiva y justa para ambos Estados.

A través de su sentencia, la Corte delimita el alcance de la controversia de manera que pueda encajar en su competencia, habiendo sido ésta convenida por Venezuela y Guyana a través de la celebración del Acuerdo de Ginebra de 1966, tratado que busca poner fin a la controversia territorial entre ambos países estableciendo una serie de procedimientos de trato directo o autocompositivos, para finalmente terminar haciendo uso del sistema internacional y del Derecho Internacional con métodos tanto autocompositivos como heterocompositivos.

Sucede, sin embargo, que Venezuela se ha mostrado en contra de adjudicar a la Corte la solución definitiva de la controversia, por considerar que no existe consentimiento expreso de los Estados en someter su controversia al órgano jurisdiccional principal de la Organización de las Naciones Unidas. Recordemos que, de acuerdo con la Carta de esta organización internacional, la jurisdicción de la Corte Internacional de Justicia es de carácter voluntario y no compulsivo, a menos que haya sido así establecido a través de algún acuerdo (como es, por ejemplo, el Pacto de Bogotá, del cual los Estados en cuestión no son parte).

Este trabajo tiene como elemento central el *consentimiento* y su efecto vinculante de cara al sometimiento a la competencia contenciosa de la Corte Internacional de Justicia. Analizamos, en particular, el consentimiento de Venezuela en obligarse por el Acuerdo de Ginebra de 1966 y, consecuentemente, a someter la controversia materia de tal tratado a la jurisdicción de la Corte Internacional de Justicia.

Al analizar el consentimiento vertido en el Acuerdo de Ginebra de 1966, estudiamos la tarea encomendada al Secretario General de las Naciones Unidas respecto de los medios de solución de controversias y medimos hasta qué punto estaba facultado para someter la controversia a la competencia jurisdiccional del órgano judicial de Naciones Unidas. Asimismo, incidimos en los efectos de un consentimiento otorgado por las partes de manera anticipada y supeditada a la decisión del Secretario General, así como en el carácter vinculante y sostenido en el tiempo de tal consentimiento.

En el análisis, hacemos uso de los métodos exegético y sistemático, a través del estudio de los tratados relevantes (en sus idiomas originales, siendo el caso del Acuerdo de Ginebra uno bilingüe), lo propuesto por la doctrina, lo sentenciado por la Corte y lo formulado por las partes en el marco del proceso y durante la ejecución del Acuerdo de Ginebra de 1966. Al respecto, serán relevantes tanto la Memoria presentada por Guyana como el Memorando que presentó Venezuela previo a la sentencia de la Corte, así como la sentencia y los votos singulares emitidos por los jueces.

A lo largo de todo el trabajo, identificamos posturas contrarias a la sentencia de la Corte Internacional de Justicia y valoramos cada una de ellas a la luz del Derecho Internacional consuetudinario, los principios generales del Derecho Internacional, los tratados y la doctrina para concluir que la sentencia de la Corte se ajusta al Derecho Internacional al encontrar los elementos suficientes para establecer que ésta es competente para conocer el fondo de la controversia.

4. Contenido del trabajo

4.1. Justificación de la elección de la resolución

La elección de la sentencia responde a dos factores: (i) la novedad y actualidad del caso, siendo uno reciente y que abarcará la agenda internacional toda vez que la Corte Internacional de Justicia ha confirmado que conocerá el fondo de la demanda de Guyana respecto de la nulidad del Laudo Arbitral referido al Esequibo; y (ii) la complejidad y lo controvertible de la decisión en sí, respecto de los elementos que configuran el consentimiento de un Estado en someter una controversia a un mecanismo de solución específico.

Respecto de la novedad y actualidad del caso, sabemos que la sentencia fue emitida en los últimos meses, específicamente el 18 de diciembre de 2020 y que, en tanto decide a favor de la competencia de la Corte respecto de la demanda de Guyana, conocerá el caso de fondo y emitirá un fallo que dé solución a una controversia territorial que data de más de un siglo. Ese proceso, en tanto pondría fin a uno de los conflictos territoriales más complicados de la región (Alija, 2019, p. 9), será observado por distintos actores y sujetos del Derecho Internacional, por la repercusión que la sentencia podrá tener en el mapa geopolítico, pero también en el Derecho Internacional.

La complejidad y lo controvertible de la decisión en sí responde al hecho de que el consentimiento de Venezuela en someter su controversia a la Corte Internacional de Justicia es anticipado y, de acuerdo con las declaraciones de dicho Estado, no habría sido manifestado, contrario a lo señalado en la sentencia. Por ello, compete a este análisis estudiar los componentes del consentimiento para así determinar si éste existió en el caso específico, en el marco del Derecho Internacional.

Es, por demás, un caso sumamente relevante para el Derecho Internacional, pues se trata del análisis, por un lado, del principio de solución pacífica de controversias recogido en el artículo 2, párrafo 3 de la Carta de las Naciones Unidas y, por otro, de la aplicabilidad

del artículo 33 de la Carta de Naciones Unidas, junto con normas bilaterales como el Acuerdo de Ginebra de 1966 relativo a la controversia entre Venezuela y el Reino Unido de Gran Bretaña e Irlanda del Norte, en adelante el Reino Unido (en representación de su entonces colonia, Guayana Británica) sobre la frontera entre Venezuela y la Guayana Británica. Asimismo, se analizarán resoluciones basadas en el Derecho Internacional, como el Laudo Arbitral del 3 de octubre de 1899, sobre la misma controversia.

4.2. Relación de los hechos sobre los que versa la controversia de la que trata la resolución

Consideraremos como hechos relevantes aquellos que han sido mencionados por la Corte Internacional de Justicia en su sentencia. De esta manera, la controversia se suscitaría durante el siglo XIX, con sendos reclamos territoriales respecto de la zona entre la desembocadura del río Esequibo y el río Orinoco. A raíz de esta situación, se desarrollaron los siguientes hitos[1]:

- 1897: el 2 de febrero, el entonces Reino Unido de Gran Bretaña e Irlanda y los entonces Estados Unidos de Venezuela celebraron el Tratado de Washington relativo a la solución fronteriza entre la Colonia Guayana Británica y los Estados Unidos de Venezuela. El tratado fue celebrado gracias a los buenos oficios de los Estados Unidos de América y dispuso la solución de la controversia a través de un arbitraje de derecho. En su artículo XIII, dispuso que el laudo solucionaría definitiva y completamente aquello que sea puesto en consideración del tribunal arbitral.

- 1899: el 3 de octubre, el tribunal designado emitió el laudo arbitral correspondiente y se dio fin al arbitraje, disponiendo la desembocadura del río Orinoco y la tierra a ambos lados de éste a Venezuela, así como la desembocadura del río Esequibo y la tierra a ambos lados al Reino Unido. La cuestión

[1] Debe considerarse que para la descripción de los hechos hemos recurrido a la paráfrasis de los mismos de acuerdo con la sentencia del 18 de diciembre de 2020 de la Corte Internacional de Justicia.

demarcatoria fue encargada a una comisión anglo-venezolana, que inició su trabajo al año siguiente y lo culminó el 10 de enero de 1905.

- 1905: el 10 de enero, comisionados de Venezuela y del Reino Unido, tras demarcar la frontera, celebraron un acuerdo expresando su conformidad con la labor demarcatoria en virtud del laudo. Este acuerdo incluyó la elaboración de un mapa fronterizo oficial donde se evidenciaba la labor demarcatoria encomendada y cumplida.

- 1962: el 14 de febrero, el representante permanente de Venezuela informó al Secretario General de las Naciones Unidas que su Estado consideraba remanente una controversia con el Reino Unido por la delimitación de la frontera, desconociendo así la validez del laudo arbitral de 1899. Esta posición fue reiterada el 22 de febrero del mismo año frente al cuarto comité de la Asamblea General de las Naciones Unidas.

- El mismo año, el 13 de noviembre, el gobierno del Reino Unido negó que existiera una controversia con Venezuela; sin embargo, propuso discutir, a través de medios diplomáticos, la revisión de los documentos relevantes considerados en el laudo arbitral de 1899. Ello fue aceptado por Venezuela y se inició una revisión conjunta.

- 1965: el 3 de agosto, culminó la revisión conjunta, pero con conclusiones contrarias. Los ministros de Relaciones Exteriores de ambos Estados se reunieron en fechas 9 y 10 de diciembre del mismo año, pero no hubo ningún progreso en acercar las posturas.

- 1966: en el marco de las negociaciones e intentos de arribar a un arreglo respecto de la delimitación fronteriza, el 17 de febrero, el Reino Unido y Venezuela celebraron el Acuerdo de Ginebra. En virtud de éste, se creó una comisión mixta que buscara resolver satisfactoriamente la controversia relativa a la validez del laudo arbitral de 1899. Cabe señalar que, si bien el Reino Unido celebró el tratado, lo hizo en representación de la Guayana Británica, a la que se le reconocería la

independencia el 26 de mayo del mismo año, fecha a partir de la cual se consideraría a la República Cooperativa de Guyana como tercer Estado parte del tratado, en virtud del artículo VIII del tratado.

- 1970: el 18 de junio, Guyana y Venezuela celebraron el Protocolo de Puerto España, en virtud del cual se adoptó la moratoria en la controversia, suspendiendo la disposición contenida en el artículo IV del Acuerdo de Ginebra (que disponía que debía elegirse un medio de solución de controversias en el marco del artículo 33 de la Carta de Naciones Unidas) durante la vigencia del protocolo. Este protocolo tuvo un plazo definido de doce años, el cual podía ser renovado si así lo decidían las partes.

- 1981: en diciembre, Venezuela manifestó su negativa a renovar el Protocolo de Puerto España, por lo que, de acuerdo con lo convenido *inter partes*, correspondió acordar un medio de solución de controversias en el marco del artículo 33 de la Carta de Naciones Unidas. Tal acuerdo no se dio en el plazo dispuesto por el artículo IV del Acuerdo de Ginebra (tres meses), por lo que, en virtud del mismo artículo del tratado, sometieron la decisión del medio de solución de controversias al Secretario General de las Naciones Unidas.

- 1983: el 31 de marzo, el Secretario General de las Naciones Unidas, Javier Pérez de Cuéllar, aceptó la responsabilidad de definir el medio de solución de controversias para resolver aquella existente entre Guyana y Venezuela. A comienzos de 1990, el Secretario General decidió que el medio apropiado para solucionar la controversia eran los buenos oficios. Tal medio de solución de controversias fue el utilizado entre 1990 y 2014, para luego ser reanudado en 2017 por un año.

- 2018: el 30 de enero, el actual Secretario General de las Naciones Unidas, António Guterres, informó a Guyana y Venezuela que, a consecuencia de la imposibilidad de llegar a una solución definitiva a través de los buenos oficios, eligió como medio de solución de controversias a la Corte Internacional de Justicia. Ese mismo año, el 29 de marzo, Guyana presentó su demanda ante la Corte.

- El 18 de junio de 2018 se llevó a cabo una audiencia preliminar en la Corte respecto de las reglas procesales. En ésta, la vicepresidente de Venezuela, Delcy Rodríguez Gómez, dio a conocer la postura del gobierno del presidente Nicolás Maduro Moros a través de una carta suscrita por éste último, en la que comunicaba que Venezuela "*never accepted the jurisdiction of [the] Court … due to its historical tradition and fundamental institutions [and still less] would it accept the unilateral presentation of the request made by Guyana nor the form and content of the claims expressed therein*" (2020, fundamento 5). Guyana, por otro lado, manifestó su deseo de que la Corte conozca la demanda planteada.

- Al día siguiente, el 19 de junio de 2018, la Corte emitió una orden estableciendo los plazos para la presentación de escritos que abordaran la cuestión de la jurisdicción. Al respecto, otorgó a Guyana plazo hasta el 19 de noviembre de 2018 para la presentación de su memoria; y, a Venezuela plazo hasta el 18 de abril de 2019 para la presentación de su contra-memoria. Guyana cumplió con presentar su memoria el día 19 de noviembre de 2018.

- 2019: el 12 de abril de 2019, el ministro de Asuntos Exteriores de Venezuela presentó ante la Corte una carta en la que reafirmó "*the decision of his Government 'not to participate in the written procedure*" (2020, fundamento 8). Posterior a eso, Venezuela no presentó una contra-memoria en el plazo otorgado. En respuesta, Guyana envió una carta el 24 de abril de 2019, sugiriendo cerrar la fase escrita y pasar a agendar la fase oral lo antes posible.

- El 15 de octubre, la Corte otorgó a Venezuela un plazo adicional -hasta el 28 de noviembre- para proveer de alguna información de cara a la decisión sobre su competencia. En la fecha final del plazo, Venezuela presentó un memorando.

- 2020: el 16 de marzo, la Corte anunció a las partes que la audiencia oral se llevaría a cabo el 30 de junio de 2020. En dicha fecha, se llevó a cabo la audiencia oral, en la que no estuvo presente la representación de Venezuela. Finalmente, el 18 de diciembre de 2020, la Corte dictó sentencia reconociendo su competencia para conocer la demanda respecto de la validez del laudo arbitral de 1899, así como respecto de la solución definitiva de la controversia territorial entre los Estados.

4.3. Identificación de los principales problemas jurídicos

Si bien la controversia planteada ante la Corte Internacional de Justicia es acerca de la validez legal y efecto vinculante del Laudo Arbitral de 1899, la sentencia concluye la etapa judicial de determinación de la competencia de la corte. En este respecto, existe el problema jurídico de si Venezuela expresó su consentimiento en obligarse a someter su controversia con Guyana a la Corte Internacional de Justicia. Ese resulta nuestro problema principal.

Para resolver esta interrogante, será necesario abordar los siguientes problemas secundarios y sub-problemas:

Primer problema secundario: ¿El Secretario General de Naciones Unidas estaba facultado para someter la controversia entre Guyana y Venezuela a la Corte Internacional de Justicia de conformidad con el Acuerdo de Ginebra de 1966 y el artículo 33 de la Carta de las Naciones Unidas?

a. Según el Acuerdo de Ginebra de 1966 y el artículo 33 de la Carta de las Naciones Unidas, ¿el Secretario General de las Naciones Unidas podía decidir someter la controversia entre Guyana y Venezuela al arreglo judicial?

b. ¿La decisión del Secretario General de las Naciones Unidas es vinculante (*binding character*) para las partes?

c. ¿El Acuerdo de Ginebra de 1966 expresa suficientemente el consentimiento de las partes para que su controversia sea sometida a la Corte Internacional de Justicia?

Segundo problema secundario: ¿Era necesario que Venezuela exprese su consentimiento posterior a la decisión del Secretario General para que la Corte Internacional de Justicia tenga jurisdicción sobre esta controversia?

a. ¿Cuáles son las obligaciones internacionales asumidas por Venezuela en el Acuerdo de Ginebra de 1966?

b. ¿Cuál es la consecuencia jurídica del no reconocimiento de Venezuela de la jurisdicción de la Corte Internacional de Justicia?

4.4. Análisis y posición fundamentada sobre los problemas de la resolución

A continuación, se presenta el análisis y la posición fundamentada acerca de los problemas jurídicos identificados en la sentencia de la Corte Internacional de Justicia, emitida el 18 de diciembre de 2020.

> **Principal problema jurídico: ¿La República Bolivariana de Venezuela expresó su consentimiento para someter su controversia con la República Cooperativa de Guyana a la Corte Internacional de Justicia?**

De acuerdo con la sentencia de la Corte Internacional de Justicia del 18 de diciembre de 2020, el principal órgano jurisdiccional de la Organización de las Naciones Unidas se declaró competente para conocer el fondo de la controversia entre Guyana y Venezuela, en función del artículo 36 de su Estatuto, cuyo primer párrafo establece que "[l]*a competencia de la Corte se extiende a todos los litigios que las partes le sometan y a todos los asuntos especialmente previstos en la Carta de las Naciones Unidas o en los tratados y convenciones vigentes*".

Siguiendo la línea argumentativa de la Corte Internacional de Justicia, su competencia está determinada por un tratado vigente cuyo tenor contiene el consentimiento de los Estados parte en obligarse a someter su controversia, entre algunas otras opciones, al arreglo judicial en virtud del artículo 33 de la Carta de las Naciones Unidas: el Acuerdo de Ginebra de 1966. Por consiguiente, se desprende de la sentencia que existe consentimiento de ambas partes en someter la controversia, en aplicación de este tratado, a la Corte Internacional de Justicia.

No obstante, y como veremos en el desarrollo del presente informe, distintos publicistas, así como el gobierno de Venezuela, defienden la posición de que la corte carece de competencia en el presente caso, toda vez que los Estados parte no habrían expresado su consentimiento en someter la controversia a la Corte Internacional de Justicia a través del Acuerdo de Ginebra de 1966. En los siguientes acápites, desarrollaremos los componentes de la respuesta al problema jurídico principal.

4.4.1. Primer problema secundario: *¿El Secretario General de Naciones Unidas estaba facultado para someter la controversia entre Guyana y Venezuela a la Corte Internacional de Justicia de conformidad con el Acuerdo de Ginebra de 1966 y el artículo 33 de la Carta de las Naciones Unidas?*

El Acuerdo de Ginebra de 1966 tiene el objeto y fin[2] de solucionar, a través de procedimientos en éste establecidos, la controversia entre Guyana y Venezuela relativa a la nulidad del laudo arbitral de 1899. Ello es considerado así por la Corte Internacional de Justicia (2020, fundamento 36) cuando indica que el Reino Unido aceptó revisar los documentos relevantes que llevaron al laudo arbitral de 1899 sin aceptar que existía una controversia sobre aquello resuelto por el tribunal arbitral. Al respecto, no se convino la nulidad ni suspensión de los efectos del laudo.

Al respecto, es importante referirnos al contexto jurídico de este tratado. De acuerdo con Huth, Croco y Appel (2011, pp. 417-418), existen tres fases en la solución pacífica de disputas territoriales: (i) el desafío al *statu quo*, que no es más que el accionar del Estado inconforme con la delimitación fronteriza; (ii) las negociaciones, que implican la entrada en escena del Estado reclamado y (iii) la elección del modo de solución, que puede bien implicar el trato directo entre los Estados o el inicio formal de un proceso de solución pacífica de disputas, mediante el arbitraje de derecho o el arreglo judicial (a través de la Corte Internacional de Justicia).

En este caso, el tratado se celebró como consecuencia de la primera y segunda fase, ya que Venezuela desafió el *statu quo* reclamando la nulidad del laudo arbitral de 1899 y, desde tal reclamo en 1962, se darían negociaciones entre los Estados hasta 1966, año en que se celebró el Acuerdo de Ginebra. Éste, al disponer procedimientos distintos de

[2] Adoptamos la definición de *objeto y fin* de Remiro Brótons, considerando que el objeto "*desempeña el papel del realismo y de la moderación*", mientras que el fin "*el papel del idealismo y del progreso*" (1987, p. 313). Ambos conceptos van de la mano en tanto establecen una realidad (la controversia) y un ideal (la solución definitiva).

solución de disputas, marcaría el inicio de una tercera fase de la solución pacífica de la disputa. De esta manera, sostenemos que es a través de este tratado que se gatillaría el sometimiento de esta controversia al arreglo judicial.

El Acuerdo de Ginebra es, en esa misma línea, un tratado relacionado exclusivamente al arreglo pacífico de una controversia ya existente, a lo que Orihuela llama un *acuerdo de compromiso* por incluir en su adopción la finalidad de "[…] *atribuir competencia a un tercero* […] *para resolver una controversia ya existente entre las partes*" (2005, p. 14). En este punto, Orihuela considera que:

> *Resulta evidente que la atribución de competencia, objeto esencial del acuerdo, se efectúa respecto de controversias, hechos o situaciones existentes con anterioridad a la entrada en vigor del mismo, incluso anterior a todo el proceso de formación de este tratado y, además sólo en relación con ese caso concreto* (2005, p. 14).

Cabe resaltar, en este punto, que el Secretario General no tenía la atribución de *resolver la controversia*; tenía la tarea de *escoger* un medio de solución de controversias, por lo que no es exactamente a éste a quien Orihuela se estaría refiriendo. Por el contrario, se estaría refiriendo a los potenciales terceros a quienes se les atribuiría la competencia para resolver la controversia, de escogerlo así -como veremos- el Secretario General.

La primera parte del desarrollo de los problemas jurídicos corresponde a un análisis sobre la voluntad de los Estados en cuestión plasmada en el Acuerdo de Ginebra de 1966. Así, el objetivo es establecer si el Secretario General estaba facultado para (i) decidir el medio del arreglo judicial para solucionar la controversia, (ii) vincular a los Estados parte a tal decisión y (iii) si existía consentimiento específicamente para someter la controversia a la Corte Internacional de Justicia.

a. *Según el Acuerdo de Ginebra de 1966 y el artículo 33 de la Carta de las Naciones Unidas, ¿el Secretario General de las Naciones Unidas podía decidir someter la controversia entre Guyana y Venezuela al arreglo judicial?*

Respecto de la capacidad del Secretario General de las Naciones Unidas de decidir someter la controversia al arreglo judicial, Guyana planteó en los fundamentos 3.30 al 3.36 de su Memoria ante la Corte, que en virtud del Acuerdo de Ginebra de 1966 y del artículo 33 de la Carta de las Naciones Unidas, el Secretario General podía decidir por cualquiera de los medios de solución pacífica de controversias establecidos en el artículo 33, entre los cuales se encuentra el arreglo judicial. Venezuela, por su lado, reconoció en el párrafo 69 de su Memorando el *efecto jurídico* que la decisión del Secretario General podía tener; sin embargo, condicionó tal efecto jurídico al cumplimiento del artículo IV del Acuerdo de Ginebra. Al respecto, la Corte anotó en su fundamento 83 que los Estados parte invistieron al Secretario General con la autoridad de escoger el medio más apropiado para solucionar la controversia, lo que incluía el arreglo judicial.

Ciertamente, el Acuerdo de Ginebra de 1966 dispuso, en su artículo IV, numeral 2, la atribución del Secretario General de las Naciones Unidas de decidir someter la controversia al arreglo judicial; sin embargo, tal atribución no es absoluta: existen presupuestos que deben cumplirse previamente. El texto de la versión oficial en idioma español es el siguiente:

Artículo IV

(1) Si dentro de un plazo de cuatro años contados a partir de la fecha de este Acuerdo, la Comisión Mixta no hubiere llegado a un acuerdo completo para la solución de la controversia, referirá al Gobierno de Venezuela y al Gobierno de Guayana en su Informe final cualesquiera cuestiones pendientes. Dichos Gobiernos escogerán sin demora uno de los medios de solución pacífica previstos en el Artículo 33 de las Naciones Unidas.

(2) *Si dentro de los tres meses siguientes a la recepción del Informe final el Gobierno de Venezuela y el Gobierno de Guayana no hubieren llegado a un acuerdo con*

respecto a la elección de uno de los medios de solución previstos en el Artículo 33 de la Carta de la Naciones Unidas, referirán la decisión sobre los medios de solución a un órgano internacional apropiado que ambos Gobiernos acuerdem [sic.]*, o de no llegar a un acuerdo sobre este punto, al Secretario General de las Naciones Unidas. Si los medios así escogidos no conducen a una solución de la controversia, dicho órgano, o como puede ser el caso, el Secretario General de las Naciones Unidas, escogerán otro de los medios estipulados en el Artículo 33 de la Carta de la Naciones Unidas, y así sucesivamente, hasta que la controversia haya sido resuelta, o hasta que todos los medios de solución pacífica contemplados en dicho Artículo hayan sido agotados*. (Acuerdo de Ginebra de 1966, Art. IV, 17 de febrero de 1966)[3]

Para que el Secretario General de las Naciones Unidas pudiera decidir sobre el medio de solución pacífica de controversias debía, en primer lugar, correr un plazo de cuatro años a partir de la fecha de celebración del tratado, es decir, desde el 17 de febrero de 1966, en el que la Comisión Mixta podría llegar a lograr un acuerdo; pero ello no sucedió, por lo que corresponde analizar el segundo presupuesto.

En tanto el informe final de la Comisión Mixta evidencie la falta de acuerdo, el tratado dispuso a las partes observar un plazo de tres meses a partir de la entrega de tal informe para acordar un medio de solución de controversias en el marco del artículo 33 de la Carta

[3] La versión oficial en idioma inglés es congruente con la versión en idioma español:

Article IV

(1) If, within a period of four years from the date of this Agreement, the Mixed Commission should not have arrived at a full agreement for the solution of the controversy it shall, in its final report, refer to the Government of Guyana and the Government of Venezuela any outstanding questions. Those Governments shall without delay choose one of the means of peaceful settlement provided in Article 33 of the Charter of the United Nations.

(2) *If, within three months of receiving the final report, the Government of Guyana and the Government of Venezuela should not have reached agreement regarding the choice of one of the means of settlement provided in Article 33 of the Charter of the United Nations, they shall refer the decision as to the means of settlement to an appropriate international organ upon which they both agree or, failing agreement on this point, to the Secretary-General of the United Nations. If the means so chosen do not lead to a solution of the controversy, the said organ or, as the case may be, the Secretary-General of the United Nations shall choose another of the means stipulated in Article 33 of the Charter of the United Nations, and so on until the controversy has been resolved or until all the means of peaceful settlement there contemplated have been exhausted*.

(Acuerdo de Ginebra de 1966, Art. IV, 17 de febrero de 1966)

de las Naciones Unidas. Ello tampoco sucedió, por lo que corresponde analizar el siguiente presupuesto.

En la medida que los Estados no pudiesen acordar un medio de solución de controversias, el tratado dispuso que pudieran referir tal decisión a *un órgano internacional apropiado que ambos gobiernos acuerden* (Acuerdo de Ginebra de 1966, Art. IV.2, 17 de febrero de 1966: "*an appropriate international organ upon which they both agree*") o, en el supuesto que tampoco puedan acordar tal designación, al Secretario General de las Naciones Unidas.

Por otro lado, además de que se cumplan los presupuestos convenidos en virtud del tratado, éste también dispuso que, una vez que la decisión sea referida al Secretario General de las Naciones Unidas, éste pueda elegir uno y luego otro medio de solución de controversias, *sucesivamente*, hasta llegar a resolver la controversia o hasta agotar los medios en el marco del artículo 33 de la Carta de las Naciones Unidas. A tal efecto, entendemos que la tarea encomendada al Secretario General se satisfaría al resolverse la controversia o incluso, de no haberse resuelto, al haber agotado todos los medios de solución previstos por el artículo 33 de la Carta.

Previo a seguir desarrollando el presente análisis, y habiendo mencionado el artículo 33 de la Carta de Naciones Unidas, corresponde analizar si el éste contempla el arreglo judicial. El texto es el siguiente:

> *Artículo 33*
>
> *1. Las partes en una controversia cuya continuación sea susceptible de poner en peligro el mantenimiento de la paz y la seguridad internacionales tratarán de buscarle solución, ante todo, mediante la negociación, la investigación, la mediación, la conciliación, el arbitraje, el arreglo judicial, el recurso a organismos o acuerdos regionales u otros medios pacíficos de su elección* […] [subrayado añadido].

El arreglo judicial está, efectivamente, contemplado por el artículo 33 de la Carta de las Naciones Unidas, por lo que queda establecido que el Secretario General de las Naciones Unidas podía, en virtud del Acuerdo de Ginebra de 1966 y el artículo 33 de la Carta, decidir someter la controversia entre Guyana y Venezuela al arreglo judicial.

Adicionalmente a ello, y como seguiremos desarrollando, es preciso atender al hecho de que la Corte Internacional de Justicia es el órgano judicial principal de la ONU, expresado así en el artículo 92 de la Carta de las Naciones Unidas. De esta manera, tiene sustento en el Derecho Internacional que el Secretario General haya decidido que la controversia se resuelva sometiéndola a la jurisdicción de este órgano judicial.

Respecto de la aplicación conjunta del Acuerdo de Ginebra de 1966 y de la Carta de las Naciones Unidas, es importante considerar algunas posturas contrarias a la posición sentada por la Corte. Así, Rodríguez Cedeño señala lo siguiente:

> *De la lectura y de la interpretación del texto general, debe entenderse que la escogencia del arreglo judicial, como la de cualquier otro de los medios previstos en el artículo 33 de la Carta de las Naciones Unidas exige* […] *el agotamiento de todos los medios políticos de solución previstos en el artículo 33 de la Carta de las Naciones Unidas* […] *antes de recurrir al arreglo judicial, dada su naturaleza, objeto y fines.* (2020, p. 12)

Desde luego, la lectura que hace Rodríguez Cedeño es inversa a la que se desprende de la lectura del artículo IV del Acuerdo de Ginebra de 1966 y del artículo 33 de la Carta de Naciones Unidas, pues la tarea del Secretario General -como adelantamos *supra*- es la de escoger un medio de solución y, si no se soluciona la controversia, escoger otro y *así sucesivamente* sin que deban agotarse necesariamente todos los medios autocompositivos antes de acudir al arreglo judicial[4]. De hecho, ni el artículo IV del Acuerdo de Ginebra

[4] Situación que, como bien indica el Juez Patrick Robinson (Corte Internacional de Justicia-Robinson, 2020, p. 3), es de imposible ocurrencia, toda vez que el artículo 33 de la Carta de las Naciones Unidas

de 1966 ni el artículo 33 de la Carta de Naciones Unidas establecen prevalencia alguna de medios autocompositivos sobre medios heterocompositivos.

En la misma línea que Rodríguez Cedeño, Opertti considera que el Acuerdo de Ginebra "[…] *ordena una selección progresiva de los 'medios de solución'*" (2020, p. 49); sin embargo, carece de fundamento jurídico. No existe, sostenemos, una obligación consuetudinaria ni convencional de seleccionar progresivamente los medios de solución a razón de su nivel de composición.

Por el contrario, sostenemos que el principio de la no existencia de jerarquía ni prevalencia de un medio de solución de controversias sobre otro (en adelante, el principio de no prevalencia) garantiza la discrecionalidad del Secretario General de Naciones Unidas al escoger un medio de solución de controversias de acuerdo a los criterios que éste considere[5]. Este principio, abordado por Cardona-Llorens (2020, p. 22)[6], sustentaría que la expresión *y así sucesivamente* no implica que la elección deba seguir el orden enunciativo de los medios de solución previstos en el artículo 33 de la Carta de Naciones Unidas; implica, en efecto, que el Secretario General debe escoger los medios de solución de controversias hasta que la controversia haya quedado resuelta o hasta que los medios establecidos por el artículo 33 de la Carta de las Naciones Unidas se hayan agotado.

enumera dos medios de solución de controversias heterocompositivos que necesariamente culminan con una resolución firme, vinculante e inapelable, a saber: el arbitraje y el arreglo judicial.

5 De esta manera, sustentamos la libertad de criterio a través del cual el Secretario General podría *escoger* el medio de solución que considere. A tal efecto, es interesante considerar que López Martín (2013, pp. 17-19) indica que en controversias estatales territoriales el arbitraje resulta el medio de solución más habitual, seguido por el arreglo judicial, el cual tiene el mayor número de casos resueltos de forma definitiva. En línea más crítica, Krisch (2014, p. 1) considera que la incapacidad del Derecho Internacional clásico de solucionar problemas propios de la globalización deviene en la necesidad de contar con mecanismos no convencionales ejecutados por instituciones internacionales poderosas. Sin duda Krisch no hace referencia a la jurisdicción voluntaria de la Corte. No obstante, sí coincide con que las soluciones a los problemas que aquejan la agenda internacional deben ser solucionados por medios distintos a los autocompositivos. Éste sería uno de ellos, y por eso el Secretario General habría preferido *escoger* el arreglo judicial.

6 Es menester indicar que Cardona-Llorens argumenta la postura contraria a la de la Corte Internacional de Justicia, en línea con la de Rodríguez Cedeño. De acuerdo con él, sin embargo, al principio de no prevalencia se aplicaría una excepción de naturaleza convencional (supuesto que negamos en el desarrollo del presente acápite).

En este punto, corresponde traer a colación la siguiente cita de Villalta, miembro del Comité Jurídico Interamericano, quien considera que el principio se aplica incluso entre medios diplomáticos (autocompositivos) y jurídicos (heterocompositivos), apuntando que sólo se podría aplicar una prevalencia en caso se haya pactado:

> *Esto es normal en los tratados de solución pacífica de controversias que contemplan expresamente el recurso de las negociaciones directas, algunos de ellos incluso llegan a establecer que las Partes deben tratar de solucionar un diferendo entre ellas mediante la negociación directa antes de invocar otros medios de solución pacífica de controversias.* (Villalta, 2014, p. 18)

A fortiori, sostenemos que habiéndose llevado a cabo medios autocompositivos de solución a esta controversia, no existe un orden específico en el que los siguientes medios de solución de controversias tendrían que ser escogidos en virtud de los artículos IV del Acuerdo de Ginebra y 33 de la Carta de las Naciones Unidas respectivamente.

En suma, encontramos que el Secretario General podía decidir someter la controversia al arreglo judicial, toda vez que el artículo IV del Acuerdo de Ginebra y el artículo 33 de la Carta de Naciones Unidas permitían el uso de ese medio de solución heterocompositivo sin ninguna restricción ni prevalencia de otros medios. Además, nos basamos también en la aplicación del principio de no prevalencia, *a fortiori* habida cuenta de que el Secretario General escogió, previamente, métodos autocompositivos que no llevaron a una solución definitiva de la controversia.

b. ¿La decisión del Secretario General de las Naciones Unidas es vinculante (binding character) para las partes?

Respecto del carácter vinculante de la decisión del Secretario General de las Naciones Unidas para los Estados parte, Guyana estableció en el fundamento 3.59 de su Memoria que la decisión del Secretario General había sido tomada en observancia de los términos

del artículo IV del Acuerdo de Ginebra y que, por ello, resulta vinculante para las partes. Venezuela, por su lado, a través del párrafo 94 de su Memorando, argumentó que ninguna disposición del Acuerdo de Ginebra de 1966 evidencia el consentimiento de los Estados partes en someter la controversia a la jurisdicción de la Corte Internacional de Justicia. La Corte, en su fundamento 74, consideró que la decisión tomada por el Secretario General y que fue previamente delegada por las partes, respecto de la elección del medio de solución de controversias, es vinculante para las partes.

Si bien el texto del tratado no incluye una mención expresa al carácter vinculante que tendría la decisión del Secretario General, ello se desprende del sentido corriente de los términos del tratado en su contexto y teniendo en cuenta el objeto y fin o la *ratio legis* del tratado. La regla general de interpretación del *sentido corriente de los términos del tratado en su contexto y teniendo en cuenta el objeto y fin del tratado* se encuentra, de acuerdo con un sector de la doctrina y con la sentencia de la Corte Internacional de Justicia (2020, fundamento 70), en el Derecho Internacional consuetudinario desde antes de la elaboración del proyecto de artículos al respecto por parte de la Comisión de Derecho Internacional de la ONU en 1966 (Villiger, 2009, p. 440). Esta regla fue posteriormente recogida por la Convención de Viena sobre el Derecho de los Tratados de 1969.

Al respecto, en 1950 la Corte Internacional de Justicia consideró lo siguiente en la Opinión Consultiva sobre la admisión de un Estado a las Naciones Unidas:

> […] *the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. <u>If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter</u>* [subrayado añadido]. (1950, p. 8)

En aplicación de la regla general de interpretación, que fue codificada en el artículo 31 de la Convención de Viena sobre el Derecho de los Tratados de 1969, y que ha sido mencionada por la Corte Internacional de Justicia, consideramos que la siguiente

disposición del artículo IV del Acuerdo de Ginebra de 1966 establece el punto de partida para dar respuesta a la pregunta que atañe a este apartado:

> […] *el Secretario General de las Naciones Unidas* [escogerá] *otro de los medios estipulados en el Artículo 33 de la Carta de la Naciones Unidas, y así sucesivamente, hasta que la controversia haya sido resuelta, o hasta que todos los medios de solución pacífica contemplados en dicho Artículo hayan sido agotados.*

El verbo *escoger* se usa en lugar de *proponer* o *sugerir*, del mismo modo que en la versión en idioma inglés se usa el verbo *choose*, que tiene un significado distinto a *propose* o *suggest*. Incluso, el verbo en ambos casos es una repetición del esgrimido en la disposición anterior, que se refiere a los *medios escogidos* (*the means so chosen*) y que no condujeron, previamente, a la solución de la controversia.

Ante esta interpretación se muestra en desacuerdo Rodríguez Cedeño, quien arguye que "[…] *la escogencia del arreglo judicial* […] *exige* […] *el consentimiento de las partes para recurrir a ella* […]", considerando de esta manera que "[…] *el Secretario General no podía someter la controversia a la Corte, como lo hizo, sin el consentimiento expreso de Venezuela* […]" (2020, p. 12). El autor no explica por qué la *escogencia* exige el consentimiento posterior. Más aun, no explica el sentido corriente del término *escoger* en la época de la adopción del Acuerdo de Ginebra, lo que resulta básico para la objetiva comprensión de la voluntad de las partes al momento de manifestar su consentimiento en obligarse por el tratado.

A tal efecto, la Real Academia Española consideraba, en 1925[7], que el verbo *escoger* implicaba "[t]*omar o elegir una o más cosas o personas entre otras*", lo que se condice con la realidad de la pluralidad de medios de solución pacífica de controversias dispuestos

[7] Si bien en este caso la Real Academia Española no ha variado la definición de este término, tomaremos en cuenta definiciones que sean, en la medida de lo posible, contemporáneas a la adopción del Acuerdo de Ginebra de 1966, de manera que podamos entender el sentido corriente de los términos del tratado en su contexto.

en la Carta de las Naciones Unidas. Lo mismo sucede con la definición que el MacMillan's Modern Dictionary (1938) atribuye al verbo *choose*: "*take or select from a number; elect; wish; be pleased; v.i. make a selection*". En ambos casos, el verbo empleado denota una capacidad de discernir y *elegir* de entre un número de opciones, lo que hace sentido en su contexto y teniendo en cuenta el objeto y fin del tratado, toda vez que provee la elección de un medio de solución pacífica de controversias.

Por otro lado, es importante considerar que el artículo IV del Acuerdo de Ginebra de 1966 también dispone que, previo a la elección del medio de solución de controversias por parte del Secretario General, los Estados parte "[…] *referirán la decisión sobre los medios de solución* […] *al Secretario General de las Naciones Unidas*", que es lo que en la práctica sucedió en 1981, de acuerdo con la cronología desarrollada en el punto 4.2 del presente documento y que fue desarrollada también por la Corte Internacional de Justicia en su sentencia del 18 de diciembre de 2020.

En este caso, el verbo *referir* o *refer to* en idioma inglés, busca indicar un despojo de la decisión comentada líneas arriba por parte de los Estados parte, y su atribución al Secretario General. Sin embargo, de acuerdo con Rodríguez Cedeño, la palabra *referir* haría alusión a la *remisión* de la cuestión del medio de solución de controversias al Secretario General, como lo señala a continuación:

> *La "remisión" (no sumisión) unilateral efectuada por el Secretario General, en el marco de su rol como facilitador en la solución de la controversia, no puede en definitiva sustituir la voluntad del Estado ni puede, en consecuencia, constituir la base del consentimiento de Venezuela para que la Corte pueda ejercer su jurisdicción.* (2020, p. 13)

La postura de Rodríguez Cedeño se basa en la interpretación del artículo IV del Acuerdo de Ginebra, indicando que éste "[…] *exige el consentimiento expreso de las partes para que alguno de* [tales medios] *pueda conocer una controversia*" (2020, p. 13). No obstante, ninguna disposición del tratado indica explícitamente -o, a nuestro juicio, implícitamente-

la necesidad de que los Estados partes validen la decisión del Secretario General a través de su consentimiento posterior.

Sin perjuicio de que la no necesidad de consentimiento ulterior será abordada en un acápite posterior, es de especial relevancia que el Juez Peter Tomka emitió una declaración concurrente en la que indicó que el Acuerdo de Ginebra de 1966 autorizó al Secretario General a escoger el medio de solución de controversias:

> […] *the Parties, by concluding the Geneva Agreement, consented to the jurisdiction of the International Court of Justice, should the Secretary-General of the United Nations decide to choose the Court as the means of settlement of the dispute in the exercise of his authority under Article IV, paragraph 2, thereof.* (Corte Internacional de Justicia-Tomka, 2020, p. 1)

De esta manera, el Juez Tomka considera -como lo hizo la Corte Internacional de Justicia de manera colegiada- que el sentido de la disposición contenida en el segundo párrafo del artículo IV del Acuerdo de Ginebra de 1966 era el de atribuir al Secretario General la decisión vinculante del medio de solución de controversias a utilizar.

Lo mismo declara el Juez Patrick Robinson, quien añade que "[…] *it is settled that consent to the jurisdiction of the Court does not have to be expressed in a particular form*" (Corte Internacional de Justicia-Robinson, 2020, p. 1). En otras palabras, la libertad formal de manifestación del consentimiento en someterse a la jurisdicción de la Corte Internacional de Justicia resulta clave en entender por qué el segundo párrafo del artículo IV del Acuerdo de Ginebra no indicó expresamente que, entre los medios a los que el Secretario General podía referir la controversia, estaba incluido el arreglo judicial. Ante ello, se muestra de acuerdo Cardona-Llorens cuando asevera que "[…] *la aceptación de la competencia de la Corte carece de requisitos formales y la clave para saber si se ha otorgado o no dicha competencia es la intención de las Partes*" (2020, p. 30).

Para dilucidar lo anterior, la Real Academia Española considera (1925)[8] que una de las acepciones del verbo *referir* implica "*atribuir*", mientras que el Concise Oxford Dictionary (1964) considera que *refer to* es "*commit, hand over (oneself, question for decision) to person*" [subrayado añadido] y el MacMillan's Modern Dictionary (1938) considera que es "*submit (a matter) to some authority for consideration, advice, or decision*" [subrayado añadido]. El término *referir* contaba, entonces, con el sentido corriente de delegar la potestad de decidir el medio de solución pacífica de controversias a utilizar y atribuirla al Secretario General, como ha sido también considerado por la Corte Internacional de Justicia en el fundamento 72 de su sentencia. Esto hace sentido en su contexto, sobre todo tomando en cuenta el objeto y fin del tratado.

De esta manera, el artículo IV del Acuerdo de Ginebra de 1966 pone en evidencia que los Estados parte buscaban someter a un tercero imparcial la decisión acerca del medio de solución de controversias a utilizar. Este tercero imparcial podría, así, *decidir* en atención a que las partes no lograban llegar a un acuerdo sobre el medio.

Lo antedicho se refleja incluso, tal como ha hecho notar la Corte Internacional de Justicia en el fundamento 75 de su sentencia, en la Exposición de Motivos venezolana para la ratificación del Protocolo de Puerto España de 1970, en la que se enunció que la determinación de los medios de solución de controversia habría pasado de los Estados involucrados a una institución como lo es el Secretario General:

> *the possibility existed that … an issue of such vital importance … as the determination of the means of dispute settlement, would have left the hands of the two directly interested Parties, to be decided by an international institution chosen by them, or failing that, by the Secretary-General of the United Nations.* (Corte Internacional de Justicia, 2020, fundamento 75)

[8] En este caso la Real Academia Española sí ha variado la definición de este término, eliminando la acepción en la versión del Diccionario Histórico de la Lengua Española de 1992. No obstante, es de aplicación al caso que nos atañe.

Incluso, a manera de contextualización, la intención de las partes de dar la facultad al Secretario General de decidir cuál medio de solución de controversias se emplearía se desprende de las comunicaciones entre ambos Estados entre 1982 y 1983, que también son materia de análisis dentro de la regla general de interpretación que recoge el artículo 31 de la Convención de Viena sobre el Derecho de los Tratados de 1969. Venezuela, en setiembre de 1982, de acuerdo con el Anexo 56 de la Memoria de Guyana a la Corte Internacional de Justicia, cursó a Guyana una comunicación en la que habría indicado lo siguiente:

> *The Government of Venezuela has become convinced that the most appropriate international organ to <u>choose</u> a means of solution is the Secretary General of the United Nations,* […] *whose role has been expressly agreed upon by the parties in the text itself of the Geneva Agreement* [subrayado añadido]. (Memoria de Guyana a la Corte Internacional de Justicia, Anexo 56, 19 de noviembre de 2018)[9]

Venezuela presentó un memorando a la Corte, en cuyo párrafo 90 aceptó el rol del Secretario General de las Naciones Unidas sólo en la medida que la escogencia del medio de solución de controversias implicase una recomendación a las partes. Sin embargo, al limitar el accionar del Secretario General, fundamentó su postura en la falta de pronunciamiento del Secretario General sobre los efectos de la comunicación en la que dio a conocer su decisión en 2018, obviando así el consentimiento manifestado al obligarse por el Acuerdo de Ginebra de 1966.

Guyana, al igual que Venezuela, aceptó *referir* la *decisión* del medio de solución de controversias al Secretario General de las Naciones Unidas. Así consta en el Anexo 61 de la Memoria de Guyana a la Corte Internacional de Justicia, compuesto de una carta en la que el ministro de Asuntos Exteriores de Guyana manifiesta: "[…] *the Government of the Co-operative Republic of Guyana* […] *hereby agrees to proceed to the next stage and,*

[9] La traducción libre al español de la cita sería la siguiente: Venezuela se ha *convencido* de que el órgano internacional más apropiado para *elegir* un medio de solución es el *Secretario General de las Naciones Unidas* […] cuyo rol ha sido *expresamente convenido por las partes* en el texto mismo del Acuerdo de Ginebra.

accordingly, to refer the decision as to the means of settlement to Secretary-General of the United Nations" [subrayado añadido].

Referir, nuevamente, es el término empleado por Guyana en su misiva. Si bien Venezuela no lo utiliza, sí usa el término *elegir* en lugar de *sugerir* o *proponer*. En ese sentido, teniendo el sentido corriente de los términos en cuestión relación con su contexto, el examen de interpretación debe detenerse. Sostenemos, categóricamente, que Venezuela, al igual que Guyana, tanto en el momento de la celebración del tratado como en la ejecución del mismo entre 1982 y 1983, estaban obligadas a respetar la decisión del Secretario General, puesto que ésta era vinculante según el Acuerdo de Ginebra de 1966.

Por lo expuesto, nos decantamos por la postura de considerar el Acuerdo de Ginebra de 1966 debe ser interpretado en concordancia con las reglas internacionales consuetudinarias que fueron codificadas después en el artículo 31 de la Convención de Viena sobre el Derecho de los Tratados de 1969 (Villiger, 2009, pp. 439-440; Rodríguez Cedeño, 2020, p. 11). En esa medida, concluimos que la decisión del Secretario General sí es vinculante para los Estados parte del Acuerdo de Ginebra.

c. ¿El Acuerdo de Ginebra de 1966 expresa suficientemente el consentimiento de las partes para que su controversia sea sometida a la Corte Internacional de Justicia?

Respecto del consentimiento manifestado por los Estados parte del Acuerdo de Ginebra en obligarse a someter su controversia a la Corte Internacional de Justicia, Guyana expuso en el fundamento 3.74 de su Memoria que "[c]*onsent depends not on the form of the agreement, but on whether it reflects an intention to confer jurisdiction on the Court*" (Memoria de Guyana, 2018, Vol. I, p. 123). Así, concluyó en el fundamento 3.75 del mismo documento que las partes habían expresado su consentimiento para solucionar la controversia en el segundo párrafo del artículo IV del Acuerdo de Ginebra de 1966. Venezuela, en el párrafo 82 de su Memorando, negó haber manifestado su consentimiento en someter su controversia a la jurisdicción de la Corte. En el párrafo 96 del mismo

documento, agregó que "[…] *it would be truly surprising, with regard to the Application filed by Guyana, that the Court would consider that Venezuela, by merely signing the Geneva Agreement: 1) unequivocally expressed its specific consent to the jurisdiction of the Court* […]" (Memorando de Venezuela, 2019, p. 39). La Corte, en su fundamento 88, concluyó que las partes sí expresaron su consentimiento para que su controversia sea sometida a ésta.

Alexandrov plantea que un Estado puede expresar de manera prematura o anticipada su consentimiento, incluso de manera implícita, de someter su disputa al arreglo judicial, en particular al de la Corte Internacional de Justicia. En ese caso, "*ese Estado deberá sujetarse a la jurisdicción compulsiva de la Corte*" (2006, pp. 30 y 34). Es ese consentimiento prematuro, plasmado en el Acuerdo de Ginebra, el que justificaría que el Secretario General decidiese *escoger* a la jurisdicción de la Corte Internacional de Justicia, en la medida que ésta, como arreglo judicial, esté contemplada por el artículo 33 y pueda ser aplicada como medio de solución pacífica de controversias.

Si bien la Convención de Viena sobre el Derecho de los Tratados de 1969 fue adoptada y entró en vigor para Guyana y Venezuela después de la celebración del Acuerdo de Ginebra de 1966 y, sobre todo, considerando que el artículo 4 de tal Convención dispone la irretroactividad de ésta, sus disposiciones podrán aplicarse al Acuerdo de Ginebra de 1966 en los supuestos en los que sus artículos tengan un efecto declarativo por ser la codificación de una costumbre internacional o sean principios de Derecho Internacional cuya existencia fuera anterior a 1969.

En consecuencia, analizaremos tres principios generales del Derecho Internacional que fueron recogidos por la Convención de Viena sobre el Derecho de los Tratados de 1969: el principio de *pacta sunt servanda*, el principio de la buena fe y el principio del libre consentimiento (Convención de Viena sobre el Derecho de los Tratados de 1969, Preámbulo, Tercer Párrafo).

El principio de *pacta sunt servanda* está recogido por el Preámbulo y el artículo 26 de la Convención de Viena sobre el Derecho de los Tratados de 1969. Éste último establece que "[t]*odo tratado en vigor obliga a las partes y debe ser cumplido por ellas de buena fe*". Esta disposición, de acuerdo con Benfeld y Müller (2018, p. 80), incluye en su ámbito de aplicación la interpretación de tratados, además de haberse ampliado -posteriormente- a la negociación de los mismos. Los mismos autores, al desarrollar la negociación como parte del ámbito de aplicación del artículo 26, concluyen que "[…] *no estaba en el espíritu de la Convención que el principio de la buena fe abandonara los contornos del* pacta sunt servanda" (Benfeld y Müller, 2018, p. 80). En ese sentido, la buena fe resulta íntimamente relacionada al *pacta sunt servanda* y, por lo mismo, la trataremos como dentro de éste último.

Al igual que Benfeld y Müller, Villiger (2009) encuentra en el principio del *pacta sunt servanda* una robustez digna de un principio de reconocimiento universal. Villiger, además, le atribuye al *pacta sunt servanda* y al principio de buena fe una historia que datería, cuando menos, de 1956, año en el que el Relator Especial Fitzmaurice colocó al *pacta sunt servanda*, junto con la buena fe, como principio fundamental del Derecho de los Tratados en un proyecto de código del Derecho de los Tratados (Comisión de Derecho Internacional, 1956, p. 108, citado en Villiger, 2009, p. 364). Esto nos permite afirmar que, en el momento de la adopción del Acuerdo de Ginebra de 1966, el *pacta sunt servanda* y el principio de la buena fe eran parte del Derecho Internacional consuetudinario, lo que además es taxativamente concluido por Villiger, cuando escribe lo siguiente sobre el artículo 26 de la Convención de Viena sobre el Derecho de los Tratados:

> *There can be no doubt as to the basis in customary law of the rule* pacta sunt servanda. *The* third *preambular para. emphasises that the rule is "universally recognised". At the Vienna Conference in 1968/1969, the principle was never called in question; indeed, all States emphasised its importance*. (2009, p. 368)

En ese sentido, debemos asumir que la voluntad de Guyana y Venezuela al manifestar su consentimiento en obligarse por el Acuerdo de Ginebra de 1966 fue, precisamente, la de obligarse de buena fe por las disposiciones del tratado, entre las que se encontraba aquella contenida en el artículo IV[10]. Por lo mismo, resulta relevante el ejercicio realizado en el acápite anterior respecto de los términos *escoger*, *referir* y respecto de su relación con el objeto y fin del tratado.

El principio del libre consentimiento terminaría de dilucidar la respuesta a la interrogante planteada. De acuerdo con este principio, el consentimiento tiene libertad de forma y es así como está recogido en la Convención de Viena sobre el Derecho de los Tratados de 1969. Al respecto, Villiger apunta que los tres principios comentados son *universalmente reconocidos* en virtud del tercer párrafo del Preámbulo de la mencionada convención (2009, p. 48). Particularmente sobre el principio del libre consentimiento, menciona lo siguiente:

> […] *Consent infers consensus,* i.e., *the concurrence of wills with a view to performing a contractual act. Unless and until a State consents to be bound, a treaty cannot create rights and obligations for that State* […] ***consent to be bound*** *is the pivotal act by which a State expresses its commitment to a treaty*. (Villiger, 2009, p. 176)

En el caso específico del Acuerdo de Ginebra de 1966, debemos considerar que el consenso vertido en la redacción del texto del tratado fue evidenciado a través del consentimiento en obligarse por el tratado, que en ambos casos se hizo a través de representantes plenipotenciarios de sus respectivos Estados. Por parte de Venezuela, firmó el ministro de Relaciones Exteriores Ignacio Iribarren, por parte de Guyana su Primer Ministro Forbes Burnham y por parte del Reino Unido (en tanto metrópoli de una Guyana *ad portas* de su independencia) el Secretario de Estado de Relaciones Exteriores,

[10] Acotamos, en este punto, que la interpretación expuesta responde a que, de acuerdo con Remiro Brótons, "[e]*l objetivo fundamental del intérprete* […] *ha de ser el descifrar la real, verdadera voluntad de compromiso o acuerdo de las partes* […] *La operación interpretativa ha de inspirarse en el principio de la* buena fe. *He aquí un islote de unanimidad*" (1987, p. 307). En nuestra opinión, siendo la real y verdadera voluntad de compromiso de las partes resolver la controversia existente, los Estados parte se obligaron a todas las disposiciones del tratado que celebraron a esos efectos.

Michael Stewart. La conducta de ambos Estados, posterior a la entrada en vigor del tratado, es evidencia complementaria del consenso devenido en consentimiento.

Si bien el Acuerdo de Ginebra fue *firmado* el 17 de febrero de 1966 y entró en vigor en la misma fecha, el Congreso Nacional Venezolano lo *aprobó* el 13 de abril del mismo año (Corte Internacional de Justicia, 2020, fundamento 41)[11]. Considerando que de acuerdo con la Corte existió esta suerte de aprobación, implicaría una reafirmación de la voluntad de Venezuela de someter la controversia al arreglo judicial del artículo 33 de la Carta de las Naciones Unidas.

Ninguno de los principios analizados cuenta con alguna limitante respecto del consentimiento prematuro abordado por Alexandrov. Por el contrario, los tres principios se condicen con la sostenibilidad del consentimiento en el tiempo. En otras palabras, resulta válido jurídicamente que, en 1966, los Estados parte hayan expresado su consentimiento en someter su controversia a la Corte Internacional de Justicia, supeditado desde luego a que el Secretario General así lo decida.

Sobre la base de los principios analizados, queda establecido que el Acuerdo de Ginebra de 1966 expresa suficientemente el consentimiento de las partes para que su controversia sea sometida a la Corte Internacional de Justicia, en tanto basta la *firma* para indicar, de buena fe, el consentimiento del Estado en obligarse por todas las disposiciones del tratado, entre las que se encontraba aquella que somete, de última *ratio*, la decisión del medio de solución de controversias a emplear al Secretario General de las Naciones Unidas.

[11] En este caso, *firmado* y *aprobó* son las palabras usadas por la Corte en su sentencia, aludiendo a que, luego de la manifestación del consentimiento, existió una suerte de aprobación de ambos congresos antes de depositar el tratado en la Secretaría de la ONU. No obstante, no compete a este informe ahondar en esta incongruencia jurídica. Sólo cabe señalar que la firma como manifestación del consentimiento ya era parte del Derecho Internacional consuetudinario, así como la firma ad-referéndum (Villiger, 2009, p. 194; Comisión de Derecho Internacional, 1956, p. 111), que no fue convenida.

4.4.2. Segundo problema secundario: *¿Era necesario que Venezuela exprese su consentimiento posterior a la decisión del Secretario General para que la Corte Internacional de Justicia tenga jurisdicción sobre esta controversia?*

En virtud de los principios abordados en el acápite anterior, los Estados parte manifestaron su consentimiento en obligarse, indefectiblemente, por las disposiciones del tratado. No obstante, conviene analizar si en este caso el consentimiento de Venezuela incluyó el consentimiento específico a someter su controversia a la competencia contenciosa de la Corte Internacional de Justicia.

El sometimiento del Estado a la jurisdicción de la Corte es voluntario de acuerdo con el artículo 36 párrafo 1 del Estatuto de la Corte Internacional de Justicia. Siendo Venezuela un Estado miembro de la Organización de las Naciones Unidas, es *ipso facto* parte en el Estatuto de la Corte Internacional de Justicia en virtud de los artículos 93 y 94 de la Carta; lo que implica que deba expresar su consentimiento para someterse voluntariamente a la competencia contenciosa de este tribunal internacional. No obstante, es posible expresar el sometimiento obligatorio a la jurisdicción de la Corte Internacional de Justicia en virtud de un tratado, tal como ha sido establecido en el artículo XXXI del Tratado Americano de Soluciones Pacíficas (en adelante, Pacto de Bogotá de 1948). Sin embargo, Venezuela y Guyana no son Estados parte del Pacto de Bogotá y, por ello, no están sometidas de manera obligatoria a la jurisdicción de la Corte Internacional de Justicia.

Pese a que es parte del Estatuto de la Corte Internacional de Justicia, Venezuela no ha acudido a este tribunal internacional; es decir, no se ha sometido a su jurisdicción. Esto coincide, de acuerdo con Herdocia (2020, p. 43), con una posición política de *larga data* por parte de Venezuela.

Ello no quiere decir, desde luego, que Venezuela no debe respetar y cumplir las decisiones de la corte en los litigios que participe, toda vez que no se cuestiona su condición de Estado parte (tanto de la organización como de su principal órgano judicial). Lo que sí

quiere decir es que, para que Venezuela sea parte en un proceso conocido por la corte, será necesario que haya aceptado voluntariamente su jurisdicción.

Por ello, corresponde evaluar cuáles son las obligaciones internacionales asumidas por Venezuela en el marco del Acuerdo de Ginebra de 1966, así como si acaso la no aceptación (o, como lo enfocan portavoces del gobierno venezolano, el no reconocimiento) de la jurisdicción de la Corte tiene alguna consecuencia jurídica en el asunto en cuestión.

a. ¿Cuáles son las obligaciones internacionales asumidas por Venezuela en el Acuerdo de Ginebra de 1966?

Guyana, a través del fundamento 1.13 de su Memoria, expresó que su contraparte buscaba incumplir sus obligaciones internacionales en virtud del Acuerdo de Ginebra de 1966 por negar la jurisdicción de la Corte en la controversia entre ambos. Venezuela, a lo largo de su Memorando, negó el nacimiento de tales obligaciones, amparándose en que el Acuerdo de Ginebra de 1966 no contiene el consentimiento de las partes respecto del efecto vinculante de la decisión del Secretario General sobre el medio de solución de controversias. La Corte, en este respecto, concluyó en su fundamento 115 que al investir al Secretario General con la autoridad de escoger -con carácter vinculante- el medio de solución de controversias, incluyendo la posibilidad de elegir el arreglo judicial, existe la obligación de las partes de respetar la decisión del Secretario General.

Venezuela, al manifestar su consentimiento en obligarse por el Acuerdo de Ginebra de 1966, aceptó obligarse también por todas las disposiciones en éste contenidas en virtud de los principios de *pacta sunt servanda* y de buena fe comentados *supra*. Ello incluye la obligación de establecer la Comisión Mixta en virtud de los artículos I y II, así como de respetar la integridad del tratado. Desde luego, las obligaciones pertinentes al presente trabajo son aquellas contenidas en el artículo IV del Acuerdo.

Entre las obligaciones internacionales del artículo IV del Acuerdo, que fueron señaladas líneas arriba, resalta la obligación de, luego de tres meses de haber recibido un informe final sin acuerdo alcanzado por parte de la Comisión Mixta y tras no haber llegado a un acuerdo sobre el órgano internacional que decidiría el medio de solución de controversias, someter tal decisión al Secretario General de las Naciones Unidas.

Venezuela, en ese sentido, asumió la obligación internacional de someter, en conjunto con Guyana, la elección del medio de solución pacífica de controversias -para solucionar su controversia- al Secretario General de las Naciones Unidas si se daban los presupuestos detallados en el Artículo IV del Acuerdo de Ginebra de 1966.

A raíz del sometimiento de los Estados partes a la elección del medio de solución de controversias por parte del Secretario General de las Naciones Unidas, sostenemos que Venezuela manifestó su consentimiento en obligarse a someter la controversia al medio de solución de controversias que eligiese el Secretario General de Naciones Unidas. Al respecto, García-Corrochano apunta que "[…] *el consentimiento del Estado a someter la controversia a un medio de solución pacífica, es uno de los puntos esenciales del Acuerdo de Ginebra, que* […] *establece claramente quiénes deben elegir los medios y cuáles son éstos*." (2020, p. 58). Sin embargo, dicho autor no considera que exista tal consentimiento en este caso:

> *Se entiende que tal elección no se impone a las partes, pues son ellas las que deberán activar los medios políticos o jurisdiccionales propuestos. En el caso de estos últimos, la propuesta de un medio jurisdiccional requiere la aceptación de las partes. Dado que el Acuerdo consagra la libertad de elección y la pluralidad de medios de solución pacífica, no puede tomarse como un compromiso* […] *es decir, la expresión de un acuerdo de voluntades para llevar un asunto al conocimiento de la Corte, aceptando que esta tiene jurisdicción y es competente para resolver dicho asunto*. (Novak y García Corrochano, 2019, p. 570; citado en García Corrochano, 2020, p. 58)

En este punto, contraponemos a lo argumentado por el publicista el principio de libre elección de medios de solución de controversias, consagrado de acuerdo con el mismo García Corrochano (2020, p. 58) en el artículo 33 de la Carta de las Naciones Unidas. En virtud de éste, los Estados parte tendrían la libertad de elegir el medio idóneo para solucionar su controversia, sin embargo, al haber *referido* la decisión del medio de solución de controversias al Secretario General de Naciones Unidas, sería éste último el que aseguraría la plena vigencia del principio de libre elección de medios de solución de controversias.

Es indispensable, además, entender que bajo esta figura no estamos sugiriendo la limitación del derecho de los Estados parte de elegir libremente el medio de solución de controversias, pues sostenemos que ese derecho fue ejercido al ser *referido* al Secretario General de las Naciones Unidas en virtud del Acuerdo de Ginebra de 1966. Así, concluimos que existe la obligación internacional de respetar y cumplir la decisión del Secretario General del medio de solución de controversias, por ser ésta de naturaleza vinculante de acuerdo con la voluntad de los Estados parte y el consentimiento manifestado en dicho tratado.

b. ¿Cuál es la consecuencia jurídica del no reconocimiento de Venezuela de la jurisdicción de la Corte Internacional de Justicia?

De acuerdo con el artículo 92 de la Carta de las Naciones Unidas, la Corte Internacional de Justicia es "[…] *el órgano judicial principal de las Naciones Unidas*" [subrayado añadido] y de acuerdo con el artículo 93 de la misma Carta, "[t]*odos los Miembros de las Naciones Unidas son* ipso facto *partes en el Estatuto de la Corte Internacional de Justicia*". Venezuela, al ser Estado miembro de la Organización de las Naciones Unidas, es también Estado parte en el Estatuto de la Corte.

Por otro lado, los artículos 92 y 93 de la Carta de las Naciones Unidas cobran mayor relevancia cuando, en el artículo IV del Acuerdo de Ginebra de 1966, se hace la referencia directa al artículo 33 de la Carta. En ese tratado de 1966, como hemos sostenido,

manifestó Venezuela su consentimiento en someter su controversia con Guyana a la Corte Internacional de Justicia.

Sin perjuicio de lo anterior, Venezuela y la Corte Internacional de Justicia, históricamente, no tienen mayor relación que la que tiene un Estado miembro de la Organización de las Naciones Unidas con el órgano judicial de ésta. En la historia de Venezuela, ésta nunca se ha sometido a la jurisdicción de la corte. Más aun, respecto de la visión que puede tener Venezuela sobre el arreglo judicial del órgano principal de Naciones Unidas:

> […] *resalta que la posición de Venezuela ha sido tradicionalmente evitar -casi a toda costa- el compromiso jurisdiccional, ya sea mediante la cláusula compulsiva del Estatuto o bien mediante el Tratado Americano de Soluciones Pacíficas (Pacto de Bogotá), o bien por otros medios y acuerdos especiales* [subrayado añadido]. (Herdocia, 2020, p. 43)

De acuerdo con la cronología de hechos recogida por la Corte Internacional de Justicia (2020, fundamentos 57 y 58), en 2016 el Secretario General adelantó que continuaría brindando sus buenos oficios por un año adicional, antes de decidir someter la controversia a la corte de no registrarse mayor progreso en la solución de dicha controversia. A esto, el presidente de Venezuela, Nicolás Maduro, respondió al Secretario General, mediante carta, que objetaba la intención de *recomendar* a las partes el recurso de arreglo judicial, desconociendo así el consentimiento que diera su Estado en 1966.

Sin perjuicio del hecho de que Venezuela nunca se haya sometido antes a la jurisdicción de la corte, del hecho de que su presidente haya desconocido el consentimiento ya otorgado, o del hecho de que el presidente haya objetado la intención del Secretario General de Naciones Unidas de *escoger* el arreglo judicial como medio para resolver la controversia, no es correcto afirmar que Venezuela "no reconozca" dicha jurisdicción porque ya lo hizo al ser Estado miembro de la Organización de las Naciones Unidas y Estado parte del Estatuto de la Corte Internacional de Justicia. No obstante, han sido

precisamente esos términos los que han usado portavoces políticos del gobierno de Venezuela.

De acuerdo con una nota virtual del Ministerio del Poder Popular para el Ecosocialismo de la República Bolivariana de Venezuela en 2020, la vicepresidente ejecutiva del país:

> […] *ratificó que Venezuela no reconoce la jurisdicción de la Corte Internacional de Justicia* […] *"Venezuela nunca ha reconocido la jurisdicción de la Corte Internacional de Justicia, y menos para la contención sobre la controversia territorial de la Guyana Esequiba (…) Los mecanismos de negociación política deben darse de mutuo acuerdo y de manera progresiva", aseveró Rodríguez* […]. (Minec, 30 de junio de 2020)

Las declaraciones de la vicepresidente Delcy Rodríguez no guardan congruencia con el Derecho Internacional general, toda vez que el no reconocer la jurisdicción de la corte como posición política, debiera llevar consistentemente a que Venezuela denuncie la Carta de las Naciones Unidas, lo cual Venezuela no ha hecho hasta la fecha. Por ello, para efectos del presente trabajo, entenderemos que la intención del gobierno de Venezuela ha sido la de no aceptar la jurisdicción de la corte en este caso. Sin embargo, sobre este punto también se pronunció la vicepresidente:

> *Cualquier forma de jurisdicción con esta corte debe darse bajo <u>el fundamento y basamento de que existe un acuerdo entre las partes</u>, de que nosotros podamos de alguna manera llegar a un consentimiento y que voluntariamente decidamos ir y reconocer esta jurisdicción. <u>Cosa que nunca ocurrió</u>, ni ocurrirá porque Venezuela históricamente no ha reconocido jurisdicción a la Corte Internacional de Justicia* [subrayado añadido]. (Minec, 30 de junio de 2020)

Se desprende de la declaración de la vicepresidente Rodríguez que a lo que quiere referirse con *reconocimiento* es en realidad *aceptación*, toda vez que se refiere al

consentimiento en someter su controversia a la jurisdicción de la corte. Ese consentimiento en someter su controversia a la jurisdicción de la Corte, además, denota que el Estado parte sí reconoce a la Corte Internacional de Justicia como órgano jurisdiccional de la Organización de las Naciones Unidas.

Se desprende, asimismo, que la posición del gobierno venezolano es que el Estado nunca aceptó la jurisdicción de la Corte para el conocimiento de su controversia, toda vez que indica nunca haber acordado tal disposición con Guyana. Sin embargo, el Acuerdo de Ginebra de 1966 recoge precisamente esta obligación internacional.

Sobre este punto, por lo menos desde 1956 existe la apreciación de que el principio de *pacta sunt servanda* incluye necesariamente el que las obligaciones nacidas de un tratado no puedan ser afectadas por cambios de gobierno. Así lo establece el proyecto de código de Derecho de los Tratados reportado por el relator especial Fitzmaurice en el Anuario de la Comisión de Derecho Internacional de 1956, cuando tipifica lo siguiente:

> *Since treaty obligations bind the State, they are not affected by changes of government, administration, dynasty or regime, within the State. A new government, administration, dynasty or regime, whatever its origin or the process by which it has assumed control, is bound to carry out the treaty obligations of the State, unless these can be terminated according to the terms of the treaty, or be otherwise lawfully brought to an end.* (A/CN.4/101, p. 108)

Adicionalmente, a raíz del laudo Taft en el Caso Tinoco (1923, pp. 375-399), se introduce en la jurisprudencia internacional el principio de la continuidad del Estado, en virtud del cual cada gobierno *soberano*[12] representa un eslabón de la cadena del Estado, no pudiendo uno desconocer a otro anterior. Sobre esto, Llanos (2007, p. 81) incide en que

[12] Entendemos que cuando el árbitro hace alusión a esta *soberanía*, está evitando ahondar en la legitimidad, toda vez que el gobierno electo del general Tinoco en Costa Rica tuvo como antecedente un golpe de Estado perpetrado por él. No obstante, Taft explica en su laudo (1923, p. 379) que el gobierno de Tinoco fue uno *de facto* y *de iure*, en virtud de lo cual lo considera un "*actual sovereign government*" (1923, p. 380).

la subjetividad internacional del Estado no es afectada por cambios de gobierno, los que sólo afectan las relaciones internacionales del Estado.

En ese sentido, se establece que la continuidad del Estado hace que un gobierno no pueda modificar unilateralmente las normas convencionales que han sido consentidas por su predecesor, como tampoco desconocerlas sobre la base de una política gubernamental de distanciamiento de la Corte Internacional de Justicia. En ese sentido, resulta obligatorio para Venezuela, de acuerdo con el Derecho Internacional, respetar la jurisdicción de la Corte Internacional de Justicia en la controversia con Guyana. Resulta, asimismo, un derecho de Venezuela el participar y ejercer su derecho a la defensa en el marco del proceso, de manera que la Corte pueda contar con los elementos necesarios para emitir un fallo justo.

Indudablemente, la consecuencia jurídica del "no reconocimiento" de la Corte, implicaría la denuncia de la Carta de las Naciones Unidas. Sin embargo, esta consecuencia no se materializa en tanto las declaraciones políticas de Venezuela no han significado la falta de reconocimiento de la Corte, más aun cuando el Estado en cuestión ha presentado un Memorando en el marco del proceso jurisdiccional del cual manifestó no haber consentido ser parte.

En consecuencia, al referirse a la aceptación de la jurisdicción de la Corte, es importante apuntar que Venezuela no ha conseguido establecer elementos que pongan en tela de juicio el consentimiento del Estado en someter su controversia al arreglo judicial a través del Acuerdo de Ginebra de 1966. Sostenemos que no ha podido establecer tales elementos toda vez que implicarían la inobservancia de los principios de *pacta sunt servanda* y de continuidad del Estado, los que permiten atribuir efecto vinculante a las decisiones tomadas por un gobierno anterior.

Por ello, concluimos que no era necesario que Venezuela exprese su consentimiento posterior a la decisión del Secretario General (i) en observancia del principio de solución pacífica de controversias internacionales, recogido por el artículo 2, párrafo 3 de la Carta

de las Naciones Unidas; (ii) considerando que en virtud de los artículos 92 y 93 de la Carta de Naciones Unidas y el artículo 1 del Estatuto de la Corte Internacional de Justicia, es ésta última el principal órgano judicial de la Organización de las Naciones Unidas; y (iii) aunado al hecho de que Venezuela, a través del Acuerdo de Ginebra de 1966 se sometió a lo establecido por el artículo 33 de la Carta.

5. **Conclusiones**

A lo largo de este trabajo, se han planteado interrogantes que, de manera cooperativa, dan respuesta al principal problema jurídico sobre si Venezuela expresó su consentimiento para someter su controversia con Guyana a la jurisdicción de la Corte Internacional de Justicia. El enfoque ha sido, sin duda, el tratamiento jurídico del consentimiento de cara a medios de solución de controversias.

En el caso específico del Acuerdo de Ginebra de 1966, concluimos que su artículo IV le atribuye al Secretario General de las Naciones Unidas, en conjunto con el artículo 33 de la Carta de las Naciones Unidas, la decisión de someter la controversia al arreglo judicial; es decir, a la Corte Internacional de Justicia. Tal atribución es ejercida sobre la base del principio de la no existencia de jerarquía ni prevalencia de un medio de solución de controversias sobre otro.

Asimismo, concluimos que, en virtud de la interpretación del sentido corriente de los términos del artículo IV del Acuerdo de Ginebra de 1966, en su contexto y tomando en consideración el objeto y fin del tratado, la decisión del Secretario General de las Naciones Unidas sobre el medio de solución de controversias es de carácter vinculante para las partes, toda vez que existió consentimiento de las mismas en atribuirle al Secretario General tal función y vincularse a su escogencia.

Por demás, concluimos que el Acuerdo de Ginebra de 1966 expresa suficientemente el consentimiento de las partes para que la controversia sea sometida a la jurisdicción de la Corte, toda vez que de la aplicación de los principios de *pacta sunt servanda,* buena fe y libre consentimiento, lo convenido libremente y de buena fe por las partes resulta obligatorio para las mismas. Aunado a ello, el consentimiento anticipado al sometimiento al arreglo judicial no requiere una formalidad específica, por lo que no hubiera sido necesario que el artículo IV del Acuerdo de Ginebra contenga una mención expresa al carácter vinculante de la decisión del Secretario General respecto del medio de solución escogido.

Así, llegamos a la respuesta al primer problema secundario: el Secretario General de las Naciones Unidas sí estaba facultado, por el Acuerdo de Ginebra de 1966, a someter la controversia a la Corte Internacional de Justicia una vez que se cumplieran los presupuestos determinados por el tratado y siempre que el medio de solución elegido se encontrase en el ámbito del artículo 33 de la Carta de Naciones Unidas.

Venezuela, en tanto Estado parte del Acuerdo de Ginebra de 1966, asumió desde entonces la obligación internacional de cumplir con las disposiciones del tratado en virtud de los principios de *pacta sunt servanda* y de buena fe. Por consiguiente, Venezuela tiene la obligación internacional de respetar y reconocer la decisión de carácter vinculante tomada por el Secretario General en relación con el medio de solución de controversias, más aun a la luz del principio de libre elección de medio de solución de controversias, habida cuenta de haber referido tal elección, conjuntamente con Guyana, al Secretario General.

En esa línea, si bien es cierto que existe por parte de Venezuela una actitud reacia a someterse a la jurisdicción de la Corte Internacional de Justicia, la primera es *ipso facto* Estado parte del Estatuto de la Corte por ser miembro de la Carta de Naciones Unidas. La aceptación de la resolución emitida por la Corte resulta, al igual que la decisión del Secretario General, vinculante para las partes.

De esta forma, llegamos a la respuesta al segundo problema secundario: no resulta necesario que Venezuela exprese su consentimiento tras la decisión del Secretario General, toda vez que el consentimiento fue dado en el Acuerdo de Ginebra de 1966 y el Estado venezolano tiene la obligación internacional de cumplirlo, no pudiendo así alegar una no aceptación o, peor aún, un no reconocimiento de la jurisdicción de la Corte.

Finalmente, considerando los elementos analizados, así como las posiciones de las partes y de la Corte Internacional de Justicia en su sentencia, concluimos que la República Bolivariana de Venezuela, en efecto, expresó su consentimiento para someter su

controversia con la República Cooperativa de Guyana a la Corte Internacional de Justicia. Desde luego, nuestra conclusión implica que la decisión de la Corte Internacional de Justicia acerca de su competencia en el presente caso es conforme con el Derecho Internacional, toda vez que existe un tratado vigente que le somete a ésta la jurisdicción contenciosa.

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18 DECEMBER 2020

JUDGMENT

ARBITRAL AWARD OF 3 OCTOBER 1899

(GUYANA *v.* VENEZUELA)

SENTENCE ARBITRALE DU 3 OCTOBRE 1899

(GUYANA c. VENEZUELA)

18 DÉCEMBRE 2020

ARRÊT

TABLE OF CONTENTS

INTERNATIONAL COURT OF JUSTICE

YEAR 2020

2020
18 December
General List
No. 171

18 December 2020

ARBITRAL AWARD OF 3 OCTOBER 1899

(GUYANA *v.* VENEZUELA)

JURISDICTION OF THE COURT

Introduction — Non-appearance of Venezuela — Article 53 of the Statute of the Court.

*

Historical and factual background.

Competing territorial claims of the United Kingdom and Venezuela in the nineteenth century — Treaty of arbitration for the settlement of the boundary between the colony of British Guiana and Venezuela signed at Washington on 2 February 1897 — Arbitral Award of 3 October 1899.

Venezuela's repudiation of the 1899 Award.

Signing of the 1966 Geneva Agreement.

Implementation of the Geneva Agreement — Mixed Commission from 1966 to 1970 — 1970 Protocol of Port of Spain — Twelve-year moratorium — Parties' subsequent referral of the decision to choose the means of settlement to the Secretary-General of the United Nations under Article IV, paragraph 2 — Secretary-General's choice of good offices process from

1990 to 2017 — Secretary-General's decision of 30 January 2018 choosing the Court as the means of settlement of the controversy — Seisin of the Court by Guyana on 29 March 2018.

*

Interpretation of the Geneva Agreement.

Identification of the "controversy" under the Geneva Agreement — Dispute concerns question of the validity of the 1899 Award, as well as its legal implications for the boundary line between Guyana and Venezuela.

Whether the Parties gave their consent to the judicial settlement of their controversy under Article IV, paragraph 2, of the Geneva Agreement — Secretary-General's decision binding on the Parties — Article IV, paragraph 2, refers to Article 33 of the Charter of the United Nations, which includes judicial settlement as a means of dispute resolution — Means of dispute settlement at the disposal of the Secretary-General, to which the Parties consented, include judicial settlement.

Whether the consent given by the Parties to the judicial settlement of their controversy was subject to any conditions — Whether Secretary-General should follow a particular order when choosing the means of dispute settlement listed in Article 33 of the Charter — No obligation for the Secretary-General to follow a particular order or to consult with the Parties on his choice.

*

Jurisdiction of the Court.

Question of the conformity of the decision of the Secretary-General with Article IV, paragraph 2 — Court constitutes a means of "judicial settlement" within the meaning of Article 33 of the Charter — Secretary-General's decision taken in conformity with Article IV, paragraph 2.

Legal effect of the Secretary-General's decision of 30 January 2018 — Statute of the Court does not prevent the Parties from expressing their consent through the mechanism established under Article IV, paragraph 2 — Decision taken by the Secretary-General under Article IV, paragraph 2, would not be effective if it were subject to the further consent of the Parties for its implementation — A requirement for the subsequent consent of the Parties would be contrary to object and purpose of Geneva Agreement — Consent of the Parties to the jurisdiction of the Court is established.

*

Seisin of the Court — The Parties having already consented to the Court's jurisdiction, no need for an agreement between them to seise the Court jointly — Court validly seised.

*

Scope of the jurisdiction of the Court.

Jurisdiction ratione materiae *— Article I of the Geneva Agreement — Questions of the validity of the 1899 Award and of the definitive settlement of the land boundary dispute between Guyana and Venezuela fall within the Court's jurisdiction* ratione materiae.

Jurisdiction ratione temporis *of the Court — Article I of the Geneva Agreement — Controversy referred to in the Geneva Agreement is the dispute which had crystallized at the time of the conclusion of the Agreement — Court does not have jurisdiction to entertain Guyana's claims arising from events that occurred after the signature of the Geneva Agreement.*

JUDGMENT

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

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

between

the Co-operative Republic of Guyana,

represented by

Hon. Carl B. Greenidge,

as Agent;

Sir Shridath Ramphal, OE, OCC, SC,

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

as Co-Agents;

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

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

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

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

as Counsel and Advocates;

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

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

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

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

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

as Counsel;

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

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

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

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

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

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

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

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

as Advisers;

Mr. Raymond McLeod, DOAR Inc.,

as Technical Adviser;

Mr. Oscar Norsworthy, Foley Hoag LLP,

as Assistant,

and

the Bolivarian Republic of Venezuela,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

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

In its Application, Guyana seeks to found the jurisdiction of the Court, under Article 36, paragraph 1, of the Statute of the Court, on Article IV, paragraph 2, of the "Agreement to Resolve the Controversy between Venezuela and the United Kingdom of Great Britain and Northern Ireland over the Frontier between Venezuela and British Guiana" signed at Geneva on 17 February 1966 (hereinafter the "Geneva Agreement"). It explains that, pursuant to this latter provision, Guyana and Venezuela "mutually conferred upon the Secretary-General of the United Nations the authority to choose the means of settlement of the controversy and, on 30 January 2018, the Secretary-General exercised his authority by choosing judicial settlement by the Court".

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

For Guyana: Sir Shridath Ramphal,
Mr. Payam Akhavan,
Mr. Paul Reichler,
Mr. Philippe Sands,
Mr. Alain Pellet.

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

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

*

19. In the Application, the following claims were presented by Guyana:

"Guyana requests the Court to adjudge and declare that:

(a) The 1899 Award is valid and binding upon Guyana and Venezuela, and the boundary established by that Award and the 1905 Agreement is valid and binding upon Guyana and Venezuela;

(b) Guyana enjoys full sovereignty over the territory between the Essequibo River and the boundary established by the 1899 Award and the 1905 Agreement, and Venezuela enjoys full sovereignty over the territory west of that boundary;

Guyana and Venezuela are under an obligation to fully respect each other's sovereignty and territorial integrity in accordance with the boundary established by the 1899 Award and the 1905 Agreement;

(c) Venezuela shall immediately withdraw from and cease its occupation of the eastern half of the Island of Ankoko, and each and every other territory which is recognized as Guyana's sovereign territory in accordance with the 1899 Award and 1905 Agreement;

(d) Venezuela shall refrain from threatening or using force against any person and/or company licensed by Guyana to engage in economic or commercial activity in Guyanese territory as determined by the 1899 Award and 1905 Agreement, or in any maritime areas appurtenant to such territory over which Guyana has sovereignty or exercises sovereign rights, and shall not interfere with any Guyanese or Guyanese-authorized activities in those areas;

(e) Venezuela is internationally responsible for violations of Guyana's sovereignty and sovereign rights, and for all injuries suffered by Guyana as a consequence."

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

"For these reasons, Guyana respectfully requests the Court:

1. to find that it has jurisdiction to hear the claims presented by Guyana, and that these claims are admissible; and

2. to proceed to the merits of the case."

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

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

1. To find that it has jurisdiction to hear the claims presented by Guyana, and that these claims are admissible; and

2. To proceed to the merits of the case."

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

*

* *

I. INTRODUCTION

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

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

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

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

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

28. Though formally absent from the proceedings, non-appearing parties sometimes submit to the Court letters and documents in ways and by means not contemplated by its Rules (*ibid.*, p. 25, para. 31). In this instance, Venezuela sent a Memorandum to the Court (see paragraph 12 above). It is valuable for the Court to know the views of both parties in whatever form those views may have been expressed (*ibid.*, p. 25, para. 31). The Court will therefore take account

of Venezuela's Memorandum to the extent that it finds it appropriate in discharging its duty, under Article 53 of the Statute, to satisfy itself as to its jurisdiction to entertain the Application (*Aegean Sea Continental Shelf (Greece* v. *Turkey), Judgment, I.C.J. Reports 1978*, p. 7, para. 14).

II. HISTORICAL AND FACTUAL BACKGROUND

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

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

A. The Washington Treaty and the 1899 Award

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

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

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

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

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

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

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

B. Venezuela's repudiation of the 1899 Award and the search for a settlement of the dispute

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

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

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

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

37. On 16 November 1962, with the authorization of the representatives of the United Kingdom and Venezuela, the Chairman of the Fourth Committee declared that the Governments of the two States (the Government of the United Kingdom acting with the full concurrence of the Government of British Guiana) would examine the "documentary material" relating to the 1899 Award (hereinafter the "Tripartite Examination"). Experts appointed by the two Governments thus examined the archives of the United Kingdom in London and the Venezuelan archives in Caracas, searching for evidence relating to Venezuela's contention of nullity of the 1899 Award.

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

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

C. The signing of the 1966 Geneva Agreement

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

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

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

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

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

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

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

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

D. The implementation of the Geneva Agreement

1. The Mixed Commission (1966-1970)

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

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

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

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

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

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

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

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

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

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

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

52. After the matter was referred to him by the Parties, the Secretary-General, Mr. Javier Pérez de Cuéllar, agreed by a letter of 31 March 1983 to undertake the responsibility conferred upon him under Article IV, paragraph 2, of the Geneva Agreement. Five months later, he sent the Under-Secretary-General for Special Political Affairs, Mr. Diego Cordovez, to Caracas and Georgetown in order to ascertain the positions of the Parties on the choice of the means of settlement of the controversy.

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

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

54. Between 1990 and 2014, the good offices process was led by three Personal Representatives appointed by successive Secretaries-General: Mr. Alister McIntyre (1990-1999), Mr. Oliver Jackman (1999-2007) and Mr. Norman Girvan (2010-2014). The Parties, for their part,

appointed facilitators to assist the different Personal Representatives in their work and to serve as a focal point with them. Regular meetings were held during this period between the representatives of both States and the Secretary-General, particularly in the margins of the annual session of the General Assembly.

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

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

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

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

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

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

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

H.E. Mr. David A. Granger, for his part, assured the President of Venezuela of his country's commitment

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

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

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

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

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

III. INTERPRETATION OF THE GENEVA AGREEMENT

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

> "(1) If, within a period of four years from the date of this Agreement, the Mixed Commission should not have arrived at a full agreement for the solution of the controversy it shall, in its final report, refer to the Government of Guyana and the Government of Venezuela any outstanding questions. Those Governments shall without delay choose one of the means of peaceful settlement provided in Article 33 of the Charter of the United Nations.
>
> (2) If, within three months of receiving the final report, the Government of Guyana and the Government of Venezuela should not have reached agreement regarding the choice of one of the means of settlement provided in Article 33 of the Charter of the United Nations, they shall refer the decision as to the means of

settlement to an appropriate international organ upon which they both agree or, failing agreement on this point, to the Secretary-General of the United Nations. If the means so chosen do not lead to a solution of the controversy, the said organ or, as the case may be, the Secretary-General of the United Nations shall choose another of the means stipulated in Article 33 of the Charter of the United Nations, and so on until the controversy has been resolved or until all the means of peaceful settlement there contemplated have been exhausted."

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

"1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means."

63. As already noted (see paragraph 50 above), the Parties failed to reach agreement on the choice of one of the means of peaceful settlement set out in Article 33 of the Charter, as provided for by Article IV, paragraph 1, of the Geneva Agreement. They then proceeded to the next step and referred this decision to the Secretary-General of the United Nations (see paragraph 51 above), pursuant to Article IV, paragraph 2, of the Agreement. The Court will interpret this provision in order to determine whether, in entrusting the decision as to the choice of one of the means of settlement provided for in Article 33 of the Charter to the Secretary-General, the Parties consented to settle their controversy by, *inter alia*, judicial means. If it finds that they did, the Court will have to determine whether this consent is subject to any conditions. As part of the interpretation of Article IV, paragraph 2, of the Geneva Agreement, the Court will first examine the use of the term "controversy" in this provision.

A. The "controversy" under the Geneva Agreement

64. For the purpose of identifying the "controversy" for the resolution of which the Geneva Agreement was concluded, the Court will examine the use of this term in this instrument. The Court observes that the Geneva Agreement uses the term "controversy" as a synonym for the word "dispute". According to the established case law of the Court, a dispute is "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11). In this regard, the Court notes that Article IV of the Washington Treaty used the term "controversy" when referring to the original dispute that was submitted to the arbitral tribunal established under the Treaty to determine the boundary line between the colony of British Guiana and the United States of Venezuela. The Court further notes that, in the conclusion and implementation of the Geneva Agreement, the parties have expressed divergent views as to the validity of the 1899 Award rendered by the tribunal and the implications of this question for their frontier. Thus, Article I of the Geneva Agreement defines the mandate of the Mixed Commission as seeking satisfactory

solutions for the practical settlement of "the controversy between Venezuela and the United Kingdom which has arisen as the result of the Venezuelan contention that the Arbitral Award of 1899 about the frontier between British Guiana and Venezuela is null and void". That contention by Venezuela was consistently opposed by the United Kingdom in the period from 1962 until the adoption of the Geneva Agreement on 17 February 1966, and subsequently by Guyana after it became a party to the Geneva Agreement upon its independence, in accordance with Article VIII thereof.

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

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

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

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

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

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

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

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

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

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

* *

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

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

72. The first sentence of Article IV, paragraph 2, of the Geneva Agreement provides that the Parties "shall refer the decision . . . to the Secretary-General". The Court previously observed in its

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

73. As the Court has noted in a number of cases, the purpose of a treaty may be indicated in its title and preamble (see, for example, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 118, para. 39; *Certain Norwegian Loans (France* v. *Norway), Judgment, I.C.J. Reports 1957*, p. 24). In the present case, the Agreement is entitled "Agreement to Resolve the Controversy . . . over the Frontier between Venezuela and British Guiana" and its preamble states that it was concluded "to resolve" that controversy. The Agreement also refers, in Article I, to the task of "seeking satisfactory solutions for the practical settlement of the controversy". This indicates that the object and purpose of the Geneva Agreement is to ensure a definitive resolution of the controversy between the Parties.

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

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

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

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

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

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

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

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

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

* *

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

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

* *

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

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

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

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

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

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

86. The Court notes that its conclusion that the Parties consented to judicial settlement under Article IV of the Geneva Agreement is not called into question by the phrase "or until all the means of peaceful settlement there contemplated have been exhausted" at paragraph 2 of that Article, which might suggest that the Parties had contemplated the possibility that the choice,

by the Secretary-General, of the means provided for in Article 33 of the Charter, which include judicial settlement, would not lead to a resolution of the controversy. There are various reasons why a judicial decision, which has the force of *res judicata* and clarifies the rights and obligations of the parties, might not in fact lead to the final settlement of a dispute. It suffices for the Court to observe that, in this case, a judicial decision declaring the 1899 Award to be null and void without delimiting the boundary between the Parties might not lead to the definitive resolution of the controversy, which would be contrary to the object and purpose of the Geneva Agreement.

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

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

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

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

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

90. The Parties do not dispute that the Secretary-General is required to establish that the means previously chosen have not "le[d] to a solution of the controversy" before "choos[ing] another of the means stipulated in Article 33 of the Charter of the United Nations". The Court will therefore interpret only the terms of the second sentence of this provision, which provides that,

if the means chosen do not lead to a resolution of the controversy, "the Secretary-General . . . shall choose another of the means stipulated in Article 33 of the Charter of the United Nations, *and so on until the controversy has been resolved or until all the means of peaceful settlement there contemplated have been exhausted*" (emphasis added).

* *

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

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

*

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

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

* *

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

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

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

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

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

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

*

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

IV. JURISDICTION OF THE COURT

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

A. The conformity of the decision of the Secretary-General of 30 January 2018 with Article IV, paragraph 2, of the Geneva Agreement

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

> "I have the honour to write to you regarding the controversy between the Co-operative Republic of Guyana and the Bolivarian Republic of Venezuela which has arisen as the result of the Venezuelan contention that the Arbitral Award of 1899 about the frontier between British Guiana and Venezuela is null and void ('the controversy').
>
> As you will be aware, Article IV, paragraph 2 of the Agreement to Resolve the Controversy between Venezuela and the United Kingdom of Great Britain and Northern Ireland over the Frontier between Venezuela and British Guiana, signed at Geneva on 17 February 1966 (the 'Geneva Agreement'), confers upon the Secretary-General of the United Nations the power and the responsibility to choose from among those means of peaceful settlement contemplated in Article 33 of the Charter of the United Nations, the means of settlement to be used for the resolution of the controversy.
>
> If the means so chosen does not lead to a solution of the controversy, Article IV, paragraph 2 of the Geneva Agreement goes on to confer upon the Secretary-General the responsibility to choose another means of peaceful settlement contemplated in Article 33 of the Charter.
>
> As you will also be aware, former Secretary-General Ban Ki-moon communicated to you and to the President of the Bolivarian Republic of Venezuela a framework for the resolution of the border controversy based on his conclusions on what would constitute the most appropriate next steps. Notably, he concluded that the Good Offices Process, which had been conducted since 1990, would continue for

one final year, until the end of 2017, with a strengthened mandate of mediation. He also reached the conclusion that if, by the end of 2017, I, as his successor, concluded that significant progress had not been made toward arriving at a full agreement for the solution of the controversy, I would choose the International Court of Justice as the next means of settlement, unless the Governments of Guyana and Venezuela jointly requested that I refrain from doing so.

In early 2017, I appointed a Personal Representative, Mr. Dag Halvor Nylander, who engaged in intensive high-level efforts to seek a negotiated settlement.

Consistently with the framework set by my predecessor, I have carefully analyzed the developments in the good offices process during the course of 2017.

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

At the same time, it is my considered view that your Government and that of the Bolivarian Republic of Venezuela could benefit from the continued good offices of the United Nations through a complementary process established on the basis of my power under the Charter. A good offices process could be supportive in at least the different ways set out below.

Firstly, should both Governments accept the offer of a complementary good offices process, I believe this process could contribute to the use of the selected means of peaceful settlement.

In addition, should both Governments wish to attempt to resolve the controversy through direct negotiations, in parallel to a judicial process, a good offices process could contribute to such negotiations.

Thirdly, as the bilateral relationship between your Government and that of the Bolivarian Republic of Venezuela is broader than the controversy, both Governments may wish to address through a good offices process any other important pending issues that would benefit from third-party facilitation.

I trust that a complementary good offices process would also contribute to the continuation of the friendly and good-neighbourly relations that have characterized exchanges between the two countries.

In closing, I should like to inform you that I will be making this way forward public. I have sent an identical letter to the President of the Bolivarian Republic of Venezuela, and I enclose a copy of that letter."

104. The Court first notes that, in taking his decision, the Secretary-General expressly relied upon Article IV, paragraph 2, of the Geneva Agreement. The Court further notes that, if the means of settlement previously chosen does not lead to a solution of the controversy, this provision calls

upon the Secretary-General to choose another of the means of settlement provided for in Article 33 of the Charter of the United Nations, without requiring him to follow any particular sequence (see paragraph 101 above).

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

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

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

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

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

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

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

B. The legal effect of the decision of the Secretary-General of 30 January 2018

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

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

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

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

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

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

V. SEISIN OF THE COURT

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

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

* *

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

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

* *

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

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

VI. SCOPE OF THE JURISDICTION OF THE COURT

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

* *

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

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

125. Specifically, Guyana argues that the wording of the Geneva Agreement, notably Article I, presents the controversy as being the "result" of Venezuela's contention that the 1899 Award about the frontier between British Guiana and Venezuela is null and void. According to Guyana, since the 1899 Award delimited the boundary between Venezuela and the colony of

British Guiana, the controversy between the Parties is territorial and the Court must therefore necessarily determine the boundary between Venezuela and Guyana, which implies first deciding whether the Award is valid. Guyana further argues that the Court would not be in a position to reach "a full agreement for the solution" of this dispute by addressing "*any* outstanding questions" (emphasis added by Guyana), which is the objective set forth under Article IV of the Geneva Agreement, without first ruling on the validity of the Award.

*

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

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

* *

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

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

words “Venezuelan contention” in Article I of the Geneva Agreement. The word “contention”, in accordance with the ordinary meaning to be given to it in the context of this provision, indicates that the alleged nullity of the 1899 Award was a point of disagreement between the parties to the Geneva Agreement for which solutions were to be sought. This in no way implies that the United Kingdom or Guyana accepted that contention before or after the conclusion of the Geneva Agreement. The Court therefore considers that, contrary to Venezuela’s argument, the use of the word “contention” points to the opposing views between the parties to the Geneva Agreement regarding the validity of the 1899 Award.

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

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

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

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

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

134. The Court further notes that Venezuela's argument that the Geneva Agreement does not cover the question of the validity of the 1899 Award is contradicted by the statement of the Minister for Foreign Affairs of Venezuela before the Venezuelan National Congress shortly after the conclusion of the Geneva Agreement. He stated in particular that "[i]f the nullity of the Award of 1899, be it through agreement between the concerned Parties or through a decision by any competent international authority as per Agreement, is declared then the question will go back to its original state". This confirms that the parties to the Geneva Agreement understood that the question of the validity of the 1899 Award was central to the controversy that needed to be resolved under Article IV, paragraph 2, of the Geneva Agreement in order to reach a definitive settlement of the land boundary between Guyana and Venezuela.

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

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

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

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138. For these reasons,

THE COURT,

(1) By twelve votes to four,

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

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

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

(2) Unanimously,

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

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

(Signed) Abdulqawi Ahmed YUSUF,
President.

(Signed) Philippe GAUTIER,
Registrar.

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

(Initialled) A.A.Y.

(Initialled) Ph.G.
