

## DISSENTING OPINION OF JUDGE GEVORGIAN

*Disagreement with the Court's finding that the Court has jurisdiction — The Court has not established that Venezuela has provided unequivocal consent to the Court's jurisdiction — The Secretary-General's choice of means of settlement under Article IV (2) of the Geneva Agreement is not legally binding upon the Parties — The Court's textual analysis of Article IV (2) does not establish that the Secretary-General's choice is binding — The object and purpose of the Geneva Agreement is best understood as facilitating an agreed resolution of the dispute — The Court ignores language in the Geneva Agreement which contradicts its conclusion — The documents referred to by the Court do not support the view that the Secretary-General's choice of the means of settlement is legally binding — Other reasons given by the Court for finding the required consent are unconvincing.*

1. I have joined the Court's unanimous finding that it lacks jurisdiction to entertain the claims of the Co-operative Republic of Guyana (hereinafter "Guyana") which arise from events that occurred after the signature of the Geneva Agreement. However, I disagree with the Court's conclusion that it has jurisdiction to entertain Guyana's Application in so far as it concerns the validity of the Arbitral Award of 3 October 1899 and "the related question of the definitive settlement of the land boundary dispute" between the Parties. In this opinion, I shall set forth the reasons for my disagreement with the Court's approach.

2. In my view, the Court's Judgment in this case undermines the fundamental principle of consent of the parties to its jurisdiction and is inconsistent with both the Court's Statute and its jurisprudence. In its prior judgments, the Court has established not only that the consent of the parties is required for it to exercise jurisdiction, as is provided in its Statute, but also that such consent must be "certain", "unequivocal" and "indisputable"<sup>1</sup>. The Court in its Judgment ignores this high threshold for finding consent, reaching the unprecedented decision to exercise jurisdiction on the basis of a treaty that does not even mention the Court, let alone contain a compromissory clause. This is especially problematic because one of the Parties has consistently refused to bring the present dispute before the Court, as was most recently demonstrated by its decision not to participate in the proceedings, though it presented a Memorandum with serious legal arguments that, in my view, did not receive due

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<sup>1</sup> See *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, p. 204, para. 62.

consideration from the Court. Moreover, in the context of this dispute, the Court should have taken into account that the case involves national interests of the highest order such as rights to large amounts of territory.

3. A key basis for the Court's flawed approach to the issue of consent is its finding that Article IV, paragraph 2 of the Geneva Agreement gives the Secretary-General of the United Nations the authority to issue a legally binding decision on the means of settlement to be employed by the Parties. In my view, this interpretation is not supported by the text of the Geneva Agreement or the Agreement's object and purpose. The Geneva Agreement was meant to assist the Parties in achieving an *agreed* resolution of their dispute, and not to subject the Parties to a particular form of dispute settlement against their will.

#### I. THE ALLEGEDLY BINDING NATURE OF THE SECRETARY-GENERAL'S CHOICE OF THE COURT

4. In paragraph 74 of the Judgment, the Court concludes 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"<sup>2</sup>. This conclusion, in my view, is contrary to the text of the Geneva Agreement, which contains no indication whatsoever that the Secretary-General has the authority to make legally binding decisions. In this respect, moreover, the Court misinterprets the Geneva Agreement's object and purpose, ignoring key elements of the preamble and Article IV (2) which make absolutely clear that the true purpose of the Agreement is to facilitate "an agreed settlement"<sup>3</sup> to the Parties' dispute. The factors relied upon by the Court in support of its interpretation of the Geneva Agreement to me are not persuasive for the following reasons.

##### 1. *Text of the Geneva Agreement*

5. In paragraph 72 of the Judgment, the Court analyses the provision in Article IV (2) that the Parties "shall refer the decision as to the means of settlement . . . to the Secretary-General" and makes a finding that the term "shall" "should be interpreted as imposing an obligation on States parties"; that the term "refer" "conveys the idea of entrusting a matter to a third party"; and that the term "decision" "is not synonymous with

<sup>2</sup> See paragraph 74 of the present Judgment.

<sup>3</sup> See *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 599, para. 109.

‘recommendation’ and suggests the binding character of the action taken by the Secretary-General as to his choice of the means of settlement”. On this basis, the Court arrives at the conclusion that “the Parties made a legal commitment to comply with the decision of the third party on whom they conferred such authority”<sup>4</sup>. I cannot agree with this interpretation, as the terms “shall” and “decision” do not necessarily indicate the creation of a legal obligation.

6. While the Court has previously found that the word “shall” imposes an obligation on State parties in the context of Article 4 (1) of the United Nations Convention against Transnational Organized Crime (also known as the “Palermo Convention”)<sup>5</sup>, the Court in the present case provides no reason to consider that this word should be given an identical construction in Article IV (2) of the Geneva Agreement. In fact, the Court has found, in other cases, that treaty provisions containing the word “shall” do *not* impose binding legal obligations upon the parties<sup>6</sup>. Moreover, the term “shall refer” does not necessarily indicate that the Parties entrusted a third party with the authority to make a legally binding decision.

7. While the Court now assumes that the word “decision” is “not synonymous with ‘recommendation’”, the Court itself has made clear, in past cases, that the term “decision” *can* in fact mean “recommendation”, and therefore does not necessarily indicate a legal obligation of compliance. The Court observed with regard to “decisions” of the General Assembly under Article 18 of the United Nations Charter that “[t]hese ‘decisions’ . . . include certain recommendations” in addition to decisions with dispositive force and effect<sup>7</sup>. The Court thus acknowledged that the reference to “decisions” in Article 18 did not exclusively refer to legally binding decisions.

8. In sum, I am of the view that the Court’s textual analysis of Article IV (2) does not establish that the Secretary-General’s choice as to the means of settlement is legally binding upon the Parties.

## 2. *Object and Purpose of the Geneva Agreement*

9. The Court also purports to rely on the object and purpose of the Geneva Agreement, which it characterizes in paragraph 73 of the Judgment as “ensur[ing] a definitive resolution of the controversy between

<sup>4</sup> See paragraph 72 of the present Judgment.

<sup>5</sup> *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018 (I), p. 321, para. 92.

<sup>6</sup> *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996 (II), pp. 812-814, paras. 24-28.

<sup>7</sup> *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, I.C.J. Reports 1962, p. 163.

the Parties”<sup>8</sup>. This interpretation of the Agreement’s object and purpose, in my view, is flawed, as it ignores several relevant portions of the Agreement’s preamble and text.

10. First, the Court omits any discussion of the fourth paragraph of the Geneva Agreement’s preamble, which provides that any outstanding controversy between the parties should “be amicably resolved in a manner acceptable to both parties”. This statement should not be taken to be a mere platitude. The Court recently observed, in *Ukraine v. Russia*, that “references to the ‘amicable solution’” of a dispute in Articles 12 and 13 of International Convention on the Elimination of All Forms of Racial Discrimination (CERD) indicate that “the objective of the CERD Committee procedure is for the States concerned to reach an *agreed settlement* of their dispute”<sup>9</sup>. There is even greater reason to find that the objective of the Geneva Agreement is to reach an agreed settlement of the dispute, by a solution “acceptable to both parties”.

11. Thus, I am of the view that the Geneva Agreement’s true object and purpose is to assist the Parties in reaching an agreed resolution of the present dispute. If the object and purpose of the Geneva Agreement is so framed, the Secretary-General’s role could be conceived of as similar to that of a conciliator entrusted with helping the Parties reach an agreed solution to the dispute rather than imposing a means of settlement on them.

12. A second significant flaw with the Court’s approach to the object and purpose of the Geneva Agreement, in my view, is that it gives inadequate consideration to the second sentence of Article IV (2). That sentence provides:

“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.*” (Emphasis added.)

13. This provision requires the Secretary-General to continue choosing from the means of settlement listed in Article 33 until one of two possible outcomes is reached: *either* (1) the controversy between the Parties is resolved, *or* (2) all the means of peaceful settlement contemplated in Article 33 have been exhausted. So, Article IV (2) contains no presumption that the controversy between the Parties will definitively be resolved.

<sup>8</sup> See paragraph 73 of the present Judgment.

<sup>9</sup> *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 599, para. 109; emphasis added.

14. This provision in Article IV (2), in my view, strongly indicates that the Parties, in concluding the Geneva Agreement, did not intend to subject themselves to a binding method of dispute resolution that would guarantee a definitive resolution of the controversy. If this had been their intent, they could have left out the final portion of Article IV (2), instead ending that provision with the phrase “and so on until the controversy has been resolved”. Article IV (2) is better interpreted as requiring agreement by the Parties before the Secretary-General’s choice of the means of settlement may be implemented. Such an interpretation would explain how the Secretary-General’s choice of a binding means such as judicial settlement could leave the controversy unresolved, namely by allowing for the possibility that the Parties would fail to agree on the implementation of the Secretary-General’s choice. Therefore, in my view, the final sentence of Article IV (2) provides additional evidence that the Geneva Agreement aims to facilitate an *agreed* resolution of the controversy, and not a resolution that is imposed upon the Parties by any third party.

15. In paragraph 86 of the Judgment, the Court provides an unconvincing alternative explanation for the language at the end of Article IV (2). It suggests that this language could account for a judicial decision which only partially addresses the Parties’ dispute, but it admits that such a scenario would be contrary to what it considers the object and purpose of the Geneva Agreement<sup>10</sup>. In other words, rather than acknowledging that the text of Article IV (2) is inconsistent with its interpretation of the Agreement’s object and purpose, the Court contends that the Parties chose to include language in Article IV (2) that would only come into play if the purpose of the Agreement were defeated.

16. In my view, this is a strained and implausible interpretation of Article IV (2). If the Parties had truly envisaged that the mechanism established by the Geneva Agreement would ensure a definitive resolution of the controversy, there would have been no reason for them to include language contemplating the Agreement’s failure to achieve such a resolution. The Agreement’s object and purpose consists of facilitating an agreed solution to the controversy.

### 3. *Additional Factors*

#### *A. Documents relied upon by the Court*

17. The Court cites a number of documents promulgated after the conclusion of the Geneva Agreement in order to prove that the Parties (and Venezuela in particular) agreed with its interpretation of Article IV (2). In my view, none of these documents contains any acknowledgment that the Secretary-General’s choice of means was meant to be legally binding

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<sup>10</sup> See paragraph 86 of the present Judgment.

upon the Parties. Rather than supporting the Court's position, the documents cited in the Judgment only further indicate that there has been no "unequivocal" and "indisputable" expression of consent to the Court's jurisdiction, as required by the Court's jurisprudence.

18. The Court first cites in paragraph 75 an excerpt from a document explaining Venezuela's motives for ratifying the Protocol of Port of Spain, which imposed a 12-year moratorium on the operation of Article IV of the Geneva Agreement. In this document, 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"<sup>11</sup>.

19. Nothing in this statement indicates that Venezuela considered Article IV (2) to confer binding decision-making authority upon the Secretary-General. At most, it reflects Venezuela's understanding that, if Article IV (2) were to be implemented, the choice of the means of settlement would no longer be the object of *direct negotiations* between the Parties. Indeed, the same document cited by the Court elsewhere states that an "essential advantage" of the Protocol of Port of Spain is the fact that it "[a]voids our border dispute with Guyana from *leaving* (in a very short period, possibly three months) *direct negotiations* between the interested Parties to passing into the hands of third parties"<sup>12</sup>. Indeed, once the Parties referred the choice of means of settlement to the Secretary-General, they were no longer engaging in direct negotiations, but rather other forms of peaceful dispute settlement (such as good offices). This does not mean, however, that the Secretary-General had the authority to issue binding decisions.

20. The Court also cites, in paragraph 77, a statement made before the Venezuelan National Congress on 17 March 1966 by the then-Minister for Foreign Affairs of Venezuela, Mr. Ignacio Iribarren Borges on the occasion of the Geneva Agreement's ratification. The Minister is quoted as stating 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"<sup>13</sup>.

21. The Minister's statement does not support the argument that the Parties are bound by the Secretary-General's choice. If anything, this statement suggests that the Secretary-General was *not* viewed as capable of issuing binding decisions. The Court does not "indicate" solutions to a dispute, but issues a definitive ruling. It is a conciliator or mediator who

<sup>11</sup> Paragraph 75 of the present Judgment.

<sup>12</sup> Memorial of Guyana, Ann. 47, para. 8 (*b*); emphasis added.

<sup>13</sup> Paragraph 77 of the present Judgment.

indicates solutions to a dispute, with the ultimate decision being left to the parties.

22. The Court cites in paragraph 87 a joint statement issued by the Venezuelan and United Kingdom Ministers for Foreign Affairs, along with the Prime Minister of British Guiana. That statement, issued contemporaneously with the signing of the Geneva Agreement, states that “an agreement was reached whose stipulations will enable a definitive solution” to the controversy between the Parties<sup>14</sup>. Importantly, this joint statement does *not* state that the Geneva Agreement will “ensure” or “guarantee” a definitive solution of the controversy. Rather, use of the term “enable” indicates an understanding on the part of the Parties that the Geneva Agreement made a definitive solution *possible*. This again is consistent with an interpretation of the Agreement’s object and purpose as facilitating an agreed solution to the controversy, rather than “ensur[ing] a definitive resolution” thereof.

23. In sum, I do not consider that any of the documents relied upon by the Court establish that the Parties understood the Secretary-General’s choice of means of settlement to be binding.

#### *B. Factors omitted by the Court*

24. In my view, the Court gives inadequate attention to the fact that, prior to the conclusion of the Geneva Agreement, Venezuela had manifested on several occasions its unwillingness to have issues related to its territory decided by third parties without its clear consent. In this respect, it should be noted that Venezuela had concluded, in 1939, a bilateral treaty with Colombia providing, in general, for submission of disputes to conciliation or judicial settlement. However, Article II of that treaty expressly excluded any disputes relating to the territorial integrity of the parties from being submitted to third-party settlement<sup>15</sup>. A similar 1940 bilateral treaty between Venezuela and Brazil required, at Article IV, that the parties attempt to conclude a special agreement before any disputes could be submitted to judicial settlement<sup>16</sup>. These treaties reflect Venezuela’s unwillingness, prior to 1966, to subject itself to judicial settlement without its express consent, particularly with regard to territorial disputes, and should have been taken into account by the Court.

<sup>14</sup> Paragraph 87 of the present Judgment.

<sup>15</sup> Treaty of non-aggression, conciliation, arbitration and judicial settlement, signed at Bogotá on 17 December 1939, United Nations, *Treaty Series (UNTS)*, Vol. 1257, Part Two, p. 463, Art. II.

<sup>16</sup> Treaty for the pacific settlement of disputes, signed at Caracas on 30 March 1940, *UNTS*, Vol. 51, Part Two, p. 308, Art. IV.

## II. OTHER ARGUMENTS CONCERNING THE PARTIES' ALLEGED CONSENT TO JUDICIAL SETTLEMENT BY THE COURT

25. Apart from the supposedly binding nature of the Secretary-General's decision-making authority, the Court rests on two other arguments in attempting to demonstrate the Parties' consent to the Court's jurisdiction. First, it states in paragraph 82 that, by including a *renvoi* to Article 33 of the United Nations Charter (which in turn refers to judicial settlement) in Article IV (2), the Parties "accepted the possibility of the controversy being settled by that means"<sup>17</sup>. It adds that if the Parties had wished to exclude judicial settlement, they could have done so during their negotiations<sup>18</sup>. However, there is a significant difference between the Parties "accept[ing] the possibility" of recourse to judicial settlement and their unequivocal consent in advance to such settlement. Moreover, by the Court's own logic, if the Parties had wished to provide consent in advance to judicial settlement by the Court, without the need for further agreement between them, they could have included an express statement to this effect in Article IV (2). However, they chose not to do so.

26. Secondly, the Court suggests in paragraph 114 that Article IV (2)'s reference to the decision of the Secretary-General would be deprived of *effet utile* if that decision were subject to the further consent by the Parties for its implementation. However, this argument does not account for the possibility that the Secretary-General could have a non-binding role in the dispute settlement process, akin to that of a conciliator. While it is true that the Secretary-General's role only comes into play when the Parties have otherwise failed to agree on a means of settlement, this does not mean that his intervention in a non-legally binding capacity would necessarily be unhelpful. Article 33 of the United Nations Charter makes clear that negotiation is a form of dispute settlement separate from conciliation or mediation, indicating that there is distinct value to the latter procedures even if the third party in question is not empowered to issue binding decisions.

## III. CONCLUSION

27. Given the foregoing, I am of the view that the Geneva Agreement contains no certain, unequivocal indication of the Parties' consent to the Court's jurisdiction, and therefore the Court has erred in finding that it has jurisdiction to entertain Guyana's Application.

28. The dangers of the Court's approach are well illustrated by its ultimate conclusion that the Court has jurisdiction over the question con-

<sup>17</sup> See paragraph 82 of the present Judgment.

<sup>18</sup> *Ibid.*

cerning the “definitive settlement of the land boundary dispute” between Guyana and Venezuela<sup>19</sup>. This would be a decision of potentially enormous significance for the Parties, and thus the fact that the Court bases its finding of jurisdiction to make this decision upon an instrument that contains no compromissory clause and does not even mention the Court is cause for concern.

29. Rather than basing itself upon an unequivocal, indisputable indication of Venezuela’s consent, as its jurisprudence requires, the Court goes looking for reasons to exercise jurisdiction, relying in particular on the presumed intentions of the Parties and upon a series of statements that are, at best, of ambiguous meaning. The Court ignores language in the text of the Geneva Agreement that squarely contradicts its position and is unable to point to any express statement evidencing either consent to this Court’s jurisdiction or an acknowledgment that the Secretary-General’s choice of the means of settlement is legally binding. In my view, this approach is wrong and undermines the fundamental principle of consent by the parties to the jurisdiction of the Court.

*(Signed)* Kirill GEVORGIAN.

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<sup>19</sup> See paragraph 138 (1) of the present Judgment.