

DISSENTING OPINION OF JUDGE ABRAHAM

[Translation]

1. To my great regret, I am unable to subscribe to the conclusion reached by the majority of my colleagues in the present case, namely that there is a jurisdictional basis allowing the Court to entertain the dispute between Guyana and Venezuela, which is essentially a territorial dispute, of which it has been seised by the unilateral Application of Guyana.

2. According to the Judgment, the Court's jurisdiction results from a combination of three elements. The first is Article 36, paragraph 1, of the Statute, which extends the jurisdiction of the Court to "all cases which the parties refer to it and all matters specially provided for . . . in treaties and conventions in force". The second is Article IV, paragraph 2, of the Geneva Agreement of 17 February 1966, which is binding on the Parties to the present case, an agreement that is intended, according to its title, "to resolve the controversy . . . over the frontier between Venezuela and British Guiana". Article IV, paragraph 2, of this Agreement stipulates that if, by a certain date, the parties have not reached agreement on the choice of one of the means of dispute settlement provided for 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". Lastly, the third link in the majority's chain of reasoning is the Secretary-General's letter of 30 January 2018, addressed to both Parties, in which the Secretary-General announced that, on the basis of Article IV, paragraph 2, of the Geneva Agreement, he had "chosen the International Court of Justice as the next means that is now to be used for [the] solution [of the controversy]".

3. Are these three combined elements sufficient to confer jurisdiction on the Court to entertain the dispute between two neighbouring States, upon the unilateral application of one of them? I do not believe so, and I shall explain why.

4. I shall begin by mentioning all those points in the reasoning developed by the majority with which I am in agreement. That will then allow me to identify the precise moment beyond which I no longer feel able to support that reasoning.

5. First, there is no doubt — and nor is it contested — that when the Secretary-General (of the day) began to exercise the responsibility conferred on him by Article IV, paragraph 2, of the Agreement, i.e. in 1983, the conditions laid down in that instrument had been met. The Mixed Commission provided for by the Agreement had not succeeded in framing a solution to the controversy within four years from the date of the Agree-

ment, and, within the time-limit set following the Commission's final report, the two parties had not reached agreement "regarding the choice of one of the means of settlement provided in Article 33 of the Charter of the United Nations". It was therefore up to the Secretary-General himself (the parties having also failed to agree on the choice of an international organ for the purpose) to choose one of the means of settlement provided for in Article 33. That is what the Secretary-General did in 1990, after ample consultation, by choosing the good offices process.

6. Secondly, once it had been established that the good offices process had failed, after very long and patient efforts to bring the parties together, namely at the beginning of 2018, it is indisputable that the Secretary-General had the authority under Article IV, paragraph 2, of the Geneva Agreement to choose "another of the means stipulated in Article 33".

7. The Secretary-General having chosen, by his letter of 30 January 2018, the International Court of Justice, it is necessary at this point in the reasoning to address two questions upon which — the Parties being in disagreement — the Court takes a stand in the present Judgment: is the International Court of Justice one of the means of settlement which the Secretary-General was at liberty to choose? And if so, was the Secretary-General able to choose this Court without having previously had recourse, unsuccessfully, to the other means set out in Article 33 of the Charter? On these two points, I agree with the position taken by the Judgment.

8. As we know, Article 33 of the Charter, to which Article IV of the Agreement refers, provides as means of settling disputes that may arise between States: negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or "other peaceful means" chosen by the parties. The list in Article 33 therefore includes "judicial settlement". Recourse to the International Court of Justice being one of the procedures for "judicial settlement" — and indeed, in the context of the Charter, the principal among them — I see no reason to consider that the Secretary-General was prevented from choosing the Court as an appropriate means of settling the dispute between Guyana and Venezuela. That is what the Judgment says, and I fully concur with it on that point.

9. Further, there is nothing in the wording of Article IV, paragraph 2, of the Agreement — which provides that if a means chosen by the Secretary-General does not enable the dispute to be settled, the Secretary-General "shall choose another of the means stipulated in Article 33 . . . and so on until the controversy has been resolved or until all the means . . . there contemplated have been exhausted" — and I shall return to this text in due course — that obliges the Secretary-General to follow any particular order in choosing successive means from among those available to him. I deduce from this that the Secretary-General has a free hand in the order of his choices, and that he was therefore able, as he did in January 2018, to choose the Court as a means of settlement of the dispute, despite the

fact that he had not previously had recourse to certain other means referred to in Article 33, such as conciliation or arbitration. The only obligation which Article IV, paragraph 2, imposes on the Secretary-General — provided he agrees to exercise the responsibility conferred upon him — is to choose a new means of settlement each time the means previously chosen proves unable to produce a solution, “and so on”, as the Agreement puts it. In short, I take the view, like the majority of the Court, that the Secretary-General has performed the functions vested in him by Article IV, paragraph 2, without laying himself open to the least reproach.

10. Lastly, to conclude on those points where I agree with the majority, I believe that the Secretary-General’s choice of a means of settlement is not a mere recommendation without binding effect, but that it creates obligations for both the parties involved. In this regard, the terms of Article IV of the Agreement seem to me to be sufficiently clear. In the absence of an agreement for the solution of the controversy within the Mixed Commission, the parties “shall without delay” choose one of the means of settlement listed in Article 33. If they fail to do so within three months, they “shall refer the decision as to the means of settlement” either to an international organ upon which they both agree or, failing that, to the Secretary-General. Everything therefore indicates that the Secretary-General’s choice of a means of settlement constitutes a decision which imposes certain obligations on the parties.

11. The majority of the Court has considered that, taken together, the elements described above provide a sufficient basis for the jurisdiction of the Court to entertain Guyana’s Application. I am not of that opinion. It is one thing to say that the choice of a means — in this instance, judicial settlement — by the Secretary-General creates obligations for the parties; it is quite another to see in Article IV, paragraph 2, of the Agreement, combined with the Secretary-General’s decision, the expression of both Parties’ consent to the settlement of their dispute by the Court.

12. As the Judgment correctly points out, the jurisdiction of the Court is based on the consent of the parties, and while it is true that this consent is not subject to being expressed in any particular form, “[t]he 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” (para. 113). I do not believe that to be the case in this instance.

I would first observe that, leaving aside judicial settlement for a moment, all the other means which the Secretary-General may choose from the list in Article 33 require, in order to be effective, an agreement between the parties following the Secretary-General’s decision. Even arbitration, which has in common with judicial settlement that it results in a legally binding decision resolving the dispute, could only produce a settlement, should the Secretary-General have chosen that means, if the parties negotiate and conclude a special agreement, without which the arbitra-

tion process could not be implemented. In other words, if the Secretary-General had chosen arbitration, the parties would in my view have had to negotiate, in good faith, a special agreement allowing for the settlement of their dispute and conferring jurisdiction to that end on an arbitral tribunal; but the Secretary-General's decision, though binding on the parties, would not in itself have founded the jurisdiction of an arbitral tribunal, which would have derived its jurisdiction from the subsequent agreement between the parties.

13. There is to my mind no reason for the position to be different in the present case, where the Secretary-General has chosen judicial settlement.

One clear difference does of course exist between the two situations: whereas an arbitral tribunal must be established by agreement of the parties, and its powers delimited by that agreement, the Court generally has no need, in practice, of any additional instrument (other than its Statute and Rules of Procedure) to be able to exercise its jurisdiction on the basis of a unilateral application. But while this difference may be a significant one in practice, it changes nothing in terms of the central question of the consent of the parties. I do not see, in the wording of Article IV, paragraph 2, of the Agreement, an unequivocal expression of consent by the parties to the jurisdiction of the Court, but only their acceptance of the idea that their dispute may ultimately be resolved by means of judicial settlement.

14. The Court rightly indicates that under Article IV, paragraph 2, "the Parties accepted the possibility of the controversy being settled by that means [judicial settlement]" (paragraph 82 of the Judgment). Up to that point, I would agree, but in my view it is not sufficient in order to establish the Parties' consent to jurisdiction.

I would add that in this instance a special agreement between the Parties following the Secretary-General's decision would have been particularly useful in order to delimit the subject-matter of the dispute submitted to the Court, which is not done clearly by the Geneva Agreement itself.

15. If the Court, in the present Judgment, finds the Parties' consent to its jurisdiction in the Agreement itself, the Secretary-General having chosen the Court as the means of settlement, it is — principally — because it gives paramount importance to the object and purpose of the Agreement in order to interpret it.

This approach is in itself a perfectly legitimate one, and the Judgment is right to point out that Articles 31 and 32 of the Vienna Convention on the Law of Treaties reflect the rules of customary international law on treaty interpretation.

16. However, I disagree with the Court as regards its understanding of the object and purpose of the Geneva Agreement. According to the Judgment, the Agreement aims to put in place a mechanism for settling the dispute such that, once all the provisions of the Agreement have been completely and correctly applied, that dispute will necessarily be resolved. The Court relies in particular, in this regard, on the title of the Agreement,

which presents the latter as seeking “to resolve the controversy . . . over the frontier”. From this it deduces that any interpretation of the Agreement which would have the effect, once the Agreement had been fully implemented, of allowing the dispute to remain in existence — without having been able to be resolved — should be ruled out, and that on the contrary preference should be given to an interpretation ensuring that, at the end of the process, the dispute will be resolved. That is why the Court believes it must reject any interpretation that would make the implementation of judicial settlement subject to “further consent by the Parties” after the decision of the Secretary-General: because such a requirement (which would suppose the conclusion of a special agreement or some other form of expression of consent) “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” (Judgment, para. 114).

17. To my mind, while it is plain to see that in concluding the Geneva Agreement, the parties intended to promote the settlement of their dispute and, in so far as possible, to enable such a settlement to be arrived at, they did not seek to establish a binding mechanism aimed at ensuring that such a resolution would be obtained, by negotiation if possible, or by judicial means if necessary. They therefore did not intend to give their consent in advance to judicial settlement.

Several provisions of the Geneva Agreement indicate very clearly, in my view, that the parties accepted the possibility that implementation of the Agreement would not necessarily result in the settlement of their dispute.

18. The first of these is Article IV, paragraph 1, which provides that it is normally for the parties themselves to choose one of the means of peaceful settlement listed in Article 33 of the Charter, should the Mixed Commission not have succeeded in finding a solution to the dispute. If the parties agree on the choice of a means other than judicial settlement (mediation or conciliation, for example), the subsequent application of the means thus chosen may fail to enable a settlement of the dispute to be achieved: the Geneva Agreement will then have been applied in full, and the dispute will still remain. The possibility of there being no settlement even after full implementation of the Agreement was therefore certainly contemplated by the parties.

In the present case, the Parties have not agreed on the choice of a means, and it is therefore Article IV, paragraph 2, which has come into play, with its special feature that, as part of this mechanism, the Secretary-General need not restrict himself to choosing one means, but, if that fails, must choose another “and so on”.

19. But even paragraph 2, as I understand it, contemplates and accepts the possibility that the dispute may not have been resolved at the end of the process.

It is indeed stipulated there that the Secretary-General must choose means of settlement one after another “and so on until the controversy has been resolved or until all the means of peaceful settlement there contemplated have been exhausted”. If the parties’ intention had been to give

their consent in advance to judicial settlement, the text of Article IV, paragraph 2, would have ended with the words “has been resolved”. In fact, the final phrase (“or until all the means of peaceful settlement . . . have been exhausted”) is deprived of all effect if the interpretation adopted by the Court — agreeing with that of Guyana — is correct. If the parties, by the very conclusion of the Agreement, have given their consent to judicial settlement, and since the Secretary-General is obliged to choose successively, if need be, all the means set out in Article 33, including judicial settlement, the result is that at the end of the process, the dispute will necessarily have been resolved. Consequently, if the text of paragraph 2 had ended with “has been resolved”, it would have had exactly the same meaning as that attributed to it by the Court in the present Judgment: this means that for the Court the final phrase of paragraph 2 is without effect, and it disregards it. The point is that this final part clearly indicates that it is possible, within the spirit in which the Agreement was drafted, that at the end of the process, the dispute could still remain; it therefore does not tally with the definition of the object and purpose of the Agreement as adopted by the Court, namely the establishment of a mechanism that will necessarily result in the settlement of the dispute.

The Judgment endeavours to respond to this objection in paragraph 86. But it does so in terms whose clarity — with all due respect to my colleagues — is not the principal feature, and which can only leave the reader perplexed.

20. Ultimately, having considered carefully all the arguments summoned by the Court in concluding that the Parties have consented to its jurisdiction to entertain their dispute on the basis of the unilateral application of one of them, I am unconvinced. I do not see in the Geneva Agreement the unequivocal indication of such consent. I believe that the Court should have declined jurisdiction.

(Signed) Ronny ABRAHAM.
