DECLARATION OF JUDGE GAJA

Obligation under a treaty to settle a dispute according to one of the means stipulated in Article 33 of the Charter of the United Nations — Referral to a decision of the Secretary-General of the United Nations on the choice of means of settlement — Decision implying an obligation for the Parties to resort to judicial settlement — Whether it confers jurisdiction on the Court — Need for the consent of both Parties — Object and purpose of the treaty.

1. While I concur with the view of the majority that the Parties are bound to submit their dispute to the Court in pursuance of Article IV, paragraph 2, of the 1966 Geneva Agreement, I do not share the opinion that, as a consequence of the decision of the Secretary-General of the United Nations, the Court has jurisdiction over the dispute irrespective of whether the Parties have given their consent to that effect.

2. According to Article IV of the Geneva Agreement, failing the choice by the Parties of "one of the means of peaceful settlement provided in Article 33 of the Charter of the United Nations", "the decision as to the means of settlement" to be used shall be referred to the Secretary-General. At first, he chose good offices. Article IV, paragraph 2, sets forth that, when "the means so chosen do not lead to a solution of the controversy", the Secretary-General "shall choose another of the means stipulated in Article 33 of the Charter of the United Nations". Accordingly, the Secretary-General, having considered that the good offices process had failed to settle the controversy, addressed on 30 January 2018 letters to both Parties by which he communicated that he had "chosen the International Court of Justice as the means that is now to be used for its solution" (Application of Guyana, Annex 7). In consequence, supposing that the decision of the Secretary-General was legitimate, as the Court rightly assessed, the Parties are now under an obligation to submit their dispute to the Court.

3. For the obligation to resort to judicial settlement to arise, there is no need for the Secretary-General's decision to be confirmed by an agreement between the Parties. However, the existence of an obligation for the Parties to comply with the Secretary-General's decision on the means of settlement to be used does not necessarily imply that the chosen means can be implemented without the consent of both Parties. Leaving judicial settlement aside for the moment, the implementation of any of the means listed in Article 33 of the Charter of the United Nations requires their agreement. For instance, resort to mediation implies, at the very minimum, an agreement of the parties on who is going to act as mediator. Similarly, recourse to arbitration requires an agreement of the parties on the appointment of the arbitrators and on conferring jurisdiction to the arbitral tribunal. With regard to judicial settlement, there is the possibility that jurisdiction be conferred on the Court without an agreement providing for additional specifications, for instance if the parties have made declarations under the optional clause covering the dispute. However, that does not necessarily lead to the conclusion that, when judicial settlement is chosen, no agreement is required for conferring jurisdiction on the Court.

4. Had the specific choice of judicial settlement been made directly by the parties, that choice could have been understood in the sense that it was sufficient to confer jurisdiction on the Court. When a compromissory clause does not specify whether it bestows jurisdiction on the Court or only binds the parties to conclude a special agreement for that purpose (as a *pactum de contrahendo*), the Court's jurisprudence tends to interpret the clause as conferring jurisdiction on the Court. Reference may be made, for example, to the Judgments in the

South West Africa cases (*(Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 344) and in *United States Diplomatic and Consular Staff in Tehran* (*(United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 27, para. 52). The same approach may be detected in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (*(Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, pp. 18-19, para. 35) with regard to an agreement providing for the judicial settlement of an existing dispute.

5. The situation is different in the present case. Judicial settlement is certainly included in the reference to the list of the means to be resorted to under Article IV of the Geneva Agreement, but this provision is not a compromissory clause or a special agreement by which the Parties confer jurisdiction on the Court. The choice to resort to judicial settlement as the means for resolving the dispute results from the determination of a third party. The Parties have not yet expressed a common will to submit their dispute to the Court. They are bound to consent to the Court's jurisdiction, whatever form their consent will take. Only once the Parties have so agreed would there be a case "which the parties refer" to the Court according to Article 36, paragraph 1, of its Statute.

6. The decision of the Secretary-General was not based on consent to judicial settlement given by the Parties. In his letters to the Parties of 30 January 2018, he recalled that the choice of the Court as "the next means of settlement" had been announced by his predecessor "unless the Governments of Guyana and Venezuela jointly requested that I refrain from doing so". There is no reference to consent given by the Parties to judicial settlement of the controversy. Moreover, the Secretary-General observed that "a complementary good offices process", if accepted by the Parties, "could contribute to the use of the selected means of peaceful settlement". This suggests that the Secretary-General envisaged that a good offices process would assist the Parties in negotiating a special agreement for submitting the dispute to the Court.

7. As it appears from the title, the object and purpose of the Geneva Agreement is to "resolve the controversy . . . over the frontier between Venezuela and [Guyana]". This does not imply that, in order to achieve the object and purpose of the treaty, one of the means for settling the dispute should be interpreted in a way that would make it the only means that does not require for its implementation the consent of the Parties and moreover leads to a binding decision. In the Geneva Agreement, as well as in Article 33 of the Charter to which the treaty refers, recourse to the Court is an option that is not given any priority over other means of settlement.

8. It is true that if, notwithstanding the obligation to resort to judicial settlement, one of the Parties refrained from giving its consent to the conferral of jurisdiction on the Court, judicial settlement would fail. However, this is what is likely to occur with regard to whichever means of settlement that the Secretary-General may choose if the Parties do not agree to its implementation. The last sentence of Article IV, paragraph 2, of the Geneva Agreement reinforces the point that the choice of any of the means stipulated in Article 33 of the Charter, including recourse to the Court, does not necessarily lead to the settlement of the dispute. It envisages the possibility that the controversy may not be "resolved" even when "all the means of peaceful settlement there contemplated have been exhausted".

9. In conclusion, the Parties are, in my opinion, under an obligation to resort to judicial settlement and therefore to confer jurisdiction on the Court. Pending consent to that effect, the Court does not yet have jurisdiction on the dispute.

(Signed) Giorgio GAJA.

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