DECLARATION OF JUDGE ROBINSON

1. I am in agreement with the finding in the *dispositif* of the Judgment. I wish however to make some brief comments on the case.

2. In the Geneva Agreement, sequence and stages are everything. The sequence follows a path along the stages of various means of settlement; in this process the failure of a particular means of settlement to resolve the controversy sets the stage for the employment of another means of settlement for the same purpose. In the circumstances of this case, this approach leads to two results. First, in the final stage, the means of settlement selected is such that it will resolve the controversy. Second, by the time the final stage of Article IV (2) has been reached, the Parties have consented to accept the means of settlement selected by the Secretary-General of the United Nations, that is, the International Court of Justice, thereby consenting to the jurisdiction of the Court over the controversy. This result has a special significance since the Geneva Agreement does not have the usual compromissory clause in a treaty empowering a party to submit to the Court a dispute concerning its interpretation or application. A compromissory clause reflects the consent of the parties to a treaty to the jurisdiction of the Court. However, it is settled that consent to the jurisdiction of the Court does not have to be expressed in a particular form. The Judgment itself makes this point in paragraph 112 as follows: "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." Consequently, in the instant case, the Court has to satisfy itself that, on the basis of the Geneva Agreement and any other relevant material, the Parties have consented to its jurisdiction.

3. Article I of the Geneva Agreement provides for the establishment of a Mixed Commission to find a solution for the practical settlement of the controversy between the two countries arising from Venezuela's argument that the Award of 1899 was null and void. Article II sets out the procedure for the establishment of the Mixed Commission and Article III provides that the Commission was to submit reports at six-month intervals over a period of four years.

4. Article IV (1) provides that, if within a period of four years the Mixed Commission had not arrived at "a full agreement for the solution of the controversy", it was to refer any outstanding questions to the two countries, which were obliged to choose one of the means of settlement in Article 33 of the Charter of the United Nations.

5. Then comes the important paragraph 2, which may be divided into two stages. In accordance with the first stage, failing agreement between the Parties within three months of receiving the final report on the choice of one of the means of settlement in Article 33, the Parties were obliged to "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". Significantly, in the circumstances of this case, what has been referred to the Secretary-General is not simply the decision as to the means of settlement but rather, the decision as to the choice of the means of settlement. Since the Parties failed to agree on referring the decision as to the means of settlement to an appropriate international organ, that decision was referred to the Secretary-General. In the ordinary meaning of the word "decide", to decide a matter is to bring that matter to a definitive resolution. Thus, the effect of the referral of the decision as to the means of settlement to the Secretary-General is to confer on him the power to bring to a definitive resolution the question of the means of settlement. Implicit in the word "decision" is the notion of an outcome that is binding, and not merely recommendatory.

6. In the second stage of the process, paragraph 2 stipulates that, in the event that the means chosen by the Secretary-General does not lead to a solution of the controversy, he was obliged to "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". The means of good offices was employed by four Secretaries-General over a period of 27 years, without producing a solution to the controversy. Consequent on that failure, the Secretary-General, acting on the authority vested in him by the Parties, stated on 30 January 2018 that in light of the lack of progress in resolving the controversy, he had "chosen the International Court of Justice as the means to be used for the solution of the controversy". Four points may be made.

7. First, Articles I, II, III and IV establish a sequence in the use of various means for the settlement of the controversy. Following the failure of the various means of settlement in Articles I, II, III and the first stage of Article IV (2), we are left in the second stage of Article IV (2) with a Secretary-General on whom the Parties have conferred the power to make a binding decision as to the means of settlement.

8. Second, by agreeing in the first stage of Article IV (2) to refer the decision as to the means of settlement to the Secretary-General, the Parties not only empower and require the Secretary-General to make a decision on the choice of the means of the settlement, but also express their agreement with the choice made by the Secretary-General, and thereby confer, on the particular means selected by him: the International Court of Justice, jurisdiction over the controversy. The Court's jurisdiction is therefore established pursuant to Article 36 (1) of the Statute, which provides for its jurisdiction on the basis of "treaties", the Geneva Agreement being the relevant treaty. Thus, the Court has satisfied the requirement under Article 53 (2) of the Statute of ensuring that it has jurisdiction in a case where a party does not appear.

9. Third, a proper reading of Article IV (2), and indeed Article IV as a whole, does not yield the conclusion that the agreement of both Parties is needed for the institution of proceedings before the Court. That is so because, when in the first stage of Article IV (2) the Parties refer the decision as to the means of settlement to the Secretary-General, they are agreeing that the decision of the Secretary-General is binding on both of them; consequently, it is a decision on the basis of which either of them can unilaterally institute proceedings before the Court. Reading Article IV (2) as requiring the other Party to agree to the institution of proceedings would run counter to the object and purpose of the Agreement to find a solution for the controversy, since it is very likely that the other Party would not agree to such a course.

10. Thus, once the Secretary-General had identified the International Court of Justice as the means of settlement, it was perfectly proper for either Guyana or Venezuela to file an application before the Court in accordance with Article 40 (1) of the Statute. In this case, it was Guyana that filed an application.

11. Fourth, there is nothing in the second stage of Article IV (2) that obliges the Secretary-General to exhaust some or all of the non-judicial means of settlement in Article 33 before he is entitled to choose judicial settlement by the Court for the resolution of the controversy. Consequent on the failure of good offices to provide a solution, the Secretary-General was entitled and required to choose any other of the means in Article 33 in his search for a solution to the controversy. It is logical and understandable that, following the failure of good offices, used over a period of 27 years, the Secretary-General would choose a means of settlement that would produce a result that was binding on the Parties. In choosing the International Court of Justice, the

Secretary-General settled on a means of settlement, the result of which would be binding on the Parties. This choice is consistent with the intention of the Parties in adopting the Geneva Agreement to provide for a dispute settlement procedure that would lead to a final and complete resolution of the controversy.

12. The real issue for the Court is whether, in choosing the International Court of Justice as a form of judicial settlement under Article 33 of the Charter, the Secretary-General acted within the scope of his powers under Article IV (2) of the Geneva Agreement. For example, was he obliged to choose a means of settlement other than judicial settlement, or was he obliged to choose a means of settlement in a particular order, and it was not the turn of judicial settlement to be chosen? The answer is no. The Secretary-General was empowered to "choose another of the means" of settlement in Article 33 of the Charter. He was left with the choice of any other means of settlement from the suite of means set out in Article 33. The second stage of Article IV (2) obliges the Secretary-General to "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". It has been argued that the Secretary-General may have recourse to all the means of settlement set out in Article 33 without the dispute being resolved. That argument is fallacious because the means of settlement included two that were capable of definitively resolving the dispute, namely arbitration and judicial settlement. Therefore, once the Secretary-General chose the International Court of Justice, there was no need for him to have recourse to any of the other means set out in Article 33, because the International Court of Justice as a judicial body would settle the dispute by arriving at a decision that would be binding on the Parties. Intriguing though the questions raised by that argument might be, the phrase "or until all the means of peaceful settlement there contemplated have been exhausted" having been rendered inoperative, has no practical consequences in the circumstances of this case.

13. In light of the foregoing, I respectfully disagree with the inclusion of paragraph 86 in the Judgment. In my view, the cautionary note sounded by the paragraph is not warranted in the circumstances of this case.

(Signed) Patrick L. ROBINSON.

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