DECLARATION OF JUDGE TOMKA

Geneva Agreement as agreement for the peaceful settlement of the dispute — Authority of the Secretary-General of the United Nations — Jurisdiction ratione materiae *concerns the frontier dispute — Issue of the validity of the 1899 Arbitral Award ripe for judicial determination —* Effet utile *of Article IV, paragraph 2, of the Geneva Agreement.*

Having voted in favour of the conclusions reached by the Court, I nevertheless wish to offer a few remarks on this case, which is rather unusual.

1. The Geneva Agreement is not a typical special agreement by which the parties ask the Court to resolve a particular dispute which already exists between them. Nor is Article IV, paragraph 2, of the Geneva Agreement a typical compromissory clause providing for dispute resolution by the Court should a dispute arise between the Parties in the future. Be that as it may, the Geneva Agreement is still an agreement on the peaceful settlement of the dispute between the Parties, as indicated by its official title which reads: "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"[1]. The Agreement provides for a set of procedures and mechanisms aiming at the resolution of the dispute opposing Venezuela and Guyana. It assigns a particular role to the Secretary-General of the United Nations — which he accepted on 4 April 1966[2] — by authorizing him, under the conditions specified in Article IV, paragraph 2, to choose the means of settlement of the dispute. While unusual, such a role is not unprecedented in international practice[3].

2. I agree with the Court's conclusion that 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.

3. The Court's jurisdiction *ratione materiae*, being based on the Geneva Agreement, concerns the controversy over the frontier. This is again clearly indicated by the official title of the Agreement: "Agreement to Resolve the *Controversy . . . over the Frontier* between Venezuela and British Guiana". It is true that the issue of the validity of the 1899 Arbitral Award[4] is part and parcel of that controversy which, as Article I of the Geneva Agreement confirms, "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".

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[1] United Nations, *Treaty Series (UNTS)*, Vol. 561, p. 321.

[2] Letters dated 4 April 1966, from the Secretary-General of the United Nations to the Minister for Foreign Affairs of the Republic of Venezuela and the Minister of State for Foreign Affairs and Permanent Representative of the United Kingdom to the United Nations, Application of Guyana, Ann. 5.

[3] See e.g. Article 33 of the Treaty of Peace with Roumania, signed at Paris on 10 February 1947, *UNTS*, Vol. 42, p. 3.

[4] The text of the Award rendered by the Arbitral Tribunal on 3 October 1899 is reproduced in United Nations, *Reports of International Arbitral Awards*, Vol. XXVIII, pp. 333-339.

4. Guyana, in its Application instituting proceedings, has focused on the issue of the validity of the 1899 Arbitral Award. It requests the Court, *inter alia*, 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"[5].

5. It is on the basis of these submissions, as formulated by Guyana in its Application, that the Court has given in 2018 a title to the case, inscribed on its General List under No. 171 as "*Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela)*"[6].

6. By upholding its jurisdiction, the Court provides an opportunity for the Respondent to substantiate its contention that the 1899 Arbitral Award is null and void. Indeed, the question whether that Award is valid, as maintained by Guyana, or null and void, as contended by Venezuela, is a legal question *par excellence*. No other organ than a judicial one is more appropriate to determine it. Almost six decades of efforts to resolve the controversy between the Parties, caused by this Venezuelan contention, have shown that no agreement can ever be reached between them on the legal status of the 1899 Arbitral Award. The Secretary-General of the United Nations made a sound decision when he chose the principal judicial organ of the United Nations as a means of settlement of the controversy, in accordance with Article IV, paragraph 2, of the Geneva Agreement.

7. It is important for the Parties to understand that, should the 1899 Arbitral Award be declared null and void by the Court, as argued by Venezuela, the Court will be in need of further submissions, in the form of evidence and arguments, about the course of the land boundary, in order for it to fully resolve the "controversy". Without these submissions, the Court will not be in a position to determine the course of the disputed boundary between the two countries. In such event, the Secretary-General of the United Nations may be called upon once again to exercise his authority under Article IV, paragraph 2, of the Geneva Agreement to choose another of the means of settlement provided in Article 33 of the Charter of the United Nations.

(Signed) Peter TOMKA.

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[5] Application of Guyana, para. 55. It is rather unusual for the *Applicant* to ask the Court to determine over which territory the *Respondent* enjoys sovereignty.

[6] *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela), Order of 19 June 2018, I.C.J. Reports 2018 (I)*, p. 402.