INTERNATIONAL DECISIONS

EDITED BY JULIAN ARATO

ICJ jurisdiction—Arbitral Agreement of 1899—1966 Geneva Agreement—UN secretary-general's reference as basis of jurisdiction—non-appearance of Venezuela

ARBITRAL AWARD OF 3 OCTOBER 1899 (GUYANA V. VENEZUELA). 2020 ICJ Rep. 455. *At* https://www.icj-cij.org/en/case/171.
International Court of Justice, December 18, 2020.

Just under two years ago, the International Court of Justice (ICJ or Court) delivered the judgment in *Guyana v. Venezuela* (Jurisdiction).[1] The Court held that it had jurisdiction to determine the validity of the Arbitral Award of 3 October 1899 which purported to settle the land boundary between the Cooperative Republic of Guyana and the Bolivarian Republic of Venezuela. This was so because the parties had consented in the 1966 Geneva Agreement to abide by the choice of the United Nations secretary-general to submit such disputes to judicial settlement. In letters dated January 30, 2018 addressed to both parties, the secretary-general announced that he had chosen the ICJ as the means to settle the dispute. It was based on these letters that Guyana asked the Court to assume jurisdiction pursuant to Article 36, paragraph 1 of its Statute. The merits of the dispute remain to be heard.

The decision broke new ground in the jurisprudence of the ICJ's jurisdiction in that the Court held, for the first time, that it had jurisdiction over a dispute between two states based upon referral by a third party. Furthermore, as the third party was the UN secretary-general, the decision recalls the age-old issue of whether the Court may exercise compulsory jurisdiction over disputes referred to it by a UN organ (specifically, the Security Council) as "matters specially provided for in the Charter of the United Nations." Finally, the failure of Venezuela to appear during the litigation, raises problems as to whether a judgment on the merits will provide the desired security and stability on the Guyana/Venezuela border, given the close relationship between non-appearance, compliance, and enforceability.

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In 1897 the United Kingdom and Venezuela signed the Washington Treaty to resolve their outstanding territorial disputes.[2] The Treaty established an arbitral tribunal "to determine the boundary-line between the Colony of British Guiana and the United States of Venezuela."[3] The

[1] Arbitral Award of 3 October 1899 (Guy. v. Venez.), Judgment, 2020 ICJ Rep. 455 (Dec. 18, 2020).
[2] Treaty Between Great Britain and the United States of Venezuela Respecting the Settlement of the Boundary Between the Colony of British Guiana and the United States of Mexico, Feb. 2, 1897.
[3] *Id.* Art. I.

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Arbitral Award of 3 October 1899 (1899 Award) purported finally to resolve these disputes. It granted the entire mouth of the Orinoco River and the land on either side to Venezuela, and granted the land to the east extending to the Essequibo River to the United Kingdom. A joint Anglo-Venezuelan commission demarcated the boundary, and, on January 10, 1905, British and Venezuelan commissioners produced an official boundary map and signed an agreement accepting that the coordinates and the points listed were correct.

Sixty-three years later, in 1962, Venezuela renounced the 1899 Award as a "political transaction carried out behind Venezuela's back and sacrificing its legitimate rights." It thenceforth contended that there was a dispute with the United Kingdom, "concerning the demarcation of the frontier between Venezuela and British Guiana" (para. 466). For its part, the United Kingdom stated that "the Western boundary of British Guiana with Venezuela [was] finally settled" by the 1899 Award and that it could not "agree that there [could] be any dispute over the question settled by that award" (*id.*).[4] After a review of the archives in London and Caracas by experts of the two governments, Venezuelan experts claimed to have found evidence that nullified the 1899 Award, while the United Kingdom experts denied the existence of such evidence. A tripartite meeting involving the ministers of foreign affairs of the United Kingdom and Venezuela and the new prime minister of British Guiana, held in London on December 9–10, 1965, ended in stalemate.

The three delegations met again in Geneva and adopted the Geneva Agreement on February 17, 1966 (1966 Geneva Agreement).[5] Upon attaining independence on May 26, 1966, British Guiana—now Guyana—became a party to the 1966 Geneva Agreement, alongside the United Kingdom and Venezuela. Articles I and II provided for the establishment of a Mixed Commission and Article IV specified four progressive steps toward dispute settlement. (1) The Mixed Commission would work for four years toward settlement. If the Commission failed, (2) Guyana and Venezuela would choose one of the means of peaceful settlement provided for in Article 33 of the UN Charter.[6] Should the two governments fail to reach agreement, (3) the decision on the means of settlement would be made by an appropriate international organ. And if the parties failed to agree on the international organ, (4) the means of settlement was to be made by the UN secretary-general. The fourth step was provided for in Article IV(2) of the 1966 Geneva Agreement.

Each of the first three steps duly failed to achieve settlement and, after twenty-five years of futile efforts, UN Secretary-General Ban Ki-moon announced that if a solution was not found by the end of his tenure, he would "initiate the process to obtain a final and binding decision from the International Court of Justice" (para. 56). After another unsuccessful attempt, the new UN secretary-general, Antonio Guterres, announced, in letters dated January 30, 2018 addressed to both parties, that he had "chosen the International Court of Justice as the means that is now to be used for [the] solution" (para. 59). On March 29, 2018, Guyana filed its Application to the Court seeking settlement of the dispute while Venezuela asserted that the Court lacked jurisdiction and that it would not participate in the proceedings.

The Court expressed regret at Venezuela's non-participation but, basing itself on Article 53, emphasized its established jurisprudence that non-participation of a party could not affect the

[4] Statement by the United Kingdom Before the Fourth Committee of the United Nations General Assembly, Nov. 13, 1962.

[5] Agreement to Resolve the Controversy Over the Frontier Between Venezuela and British Guiana, Feb. 17, 1966, 561 UNTS 322.

[6] UN Charter, Art. 33.

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validity of the judgment,[7] which was final and binding on all the parties under Articles 59 and 60 of the Statute.[8] At the same time, in the interest of ensuring fairness in the proceedings, the Court followed its established practice of consulting official documents that clarified the position of the absentee party.[9]

The Court accepted the contention by Guyana that the reference to the Court had been properly made by the secretary-general pursuant to Article IV(2) of the Geneva Agreement—as the "treaty" by which the parties had allowed for possible subscription to the Court's jurisdiction. The Court rejected Venezuela's stance that Article IV(2) only conferred upon the secretary-general the power to make recommendations. Affirming its precedent in *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*,[10] the Court reasoned that the word "shall" must be interpreted as imposing an obligation; the verb "refer" in Article IV(2) conveyed the entrusting of a matter to a third party; and "decision" suggested the binding character of the action taken by the third party. These terms, together, indicated "that the Parties made a legal commitment to comply with the decision of the third party on whom they conferred such authority, in this instance the Secretary-General of the United Nations" (para. 72).

The Court next considered whether the consent thus given was subject to any conditions. Venezuela suggested that the secretary-general's choice of settlement by the ICJ was inconsistent with Article IV(2), which required that the secretary-general "choose" each of the several means stipulated in Article 33 of the Charter in turn and that the parties go through the entirety of that method of dispute settlement before the secretary-general could choose the next "and so on" until the controversy was resolved. The Court rejected this suggestion noting that the use of the verb "choose" in Article IV(2) denoted deciding between several solutions without having to follow a particular order. A condition that the means of settlement should be applied successively was contradictory to the object and purpose of the Geneva Agreement since it would delay resolution of the dispute as some means were more effective than others.

* * * *

Three points warrant comment. Firstly, the Court's recourse to the clichéd observation that the parties were not bound to express their consent to jurisdiction in any specific form[11] and that there was nothing in the Court's statute to prevent them from expressing their consent through the mechanism in Article IV(2) is entirely correct but hardly does justice to the revolutionary nature of this attornment to the Court's jurisdiction. The unprecedented assumption of jurisdiction based on the referral from a third party (a delegated and discretionary power, rather than specified consent to jurisdiction in a treaty) is a new waystation on the long journey toward an effective system of global dispute settlement.

[7] *Citing* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, Judgment, 1986 ICJ Rep. 14, 23, 45 (June 27).

[8] *Citing* Corfu Channel (UK v. Alb.), Judgment, 1949 ICJ Rep. 244, 248 (Dec. 15).

[9] Here, a memorandum on the Venezuelan position was submitted, outside of the Court rules, on November 28, 2019.

[10] Immunities and Criminal Proceedings (Eq. Guinea v. Fr.), Preliminary Objections, Judgment, 2018 ICJ Rep. 292 (June 6).

[11] *See, e.g.*, Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, 2006 ICJ Rep. 6, 18, para. 21 (Feb. 3).

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Guyana v. Venezuela (Jurisdiction) opens an alternative route for acceptance of ICJ jurisdiction, provided only that the intent of states to delegate the choice of forum is clear from the wording in their agreement. There is no reason this tool should rely exclusively on the UN secretary-general—states may in time opt to delegate this competence to other third parties, such as secretaries-general of regional blocs, or a body of the UN.

Venezuela's position that it was not bound by the 1966 Geneva Agreement raises the question of whether simple renunciation of the Agreement would have deprived the Court of jurisdiction. A similar question arises in all cases where a defendant state disagrees that there is a treaty basis for ICJ jurisdiction. Why not simply renounce the alleged or conceded treaty obligation and thereby suffer the normal consequences of treaty breach entailing the making of reparations? Reparations for an internationally wrongful act normally take the form of restitution; damages are payable only "*insofar as such damage is not made good by restitution.*"[12]

Opinion is sharply divided on whether restitution includes specific performance.[13] General international law eschews specific performance; however, *Nicaragua v. United States* (Jurisdiction)[14] may be counter-indicative where jurisdiction-selecting clauses are concerned. There, the Court adhered to the requirement in the U.S. 1946 Declaration of the giving of six months' notice of termination thus refusing the proviso in the 1984 U.S. letter seeking to terminate that Declaration "with immediate effect." The Court rejected the argument that, based on the 1984 U.S. letter, the reciprocity requirement in the Nicaraguan 1929 Declaration, which was of no defined duration, became liable to "immediate termination." By analogy with the law of treaties, it held that "a reasonable time for withdrawal from or termination of" jurisdiction would have been required for Nicaragua to withdraw its declaration. Accordingly, in every case of treaty-based acceptance of ICJ jurisdiction, the time specified in the jurisdiction-granting clause, or if no time is specified, a reasonable time, will be required for renunciation—allowing a putative claimant state to file a case before modification or termination by the putative defendant state is effective. That approach is not far removed in practice, even if far removed in doctrine, from specific performance of the treaty-based jurisdiction-accepting obligation. Taken together with the interpretation of reciprocity in *Nicaragua v. United States* (Jurisdiction), *Guyana v. Venezuela* (Jurisdiction), is the closest the Court has come (perhaps can come) to asserting compulsory jurisdiction over states.

Secondly, the fact that the third party who made the referral in *Guyana v. Venezuela* (Jurisdiction) was the UN secretary-general invites a revisitation of whether Article 36(1) of the ICJ Statute could possibly constitute a genuine title of jurisdiction. It includes within the jurisdiction of the Court, "all matters specially provided for in the Charter of the United Nations." This stipulation has long been an open wound of dispute settlement in public

[12] Article 36(1) of the International Law Commission's (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles), which codified similar views expressed by the PCIJ in *Chorzów Factory (Ger. v. Pol.)*, Judgment, 1928 PCIJ Judgment (ser. A) No. 17 (July 26, 1927).

[13] *See, e.g.*, CHRISTINE D. GRAY, JUDICIAL REMEDIES IN INTERNATIONAL LAW 12–13 (1990) (suggesting that restitution should not be confused with specific performance); *cf.* Farshad Rahimi Dizgovin, *Foundations of Specific Performance in Investor-State Dispute Settlements: Is It Possible and Desirable?*, 28 FL. J. INT'L L. 1, 11–12 (2016) (arguing that specific performance may be associated with the duty of *restitutio in integrum*).

[14] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Jurisdiction, Judgment, 1984 ICJ Rep. 392 (Nov. 26).

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international law. Many scholars accept that the stipulation was an error in drafting;[15] that is, the phrase was a leftover from the days when a compulsory system of dispute settlement was intended. But this conflicts with the primary rule of treaty interpretation presupposing attribution of ordinary meaning to words found in the treaty in the light of the treaty's object and purpose.[16] It also clashes with Rosenne's examination of the *travaux préparatoires*,[17] which confirms that Article 36(1) concerned the compulsory references to the Court by the Security Council. This altogether coherent explanation of the reach of Article 36(1) was obfuscated by the decision in *Corfu Channel* where eight of the fifteen members of the ICJ refused to consider the point because Albania had accepted the jurisdiction of the Court on another ground; the other seven judges rejected jurisdiction based on Article 36(1) because they considered it impossible to accept "an interpretation according to which this Article, without explicitly saying so, has introduced more or less surreptitiously, a new case of compulsory jurisdiction."[18]

Many commentators consider the separate opinion in *Corfu Channel* to be correct[19] but the decision in *Guyana v. Venezuela* (Jurisdiction) clearly affirms that disputing states may themselves expressly agree in a treaty that an organ of the United Nations (in the present case, the secretary-general but equally, it is submitted, the Security Council) may decide whether and when to refer their dispute to the ICJ. This is important. Disputes that have at their core issues of national boundaries, human rights, trade, intellectual property, environment, and security can threaten nations and, in some instances, the very future of humanity. Initiation of the process of adjudicating these disputes cannot forever be left in the exclusive control of the disputing states themselves, acting in their own national self-interests. Referral to the ICJ by a disinterested third entity represents a first step in dismantling that exclusivity of state control. A teleological view of Article 36(1) could allow the Security Council, by decision taken under Article 27(3), to require referral of disputes that threaten peace and security to the Court; member states would be obliged to comply with that decision by virtue of Article 25. It would be Pollyannish to suggest that such an interpretation is possible at present (moreover, an interpretation that would only be effective based on a restructured Security Council), but if we survive the present, another day for rational global dispute settlement will surely come. *Guyana v. Venezuela* (Jurisdiction) represents a glimmer of what a mature system of international dispute settlement could look like.

Thirdly, the non-appearance of Venezuela during the jurisdictional phase raises well-trodden jurisprudential grounds but also some important practical concerns. The Court is now familiar with defendant states not appearing before it. At its peak in the 1970s and 1980s, non-appearance by defendants was almost more the norm than the exception, but since

[15] Malcolm N. Shaw, *Matters Provided for in the United Nations Charter: Statute Article 36(1)*, *in* MALCOLM N. SHAW, ROSENNE'S LAW AND PRACTICE OF THE INTERNATIONAL COURT: 1920–2015 (2017).

[16] *See, e.g.*, Vienna Convention on the Law of Treaties, Arts. 31–32, May 23, 1969, 1155 UNTS 331.

[17] ROSENNE'S LAW AND PRACTICE OF THE INTERNATIONAL COURT, *supra* note 15, at 670.

[18] Corfu Channel (UK v. Alb.), Judgment, 1948 ICJ Rep. 15, 32 (Mar. 25).

[19] G. G. Fitzmaurice, *The Law and Procedure of the International Court of Justice: International Organizations and Tribunal*, 29 BRIT. Y.B. INT'L L. 1, 31–32, 44 (1952); L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE, ii, 115 (Hersch Lauterpacht eds., 7th ed. 1948).

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then there have only been rare incidents of partial non-participation.[20] Whether the Venezuelan non-participation in this case is symptomatic of a wider return to the previous era of rejection of ICJ adjudication is unclear. What is clear is that there are provisions in the ICJ Statute (as there were in the statute of its predecessor, the Permanent Court of International Justice (PCIJ)) that expressly regulate the consequences of non-appearance, and both courts have developed a solid body of jurisprudence on the legal consequences of non-appearance. Article 36(6) of the ICJ Statute[21] (repeating Article 36 of the PCIJ Statute) expresses the widely accepted rule that in the event of a dispute as to whether a court has jurisdiction, the matter "shall be settled by the decision of the Court." Article 53(1) of the ICJ Statute[22] (repeating Article 53(1) of the PCIJ Statute) provides that whenever one the parties does not appear before the Court, or fails to defend its case, "the other party may call upon the Court to decide in favour of its claim."[23]

Article 53(1) was based on the practice of common law courts where non-appearance of the defendant does not by itself prevent the proceedings from taking place, but also does not, by itself, automatically result in a default judgment.[24] The *travaux préparatoires* of Article 53 recorded that judgment in default of appearance was considered inappropriate mainly because of the absence of universal compulsory jurisdiction for states.[25] The unilateral declaration of non-appearance by a state is an act entailing legal consequences,[26] but the non-appearing party remains free to resile and start participating at any stage—as the Court affirmed in the *Nuclear Tests cases;*[27] *Nicaragua v. United States* (Jurisdiction);[28] and *Nicaragua v. Colombia.*[29] Given Venezuela's long-standing hostility to adjudication in this case (and to governance by international organizations more generally[30]), it seems unlikely that there will be a *volte-face* over the course of the proceedings on the merits.

Finally, at the practical level, it is notorious that international adjudication lacks strong enforcement mechanisms and that judgments of the ICJ can remain unsatisfied for decades.[31]

[20] Bahrain was absent from the second judgment on jurisdiction and admissibility in *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, 1995 ICJ Rep. 6 (Feb. 15), and from a later meeting when the Court fixed time limits for submissions of the next stage.

[21] International Court of Justice Statute, Apr. 18, 1946, Art. 36(6).

[22] *Id.* Art. 53(1).

[23] ICJ Statute Article 53(2) requires that before making the decision the Court must "satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law." *Id.* Art. 53(2).

[24] See, by contrast, Article 41 of the Statute of the Court of Justice of the European Union (CJEU).

[25] J.B. ELKIND, NON-APPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE: FUNCTIONAL AND COMPARATIVE ANALYSIS, VOL. 4 (1984).

[26] *See* Int'l L. Comm'n Rep., Unilateral Acts of States, UN Doc. A/CN.4/557 (May 26, 2005); Int'l L. Comm'n Rep., UN Doc. A/60/10 (2005) (for criteria developed by the ILC).

[27] Nuclear Tests Case (N.Z. v. Fr.), Judgment, 1974 ICJ Rep. 457 (Dec. 20); Nuclear Tests Case (Austl. v. Fr.), Judgment, 1974 ICJ Rep. 253 (Dec. 20).

[28] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Jurisdiction, *supra* note 14.

[29] Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicar. v. Colom.), 2016 ICJ Rep. 100 (Mar. 17).

[30] Venezuela has withdrawn from the International Centre for Settlement of Investing (ICSID) Convention and the American Convention on Human Rights (ACHR) and has initiated withdrawal from the Organization of American States (OAS).

[31] The award in *Corfu Channel*, *supra* note 18, remained unsatisfied until 1996 (forty-eight years); the award in *Nicaragua v. United States* (Merits), *supra* note 7, remains unsatisfied (thirty-six years as at the time of writing).

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The fact that a state decides not to appear at, and/or after, a judgment on jurisdiction, frequently leads to corollary problems of compliance and enforceability. International law requires that each member of the United Nations must comply with decisions of the ICJ in cases to which it is a party;[32] if any party fails to comply with the judgment, the other party may have recourse to the Security Council, which may make recommendations or decide on measures to give effect to the judgment.[33] In practice, this enforcement mechanism exists largely in name only; an attempt to adopt the "Nicaraguan" resolution urging "full compliance" with the Court's ruling in the *Venezuela v. United States* (Merits) was, predictably, vetoed by the United States.[34] Yet such compliance problems are particularly acute in the context of disputes over territories, where finality and stability of borders are central values.

When the decision in *Guyana v. Venezuela* (Jurisdiction) was given, under two years ago, there were reasons for strong optimism that there would be compliance with the decision on the merits. By restricting itself to considering only the validity of the 1899 Award (and not events that occurred after the 1966 Geneva Agreement) the Court probably signaled that reparation in the form of damages was unlikely; if so, the final decision will probably not require positive fiscal action on the part of the losing state. If the Court finds the 1899 Award to be invalid it would be extremely difficult for Guyana to cavil given its fervent assertion of the Court's jurisdiction; if the 1899 Award is found to be valid, Venezuela would simply be required to respect the existing boundary established by the Award. Violation by either side would be in fact an invasion of the territorial sovereignty of the other member state of the United Nations and would constitute a direct threat to international peace and security. In these specific circumstances it is hoped that even a largely inoperable Security Council would find it unacceptable not to act. The hope remains but has been appropriately chastened by intervening developments in eastern Europe.

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World Trade Organization—General Agreement on Tariffs and Trade 1994—Agreement on Safeguards—unforeseen developments—causal link—Appellate Body crisis

UNITED STATES—SAFEGUARD MEASURE ON IMPORTS OF CRYSTALLINE SILICON PHOTOVOLTAIC PRODUCTS, WT/DS562/R. *At* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds562_e.htm.
World Trade Organization Panel, September 2, 2021 (unadopted).

In *U.S. – Safeguard Measure on PV Products (China)*, a Panel of the World Trade Organization (WTO) dismissed China's complaint that the United States had imposed

[32] UN Charter, Art. 94(1).
[33] *Id.* Art. 94(2).
[34] Michael J. Berlin, *U.S. Vetoes Nicaraguan Resolution on Compliance with Court Decision*, WASH. POST (Aug. 1, 1986).