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History of the diplomatic negotiation in the International court of justice narrative, a review of the ICJ jurisprudence

Abstract

Diplomatic negotiation serves as a fundamental prerequisite to both arbitration and judicial settlement, a dynamic that unfolds alongside the evolution of conventional international law. Negotiation stands as an essential and integral precursor to the arbitral resolution. In this comprehensive review, we delve into the jurisprudence of the Permanent Court of International Justice (P.C.I.J.) and the International Court of Justice (I.C.J.), shedding light on the critical role of negotiation in achieving agreements and peaceful dispute resolutions. The prevailing customary foundation mirrors an era in international law marked by the "quasi-legislative role" of traditional sources. The obligation to negotiate may seemingly encroach on State sovereignty while endeavoring to establish a framework for nonviolent conflict resolution. Thus, it becomes imperative to initially address the juxtaposition between the sovereignty principle and the obligation to negotiate. Considering these realities, sovereignties are compelled to find common ground, underscoring the pivotal role of diplomatic negotiation in binding what is commonly referred to as the community of nations, evolving towards a higher level of political awareness ensure sustainable commitments between Nations and international stakeholders.

Keywords: history, ICJ jurisprudence, International court of justice

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Introduction

In traditional international society, characterized by the dominant action of powers and state individualism, several authors consider that it is primarily arbitration that accompanies the development of conventional international law. Negotiation is a prerequisite and necessary complement to the arbitral solution. This is the position of Nacer-Eddine Ghozali.[1] According to whom, the entire procedure which starts with negotiation, reaching an agreement or a judicial sentence is dominated by the "diplomatic" process.

Arbitral jurisprudence and the jurisprudence of the Permanent Court of International Justice (P.C.I.J.) consider that diplomatic negotiation is a prerequisite to arbitration and judicial settlement. According to the International Court of Justice (I.C.J.), the role of negotiation is appreciated differently. In its judgment of July 25, 1974, on "Jurisdiction in Fisheries," the Court stated that "diplomatic negotiation is the most appropriate method for resolving disputes".[2]

Compared to the position of the P.C.I.J., the jurisprudence of the International Court of Justice has undergone a turning point. This review aims to study the Permanent Court of International Justice (P.C.I.J.) and the International Court of Justice (I.C.J.) jurisprudence and reflection about the importance to negotiate to reach agreement and pacific settlements of disputes.

Under Article 13, the General Assembly of the United Nations has, among other functions, the function of "encouraging the progressive development of international law and its codification." The General Assembly and its organs implement this function, by drafting numerous international conventions, but the principal organ of the United Nations responsible for the settlement of disputes is the International Court of Justice.

Through its judgments and advisory opinions - between May 22, 1947, and October 4, 2021, 181 cases (including 27 advisory opinions) have been registered on its docket.[3] The principal judicial organ of the United Nations has contributed to the strengthening of international law and the peaceful settlement of numerous disputes. The disputes submitted to the Court deal with various subjects:[4]

Cases relate to territorial sovereignty:

i. In 1953, in a case between France and the United Kingdom, the Court declared that certain Channel Islands fell under British sovereignty.

ii. In another case (1959), it held that Belgium's claims concerning an enclave near its border with the Netherlands were justified.

iii. In 1960, it ruled that India had not violated the obligations imposed by the existence of passage right, enjoyed by Portugal between its enclaves.

iv. In 1986, a chamber of the Court delimited part of the border between Burkina Faso and Mali.

v. In 1990, Libya and Chad submitted a territorial dispute to the Court by mutual agreement.

Other cases concern the law of the sea:

In 1949, the Court ruled that Albania was responsible for the damages caused by mines placed in its territorial waters to British warships exercising their innocent passage right.

[1]Ghozali NE. Diplomatic negotiation in International Jurisprudence. RBDI. 1992;II:324.

[2]CJI. Judgment of July 25, 1974;31–73.

[3]CIJ. Affaires.

[4]The list of cases described here is sourced from the International Court of Justice website.

In fisheries case between the United Kingdom and Norway presented in 1951, the Court concluded that the method employed by Norway to delimit its territorial waters was not contrary to international law.

In 1969, at the request of Denmark, the Netherlands, and the Federal Republic of Germany, the Court indicated the principles and rules of international law to be applied in delimiting the zones of the continental shelf of the North Sea belonging to each of the parties.

In 1974, it ruled that Iceland did not have the right to unilaterally prohibit the presence of fishing boats from the United Kingdom and the Federal Republic of Germany in the areas located between the agreed fishing limits in 1961 and the 50-mile limit proclaimed by Iceland in 1972.

In 1982, at the request of Tunisia and the Great Socialist People's Libyan Arab Jamahiriya, and again in 1985, in a case submitted by the Great Socialist People's Libyan Arab Jamahiriya and Malta, the Court indicated the principles and rules of international law to be applied in delimiting the zones of the Mediterranean continental shelf belonging to each of the parties.

In 1984, a chamber of the Court determined the course of the maritime boundary dividing the continental shelf and fishing zones of Canada and the United States in the Gulf of Maine region.

In 1993, the Court, in a plenary session, determined the course of the maritime boundary which, in the area between Greenland and Jan Mayen Island, divides the continental shelf and fishing zones of Denmark and Norway.

In 1995, Spain filed a request against Canada regarding Canada's law on the protection of coastal fisheries and its enforcement.

In 1992, a chamber of the Court rendered its decision on a dispute between El Salvador and Honduras concerning the delimitation of the land and maritime border.

Cases also dealt with issues of territorial and maritime delimitation, one between Qatar and Bahrain and the other between Cameroon and Nigeria. There have also been disputes regarding diplomatic protection: The right of asylum in Latin America (Colombia against Peru, 1950); Rights of U.S. nationals in Morocco (France against the United States, 1951); And nationality disputes (Liechtenstein against Guatemala, 1955).

i. In 1970, the Court concluded that Belgium had no legal capacity to protect the interests of Belgian shareholders of a Canadian company that had been subject to certain measures in Spain.

ii. In 1989, a chamber of the Court rejected a claim for reparation filed by the United States against Italy regarding the seizure of a company owned by American companies in Sicily.

iii. The Gabíkovo-Nagymaros case brought before the Court, sitting as a full bench, by Hungary and the Slovak Republic in 1994 concerns environmental protection issues. However, since 1993, States may submit their disputes in this area to a specialized chamber on environmental matters.

iv. In matters related to the obligations of the administering power responsible for the Territory of South-West Africa (Namibia), the Court decided in 1966 that Ethiopia and Liberia had no legal rights or interests in their complaint against South Africa. Four advisory opinions given by the Court concerning this territory, of which three had been requested by the General Assembly. In the first, the Court held (in 1950) that South Africa remained bound by international obligations under the mandate, despite the dissolution of the League of Nations. In the fourth, requested by the Security Council, it declared (in 1971) that the continued presence of South Africa in Namibia was illegal, and that South Africa must withdraw its administration from Namibia and end its occupation of the territory. The ICJ addressed the principle of self-determination and decolonization and affirmed the principle of self-determination of peoples and the duty of the international community to ensure the realization of this right. This opinion can be invoked to support the right to self-determination and independence. It underscores the importance of ending foreign occupation and colonial rule and allowing the people of an occupied territory to exercise their right to self-determination.

v. Another dispute, withdrawn in 1993 following an agreement between the parties (Nauru and Australia), concerned a formerly mandated territory, the island of Nauru. And in 1991, Portugal, the former colonial power in East Timor, filed a case against Australia regarding a dispute over "certain activities of Australia related to East Timor."

Advisory opinions requested by the UN General Assembly were related to the relations between the UN and its Members:

i. In 1949, on a question asked after the assassination of the UN mediator in Palestine, the Court declared that the UN could assert its rights against a State in the event of harm to one of its agents.

ii. After the refusal of various States to contribute to the expenses related to peacekeeping operations in the Middle East and Congo, the Court concluded in 1962 that these expenses had to be borne by all Member States in accordance with the Charter.

iii. In 1988, the Court held that under the Agreement on the UN Headquarters, the United States was required to submit their dispute with the Organization regarding the order to close the premises of the Palestine Liberation Organization Mission in New York to arbitration.

iv. The Court advisory opinion was rendered in 1989 regarding a request by the Economic and Social Council on the applicability of certain provisions of the Convention on the Privileges and Immunities of the United Nations to a former reporter of a sub-commission.

v. In 2004, the Court issued an advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, reaching conclusion on Israel violation of the international law, including grave breaches of the Geneva Conventions of 1949.

The Court has been seized of several cases involving political upheavals or regional conflicts:

i. In 1980, in the case brought by the United States regarding the seizure of their embassy in Tehran and the detention of their diplomatic and consular personnel, the Court concluded that Iran had to release the hostages, return the embassy, and pay reparations. However, before the Court could determine the amount of these reparations, the case was withdrawn following an agreement between the two States. In 1989, Iran requested the Court to condemn the destruction of an Iranian passenger plane shot down by the US warship USS Vincennes and to declare that the United States was required to pay reparations. The case proceeded to the International Court of Justice (ICJ),

but it was not ultimately settled through the ICJ. In 1996, the ICJ ruled that it had jurisdiction to hear the case but that the United States could not be held responsible for the actions of its military personnel. The Court found that the United States had violated its obligations under international law concerning the safety of civil aviation but did not decide on reparations or compensation. The case was essentially terminated without a determination of responsibility or reparations and is legally still pending.

ii. In 1984, Nicaragua argued that the United States was using military force against it and interfering in its internal affairs. The United States contested the jurisdiction of the Court. After written and oral proceedings, the Court declared itself competent and deemed Nicaragua's claim admissible. The United States rejected this judgment and the 1986 ruling, in which the Court concluded that they had failed to fulfil their obligations towards Nicaragua and should cease the accused acts and provide reparation. In 1991, Nicaragua withdrew the request it had made to the Court to determine the form and amount of these reparations.

iii. In 1986, Nicaragua also brought a case against Costa Rica and Honduras, alleging their responsibility in armed activities in border areas. Both cases were also withdrawn after an agreement between the parties.

iv. In 1992, the Libyan Arab Jamahiriya submitted a case to the Court against the United States and the United Kingdom regarding the interpretation or application of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971), following the incident of Pan American Flight 103 in Lockerbie, Scotland on December 21, 1988.

v. In 1993, Bosnia and Herzegovina submitted a request against Yugoslavia (Serbia and Montenegro) regarding the application of the Convention on the Prevention and Punishment of the Crime of Genocide. In April and September, the Court, in orders issued on requests for provisional measures of protection, urged the parties to prevent the perpetration of the crime of genocide and the escalation or expansion of the dispute.

Through this short overview of cases treated by the International Court of Justice throughout history, emerges a clear statement encouraging the use of diplomatic negotiation for the peaceful settlement of international disputes. The ICJ's jurisprudence establishes the principles and mechanisms for dispute resolution. The ICJ upholds the principle of pacta sunt servanda, which means that States must fulfill their treaty obligations in good faith. This principle encourages States to engage in diplomatic negotiations to resolve disputes arising from treaty violations. When disputes arise, States are expected to negotiate with the aim of finding a mutually acceptable solution.

The case of "Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)" (2005) presented a pivotal legal dispute before the International Court of Justice (ICJ) in 1999. This case was initiated by the Democratic Republic of the Congo (DRC) against Uganda, with the primary focus on violations of international law, encompassing treaties, customary principles, and the resolution of armed conflict within the region.

The complexity of the conflict in the eastern region of the DRC was characterized by the involvement of various rebel groups and foreign States. Uganda faced accusations of supporting select rebel factions operating within Congolese territory. The DRC alleged that Uganda's military forces had infringed upon its territorial integrity and sovereignty, engaging in illegal exploitation of Congolese natural resources, and providing support to rebel groups in opposition to the DRC government.[5] The case presented a spectrum of legal concerns, breach of Sovereignty and territorial Integrity, the DRC contended that Uganda's actions amounted to violations of the fundamental principles of international law: sovereignty and territorial integrity. The DRC's claimed Uganda's infringements of a multitude of international agreements and treaties, encompassing the United Nations Charter, the Organization of African Unity (now the African Union) Charter, and several bilateral accords. Uganda faced accusations of engaging in the illicit exploitation of the DRC's abundant natural resources and in 2005, Uganda was held accountable for its illegal exploitation of the DRC's natural resources. This finding had far-reaching implications for addressing resource-related conflicts within the scope of international law. The ICJ ruled in favour of the DRC, underscored Uganda's breaches of international treaties and agreements, placing emphasis on the principle of pacta sunt servanda, which dictates the necessity of honouring international commitments, confirming Uganda's transgressions against the DRC's sovereignty and territorial integrity. This ruling reinforced the paramount importance of respecting the sovereignty of nations within the realm of international law.[6]

States can submit their disputes to the ICJ for adjudication if they consent to the Court's jurisdiction. This consent-based system encourages States to consider diplomatic negotiations before resorting to legal action. Parties often negotiate to reach a compromise or settlement to avoid protracted legal proceedings. The "Case Concerning the Frontier Dispute" (Benin/Niger) (2005) was settled through negotiation and the parties withdrew their requests to the ICJ, demonstrating the willingness of States to engage in diplomatic negotiations to resolve border disputes.[7]

Coming back to advisory opinions, through United Nations bodies and agencies, States can also request advisory opinions from the ICJ on legal questions related to international disputes. While advisory opinions are not legally binding, they provide legal clarity and guidance to parties involved in disputes, which can encourage diplomatic negotiations, and guide the international community to take needed measures.

The International Court of Justice (ICJ) issued an Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory in 2004 at the request of the United Nations General Assembly by resolution ES-10/14, adopted on 8 December 2003.

The ICJ declared that the construction of the wall by Israel in the Occupied Palestinian Territory, including in and around East Jerusalem, is contrary to international law. The Court stated that Israel had not provided any justification under international law for the construction of the wall on Palestinian territory. The Court emphasized that the construction of the wall constitutes breaches of various legal obligations. It particularly highlighted violations of the Fourth Geneva Convention, which pertains to the protection of

[5]Armed activities on the territory of the Congo (Democratic Republic of the Congo v. Rwanda). ICJ; 2006. 126 p.

[6]Armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda). Jurisdiction and admissibility judgment. ICJ Reports; 2005.

[7]Case concerning the frontier dispute (Benin/Niger) Judgment. ICJ Reports; 2005.

civilians in times of armed conflict. "The court recalled the customary principles laid down in Article 2, paragraph 4, of the United Nations Charter and in General Assembly resolution 2625 (XXV), which prohibit the threat or use of force and emphasize the illegality of any territorial acquisition by such means, the Court further cited the principle of self-determination of peoples, as enshrined in the Charter and reaffirmed by resolution 2625 (XXV). In relation to international humanitarian law, the Court then referred to the provisions of the Hague Regulations of 1907, which it found to have become part of customary law, as well as to the Fourth Geneva Convention of 1949, holding that these were applicable in those Palestinian territories which, before the armed conflict of 1967, lay to the east of the 1949 Armistice demarcation line (or "Green Line") and were occupied by Israel during that conflict".[8]

The ICJ underlined that the construction of the wall severely impedes the exercise of the rights of the Palestinian people. It highlighted that the wall's route and associated practices led to significant hardships for Palestinians, including restrictions on their freedom of movement and access to essential services. The Court confirmed the illegality of Israeli settlements in the Occupied Palestinian Territory. It considered the construction of the wall as a part of a broader system connected to the Israeli settlements. In 2004, the ICJ concluded that Israel is under an obligation to cease the construction of the wall, dismantle the parts already constructed, and repeal or render ineffective any legislative and regulatory acts related to the wall. As highlighted previously, the ICJ advisory opinion are not binding, Israel took the position that the ICJ did not have jurisdiction to issue the opinion and did not give any consideration to the ICJ's demand, the construction of the wall continued in defiance of the ICJ's opinion.[9]

The ICJ also uses interim measures to preserve the rights of parties during ongoing disputes. The prospect of interim measures may encourage parties to engage in diplomatic negotiations to avoid further legal action. In the case of "Avena and Other Mexican Nationals (Mexico v. United States of America)" (2003), the ICJ issued interim measures to protect the rights of Mexican nationals on death row in the United States. This prompted diplomatic negotiations between the two countries on issues related to consular access and the rights of foreign nationals.[10]

The ICJ often encourages parties to seek amicable settlements and informs them of their right to do so. This encouragement reinforces the idea that peaceful negotiations are preferable to litigation. In the "Armed Activities on the Territory of the Congo" case, the ICJ encouraged the parties to seek a peaceful settlement and amicably resolve their differences. While the case continued, the encouragement of negotiation remained a consistent theme in the Court's proceedings.[11]

The ICJ's jurisprudence underscores the importance of diplomatic negotiation as a means of peacefully settling international disputes. It promotes principles of good faith, consent, and amicable settlement, and it provides legal clarity to guide diplomatic efforts to resolve conflicts.

The prerequisite in its conventional basis and in arbitral jurisprudence

Originally, it was the arbitration treaties inaugurated by those concluded between the United States and Great Britain on November 19, 1794, which contained the clause stating that the contracting parties only resort to arbitration if the dispute could not be resolved through negotiations. These treaties are often referred to as the "Jay Treaties" or the "Jay-Grenville Treaty" because they were negotiated by John Jay, the United States' first Chief Justice, and Thomas Grenville, the British Minister to the United States.[12]

This provision becomes a standard clause in bilateral or multilateral treaties that deal with the procedure for the peaceful settlement of disputes, so that this condition could be considered "implicit and therefore mandatory," even if the jurisdiction clause does not expressly mention it.[13]

In the Bryan treaty system, which includes more than thirty treaties signed by the United States with American and European States, the jurisdiction of the permanent commissions extends to all disputes of any nature that "could not have been resolved through diplomatic channels". This provision is found in numerous permanent arbitration treaties, such as Article 1 of the arbitration and conciliation treaty between Switzerland and Germany on December 3, 1921: "The contracting parties undertake to submit to arbitration or conciliation proceedings any disputes, of any nature whatsoever, that may arise between them and have not been resolved through diplomatic channels within a reasonable timeframe".[14]

Similarly, the Hague Convention for the Pacific Settlement of International Disputes of October 18, 1907, provides in Article 41 that recourse to arbitration shall be immediate for international disputes that have not been resolved through diplomatic channels. The same principle is proclaimed in Article 19 of the Draft Convention on the establishment of an Arbitral Court of Justice, Article 2 of the final act of the Locarno Agreements, and Article 10 of the Pact of the Organization of the Little Entente.[15] The principle of prior diplomatic negotiations is recognized by jurisprudence as early as the 20th century. Seen as an extension of diplomatic action, it covers the entire process of arbitration. As a result, arbitration bears the mark of its "transactional and political" origin.

In the field of arbitration, it is generally the rule that prior diplomatic negotiation is required.[16] This customary practice not only conditions the admissibility of the proceedings, but it is also necessary that it has been used unsuccessfully. From this perspective, Negotiation is indeed an autonomous method of settlement during the period under consideration.[17]

[8]Legal consequences of the construction of a wall in the occupied palestinian territory. ICJ; 09 July 2004.

[9]Op.cit.

[10]Avena and other Mexican Nationals (Mexico v. United States of America). Judgment of 31 March 2004.

[11]Ibid, 2005.

[12]Geamanu G. Theory and practice of negotiations in international law. RCADI; 1980:379.

[13]Guggenheim P. Research to Public international law treaty. In: Ghozali NE. Diplomatic Negotiation in International Jurisprudence. Geneva: University of Georg; 1954;149.

[14]Conciliation commissions. RGDIP; 1922:410–411.

[15]Treaty of arbitration and conciliation concluded between Switzerland and Germany. Hague Convention; 1907:41.

[16]Mandelstam A. International conciliation according to the Covenant and the jurisprudence of the Council of the League of Nations. RCADI; 1926(IV):362–363.

[17]Abi Saab G. Preliminary objections, in the right to development. ASDI; 1988:5–11.

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"Diplomatic" International negotiation in the jurisprudence of the PCIJ and ICJ

The issue of the prerequisite of diplomatic negotiation is pragmatically raised during the elaboration of the draft Statute of the Permanent Court of International Justice. Subsequently, the jurisprudence reflects the recognition of this prerequisite for initiating proceedings before the Court.

In its introductory note to the draft statute of the first international court, the committee of jurists admits that: "Resorting to the judge must only take place when all peaceful means have been attempted. Acting otherwise, and abruptly summoning an adversary before the Court, would be failing to show the respect that States mutually owe each other."[18]

The UN Committee of Jurists drafted and elaborated the pacific settlement chapter of the UN Charter including article 33 baring the condition of prior exhaustion of peaceful settlement of conflicts. However, it remains noteworthy that this provision does not differentiate between settlement methods but implies the obligatory recourse to negotiation.

In cases where the condition of negotiations has been raised, the PCIJ did not fail to give it effect. In its judgment of August 30, 1924, "Mavrommatis," it stated the now famous expression according to which: "The Court realizes the importance according to which only cases that cannot be settled by negotiation should be brought before it."[19]

The Court seems to require the negotiation process before any referral to its jurisdiction. Ultimately, in all cases where the issue of priority has been raised, the ICJ has consistently maintained its position. This is the position of J.C. Wittenberg, an eminent specialist of the ICJ, who argues that prior recourse to negotiation is a condition of admissibility of the claim.[20] In the absence of such recourse, the Court should, in principle, refuse to examine the case.

However, as noted by another specialist in the ICJ procedure, G. Abi Saab: "The Court did not resolve to such a possibility in the judgment on German interests in Upper Silesia in Poland (CPJI 25 May 1936), given the dilatory nature of the exception based on the absence of prior diplomatic negotiation, and the fact that the Court stated in that judgment, "this condition could be fulfilled at any time by a unilateral act of the requesting party." The Court was led to admit that, even if this condition were required by the jurisdictional title, it would have considered it as a formal condition whose absence would not have prevented it from examining the substance of the case.[21]

Thus, it is not debatable that the preliminary requirement of diplomatic negotiation has been endorsed by the ICJ, the Court has not interpreted the rule strictly. The commencement of negotiations is sufficient to meet the prerequisite condition. However, while the existence of the rule is no longer in doubt, its legal foundation is variously appreciated. It appears to Charles de Visscher, Member of the Permanent Court of Arbitration, and distinguished internationalist, as a principle of general or customary international law,[22] while, conversely, for Louis Cavaré, "It would be exaggerated to say that the commitment to prior diplomatic negotiations constitutes a necessity established by customary international law."[23]

The predominant customary foundation reflects a period of international law characterized by the "quasi-legislative role" of classical sources: "in substance, custom, once accepted by European States, applies to all."[24]

For the International Court of Justice, "negotiations" constitute a matter of common-sense obligation. They do not fall under any customary norm. They are imposed if the parties to the dispute have dedicated them in a legal instrument. But even without this hypothesis, the admissibility of the application could not be in doubt. The Court has clearly refused to subordinate its jurisdiction to a political settlement, whatever the importance of the dispute. It has held that its jurisdiction is based even when negotiations are ongoing. Therefore, it does not prevent the simultaneous establishment of what is called a judicial process and negotiation.

The classification that attempts to categorize disputes into political or legal sets does not apply in this matter. The ICJ can, in its final decision, compel parties to negotiate to complete the judicial solution. Before the ICJ, the issue of the precedence of diplomatic negotiations in the peaceful settlement of conflicts was raised in the "Nottebohm Case" between Liechtenstein and Guatemala. The Council of Liechtenstein emphasized in its oral statement the "importance of the diplomatic path as a condition for inter-state litigation, as differences of opinion generally become precise during diplomatic negotiations." The representative of Liechtenstein argued that "a claim for responsibility can only be brought before an international court if the subject of the dispute has been on the diplomatic agenda."[25]

The ICJ did not uphold such exceptions, which were clearly inspired by the jurisprudence of the PCIJ (Permanent Court of International Justice), from which it intended to distance itself. In all the cases it has had to consider, the ICJ has never suggested any subordination of the submission to a "diplomatic" prerequisite. The same holds true for the conventional commitment obliging States to resort to this prerequisite.

In an Advisory Opinion on the "International Status of South-West Africa"[26] the ICJ questioned the nature of the obligations incumbent on States holding a mandate from the League of Nations in view of the new trusteeship regime established by the United Nations Charter. Ultimately, it did not recognize the obligation to negotiate and conclude a trusteeship agreement, even though the mandating power had violated the legal obligation it had undertaken to "engage in negotiations and pursue them in good faith with a view to concluding an agreement." In other words, it amounted to, at a minimum, an obligation of conduct."[27]

[18]Ghozali NE. Minutes of the Committee of Jurists. 1920:349. op. cit.

[19]Mavrommatis Palestine Concessions (Greece v United Kingdom). PCIJ Ser A No 2; 1924. PCIJ Ser A No 5; 1925. Ser A No 10; 1927.

[20]Wittenberg JC. The admissibility of claims before international courts. RCADI; 1932(41):8. The current state of international jurisdiction and its future.

[21]Abi Saab G. op. cit. 123–125.

[22]De Visscher Ch. Recent aspects of the procedural law of the ICJ. Paris, Pedone: 1966:86.

[23]Cavare L. Le droit international public positive. Paris, Pedone: 1967:256.

[24]Chaumont Ch. General course of public International law. RCADI; 1970:434.

[25]CIJ. Reports 1955:4. Nottebohm Case (Liechtenstein v. Guatemala). Mémoires: 1955:165–303.

[26]ICJ. 1950:128–180.

[27]Op. cit.

The restrictive stance of the ICJ regarding the conventional obligation to negotiate[28] was followed by a more favourable trend in the case concerning "The Right of Passage over Indian Territory" on November 26, 1957. The Indian government argued in its third preliminary objection that the Portuguese application of December 29, 1955, was filed before Portugal's claim to a right of passage for people and goods over Indian territory had been the subject of negotiations.[29] In response, the Court stated in its judgment: "In considering this objection, the Court must assess the extent to which negotiations on the issue of the right of passage took place between the Parties before the submission of Portugal's application."

Similarly, in the "South-West Africa (Namibia) cases"[30] of December 21, 1962, the fourth preliminary objection, which aimed to deny the existence of a dispute on the grounds that there was no dispute "that could not be resolved by negotiations with the claimants, and that there had been no such negotiations for its settlement", prompted the ICJ to reiterate the terms of the aforementioned "Mavrommatis" judgment: "It has become evident that the dispute is not susceptible to resolution through diplomatic negotiation".[31] This jurisprudence was confirmed in "The Case Concerning Military and Paramilitary Activities in and Against Nicaragua,"[32] and in the examination by the ICJ of its jurisdiction and the admissibility of the application.

As for the simultaneity of the judicial process and "negotiations" it was first in the "Continental Shelf in the Aegean Sea" case that the ICJ faced the argument that it could not rule. It responded clearly, stating that "the fact that negotiations are actively ongoing during the current proceedings does not, in law, constitute an obstacle to the Court exercising its judicial function".[33]

Therefore, there is no priority of pending legal actions between the political bodies dealing with the political dispute and the judicial body, with the ICJ citing negotiation and judicial settlement as interchangeable means of peaceful dispute resolution. In this context, it is essential to become familiar with the negotiation as a preferred mode of conflict resolution. International negotiation is indeed a remedy for the challenges ahead of the international society, but its application remains painful, even though it is evident.

International negotiation as a remedy for the Ails of the international society: a strict dosage

"The negotiation follows no determined rule. The essential thing is to initiate it with a view to reaching an agreement".[34] These were the words of Alain Plantey in his work titled "International Negotiation in the 21st Century," which demonstrates a certain evolution in the thinking of international law through this mode of peaceful conflict resolution. Nevertheless, negotiation demands certain formal conditions. Negotiation has suffered for many years due to an inadequate application of its process. This process was criticized by numerous authors. It constitutes a strategy in the establishment of practices that enable the harmonization of sensitive inter-state relations. International negotiation, therefore, requires the observance of modalities and the application of unconditional rules to achieve its objectives.

In general, international law doctrine has not, until now, extensively, and thoroughly addressed the issue of regulating negotiation between States. Except for mentioning, as a primary means of peaceful settlement of international disputes, the obligation to negotiate.[35] The obligation to negotiate may jeopardize state sovereignty while striving to implement a process for peaceful conflict resolution. Therefore, it is essential to first address the confrontation between the principle of sovereignty and the obligation to negotiate and then examine the customary basis for this obligation.

The question we address here revolves around whether, given the absolute and imperative nature of the obligation to peacefully resolve disputes, the sovereignty of States would be reduced to a mere principle that must conform to the requirements of Article 33 of the United Nations Charter.

In the international arena, the principle is that States are sovereign and autonomous; their internal systems obey their own laws, and their authorities operate according to their own judgment of legitimacy or opportunity, particularly in their foreign policy. However, the coexistence of States compels them to coordinate their behaviours. Progress bends their autonomy to rules that are external to them, based on the emergence of common or identical interests and needs among nations. Realities force sovereignties to compromise, highlighting the importance of diplomatic negotiation as the glue of what is called the community of nations and should instead be regarded as a society of States, where new solidarities emerge gradually. The State assesses its interests with full sovereignty, it has the freedom to define its goals and determine the value it attaches to its interests. Respecting sovereignty implies, of course, non-interference in the affairs of other States. No one can force a state to negotiate or conclude on any matter against its will. States are free to negotiate, and they remain free until they have bound themselves to commitments in the form of international treaties.[36]

The principle in international relations is that exchanges occur between sovereign powers, meaning between States or heads of States whose actions are not subject to the disposition of others, except through prior consent given by treaty.[37] Sovereignty is the subject of negotiation, either in the assertion of its attributes, especially by new States, or in the discussion of its limitations, such as when joining treaties and systems of international organization or integration designed to dismantle it. Public international law develops the consequences of the principle that the sovereign people are free to negotiate and contract according to their own ends, their own provisions, and their own formalism. Sovereignty grants immediate and exclusive access of each state to negotiations concerning its fate and interests. This is an essential mission of their diplomacy.

[28]Reuter P. On the obligation to negotiate. Studies in honor of Morelli G, Milano; 1975:712–713.

[29]ICJ. Judgment of November 26, 1957:132–133.

[30]South West Africa cases, (Liberia v. South Africa and Ethiopia v. South Africa). ICJ Reports. 1962:344.

[31]Mavrommatis Palestine Concessions. Ibid. 346.

[32]Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America). ICJ Reports. 1986:14.

[33]ICJ. Rec. 1978:12–29. Bettati M. The affair of the Continental Shelf of the Aegean Sea. AFDI. 1979:297–317.

[34]Plantey A. International Negotiation in the 21st Century. CNRS. 2002:583.

[35]Reuter P. The obligation to negotiate. Mixtures Morelli Giuffré, Milano. 1975:711–733. Lhomme D. Research on the legal rules applicable to negotiation in public international law. ANRT. Lille: 2001:9.

[36]ICJ. Haya della Torre. 1951:17.

[37]Rousseau Ch. The independence of the State in the international order. RCADI. 1948;II:67. Plantey, A. International Negotiation in the 21st century. CNRS. 2002:153–606.

The sovereign state is the one responsible for its behaviour and the activities of its agents and nationals or the use of its territory and dependencies. In the eyes of its partners, a state must generally be seen as a coherent entity. The notion of responsibility is one of the factors at play in negotiation, namely in its procedure and outcome, as it is reflected in all aspects of state relations. The international system assumes that a state can fulfil its obligations when it enters into negotiations.[38]

The exercise of the power to negotiate creates a responsibility on each of the parties. This obligation does not only result from specific actions; it primarily emerges in relation to other States.[39] One aspect of the responsibility resulting from sovereignty in negotiation specifies that each state must ensure the political and legal coverage of its representatives.

Responsibility underlies all international negotiation; it is the condition of its significance and scope. It also sets limits on negotiation insofar as it reflects the major constraint that domestic politics places on Statesmen and diplomats. International negotiations play a significant role in the varied range of methods for resolving disputes. The obligation to negotiate is an essential foundation of the process in the context of international relations. It is crucial to identify the foundations and characteristics of the obligation to negotiate.

The obligation to negotiate has piqued the interest of many authors,[40] usually within the framework of treaty law or the responsibility regime. It has also undergone significant expansion in practice. For all these reasons, we need to determine the scope of the obligation to negotiate. As we have seen, negotiation falls within the realm of sovereignty, and through the commitments made, it implies a limitation on that sovereignty.

Two theses exist regarding its scope:[41]

According to the first thesis, opening negotiations does not entail any commitment because it is a discretionary act; the negotiator retains complete freedom regarding the outcome of these negotiations, and in this case, negotiation has limited legal significance.

According to the second thesis, opening negotiations implies an implicit commitment, at least to achieve a certain result or reach a compromise of interests. Within the context of the first thesis, it is legitimate to study the phenomenon that influences some States to postpone the start of negotiations to avoid being definitively bound by the obligation to produce a result. Certainly, according to some authors, the obligation to negotiate is multifaceted, and its scope can vary. It ranges from a minimum threshold to a maximum one.

However, one idea seems to prevail, negotiations must be initiated with the intention of reaching an agreement. Regarding its minimum content, this means that when States explicitly commit to negotiating, they must first initiate negotiations, which means making a formal and public gesture indicating the beginning of negotiations. They must then act as negotiators, they must act in good faith, they must prohibit certain behaviours, such as unjustified termination of discussions, setting abnormal deadlines, and systematically refusing to consider the proposals or interests of the other party.[42] These conditions constitute the obligation to behave.

As for the maximum content of the obligation to negotiate, it is summarized in a famous statement from the International Court of Justice quoting the Permanent Court of Justice advisory opinion on Railway Traffic between Lithuania and Poland: "The commitment to negotiate does not imply an obligation to reach an agreement".[43]

The obligation to negotiate schematically is covering three characteristics: the linked obligation to negotiate, the permanent obligation to negotiate, the obligation to negotiate with a deadlock. The linked obligation to negotiate concerns negotiations that involve a certain margin of undetermined commitment while accepting, conventionally or otherwise, that other conditions are part of their respective obligations or should be part of their future agreement. An example of this is "implementation agreements" that are subject to "primary agreements" like the existence of certain customary principles that should guide the negotiation or the existence of a promise to negotiate, which means that in this case, negotiations have a very narrow margin of freedom and are bound to apply primary agreements.[44] In summary, the linked obligation to negotiate responds to the fact that this obligation cannot be isolated from its general context, which is the case for the majority, if not all, negotiation processes. About the permanent Obligation and the Obligation with Deadlock, we must answer the following question: When negotiations, to which States have committed, fail, is the obligation definitively extinguished?

One could respond that in the absence of contrary indications, such an obligation persists as long as there are still chances of success. The International Court of Justice in the "North Sea Continental Shelf" case followed this same position when it declared that "the obligation to negotiate is a continuing obligation that never comes to an end and exists potentially in all relations between States".[45] Indeed, the specific rule affirmed by the court "constitutes only a particular application of a principle that underlies international relations and is recognized in Article 33 of the United Nations Charter as one of the methods for the peaceful settlement of international disputes".[46] This represents only a minimal content of the obligation to negotiate.

By delving further into the question, we can explore the intention of those who established the obligation to negotiate in cases where these negotiations fail. The answer to this question cannot be presented in a general way but requires certain distinctions to be made: If the failure is due to a violation of the obligation to negotiate by one of the interested parties, is that party thereby released? They are released if, by this violation, the negotiation has lost its purpose. In some circumstances, the very permanence itself may serve as a sanction for the violator. However, failure can also be since the parties could not reach an agreement. This failure can occur repeatedly until the negotiation no longer has a purpose.

[38]Kaufmann E. International law of peace. RCADI. 1935;IV:311. Plantey A. International Negotiation in the 21st century. CNRS. Paris: 2002:166–648.

[39]ICJ. Barcelona Traction. 1970:32. Yasseen MK. The Vienna convention on the succession of states in respect of treaties. AFDI. 1978:59.

[40]Guggenheim P. The model clause of the compulsory jurisdiction of the International Court of Justice. AFDI. 1952:462.

[41]Op cit. 465.

[42]Collection of arbitral awards. 1949:633.

[43]CPJI. Obligation to negotiate access to the Pacific Ocean (Bolivia v. Chile). Série A/ B 42. ICJ. 2018:116.

[44]ICJ. North Sea Continental Shelf cases between the Federal Republic of Germany, Denmark and the Netherlands, in this case the obligation to negotiate as well as the rules and principles which must govern the Negotiation are of a customary nature. Rec. 1969:3.

[45]Op. Cit. 1969:92.

[46]Op. Cit. 1969:88.

In case there has been no violation, do the States regain their freedom of action within the general framework of international law? Or do they need to obtain the prior agreement of the other parties, which would mean that the obligation to negotiate is permanent? The question revolves around whether it is an obligation to maintain an existing status quo if the obligatory negotiation principle has not yielded results. In fact, international law recognizes such obligations to negotiate with a deadlock. However, it must be acknowledged that these obligations are extremely serious and exceptional because they can infringe on the sovereignty of a state and perpetuate situations that call for change.

Moreover, a brief overview of the Vienna Convention on the Law of Treaties allows us to state that the obligation to negotiate, which continues to exist, does not block the authority of the State.

The state that considers itself not bound is not, in fact, obligated to remain indefinitely in that situation; each state is free to assess legal situations for its own account.[47] Regardless of the nature of the obligation to negotiate, it remains a behavioral obligation.

The obligation to negotiate is imposed first and foremost by itself when two subjects of international law are in dispute as it constitutes the minimum expected of them to peacefully resolve any dispute. In this regard, direct negotiation between States in conflict constitutes the common-law technique; it applies in all circumstances, even without a specific text.

It is worth noting that negotiation is often just one element of a broader commitment. It sometimes serves as a prerequisite to a complex procedure, such as arbitration, or facilitates the completion of the process after another method, such as judicial settlement. It is well-established jurisprudence that "before a dispute is taken to court, it is essential that its subject matter has been clearly defined through diplomatic negotiations".[48]

As we have seen, beyond this common-sense obligation, negotiation can be a legal prerequisite for the referral to an arbitral or judicial body. The admissibility of the application is then subject to the principle of exhaustion of prior negotiations. However, this is not a customary obligation; it only applies if it is proven that a conventional commitment to this effect binds the parties in dispute. The International Court of Justice (ICJ) has refused to accept it in several cases and ruled that the application could be submitted to it while negotiations are ongoing.[49]

Diplomatic negotiation serves a purely technical function when a judgment or arbitral award provides a complete solution to the dispute. It becomes decisive when the judicial or arbitral body merely obliges the parties to negotiate in good faith. This was the case in the 1977 arbitration in Case of "the Continental Shelf of the Iroise Sea," which corresponds to the first scenario. Similarly, the ICJ's judgments on February 24, 1982, and June 3, 1985, in the "Cases of the Continental Shelf (Tunisia/Libya and Malta/Libya)" and that of October 12, 1984, in the "Case of Maritime Delimitation in the Gulf of Maine" illustrate the second situation. Finally, the dispute between Denmark and Norway in the "Case of Jan Mayen" and the Court's decision in the judgment of June 14, 1993, also address this situation.[50]

Conclusion

The foundation of the principle of international negotiation lies in the idea that negotiation aims to reconcile two currents. On the one hand, there is the view that this method of conflict resolution is a mere means to access other proposed methods, and on the other hand, there is the view that international negotiation is an independent and entirely autonomous method that evolves as a "singleton" without ever interacting with other procedures.

International negotiation, from the perspective of this study, is not reducible mathematically to these two currents. International negotiation effectively reconciles these two currents by being a prerequisite for all other methods of peaceful conflict resolution. Negotiation is a prerequisite for any peaceful resolution of disputes, the common-sense legal channel is to pass through negotiation.

But negotiation does not stop there, it is a complete process that involves obligations of conduct and results. International negotiation is contingent on the behaviour of the parties to the dispute, the good faith of the actors is a prerequisite for the continuation of negotiations. The constitutive elements of the validity of this process are therefore essential to successfully conduct negotiations.

The negotiation process exists between recognized authorities in disagreements, and it is the process of administering the opposing interests of the parties to the conflicts. It constitutes both the concept as a dispute resolution system at the legal level of the States concerned, which corresponds to a theoretical approach, and the States themselves, who negotiate with their political and cultural background corresponding to an empirical approach. Concepts and judgments are two sides of the same coin, intelligible only in solidarity, as elements of the experience process; international negotiation is a process of adjusting commitments.

To create sustainable and durable legal relationships, political commitments may take various forms: Bilateral and Multilateral Treaties; International Conventions or Agreements; Regional Agreements, and many other forms of negotiation crystallisations. Nevertheless, the challenge lies in the assurance that in case of conflict, commitments are respected and implemented in line with the principle of pacta sunt servanda. This requires a high level of political awareness, attentiveness, and ethical decision-making. It involves a profound comprehension of the intricacies of international relations, a dedication to diplomacy and conflict resolution, and a focus on ethical and sustainable practices. This configuration requires mindful leaders prioritizing diplomacy and peaceful conflict resolution, actively seeking alternatives to military action, and demonstrating expertise in mediating disputes. The respect to sovereignty of nations, adherence

[47]"A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty and which was not foreseen by the parties cannot be invoked as a reason for terminating or withdrawing from the treaty unless the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty." Vienna Convention on the Law of Treaties. May 23, 1969; Title V, Article 62, para. 1.

[48]CPIJ. August 30, 1924. Mavrommatis, Series A. 1957;2:15. ICJ. November 26, Right of Passage over Indian Territory. ICJ Reports. 1957:148–149. However, the principle of good faith does not prohibit the immediate filing of an application following the deposit of the declaration accepting the jurisdiction of the Court by the applicant State, as long as the subject of the dispute is well established: Land and Maritime Boundary, Cameroon v. Nigeria, June 11, 1998, §36 and following.

[49]Aegean Continental Shelf Case. Rec. 1984:440. Land and maritime border, Cameroon vs. Nigeria. op. cit. 56.

[50]Case of the Continental Shelf of the Iroise Sea. ICJ; 1982. Cases of the Continental Shelf (Tunisia/Libya and Malta/Libya). ICJ; 1984. Case of Maritime Delimitation in the Gulf of Maine (Canada/United States). ICJ; 1993. Case of Sovereignty over Certain Frontier Land (Denmark/Norway) (Jan Mayen).

to non-interference principles and advocacy of self- determination of peoples are the building blocks of ethical decision-making, ensuring that commitments are fulfilled with focus on human rights and respect of international law while acknowledging the moral and humanitarian implications of all actions.

In this regard, Yves Delahaye shares that:

"*Of all the processes that make up international relations, international negotiation is undoubtedly the one to which we most readily refer as representative of this type of social relations. This is because, in some respects, it is exemplary. First and foremost, no matter how one defines international relations, their history began with these negotiations that, from the very beginning, dealt with fundamental issues of state life: recognition, delimitation, exchanges, alliances, peace settlements. But negotiation also has all the features of modernity. Historians, jurists, and practitioners all agree that it is a political instrument of our time, whereas traditional means of violence (...) appear to everyone to bear the imprint of a profoundly archaic character. It is also credited with a quality prized in politics: effectiveness. This is rightly so because it is through negotiation that agreement is ultimately concluded, disputes are resolved, and wars are avoided. Therefore, it is not surprising that, of all international activities, negotiation has always been considered both the most estimable and the most common/...*".[51]

International negotiation undergoes the vagaries and political whims behind which States confront each other, but also claim political commitments that are intended to create legal relationships. Negotiation strives to combine the inalienable, to contribute to the creation of a legalized international environment. The international negotiation corresponds, therefore, to the polymorphism of procedures for the peaceful settlement of international disputes, which indeed constitutes a therapy for the interactions suffering from the ills of our international society.

The list of ICJ and CPJI cases- https://www.icj-cij.org/fr/affaires

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[51]Delahaye Y. "Semiotics of International Negotiation," revue powers. 1980:99–108.

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None.

Conflicts of interest

The authors declare that there is no conflict of interest.

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