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International Dispute Settlement in Perspective

Main Issues

The settlement of disputes is one of the essential functions of law and this is equally true of international law. Indeed, the peaceful settlement of international disputes is a prerequisite to the maintenance of international peace and security. Furthermore, the establishment of mechanisms for settling international disputes is needed to secure the effectiveness of the international legal system. Peaceful settlement of international disputes thus occupies a central place within international law. As we shall discuss in this book, international law provides a range of means of international dispute settlement. They include negotiation, good offices, mediation, inquiry (fact-finding), conciliation, dispute settlement through international organisations, arbitration and judicial settlement. As a preliminary consideration, this chapter will discuss basic concepts and issues concerning peaceful settlement of international disputes in international law. The principal focus will be on the following issues:

- (i) What is the obligation of peaceful settlement of international disputes?
- (ii) What are international disputes in international law?
- (iii) What is the principle of free choice of means?
- (iv) What is the distinction between static and dynamic disputes?
- (v) Should means of international dispute settlement differ according to the types of disputes?

1 INTRODUCTION

Whilst international disputes stem from a variety of factors, such as strategic, political, economic, cultural and religious factors, two elements in particular merit highlighting from the viewpoint of international law.

The first noteworthy element concerns the interpretation and application of rules of international law.¹ In the municipal legal system, basic functions of law – that is,

¹ L. Caflisch, 'Cent ans des règlement pacifique des différends interétatiques' (2001) 288 *RCADI*, pp. 257–61.

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legislative, executive and judicial functions – are essentially monopolised by the State authority. In this sense, the municipal legal system can be regarded as a centralised legal system. Under this system, a dispute with regard to the interpretation and application of law is to be settled eventually by municipal courts. Jurisdiction of the municipal courts is obligatory in the sense that it does not rely on the consent of the parties of the litigation, and the decisions of the courts are enforced by the State authority. Thus the uniform interpretation and application of municipal law can be secured in the municipal legal system. In contrast, international law is considered as a decentralised legal system since there is no centralised authority which exercises legislative, executive and judicial functions. As there is no higher authority above individual States, rules of international law, customary or conventional, are interpreted and applied by States on their own. This is called auto-interpretation/auto-application. Normally States interpret rules of international law in such a way as to justify their policy. As a consequence, they may be interpreted in a different manner by different States. Yet the different interpretation and application of these rules are likely to create international disputes. These are in essence legal disputes. It can be said that the effectiveness of rules of international law relies essentially on the existence of mechanisms for settling international disputes with regard to the interpretation and application of these rules.²

The second noteworthy element relates to the antithesis between stability and change in international law. Once a rule of international law is established at a certain moment, the content of the rule is fixed in time. Thus the rule stabilises the legal order. Nevertheless, society, national or international, is constantly changing. Whilst the existing rules of international law may be advantageous to safeguard the interests of certain States, these rules may put other States at a disadvantage. As a consequence, a sharp tension is raised between States which have interests in maintaining the status quo and other States which demand a change of the status quo for their future development.³ The tension is further intensified by uneven development and inequality of economic, military and political powers among States. Hence the antithesis between stability and change becomes a fundamental issue for international law.⁴ Since there is no centralised machinery for peacefully changing the status quo in the international community, a change is often attempted by unilateral acts of a State or States. Yet, unilateral actions to change the status quo are likely to create international disputes. Here political or dynamic disputes may arise.⁵

Overall one can argue that fundamental causes of international disputes are deeply rooted in the decentralised system of international law and the international community. Hence disputes can be regarded as an inevitable part of international relations. In this regard, some argue that disputes have certain valuable characteristics because they aim to secure adjustments to the existing order and that this is necessary for the

² *Ibid.*, p. 261.

³ See H. Morgenthau, *La notion du 'politique' et la théorie des différends internationaux* (Paris: Librairie du Recueil Sirey, 1933), pp. 70–3. For the purpose of this book, the status quo means the maintenance of the existing rules of international law and international order on the basis of the rules.

⁴ J. L. Kunz, 'The Problem of Revision in International Law ("Peaceful Change")' (1939) 33 *AJIL*, pp. 38–40.

⁵ See section 3.3 of this chapter.

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development of any society.⁶ In the international community which lacks a centralised organ performing the legislative function, a demand to change the status quo emerges via international disputes. In this sense, international disputes can be considered as a signal showing that the existing legal order is not satisfactory for some members of the international community.⁷ Even so, it must always be remembered that international disputes may entail the risk of escalation endangering the international community as a whole.

Given that international disputes are inescapable in international relations, there is certainly a need to create effective mechanisms for peacefully resolving international disputes. Furthermore, as stated in the Report of the United Nations (UN) Secretary-General of 27 July 2015, the peaceful settlement of international disputes is essential to the maintenance of international peace and security and to promote the rule of law at the international level.⁸ Thus the peaceful settlement of international disputes should be a crucial subject in international law. As a preliminary consideration, first, this chapter addresses the obligation of peaceful settlement of international disputes in international law (section 2). It then analyses the concept of international disputes in international law (section 3). Next, it moves on to examine the classification of various means of international dispute settlement (section 4). Finally, it discusses the principal features of the dispute settlement system in international law (section 5), before offering conclusions (section 6).

2 OBLIGATION OF PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES

The obligation of peaceful settlement of international disputes is clearly embodied in Article 2(3) of the Charter of the United Nations (hereafter the UN Charter):⁹

All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

Whilst the obligation under this provision is primarily incumbent upon members of the United Nations, it is binding on every State as a rule of customary international law.¹⁰ This obligation is also to apply to the United Nations itself.¹¹ Subsequently the

⁶ J. Collier and V. Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (Oxford University Press, 2000), pp. 1–2.

⁷ *Ibid.*, p. 2.

⁸ UN General Assembly, Report of the UN Secretary-General, *Strengthening and Coordinating United Nations Rule of Law Activities*, A/70/206, 27 July 2015, p. 7, para. 21.

⁹ 892 UNTS, p. 119. Entered into force 24 October 1945.

¹⁰ *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Judgment of 27 June 1986, ICJ Reports 1986, p. 145, para. 290. See also *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear* (Cambodia v. Thailand), Judgment of 11 November 2013, ICJ Reports 2013, para. 105.

¹¹ B. Simma, D.-E. Khan, G. Nolte and A. Paulus (eds.), *The Charter of the United Nations: A Commentary* (hereafter *A Commentary*), 3rd edn, Vol. I (Oxford University Press, 2012), p. 188.

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obligation of peaceful settlement of international disputes is confirmed in multiple international instruments, such as the 1970 Friendly Relations Declaration,¹² the 1982 Manila Declaration,¹³ and the 2012 Declaration on the Rule of Law.¹⁴

The obligation of peaceful settlement of international disputes means that States must settle disputes by peaceful means, not coercive means. It is not suggested that all international disputes must be resolved immediately. In appropriate circumstances, wisdom may require parties to freeze disputes and maintain the status quo. The 1959 Antarctic Treaty that freezes claims to territorial sovereignty over Antarctica is a case in point.¹⁵ However, it must be remembered that freezing of international disputes is only possible as long as all parties in dispute agree to do so. In addition, absence of solution must not constitute a threat to the maintenance of international peace and security.¹⁶

It is important to note that the obligation of peaceful settlement of international disputes is closely linked to the outlawry of war and the prohibition of the use or threat of force in international law. In fact, if States can freely recourse to war to resolve a dispute, the obligation of peaceful settlement of international disputes will become meaningless. At present, the use or threat of force is prohibited in international law. Under Article 2(4) of the UN Charter:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.¹⁷

The International Court of Justice (ICJ), in the 1986 *Nicaragua* case (Merits), confirmed the customary law nature of the principle of non-use of force expressed in Article 2(4) of the UN Charter.¹⁸ As the use of force is prohibited in international law, it is logical that all disputes must be settled in a peaceful manner. In this sense, the obligation of peaceful settlement of international disputes can be thought to be the corollary of the prohibition of the use of force in international law.¹⁹

¹² *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, Annex to the UN General Assembly Resolution 2625(XXV), 24 October 1970.

¹³ UN General Assembly Resolution 37/10. *Manila Declaration on the Peaceful Settlement of International Disputes*, A/RES/37/2, 15 November 1982, Section I, para. 2.

¹⁴ UN General Assembly Resolution, 67/1. *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Level*, A/RES/67/1, 30 November 2012, para. 4.

¹⁵ Article IV(2). Text in: 402 *UNTS*, p. 71. Entered into force 23 June 1961.

¹⁶ A. Pellet, 'Peaceful Settlement of International Disputes' in *Max Planck Encyclopaedia*, para. 5.

¹⁷ For a detailed analysis of Article 2(4), see *A Commentary*, Vol. I, pp. 200–34.

¹⁸ *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Judgment of 27 June 1986, Merits, ICJ Reports 1986, p. 100, para. 190. According to the ICJ, the principle of non-use of force includes the prohibition of the threat of force. *Ibid.*, p. 118, para. 227.

¹⁹ D. W. Bowett, 'Contemporary Developments in Legal Techniques in the Settlement of Disputes' (1983-II) 169 *RCADI*, p. 177; P.-M. Dupuy and Y. Kerbrat, *Droit international public*, 12th edn (Paris: Dalloz, 2014), p. 613. See also Chapter 12, section 1 of this book.

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A catalogue of means of international dispute settlement is provided in Article 33(1) of the UN Charter:

The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

This provision calls for three comments.

First, taken literally, this provision seems to apply only to disputes ‘the continuance of which is likely to endanger the maintenance of international peace and security’. However, this is not the case and all disputes must be settled peacefully in international law.²⁰

Second, Article 33(1) of the UN Charter is not an exhaustive list of means of dispute settlement. In fact, Article 33(1) goes on to add ‘other peaceful means of their own choice’. It seems to follow that the means of dispute settlement are not limited to the methods clearly mentioned in that provision.²¹ Indeed, the Manila Declaration adds good offices as a means of dispute settlement, although Article 33(1) makes no reference to good offices.²² States are also free to combine means of dispute settlement or create an original technique for dispute settlement.²³

Third, as shown in the phrase ‘their own choice’, the choice of dispute settlement means relies on the consent of the parties in dispute. This is called the principle of free choice of means. According to the advisory opinion of the *Status of Eastern Carelia* case:

It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement.²⁴

The Friendly Relations Declaration also confirms this principle, stating that: ‘International disputes shall be settled on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.’²⁵

The obligations set out in Articles 2(3) and 33(1) of the UN Charter are regarded as an obligation of conduct and there is no obligation to reach a specific result.²⁶ Even

²⁰ J. Verhoeven, *Droit international public* (Brussels: Larcier, 2000), p. 694; the Manila Declaration, para. I(2). See also Friendly Relations Declaration.

²¹ José Antonio Pastor Ridruejo, ‘Le droit international à la veille du vingt et unième siècle: normes, faits et valeurs: Cours général de droit international public’ (hereafter ‘Cours général’) (1998) 274 *RCADI*, p. 99; Caflisch, ‘Cent ans’, p. 274. ²² Section I, para. 5.

²³ Verhoeven, *Droit international public*, p. 696.

²⁴ *Status of Eastern Carelia*, Advisory Opinion of 23 July 1923, PCIJ Ser. B, 1923, No. 5, p. 27.

²⁵ Emphasis added. See also Section I, para. 3, of the Manila Declaration.

²⁶ *A Commentary*, Vol. I, p. 190; R. Kolb, *The International Court of Justice* (Oxford: Hart Publishing 2013), p. 23; Pellet, ‘Peaceful Settlement’, para. 16.

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so, it must be noted that peaceful settlement of international disputes is governed by the principle of good faith.²⁷ In the event of failure to reach a solution by any one of the means of dispute settlement, the State Parties to an international dispute are under the duty to ‘continue to seek a settlement of the dispute by other peaceful means agreed upon by them’.²⁸

3 THE CONCEPT OF INTERNATIONAL DISPUTES IN INTERNATIONAL LAW

3.1 Definition of International Disputes

An often quoted definition of international disputes is that stated in the *Mavromatis* judgment of 1924 by the Permanent Court of International Justice (PCIJ):²⁹

[A] disagreement over a point of law or fact, a conflict of legal views or of interests between two persons.³⁰

The *Mavromatis* formula and its variations have been repeatedly confirmed in the ICJ jurisprudence.³¹

However, the time-honoured formula appears to be too broad in its scope in the sense that it includes ‘conflict of interests’ in the category of disputes. If there are always differences of interests behind international disputes, a mere disagreement of interests does not automatically create a dispute in a legal sense.³² For example, an exporting country of petrol usually attempts to export it at a high price, while an importing country of petrol has an interest in buying it at a low price. Here there is a difference concerning economic interests between States. Nonetheless, this is not a dispute in international law, unless

²⁷ Manila Declaration, Section I, para. 5. See also Section I, para. 11. For a comprehensive analysis of the principle of good faith in international law, see R. Kolb, *La bonne foi en droit international public: contribution à l'étude des principes généraux de droit* (Paris: PUF, 2000). See in particular, pp. 579 *et seq.* See also United Nations, *Handbook on the Peaceful Settlement of Disputes between States* (New York: United Nations, 1992), p. 6.

²⁸ The second principle of the Friendly Relation Declaration; Section I, para. 7 of the Manila Declaration; *A Commentary*, Vol. I, p. 1075.

²⁹ Generally on this issue, see R. Jennings, ‘Reflections on the Term “Dispute”’ in R. St. J. Macdonald (ed.), *Essays in Honour of Wang Tieya* (Dordrecht: Nijhoff, 1994), pp. 401–5; C. Schreuer, ‘What Is a Legal Dispute?’ in I. Buffard, J. Crawford, A. Pellet and S. Wittich (eds.), *International Law between Universalism and Fragmentation, Festschrift in Honour of Gerhard Hafner* (Leiden: Nijhoff, 2008), pp. 959–79; R. Kolb, ‘Note sur certaines caractéristiques du différend international’ (2004) *The Global Community: Yearbook of International Law and Jurisprudence*, pp. 227–42; Kolb, *The International Court of Justice*, pp. 300 *et seq.*

³⁰ *Mavromatis Palestine Concessions*, Judgment No. 2, 1924, PCIJ, Series A, No. 2, p. 11.

³¹ For instance, see *Case Concerning East Timor* (Portugal v. Australia), Judgment of 30 June 1995, ICJ Reports 1995, p. 99, para. 22; *Case Concerning Certain Property* (Liechtenstein v. Germany), Preliminary Objections, Judgment of 10 February 2005, p. 18, para. 24. See also Kolb, *The International Court of Justice*, p. 302.

³² Kolb, *The International Court of Justice*, p. 306.

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there is an obligation to fix the price of petrol.³³ In this respect, the ICJ in the *South West Africa* case stated that:

[I]t is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. *Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other.*³⁴

Further, conceptual distinction should be made between disputes and conflicts, even though the term ‘dispute’ and ‘conflict’ are often used interchangeably. Whilst conflicts are often unfocused and general in their nature, disputes are formulated by way of claims and counterclaims or denials, focusing on specific issues. For the purpose of this book, a general state of hostility or a wider antagonism between States should be called international ‘conflict’,³⁵ whilst the term international ‘dispute’ in the traditional sense signifies a specific disagreement between subjects of international law concerning a matter of fact, law or policy in which a claim of one party is positively opposed by the other.³⁶ A dispute always arises from a conflict, while the existence of a conflict does not always lead to a dispute. When submitting an international dispute to an international court, a party or parties in dispute must extrapolate relevant elements from a conflict and convert them into a dispute which is relevant to examination by the court. International courts and tribunals can settle only legal aspects of an international ‘conflict’. Hence the judicial settlement of an international dispute does not mean that all aspects of an international conflict are resolved.

3.2 Identification of International Disputes

3.2.1 Criteria for Identifying International Disputes

In reality, it is not infrequent that one of the parties in dispute declines to admit the existence of an international dispute in international adjudication.³⁷ In this case, a dispute arises with regard to the existence of a dispute. As the ICJ ruled in the 1974 *Nuclear Tests* case, ‘the existence of a dispute is the primary condition for the Court to

³³ P. Cahier, ‘Changements et continuité du droit international: Cours général de droit international public’ (1985-VI) 195 *RCADI*, pp. 329–30.

³⁴ Emphasis added. *South West Africa* cases (Liberia v. South Africa) (Ethiopia v. South Africa), Judgment of 21 December 1962, Preliminary Objections, ICJ Reports 1962, p. 328. This view was echoed by the Court in the *East Timor* case, ICJ Reports 1995, p. 100, para. 22.

³⁵ Morgenthau called such a wider antagonism ‘tensions’ which must be distinct from ‘disputes’ focusing on a clearly defined single issue. Morgenthau, *La Notion du ‘politique’*, p. 78. Charles de Visscher also took a similar view. Charles de Visscher, *Theory and Reality in Public International Law*, Revised edn (trans. P. E. Corbett) (Princeton University Press, 1968), p. 353.

³⁶ This definition is based on that proposed by J. G. Merrills, *International Dispute Settlement*, 6th edn (Cambridge University Press, 2017), p. 1. Concerning the distinction between conflicts and disputes, see Collier and Lowe, *The Settlement of Disputes*, p. 1.

³⁷ Generally on this issue, see S. Yee, ‘A Proposal for Formalizing the “No Case Exists” Objections Procedure at the International Court of Justice’ (2005) 4 *CJIL*, pp. 393–416.

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exercise its judicial function'.³⁸ Thus whether an international dispute exists between the parties should be an important question in judicial proceedings. As stated by the ICJ in the 1998 *Fisheries Jurisdiction* case between Spain and Canada, 'it is for the Applicant, in its Application, to present to the Court the dispute with which it wishes to seise the Court and to set out the claims which it is submitting to it'.³⁹ In the Court's view:

Whether there exists an international dispute is a matter for objective determination. The mere denial of the existence of a dispute [by a State] does not prove its non-existence.⁴⁰

Whilst the evaluation of the existence of a dispute is context-specific, the ICJ jurisprudence appears to reveal some key elements of deciding the existence of a dispute. These elements can be summarised as follows:

- (i) The Court's determination of the existence of a dispute is a matter of substance, not a question of form or procedure.⁴¹
- (ii) As the ICJ stated in the *South West Africa* case, it must be shown that the claim of one party is positively opposed by the other.⁴² In this regard, the Court, in the 2016 *Nicaragua/Colombia* case, took the view that: '[A]lthough a formal diplomatic protest may be an important step to bring a claim of one party to the attention of the other, such a formal protest is not a necessary condition [for the existence of a dispute].'⁴³ If one of the parties maintains the application of a treaty and the other denies it, the difference of the views concerning the applicability of the treaty alone is not adequate to confirm the existence of a dispute. The ICJ is required to ascertain whether the matters claimed before the Court, such as alleged breaches of the treaty or acts

³⁸ The *Nuclear Tests* case (Australia v. France) (New Zealand v. France), Judgment of 20 December, ICJ Reports 1974, pp. 270–1, para. 55.

³⁹ *Fisheries Jurisdiction* case (Spain v. Canada), Jurisdiction of the Court, Judgment of 4 December, ICJ Reports 1998, p. 447, para. 29.

⁴⁰ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase*, Advisory Opinion, 30 March 1950, ICJ Reports 1950, p. 74.

⁴¹ *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (Marshall Islands v. United Kingdom), Judgment of 5 October 2016, Preliminary Objections (not yet reported), para. 38; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), Preliminary Objection, Judgment of 1 April 2011, ICJ Reports 2011, p. 84, para. 30.

⁴² *South West Africa* case (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment of 21 December 1962, ICJ Reports 1962, p. 328. See also *Armed Activities on the Territory of the Congo (New Application: 2002)* (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment of 3 February 2006, ICJ Reports 2006, p. 40, para. 90. Judge Owada, in the 2011 *Georgia/Russia* case, argued that a party must show that there exists a situation in which the claim advanced by the Applicant party is positively met with *an attitude of opposition*. Separate Opinion of Judge Owada in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation) (hereafter the *Georgia/Russia* case), Preliminary Objections, Judgment of 1 April 2011, ICJ Reports 2011, p. 174, para. 12.

⁴³ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (Nicaragua v. Colombia), Preliminary Objections, Judgment of 17 March 2016 (not yet reported), para. 72.

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complained of by the applicant, are capable of falling within the provisions of that instrument to determine the existence of a dispute.⁴⁴

- (iii) According to the Court in the *Georgia/Russia* case, '[t]he existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for'.⁴⁵ It would seem to follow that failure to respond to the demands of one of the parties to a dispute does not automatically preclude the existence of a dispute.⁴⁶ Furthermore, the ICJ, in the 2016 *Nicaragua/Colombia* judgment (preliminary objection), took the view that the fact that the parties remained open to a dialogue does not by itself prove that there existed no dispute between them concerning the subject matter of the dispute.⁴⁷
- (iv) As the ICJ observed in the *Georgia/Russia* case, '[w]hile the existence of a dispute and the undertaking of negotiations are distinct as a matter of principle, the negotiations may help demonstrate the existence of the dispute and delineate its subject-matter'.⁴⁸
- (v) Dispute must clearly specify issues between the parties. A hypothetical dispute or a question *in abstracto* cannot be regarded as a dispute capable of judicial settlement.⁴⁹ As stated in the *Northern Cameroons* judgment, the Court 'may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties'.⁵⁰ However, it is not suggested that actual or concrete damage is required to establish the existence of a dispute. In the *Headquarters Agreement* case, for instance, the United States made clear that it would not take actions to close the PLO Mission to the United Nations,⁵¹ although the United States had passed legislation designed to lead to the closure of the Mission.⁵² The United States thus argued that

⁴⁴ *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Request for the Indication of Provisional Measures, Order of 2 June 1999, ICJ Reports 1999, p. 137, para. 38; *Immunities and Criminal Proceedings* (Equatorial Guinea v. France), Request for the Indication of Provisional Measures, 7 December 2016, ICJ Reports 2016 (not yet reported), para. 47.

⁴⁵ The *Georgia/Russia* case, Preliminary Objection, ICJ Reports 2011, p. 84, para. 30. See also *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion of 26 April 1988, ICJ Reports 1988, p. 28, para. 38; *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria) (hereafter the *Cameroon/Nigeria* case), Preliminary Objections, Judgment of 11 June 1998, ICJ Reports 1998, p. 315, para. 89. The ICJ's view was echoed by ITLOS. See The *M/V 'Norstar'* case (Panama v. Italy), Preliminary Objections, 4 November 2016, ITLOS case No. 25, para. 101.

⁴⁶ Schreuer, 'What Is a Legal Dispute?', pp. 964–5.

⁴⁷ The 2016 *Nicaragua/Colombia* case (Preliminary Objections), para. 69.

⁴⁸ The *Georgia/Russia* case, Preliminary Objection, ICJ Reports 2011, p. 84, para. 30. Yet, Judge ad hoc Fleischhauer, in the *Certain Property* case, expressed his misgivings that if the Court regards negotiations over a contentious issue as evidence of the existence of a dispute, this could have negative effects on the readiness of States to engage in attempts at peaceful settlement of disputes. Declaration of Judge ad hoc Fleischhauer, *Certain Property* (Liechtenstein v. Germany), Preliminary Objections, Judgment of 10 February 2005, ICJ Reports 2005, p. 69. See also H. Thirlway, *The International Court of Justice* (Oxford University Press, 2016), p. 54.

⁴⁹ Schreuer, 'What Is a Legal Dispute?', pp. 970–1.

⁵⁰ *Northern Cameroons* (Cameroon v. United Kingdom), Judgment of 2 December 1963, Preliminary Objections, ICJ Reports 1962, pp. 33–4.

⁵¹ ICJ Reports 1988, p. 29, para. 39. ⁵² *Ibid.*, pp. 15–19, paras. 9–15.

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there was no dispute between the United Nations and itself.⁵³ Nonetheless, the Court was not persuaded by this argument. According to the Court:

While the existence of a dispute does presuppose a claim arising out of the behaviour of or a decision by one of the parties, it in no way requires that any contested decision must already have been carried into effect. What is more, a dispute may arise even if the party in question gives an assurance that no measure of execution will be taken until ordered by decision of the domestic courts.⁵⁴

In addition, the ICJ ruled, in the *Arrest Warrant* case, that Belgium had violated international law by issuing against the incumbent Foreign Minister of the Democratic Republic of the Congo the arrest warrant of 11 April 2000 and its international circulation, even though no arrest had ever taken place under the arrest warrant.⁵⁵

- (vi) As the ICJ stated in the *Belgium/Senegal* case, the ‘dispute must *in principle* exist at the time the Application is submitted to the Court.’⁵⁶ According to the Court, ‘[i]n principle, the critical date for determining the existence of a dispute is the date on which the application is submitted to the Court.’⁵⁷ The term ‘in principle’ seems to allow for some nuance when determining the existence of a dispute on the date the case is referred to it.⁵⁸

3.2.2 Case Study

In some cases, the existence of a particular dispute constitutes a debatable issue. An eminent example is the *Georgia/Russia* case. In this case, a contentious issue arose whether there was a dispute between the parties with regard to violations of the 1965 Convention on the Elimination of All Forms of Racial Discrimination.⁵⁹ While, at the stage of the proceedings of provisional measures, the majority opinion of the Court found that a dispute with regard to the 1965 Convention existed between the parties,⁶⁰ seven judges, in their Joint Dissenting Opinion, denied the existence of the dispute.⁶¹ The voting record, eight votes versus seven, suggests that the decision of the Court in this matter was highly controversial. The existence of a dispute was also at issue at the stage of the proceedings concerning preliminary objections put forward by the Russian Federation. Again, the Russian Federation claimed

⁵³ *Ibid.*, p. 29, para. 39. ⁵⁴ *Ibid.*, p. 30, para. 42.

⁵⁵ *Arrest Warrant of 11 April 2000* (hereafter the *Arrest Warrant* case) (Democratic Republic of the Congo v. Belgium), Judgment of 14 February 2002, ICJ Reports 2002, p. 33, para. 78(2).

⁵⁶ Emphasis added. *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), Judgment of 20 July 2012, Merits, ICJ Reports 2012, p. 442, para. 46. The *dictum* was repeatedly confirmed by the Court.

⁵⁷ The 2016 *Nicaragua/Colombia* case (Preliminary Objections), para. 25.

⁵⁸ In this regard, Kolb argued that while there must at least be the beginnings of a dispute before the parties seise the Court, the definitive dispute can crystallise later in the course of the proceedings. Kolb, *The International Court of Justice*, p. 315.

⁵⁹ Text in: 660 UNTS, p. 195. Entered into force 4 January 1969.

⁶⁰ The *Georgia/Russia* case, Request for the Indication of Provisional Measures, Order of 15 October 2008, ICJ Reports 2008, p. 387, para. 112.

⁶¹ Joint Dissenting Opinion of Vice-President Al Khasawneh and Judges Ranjeva, Shi, Koroma, Tomka, Benouna and Skotnikov, *ibid.*, pp. 400 *et seq.*