

UNIT 18.- THE PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES: POLITICAL MEANS OF SETTLEMENT

1.- GENERAL ASPECTS. A) NOTION OF CONTROVERSY B) THE OBLIGATION OF PEACEFUL SETTLEMENT C) FREEDOM OF CHOICE OF THE MEANS FOR THE SETTLEMENT D) THE TYPES OF MEANS OF SETTLEMENT 2. POLITICAL MEANS OF SETTLEMENT. (A) DIPLOMATIC NEGOTIATION. (B) GOOD OFFICES AND MEDIATION. (C) INQUIRY. (D) RECONCILIATION. (E) RESOURCES TO REGIONAL ORGANIZATIONS OR AGREEMENTS. 3. THE PACIFIC SETTLEMENT OF DISPUTES BY THE UNITED NATIONS. A) ACTION BY THE SECURITY COUNCIL. B) ACTION BY THE GENERAL ASSEMBLY. C) THE SECRETARY GENERAL'S ACTION



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1.- General aspects

- Conflict situations often arise in international relations: "alarms", "tensions", "conflicts", "crises", etc.,
 - ❖ element of destabilization and can compromise the maintenance of international peace and security.
 - ❖ can also affect specific parties that are confronted with each other because of a divergence that has reached a critical point.
- Properly speaking: international "controversies" (international disputes; *différends internationaux*).

a) *Notion of controversy*

- Classic definition:
 - ❖ PCIJ Judgment 26/3/1925, concerning the case of the Mavrommatis concessions in Palestine (Greece v. United Kingdom): *"a dispute is a disagreement on a point of law or fact, a contradiction, an opposition of legal theses or interests between two persons."*
- Currently: adding that the disagreement in question must arise between subjects of international law (States and international organizations) and be expressed in an objective and externalized form.
 - ❖ ICJ "for a dispute to exist it must be shown that the claim of one party is confronted by the manifest opposition of the other party".
- Traditionally, doctrine has traditionally distinguished between:
 - ❖ Legal disputes (art. 36,2 ICJ Statute) "disputes concerning : a) the interpretation of a treaty; b) any question of IL; c) the existence of any fact which, if established, would constitute a breach of an international obligation; d) the nature or extent of the reparation to be made for the breach of an international obligation, which are capable of settlement "by application of the principles and rules of IL".

- ✓ legal disputes should be settled by jurisdictional means, i.e. by recourse to arbitration or judicial settlement.
- ❖ Non-legal (or political) disputes: disputes other than those listed above, i.e., those that cannot be settled by the application of international law. Resolution through recourse to political means of settlement (diplomatic negotiation, good offices, etc.).
 - ✓ Disputes in which what is sought is a change in the law in force.
 - ✓ Disputes in which the parties consider that their interests are not susceptible of being adequately protected by taking into account only the existing legal rules.
- In any case, the distinction between legal and non-legal or political disputes is essentially relative:
 - ❖ All international disputes have legal aspects and political aspects.
- decisive: attitude of the disputing States and their willingness to classify it in one way or another and thus to submit it to a political or legal means of settlement.

b) Obligation of peaceful settlement

- End of XIX Century: peace through law and limiting recourse to war.
 - ❖ The Hague Peace Conferences of 1899 and 1907: Convention for the Peaceful Settlement of International Disputes of October 18, 1907.
- End WWI: LoN
 - ❖ commitments for the peaceful settlement of disputes and the limitation of recourse to war.
 - ❖ 1928: General Treaty for the Renunciation of War (Briand-Kellog Pact) the settlement of their differences, whatever their origin or nature, should be sought only by peaceful means (Article 2)".
- End WWII creation of UNO 1945:
 - ❖ Article 1 of the Charter: "to maintain international peace and security, and to that end ... to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace".
 - ❖ Article 2: prohibition of the use of force (par. 4) and the peaceful settlement of disputes (par. 3)

- ❖ Chapter VI of the Charter: Scope of the obligation of peaceful settlement of disputes (Articles 33 to 37).
 - ✓ Further developed by:
 - General Assembly Resolution 2625 (XXV) of 24 October 1970, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations;
 - General Assembly Resolution A/37/10 of 15 November 1982, Manila Declaration on the Peaceful Settlement of International Disputes,
 - General Assembly Resolution A/43/51 of 5 December 1988, Declaration on the Prevention and Elimination of Disputes and Situations Which May Endanger the Maintenance of International Peace and Security and on the Role of the United Nations in this Field.
- ICJ Case law:
 - ❖ The principle of the peaceful settlement of international disputes is complementary to the principle prohibiting the threat or use of force.
 - ❖ Is a rule of customary law whose observance is essential in today's world.
 - ❖ The obligations of the Charter relating to the peaceful settlement of disputes are "manifestly peremptory" in character .
- Characteristics of the obligation:
 - ❖ It is limited to disputes "the continuance of which is likely to endanger the maintenance of international peace and security" (Art. 33, 1 of the Charter).

- ❖ This obligation does not apply to purely internal conflicts in which no other subjects of international law are involved, insofar as they do not affect international peace and security.
- ❖ The obligation of peaceful settlement of international disputes constitutes an obligation of conduct and not an obligation of result
- ❖ In seeking such settlement, the States parties to the dispute must:
 - ✓ refrain "from any action which might aggravate the situation in a manner likely to endanger the maintenance of international peace and security and shall act in conformity with the purposes and principles of the United Nations" (Resolution 2625 (XXV)).
 - ✓ "continue to respect in their mutual relations the obligations incumbent upon them by virtue of the fundamental principles of international law concerning the sovereignty, independence and territorial integrity of States, as well as the other generally recognized principles and rules of international law" (Manila Declaration).
 - ✓ In the event of failure to reach a solution by one of the above-mentioned peaceful means, "to continue to seek settlement of the dispute by other peaceful means agreed upon by them" (Resolution 2625 (XXV)).
 - ✓ "neither the existence of a dispute nor the failure of a procedure for the peaceful settlement of a dispute authorizes the parties to the dispute to resort to the threat or use of force" (Manila Declaration).

c) Freedom of choice of the peaceful means of settlement

- The obligation of peaceful settlement is counterbalanced by the principle of free choice of the means or procedures of settlement to be used in each case: corollary of the sovereign equality of States.
- Art 33 UN Charter and GA Resolution 2625 (XXV) list most of the procedures or means of peaceful settlement: negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, recourse to regional bodies, agreements or systems or other peaceful means of their choice. The 1982 Manila Declaration also includes good offices.
- States are free to decide on the means to be applied in a given case, and may choose any of those listed in the above texts, combine them at their discretion or choose any other peaceful means freely devised by them. BUT CONSENT is indispensable: it may occur either:
 - ❖ once the dispute has crystallized (ex post choice)
 - ❖ have been established beforehand by any means expressive of the consent of the parties thereto (ex ante choice) by the conclusion of general treaties of pacific settlement, or of regional or bilateral agreements.

d) Types of means or procedures for peaceful settlement

- Traditional classification (art. 33 Charter-open list):
 - ❖ Political or diplomatic procedures: negotiation, good offices, mediation, investigation, conciliation, recourse to regional bodies, agreements or systems or any others that the Parties accept.
 - ✓ Solutions need not be based exclusively on legal considerations.
 - ✓ Results are not in principle binding on the parties.
 - ❖ Legal or jurisdictional procedures: arbitration and judicial settlement.
 - ✓ Submission to an impartial third party who issues a binding decision based on law.
 - ✓ Solution based in IL (unless authorization of ex aequo et bono).
 - ❖ Other peaceful means.
- Practice shows that there may also be combinations of these or recourse to different procedures.

2. Political means of peaceful settlement

a) Diplomatic negotiation

- Negotiation: essence of diplomacy.
 - ❖ Context of the peaceful settlement of disputes: flexible means of dispute settlement in which the settlement is attempted directly by the parties concerned, without the intervention of a third party.
 - ✓ self-composition or self-settlement procedure.
 - ✓ Discretion, flexibility, immediacy and ability to be applied to any type of international dispute.
 - ✓ Usually: first form of settlement. BUT: no rule of prior exhaustion as condition for applying other means.
- The Manila Declaration:
 - ❖ States must conduct themselves in such a way as to make the negotiation meaningful, so that a settlement acceptable to the parties can be reached rapidly: manifestation of the requirement of good faith.

b) Good offices and mediation

- Procedures involving the intervention of a third party to facilitate the settlement of the dispute when relations between the parties are strained or have broken down.
 - ❖ Very similar means: degree of intensity of the intervention.
- **Good offices:**
 - ❖ Action of a third party in an attempt to bring the parties to the dispute closer together, but without providing its own point of view on the dispute.
 - ❖ Very modest intervention aimed at facilitating the parties to enter into negotiations with a view to settling the dispute between them.
 - ❖ May be exercised by a friendly State, by an international organization (or a senior official or agent thereof) or by an eminent person, either on his own initiative or at the request of the parties to the dispute.
 - ❖ Informal.
- **Mediation:**
 - ❖ Action of a third party (State, International Organization, personality of recognized authority) to conciliate the claims of the parties in conflict, assuming greater protagonism than in good offices.

- ❖ Convention for the Pacific Settlement of International Disputes of 18 October 1907: role of the mediator consists of: *"to reconcile opposing claims and to pacify resentments which may have arisen between the States in conflict"* (Article 4).
 - ✓ more direct and intense intervention between the parties, trying to bring their positions closer together, acting as a channel of communication between them, suggesting possible avenues of agreement and making efforts to accommodate the respective positions of both parties.
 - ✓ May even present his own proposals aimed at a mutually acceptable compromise solution .
- Its results are not binding on the Parties.

c) *Inquiry*

- Inquiry or "fact finding": intervention of a third party to facilitate the settlement of the dispute when the international dispute results from a divergence of appreciation on points of fact.
 - ❖ Third party is usually not an individual person or entity but a collective body: the international commission of inquiry.
 - ❖ Intervention of a commission of inquiry, constituted with the agreement of the parties to the dispute, in order to clarify the factual issues by means of an impartial and conscientious examination.
 - ✓ Conventions: list of experts+usually regulate in some detail the procedure to be followed by the commission (adversarial examination of the data submitted in order to establish an impartial determination of the facts).
 - ❖ End of work: preparation of a report, limited to the ascertainment of the facts, which will be delivered to the parties.
 - ✓ The Parties, in the light of the facts established in the report, shall agree on the measures to be adopted to resolve the dispute .

- Fact-finding of IO in order to gain a better understanding of a situation or conflict: outside the mechanisms of direct settlement between the parties.

d) Conciliation

- Intervention of a third party (conciliation commission), which is constituted with the agreement of the parties, in order to clarify the issues in dispute, drawing the attention of the parties to all measures likely to facilitate an amicable settlement of the dispute and making proposals to that end.
 - ❖ Carried out by a collective body: rules of procedure and scope of its functions are established in detail by the Parties.
 - ❖ The conciliation commission will conduct an adversarial examination of the case, considering its factual and legal elements, and will endeavor to submit to the parties a report with recommendations containing the basic outlines of a settlement proposal.
 - ❖ The report of the commission and its recommendations are not binding, but are submitted to the parties for their consideration in order to facilitate an amicable settlement of the dispute.

e) Resource to regional organizations or agreements

- Most regional IO: Mechanisms for the peaceful settlement of disputes, which include recourse to political and jurisdictional means of settlement. Important contribution to peacemaking in an area.
 - ❖ Ex: mechanisms for the peaceful settlement of disputes that have been established by both the Council of Europe (CE) and the Organization for Security and Cooperation in Europe (OSCE).
- Regional agencies or arrangements: Chapter VIII of the UN Charter.
 - ❖ Manila Declaration 1982: recourse to regional bodies or agreements is appropriate for the peaceful settlement of disputes of a local character.

3. The pacific settlement of disputes by the United Nations

- UN Charter: Chapter VI (Articles 33 to 38).
 - ❖ Not only of "disputes" but also of "situations".
 - ✓ First, in practice it is the State that brings the matter before the Security Council that in principle determines whether it should be registered as a "dispute" or as a "situation". Although the Security Council may modify this provisional qualification, in practice it is generally maintained.
 - ✓ Secondly, the imprecise nature of the term "situation" has allowed the Security Council to intervene in the peaceful settlement of various conflicts that could be considered "internal", despite the reservation of domestic competence of States established in Article 2.7 of the Charter.
- Organization's own action for the peaceful settlement of the most serious international disputes, i.e. those "the continuance of which is likely to endanger the maintenance of international peace and security" (Article 33.1), as well as for situations "likely to lead to international friction or to give rise to a dispute" (Article 34).
- Competence of the SC, the GA and the Secretary General, regardless of the role of the International Court of Justice in the judicial settlement of disputes.

a) Action by the Security Council

- Article 24: "primary responsibility for the maintenance of international peace and security". Important role in the settlement of international disputes.
- Initiative:
 - ❖ On its own initiative (ex officio) to "investigate any dispute or any situation likely to lead to international friction or give rise to a dispute" (Article 34).
 - ❖ At the request of either a Member of the Organization or a non-Member (Article 35.1 & 2).
 - ✓ obligation in the case of a dispute whose continuance is likely to endanger the maintenance of international peace and security, and the parties to the dispute have not succeeded in settling it by the means indicated in Article 33.
 - ❖ By both the General Assembly (Article 11.3) and the Secretary-General (Article 99) who may "bring to the attention" of the Security Council situations that are likely to endanger international peace and security .
- Modalities of action (operate in a gradual manner):
 - ❖ Investigate any dispute or situation.
 - ❖ "Urge" the parties to settle the dispute or situation by peaceful means.

- ❖ If this invitation is unsuccessful, may take more direct action by "recommending such procedures or methods of adjustment as may be appropriate".
- ❖ If the Security Council considers that the dispute is really likely to endanger the maintenance of international peace and security, it may "recommend such terms of settlement as it may deem appropriate" (Article 37.2) and, if so requested by all the parties to a dispute, make recommendations to them for the purpose of bringing about a peaceful settlement (Article 38).
- ❖ Chapter VII.
- Recommendations within the scope of Chapter VI have no binding force on the parties to the dispute.

b) Action by the General Assembly

- Article 10: the General Assembly may discuss any matters or questions within the limits of the Charter, and may make recommendations on such matters or questions to the Members of the United Nations and to the Security Council.
- Initiative:
 - ❖ Any Member of the United Nations, a State which is not a Member of the United Nations, or the Security Council may bring before the General Assembly any question relating to the maintenance of international peace and security;
 - ❖ the General Assembly may make recommendations concerning such questions to the State or States concerned or to the Security Council or to both the Security Council and the State or States concerned (Article 11.2).
 - ❖ **Limitations:** while the Security Council is performing the functions assigned to it by the Charter with respect to a dispute or situation, the General Assembly shall refrain from making any recommendation thereon unless requested to do so by the Security Council (Article 12.1). Furthermore, any question of that nature in respect of which action is required must be referred by the General Assembly to the Security Council, before or after discussion (Article 11.2).

c) *The Secretary General action*

- Not only administrative functions:
 - ❖ Article 98: shall perform such other functions as may be entrusted to him by other principal organs of the Organization, and these may include functions in the field of the peaceful settlement of international disputes.
 - ❖ Article 99: may call the attention of the Security Council to any matter which in his opinion may endanger the maintenance of international peace and security.
 - ❖ Manila Declaration: assume the responsibilities entrusted by the Charter.
- Such diplomatic functions include: discussions and consultations with the parties, fact-finding activities, participation in or assistance with negotiations for the settlement of a dispute, participation in the implementation of an agreed settlement, etc.
- General Assembly Resolution 43/51 of 5 December 1988: Rules.



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