

UNIVERSITY OF OXFORD FACULTY OF LAW

INTERNATIONAL DISPUTE SETTLEMENT 2003-2004

(3) ALTERNATIVE DISPUTE RESOLUTION (ADR); GOOD OFFICES

Reading:

** J.G. Merrills, *International Dispute Settlement*, (1998), ch. 1.

* H.G. Darwin, in David Davies Memorial Institute, *International Disputes: The Legal Aspects*, (London, 1972), pp. 83-92

R. R. Probst, 'Good offices' in the light of Swiss international practice and experience (Dordrecht; 1989)

C. R. Hume, *Ending Mozambique's civil war: the role of mediation and good offices* (Washington, D.C.: United States Institute of Peace Press, c1994)

1. The offering of Good Offices is not a hostile act: **Hague Convention for the Pacific Settlement of International Disputes, 1899 (arts. 2, 3), 91 BFSP 970, (1901) UKTS No. 9 (Cd. 798), (1971) UKTS No. 6 (Cmnd. 4575). For the 1899 text, see < <http://www.yale.edu/lawweb/avalon/lawofwar/hague01.htm> >. For the revised 1907 text, see < <http://www.fletcher.tufts.edu/multi/texts/BH033.txt> >
2. Good Offices are a common feature of UN practice: UN Charter -GA recommendations under arts. 10, 14; SC recommendations under art. 36. There is increasing use of the Secretary-General in this context: *T.A. Franck, "The Good Offices Function of the UN Secretary General", in A. Roberts and B. Kingsbury (eds.), *United Nations, Divided World*, 2nd ed., (Oxford, Clarendon Press, 1993).
3. Provision is made for the offering of Good Offices in regional political structures: see, e.g., American Treaty on Pacific Settlement (Bogota Pact), 30 UNTS 55, arts. IX, X [cf., E. Turlington, "The Pact of Bogota", 42 AJIL 608 (1948)]; Inter-American Treaty on Good Offices and Mediation, 1936, 188 UNTS 75. See the United Nations Treaty Collection, on OXLIP or the text at < <http://www.yale.edu/lawweb/avalon/intdip/interam/intam09.htm> > .

MEDIATION

See:- , <http://www.internationaladr.com/int1.htm>
<http://www.pon.harvard.edu/main/home/index.php3> [the Project on Negotiation]

Reading:

*Darwin, *supra*.

*C. Bühring-Uhle, *Arbitration and mediation in international business: designing procedures for effective conflict management* (The Hague, 1996), especially Part Three V. C. Igbokwe, 'Socio-cultural dimensions of dispute settlement resolution: informal justice among the Ibo-speaking peoples of eastern Nigeria', 10 *African Jo. Int. & Comp. Law* 446-471 (1998)

Saadia Touval & I. William Zartman (Eds), *International Mediation in Theory and Practice*, (Boulder, 1985)

V. H. Umbrich, *Multilateral Mediation: practical experiences and lessons* (Dordrecht, 1989).

And see generally: J.G. Merrills, *International Dispute Settlement*, (1998), ch. 2.

4. In 'municipal' systems, mediation has a very long history. It is common to distinguish 'traditional', 'judicial', and 'modern' approaches to arbitration.
5. Mediators are more 'active' than providers of Good Offices. The purpose of mediation is the 'reconciliation of opposing claims and appeasing feelings of resentment': **Hague Convention for the Pacific Settlement of International Disputes, 1899 (arts. 2-8), 91 BFSP 970, (1901) UKTS No. 9 (Cd. 798), (1971) UKTS No. 6 (Cmnd. 4575) < <http://www.yale.edu/lawweb/avalon/lawofwar/hague01.htm> >.
6. Provision is made for mediation in various regional instruments> Americas: see, e.g., the American Treaty on Pacific Settlement (Bogota Pact), 30 UNTS 55, arts. IX, X, and at < <http://www.yale.edu/lawweb/avalon/intdip/interam/intam09.htm> >. Africa: African Union and sub-regional mechanisms (e.g., ECOWAS) -AU website < <http://www.africa-union.org/home/Welcome.htm> > not yet fully functional. Original provisions in the OAU Protocol of the Commission of Mediation, Conciliation and Arbitration, 1964, 3 ILM 1116 (1964) [see Maluwa, 38 ICLQ 299 (1989); and < <http://www.peace.ca/africaresponseconflict.htm> >. The Protocol was supplemented in 1993 by the OAU Mechanism for Conflict Prevention: see 6 *African Jo. Int. & Comp. Law* 158 (1994) -; cf., < <http://www.ipacademy.org/Publications/Reports/Africa/PublRepoAfriAssessPrint.htm> >. Europe: see the CSCE, report of the CSCE Meeting of Experts on Peaceful Settlement of Disputes, 1991, 30 ILM 382, 1353 (1991), and at < <http://www.osce.org/docs/english/1973-1990/psd/val191e.htm> >.
7. Mediation passes through distinct phases: consent; the 'diagnostic' phase; the attempt to find consensus; the post-mediation phase.
8. Mediation may take different forms: see, e.g., the 'semi-binding' "Michigan mediation" (Redfern & Hunter, *Law and Practice of International Commercial Arbitration*, 2nd ed., (London, 1991) 30-31 –not in 3rd edition)
9. For accounts of inter-State mediation see, e.g., *Digest of US Practice in International Law* 1979, pp. 1686-1724 (on mediation in Nicaragua/US and Egypt/Israel conflicts); Dixon & McCorquodale, *Cases & Materials on International Law*, (4th ed., 2003), p. 574; Touval & Zartman, and Umbrich in 'Reading'.

CONCILIATION

Reading:

** N. Bar-Yaacov, *The Handling of International Disputes by means of Inquiry*, (London, 1974), pp. 119-132, ch. 7.

* H. Fox, in David Davies Memorial Institute, *International Disputes: The Legal Aspects*, (London, 1972), pp. 93-100

T. Maluwa, "The Peaceful Settlement of African Disputes, 1963-1983: Some Conceptual Issues and Practical Trends", 38 ICLQ 299-320 (1989)

** J.G. Merrills, *International Dispute Settlement*, (1998), ch. 4.

F.M. Van Asbeck, "La tâche et l'action d'une Commission de Conciliation", 3 *Nederlands Tijdschrift voor International Recht* 1, 208 (1955)

10. Proposals for the adoption of a system of conciliation in the League of Nations Covenant were not successful, but in a resolution of 22 September 1922 the League Assembly recommended that States conclude conciliation agreements: *Records of the Third Assembly*: text of debates, p. 199.
11. Many bilateral conciliation agreements were concluded: see, e.g., Chile-Sweden Agreement, 26 March 1920: 4 LNTS 273; Germany-Switzerland Agreement, 3 December 1921: 12 LNTS 281. See the France-Switzerland Agreement, 6 April 1925 Bar-Yaacov, p. 125 - "The duty of the Permanent Conciliation Commission shall be to elucidate the questions in dispute, to collect with that object all useful information by inquiry or otherwise, and to endeavour to bring the Parties to an agreement. It may, after examining the case, intimate to the parties the terms of settlement which seem to it suitable, and lay down a time-limit within which they are to reach a conclusion." This was used as model for the **Locarno Treaties**, 1925. [Cf., the 1925 Locarno Pact: < http://www.yale.edu/lawweb/avalon/intdip/formulti/locarno_001.htm >].
12. This pattern was followed in the General Act for the Pacific Settlement of International Disputes, 1928: 93 LNTS 343; 1949 Revisions: 71 UNTS 102. See also American Treaty on Pacific Settlement (Bogota Pact), 30 UNTS 55, Cf., E. Turlington, "The Pact of Bogota", 42 AJIL 608 (1948); European Convention for the Peaceful Settlement of Disputes, 1957: 320 UNTS 244, and at < <http://conventions.coe.int/Treaty/EN/Treaties/Html/023.htm> >; Switzerland-UK Treaty of Conciliation, Judicial Settlement and Arbitration, 1965: 605 UNTS 206.
13. For examples of conciliation in practice see, e.g., the *Chaco* Commission (Bolivia/Paraguay, 1929): Bar-Yaacov, ch. 7; the Franco-Siamese Conciliation Commission (1947): Bar-Yaacov, ch. 7. For a prominent modern instance, see the **Jan Mayen** Conciliation Commission (Iceland/Norway, 1981): 20 ILM 797 (1981), 62 ILR 108; 21 ILM 1222 (1982).
14. Conciliation may be indicated as a dispute settlement mechanism in multilateral treaties. See, e.g.: Vienna Convention on the Law of Treaties, 1969, < <http://fletcher.tufts.edu/multi/texts/BH538.txt> >; Vienna Convention on the Succession of States in Respect of Treaties, 1978, < <http://www.un.org/law/ilc/texts/treasure.htm> >; Vienna Convention on the Protection of the Ozone Layer, 1985, < <http://www.unep.ch/ozone/vc-text.shtml> > .
15. Conciliation is not widely practised as a formal approach to dispute settlement; but the UN has sought to facilitate resort to conciliation for disputes other than purely legal disputes: UN Model Rules for the Conciliation of Disputes Between States, 1990, 30 ILM 229 (1991); adopted as UNGA Res 50/50 (1996) <

<http://www.un.org/documents/ga/res/50/a50r050.htm> .>. And the Permanent Court of Arbitration (see next handout) promotes conciliation: see the 1996 Optional Conciliation Rules in < <http://www.pca-cpa.org/conciliationenglish.htm> >.

FACT-FINDING AND COMMISSIONS OF INQUIRY

Reading:

** < [Axel Berg, *The 1991 Declaration on Fact-finding by the United Nations*](#) > and 4 *EJIL* 107 (1993)

N. Bar-Yaacov, *The Handling of International Disputes by means of Inquiry*, (London, 1974)

* H.G. Darwin, in David Davies Memorial Institute, *International Disputes: The Legal Aspects*, (London, 1972), pp. 159-177

** J.G. Merrills, *International Dispute Settlement*, (1998), ch. 3

16. Fact-finding commissions were a major element in the Hague Convention for the Pacific Settlement of International Disputes, 1899 (arts. 9-14), 91 BFSP 970, (1901) UKTS No. 9 (Cd. 798) < <http://www.yale.edu/lawweb/avalon/lawofwar/hague01.htm> >

17. For a classic instance of the use of fact-finding commissions, see the **Dogger Bank Incident* (1905). [Anglo-Russian Declaration of St Petersburg, 25 November 1904, 97 BFSP 77; Finding of Commission, J.B. Scott, *Hague Court Reports*, p. 404, and 2 AJIL 929 (1907), and Cd. 2352; see further Bar-Yaacov, *supra*, ch. 3.]

18. The 1907 Hague Convention expanded the provisions of the 1899 text on fact-finding missions: Hague Convention for the Pacific Settlement of International Disputes, 1907 Revision, (arts. 9-36) , (1971) UKTS No. 6 (Cmnd. 4575). See Bar-Yaacov, *supra*, chs 2, 4 < <http://www.yale.edu/lawweb/avalon/lawofwar/pacific.htm> >.

19. For an instance of the use of the 1907 procedures, see the *Tavignano* incident (France/Italy, 1912): J.B. Scott, *Hague Court Reports*, pp. 413, 616; 16 AJIL (Documents) 484 (1922).

20. Provision for fact-finding commissions was made in the Taft (Knox) Treaties in 1911 - (Joint High Commission of Inquiry as alternative to arbitration), and in the Bryan Treaties, 1913-1940. In the case of *Letelier and Moffitt* (1989), the US invoked the US-Chile Treaty, 1914 [83 AJIL 352 (1989); 31 ILM 1 (1993)] to investigate and report on the facts, and then to fix compensation. See also the provisions in. e.g., the ABC Treaty, 1915 (Argentina, Brazil, Chile), 22 RGDIP 475 (1915), and the Gondra Treaty, 1923, IV *Treaties, conventions international acts...between the United States of America and other powers* 4691.

21. *Ad hoc* arrangements for fact-finding have been more often utilised: see, e.g., the *Red Crusader* Inquiry, (UK/Denmark, 1962), (1961) UKTS No. 118 (Cmnd. 1575); 35 ILR 485; Bar-Yaacov, *supra*, pp. 179-197.

22. The UN has sought to encourage fact-finding. In 1949, GA Res. 268(III), established a Panel for Inquiry and Conciliation; and in GA Res. 46/59 (1992), the Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security [31 ILM 236 (1992), < <http://www.un.org/documents/ga/res/46/a46r059.htm> >], encouraged UN organs to engage in fact-finding missions, with consent of the States concerned: < <http://www.un.org/documents/ga/res/46/a46r059.htm> >. See, too, the PCA Optional Rules for Fact-finding Commissions of Inquiry (1997), < <http://www.pca-cpa.org/inquiryenglish.htm> >.
23. For a recent example, see the Mitchell Committee in the Middle East < <http://www.al-bab.com/arab/docs/pal/mitchell1.htm> >
24. For a failure to use available fact-finding procedures, see L. Condorelli, 'The International Humanitarian Fact-Finding Commission: an obsolete tool or a useful measure to implement international humanitarian law?', *International Review of the Red Cross* No. 842, p. 393-40 (2001). (And see < www.icrc.org/ > for the ICRC text on fact-finding.)

Questions for consideration:-

- 1) What kinds of disputes are best suited to settlement by non-judicial means? What are their common characteristics?
- 2) In what circumstances may the chances of settlement be improved by the involvement of third parties, or by the institutionalisation of the settlement process?
- 3) What is the role of law in non-judicial settlement? How is the community interest safeguarded? Does the stipulation of non-judicial means mark a retreat from attempts to adjust disputes under the Rule of Law? Should we be encouraging or discouraging non-judicial means?
- 4) What procedural safeguards, and what sanctions, are appropriate to underpin obligations to have recourse to non-judicial means of dispute settlement?