International Law

Discussion Questions

Gleider Hernández, *International Law* (Oxford University Press, 2019)

Chapter 12, International Dispute Settlement and the ICJ

Question 1. '*The UN Charter clearly indicates that international disputes are, in the interests of peace, best settled by binding third party settlement*'. *Is this accurate?*

It is true that the Statute of the ICJ is annexed to the UN Charter; however, students would first begin by noting that Article 33(1) of the Charter lists a number of mechanisms for dispute settlement, many of which lead to non-binding outcomes.

Students would then, ideally, be able to compare and contrast the various diplomatic modes of dispute settlement and what sorts of outcome they yield:

Negotiation: A meaningful attempt by one of the disputing parties to engage in discussions with the other in respect of a dispute (*Application of CERD* and *North Sea Continental Shelf*). The outcome of negotiations can be a political or negotiated settlement, and negotiation can proceed in parallel to other forms of dispute settlement.

Mediation and good offices. Discussions between disputing parties that are facilitated by an impartial third party observer, whose task is to facilitate discussion and arrive at a settlement (first defined in 1899 Hague Convention). 'Good offices' are somewhat more passive, facilitating communications; mediators can sometimes take a more active role and encourage common ground or proposed solutions. Neither would yield a settlement that is binding on the parties: see e.g. US mediation between UK and Argentina in the Falklands crisis.

Inquiry. An attempt by a third party to establish a factual record that will be used by disputing parties in subsequent negotiations. Commissions of inquiry are also proposed in the 1899 Hague Convention. Such determinations of fact *might* be binding if agreed in advance, but the outcome is not predetermined and may take the form of any of the other modes of international dispute settlement. See e.g. UNCC in relation to Iraq or the IICI proposed for Syria.

Conciliation. A third party will investigate a dispute and listen to the parties; it will begin to resemble an arbitral or adjudicative proceeding, except for one important point: the final proposal of a conciliator is non-binding and the parties can do what they wish. A highlighted conciliation in the book is that concerning Jan Mayen Island between Iceland and Norway, which served as the basis for a negotiated treaty.

The best answers will consider the criteria for each method and which overriding principles might apply; and what obligations or duties have been recognised in relation to each mode of dispute settlement. The key point would be to understand and appreciate the differences between each mode of dispute settlement.

Question 2. *'After the ICJ came into existence, the Permanent Court of Arbitration became obsolete; it should be abolished.' Give a reasoned response to this statement.*

The response an individual student will offer will depend on their views on arbitration and adjudication generally, and on their knowledge of the PCA. First, students could consider the purpose of establishing the PCA in 1907 and looking at the 1907 Hague Convention. Though the PCA is 'permanent', it is not a standing court but instead a roster of arbitrators that are on 'offer' to States. They may choose the arbitrators and shape the procedure of the tribunal, and ultimately, the jurisdiction of PCA tribunals depends on the consent of the parties.

In this respect, arbitration was seen as less judicial and it is true that the ICJ has enjoyed more visibility and respect because of fixed rules of procedure, a long legacy of continuous judgments dating from the time of the PCIJ. Students arguing in favour of abolition (or in favour of adjudication) might wish to point out how

consistent procedures can yield a more consistent development of the law; the fact that PCIJ/ICJ judgments are always published and consistently apply the same international legal rules; and perhaps how the fixed composition of judges represent a diversity of States and all major regions of the world.

Students who take a decision in favour of arbitration might wish to point out, however, that it is this control over procedure that has proved attractive to States. Though consent to arbitration by States remains required, arbitral awards are of the same binding force as judicial decisions. In fact the control over the procedure, applicable law and selection of judges might influence certain States in favour of arbitration. Moreover, arbitral tribunals can hear disputes between States and non-State actors such as investors or international organisations, whereas the ICJ is limited to States only.

Finally, the most complete answers in this respect might wish to point out the upsurge in arbitral activity over the last years, especially in relation to highly sensitive political disputes (e.g. the Ethiopia-Eritrea Boundary Commission) in addition to more routine matters (e.g. *Iron Rhine*).

Question 3. *'The "Optional Clause" is no more than window-dressing, as States can essentially exclude any dispute from the jurisdiction of the Court with the appropriate reservations.' Do you agree?*

Students are invited in this exam question to demonstrate both their understanding of the 'Optional Clause' system as well as its possible limitations. Recall first that the Optional Clause was an 'opt in' system: not all parties to the ICJ Statute accept the compulsory jurisdiction of the Court. States then make an optional declaration under Article 36(2) (called the Optional Clause) through which they accept the jurisdiction of the Court as compulsory in relation to disputes. Optional Clause declarations are unilateral acts, but are subject to the principle of *reciprocity* insofar as disputes can only be heard by the Court when all disputing States have expressed their consent in relation to that category of dispute (*Norwegian Loans*). States can exclude disputes on a wide range of issues; for example, with certain categories of States (e.g. the 'Commonwealth reservation' or the NATO

reservation), or in respect of certain sensitive subjects (e.g. the exclusion of disputes over maritime boundaries or nuclear disarmament).

Two controversial types of reservations have been challenged as being highly problematic; both had been filed originally by the United States senators (hence their names). The 'Connally amendment' excludes all matters falling within domestic jurisdiction 'as understood by' the reserving State—a 'self-judging character' that has been challenged (see e.g. Lauterpacht in *Norwegian Loans*). The 'Vandenberg amendment' purported to exclude matters arising under the use of force provisions in the UN Charter, and though it was upheld in *Nicaragua (Merits)*, the Court concluded that those same provisions were a codification of customary international law, and the Court could therefore hear the case.