THE CREATION OF THE PERMANENT COURT OF ARBITRATION: DOCTRINAL DEBATES ABOUT ITS ORIGINS

Lucas Carlos Lima [1]

ABSTRACT

Created in 1899 by the Hague Peace Convention, the Permanent Court of Arbitration is an international judicial organ whose creation takes place in a field of tension between discourses that involved the international arbitration at the time and also those which assured the need for the creation of a permanent court. Established in a background of discourses that glorified international arbitration, the Court became a target of fierce criticizing concerning its structure and inability to develop the International Law through its awards. The purpose of the present work is to historically revisit the debates on the Permanent Court of Arbitration not only for a better comprehension of the moment and the jurisdictional organ itself (which, at the present day, has suffered a severe process of modernization and adaptation to the international scene), but also to know critically the juridical discourses that involve the dynamics of the international arbitration.

The year is 1898 and the European nations are in extreme and burdensome reciprocal militarization[2]. The peace of the Concert of Europe is under threat[3] but the international relations are still peaceful, even though a number of small preoccupations disturb the continent[4]. Along with the uncertainties of the end of the century, more recurrent attempts to avoid a significant armed conflict take place amongst the European powers. The culture of international arbitration, although in prominent position, does not seem to be an imposing reality so as to make States ignore the bellicose resolution of conflicts. The possibility of new wars is still patent, as well as the recourse to war is a part of international *praxis*. Furthermore, the world had just watched the end of the Spanish-American war in 1898, which showed that an enduring international peace was not within near reach.

In this context, on the 24th of August 1898, the Russian minister of foreign affairs Boris Mouraviev, under the command of Tsar Nicholas II, issued an imperial declaration to all the diplomatic representatives accredited in Saint Petersburg. In this statement, he considers to be an objective:

[1] Doctor y docente en derecho tributario de la Universidad Nacional Mayor de San Marcos.
[2] Cf. LANGE. Christian L. *Histoire de l'Internationalisme*. Vol. I. New York: G.P. Putnams Sons, 1919. Also MORRIS, Robert C. *International Arbitration and Procedure*. New Haven: Yale University Press, 1911.
[3] WATSON, 2004, p. 350.
[4] DUROSELLE, 1976, p. 49

To put an end to these incessant armaments and to seek the means of warding off the calamities which are threatening the whole world such is the supreme duty which is today imposed on all States. Filled with this idea, His Majesty has been pleased to order me to propose to all the Governments whose representatives are accredited to the Imperial Court, the meeting of a conference which would have to occupy itself with this grave problem[5].

For a long period of time Tsar Nicholas II was considered to be one of the great "friends of peace"[6] due to the proposition of this Conference, to which the discourse of elimination of armaments in Europe based on a pacifist scenery served as an engine. It was even argued that "[t]he recent proposals of the Tsar of Russia, and the conference at the Hague to which they led, have naturally directed attention to the possibility of an age of peace"[7].

In the same sense goes the unconvinced analysis of the historian Eric Hobsbawm when he considers that the Hague Peace Conventions were "international meetings by mostly sceptical representatives of governments, and the first of many gatherings since in which governments have declared their unwavering but theoretical commitment to the ideal of peace"[8]. His approach indicates a central element which is the main aspect of the Conventions delegates: there were important men sent by their States, but chancellery men, habituated to the vicissitudes of an international policy of European balance (and unbalance). Those men were curious, but at the same time they were skeptical to the peace and disarmament proposed by the Tsar.

However, regardless of the intellectual and emotional motives of the Tsar, the fact is that for Russia (as well as for other powerful States) bellicose recrudescence was accompanied by heavy economic burden, not to mention the very dynamic of the balance of power defended by the realists, who comprehended that the Hague Peace Conferences were summoned due to the desire of the Tsar to reduce the armory of his neighbors, who were becoming more powerful than his own nation, a desire that was dissembled by the idealistic argument of the pursuit of Peace[9].

In any case, it is interesting to note that the primary objective of the Convention was the pursuit for the diminishment or regulation of military armaments, instead of a pursuit of regulation of peace through international arbitration. In reality, at no point the diplomatic messages sent by the Tsar mentioned the subject of international arbitration.

Retaking the factual track, despite the apparent skepticism of Continental Europe[10] the European nations took the invitation to the congregation that was to take place on the 18th May, 1899[11] in the Hague, city chosen for being historically important

[5] In: SCOTT, James Brown. *The Hague Peace Conferences of 1899 and 1907*. Vol. 2 - Documents. Baltimore: The Johns Hopkins Press, 1909.
[6] RICHET, 1899, p.107
[7] SMITH, 1903, p.12.
[8] HOBSBAWM, Erick. *The Age of Empire: 1875-1914*. Nova Iorque: First Vintage Books, 1989, p.302.
[9] In the same sense, see LANGE (1919, p.429).
[10] FOSTER, 1904, p.19.
[11] This was the birthday of Tsar Nicholas II. It was a tribute of the Conference to its idealizer (SCOTT, 1909, p.47)

in the development of International Law, and also due to its role as a place of discussion among the European powers[12]. Therefore, on the due date, twenty six[13] delegations were gathered at the Oranje Zaal (Orange Hall) of the House in the Woods (Huis ten Bosch), the summer palace of the Dutch royal family, situated nearly a mile from the centre of the Hague.

An important consideration on the nature of this Convention must be made: this large reunion of States representatives differs from other preceding conventions of the same period. That is because, unlike the earlier gatherings, it did not seek to resolve conflicts and bring actual peace to the belligerents parties, but, instead, it sought to cease any consequence of the lack of peace through disarmament and pacific settlement of disputes. In the words of Frederick Holls, the Conference "was the first diplomatic gathering called to discuss guarantees of peace without reference to any particular war, past, present, or prospective"[14].

There it can be noticed the patent idealism[15] imbued to the Conventions. Due to the fact that it was a phenomenon unforeseen in the international community, it was argued that the Peace Conventions were "*législatures rudimentaires*"[16]. The delegates were astounded by the great importance of the event, "the first great Parliament of Man"[17]. It was a conference that, unlike its predecessors, did not seek to dispute the best manner to put an end to a war or divide the European powers, but instead it made a conjoint effort to create international rules *towards* peace (or ways for diminishing conflicts).

The works within the Conference were designated under three commissions: one was in charge of armaments (and their reduction), the second should study different subjects related to mitigating the horror of the war and the third one was entrusted with pacific settlement of disputes. Although the results were not precisely those intended by the Tsar in relation to disarmament of the States[18], three Conventions[19] and three Declarations[20] were signed by the participant powers. On the 29th of July the Convention for the Pacific Settlement of International Disputes was signed.

This convention is considered by many the most important one[21], and in its preamble it states that the works should be carried out "[h]aving regard to the advantages

[12] Cf. FOSTER, 1904, p.17.
[13]The signatories of the Hague Peace Convention of 1899 were: Germany, Austria, Belgium, China, Denmark, Spain, United States, United Mexican States, France, Great Britain, Hellenic Republic, Italy, Japan, Luxembourg, The Netherlands, Persia, Portugal, Romany, Russia, Serbia, Zion, Sweden and Norway, Switzerland, the Ottoman Empire, Bulgaria.
[14] HOLLS, 1900, p.55.
[15] HOLLS, 1900, p.56. In the words of Robert Morris, *"the Hague Conference itself is virtually an international legislature"* (MORRIS, 1911, p.133). Frederick Holls also states that this is the "Magna Charta of international law" (HOLLS, 1900, p.57)
[16] LAWRENCE, 1920, p.48.
[17] FOSTER, 1904, p.22.
[18] "*The first Hague Conference, so far as the purpose for which it was originally called was concerned, had been a lamentable failure*" (MORRIS, 1911, p.129).
[19] The three conventions are: I - Pacific Settlement of International Disputes; II - Laws and Customs of War on Land; III - Adaptation to Maritime Warfare of Principles of Geneva Convention of 1864.
[20] The three declarations are: I - To prohibit the launching of projectiles and explosives from balloons or by other similar new methods; II - To prohibit the use of projectiles the only object of which is the diffusion of asphyxiating or deleterious gases; III - To prohibit the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope, of which the envelope does not entirely cover the core, or is pierced with incisions.
[21] FOSTER, 1904, p. 39.

attending the general and regular organization of the procedure of arbitration"[22]. This document considered general matters related to the peace maintenance, but also dealt with good offices, mediation and international commissions of inquiry. Moreover, its articles 15 and following lay out dispositions on international arbitration, and article 16 considers this procedure with particular prominence:

In questions of a legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognized by the Signatory Powers as the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle.

This article, however, does not create a binding obligation to the contracting parties. On the contrary, it is a proposition for mere orientation. Although part of the internationalists of the time already defended[23] (and yearned for) a true *binding* arbitration, the contracting States of the convention did not converge in this topic.

In this regard it can be noticed a small divergence between theory and praxis. Although part of the theorizers and internationalists wanted the concretion of a system of mandatory arbitration between States and imagined the Hague Conventions could consolidate this idea, still they forgot that the nations were being represented above all by defenders of the State, instead of actual internationalists[24]. The Convention was being organized by members of the high diplomacy of each State, men who were worried about the sovereignty and the power of their own country, rather than about the accomplishment of a system of international law.

Another interesting point that can be taken from the abovementioned article is that the Convention establishes two sorts of disputes to which arbitration can apply as a method of settlement: matters of strict juridical character and matters related to international treaty interpretations. Here one can observe how a doctrinal construction (already at use during the 19th century, the idea of "vital questions" that cannot be submitted to arbitration) turned into positive Law. There is, therefore, a restriction on the use of arbitration, which was necessary and in which it can be found the root of the forthcoming debate regarding the juridical and political controversies within the international jurisdictions[25].

Considering the arguments exposed, it can be argued that although having given great prominence to international arbitration, the Convention of 1899 also marked out the limitations of such institute. Unlike the rosy views that consider the Conventions the great apotheosis of arbitration, the way in which it was developed does not correspond to the desired attempt to a binding arbitration.

This is due to the fact that the Convention did not establish a compulsory order, but instead indicated a suggestion of methodology for a pacific settlement of disputes.

[22] Available on <www.pca-cpa.org/showfile.asp?fil_id=193>. Accessed em 17/09/2014.
[23] Cf. BARCLAY, 1917, p. 52
[24] In this sense, Foster remembers that: *"*They were neither dreamers nor theorists, but men of eminently practical experience in government, diplomacy, and war. The respective nations sent as their representatives their first diplomatists, most erudite jurists, prominent men of affairs, and skillful soldiers*"* (FOSTER, 1904, 21)
[25] About thistopic, see MORELLI, Gaetano. *Considerazioni sulla soluzione giudiziaria delle controversie internazionali*. Comunicazioni e Studi, Volume Secondo, pp. 109-127. Milano: Giufrrè, 1946.

It did not place international arbitration as a first option, but as one of the possible tools to which the States could resort. Still,

[t]he sentiment, however, in favor of compulsory arbitration was so strong that an article was inserted in the convention reserving the right to any of the signatory powers to conclude general or special agreements, extending the obligation to submit controversies to arbitration in all cases which they consider suitable for such submission[26]

This strong sentiment for binding arbitration is inserted in article 19, which reflects quite clearly this tension within the Convention. It translates an apprehension on the yearnings of the time: on the one hand those of a group of internationalists and pacifists who believed that arbitration truly was the way to peace, and on the other hand those linked to the representatives of the power States. Indeed, the manner with which arbitration was inserted in the Convention is controversial; nevertheless, it cannot be denied that if it had not been so, a consensus would not have been reached between the present States.

Yet the efforts of the Convention must not be overlooked, particularly considering that not only did it grant arbitration a place of prominence in the international scenario, sacralizing in major international treaties the experiences of the former century, but it also created an actual Permanent Court of Arbitration under its article 20:

With the object of facilitating an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy, the Signatory Powers undertake to organize a Permanent Court of Arbitration, accessible at all times and operating, unless otherwise stipulated by the parties, in accordance with the Rules of Procedure inserted in the present Convention.

This court was structured with a Secretariat[27] and an Administrative Council[28], and each Signatory Power should send the Court a list of four names to compose the list of arbitrators[29]. Such arbitrators, of "known competency of international law" and "highest moral reputation"[30] would be appointed for a term of six years, and the final list would be available for the States to form arbitral tribunals at any time, according to a series of proceeding dispositions also compiled by the Convention.

On this topic it must be pointed out that the procedural rules related to arbitration in the Convention is contained in article 30 through article 58, and thus they represent the major part of the referred document[31]. Far from being a truly innovative work, this compilation of arbitral procedural rules are the sharp choice of a set of laws chosen beforehand. Such set of rules did not consist only of existing rules and conventions

[26] FOSTER, 1904, p.44.
[27] The International Bureau has its seat at the Peace Palace, The Hague. It is a communication channel for the creation of tribunals, as well as it serves as a documents archive.
[28] The Administrative Counsel is formed by the Foreign Minister of Netherlands and diplomats of some State members.
[29] As it is set by article 23 of the Convention
[30] In the words of article 23 of the 1899's Convention: "each Signatory Power shall select four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of Arbitrators".
[31] In this sense, it should be noted that "the work in international law at these conferences concerned the normalization of the procedure of international law. The most important of the Hague Conventions deals with the peaceful settlement of international disputes". (NIPPOLD, 1923, p.14)

between states, but also of a selection of procedural rules regarding arbitration, as well as part of the doctrinal understanding on international arbitration.

This is also one of the great merits of the Convention, that is the selection and organization of scattered arbitral procedures that had no uniform use. With the composition of an arbitral tribunal for the settlement of a dispute between States, some time was usually lost in choosing the proceedings to be applied by that arrangement. Therefore, article 30 of the Convention introduces: "[w]ith a view to encourage the development of arbitration, the Signatory Powers have agreed on the following Rules which shall be applicable to arbitral procedure, unless other Rules have been agreed on by the parties".

The merits of the Court created by the Convention were an object of severe criticism. Far from being a true Court of International Arbitration, it was instead a list of arbitrators. Lassa Oppenheim calls "euphemism"[32] the name given to the Court, and the French internationalist Georges Scelle considers it a "pseudo-Court"[33] due to the fact that it holds only a few elements of a permanent character (such as its Secretary). Verzijl[34] indicates that its own name is an indication that the Signing Powers were still reluctant in subscribing to the idea of a genuine court of justice aimed at settling disputes between States, hence its "hybrid designation". Nicolas Politis, slightly more sour, considers that "deprived of any character of obligation of permanence, the Court is no more than a simple phantom jurisdiction"[35].

It was inaugurated in 1901, in an unpretentious private hotel. It remained there for twelve years, until it moves to the Peace Palace, built by Andrew Carnegie on a land ceded by the Netherlands[36].

Moreover, stimulated by the spirits in favor of international arbitration after the establishment of the Convention many nations started to sign new treaties of arbitration entailing jurisdiction over disputes to the Permanent Court of Arbitration[37]. In October, 1903 Great Britain and France established a treaty with a term of five years, stating that all the disputes that should arise in that period should be sent to the Court[38]. Similarly, in 1902, a treaty of binding arbitration linked to the jurisdiction of the Court had been firmed between Mexico and Spain, stating also that "national independence and honor" should be excluded of the appraisal of the Court[39].

In relation to this choice of words ("national independence and honor"), it is affirmed that they are "so vague and elastic that it is difficult to see what cases the Court might not be made to cover"[40]. Once again it can be noticed that even the praxis of the States also limits the already strict arbitral system erected by the Conventions. The inclusion of such vague terms is meant to allay the signing parties by setting the

[32] OPPENHEIM, 1921, p.42.
[33] SCELLE, 1919, p.75.
[34] VERZIJL, 1976, p. 344.
[35] POLITIS, 1927, p. 102.
[36] POLITIS, 1927, P.103.
[37] According to Morris (1911, p.130) 33 arbitral treaties were concluded after the Convention's creation.
[38] FOSTER, 1904, p.45.
[39] FOSTER, 1904, p.54.
[40] BARCLAY, 1917, p.61.

possibility of dismissing the arbitral obligatoriness that these treaties would represent otherwise.

This is also the criticism made by Anzilotti, when he affirms that some rules that enforce procedural rules are certainly inaccurate, because as they "depend on the will of the States to resort to arbitration or to be bound to this recourse, this means it is always their will that adopts or makes juridical the rules proposed by this conference"[41].

The debate related to such enforceability was also unfruitful as to determine a binding way to execute it. According to Foster[42], a sense of equity and the force of public opinion should be enough to assure the observance of the awards. This way, in relation to this matter, Article 31 establishes that

[t]he Powers who have recourse to arbitration sign a special Act ('Compromis'), in which the subject of the difference is clearly defined, as well as the extent of the Arbitrators' powers. This Act implies the undertaking of the parties to submit loyally to the Award.

The problem of the enforceability of international decisions also dates back to this period, and even at this point the absence of a solution is notorious. Instead, it is created a system that relegates the validity of arbitral decisions to ethereal concepts as "sense of equity" and "force of the public opinion". Believing that peace can be kept by a solution that bases the subordination to the arbitral award upon mere "good faith" is a mistake. However, it is very difficult to think about a different solution for that context. It was quite hard to create a compulsory system of enforceability of decisions, especially if one considers the possibility of acceptance by the States.

However, the issue of the absence of enforceability of the decisions reopens the discussion regarding the real dimensions of the institute and the view according to which a tidy analysis of the phenomenon in the beginning of the century can be carried out.

With the Hague Conventions of 1907 (which will be analyzed with more detail later on), the Permanent Court of Arbitration continues to exist in the international community, but its practice is severely criticized by the internationalists of the time, who longed for an arbitration organization truly permanent.

Nevertheless, its importance in the international law field cannot be denied. Between 1900 and 1920 the PCA was the largest arbitral organization. According to Ian Brownlie, it was not an actual court, but still it was machinery for the composition of arbitral tribunals[43]. And his words well represent the reality of that Court:it was indeed machinery that served the arbitral system of the time, an easy mechanism of access to the composition of arbitrations. It is a structure directly connected to the arbitral system experienced at the 19th century, but still not *the* arbitral system truly permanent desired

[41] ANZILOTTI, 1915, p,53. From the original*: "come dipende dalla volontà degli Stati di ricorrere all'arbirtrato o di obbligarsi a ricorrervi, così è sempre la loro volontà che adotta e rende giuridiche le norme proposte dalla conferenza"* In the same sense: "*Elles* [the conventions] *représentaient la réglementation d'une liberte qui demeurait intacte et dont l'usage NE dépendait que du bom vouloir dês États interesses"* (POLITIS, 1924, p.142)
[42] FOSTER, 1904, p. 57.
[43] BROWNLIE, 1998, p.705.

by the internationalists[44]. It was even said that the Hague Convention was a mountain that gave birth to a rat ("*la montagne qui accouche d'une souris*")[45]. Extremely critical, in his work *Justice Internationale*, Politis stings the Court with acidity and reality, stating that the excessive number of possible arbitrators diminishes the authority of the institution and makes it even harder to establish a juridical tradition or the formation of a jurisprudence[46].

The decisions were very significant to consolidate the arbitral tribunal as a method of pacific settlement of disputes; however, they did not make much contribution to the development of international law[47]. This is one of disappointing results of the Permanent Court of Arbitration. It was expected that the existence of this tribunal would turn the arbitral awards into true jurisprudence in the process of legalism and formation of international law, which was not held true. According to Oppenhein[48], an arbitral tribunal is not a court in the true sense of the word, for its decisions are not necessarily based on rules of law nor develop law because there is a strong element of *ex aequo et bono*, that is, of equity.

In other words, there is no compulsory use of international law so as to make it an actual system, nor does it cope with international law. There is a strict analysis of the concrete case, and many times it serves merely to rearrange interests in a pacific way based on the principle of equity. It must not be forgotten, at the same time, the criticism made in the former period of the absence of a continuous[49] body of case law .

Furthermore, Politis[50] also considers that the Permanent Court of Arbitration is little accessible, and recollects that it is not responsible for most of the arbitration procedures of the period. From 1902 to 1934 only 21 cases were submitted to the Court. According to Verzijl[51] , from 1902 to 1914 there were 70 registered cases of arbitration.

This lack of access, also in the view of the French jurist, is due to the fact that trust in the Court is limited. And that is so because the members are not actual judges. They are not known. They do not hold the reliance that is indispensible to the exercise of the judicial function[52]. The tribunals formed for their performance are extensions of chancelleries, not a real jurisdictional court.

Furthermore, another critique that joins the aforementioned criticism is the onerousness of the Court when compared to the dissatisfaction with its performance. There are general expenses with the maintenance of the Secretary and the Council, shared among all the participating States, as well as private expenses specific to each procedure[53].

The criticism made by the internationalists at the time (particularly regarding the fact that the Court was not a truly permanent organ) was clear to the States in the

[44] Cf. POLITIS, 1924, p.102:
[45] POLITIS, 1924, p.103.
[46] POLITIS, 1924, p. 104.
[47] WEHBERG, 1918, p.39.
[48] OPPENHEIN, 1921, p.46.
[49] "The awards of the tribunal lack the continuity and consistency which would constitute them a body of cumulating jurisprudence. "(HUDSON, 1943, p.34)
[50] POLITIS, 1924, p.127.
[51] VERZIJL, 1976, p. 382.
[52] POLITIS, 1924, p.128.
[53] POLITIS, 1924. p.105.

immediately following moment. However, the historical perception of this event demonstrates that the debate that circumscribes an international jurisdiction at that time already considered a few questions that still today remain problematic, especially when those related to the arbitral aspect that the international jurisdiction still holds.

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