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# Convention for the Peaceful Adjustment of International Differences

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## CONVENTION FOR THE PEACEFUL ADJUSTMENT OF INTERNATIONAL DIFFERENCES <sup>1</sup>

The First Hague Conference had as its main object a consideration of a "possible reduction of the excessive armaments which weigh upon all nations," or, at least, a discussion of the possibility of "putting an end to the progressive development of the present armaments."<sup>2</sup> The conference early realized that even a limitation of the increase of military and naval expenditure was impracticable at that time, and devoted its chief energies to the secondary purpose for which it was called, viz., to discuss and devise "the most effectual means of insuring to all peoples the benefits of a real and durable peace."<sup>3</sup>

Among the specific proposals contained in Count Muravieff's circular letter of January 11, 1899, was one "to accept in principle the employment of good offices, of mediation and facultative arbitration in cases lending themselves thereto, with the object of preventing armed conflicts between nations; to come to an understanding with respect to the mode of applying these good offices, and to establish a uniform practice in using them."<sup>4</sup>

The result of the deliberations of the third committee — the most important commission of the conference — was the Treaty of Arbitration, or convention for the peaceful adjustment of international differences, of 1899, consisting of sixty-one articles. Of these, seven articles related to the use of good offices and mediation, six were concerned with international commissions of inquiry, and fifty-two were devoted to international arbitration proper. "In questions

<sup>1</sup> Professor Hershey was present at the Second Hague Conference as correspondent of the *New York Evening Post* and the *Boston Evening Transcript*. — MANAGING EDITOR.

<sup>2</sup> The Czar's Rescript of August 24, 1898.

<sup>3</sup> *Ibid.*

<sup>4</sup> Holls, Peace Conference, p. 8.

of a judicial character, and especially in questions regarding the interpretation of international treaties or conventions," arbitration was recognized as "the most efficacious and at the same time the most equitable method of deciding controversies which have not been settled by diplomatic methods."<sup>5</sup>

By far the most important of these provisions were those which established the Hague Tribunal, or Permanent Court of Arbitration, and regulated its procedure. But it was a court permanent in name only and a panel or list of judges rather than a court. Its procedure and mode of organization were very defective, and its importance lay rather in what it held out by way of promise for the future than of actual achievement. But it was nevertheless a great step in advance; for it provided governments with a list of judges and a procedure ready at hand for the settlement of such differences as they might choose to submit to arbitration, thus rendering it "unnecessary for them to enter into long and tedious negotiations respecting the selection of arbitrators or the settlement of the mode of procedure upon the occasion of each and every controversy."<sup>6</sup>

Although very few cases have thus far been submitted to the Hague Tribunal, its creation has greatly stimulated the negotiation of treaties of arbitration between nations with agreements to submit some or all disputes to its jurisdiction. And perhaps this has been the greatest single result of the First Hague Conference.

But arbitration is not the sole or even chief mode of settling international differences. Diplomacy is ever at work healing wounds, arranging compromises, adjusting claims, and preventing friction. And recent experience during the Russo-Japanese war has shown that there are also great possibilities in mediation and international commissions of inquiry.

The signatory powers in 1899 declared in favor of good offices or mediation, as far as circumstances permit, both before and during hostilities, and defined the duties and functions of the mediator. They also recommended the application, when circumstances allow, of special mediation in the following form:

<sup>5</sup> Article 16 of the Arbitration Treaty of 1899.

<sup>6</sup> See an article by the writer in the *New York Independent* for September 13, 1906.

In case of a serious difference endangering the peace, the states at variance shall each choose a power to whom they intrust the mission of entering into direct communication with the power chosen by the other side, with the object of preventing the rupture of pacific relations.

During the period of this mandate, the term of which, unless otherwise stipulated, can not exceed thirty days, the states in conflict shall cease from all direct communication on the subject of the dispute, which shall be regarded as having been referred exclusively to the mediating powers, who shall use their best efforts to settle the controversy.

In case of a definite rupture of pacific relations, these powers remain charged with the joint duty of taking advantage of every opportunity to restore peace.<sup>7</sup>

It is a matter of regret that this form of special mediation, which is based upon the use of seconds in duelling, was not tried upon the outbreak either of the South African struggle or the Russo-Japanese war; but there can be no doubt that it was in pursuance of the recommendations contained in article 3 that President Roosevelt induced negotiations which resulted in the Treaty of Portsmouth<sup>8</sup> in 1905. This article read:

Independently of this recourse [*i. e.*, recourse to the good offices or mediation of one or more friendly powers to avert hostilities],<sup>9</sup> the signatory powers consider it to be useful that one or more powers who are strangers to the dispute should, on their own initiative, and as far as circumstances will allow, offer their good offices or mediation to the states at variance.

The right to offer good offices or mediation belongs to powers who are strangers to the dispute, even during the course of hostilities.

The exercise of this right shall never be regarded by one or the other of the parties to the contest as an unfriendly act.

If the convention of 1899 for the peaceful adjustment of international differences thus furnished our President with the means of initiating negotiations which terminated one of the greatest wars of modern history, another great war was narrowly averted by means of an institution suggested by this same convention.

Article 9 of the Treaty of Arbitration provides:

<sup>7</sup> Article 8 of the Arbitration Treaty. This article was drafted by Mr. Holls, secretary of the American delegation.

<sup>8</sup> Hershey, *The International Law and Diplomacy of the Russo-Japanese War*, pp. 347-348.

<sup>9</sup> See Article 2 of the Arbitration Treaty of 1899.

In differences of an international nature involving neither honor nor vital interests, and arising from a difference of opinion on matters of fact, the signatory powers consider it useful that parties who have not been able to come to an agreement by diplomatic methods should, as far as circumstances allow, institute an International Commission of Inquiry to facilitate a solution of these difference by elucidating facts, by means of an impartial and conscientious investigation.

Article 14 declared, however, that "the report of the International Commission of Inquiry shall be limited to a statement of the facts, and shall in no way have the character of an arbitral award."

When public anger and excitement in England had been inflamed to the fighting point as the result of what appeared to be a wanton and deliberate attack by the Russian Baltic fleet upon innocent fishermen at Dogger Bank in October, 1904, both the Russian and British Governments, in spite of the fact that a question of honor seemed involved, proposed an international commission of inquiry analagous to that recommended by this convention. It is true that the North Sea Commission, which conducted the North Sea inquiry in conformity with this agreement, was given a scope more extended than that originally contemplated, and this combined the functions of a commission of inquiry and a court of arbitration;<sup>10</sup> nevertheless the credit for suggesting the application of this idea on a large scale belongs to the First Hague Conference.

Although the excellence of the work of the *Comité d'Examen* of the third committee of the Hague Conference of 1899 (which framed the Arbitration Treaty, or convention for the peaceful adjustment of international differences) was generally admitted, additions were freely suggested, and it was felt in some quarters that it needed radical correction and revision. The organization and procedure of the Hague Tribunal was generally held to be defective, and many believed that a new permanent court of arbitration, composed of salaried, impartial, and independent judges, should be instituted.

There was also a strong and growing sentiment in favor of obligatory arbitration in a large number of cases — a plan which had been advocated by Russia, but was rejected on the motion of

<sup>10</sup> Hershey, *op. cit.*, ch. 8, *passim*.

Germany at the First Hague Conference. Mr. W. T. Stead and the other "militant" peace advocates favored making special mediation and commissions of inquiry obligatory, with an interval of at least thirty days' compulsory peace prior to the outbreak of hostilities. Mr. Stead also demanded a so-called league of peace, with a system of international financial boycott and persecution of peace breakers.

Acting upon the suggestions of Mr. Richard Bartholdt and William Jennings Bryan, the Interparliamentary Union, at its London session in 1906, adopted a resolution favoring "an investigation of all questions in dispute between nations or a resort to mediation prior to the commencement of hostilities."<sup>11</sup>

Among the Russian proposals of April, 1906, which formed the main basis or program for discussion at the Hague Conference of 1907, were: "Improvements to be made in the provisions of the convention relative to the peaceful settlement of international disputes as regards the Court of Arbitration and international commissions of inquiry." These matters were referred to the committee on arbitration, with M. Bourgeois as president. This commission, which held its first meeting on June 22, 1907, was divided into two sub-committees—the first to confine itself to mediation, commissions of inquiry, and arbitration in general, and the second to consider the projects for an international high court of appeal for the final adjudication of maritime prizes. The actual work of the first subcommittee, except that relating to the establishment of a permanent court of arbitral justice, was performed by two *Comités d'Examen* designated as *Comité A* and *Comité C*.<sup>12</sup>

<sup>11</sup> Among the World's Peace Makers, by Hayne Davis, page 180.

<sup>12</sup> The first committee, designated as *Comité A*, and placed under the presidency of M. L. Bourgeois, was composed of Baron Marschall and Mr. Kriege, for Germany; General Porter and Mr. Scott for the United States; Mr. Drago for the Argentine Republic; Mr. Mérey de Kapos-Mère and Mr. Lammasch for Austria-Hungary; Baron Guillaume, reporter, for Belgium; Mr. Ruy Barbosa for Brazil; Baron d'Estournelles de Constant and Mr. Fromageot for France; Sir Edward Fry for Great Britain; Mr. Streit for Greece; Count Torielli, Mr. Pompilj, and Mr. Fusinato for Italy; Mr. Esteva and Mr. de La Barra for Mexico; Mr. Lange for Norway; Mr. Asser for the Netherlands; Mr. d'Oliveira

The result of the labors of these committees was a revised Arbitration Treaty, or convention for the peaceful adjustment of international differences, which was indeed based upon that of 1899, but which consisted of ninety-four articles instead of sixty-one, and comprised a number of additions and corrections.

In order to pass judgment upon this portion of the work of the Second Hague Conference, it will be necessary to compare the conventions of 1899 and 1907, with a view of ascertaining their main points of similarity and difference.

The first article remains unchanged. It reads:

With a view to obviate, as far as possible, recourse to force in the relations between states, the contracting powers agree to use their best efforts to insure the pacific settlement of international differences."

The seven articles (arts. 2-9) on good offices and mediation also remain unchanged, except that, on motion of Mr. Choate, the words *and desirable* were added to the word *useful* in the first paragraph of article 3. This paragraph now reads:

Independently of this recourse, the contracting powers consider it useful *and desirable* that one or more powers, strangers to the dispute, should, on their own initiative, and as far as circumstances will allow, offer their good offices or mediation to the states at variance.

The conference has been criticised<sup>13</sup> for failing to make a delay of thirty days and special mediation as recommended in article 8<sup>14</sup> compulsory; but a little reflection should convince one that the duties of a mediator are too delicate and the situation at such times is usually too critical to be controlled by the rude hands of force. Besides, it is extremely doubtful whether the suggestion was a practical one; for "two prospective belligerents have seldom, if ever,

for Portugal; Mr. de Martens for Russia; Mr. Milovanovitch for Serbia; Mr. de Hammarskjöld for Sweden; Mr. Carlin for Switzerland.

The other committee, designated as Comité C, was placed under the presidency of Mr. Fusinato; it was composed of Mr. Kriege, Mr. Scott, Mr. Lammasch, Baron Guillaume, reporter; Mr. Fromageot, Sir Edward Fry, Mr. Crowe, Mr. Lange, and Mr. d'Oliveira. A third committee (B) considered the establishment of a court of arbitral justice.

<sup>13</sup> By Mr. W. T. Stead in *Le Courrier de la Conférence* for July 4, 1907.

<sup>14</sup> For the text of this article, see *supra*, p. 31.

reached the same stage in their military or naval preparations at the same time. It is not probable that Von Moltke, who informed Bismarck that he was ready for war on July 13, 1870, would have been willing to give France thirty days during which to complete the mobilization of her army. Japan was ready to attack the Russian fleet at Port Arthur on the evening of February 8, 1904. Is it likely that she could have been induced to give the Russians another month during which to transport more troops to Manchuria?"<sup>15</sup>

The delegation from Haiti suggested a modification of article 8 with a view of securing an impartial mediator, viz, that the two powers selected by the parties at variance choose a third power to act in that capacity. But this proposal was evidently founded upon a misunderstanding of the real character of mediation, and it was unanimously rejected by the committee.<sup>16</sup>

The convention of 1907 devotes twenty-eight articles (arts. 19-37) to commissions of inquiry instead of the six articles of the convention of 1899. The additional articles relate mainly to matters of organization and procedure.

After much deliberation it was decided to leave article 9 intact,<sup>17</sup> except for the addition of the phrase *and desirable* after the word *useful*. An amendment proposed by Haiti that, as in the case of arbitration and mediation, "the signatory powers may equally suggest to the parties in controversy recourse to international commissions of inquiry," was rejected for the same reasons that the Haitian proposal regarding special mediation had been set aside.<sup>18</sup> This action was most unfortunate. It was apparently based on a failure to distinguish between the two Haitian propositions, which were wholly dissimilar in character and import.

The discussion turned mainly on the Russian proposal to substitute the term *agree* for the words *consider useful* and to grant to commissions of inquiry the right to fix responsibility as well as elucidate facts.

<sup>15</sup> Citation from the writer's letter to the *New York Evening Post* for June 15, 1907.

<sup>16</sup> On the Haitian proposition, see M. le Baron Guillaume's Report, pp. 5 and 201, and *Le Courrier de la Conférence* for July 9, 1907.

<sup>17</sup> See *supra*, p. 32.

<sup>18</sup> See the Report of M. le Baron Guillaume, pp. 6 and 202.



The text of the Russian proposal was as follows:

In differences of an international nature involving neither honor nor *independence*,<sup>19</sup> and arising from a difference of opinion on matters of fact, the signatory powers *agree*, if circumstances allow, to institute a commission of inquiry to facilitate a *peaceful* solution of these differences by elucidating the facts *and fixing responsibilities, in case there are any*, by an impartial and conscientious investigation.<sup>20</sup>

The eminent Russian jurist, M. de Martens,<sup>21</sup> argued repeatedly and at length in favor of these changes. He did not insist upon the word *responsibilities*, nor wish to make recourse to commissions of inquiry obligatory; but he desired to render their use easier and more frequent, and maintained that the wording of the article as agreed upon was extremely defective. He pointed out that the conference had failed to draw adequate profit from the teaching afforded by the experience of the North Sea Commission of Inquiry which met in Paris in January, 1905 — a commission which not only investigated the facts, but also passed upon the questions of responsibility and degree of blame, in connection with the North Sea incident.

But the Russian jurist was unable to convince his colleagues of the first commission, who seemed to fear that the acceptance of these enlightened views would tend to render the use of commissions of inquiry compulsory. The main opponents of the Russian proposition appear to have been Count Tornielli, of Italy, Sir Edward Fry, Baron Marschall von Bieberstein, of Germany, Turkhan Pacha, and M. Beldiman, of Roumania, the leader of the opposition to commissions of inquiry in the Hague Conference of 1899.<sup>22</sup>

<sup>19</sup> In the Russian draft the word *independence* is substituted for the phrase *vital interests*.

<sup>20</sup> For the Russian text, see Baron Guillaume's Report, p. 195. The additions and variations of the Russian draft have been placed in *italics*. There is also an important omission of the phrase "parties who have not been able to come to an agreement by diplomatic methods."

<sup>21</sup> For the views of Professor de Martens on commissions of inquiry, see the Report of Baron Guillaume, pp. 6-7; Première Commission, troisième séance, pp. 3-4; *Le Courrier de la Conférence* for July 10, 1907; and Holls, *op. cit.*, pp. 206-210.

<sup>22</sup> *Le Courrier de la Conférence* for July 10, 1907; and Holls, *op. cit.*, pp. 210-214.

Although it is true, as claimed, that sovereign states are in no wise bound by the apparent limitations of article 9, yet it is to be feared lest some of the powers may interpret it to mean that recourse to such commissions in cases which involve questions of so-called national honor or vital interests are forbidden by the convention, or at least that such recourse may be discouraged to some extent. There seems to be no valid ground for the timid or conservative attitude of the conference on this subject. On the contrary, "the successful application of this method at a time of great public passion and excitement shows that it is particularly well adapted to meet crises or emergencies. It would also seem to be an appropriate means for securing a calm consideration of those questions which are supposed to affect the honor, dignity, and vital interests of a nation and which, it is held, are not proper subjects for arbitration. A calm and impartial inquiry into the facts gives time for passions to cool and for conservative tendencies and sober second thought of the nation to assert themselves. If, as has been claimed, war is sometimes due to modern or 'yellow' journalistic methods, it would give the newspapers a chance to sell their successive editions without actually precipitating war."<sup>23</sup>

The remaining articles relating to commissions of inquiry deal with matters of organization and procedure and need not be considered here in great detail. As in the convention of 1899, it is stipulated that "international commissions of inquiry shall be constituted by special agreement between the parties at variance." This agreement shall specify the facts to be examined; it may determine the procedure to be followed, the extent of the powers of the commissioners, the languages to be employed, the place of sitting, etc. (art. 10). If the special agreement does not indicate the place of meeting, the commission shall sit at The Hague. If it does not determine the languages to be employed, these shall be decided upon by the commission (art. 11).

As article 11 of the convention of 1899 declared that "unless otherwise stipulated, the international commissions of inquiry shall be formed in the manner fixed by article 32," so article 12 provided

<sup>23</sup> From the writer's letter to the *New York Evening Post* for June 15, 1907.

that they shall be formed in the manner determined by articles 45 to 57 of the convention of 1907.<sup>24</sup>

Article 13 is a reproduction of article 35 of the convention of 1899. It provides that "in case of the death, resignation, or absence for any cause, of one of the members of the Commission of Inquiry, his place shall be filled in the manner provided for his appointment."

Article 14 was inspired by article 37 of the convention of 1899. It declares that "the parties shall have the right to appoint special agents to represent them and to serve as intermediaries between them and the commission," and authorizes them to employ counsel for the defense of their interests.

Article 15 prescribes that "the International Bureau of the Permanent Court of Arbitration shall serve as the record office for commissions which sit at The Hague;" but if "the commission sits elsewhere than at The Hague, it shall appoint a general secretary" for this purpose (art. 16).

Article 17 declares that "with a view of facilitating the institution and operation of commissions of inquiry, the contracting powers recommend the following rules which shall be applicable to the procedure of such commissions in so far as the parties do not adopt other rules."

These rules are contained in articles 18-35. They are purely optional and largely based upon the experiences of the North Sea Commission. They provide for the securing and furnishing of information; the securing and interrogation of witnesses and experts; and prescribe the duties of agents and counsel. The deliberations and sessions of the commission are to be and remain secret, and the reports of proceedings and all documents bearing upon the inquiry shall not be published unless with the consent of the parties and the commission. The report of the commission is, however, to be read in public session in the presence of the agents and counsel of the parties concerned. Every decision shall be by a majority vote, but the report shall be signed by all members of the commission. If one of the members refuses to sign, mention of this fact shall be made. Such refusal shall not, however, invalidate the report.

<sup>24</sup> See *infra*, pp. 41-45.

Article 18 prescribes that the commission itself shall regulate the details of procedure which have not been provided for either by the special convention or inquiry or the present convention.

Article 35 reproduces the limitations of article 14 of the convention of 1899, which asserted that "the report of the international commission of inquiry shall be limited to a statement of the facts, and shall in no wise have the character of an arbitral award." As stated above,<sup>25</sup> this direction was not observed by Great Britain and Russia in their institution of the North Sea Commission, which combined the functions of court of arbitration with those of a commission of inquiry.

The Russian delegation had proposed the following modification of article 35:

The powers at variance, having obtained knowledge of the ascertainment of facts and responsibilities as declared by the international commission of inquiry, are free either to conclude an amicable arrangement or have recourse to the Permanent Court of Arbitration at The Hague.

This proposal seems to have been rejected by Committee A on the ground that it implied obligatory arbitration as a necessary consequence of recourse to commissions of inquiry, whose use it would thus tend to discourage.<sup>26</sup>

In this matter, again, the leaders of the conference appear to have exhibited undue timidity and conservatism. It is difficult to see how the principle of obligatory arbitration was necessarily involved; even had this been the case, it need not necessarily have been a fatal objection to the Russian proposition.

The most important part of the convention for the peaceful adjustment of international differences is that portion relating to international arbitration, which consists of fifty-four articles, divided into four chapters under the head of Title IV.

Chapter I on "Arbitral Justice" consists of articles 37-41. Article 37 combines articles 15 and 18 of the convention of 1899. It now reads:

<sup>25</sup> See *supra*, p. 36.

<sup>26</sup> Baron Guillaume's Report, p. 19.

International arbitration has for its object the determination of controversies between states by judges of their own choice, upon the basis of respect for law.

Recourse to arbitration implies the obligation to submit in good faith to the decision.

Article 16 has been called the corner-stone of the convention of 1899. It was around this article that the various propositions, regarding obligatory arbitration, naturally grouped themselves. It read:

In questions of a judicial character, and especially in questions regarding the interpretation of application of international conventions, arbitration is recognized by the signatory powers as the most efficacious and, at the same time, the most equitable, means of deciding controversies which have not been settled by diplomatic methods.

Except for the substitution of the phrase *contracting powers* for *signatory powers* — a substitution which is made in every instance where this expression is used in the convention of 1907 — article 16 of the convention of 1899 remains intact, as article 38 in that of 1907. On the motion of M. de Mérey, of Austria-Hungary, the following paragraph to article 38 was added:

Consequently, it would be desirable that, in differences upon questions of the kind above mentioned, the contracting powers should have recourse to arbitration, in so far as circumstances may allow.

Articles 17 and 19 of the convention of 1899 were retained as articles 39 and 40 without any modification. The contracting powers reserve the right to arbitrate any kind of controversy or enter into general or special agreements with a view to extending arbitration to any or all cases which they consider suitable for such submission.

Chapter II on "The Permanent Court of Arbitration" consists of articles 41 to 51. Articles 41 and 42 are a reproduction of articles 25 and 21 of the convention of 1899. They provide for the maintenance of the "Permanent Court of Arbitration established by the First Peace Conference." This court shall be "accessible at all times," and shall have "jurisdiction of all cases of arbitration, unless there shall be an agreement between the parties for the establishment of a special tribunal."

Article 43, which corresponds to article 22 of the convention of 1899, prescribes the main duties of the International Bureau at The Hague. "It shall serve as the record office for the court and as its medium of communication. It shall have the custody of the archives and conduct all the administrative business."

Article 44, which almost literally reproduces article 23 of the convention of 1899, provides for the selection by each contracting power of "not more than four persons of recognized competence in questions of international law, enjoying the highest moral reputation, and disposed to accept the duties of arbitrators. The persons thus selected shall be enrolled as members of the court, upon a list which shall be communicated by the Bureau to all the contracting powers. \* \* \*" Their term of appointment is for six years, subject to renewal.

Article 24 of the convention of 1899 stipulated that

whenever the signatory powers wish to have recourse to the Permanent Court for the settlement of a difference that has arisen between them, the arbitrators selected to constitute the tribunal which shall have jurisdiction to determine such difference, shall be chosen from the general list of members of the court. If such arbitral tribunal be not constituted by the special agreement of the parties, it shall be formed in the following manner: Each party shall name two arbitrators, and these together shall choose an umpire. If the votes shall be equal, the choice of the umpire shall be intrusted to a third power selected by the parties by common accord. If an agreement is not arrived at on this subject, each party shall select a different power, and the choice of the umpire shall be made by the united action of the powers thus selected. The tribunal being thus constituted, the parties shall communicate to the Bureau their decision to have recourse to the court, and the names of the arbitrators. The Tribunal of Arbitration shall meet at the time fixed by the parties. The members of the court, in the discharge of their duties, and outside of their own country, shall enjoy diplomatic privileges and immunities.

The above provisions have, with a few slight additions, been incorporated into articles 45 and 46 of the convention of 1907. But one paragraph has been modified and a new one added:

Each party shall name two arbitrators of whom only one may be a national or chosen from among those who have been designated by it as members of the Permanent Court.

If, after a delay of two months, these two powers have not been able to come to an agreement, each of them shall present two candidates taken from the list of members of the Permanent Court (these not being nationals of either of them), beyond the members designated by the parties. It shall determine by lot which of the candidates thus presented shall be the umpire:

Article 48 contains what is perhaps the most unique and interesting innovation in the entire convention for the peaceful adjustment of international differences. Article 27 of the convention of 1899 had asserted that "the signatory powers consider it their *duty*, in case a serious dispute threatens to break out between two or more of them, to remind these latter that the Permanent Court of Arbitration is open to them." Much was hoped from this declaration of the powers proposed by France, and Mr. Holls was of the opinion that "next to the establishment of the Permanent Court of Arbitration this article undoubtedly marks the highest achievement of the conference."<sup>27</sup> But it remained practically a dead letter and, so far as the writer is aware, the only applications which have been made of article 27 have been by President Roosevelt in Latin American affairs.

In order to encourage and facilitate the arbitration of grave political controversies, the Peruvian delegation proposed that in case of a controversy between two powers one of them may address to the International Bureau of The Hague a note declaring that it is disposed to submit the difference in question to arbitration. "This note shall also indicate the point of view of the power making the declaration as to its rights in the matter. The International Bureau shall communicate this declaration to the other power, and place itself at the disposition of both powers in order to facilitate an exchange of views between them leading to a mutual agreement."

A similar proposition was made by the Chilean delegation, which, however, aimed to avoid the imposition upon the International Bureau of the duties of obligatory mediation — a function for the exercise of which it was not designed. The Chilean proposition simply provided that "the International Bureau shall immediately

<sup>27</sup> Holls, Peace Conference, p. 269.

communicate the above declaration to the interested government. It shall also communicate this declaration, as also the reply thereto, to the signatory government of the present convention."

The Peruvian proposal, as amended by Chile, was warmly supported by the delegations from France, the United States, Great Britain, Russia, and Brazil; but opposed by Germany, Austria, Belgium, and Greece. As a result of this discussion, the following paragraphs were finally added to the "duty" sections of article 48.

In case of controversy between two powers, one of them may always address to the International Bureau a note declaring that it is disposed to submit the difference to arbitration.

The Bureau shall immediately communicate this declaration to the other powers.<sup>28</sup>

It remains to be seen whether article 48 of the convention of 1907 will meet with a more cordial reception than did article 27 of the convention of 1899. There are undoubtedly great possibilities in it even in its present modified form, if properly and extensively applied. In commenting upon this innovation, Baron d'Estournelles de Constant says:<sup>29</sup>

Thanks to America, a very important article was voted, article 48, which authorizes governments, in case of disputes, to address the Bureau of The Hague directly and demand or propose arbitration. This mechanism has not even been noticed by the press,<sup>30</sup> and yet it will be amply sufficient to put all the resources of arbitration in motion. Previously, where two states had a ground of quarrel they were obliged to agree together to submit the question to arbitration. And such an agreement between two governments whose relations have become envenomed is almost impossible. To-day it is in the power of one of them to make its offer openly, and thus force the second state to accept or decline that offer in presence of public opinion. It is a very great progress, although it may appear almost imperceptible, and henceforth a state that sincerely wishes to avoid war can reply to its aggressor: "*I appeal to the judges at The Hague.*"

<sup>28</sup> Baron Guillaume's Report, pp. 25-26, 176, 218, 219; *Le Courrier de la Conférence* for October 2, 1907; Holls, *op. cit.*, pp. 267-269.

<sup>29</sup> In the *New York Independent* for November 21, 1907.

<sup>30</sup> This statement is not quite accurate, for a commendation of the Peruvian proposition by the writer appeared in the *New York Evening Post* for July 27, 1907.



There is another phase of the matter which deserves consideration. The federation of the world is often regarded as a mere vision of poets or a dream of philosophers. But it may be observed that in the Hague Tribunal, or Court of Arbitration, we actually have, albeit in rudimentary form, a world judiciary; in the system of periodical Hague conferences, we have at least the rude beginnings of a world legislature; and in the International Bureau at The Hague, we may in time discover the germ of a world executive.<sup>31</sup>

Article 49 relates to the duties of the permanent Administrative Council, which is composed of the diplomatic representatives of the contracting powers accredited to The Hague. This Council is charged with the establishment and organization of the International Bureau, which remains under its direction and control. This article replaces article 28 of the convention of 1899, of which it is almost an exact copy. But it provides that nine instead of five members shall constitute a quorum. The duties of this Council and Bureau relate principally to the operation of the Hague Tribunal, for which it serves as a medium of communicating with the contracting powers.

Article 29 of the convention of 1899 provided that "the expenses of the Bureau shall be borne by the signatory powers in the proportion established for the International Bureau of the International Postal Union." In view of the large number of new adhering powers, it was deemed equitable to add to article 50 of the convention of 1907, the following paragraph:

The expenses charged to the adhering powers shall be counted from the date of their adhesion.

Chapter III on "Arbitral Procedure" consists of articles 51 to 86 and need not be considered in great detail. They correspond to

<sup>31</sup> In an article entitled "The Coming Peace Conference at The Hague," published in the *New York Independent* for September 13, 1906, the writer called attention to the importance of appointing a "permanent committee to sit during the interim [*i. e.*, between successive conferences] in order to watch over international interests, to use its influence in behalf of peace and the enforcement of law, and report upon desirable changes, or improvements in international law at the meeting of the following congress or conference." This suggestion was scarcely noticed at the time.

articles 30 to 58 of the convention of 1899 and, like these, are purely optional.

Article 31 of the convention of 1899 provided that "The powers which resort to arbitration shall sign a special act (*compromis*) in which the subject of the difference shall be precisely defined, as well as the extent of the powers of the arbitrators. This act implies an agreement by each party to submit in good faith to the award." This article was entirely recast in article 52 of the convention of 1907 and two new articles (articles 53 and 54) added. Article 52 contains very specific directions as to what matters shall be included in the special agreement (*compromis*). Article 53 declares that the Permanent Court is competent to conclude such an agreement if the parties are in accord upon this point. It is equally competent, even if the request be made by only one of them (after a failure to come to an agreement by diplomatic methods) in certain cases.

The question of the choice of languages gave rise to some discussion in committee. Article 38 of the convention of 1899 authorized the Hague Tribunal to decide upon the choice of languages, but Germany and Russia were of the opinion that the parties themselves should decide this matter. Article 61 was finally edited to read:

If the agreement has not determined the languages to be employed, the tribunal shall decide.

Article 37 of the convention of 1899 left it to the absolute discretion of the parties to employ such agents and counsel as they wished. This freedom seems to have been abused by some of the parties in employing as counsel members of the Hague Tribunal itself, thus inviting severe criticism in some quarters. In view of this danger, the German amendment to article 62 was adopted:

Members of the Permanent Court can only exercise the function of agents, counsel, or advocates, in behalf of the power which has named them members of the court.<sup>32</sup>

<sup>32</sup> A Russian amendment proposed to prohibit the practice altogether. It had the support of Great Britain and the United States. See Baron Guillaume's Report, p. 36.

The question of the publicity of discussions does not seem to have given rise to any debate. In 1907 as in 1899 it was provided that "they shall be public only in case it shall be so decided by the Tribunal, with the assent of the parties" (art. 66). Of course it is expected that publicity will be the rule. To the declaration of article 51 of the convention of 1899 that "the deliberations of the tribunal shall take place with closed doors," article 78 of the convention of 1907 adds, "*and remain secret.*" Every decision is to be by a majority vote. The provision (in article 51) that "the refusal of a member to vote shall be noted in the official minutes" was suppressed in article 78.

The requirement of article 52 that "the arbitral award must be drawn up in writing and signed by each member of the tribunal," as also the permission granted to those voting in the minority to state, in unity, the grounds of their dissent, were also suppressed in article 79; but the provision that "the arbitral award shall be made by a majority of votes, and accompanied by a statement of the reasons upon which it is based," was retained.

Articles 53 and 54 of the convention of 1899 remain unchanged in that of 1907. Articles 80 and 81 prescribe that the award which is to settle the dispute finally and without appeal shall be read in public in the presence of the agents and counsel of the litigants. Article 82 is altogether new. It declares that "Every difference, which may arise between the parties concerning the interpretation and execution of the award, in so far as not forbidden by special agreement, shall be submitted to the tribunal that made it."

The Russian delegation asked for the total suppression of article 55 of the convention of 1899, which lays down the conditions under which the parties may reserve the right to demand a rehearing of the case. These are the "discovery of new facts, of such a character as to exercise a decisive influence upon the judgment, and which at the time of the judgment were unknown to the tribunal itself and to the parties demanding the rehearing." This condition must be established by a decision of the tribunal itself.

In 1907, as in 1899, M. de Martens argued strongly against the retention of article 55 on the ground that an arbitral award should

terminate, finally and forever, the conflict between litigants. He maintained that a rehearing must necessarily provoke new discussions, again inflame public passion, and once more menace the peace of the world.

On the other hand it was urged that the right to revision is essential to liberty; that the sole end of arbitration is not the termination of the dispute; and that "nothing is settled until it is settled right."<sup>33</sup> The result of the discussion was an overwhelming vote in favor of the retention of article 55 as article 83 of the convention of 1907.

Article 84 reproduces with slight variations article 56 of the convention of 1899. Its first paragraph provides that "the arbitral award is merely obligatory for the litigant parties." Article 85 (article 57 of the convention of 1899) prescribes that "each party shall bear its own expenses and an equal part of the expenses of the tribunal."

Chapter IV on "Summary Procedure of Arbitration" is wholly new and consists of five articles (86-90). These were based upon a project presented by the French delegation which was designed to aid in the solution of disputes of a special or technical character by furnishing the parties with tribunals and a mode of procedure more simple, rapid, and less expensive than that elaborated in the previous chapter. They are as follows:

ART. 86. With a view of facilitating the operation of arbitral justice in differences that permit of a summary procedure, the contracting powers agree upon the following rules which shall be observed in the absence of different stipulations, and under reserve, should the case arise, of the application of the provisions of Chapter III which are not contrary to them.

ART. 87. Each of the parties at variance shall name an arbitrator. The two arbitrators thus designated shall choose an umpire. If they are unable to come to an agreement upon this subject, each shall present two candidates taken from the general list of members of the Permanent Court (none of them being nationals of any of the states selecting them) beyond the members indicated by each of the parties themselves. It shall be determined by lot which of the candidates thus presented shall be the umpire.

<sup>33</sup> For the arguments *pro* and *con*, see the Report by Baron Guillaume, p. 42; *Le Courrier de la Conférence* for August 25, 1907; and Holls, *op. cit.*, pp. 286-303.

The umpire shall preside over the tribunal, which shall render its decisions by a majority of votes.

ART. 88. In default of previous agreement, the tribunal, as soon as it is constituted, shall fix the period within which the two parties must submit to it their respective memoirs.

ART. 89. Each party shall be represented before the tribunal by an agent who shall serve as intermediary between the tribunal and the government that has selected him.

ART. 90. The procedure shall be exclusively in writing. Each party shall have, however, the right to demand the presence of witnesses and experts. The tribunal, on its side, shall have the power of requiring oral explanations from the agents of the two parties, as also from the experts and the witnesses whose presence it considers useful.

Seven articles (91 to 97, inclusive) of "Final Provisions" replace the four articles (58 to 61) of "General Provisions" of the convention of 1899. They include the customary provisions relating to the date, place, and mode of ratification; the means by which nonsignatory or nonadhering powers may become parties to the convention; and the conditions under which withdrawals may take place.

The convention for the peaceful adjustment of international differences, accompanied by a voluminous report drawn up by Baron Guillaume of Belgium, was submitted to the conference at its ninth plenary session on October 17, 1907, and adopted unanimously. There were, however, more or less important reserves on the part of Brazil, Greece, Japan, Switzerland, Turkey, and the United States.<sup>34</sup>

The reserve of the United States related to the Monroe Doctrine and was made with reference to article 48:

Nothing contained in this convention shall be so construed as to require the United States of America to depart from its traditional policy of not entering upon, interfering with, or entangling itself in the political questions or internal administration of any foreign State. It is equally understood that nothing contained in the said convention shall be so construed as to imply the relinquishment, by the United States of America, of its traditional attitude toward purely American questions.

On the whole, the convention of 1907 must be pronounced somewhat disappointing even to many advocates of peace and arbitration

<sup>34</sup> *Le Courrier de la Conférence* for October 17, 1907.

who do not belong to the "militant" school of pacifists. Aside from its failure to agree upon a plan for obligatory arbitration or to adopt the American scheme for a real permanent high court of arbitral justice or supreme court of the nations, it is to be regretted that the Second Hague Peace Conference did not see its way clear to recommend that third powers suggest recourse to commissions of inquiry in all cases of serious controversy regarding facts, that they did not make the use of such commissions obligatory, at least in certain cases, and give them the right to fix responsibility and apportion blame as well as to elucidate facts. It is also a matter for regret that the functions of the Administrative Council and International Bureau at The Hague were not enlarged to enable them to exert a more powerful influence in behalf of peace and the enforcement of law; and that the employment of members of the Hague Tribunal as agents or counsel was not absolutely prohibited.

On the other hand, some excellent results were obtained. Commissions of inquiry were provided with a form of organization and rules of procedure which, although purely optional, seem sufficiently detailed and adequate for their purpose. The rules of procedure suggested for the use of the Hague Tribunal were considerably enlarged and strengthened, and the functions of that body somewhat increased. Special tribunals with a more summary mode of procedure were devised for the settlement of disputes of a special or technical character. Most important of all, governments desiring arbitration of a given dispute are authorized by article 48 to appeal directly to the International Bureau at The Hague, which must immediately communicate this fact to the other power.

Surely these are important steps in advance and, taken collectively, constitute no small service to the cause of peace and arbitration.

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