Court of Conciliation and Arbitration

English translation – Original in French

Stockholm, 3 May 2022

SEMINAR ON CONFLICT RESOLUTION WITHIN THE OSCE: THE ROLE OF THE COURT OF CONCILIATION AND ARBITRATION

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I am particularly honoured to be opening this seminar and I am delighted to be here with you for several reasons.

First, it is an opportunity to thank our Swedish hosts and to pay tribute to Sweden's role as the depositary State of the Convention on Conciliation and Arbitration within the OSCE, which was adopted in Stockholm on 15 December 1992 and entered into force on 5 December 1994. The Convention has now been ratified by 34 States Parties, and Swedish diplomacy is to be commended for its commitment to encouraging further ratifications.

This is also an opportunity to speak in an informal setting and to speak in a more personal capacity on a topic that is at the heart of our concerns. We are approaching the thirtieth anniversary of the adoption of the Stockholm Convention, and we must all make a clear assessment.

Have the promises, hopes and expectations raised at the time been fulfilled? Evidently not, if we look at the Court's "roll", its register having remained empty since the beginning. No case, however small or significant, technical, or political, has ever been brought before it. Yet the Court is in place, it exists, it is "up and running", ready to function, at the service of the States Parties as well as of all participating States and OSCE institutions. We can cite precedents: the Permanent Court of Arbitration was dormant for a long time, the International Court of Justice itself went through very quiet phases, the European Court of Human Rights was also described as a "sleeping beauty in its early days"... But clearly this is far from satisfactory, especially as these courts are now in full operation. What was a nagging question for the members of the Court has become a collective challenge.

In the dramatic context of a new war in Europe, the foundations of international peace and security laid down in 1945 by the Charter of the United Nations and the foundations of co-operative security reaffirmed in the framework of the OSCE are now being called into question.

The peaceful settlement of disputes went hand in hand with the prohibition of the use of force, as recalled in the Decalogue of the Helsinki Final Act signed in 1975 by all Heads of State and Government of OSCE participating States. In line with the 1990 Charter of Paris for a New Europe, the Stockholm Convention provided a legal and diplomatic institutional framework for these principled commitments by establishing a Court of Conciliation and Arbitration within the OSCE. Thirty years on, we must ask ourselves what the role of our Court can and should be in the structure of European security.

The collective assessment that is required as we approach the thirtieth anniversary of the Stockholm Convention involves three long-term dimensions, knowing that the time of States and treaties is not that of individuals. We must constantly confront the key elements of the long term and the constraints of current events, patience and urgency. Let us review together, if you will, the past, the present and the future.

I – **First, it is about honouring the past**.

The idea of the peaceful settlement of disputes is an old one, a noble ideal that took its modern form more than one hundred and fifty years ago, in the 19th century. It led to the codification of international arbitration at the two Hague Peace Conferences of 1899 and 1907 and to the institutionalisation of international justice, with the creation of the Permanent Court of International Justice between the wars and then of the International Court of Justice under the 1945 Charter.

In this respect, the two world wars were terrible ordeals for civilisation. The violation of treaties, these "*scraps of paper*", and the regression into the most inhuman barbarism, led in 1919 as in 1945, to the creation of international organisations, opposing "*the force of law to the law of force*", in the words of Léon Bourgeois, one of the fathers of the League of Nations, and future Nobel Peace Prize winner. Each time, the ideal of peace through law was revived more vividly than ever. While peaceful means of settlement could not resolve political disputes and prevent wars, they had their place in the reconstruction of an international order, as shown by the role of bilateral arbitration or conciliation commissions in the two post-war periods. Article 33 of the Charter of the United Nations combines the principled commitment to the peaceful settlement of disputes with the enumeration of a wide range of means of settlement available to states, such as arbitration and conciliation, including on the basis of regional arrangements.

This is the essence of the efforts undertaken in the framework of the OSCE, with a series of thematic seminars held in Montreux in 1978, Athens in 1984 and Valletta in 1991. But it was necessary to go further, to go beyond the reminder of good practices to have effective tools. The Stockholm Conference marked a qualitative leap forward with the adoption of a formal treaty, which created a Court of Conciliation and Arbitration, even if it meant breaking the usual consensus within the OSCE. It is true that the Court is open on a voluntary basis to all OSCE participating States, whereas legal commitments are only binding on the States Parties. But the map of ratifications speaks for itself: neither the United States, Canada, nor the United Kingdom are parties to the Convention, nor is the Russian Federation...

The founding fathers of the Convention had the immense merit of combining political voluntarism and legal expertise to set up a model institution, a true "Swiss army knife". The Court itself has two lists of members, arbitrators, and conciliators, composed of distinguished figures.

In this à la carte system, States may engage in the original approach of conciliation, which is compulsory for the States Parties, with the establishment of a conciliation commission which, at the end of a confidential procedure, proposes a solution to the parties which they are free to accept or refuse. The other, more traditional route is arbitration, based on an optional declaration of acceptance, again with the setting up of an ad hoc judgment body, an arbitral tribunal which issues an award that is binding for the States. As can be seen, both systems offer great flexibility in the procedure.

The same approach can be found in the mission of the bodies that have been established, allowing the arbitrators to combine the implementation of international law with the notion of equity, *ex aequo et bono*, if the parties so wish (Art.30). While the objective of conciliation is " *to assist the parties in the dispute to settle the dispute in accordance with international law and their CSCE commitments* " (Art.24).

Compared to other regional conventions for the settlement of inter-State disputes, such as the 1957 Convention within the framework of the Council of Europe, the Stockholm Convention has a strong institutional dimension: the Court is to function "*within the OSCE*". It is fully independent, its composition being a guarantee of expertise and impartiality, but it is at the same time one of the "institutions and structures" of the OSCE, presenting its annual report to the Permanent Council in Vienna. But above all, it could be said to share the same DNA as the OSCE, with the OSCE's frame of reference of principles and commitments that must guide any conciliation efforts between the parties.

As I see it, the Court thus offers essential advantages, enshrining the institutionalisation of flexible procedures, available to both States Parties and participating States, in a dual system, combining conciliation and arbitration, under the aegis of the Court's office, which ensures independence and impartiality, continuity and consistency. It also offers the guarantee of close integration into a pan-European system built step by step over nearly fifty years, on the basis of the principles of the Helsinki Final Act of 1975 and the Charter of Paris for a New Europe of 1990. In other words, the founding fathers designed the Court of Conciliation and Arbitration as a permanent tool, available to States, in the context of "*a new era of democracy, peace, and unity*" to quote a subtitle of the Paris Charter, where States reaffirmed their "*commitment to settle disputes by peaceful means*", deciding "*to develop mechanisms for the prevention and resolution of conflicts among participating States*".

However, this promising tool has since remained a mere legal virtuality - a Rolls-Royce in the garage, to put it mildly - even as crises have multiplied. Without resigning ourselves, we

must confront this hopeful past with the realities of the present day with lucidity and demand. What have we done with this precious inheritance over the past 30 years?

II – **We must ask ourselves about the present.**

The peaceful settlement of disputes has never been a smooth ride. If it is to be effective, we must also be aware of its limitations.

In a classic article, Michel Virally considered that the technical field of international justice was an intermediate zone: for cases of minor importance, States could settle their dispute directly and find a mutually acceptable compromise through negotiation. However, for cases that are rightly or wrongly considered to be of vital interest, states would never agree to submit to the decision of an impartial third party. This was an empirical reiteration of the old distinction between legal and political disputes, even though international law is itself a component of the "external legal policy" of states. In an original manner, Lucius Caflisch, who was one of the main drafters of the Convention, often stated that the peaceful settlement of disputes implied a situation of peace and that once an armed conflict started, one was in a situation where any form of conciliation or arbitration was impossible.

There are of course a whole series of intermediate situations between war and peace, with "frozen conflicts", and processes for ending the crisis, but the goodwill and good faith of States seem to me to be essential for the effectiveness of amicable settlement procedures, avoiding any risk of instrumentalisation of the law. I believe that a concrete example of this is the inter-state conciliation procedures set up under the 1965 Convention on the Elimination of All Forms of Racial Discrimination, which were recently launched. In one case, with the communication filed by the State of Palestine against Israel, the admissibility decision adopted on 12 December 2019 by the Committee on the Elimination of Racial Discrimination (CERD) led to a legal impasse. In another, the political dispute between two neighbouring Gulf States was suddenly settled by political reconciliation, without any intervention by the CERD, which was seized and divested, without any further process...

With regard to the Stockholm Convention, there are undoubtedly also limits inherent in its nature. By definition, the Court's jurisdiction is limited to inter-state disputes, which is in the tradition of international public law, but today we are in a multi-party world, with a multiplicity of *stakeholders*. This is the case for companies, particularly multinational companies, and the success of the International Centre for Settlement of Investment Disputes (ICSID) and the Permanent Court of Arbitration (PCA) both show that transnational arbitration has a bright future. Moreover, the good practices of the Organisation for Economic Co-operation and Development (OECD) - with its national contact points - and the ongoing negotiations on business and human rights in the Human Rights Council illustrate the need for independent *monitoring* mechanisms and impartial dispute resolution. This is also the case for environmental disputes, which the founding fathers of the Convention already had in mind, as President Robert Badinter has often said. The discrepancy with current emergencies seems particularly striking to me.

It seems that other constraints are linked to the Court's generalist vocation. It is true that states are traditionally wary of specialised bodies that may exercise a methodological bias, which explains the lack of success of "thematic chambers" within the International Court of Justice. At the same time, however, a wide-ranging jurisdiction and a variable-geometry composition can give rise to a natural reflex of fear in the face of the unknown. States like to find themselves on familiar ground, with well-established precedents and familiar faces, if I may say so, in this game of musical chairs between judges, arbitrators and counsel, this "small world" is not very different from the *Small World* described by David Lodge. By necessity, however, the Court was unable to 'prove itself'.

The first step is always the hardest, but no state has taken this first step in the last thirty years, despite all the efforts to raise awareness and provide information made by all our predecessors over the years, President Robert Badinter and President Christian Tomuschat. The first Court, with its particularly prestigious composition of former ministers and top diplomats, could impress and dissuade States, following on from the Arbitration Commission of the European Conference for Peace in former Yugoslavia. Since then, the composition of the Court has evolved with a stronger academic dimension, but also practitioners, jurists, and experienced judges. Professor Tomuschat has organised two seminars which have resulted in reference publications to raise awareness of conciliation by highlighting recent experiences and highlighting the advantage of flexibility. For almost thirty years, the Court has endeavoured to be present, to be reactive, if not proactive, since the principles of independence and impartiality prevent us from doing anything that might resemble *forum shopping* or "comparative advertising" in an increasingly competitive legal market. Without renouncing the inherent dignity of our functions, should we not be more visible in order to recall, time and time again, the added value of the Convention, bearing in mind that there is room for everyone, given the pressing need for law?

I believe that non-judicial and judicial forms of dispute settlement are complementary. In this respect, the contacts established with the Council of Europe bodies have been very promising, in particular before the Committee of Legal Advisers on Public International Law (CAHDI). However, we must also be aware of the Achilles' heel of the Stockholm Convention, which is Article 19 on "*safeguarding existing means of dispute settlement*". Beyond the very technical aspects of divestiture, in order to avoid duplications and contradictions, a more constructive reading of these provisions is needed to highlight the notions of complementarity and subsidiarity, to enable States to favour the solution that is the most rapid and effective in their eyes. In this respect, the Court of Conciliation has many advantages that make it the 'best bid' in terms of cost and adaptability, as well as time management, with a "tailor-made" procedure. It only lacks the effectiveness to show its efficiency.

Finally, we must take into account the geopolitical dynamics that have occurred over the last thirty years. To put it briefly, and perhaps too bluntly, far from the dream of a "free and united Europe", the OSCE area is being driven by contradictory forces. The European States are engaged in a historic process of unification based on law, with the role played by the

European Union. At the same time, the divides in Eastern Europe are multiplying, with "frozen conflicts", undermined by violence, leading to military interventions and inter-state wars. The scope for the peaceful settlement of disputes is shrinking, on both sides, despite the Court's pan-European vocation.

I believe that these observations are necessary in order to look to the future in a pragmatic manner, beyond the nostalgic memories and pious wishes that are customary on anniversaries.

III – **Now we must invent the future together**.

In view of the 30th anniversary of the Stockholm Convention, we need to devise a "Stockholm +30" that is a real action plan, a comprehensive strategy involving all the "friends of the Convention".

This begins with small steps, positive signals that dispute settlement remains an integral part of the OSCE and a concrete sign of hope for the entire continent.

The narrow circle of States Parties is still marked by the antagonisms that plagued the preparatory work for the Stockholm Convention. A generation later, is it not time for all participating States to reflect on their commitment, not only in theory but also in practice, to what is now called "*law-based multilateralism*"? It would be a strong gesture if new States ratified the Convention on the occasion of this anniversary, as Luxembourg and Montenegro did a few years ago. To date, ten or so EU Member States have not yet ratified the Convention, so one must ask the reason for this wait-and-see attitude, when the European mantra is *Leading by Example?* In a time of crisis, when the very principle of the peaceful settlement of disputes is under threat, it would be a very positive contribution if signatory states such as Belgium, Bulgaria or the Czech Republic, not to mention various third countries, took the step and ratified the Stockholm Convention.

The basic commitment of the Convention, as has been said, is to compulsory conciliation, the outcome of which remains optional. Arbitration, on the other hand, whose outcome is a binding award, remains optional in principle. It requires an optional declaration of acceptance, according to the classic formula in Article 26. To date, the optional declarations that have been made have come to an end. In other words, a request for arbitration can only be made to the Court on the voluntary basis of a bilateral agreement. Updating the unilateral declarations of acceptance would also be a sign of confidence in the Court and of effective adherence to the principle of inter-state arbitration.

But obviously the key to everything remains the referral of a case to the Court in a concrete situation, otherwise the Court will remain a nice list of names of arbitrators and conciliators, like the lists provided for in many other instruments, starting with the Vienna Convention on the Law of Treaties of 1969. And we will remain " *characters in search of an author* " like Pirandello's actors. But the Court has not been idle. In addition to our

communication efforts - which include the enrichment of our official website - we have ensured that the Court is in a position to proceed, by considering various scenarios for the establishment of a commission or a court, with different parameters, variants and options. We could go further and post the practicalities of implementing the Convention, as the Permanent Court of Arbitration does, although there is a need for confidentiality and flexibility. One of the essential elements seems to be the time factor, with the necessary hindsight to calm passions, but the imperatives of early warning and rapid response, so as not to let "malevolent obsessions" fester.

In an original way, the Court also supported the *Moot Court* organised on the initiative of our colleague from the Bureau, Professor Vasilka Sancin. We hope that an academic network will be able to contribute to the expansion and strengthening of this initiative, which has already been a great success when aimed at students. Perhaps it would also be useful to have seminars or training modules on conciliation and arbitration for future users, diplomats and jurists.

Can we go further without stepping out of our role as "*honest intermediary*"? One can imagine regular contacts with other OSCE bodies such as the Parliamentary Assembly or the Office for Democratic Institutions and Human Rights. We are constrained by the legal framework of the Convention, but the Court could take on extra-conventional functions, in the advisory field, for example, as has sometimes been suggested. In this sense, the success of the Venice Commission for Democracy through Law, an open agreement of the Council of Europe, is quite remarkable and synergies could be found.

To go further would require the Stockholm Convention to be reopened, which does not seem appropriate in a period as uncertain as the one we are going through. At the very most, we can imagine an additional protocol to go beyond the inter-state logic of thirty years ago and take into account the new transnational issues involving companies or civil society players.

I hope that other ideas will emerge on the occasion of this thirtieth anniversary, far from any self-congratulation. Bringing together the members of the Court to benefit from their very varied and rich professional experience would be excellent, but the indispensable revival, the "*reset"* of the Stockholm Convention can only come from the States.

As for us, we must keep the flame of the peaceful settlement of disputes alive with conviction, resolution, and determination. It is when the very foundations of law and peace are threatened that we must safeguard the instruments that guarantee international legality. While the Stockholm Convention may have lain dormant for thirty years, it must now be used to the full, wherever possible and necessary. As Léon Bourgeois said in uncertain times, " *Peace is the duration of law."*