

## AN INTERNATIONAL MARITIME AND AERONAUTIC LAW COURT

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1. In 1934 the French university professor de la Pradelle presented to the 38th conference of the "International Law Association" a draft for an international civil lawcourt 1) He was not the first to advocate such an institution; the "Union interparlementaire" 2), the Hungarian branch of the I.L.A. 3), the Polish counsellor Rundstein 4), the well-known Greek jurist Seferiades 5) and others had already raised similar voices; and at the meeting where the above mentioned project was discussed, the late secretary to the international court at the Hague Hammarskjöld said that the experience acquired in his daily work showed him that that world was really in want of an international jurisdiction for private affairs 6).

2. Notwithstanding much sympathy for the idea of an international civil lawcourt, as such, de la Pradelle's draft also met with objections; among other things with regard to the cases under the competency of the court 7).

3. De la Pradelle aimed at a court for "all civil and commercial litigations".

This would have been too heavy a task to start with.

In many instances it is very difficult nowadays to state what international private law prescribes for a certain special case. Sometimes it is only possible to ascertain that there is no common or preponderant or average rule, but merely a controversy between two or more opinions none of which can be taken on reasonable grounds as a universal norm or from which an international resultant can be deduced. Then the court would be compelled to impose a decision according to its own personal insight.

This does not point to a fundamental difficulty. Juridical brain-work is able to limit the choice between some possibilities and bridles dangerous passions; but the final act of judicial

administration has nearly always a subjective side and its outcome depends upon the innate sense of justice of the judge. Nevertheless this circumstance does not deprive his task of its beneficial influence, if he is not only a learned, but also an upright and a wise man 8). With all this the judge remains able to push legal development on the whole in an objective and plausible direction, if the inner moral excellence of his decisions meets with general credit to his words. A national judge mostly has such credit through a tradition which his newborn international colleague must still try to achieve. Moreover he acts in a more closely restricted and more closely knit legal circle.

Therefore it seems advisable not to risk a too strained trial of strength for an international private lawcourt and to limit its competency at the beginning to a province of law, where there is already a certain natural impulse towards legal unity. Otherwise it is to be feared that it will easily lose a good deal of its reputation through a decision, which may be considered somewhat arbitrary and this would undermine the general reliance on its judgments. This would be detrimental to the benefit of its work.

This objection weighs most heavily in the legal sphere of personal life and real property. It can easily be understood that as soon as he caught sight of De la Pradelles draft, the Hungarian Lawyer De Auer proposed an amendment to except "questions of personal status" and some others. On the other hand there are maritime law with its many divergencies and nevertheless its everlasting tendency towards uniformity, and also aeronautic law of which a paper delivered in 1946 to the Paris Conference of the Citeja by the lawyer Charlier said that during a discussion in 1939 many delegates recommended "un tribunal aérien international".

So it seems wise to start on a limited scale and to reduce De la Pradelles conception to an international maritime (and aeronautic) court.

4. There was still another important objection raised concer-



ning the competency of the proposed court. It affected the nature of private international law 9).

There is one thing which seems to be obvious: you can submit questions to the decision of an international lawcourt, which arise from different interpretations of a rule intentionally drawn up for the sake of unification as a result of previous mutual understanding as for instance of an article of a convention or of the "York-Antwerp-Rules" or of a standard charter or something else of that kind. Then the situation is thus: First there has been an International legislation for the wording of the rule that governs the case; and now the International judge is instructed: "Do justice while taking this rule as a basis; give it for this case the finishing touch".

But is it also possible to go further and to assign to an international court the task of deciding on a question if such an international legislation should not have preceded?

De la Pradelle replied in the affirmative. In his draft he inserted an article 11 stating that the international judge, whom he had in view, had to apply eventually above all the law that was equally referred to by the laws of the states in question, if there was such a law; otherwise he had to take as his line of conduct "the general principles for the solution of the conflict of laws".

Thereupon the Austrian lawyer Pasching and others said:- "Such principles do not exist; so it would usually be impossible for the court to give a decision". This view is often upheld. Then the reasoning is something like this: If you look around without any prejudice, you can easily ascertain that in the province of private law each state, apart from treaties, upholds its undiminished right of sovereignty. It reserves to itself the right to regulate cases with an international aspect according to its own best convenience. It also recognizes the right of other states to do the same, each for itself. In the sphere of private law states do not protest to each other against any rules which they are drawing up for themselves and which they apply. That part of civil law which contains the rules for international cases is



often called private international law, but the name is a misleading one because this law is not international but national, internal law. It does not matter how it is shaped; if its rules refer to foreign law systems and if they are therefore so-called conflict-rules, it remains nevertheless national law. There is American, French, Dutch, Belgian, Luxembourg and other national private international law. If some law systems have a similar rule, it may have a different appearance, but in reality there are in such a case only a large number of similar rules and each country can go its separate way at any moment it likes to do so.

In this line of thought the starting point in an international civil case for a national judicial magistrate is his own national law. From the contents of this law he reads whether perhaps he has to build up his judgment on the ground of a foreign law system.

But as regards to an international judge? What has he to do if there is no treaty or such a regulation for him to stand on? Then he has no starting point at all. So it is impossible to charge an international law court with the solution of an international problem before there is a treaty or another supernatural constructed rule. First there must be a treaty which brings in some way or another the substantive law which is necessary for the decision, then you can entrust a judge with its application and interpretation, but you cannot first install a judge and then leave it to him to proceed. Referring to "general principles" does not alter this situation. This is nothing else but an empty phrase. You must first give an international judge a law to apply; as long as this does not exist, all efforts are in vain. "It would be", the French University Professor Noboyet said, "like sending an artillery to battle without munition" 10), and there are many jurists in countries all over the world who share his opinion.

The weakness of this thesis can be experimentally demonstrated. More than once the international court at The Hague gave civil decisions in the course of its work apart from any treaty and the mixed arbitration courts after the first world war did the same



thing. They did not stop their work with a non liquet. Even without being able to take as a starting point a special national law because they were international and as such they were not attached to any national sphere, they nevertheless came to a conclusion. This means that they started from a system of their own, from an actually international private law which they showed by their attitude to take as really being in existence. It might be vague and difficult to trace, but it was an essentiality.

A telling example is the judgment in the case of the Serbian and Brazilian loans of 1929 (11). In that instance Noboyet admitted that the problem at stake was a rather thorny one ("très délicate" 12). In point of fact it was no more thorny than other complicated questions. Only for Noboyet and his followers it was especially delicate because it did not fit in with their axiom.

So experience shows that here De la Pradelle was right. There is no need for the task of an international maritime (and aeronautic) court to be limited to the interpretation of treaties and similar rules. It is possible to charge it with the decision on other litigations as well.

5. If this is actually done, the possibility becomes all the larger that the court will have to express itself about questions on which the states did not yet come to any deliberate harmony. Then the finally binding word which they did not yet speak themselves will be left to be spoken by the court in a special and possibly unforeseen case. Statesmen with a sense of responsibility will hesitate to compel their subjects to accept that judicial word as decisive. So in the beginning the court had better be optional only, but not compulsory; that is to say that it will only be permitted to go into an issue if proof is given of a competence giving agreement between the litigating parties.

A so constructed lawcourt will be a kind of arbitrator. With the idea that such an agreement for existing and future disputes is binding upon the contracting parties and that a subsequent award is enforceable in the national states, the world has already

grown familiar since the Geneva Conventions of 1923 and 1927. In such an arbitral form an international maritime court will more readily be accepted because then the statesmen know that they are not plunging into dangerous adventures. Only its official and permanent character will be new. This character introduces the possibility of the benefit of a larger virtual authority of its decisions and so of the growth to a standing which in a distant future will enable to change the facultative access into an imperative one. New may also become the possibility of an appeal from the national judge to the international one if voluntarily accepted by the litigating parties and sanctioned by the states.

6. Apart from its main function another useful one can be inserted into the court's charter at the very outset. The reason for its creation chiefly lies in the hope of more legal uniformity. This leads to the idea of a "pourvoi dans l'intérêt du droit", to which during the deliberations upon De la Pradelles project Hammarskjöld already referred, though in a somewhat different connection.

7. In the line of the optional character of the court lies abstention from precedential authority of its judgments. Its importance must depend upon the moral and scientific reputation which it gains. For the effective influence of a court in high esteem precedential authority seems to be superfluous or even harmful in so far as it may be a hindrance towards correction or adaptation. A court in low esteem will turn out to be a failure anyhow.

8. So I have in mind an international civil lawcourt for maritime and aeronautic affairs for the interpretation of treaties and of other world statutory regulations as well. These affairs can be submitted by an introductory action of one of the parties (a writ or a petition) after an agreement for administration of justice; then its decision is binding upon the litigating parties and can be enforced in the states which adhere to the court's conventional charter through the intermediary of a national judicial



authority examining the authenticity of the copy of the judgment to be stamped with the executory formula. Cases can also be submitted to the court through a redress filed by some national public functionary (e.g. a Procurator-general) against a national judgment which is final between parties themselves and no more open to any normal remedy. Its decisions should have no binding authority for national judges or for the court itself.

9. If ever it comes to such an institution there will be other problems to solve: the appointment of its members, its residence, the languages, the procedure, the safeguarding measures, the compulsory measures with regard to the hearing of witnesses, experts, etc., its financial basis and so on; but they are of secondary importance and cannot be dealt with in a paper of small size like the present one.

10. What benefit can be expected from the activity of such a court is a matter for a too lengthy speculation if considered in all its details. Only a few words on this aspect of the problem: As it administers justice from case to case, the court is confronted with different questions in a clear and concrete form. While giving its judgments it builds up a series of decisions from which finally a general rule can be deduced. Thus it will serve as a leader on the way towards legal concordance. First in its own maritime and aeronautic field and between a limited number of more or less homocultural nations; and perhaps in the long run when its position is firmly settled and its competency cautiously can be expanded, in other legal provinces and ultimately even in the entire broad territory of civil law in the whole world.

For this prospect it seems worth while to give it a trial.

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1. "Report" of the thirty-eighth conference held at Budapest, p.p. 71-75.
2. "Annuaire" 1913, p.43.
3. "Report" p.71.
4. "Recueil des cours de l'Académie de Droit International", 23 (1928, III) p.381-382.
5. "Recueil des cours de l'Académie de Droit International", 51 (1935, I) p.56.
6. "Report", p.96.
7. Cf. with this paper my somewhat more elaborate "Lecture delivered to the Anglo-Netherlands Society" on June 6th 1947 in Lloyd's, Leadenhallstreet, London (ed. Victoria-street 3, London, W.I.)
8. Further reference may be made to the beautiful introductory volume which Scholten composed for Asser's Handleiding tot de beoefening van het Nederlandsch burgerlijk recht"; especially to pp. 173-181.  
As for my own view on the subject, vide "Inleidende colleges", pp. 8-13, 27-34, 36-50.
9. Cf. on this point: "Art. 517d W.v.K." (rectoral discourse delivered on the nature of private international law on the 8th February, 1947, the 372nd anniversary of Leiden University; with French and English summaries).
10. "Recueil des cours de l'Académie de droit international" 40, (1932, II) p.230.
11. "Recueil des arrêts", nos.14 and 15.
12. "Revue de droit international privé", 1929, XXIV, pp. 481.