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AN INTERNATIONAL PRIZE COURT

By AMOS S. HERSHEY

THE extreme desirability, if not the absolute need for an International Prize Court has long been admitted on all sides. After a very thorough study of this question, the Institute of International Law at its Heidelberg session in 1887, adopted a project for the organization and procedure of such a court.1

This need was demonstrated anew during the Russo-Japanese war when Russian prize courts condemned and confiscated a number of neutral cargoes (including the vessels, in a few instances), on wholly insufficient or illegal grounds. It is true that the Russian High Admiralty Court at St. Petersburg reversed most of these decisions, either in whole or in part (e.g., in the cases of the Allanton, the Arabia, the Calchas, and the Knight Commander); but this was only after long delays and repeated protests on the part of Great Britain and the United States.

The Second Peace Conference which met at the Hague on June 15, 1907, had not been in session more than ten days before two projects 2—one German and the other British—for the establishment of an International Prize Court had been submitted to the second sub-committee of the First Commission on Arbitration, presided over by M. Bourgeois. At the first meeting of this committee on June 25, M. Renault (France), Sir Edward Fry (Great Britain), and Professor Kriege (Germany), were appointed as a comité d’ examen to study and report upon these proposals.

The British plan provided that each of the Signatory Powers whose merchant marine surpasses a total of 800,000 tons should appoint a jurist and a substitute judge of recognized competence in questions of maritime international law within three months after the ratification of the agreement. The right of appeal was confined to neutral states and an appeal was only allowed after a national prize court of last instance had given its decision. The president of the court, whose term was limited to one year, was to be chosen in alphabetical order by such powers as had the right to appoint judges.

The German project, which was largely based on the plan suggested by the Institute of International Law referred to above, provided that the court was to consist of five members, two of whom were to be admirals representing the belligerents. The three remaining judges were to be selected from the list of members of the Hague Tribunal of Arbitration in a somewhat complicated manner by three neutral powers, and the court was only to be instituted after the outbreak of war between two or more states. The right of appeal was to belong to neutral and belligerent individuals as well as to neutral states, and might be made from the decision of a national prize court of first instance. The president was to be elected by the court itself from among those of its members who belonged to the Hague Tribunal, and liberal provision was made for the payment of the judges.

The advocates of the German plan claimed that its advantages over the British scheme were at least twofold. In the first place, it provided for a direct appeal from national prize courts of the first instance by injured belligerent and neutral individuals instead of merely by neutral states. Secondly, it created a court ad hoc, composed partly of admirals, in which belligerents would probably place greater confidence than in a permanent body of international jurists.

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1 For the text of this project, see Tableau Général de l’ Institut de Droit Int., pp. 217–219, sections 100–109 of the Reglement International des Prises.

2 The texts of both projects were published in Le Courrier de la Conference, for June 28, 1907.
Theoretically, it might seem very desirable to establish an International Prize Court wholly composed of neutrals, but in practice it seemed wise not to attempt too wide a departure from present methods of adjudication. The transition from purely belligerent to purely neutral prize courts had perhaps better be made gradually.

The partizans of the British project maintained that its advantages were threefold: “First, the court would consist (solely) of expert juris-consults; secondly, it would be established on an eminently neutral basis; thirdly, it would be established in time of peace and be secure from the influences of passions and prejudices so easily and widely excited in time of war.”

The discussions in committee which followed revolved about the following points were put in the form of a series of questions:

1. Should an International Prize Court of Appeal for the adjudication of maritime prizes be instituted?
2. Should the jurisdiction of the court be confined to cases arising between the belligerent state making the capture and the state claiming that its subjects had been injured by capture, or should it extend directly to individuals claiming to have been injured?
3. Should this jurisdiction extend to all matters relating to prizes or merely to captures in which governments or neutral individuals are interested?
4. When shall the role of international jurisdiction begin? Should it commence as soon as the national tribunals of first instance shall have rendered their decision upon the validity of the capture or should it be deferred until a final sentence shall have been obtained in the state of the captor?
5. Should the court be permanent or should it be instituted ad hoc upon the outbreak of war? Other questions (6, 7, and 8) framed by the comité d’examen related to the composition of the court, principles of international law to be applied, and the nature of the proof required in behalf of the claimant.

It was unanimously agreed that an International Prize Court of Appeal was necessary, although Mr. Tsudzuki, the first Japanese delegate, expressed the hope that before such a court be instituted, the Conference would reach an agreement on the codification of rules affecting prize cases.

In answer to the second and third questions, Baron Marshall von Bieberstein and Professor Kriege of Germany urged that the right of appeal should belong to individuals rather than to states, inasmuch as the action of the latter might be influenced by political considerations. Moreover, before championing the cause of its nationals, a state should examine their claims in fact as well as in law—a work which it is often very difficult, if not impossible to accomplish. It would seem preferable that individuals themselves be required to prove the validity of their claims before the International Court. War being a conflict between states and not between individuals, the subjects of belligerent states are entitled to the same protection as are those of neutral states. The majority of the members of the committee seemed to agree with the German attitude on these questions, even Sir Edward Fry failing to advance any arguments in favor of his contention that neutral states alone should have the right of appeal.

In answer to the fourth question the German delegates argued that the appeal should lie from a national court of first instance on the ground that an appeal from the highest national court might lead to friction and loss of respect for the court in case its verdict were quashed. It was also urged that such a procedure would be long and very onerous. But Sir Edward Fry maintained that all national instances should be exhausted before having recourse to the International Court.

Respecting the permanency and composi-
tion of the court, opinions were very much divided. Professor Kriege, although admitting that permanence would give to the court a more stable and judicial aspect, argued that practical considerations were opposed to it. Peace and not war is the ordinary condition of humanity, and why establish a permanent tribunal which during long intervals would have nothing to do? But M. Ruy Barbosa of Brazil observed that permanence was necessary in order to secure good judges. Temporary judges are wanting in experience, impartiality, and independence. He suggested that they might devote their years of peace and enforced leisure to the study of maritime law.

Professors Kriege and de Martens favored the admission of two admirals representing the opposing belligerent powers in order to afford necessary information. They would tend to neutralize each other and the preponderance would in any case be on the side of the jurists selected from the Hague Tribunal. Mr Choate declared in favor of the presence of two admirals acting in a purely advisory capacity.

M. Barbosa was strongly opposed to the British idea of limiting the right of appointment of judges to states having a merchant marine of over 800,000 tons. This, he declared, would be to submit the weak to the justice of the strong and would substitute another principle (adjudication?) for that of arbitration. He suggested a grouping of the smaller states in such a manner that each group might possess the required amount of tonnage.

M. Tcharikoff held the seventh question to be most important and declared that Russia reserved her opinion upon the scheme as a whole until it had been decided what principles of international law should be applied by the court. It was generally agreed that in the absence of conventions, the ordinary rules of international law would serve as a juristic base in the decision of cases. Several delegates expressed the hope that the conference itself would succeed in establishing such rules in addition to those that already existed, and that these might serve as a basis of further development by judicial decision.

In the meantime, the third and fourth commissions of the conference addressed themselves seriously to the work of formulating rules of maritime law; but the task proved to be too great and intricate for their combined wisdom, and the results of their labors seem meagre enough. Beyond certain rules relating to "days of grace," the transformation of merchantmen into warships, the inviolability of mail matter at sea, the exemption of coast fishing vessels, etc., very little has thus far been accomplished in the direction of formulating an authoritative code of maritime law which might serve as a juridical basis for the decisions of an International Prize Court. Especially has there been a total failure to agree upon definitions of contraband and blockade, to prohibit the sinking of neutral merchantmen, and to abolish the right of the capture of private enemy property at sea.

But in spite of these failures, partly through private negotiation and partly as a result of further discussion in committee, a project for the establishment of an International Prize Court was finally agreed upon and submitted to the conference at its sixth plenary session on September 21, 1907. It was presented as a joint proposition from the delegations of Germany, the United States, France, and Great Britain, and was accompanied by a lucid and able report read by M. Renault in the name of the comité d'examen of the second sub-committee of the First Commission on Arbitration.

In submitting this project, M. Renault explained why an International Prize Court was necessary:

"The seizure of a neutral ship implies a real or pretended violation of neutrality. Adjudication seems in this case to be a necessity instead of a concession as in the case of the capture of enemy property. To
whom shall this jurisdiction belong? In fact, it is exercised by the captor.

"Rationally, the captor should play the role of claimant in order to validate the seizure and secure confiscation, whether of the ship or cargo. But it is generally otherwise—the one whose goods have been seized is claimant and he must prove the illegality of the capture.

"In fact, if one goes to the bottom of things, one finds that the prize courts are national tribunals which decide international questions. They must apply the laws of their country without inquiring whether these laws do or do not conform to international law. That is to say, a state may regulate as it wishes international relations by its own laws or regulations. It is responsible however, to other states for every violation of the principles of the law of nations, whether such violation be the result of a defective legislation or jurisprudence, or of arbitrary acts on the part of the government or its agents."

This report goes on to say that "under such circumstances, one should not be astonished that the decisions of prize courts have often given rise to well-founded complaints." If the government to which individuals make these complaints is strong, it presents diplomatic claims which may lead to international controversies.

In answer to the important question, "What rules of law shall the new prize court apply?" M. Renault said:

"If the law of maritime warfare were codified, it would be easy to say that the International Prize Court, like the national tribunals, should apply international law, but this is far from being the case. Upon very many points of which some are of great importance, the law of maritime warfare is still uncertain, and each state formulates it in accordance with its own ideas and interests. In spite of the efforts made at the present conference to diminish these uncertainties, it is impossible to conceal the fact that very many uncertainties still remain. Hence there arises a serious difficulty.

"It goes without saying that even in the absence of a formal convention, we may have a customary rule which is recognized as the tacit expression of the will of states. But what will happen if the positive law, written or customary, is silent? The solution indicated by strict principles of judicial reasoning do not appear doubtful. In default of an international regulation firmly established, international adjudication will apply the law of the captor.

"It is doubtless easy to object and say that we shall thus have a law which is very changeable, often very arbitrary and even crude, and that certain belligerents will abuse the latitude left them by the positive law. This will be a reason for hastening its codification in order to get rid of the gaps and uncertainties of which complaint is made.

"Nevertheless, after ripe reflection, we believe that we should propose a solution which is doubtless bold, but of a nature seriously to ameliorate the practice of international law. 'If rules generally recognized do not exist, the court will decide in accordance with the principles of justice and equity.' It will thus be called upon to make law and to take account of other principles than those applied by the national prize courts whose decisions are challenged before the International Court. We have the confidence that the magistrates chosen by the Powers will realize their high mission, and that they will act with moderation and firmness. They will modify the practice in the spirit of justice without overthrowing it.

"Let us then accept a court composed of magistrates charged with supplying the deficiencies of positive law until the codification of international law, effected by the governments, simplifies their task."

1 Sec. 2 of Art. VII.
2 For a digest or summary of M. Renault's report, see Le Courier de la Conference for Sept. 10,
Let us now examine the text\(^1\) of the “Project for a Convention for the Establishment of an International Prize Court.”

**Titre I** consists of nine articles, and contains “general provisions” relating to the conditions under which, and the states and individuals by whom, an appeal may be made, and the kind of law which shall be applied by the court.

Art. 3 provides that an appeal may be made to the International Court from the decisions of national tribunals: (1) When these concern the property of neutral Powers or of neutral individuals; (2) When they concern enemy property in cases (a) of merchandise conveyed upon a neutral ship; (b) of an enemy ship captured in the territorial waters of a neutral Power, provided the neutral Power has not made this capture the subject of a diplomatic claim; and (c) in case of a claim founded upon the allegation that the capture has been effected in violation of a provision of a convention in force between the belligerent Power or of a legal regulation issued by the belligerent captor. An appeal against the decision of a national tribunal may be based upon the allegation that this decision is not justified either in fact or in law.\(^2\)

1907. There seems to be a contradiction between the statement that “in default of an international regulation firmly established, International Jurisdiction will apply the law of the captor,” and the assertion that “if rules generally recognized do not exist, the court will decide in accordance with the general principles of justice and equity.” They may perhaps be reconciled by a comparison with Sections 4 and 5 of Art. VII of the Convention. Secs. 4 and 5 of Art. VII read as follows: “If, in conformity with Sec. 25 of Art. III, recourse is founded upon a violation of a legal provision ordained by the belligerent captor, the court shall apply this provision. “The court cannot take into consideration the defects in the procedure enacted by the legislation of its belligerent captor in cases in which it is of the opinion that the consequences would be contrary to justice and equity.”

Art. 4 provides that the right of appeal may be exercised under prescribed conditions: (1) By a neutral Power; (2) by a neutral individual; (3) by an individual dependent upon an enemy Power.

Art. 6 declares that the right of jurisdiction of national tribunals cannot be exercised in more than two instances. “The legislation of the belligerent captor shall determine whether appeal is open after a decision has been given by a Court of Appeal or the Supreme Court. In case the national tribunals have failed to give a final decision within two years from the date of capture, the Court may be directly seized of the case.”

Art. 7 provides that in the absence of conventions or national legislation, the court shall apply the rules of international law. If generally recognized rules do not exist, the Court shall decide in accordance with the general principles of justice and equity.” Justice and equity shall even be applied in cases where the rules of procedure enacted by the belligerent captor is defective.

According to Art. 9, “the Signatory Powers agree to submit in good faith to the decisions of the International Prize Court and to execute them with as little delay as possible.”

**Titre II** deals with the organization of the court in seventeen articles. The Signatory Powers agree within six months after the date of ratification of the Convention, to appoint judges and substitutes for these judges who shall be “juris-consults of recognized competence in questions of international maritime law.” The term of appointment for both classes is for six years and they may be reappointed. The judges are equal and enjoy diplomatic privileges, but shall rank in accordance with the dates

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\(^1\) See the *Courier de la Conference* for Sept. 22, Sept. 24, and Oct. 2, 1907.

\(^2\) It thus appears that the right of appeal of a belligerent is limited, whereas that of a neutral is unlimited. As M. Renault remarks, a belligerent can never ground an appeal on a “violation of a rule of customary law or of a general principle of the law of nations.”
at which their appointments are notified to
the Administrative Council at The Hague.
In case this date is the same for several
judges, seniority of age shall determine
precedence. The titular judges shall take
precedence over the substitutes. (Arts.
10–14.)

The court shall consist of fifteen judges of
whom nine shall constitute a quorum. If a
judge is absent, he shall be replaced by his
substitute. Art. 15 provides that the fol-
lowing eight Great Powers shall always be
ettitled to a seat in the Tribunal: Germany,
the United States, Austria-Hungary, France,
Great Britain, Italy, Japan, and Russia.
"The judges and substitutes shall be ap-
pointed by the other Powers in rotation in
accordance with the list annexed to the
present Convention. Their functions may
be exercised by the same person. The same
judge may be appointed by several of the
said Powers."

"If a belligerent Power, according to the
system of rotation, has no judge sitting in
the court, it may require that the judge
which it has appointed shall participate in
the trial of all cases arising out of the war.
In this case it shall be decided by lot which
of the judges whose turn it is to sit shall
withdraw. But the judge appointed by the
other belligerent shall not be excluded." (Art.
16.)

No one can sit as judge who has in any
way taken part in the decision of the case or
who has been counsel or advocate for one of
the parties in the national courts; and no
judge may act as agent or advocate before
the International Court during his term of
office. (Art. 17.)

Art. 18 embodies in modified form certain
features of the original German project
referred to in the first part of this article.

"The belligerent captor has the right of
appointing a naval officer of high rank who
shall sit in the character of an assessor with
advisory functions. The same right belongs
to the neutral Power, which is a party to the
litigation or to the Power whose nationals
are parties to the dispute. If, in accordance
with this latter provision, there are several
interested Powers, they should agree, if
necessary by lot, upon the officer to be
appointed.

"Every three years the court shall elect its
president and vice-president by an absolute
majority of votes. After the second ballot
the election shall be by relative majority.
In case of an equal division of votes, the
selection shall be made by lot." (Art. 19.)

Art. 20 provides for the payment of the
judges. They shall receive though the
International Bureau at the Hague one
hundred florins per diem during the exercise
of their functions, together with an in-
demnity for their travelling expenses. As
members of the court they are not to receive
any remuneration from their own govern-
ment or from any other Power. They shall
sit at The Hague and can only sit elsewhere,
unless forced to do so, with the assent of the
belligerent parties. (Art. 21.)

Arts. 22 and 23 relate to the duties of the
Administrative Council and International
Bureau at The Hague, the latter of which
is to keep the archives and serve as a record-
office. The court shall decide which lan-
guage or languages may be used; but "in
all cases, the official language of the national
tribunals which have taken cognizance of the
case, may be used before the court." (Art.
24.)

Titre III deals in twenty-two articles with
the procedure of the court. Most of these
are comparatively unimportant except to
the interested parties and may be omitted
here. The most interesting and important
is perhaps Art. 43, which prescribes that the
deliberations of the court shall be secret,
although "the discussions are public unless
a litigant Power asks for secrecy." (Art. 39.)

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1 This list has unfortunately not as yet been
published in accessible form. The principle of
rotation will be applied to the smaller states, i. e.,
the judge of one state will, at the end of a specified
time, be succeeded by a judge representing another
state.
"All decisions shall be by a majority of the judges present. If an even number of judges is sitting and the votes are equally divided, the vote of the last of the judges in the order of precedence (see Sec. 1 of Art. 12) is not to be counted." (Art. 43.) The verdict of the court must be pronounced in public and be accompanied by a statement of reasons; it must mention the names of the judges who have participated in the decision, and be signed by the president and the clerk of the court. (Arts. 44 and 45.)

Each party defrays the costs of its counsel. The losing party has also to pay the cost of the proceedings; and, in addition, to turn over one-hundredth of the value of the object of litigation as a contribution to the general expenses of the court. A deposit is required as a guarantee from a private individual. (Art. 46.)

The general expenses of the court will be borne by the Signatory Powers in proportion to their participation in its action as contemplated by Article 15 and the annexed list (Art. 47.)

When the court is not in session its functions will be exercised by a committee of three judges designated by the Court. (Art. 48.)

This project was adopted by the Conference on September 12, 1907, by a vote of thirty-seven votes against one, with six abstentions. The only state directly voting in the negative was Brazil who was dissatisfied with her share in the appointment of the judges. The abstaining states were Japan, Russia, Turkey, Siam, San Domingo, and Venezuela. Japan and Russia appear to think that the establishment of an International Prize Court should be preceded by a codification of maritime law—an opinion which seems to be shared by a large and influential section of the British public. Indeed, it is very doubtful whether public opinion in England, which is extremely jealous of belligerent rights and British naval supremacy, will ever permit the ratification of the Convention.

Ten Powers—China, Chile, Columbia, Cuba, Equador, Guatamela, Haiti, Persia, San Salvador, and Uruguay—entered reservations concerning Article 15, which provides for the nomination of judges and a scheme of rotation for the smaller states.

It will thus be seen that this project lacks that unanimity or even general consensus which is supposed to be necessary (or at least desirable) in support of principles or usages of international law. Two important Powers—Japan and Russia—have withheld their assent, and a considerable number of the smaller states seriously object to the way in which the court is constituted. It is doubtful whether the British House of Lords will consent to enact the legislation which is needed to carry the Convention into effect, or whether the American Senate can be induced to ratify it. Whatever our prepossessions in favor of such a court may be, the fact must be faced that the majority of its members will be jurists who have been trained in the continental school of international jurisprudence, and that they are not likely to treat Anglo-American views and decisions on maritime law with that respect and veneration which we have been taught to think they deserve.

BLOOMINGTON, IND., October, 1907.

1 See, e.g. letter of Professor Holland to the London Times, reprinted in the Courier de la Conference on Sept. 24, 1907; editorial entitled "Pas de code naval, pas de Cour des Prises" in the Courier for Sept. 7, 1907; a very remarkable editorial in the London Times for Sept. 30, 1907, and editorial in the London Spectator for Oct. 5, 1907.