Ladies and Gentlemen,

1. When I received the kind invitation of your society for a lecture I felt somewhat embarrassed. Not only on account of the language which should not be my dear and beautiful mother tongue but a foreign one which must be equally dear and melodious to you; a language to which I shall certainly do violence beyond my will for which involuntary sins I beg your pardon in anticipation. But I felt also somewhat confused on account of the subject. I am a jurist and so I had to take a legal subject. Now as a rule juridical tales are not famous for their amusing character and I fear I shall have to be a little bit dry. I must apologize for that, but perhaps I may remind you of still another side of the matter. Law is a normative view of social life; it is more or less a business of all of us and so it deserves our common interest.

I hope you will allow me to appeal to this circumstance while asking your attention for my topic.

2. There is an old little rhyme stating that things in this world would be better if only we had one religion, one currency and one law. It is a German rhyme (1) and perhaps to some of you this origin does not increase its credibility. But leaving aside currency and religion many people will admit that more legal similarity would strongly contribute to an improvement of social conditions on this earth. If this is really so, it is worth while to take up everything that can forward its cause. This, I hope, may be able to justify my choice: an international maritime law court.

3. There are some parts of the law which by their subject are more closely connected than others to personal or local life; e.g. family law and matrimonial law and the law of real property. On account of this they have a more private or national character and this is a hindrance towards unification. If uniform rules for marriages are proposed which differ from a nation's own ones it is more readily inclined to reject them than if a unification of the law of contracts is at stake.

(1) So wir hatten einen Glauben
Gott und Drechsigkeit vor Augen,
Ein Khl, Gewicht, mass, Münz und Gelt,
So stund' es wohl in dieser Welt.
The Swiss, while preparing their uniform civil code, first put in hand their code of obligations and only some quarter of a century afterwards the rest (2). To the most promising provinces of law with regard to uniformity belongs maritime law.

"Admiralty law", the recent American author Robinson says (3), "is a body of concepts, international in character like international law itself"; and there are more such utterances. A good hundred years ago the great Pardessus attributed to the laws of maritime commerce "a character of universality" ("un caractère d'universalité (4) and he spoke highly of "the character of uniformity which is inherent in them" ("le caractère d'uniformité qui leur est essentiel" (5); "qui est de leur essence"); etc.

This does not alter the fact that sealawsystems of several different peoples in course of time have diverged on many points. The same Robinson, whom I mentioned, puts at the initial words of his book which I quoted this appealing note: "Variances in admiralty law exist notwithstanding this common background. These variances ships meet as they go to their rounds and it may happen that if the same maritime facts are litigated in various forums the juristic results will be widely different in the several forums" (6). And so it is indeed.

Anyhow there is a certain promise in maritime law if you are setting yourself to weld it together to one well balanced entity. The attempts to effect uniformity have been numerous in this sphere. I call to mind several international conventions: On maritime liens and mortgages, on the limitation of liability of ship owners, on bills of lading (the so-called "Hague Rules"), on collisions, on salvage; the rules relating to the road at sea; the "York Antwerp Rules" on general average which are referred to in nearly all contracts for the carriage of goods by sea and charters parties; many standardised charterforms and also a few standardised bill-of-ladingforms. All this attests to a certain desire for maritime harmony.

4. Nevertheless the actual situation in matters of maritime law is still far from representing an international legal unity; there still remains much to be done before this end will be reached.

In the first place the constructions with a tendency to uniformity do not embrace the whole of maritime law.

(2) 1874: "De grondwet brengt tot de wetgevende bevoegdheid van den Bond "toutes les matières du droit se rapportant au commerce et aux transacties mobilières (droit des obligations, y compris le droit commercial et le droit de change)" (art. 54).

1881: "Code fédéral des obligations" (14 Juni), herzien in 1911 en 1936; in werking getreden 1 Januari 1883. ≠

(3) "Handbook of admiralty law" (1939) blz. 1.
(4) "Collection de lois maritimes antérieures au XVIIIème siècle" (1829), 1, blz. L.
(5) T.a.p., blz. 2.
(6) T.a.p., blz. 1.
≠ 1898: De grondwet breidt de federaal wetgevende bevoegdheid uit tot het geheel van het burgerlijk recht.

1907: "Code civil Suisse" (personenrecht, familierecht, erfrecht, zakenrecht); in werking op 1 Januari 1912.
Several parts of it do not fall under those heads as f.i. the ship’s nationality and (some small details excepted) labour questions.

In the second place the principal treaties do not contain more than "certain rules" ("certaines règles") as they say themselves. They leave certain particulars unsettled and there are others which they only regulate in part.

E.g., one of the most generally accepted treaties is the convention on collisions of 1910. England made its consents part of its law by means of the "Maritime conventions act 1911" and Holland did the same in the articles 534 and following of its commercial code ("Wetboek van koophandel"). It regulates many important matters but not all of them; not f.i. the judicial competence, nor the question which person is responsible for the damage caused by a ship, neither whether a ship which through no fault of its own runs into another vessel has to stand for the fault of its tugboat.

Sometimes a treaty regulates a question only in part. According to the bill-of-lading-convention of 1924 the liability of a carrier for any loss of damage to goods is limited to a fixed gold value per package or unit, but states in which the pound sterling is not a monetary unit are allowed to translate this sum into terms of their own monetary system in round figures. Now it has been fixed in Belgium at F 17500, in France at F 8000, in the Scandinavian countries at Kr 1800, in Italy at Lit 5000, and these amounts nowadays diverge a good deal.

In the third place the success of the unifying treaties has been far from complete so that there is still much left to be desired with regard to their geographical sphere of action. Even a widely accepted convention as the collision treaty of 1910 has not yet been signed by America.

5. And even where legal uniformity has been confirmed by treaty, it sometimes only exists in appearance.

I take an example from the book which A. van Oever (a son of the Leiden Romanist J.C. van Oever) in 1938 wrote on the uniformizing effect of the Brussels treaty on collisions ("de uniformisende werking van het Brusselse aanvaringswetgeving"). This by the way is one of the Dutch legal books with which to my regret jurists in other than Dutch speaking countries are too little acquainted because too few of them take the trouble to learn the Dutch language in order to be able to enter into the garden of Dutch legal litterature where so many remarkable flowers are growing. Van Oever's book made an investigation as to how far that treaty actually realised the uniformity for which it was shaped. It is a fine work; clear, thorough, lively, agreeably readable. His conclusions is that the convention certainly here and there brought about something good although it failed on other points.

(7) A.W. Knauth, "On ocean bills of lading", blz. 70-73
(8) Art. 423 van het wetboek van 1940.
Amongst other things one of the failures was the principal rule laid down in art. 3 which runs as follows: "If the collision is caused by the fault of one of the vessels the damage must be made good by the ship which committed same" ("si l'abordage est causé par la faute de l'un des navires, la réparation des dommages incombe à celui qui l'a commise"). Consequently indemnity is due if a ship has been at fault ("faute"). This conception has been translated in the Dutch code by "schuld" or "fout" of the ship.

The English "Maritime conventions act" also speaks of the "fault of a vessel" although it did not copy art. 3 of the treaty because this rule was deemed to be such a matter of course that it was superfluous to do so.

Also the most recent maritime lawbook, the Italian of 1942 in its art. 485 awards an indemnity to the charge of the "nave in colpa". Etc.

So the regulation of the liability for a collision was founded everywhere on the same notion: "fault of a vessel"; but Van Oven showed that in different countries it was taken in a different way and in consequence the results of the same art. 3 were different.

The simplest way to understand what the question is, is to look at the judgement of the Rotterdam tribunal ("rechtbank") of the 12th of April 1929 in the case of the "Salomon" (9). This ship was sailing on the river Lek when suddenly the helmsman became indisposed and fainted. There had not been the slightest previous indication of the possibility of this occurrence. The helmsman of course let the steering apparatus slip, the Salomon got out of control and before anybody could prevent it she ran right into the "Morgenster" and caused considerable damage to this ship. So the owner of the "Morgenster" sued the managing owner of the "Salomon" for damages but the defendant replied that he was not responsible because his ship was not at fault. For, he said, things have turn out for you very unfortunately and I am very sorry but that is no reason why I should have to pay for your damage because nobody at my side can be blamed for what happened. Thereupon the plaintiff said: "I do not deny what you allege as fact, but it is not necessary that a man is to blame for a ship is at fault in the legal meaning if it sails wrongly in consequence of a cause operating on board the vessel, even if you cannot reproach anybody with anything". This view was also held by the tribunal and the claim was allowed. Lateron the "High Court" ("Hooge Raad") shared the same opinion when a collision was caused by a latent defect (the rudder-head broke); this happened in the case of the "Rubens" off the 5th of January 1940 (10).

A similar question was submitted to the decision of an English judge in 1923; in this case the steering chain of the "Merryweather" broke and then this ship ran into the "Zenobia" (11). The claim of the "Zenobia"'s owner for damages was likewise awarded; but the judge took expressly into consideration that the "Merryweather"'s

(9) N.J. 1930, blz. 1611.
(10) N.J. 1940, no. 340.
(11) Van Oven, t.a.p., blz. 16.
defect was not a latent one and could have been discovered if due attention had been paid to her seaworthiness. In other words he required for a ship to be at fault the culpability of someone who is in definite relation to it. In the cases of the "Salomon" and the "Rubenxo" he would have decided differently to his Dutch colleagues and he would have dismissed the claims.

So van oven found there was a Dutch system and an English one. They do not always lead to different results; usually not, because the majority of defects is not latent and because there are more normal than abnormal men. But nevertheless they sometimes do although on this point in the Netherlands and in England the same law is said to prevail. And this is nog yet the end of it.

If the English view is taken the question arises which relation the person who has to be blamed must have with the ship so that his fault has to be taken as the vessel's fault. Must he belong to its crew; or will it be sufficient if he belongs to the servants of the shipping company on board or on shore; or will it also be enough if he belongs to the servants of the dock company that examined the ship before it sailed? Van oven when going further into these details found some other divergences although he believed that there was a certain amount of mutual approach between the following of the English doctrine.

So you see there is here one internationally adopted rule with nevertheless nationally divergent applications; and this is nog the only specimen.

6. Therefore the unification of maritime law is still far from being complete.

Now in order to improve this situation different methods can be undertaken:

You can sit down round the conference table at a congress and discuss certain rules to be laid down in a convention which the adhering countries adopt as their own law.

These rules can be of different types. You can try to draw rules for direct application as that art. 3 of the collision convention which I just referred to.

But you can also take another way and make an agreement concerning a so-called conflict-of-law-rule. Then the starting-point is that in England, Holland and elsewhere there is and remains a dissimilarity of law; but you agree that in one case English law will be applicable and Dutch law in another one and so on so that there will not be a conflict and the diversity of laws will not do any harm. This method does not lead to uniformity, but it brings into existence a harmony that goes away with the difficulties which may arise out of divergent laws existing next to one another almost as well as the unification system. Art. 1 of a convention of 1920 e.g. states that the validity of a ship's mortgage depends upon the law of the flag. If therefore England and the Netherlands had ratified it (but up to now none of them has done so) this would not bring uniformity; but the English "mortgage" and
the Dutch "scheepshypotheek" (the corresponding security and priority giving absolute right on a ship) would never hurt each other.

If you are acting according to this conception, I mean if you are looking for uniform rules or for common conflict rules, you are proceeding as a kind of international legislator.

But the question is, whether it would not be a good thing next to this procedure to act at the same time as a justiciable with an international judge; i.e., if it is recommendable to set up an international maritime lawcourt to adjudicate upon the difficulties arising out of divergencies in maritime law so that there may come an international judicial body whose jurisprudence may tend to force in a special direction.

Before a reply in the affirmative can be given with regard to this problem, several aspects of it have to be taken into consideration; as:

a. What task can be consigned to such a court?
b. How will the competence of such a court be determined?
c. How will the different cases have to be submitted to the jurisdiction of the court?
d. What authorities will be given to its judgments?
e. What benefit can be expected from its activity?

There will be other problems to solve if ever it comes to the establishment of such a court: the appointment of its members, its residence, the languages, the procedure, the conservatorian measures, the compulsory measures with regard to the hearing of witnesses, experts etc., its financial basis a.s.o.; but they are, as I think, of secondary importance and so I leave them aside for the moment, because otherwise I should overload my programme and I run the risk to entangle you in such a confusing mass of questions that you would get the sensation of Faust's disciple as if a millstone were turning in your poor heads; and I am not here to try to drive you mad.

7. So, first of all, the courts' task has to be examined. There is one thing which seems to be obvious: you can submit questions to its decision which arise from different interpretations of a rule, drawn up for the sake of the unification of maritime law as a result of mutual deliberation, as f.i., of an article of a convention or of one of the "York-Antwerp-rules" or of a standard charter or something else of that kind. E.g., you can raise the question which meaning is the right one of "fault of a ship" in article 3 of the collision treaty. As far as I know there is nobody who doubts that such a task can be allotted to an international court with success. Then the situation is thus: first there has been an international legislator for the wording of the rule that governs the case; and now the international judge is told: "Do justice while taking this rule as a basis; give it for this case the finishing touch".
In 1934 the French university professor de la Pradelle presented to the "International Law Association" a draft for an international civil lawcourt (12) and in its art. 8 he brought to its sphere of activity among other things all litigations on the application of international treaties on private law. Nobody feared that this could be done; and 2 years before even his colleague Niboyet had admitted this explicitly (13).

I say "even Niboyet"; because Niboyet actually denied another possibility; and now I have first to make some remarks on this subject. In that same art. 8 of his project de la Pradelle changed the international civil court which he had in view with yet another task besides the interpretation of international rules previously shaped by another instance, viz. with the examination of all disputes ("litiges") of a private or commercial law nature between some specified parties; even when there was as yet no treaty applicable to the case in point and when no international legislator should have preceded the court. E.g.: An English vessel is sold under execution at Rotterdam; the owner entered into debts in England, Holland, America an other countries; how must the proceeds be distributed if they are not enough to satisfy all creditors according to the order prescribed by English law, by Dutch law, by American law or in still another way? Neither England, nor Holland, nor America has ratified the priorities convention of 1926.

This question has been submitted to the decision of several national lawcourts and had been decided upon by them in different ways. Sometimes the decision was in favour of the law of the place of the origin of the debt, sometimes in favour of that of the place where the proceeds had to be distributed, sometimes in favour of the law of the flag of the ship, sometimes in favour of yet another law (14). In 1935 the wellknown Parisian lawyer Dor wrote on this subject: (15) "The conflicts of law on the classification of mortgages and priorities on ships have been solved by the different jurisdictions, and within the frontiers of even the same country by the different judicial bodies, in the most discordant way" ("Les conflits de lois sur le classement des hypothèses et privilèges sur navires sont résolus par les diverses jurisprudences et à l'intérieur de chaque pays même, par les diverses juridictions, de la façon la plus discordante"). Is it possible to assign the task of deciding on such a question to an international lawcourt, such as de la Pradelle proposed?

(12) "Report on the thirty-eighth conference held at Budapest", blz. 71-75.
(13) "Nous n'entrevoyons le rôle utile de la justice internationales pour les conflits de lois que dans des cas très limités et qui envalent la peine, tels que l'interprétations des traités, qui doit être exacte et loyale de part et d'autre, ou encore dans certaines contestations entre des particuliers et des États, mais à des conditions très nettement en très strictement déterminées, constituant une exception"; "Hoeuil des cours de l'académie de droit international" 1932 (II), deel 40 bl. 230.
(14) "Het nieuwe zaarrecht", 3e druk, blz. 105-110.
(15) "Revue de droit maritème comparé" 1935 (32), blz. 252.
(16) "Art. 517d W.v.K." nos. 6, 7, 8, 10.
There are many jurists who deny that this can be done. Their reasoning is somewhat thus (16): "If you look around without any prejudice you can easily ascertain that in the province of private law each state upholds its undiminished right of sovereignty. It reserves to itself the right to regulate cases with an international aspect according to its own best insight and convenience and it asserts hereby its right to take into consideration all economic, political, religious and other interests which it seems suitable. It also recognises the right of other states to do the same, each for itself. This appears from the fact, that 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 such 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 lawsystems and if they are therefore so-called conflict-rules, it remains nevertheless national law. Each nationale lawsystem has such conflict rules, the Dutch as well as the English. So, they say, there is only English, French, Dutch and other national private international law. Sometimes it has a different appearance. If there is a rule that prescribes that a timecharter with regard to a Dutch ship is governed by certain articles of the Dutch code and a timecharter with regard to an English vessel by English law, a.s.o., it seems at first sight that this rule is part of a higher, supra-national law which allocates the Dutch, the English and other national lawsystems their places in the world next to one another, but this is a mere appearance; such a rule belongs to the Dutch, the English or another national system as a prescription for the Dutch, the English and other national judges. The Dutch, the English and other lawsystems can be similar or different. If they are similar it looks as if there is one international rule prevailing everywhere; but that is not true; in reality there are only a large number of similar rules and each country can go its separate way at any moment it seems convenient to it to do so."

The followers of this theory often express their view in the titles of their books. The most recent Dutch book on this subject, a fine and clear little work by my Utrecht colleague van Brakel, is called "Basic rules and principles of Dutch private international law" ("Grondslagen en beginselen van Nederlands internationaal privaatrecht") and one of the most recent English ones calls itself "A textbook of the English conflict of laws" (17).

In this line of thought the starting-point in international civil cases of a national judicial magistrate is his own national private international law; from the contents of which he reads whether perhaps he has to build up his judgment on the ground of a foreign lawsystem.

But now a international judge, what has he to do

(16) "Art. 517d W.v.K., nos 6, 7, 9, 10.
(17) Van Clive Schmitthoff; 1845.
if there is no treaty or such a regulation for him to stand on? Then he has no starting-point at all. When he finds himself confronted with an international case, he is not able to discover which law he has to apply, because there is no rule to test the question. This rule should have been a supernational one but besides treaties and other regulations of that kind there are no such supernational rules, states being sovereign, free from any obligation, free from any rule. So it is impossible to charge an international lawcourt with the solution of an international problem before there is a treaty. 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.

Nioyet says (18): "In a domain as this, which is quite distinct from that of the law of nations, the judges must first be given the means, i.e. a law to apply. As long as this does not exist, all efforts will be in vain. It would be like sending an artillery battery without munitions" ("Dans un domaine comme le notre, bien différent de celui du droit des gens, il faut d'abord donner aux juges des moyens; c'est-à-dire un droit à appliquer. Tant que celui n'existera pas, tous les efforts seront vains. Ce serait envoyer à la bataille une artillerie sans munitions"). The Polish counsellor Rundstein expressed himself in similar terms (19). In his 1934-draft de la Pradelle also inserted an article II, 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" ("les principes généraux de solution du conflit des lois"). Thereupon the Austrian lawyer Paschinger said (20) at the meeting at Budapest where the project was discussed: "Anyhow I do not believe that such principles exist when rules common to the states in question are wanting, it would therefore usually be impossible for the court to give a decision and it would find itself compelled to pronounce a non liquet" ("Je ne crois pourtant pas que de pareils principes généraux existent si même des règles communes aux États intéressés font défaut. La Cour se trouverait donc bien souvent dans l'impossibilité de rendre une décision et serait par conséquent obligée à prononcer un non liquet"). The Italian professor Manassero sang the same tune (21): "In each country the rules for the solutions of the conflicts of the laws have their specially national character: That which comes from the sovereignty and the independence of the states ("in ogni paese le regole di soluzioni dei conflitti delle leggi hanno un carattere specificamente nazionale: ciò che deriva dalla sovranità e dall'indipendenza degli Stati"); So an international court

(18) T.t.s.p., bladz.230
(19) "Recueil des cours de l'académie de droit international" 23 (1928, III)
blz. 422-423.
(20) "Report" t.s.p., blz.95
(21) "Report" t.s.p. " 99-100
can serve “for the uniform interpretation of law” (“per la interpretazione uniforme del diritto”), but for the rest it is first necessary to create “the substantive rules or at least the rules of international private law” (“le norme materiali o almeno le norme di diritto internazionale privato”) for the existence of a “necessary sufficient situation for legitimate and proper administration of international justice” (“condizioni necessarie sufficiente per una legittima e ben intesa amministrazione della giustizia internazionale”).

And there are more such statements (21a).

Was this view to be assented to? During the deliberations in 1934 Peasch’s countryman, the Viennese lawyer Bondi, replied to this question in the negative (22) and I am also myself of opinion that the erroneousness of the thesis of Niboyet and his partners has been experimentally demonstrated (23). More than once the international court at The Hague gave civil decisions beyond 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 came nevertheless to a conclusion; and this means that they started from a system of their own, from an actually international private international law which they showed by their attitude to take as really being in existence. So, in 1929 in the question of the Serbian and Brazilian loan emitted in France the international court had to decide upon the question of the law governing the relations between the parties. There was no treaty and of course the solution could not be found by consulting the Serbian or the Brazilian or the French law because then the question could have been put why this of that law was considered decisive for this purpose; to the international court all these laws originally had the same legal value. The solution could only be found by assuming an international rule indicating the law to be applied; and this is what the court did (24). Its judgments have been discussed by Niboyet in a very clear and fair annotation in the "Revue de droit international privé" of the year 1929 (25) where he admitted that for him and his followers this matter was a rather thorny one "Le problème est, en effet, très délicat", he said in his elegant French; which meant: it does not fit in with my theory.

I will not now enter into the question of the methods for tracing the right rule to be applied; the study of comparative law, I think, will play an important part in them. I only point out that experience shows that there is no need for the task of an international maritime

(21a) "erg., de la Barra en Mercier, "Annuaire de L’Institut de droit international" 1927, XV, blz. 577-580.
(22) "Report", t.a.p., blz. 102
(24) "Recueil des arrêts", mos 14 en 15
(25) Recueil XVII; blz. 481 e.v.
lawcourt being limited to the interpretation of treaties and so on, but that it must be considered possible to charge it with the decision on other litigations as well.

8. Put then the question arises: Why only an international war-time lawcourt? Why not, as de la Pradelle suggested, a lawcourt for "all civil and commercial litigations" ("tous litiges de nature civile et commerciale")? I am inclined to say: because this would go beyond what can possibly be realised at the present moment; although it must remain an ideal for the future.

A few words to explain this opinion. Even if you are ready to take up as your starting point the hypothesis that there actually exists an international private law which binds the different national civil lawsystems together to a harmonious entity, you need not be blind to the fact that nowadays it is often very difficult to state precisely what that private law prescribes for a certain special case. In order to come to a conclusion you have to examine all sorts of opinions expressed in statutes, verdicts, legal books, etc., and see whether you meet with a common or a preponderant rule or with a reasonable average rule; but such a research does not always lead to a properly firm result. Sometimes it is only possible to ascertain that there is a controversy between two or more opinions of which one prevails here, another there, and a third elsewhere without being able to take one of them on reasonable grounds as a universal norm or that you can deduce from them an international resultant. These circumstances of course have greatly contributed to the opinion of M'hovet and others, that there are only national private international lawsystems.

I give you one famous example: In Holland we take it that a man's personal status depends upon his nationality; it depends upon his national law whether he is of age or a minor. This same view prevails on nearly the whole European continent and in many other countries (26), but in England and America (and also elsewhere) the law of the domicile is determinant (27). It may be that in the end both systems may meet. In the Netherlands f.i., we are not blind to the imperfection of the nationality system and with regard to persons with no nationality the law of the domicile was already taken as the decisive factor (28). On the other hand there seems to be in England an inclination towards the nationality system by introducing the conception of a "domicile of origin" with a more enduring character; although it can easily be understood that in America, where millions of people were born in other lands and the material and sentimental ties which bind one to his birthplace are not so strong, there is not so much sympathy with it (29).

(27) Goodrich, "Handbook of the conflict of laws", 2e dr., blz. 28.
(29) Goodrich, t.a.p., blz. 35.
Anyhow up to now there is still a rather sharp controversy on principle and for an international judge the choice must be a very difficult one if he tries to do away as much as possible with the national influences under which he grew up. So, it was not a mere caprice of the Hungarian lawyer de Auer (30) when he proposed in 1934 an amendment to de la Fradelles project to the effect that the court then under discussion should only be competent for litigations "of civil or commercial nature, except questions of personal status and those cases which according to the respective legislature of one of the contracting parties must come before a special court."

It seems to be advisable not to start with too heavy a charge on the court and not to risk too strained a trial of strength. Otherwise it is to be feared that the court will easily lose a good deal of its reputation through a decision which may be considered somewhat arbitrary. This would undermine the general reliance on its decisions and so it would be detrimental to the benefit which its work might contribute to the international legal unity. This objection weighs most heavily in the legal sphere of personal life.

So if an international lawcourt for civil affairs is called into existence, it seems to be wise to start on a limited scale and in a province where there is already a certain natural impulse towards legal unity; and such a province is (as I called to your minds at the beginning of my speech) maritime law; or, if you like to take a somewhat larger scale, maritime and aeronautic law.

If however for this reason the competence of the international court must be restricted for the time being to maritime affairs, the question arises whether it is possible to mark its position in a sufficiently clear and concise manner.

You may try in your scheme to regulate all sorts of details; as how a counterclaim of a non-maritime charter can be moved, where the bounds are between maritime and inland navigation law etc. But then you will soon observe that your scheme grows ever more lengthy and complicated and nevertheless you will most probably find later on that you have overlooked something. So it will be necessary to stop at a short and subtle and pliant indication as f.i. "all admiralty and maritime litigations" just as de la Fradelles only spoke of "tous litiges de nature civile ou commerciale", which is somewhat vague too but notwithstanding this suggests a certain idea. The vagueness is the less inconvenient because in most cases there will not be any doubt (cases on seasing vessels, goods carried by sea, collisions in seaports etc.) And for the rest it does not seem to be a dangerous policy to leave the matter to the court itself; just as de la Fradelles did in his art. 10, stating that "the tribunal will decide upon its own competence" ("le tribunal est juge de sa compétence"). If the words "admiralty and maritime" are taken which have a certain history in Anglosaxon countries with regard to

(30) "Report", t.a.p. blz. 81.
jurisdiction and which also appear in the second section of art. 3 of the American constitution to describe the judicial power of the federal courts, the court will have in case of need a guide in the relative jurisdiction and further in the contents of leading literature on maritime law. And if in the opinion of some people the court extends its competence over a rather wide area this does not matter so much because the restriction of its field of activity is not dictated by a principle but only by considerations of adequacy and safety; and because it is even to be hoped that in the end the international maritime court will grow up to an all-round civil court. Perhaps it will be useful to state explicitly whether its competence extends to maritime insurance because many authors dealing with maritime law exclude it from their considerations whereas others include it and because this part of the law is a rather important and independent one.

Apart from the interpretation of treaties de la Pradelle proposed to restrict the competence of his international civil court to litigations between subjects of the contracting states who have no domicile nor residence in the same state and to litigations between those states themselves or between one of them and a subject of another state. Probably he did so in order to ensure that only litigations with an international factor should be dealt with in the court and so as to rule out lawsuits of a merely national character. But when is a litigation international, when national? Even between subjects of the same country the question can arise whether their dispute has to be settled according to their own law or a foreign one; e.g., if between two Dutchmen there is a difference of opinion with regard to the distribution of the proceeds of an English vessel which is sold under execution. Therefore de la Pradelle's restriction had better not be accepted but be replaced by the simple requirement of internationality. This is rather indefinite but the court itself can elaborate it if it is necessary in case of doubt.

9. Close to these questions there is that how the different cases must be submitted to the jurisdiction of the court.

You can imagine that a claimant brings his action before the court independently of his opponent. The defendant may appear or not; but in any case he will be bound by the verdict. But it can also be imagined that you do not go as far as that and that the court only enters into litigations upon the adjudication to which both parties have previously agreed.

Probably this last idea is the best to start with. If you set out for a compulsory administration of justice the precise description of the court's task becomes of course more important and will give rise to more discussions and this will cause delay in starting. Moreover the states that will have to bring the court into existence will be shyer of accepting it in an
imperative form than in a facultive one. For it will have to express itself about questions on which the states have not yet come to an agreement by means of mutual deliberations. Then the finally binding word which the states themselves did not speak is left to the court to be spoken in an special and possibly unforeseen case. It can easily be understood that leaders of states with a sense of responsibility have scruples about compelling their subjects to take such a word as the highest wisdom. If, e.g., a state still combats the law of the flag for the order of precedence with regard to the distribution of a ship's proceeds, it is comprehensible that it likewise hesitates to compel its justiciables to submit themselves to the decision of an international court that may possibly apply that law. If you wish to set going something of the nature of an international maritime lawcourt you must start cautiously. Therefore in the beginning it had better to be optional, not compulsory, that is to say that the court will only go into an issue which is put before it if proof is given of a competence giving agreement between the litigating parties entered into by them before or after the dispute arose.

The international maritime lawcourt so constructed is a kind of arbitator. In establishing its competence this way you are building on the protocol on arbitration clauses of 1923 which has already been adhered to by many countries (among them: England and Holland). In that protocol the validity was recognised of the agreements for the submission to arbitration of existing and future differences relating to commercial matters or to any other matter capable of settlement by arbitration. This is now an idea with which the world has grown familiar. This basis will be retained. In this form the international maritime court will be more readily accepted, because then the states know that they are not plunging into new, dangerous adventures. Only the official and permanent character of the court is new which introduces the possibility of the benefit of a larger intrinsic authority of its decisions for third parties. New may also become the possibilities of an appeal from the national judge to the international one, voluntarily accepted by the litigating parties and sanctioned by the contracting states. Then you must wait for what will grow out of it. Perhaps from a moral point of view it will become even more difficult to escape from the court's jurisdiction the more its reputation grows and then finally the moment will come to raise the question whether its facultative character must be changed into an imperative one. But that is for the distant future.

But is may be notwithstanding all this advisable at the very outset to insert into the court's charter still another function. The reason for its creation lies in the hope that maritime legal unity will be promoted by its work. That this actually happens is of common and universal interest, so it may be useful in a case where the parties themselves omit to seize the court of their dispute that its decision on it is requested by a national public authority without the
litigating parties being bound by the international judgment. This figure also is not a quite new one; it means the institution of a remedy like the Dutch "cassation for the law's sake" ("cassatie in het belang der wet"); the procurator-general ("procureur-generaal") with the "High-Court" ("Hooge Raad") has the right to attempt it when no more ordinary remedy is open to the parties themselves but if he succeeds this does not alter their position. Other countries have similar institutions.

During the deliberations of 1934 upon de la Pradelle's draft the late secretary to the international court at the Hague Hammerskjöld also referred in a somewhat different connection to the idea of a "pourvoi dans l'intérêt du droit"; he expected a beneficial influence from it especially with regard to the interpretation of treaties but there is no need for such a restriction (31).

So the court in my opinion should be seized in two different ways: a. Through an introductory action of one of the litigating parties based upon an agreement to accept its decision;

b. Through an introductory action of a national public authority appointed by its own government after the parties themselves have stopped their proceedings.

10. Of course the authority of the judgments of the court cannot be the same in both instances.

To start with the first one and to make again a comparison with de la Pradelle's project he proposed that the judgments of his court would have binding and executory force in each of the contracting states (he only thought of bilateral conventions to spread over the world, but this makes no difference here) after an executory formula to be stamped on them by a national functionary. Something of that kind lies at hand, in so far as the court's competence remains attached to an agreement between the parties, it is also in the line of the convention of the 28th. of September 1927 on the execution of arbitral awards that has been ratified by a great many states and by England and the Netherlands among them.

This binding and executory force refers to the parties. The judgments given at the initiative of a national public authority have nothing to do with their rights and duties.

When Hammerskjöld put forward his idea of a "pourvoi dans l'intérêt du droit" he was of opinion that a judgment given should not be binding upon the litigating parties but that in future it should bind the different tribunals ("par la suite obligatoire pour les divers tribunaux"). Perhaps this idea is more attractive to an Englishman, to whom a previous judgment having legal authority for other judges is familiar, than to a Dutchman, because Dutch law is different; although the practical influence of jurisprudence in Holland makes the difference smaller than it may look at first sight. Anyhow it seems better not to follow Hammerskjöld for the same reason for which the compulsory administration of justice has to be provisionally rejected, if two
or more states have not yet succeeded in coming to an agreement about a legal question, you must not too rashly ask them to bind themselves beforehand to the judgment of an unknown international court; perhaps they will be afraid of buying a pig in a poke and be shy of cooperating in the creation of such a court.

Therefore it is better to abstain from precedential authority, when the importance of the court's judgments will depend upon the moral and scientific reputation which it will achieve, if it is highly respected its judgments will inspire confidence although they have no compulsory authority; if not, they will not be of much value. But the latter supposition is better left aside. An unrespected court will turn out to be a failure anyhow.

II. Thus I have in mind an international civil law court for matters (and aeronautical affairs) for the interpretation of treaties and of other written world regulations and for the decision of cases beyond such regulations as well. These affairs can be submitted to it by an introductory action of a party (a writ or a petition) after an agreement for administration of justice; then its judgments are binding upon the litigating parties and can be executed in the adhering states. Cases can also be submitted to it through a redress filed by some national public functionary against a judgment which is final between parties themselves and no more open to any normal revision; then its decisions do not affect the parties. In no case its decisions have binding authority for national judges or the court itself.

What benefit can be expected from the activity of a court so formed? This of course will first of all depend upon the frequency of its being seized; now in the beginning I suppose this will not occur very often; for the courts members their function will at first only be an occasional occupation. I am sorry I cannot hold out the prospect of a new well-paid pleasant career, if you go through the volumes of the "Revue de droit maritime comparé" you only find a comparatively small number of international maritime arbitration; and when niyouel went over 'international arbitral awards in civil affairs', his harvest was "very poor" (Très maigre) (32) but this is no reason to restrain us from the experiment, only a small part of arbitral awards is brought before the public. Then the institution of the court itself may be a stimulus to make use of it. Moreover there have been a good many utterances which testified to a certain desire for an international civil law court on a more or less extensive field. In

(32) "Le rôle de la justice internationale en droit international privé" ("Recueil des cours de l'académie de droit international" 1932, II deel 40) blz. 230.
1913 "the Union parlementaire" expressed itself in favour of it (33). In 1934 the Hungarian branch of the "International Law Association" insisted on the "League of Nations" taking the matter in hands (34). In 1934 Hammerskjöld, whose words in this instance deserve much confidence, said (35): "the experience which I have been able to acquire in my daily work shows me that the world is really in want of an international jurisdiction open to private persons against foreign states and to the subject of one state against the subject of another one". ("L'expérience que j'ai pu acquérir dans mon travail quotidien m'enseigne qu'il y a dans le monde un véritable besoin d'une juridiction internationale qui soit ouverte aux particuliers contre les États étrangers et au ressortissant d'un État contre le ressortissant d'un autre État"). In the meantime there are other voices raised: Rudstein (36), La Barra and Mercier (37), Seférianès (38) and others (39).

If it comes to an international maritime law court its value will largely depend upon the reliability of its decisions and the moral credit it gains. If it commands confidence its work will contribute to world harmony. It will have to compare the different opinions upheld in a cautious and accurate and scrupulous way; both with reference to their intrinsic value and as regards their adherents, because a large number of adherents may point to a world sense of justice which it will then be its task to reproduce, even if the personal preference of its members should be otherwise.

(33) Seférianès, "Le problème de l'accès des particuliers à des juridictions internationales" ("Recueil des cours de l'assemblée de droit international 1935, I deel 51), blz. 56; "Annuaire de l'Union interparlementaire", 1913 (blz. 45).
(35) "Report", t.a.p., " 86.
(36) T.a.p. blz. 382. Hij herinnert aan het "Cour de justice centro-americaanse, dat een tijde heeft bestaan (ongeveer 1907; ook Seférianès doet dit; t.a.p. par 15), doch dat mislukte. Hij zegt: "On a soutenu la thèse que l'admission des particuliers en qualité de demandeurs a été une des cause principales de la dissolution et du non-renouvellement de la Cour. M. Guani a fait observer que la Cour échoua parceque, du fait de l'ouverture du tribunal aux causes des particuliers contre le gouvernement, les intérêts privés et les intérêts d'ordre international ont été mêlés" (blz. 481). Naar vervolgt hij: "Tous ces dangers pourraient probablement être évités si l'on crée pour les litiges d'ordre privé une instance internationale particulière, séparée de la juridiction réservée spécialement aux différends s'élévant entre les États comme tels" (blz. 381-382).
(37) "Annuaire de l'Institut de droit international", 1927, II, blz. 575.
(38) T.a.p. blz. 56; zelf overigens beperkt hij zich tot de mogelijkheid van het optreden van particulieren tegen vreemde staten.
But it will not always be able to act in this way, because it may meet with questions to which different solutions have been disposed of almost equal value. Then it may try to come to an average conclusion or a legal resultant and otherwise it will have to choose. There is a large difference of opinions concerning by which law the legal consequences of a collision on the high seas between ships of different nationalities should be regulated: the law of the claimant, the law of the defendant, the law of the judge seized (which of course is inapplicable for an international judge) or still another one; but it cannot be said that one of these opinions clearly preponderates. Nevertheless the court, if such a problem is put before it, will have to decide upon it. Then it may appear to somebody that its decision is a subjective one. This will probably be so; in such a case it is almost unavoidable. But it does not matter so much, nearly always the final act of judicial administration has a subjective side. Whoever tries to do justice in absolute objectivity eliminating every remnant of his subjective feelings with only the aid of his objectively working intellect will usually find that his hopes are deceived. If we are putting up a most perfectly logical legal reasoning, it is often possible to put next to it another equally logical one with another conclusion.

Examples can easily be found in the jurisprudence of cases where the judgment of a lower judge on appeal has been reversed by his colleague of the higher resort, but this does not necessarily points to one of them being logically superior to the other. Some twenty years ago in the case of the "Canadian Highlander" the tarpaulins over a ship's hold were removed and the hatchway opened for the purpose of repairs to the vessel (40). This was done in a negligent way and so raining water was allowed to penetrate into the hold and there to damage the cargo. Now according to English law the carrier was not responsible for the neglect of his servants "in the management of the ship", although he was liable for properly caring for the goods carried; and the question was under which head the damage fell. The Court of Appeal replied to the negligence being committed in the management of the ship", because, as one of its spokesmen, the judge Sargant, said the tarpaulins and the hatchway were removed for the ship's sake; and so the claim was dismissed. Had they been removed for cargo purposes as f.i. for the ventilation of the cargo the result would have been otherwise. The crucial point for the court therefore was in the purpose of the removal of the tarpaulins. But the House of Lords reversed the verdict and Lord Sumner said: "What did the damage was misuse of the tarpaulins. Now the tarpaulins were used to protect the cargo". For him the decisive factor was the purpose of the tarpaulins themselves. I suppose there will be some among you who agree with Mr. Sargant and others, who share Lord Sumner's view. As a guest to your country it is not for me to take sides in this domestic legal dispute. So I remain neutral and I take it that both judges were equally right and wrong. Both their reasonings were equally fitting from an intellectual standpoint, but that was not enough. A decision had to be taken, but brainwork could not achieve it.

Mr. Sargent's sense of justice pushed him to the left, Lord Sumner's to the right. It often goes that way. A man's intellect is of a limited capacity; it can build up logical reasonings but often it is not able to prove why one surpasses the other. Which of the two you prefer then depends upon your receptivity. Your innate sense of justice, a subjective function, turns the scale.

This does not mean that juridical brainwork is of no use. It limits the choice between some possibilities and it bridles dangerous passions.

Neither does it mean that the judge makes his choice between two of more logical possibilities in an arbitrary way. In this connection I may mention another beautiful book of our Dutch legal literature; and this time one that is to my liking of a very exquisite and almost devout character, a little jewel of legal science and art. It is the first chapter of the introductory tone which the recently deceased Amsterdam University professor Scholten composed for Asser's "Manual for the study of Dutch civil law" ("Handleiding tot de beoefening van het Nederlands burgerlijk recht"). It only contains 181 pages and it is written in an extremely plain style but when you read it you feel as if you are carried upwards even higher to the peaks of the human spirit. Then, Scholten says: The judge who decides chooses because he feels bound to his choice in his inmost heart. The judge does not say: "I am deciding this way although the contrary is just as good as this". He is of opinion that the contrary is less good and therefore after profound consideration he feels he can do no other. In so far his subjective decision is also an objective one; he obeys his conscience where the Highest in a man knocks for admission. He cannot completely prove with his intellectual means the correctness of his decision; his emotional life also plays its part. We need judges who are able to act this way. Scholten resumes: "Neither the sharp-witted nor the learned judge is the ideal, but the wise one".

For such wise and upright judges we have to look; if ever it comes to an international maritime lawcourt: men who know maritime law thoroughly but who are also in possession of a large amount of legal artistry. If we have those men, judges who are able to discern the harmonising or preconceiving opinions and to choose delicately where choice is necessary, we may hope that their decisions will be followed more and more on account of their general acceptability and the confidence they inspire. We may hope this more readily because in the province of maritime law there is a tendency towards mutual accommodation. If this hope is realised the international maritime lawcourt will drive maritime law ever more towards uniformity or at least towards harmony.

As it administers justice from case to case it is confronted with different questions in a clear, 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.

Therefore it seems worthwhile to give it a trial. Whose affair it will possibly be to take the initiative is not a difficult question in the present world. It will be the task of the "United Nations". Neither is it a problem who will have to put the matter forward in the "General Assembly": first of all the nations with a maritime tradition; i.e., among others: England and the Netherlands. And so I ventured to raise my subject in a meeting of this society with its sympathy for the many things which are of common interest to both countries.