CHAPTER – 1
ICJ : INTRODUCTION

"The Existence of ICJ within the United Nations System is the most important condition for the legitimacy of the organization, not least in the context of developing and carrying out an integrated strategy to counter new challenges and threats".

- Jon Peter Balkenende¹

Peace has been preached by all religions; it has been the ideal of all civilizations and has been the most sought after all efforts. Among the several factors and instrumentalities that promote the evolution of peace paramount is the role of law and of the courts which state the law; it is the latter aspect which concerns us here. It is the function of law in any community, whether tribal, city State, national or international, firstly, to maintain public order, in the wider sense, and secondly, to administer Justice by adjudication.²

However, the quest for peace may be categorized as a comparatively recent approach of the nation State in its task of developing public order within its territories, whereas humanity has been busy from the dawn of civilization exploring several other avenues with that very objective in mind, but in the wider context of international or universal peace.

It may be worthwhile to examine first the methods pursued in human history and subsequently to assess the role of law in the same direction in the present day world.

The well known ancient principle for maintaining peace and prosperity was that there should be only one sun in the sky, and that two suns in one sky must clash and destroy peace.

One of the oldest and universal approaches to the cause of peace has been the peaceful settlement of international disputes, monitored by law. Since, time immemorial, all religions have been preaching peace. All civilizations have

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fostered this ideal and mankind has made it its most sought after objectives. Yet universal peace has not been an easy goal to achieve. Inspite of the advancement of civilization through ages there are still remnants of the jungle law to which nations take recourse as the ultimate mechanism to settle their disputes with one another. To prevent the complete destruction of what we have attained and endeared to ourselves, we ought to respect third party settlement to resolve our disputes if we do not succeed in negotiating by ourselves consciously or in absentia.

1. THE POLITICAL AND THE LEGAL IN THE SETTLEMENT OF DISPUTES

In the highly civilized society setup, conflicts are bound to arise between different interest groups. This is an inevitable consequence of social interaction between the confederates of any community national or international. In order to sustain community living and more so to develop and strengthen sound social interaction, it is necessary to establish some forum legal or political or both. To sort out the inevitable differences between the community members, by virtue of faith generally reposed by every community in the judicial forum it has become most desirable support system of any legal order. It is most unthinkable to contemplate any viable legal order without its judicial wing. It will not be wrong to say that a legal order is as strong, fair and just as its judicial wing. From the very inception, international community was well aware of the inherent weakness and limitation of its judicial wing and also the historical and political justifications which were there, for these inevitable though undesirable weakness. After the tragedy of second World War, it was the beginning of a new approach towards a more secure future for the humanity which ultimately culminated into the form of U.N. Charter and Statute of I.C.J.

The statute of I.C.J. was a compromise of different shades of opinions and ideologies as the international community thought it better to have some consensus rather then not to have at all in its search for an elusive absolute unanimity. Some is true of an international legal order. Unanimity certainly is very
difficult, if not impossible in reaching at some consensus with regard to matters as diverse as cooperation and development, international legal order, necessary to sustain international peace and security has to be there in one form or the other. With the ever increasing development role of international law and its instrumentability, the task of reaching at consensus decisions has become more difficult. As a result change in the existing legal order and its instrumentalities has become almost impossible.

No human agency can deal with human problems for all times to come and the long absence of change makes the agency dominant and slowly reduces it to historical importance. Thus, change is inevitable not only to sustain the utility of any human agency, but also to make it more effective and purposeful. But unfortunately it has not happened in case of I.C.J. The only judicial body to sustain and develop international legal order. The position with regard to political wings of international legal order i.e. General Assembly and Security Council is also not very happy. They are still harping upon fastly decaying legal order, created in the middle of twentieth century, among the insecurity and danger aroused by the destructiveness of Second World War. It is on account of institutional and functional deficiencies of the international legal order that some jurists even today refuse to take cognizance of its existence efficacy. In this direction, the creation of the league of Nation was a decisive step in the orientation of political thought and in the development of a stable international legal order.

The twenty years that separated the peace treaty of 1919 and the beginning of Second World War were impregnated with the euphoria of political insecurity, economic chaos and above all moral instability. Further, planned economy, a bye-product of militant nationalism and State socialism, become the tool of the policy and politics of power. The emergence and triumph of totalitarian regimes in Europe marked the regression to a primitive type of political and social organization. The totalitarian governments harnessed the methods and tools of a pseudo democracy to work for and promote a pseudo-ethic political system. The short history of the League of Nations was that of a triumph of historical nationalism over a noble but abstract and remote ideal of international cooperation.
During the Second World War, on previous experience of International Adjudication, the main scope of judicial process in international affairs had been confined to disputes which had not commanded the first attention of. International community and which had not engrossed the public. The permanent Court had fulfilled a role as “a great bulwark of peace” - A few of the cases brought before it for judgment becoming the subject of a general popular interest. It would be difficult to say that any of the cases threatened to become ‘casus belli’ though some of them related to differences which if the Court had not been available, and if they had been allowed to faster might have led to serious complication. The courts bolstering of the structure of peace was accomplished through its advisory opinions which inspired confidence and encouraged the trends towards the pacific settlement of international disputes.

What a change has come over the attitudes of States towards the type of problem which the Court might be called upon the Court to settle Admittedly; one should not over estimate the war causing potentialities of the incidents in the Corfu Channel in 1946, barely a year after the end of the Second World War in Europe. The Dogger Bank incident of 1905 justified the need for an authoritative international fact finding organism as potential machinery for the settlement of international disputes, as had been recognized as long ago as the First Hague Convention of 1899. Yet it remains true that since 1947, many cases brought before the Court have had widespread political implications both for the internal life of the litigating states and in their geographic regions, and have engrossed the public mind. Sometimes their implications were potentially of universal scope. Since the 1980s the use of the Court for clearly political purposes and not for the determination of legal disputes has become open. The possibility that some of those disputes might lead to a threat to, or even a breach of, international peace has been present. This is a paradoxical development.

At the same time, over the period as a whole a marked decline has occurred in the business of the Court, if statistics are the sole measuring rod. On the other hand, in the progression of cases since 1947 there is a growing complexity and
multiplicity of issues that the Court may be required to decide at one time. This is rarely today limited to a simple matter of the interpretation of a treaty.

The Court’s status as a principal organ and the principal judicial organ of the United Nations, itself above all a political organization, emphasizes that the judicial settlement of international disputes is a function performed within the general framework of the political organization of the international society. Accordingly, the Court has a task that is directly related to the pacific settlement of International disputes and therefore to the maintenance of international peace and security and today, peace-making. That the invocation of procedures for the judicial settlement of an international dispute is a political operation does not cease to have political consequences when the States concerned are before the Court. The political factor continues influencing the litigating States in their handling of the case, though in a subdued measure (due to the special discipline that the law and litigation impose upon their participants). If re-emerges after judgment has been given and the litigating States face the problem of complying with what the Court has decided in application of the law. Litigation is but a phase in the unfolding of a political drama.

Although the work of the permanent Court of Arbitration at the Hague was valuable, it was neither a real Court of Justice nor permanent as that term is ordinarily understood for in the first place. It was not itself a deciding tribunal, but only a penal of names out of which the passing in each case select, and thereby constitute, the Court. Secondly, since conflicts to be decided by arbitration the arbitrators are selected by the parties on each occasion, there are in most cases different individuals acting as arbitrators, with the result that there was no continuity in the administration of Justice at the international level.

2. JUDICIAL SUPPORT SYSTEM-P.C.I.J

The Covenant of the League of Nations authorized the Council to formulate plans for the establishment of the PCIJ with competence not only to hear and determine any international disputes submitted to it by the parties to the dispute
but also to give advisory opinion upon any dispute or question referred to it by the Council or the Assembly.

To give effect to Article 14 of the covenant making provisions on above rested with the Council to take necessary action. In early 1920 at its Second Session the Council appointed an Advisory Committee of Jurists to submit a report on the establishment of the PCIJ. The Committee with its seat at the Hague, submitted in August, 1920 a report containing a draft scheme under the Chairmanship of Baron Descampes (Belgium). The council after examining the report and making some amendments placed it before the First Assembly of the League of Nations at Geneva in November 1920. This Assembly instructed its Third Committee to examine the question of the Court’s Constitution. In December, 1920 having got the report studies exhaustively by a Sub-Committee, the Committee submitted a revised draft to the Assembly, which was unanimously adopted as the Statute of the PCIJ. The Assembly thought a mere vote to be insufficient to establish the Court and wanted each State represented in the Assembly to formally to ratify the statute. In a resolution dated December 13, 1920 it asked the Council to submit to the Members of the League, a protocol adopting the statute and decided that as soon as it had been ratified by a majority of member states, the statute should come into force. A majority of member states, the statute should come into force. A majority of the members of the League had signed and ratified the protocol by September, 1921 and the statute entered into force. It was revised only once in 1929 and the revised version came into force in 1936.

The erstwhile unresolved problem of election of the members of the Permanent Court was resolved by introducing the provision that the judges were to be elected concurrently but independently by the Council and the Assembly of the League and that those elected should represent the main forms of civilization and principal legal systems of the world. Today, this solution appears simple but in its own time it was a valuable achievement to have made it possible. The first elections were held on September 14, 1921. In response to request by the Netherlands Government in 1919, it was decided that the PCIJ’s permanent seat
should be in the Peace Palace at the Hague, which it would share with the Permanent Court of Arbitration. Accordingly, on January 30, 1922 the Court’s preliminary session devoted to the elaboration of the courts rules, opened and with the Dutch jurists Loder as President, its first sitting was held on February 15, 1922.

The establishment of the PCIJ was a great step forward, towards setting up of a Court of law in the fullest sense. Though its lacking jurisdiction obstructed its passage to its goal, it make several advances in the judicial process which deserve brief mention.

The work and achievements the Permanent Court of International Justice are seen to have been as it were a preparation for the more significant disputes brought before the present Court. The Permanent Court created a sense of confidence in its methods. That was not upon the founder of the United Nations, even if the fifty years that have elapsed political conditions have not been favourable to widespread invocation of the judicial processes. The foundation laid in 1945 has enabled the present International Court of Justice to make a far more spectacular contribution to the pacific settlement of international disputes. That is not to say that it could not have done more had States been willing to refer more matters to it.

At this point the question has to be considered of the meaning of political in the context of the work of a Court, or rather, in that of the work of the International Court of Justice. That itself is a question of considerable complexity which may be illustrated by recalling the manner in which the general development of every branch of international law has been the consequence of political events, so that the law itself is closely influenced by the circumstances of international politics.3 Space does not allow more than the briefest consideration of this problem. The assumed antithesis between law and politics commonly postulated for domestic State organization is not applicable in international law and organization. In both cases the consequence of a political event is the creation of a new legal norm. It is immaterial whether its appearance is that of a formal

enactment of the legislature, an agreement between rival political parties or interests as to some future course of action (for example in labour relations), or a decision of a tribunal invaliding – or upholding – some other political act. In the internal law of States (ignoring for this purpose the special doctrine of the binding force of precedents in some countries) the application of the law by the courts rarely leads to the creation of new general norms. It does so in one principal sphere, where a Court has the power to pass upon the constitutionality of legislation. When a Court does that, it is performing a political function, because its action impinges upon that aspect of the national life and organization concerned with the disposal of the conflicting and contradictory aspirations of the political, that is norm creating, groups within the State. The Court then to extent shares the law creating function with the legislature.

This feature has far greater prominence in international litigation. All international litigation presupposes a dispute (in the general, non-technical, sense) and is therefore concerned with finding a solution to the conflicting and contradictory aspiration of two or more political, norm-creating, groups, in this case the States. These groups do not operate within the framework of a domestic Constitution that is deliberately designed both to regulate the political struggle and to provide for the distribution of powers. Furthermore, there is no analogous distribution of executive, legislative and judicial power in the international sphere. While it is frequently possible in the Charter of the United Nations and other similar constituent instruments of international organizations to differentiate between these functions, it is quite another matter when it comes to differentiating between either the organs, or the applicable techniques.

International practice, with its own starting point, has developed two principal methods for setting international affairs and for dealing with international disputes. One is purely political. The other is legal. There are degrees of shading off between them, and various processes for the introduction of different types of third-party settlement. Because of this fundamental difference between the two approaches of settling international disputes, analogies from one to the other are false. Leaving aside cases where the settlement is imposed,
diplomatic (or political) settlement of this character is not to be regarded as arbitrary or as being. Indeed, typically the application of the law is at patient as in cases of judicial settlement; and the action of the States shares at one and the same time of the character of the executive, legislative and judicial (in the sense of law applying) functions. For the system of purely legal settlement, it is the agreement of the states concerned that directs a binding settlement to be produced by an organ, independent of them, applying established international judicial techniques. Here by deliberate political choice, the law applying function is differentiated from the political, and left to operate in relative freedom. The states now attempt to influence the decision, as the solution will then be called, indirectly, by the process of pleading. They do not make the acceptance of the decision depend upon their prior assent to it. Hence the compromissory character of the agreement to submit a dispute to judicial statement. Judicial settlement does not mean the displacing of the political nature of the process of choosing the organ through which the decision is reached. It represents a political decision that the technique by which the dispute is resolved is based upon the voluntary renunciation by the disputants, in the interests of a settlement, of their right to solve the dispute directly, in favour of binding third-party judicial settlement, coupled with the requirement that the solution shall be based on articulated legal grounds exclusively.

Once the close interrelation between the political and the legal factors is recognized and the function performed by the existence of the Court (as distinct from the performance of that function by the Court itself) is seen in the ultimate analysis as a political one, much of the Court's practice and procedure, and of the attitudes of states towards the Court, appears in a new perspective. That interrelation explains the keenness with which elections of Members of the Court are conducted. It shed new light upon the Court's administrative and budgetary problems. Together these elements make up the kernel of the organic connection between the Court and the United Nations. But that interrelation goes further. It explains the conflict of ideologies regarding the Court — a conflict exacerbated during the Cold War but which exists independently of it. It throws into sharp
relief the primordial importance of jurisdictional questions – the channel through which the Court receives the power enabling it to function, the mechanism for the transformation of the political decision of the parties into legal and formal procedural terms. These are not mere technical questions, but in reality the issues of substance cast into a new form to meet the shifted ground on which the dispute is placed. It provides food for thought on the question whether certain fundamental axioms of international adjudication, such as the present rules for participation in a case before the Court and the manner decisions are reached (to mention but two) are entirely suited to the international political circumstances of the end of the twentieth century. This era is witnessing the birth of new conceptions of the extent and limitations of sovereignty, and the collapse of the exclusiveness of the independent State in the Westphalian sense as the sole bearer of international personality, or, to put it more concretely, as the sole bearer of rights and duties of an international law character. That interrelation raises the question whether, with the political polarization of the world and the accompanying tendency towards the fragmentation of international law into some sort of regional units and specialized functional branches, a Court organized primarily as a world Court applying general international law is always the most suitable form of international judicial organization.

3. ARBITRATION AND JUSTICE SETTLEMENT BE ON TERMS OF EQUALITY

The Court is a body of high achievement and unused potential. But it is not a body of uniformly high achievement or unlimited potential. In the early years of this century, such a Court was looked upon by the peace movement of that day as a means – if not the means – for avoiding resort to the use of force in international relations. It was thought that states should and even would submit to arbitration rather than the arbitrament of war. The Hague Peace Conference of 1989 and 1907, which had a number of successes, particularly in codifying the law of war, succeeded in forming the Permanent Court of Arbitration. Actually, it was not a Court which was permanently formed, and it arbitrated relatively infrequently. But
arbitral panels drawn from the membership of the Permanent Court of Arbitration did dispose constructively of more than a score of international legal disputes, nearly all in the first three decades of this century. Nowadays, while the processes of international arbitration and especially international commercial arbitration, go forward actively elsewhere, the main function of the Permanent Court of Arbitration lies in the role of its national groups of potential arbitrators who are the members of that Court in nominating candidates for election to the International Court of Justice. Each State Party to the Hague Convention of 1907 may nominate four persons as potential arbitrators, and these persons in turn nominate candidates of whatever nationality for election to the International Court. Where a State is not a party to the Hague Convention, it forms a comparable national group to make nominations. Judges of the Court are elected in concurrent elections of the Security Council and General Assembly.

It is interesting to recall that, in 1907, the United States took the lead at The Hague in pressing for the establishment of a true international Court of Justice. Agreement then proved elusive, especially on how the judges were to be elected. It was not practical to have a judge from every State, even though in 1907 there were less than fifty States, but the mechanism for selection or election was not at hand. With the conclusion of the Covenant of the League of Nations, a mechanism was, Judges of the Permanent Court of International Justice were chosen by the concurrent election of the League Assembly and Council, thus mixing the predominant role of the smaller powers in the assembly with that of the larger in the Council.

In 1922, the first World Court in history came into operation, in the Peace Palace in The Hague, which a gift of Andrew Carnegie had built for the Permanent Court of Arbitration.

The measure of the difference between arbitration as a form of the pacific settlement of disputes leading to binding decision by disinterested third parties applying judicial or quasi-judicial techniques and judicial settlement by the International Court lies in the existence of this later as permanent and pre-constituted institution. Factors such as the number and choice of the Judges, their
agreement to act, the law they are to apply, the procedure to be followed, the competence of the Court both regarding the merits and regarding all pre-judicatory and other incidental questions, are carefully regulated in the constituent instruments. Even the philosophy of the Charter. Either states cannot derogate from them at all, or they can only do so with the consent of the Court and under its control. In the case of judicial settlement by the Court, these matters which, though to a large extent technical, frequently have strong political undertones do not, therefore, have to be brought within the scope of the political negotiation that must precede the organization of an international arbitration. There is always room for discussion, even if a legal solution is wanted, whether and how a given dispute should be submitted to arbitration or to judicial settlement, and in such a discussion the generic differences between the two processes legitimately come into play. If that discussion ends with agreement to have recourse to the Court, attention can then be devoted exclusively to the terms of the reference to the Court.

The existence of the Court thus has an effect that the probability of a settlement of the dispute by legal techniques, whether judicial or arbitral, may take definite shape at an earlier stage than would be possible if the Court did not exist. The permanency of the Court, which transforms into constants most of the variables inherent in international arbitration, makes of the Court the most refined instrument now existing for the depoliticization of the process of pacific settlement and its fulfillment through the application of legal techniques, which is to say, in the words of Charles De Visscher, the renunciation by the parties of their individual powers of decision and their submission to the impersonal criteria of the law.4

The enumeration of the means of pacific settlement of disputes set out in Article 33 of the charter marches from the extreme of politicization – negotiation – to the extreme of depoliticization-judicial statement: it goes from the purely political level of discussion between the parties themselves to the purely political

level of disinterested third party adjudication producing a binding decision on the basis of law. Frequently called the principle of freedom of choice, Article 33 of the Charter reads:

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

The decision of what means to employ, especially if the direct settlement through negotiation is abortive, is naturally the consequence of the usual processes of political and diplomatic decision making. If the prolonged discussions in the International Law Commission and the General Assembly failed to produce a generally accepted codification of the law of arbitral procedure, a significant reason can be seen in the desire of many states not to push too far the depoliticization of international arbitration, to preserve the tradition of ‘diplomatic’ arbitration alongside the completely depoliticized judicial procedure of the Court. In this sense, the real difference between international arbitration and international judicial settlement by the Court is to be found in the degree of depoliticization that the parties want, and its timing.

4 THE DISINTEGRATION OF PERMANENT COURT OF INTERNATIONAL JUSTICE

At the San Francisco Conference on International Organisation at which the United Nations Charter was concluded, and in the preparatory meetings of the Committee of Jurists which prepared a revision of the Statute of the Permanent Court, there was not the slightest doubt about the utility of maintaining a world
Court. While it was found to be politically and legally desirable to create a new Court, the International Court of Justice, its Statute was in fact a very modest revision of the Statute of the Permanent Court. Every effort was made to maintain continuity between the two courts. It was recognized on all sides that the Permanent Court had created a heritage worth preserving intact and nurturing. In this regard, attitudes towards the League of Nations and towards the World Court stood in striking contrast.

What has been the record of the International Court of Justice? In terms of case dealt with, between the time it began functioning in April 1946 until the end of 1984, it gave forty-five judgments in contentious cases between states, and eighteen advisory opinions to the United Nations and certain of its Specialized Agencies. The number of contentious cases compares to that with which the Permanent Court dealt between the two World Wars, though the business of the Court since the mid-1960s has, until recently, been markedly less than earlier. In fact, in a world full of international legal disputes between states, too few are submitted to the Court, even if, for the moment its docket is relatively full. Moreover, the United Nations and its specialized Agencies have resorted to the Court for advisory opinions proportionately far less frequently than did the League and the ILO resort to the Permanent Court of International Justice in the eighteen years of its activity. It is widely agreed in the international legal community that the judgments and opinions of the Court have been sound and of high quality – though some maintain that there are a few extraordinary exceptions. The Court has been criticized for elliptical conclusions which at times are not sufficiently supported by reasons, and for insufficient citation of authority. Recently, questions of observance of due process have been raised. But, as a whole and over the years, the Court’s procedural and substantive record is very good.

From 24 October 1945, the date of the entry into force of the Charter of the United Nations, to 18 April, 1946, the date of the dissolution of the League of Nations and of the Parliament Court, the two Courts were technically in existence side-by-side, although neither of them had any judicial business. The present Court has found in the simultaneous co-existence of the two Courts a factor
relevant to its jurisdiction. It is accordingly necessary to describe the manner in which the Permanent Court was brought to an end.

This uncertain, controversial, fragmentary and, in some respects, outmoded nature of international law can hardly be denied. Every attempt, therefore, to clarify and re-formulate the principles of international law, whether by (private) Juristic restatement or by agreed codification by states themselves, must be welcomed. So also, careful revision of the content of international law in the light of modern circumstances must be encouraged. There is no doubt that such clarification and reformulation, if achieved, would allay to a great extent the fears of states about the law that the international courts are likely to apply, and may encourage them to accept wider obligations in regard to the settlement of their disputes through international adjudication. It must be understood, however, that even if progress in the codification, systematization and development of law is essential to the advancement of the rule of law, “the chances of achieving this over any wide area in the near future are negligible”\(^5\) in the presence of the present “politico-ideological” disputes between the Communist and non-Communist states on the one hand, and the “politico-economic” differences between the rich industrialised Western States and the underdeveloped States of Asia, Africa and Latin America on the other hand, the possibility of any far reaching agreement on the controversial subjects is indeed remote. The failure to the two conferences on the law of the sea to reach agreement on the limits of territorial waters is a timely reminder to any over-ambitious schemes about the codification of international law. Even the great of codification admit that . . . as a rule, universal acceptance of the results of codification can be achieved in the international sphere only at risk of making it nominal and retrogressive. This is so in particular in period when political division in the world and the conflict of some fundamental notions of law as between groups of states render impracticable, in most spheres, any attempt to achieve generally agreed statement or development of law.

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CURRENTLY ARISING LEGAL ORDER AND THE NEED FOR REINTERPRETING THE ROLE OF INTERNATIONAL JUDICIAL SYSTEM

Regarding the international Court of Justice it has been said that the Court has not released its full potential. Rather, it has not been assigned the rote it deserves in the international legal order. The reasons must be found in the want or confidence in a still maturing system of international law, in the premises of national self interest and the conviction that political action is of greater importance then recourse to the Court. It is generally believed that their essential role, codification and progressive development of international law will strengthen the position of the Court in the confidence and esteem of the world community.

A number of organisations have been setup within the United Nations fold for securing to mankind the full benefit of the recent phenomenal scientific and technological developments, and accordingly new regulatory measures hitherto conceivable in the realm of fiction alone, are coming in to real existence. Treaties in relation to astronauts and space which and object launched in to outer space and the activities of states on the moon have been agreed on.

But where the international community finds it difficult to agree, is the field of international trade and economic development. UNCTAD, in conference has witnessed the rival pulls of developed states. On the one hand and life of developing nations on the other. In this respect, the international law is not free from a certain sense of tragedy one on the hand, Man stands today on the threshold of tremendous possibilities that there is an immediate need for preserving peace and security, so that the opportunities awaiting the human being on the road to new discoveries, promising the possibility of greater human happiness are not delayed. On the other hand, several new states, effervescing with the ambitious energy and desire of telescoping in their national life the achievement of worlds standards in to a few decades, are burdened by the distrust and hunger haunting their peoples. The sharing of the common heritage of the earth’s resources between the developed and the developing nations call for a radical change in the attitudes of the prosperous states. Justice, it has been said, requires equality
between equals and inequality between unequal so that all are brought to the balance of equivalence.

Time has come for introspection of international Court of Justice, and its role in the altogether emerging new legal order. States are fastly advancing towards cooperation, help and legal order closer to social Justice. This is perhaps the most appropriate time for rewoomping of the international Court of Justice, in order to enable it to match with compulsion of newly emerging political realities. These newly emerging political realities can be sustained only if legal order and its instrumentalities too are tailored to take on their new role. States are now more eager for ‘give and take’ them ever before. This is perhaps, the most appropriate time to redefine the roles of all political and legal agencies which are inevitable to share and sustain the burden of newly emerging realities.

Some of the identified areas where new legal order has become quite tangible and commands universal support are human rights, international criminal law, International terrorism, national wealth of high seas, Outer Space, Environmental Law, Law of Treaties, Management, and Regulation of Warfare. Besides, in the economic sphere relating to taxation, economic balancing of needs and production and sharing of technology a new approach of corporatism and help is emerging, thus making a way for the shaping and reshaping of new legal order.

I.C.J. is an institution which was primarily designed to maintain order among the nations. Now that the centre, of focus is not “order” but “just order”, based upon cooperation and co-existence among the nations: as a natural consequence thereof, it is desirable to shape and reshape the existing international judicial organization in order to legally and politically arm it to meet these new challenges in the emerging new International Legal Order. Otherwise, the I.C.J. as such, will become redundant and ultimately may turn up to be only historical reference. Now, the question arises whether our present international, judicial setup (I.C.J.) is sufficient to meet this challenge of new and ever increasing aspiration of the international community. As it is, it so appears that the I.C.J. and the existing international legal order may not be sufficient to squarely deal with
the problems of modern world. An answer to this questions call for a through
evolution of the various aspects of the role of I.C.J.

As a matter of necessity, normative changes in the contents of International
legal Order are taking place in a very slow manner but little care has been taken in
filling up the institutional gaps, which are more visible in the judicial wing of the
international legal order. If no attention is paid immediately to the institutional
aspects of legal orders, it is most likely to succumb to the ever increasing gap
between the requirements of newly emerging legal order and traditional roles
assigned to the judicial wing of international legal order.

The way the ICJ is required to function with due respect to its statute and
the United Nations Charter, the States’ faith in the impartiality, objectivity and
capability of the Court may be lacking; they may be under-weighting the
soundness of the Court’s judgments; feasibility of the compliance of the Court’s
judgments may be viewed with doubts; usefulness of initiating the judicial process
may in turn be under estimated; the States may not be in agreement with the
Constitution and the style of the functioning of the Court; they may also be having
fears in facing the Justice from the Court; the Court may be lacking in
responsibility. There may be hindrances to many states being attracted to the Court
for Justice, the judges may not be popular as a custodians of international law and
Justice; they may be unable to assert their independence; impartiality and
objectivity; the judges’ behaviour may be viewed like that of the political
representatives of their home states rather than a judges discharging judicial
functions. The ideological inclinations of the Judges as reflected in their
judgments may be at variance with the states ideologies and may be acting to deter
many of them coming to the Court.

These plausible reasons and other related factors call for the necessity to
study the following issues:

(1) The purpose, judicial, process is expected to serve in the World today.
(2) The degree of importance that is to be attached to the acceptance of judicial
procedures by Sovereign States.
(3) Whether, with the increase in the number of Sovereign independent States, proportionate increase in the number of Judges on the ICJ is advisable or not; whether the increase will afford better response from the States towards the international judicial adjudication.

(4) Extension of the contentious jurisdiction of the Court to include international organizations.

(5) Extension of power, to request an advisory opinion, to wider range of international organizations.

(6) The possibility of giving procedural capacity before the Court to individuals and non-governmental organizations including Companies.

(7) The question whether the Court should acquire a human rights jurisdiction by giving individuals procedural capacity before the Court.

(8) How far the success of the Court depends on acceptance of the Compulsory Jurisdiction of the Court under Article 36, para 2 of the Statute.

(9) How far, if made compulsory, the Court’s jurisdiction will attract the states to have their disputes settled through resort to the Court.

This study provides comprehensive analysis of the functional study of I.C.J. as the United Nations principle judicial organ in the light of its practice over the Sixty Four years since its creation. In contrast to the numerous works already in print which focus on one or several aspects of the working of the I.C.J. It concentrates on those aspects which are pertinent to an evolution of how the courts works within the structure and purposes to an evolution of how the Court works within the structure and purposes of the United Nations, and what the Court has contributed to the development of the United Nations, an approach which has hitherto received little attention. The Thesis concludes that whilst the I.C.J.’s contribution has been of paramount importance, many practical and theoretical difficulties exist regarding its role as a principle judicial organ of the United Nations. The Thesis explores these difficulties and attempts to provide a number of recommendations.
Chapter II is dealing with historical background. The study begins with a probe into the historical development of institutional methodology of dispute settlement and provides a brief examination of the evolution of the notion of international adjudication and its link to that of international organizations. It demonstrates that the current position of I.C.J. as a principle judicial organ of the United Nations is not a recent phenomenon but a result of development that took place over centuries, stemming from ancient Greek and Roman Times. The international community’s first attempt to codify international Justice at the Hague peace conferences of 1899 and 1907, the creation of Permanent Court of Arbitration and the establishment of the League of Nations and the PCIJ are examined from this perspective and provide the necessary background for the examination of the discussion leading to the creation of the ICJ as an integral part of the United Nations. The legal basis of the organic relationship relies on an examination of the provisions of the charter and the Court’s statute and is contrasted with that of the PCIJ with in the League.

Chapter III explores the mechanisms of a process are very important in imparting to it the success for which it is created. The evaluation of these mechanisms in respect of the ICJ which are the size of the Court, Election procedure of its members, their qualifications, privileges and immunities, institution of ad hoc judges, Chamber procedure, etc., which play an important role in enabling the Court to discharge its functions effectively, has been undertaken in the next Chapter on composition of ICJ. Such a study will enable the reader to adjudge the utility of these constituents in the effective functioning of the Court.

Chapter IV explores about Jurisdiction of the Court. A judicial tribunal, whether municipal or international, without an appropriate jurisdiction delegated to it, is a meaningless institution. So that its functional efficiency is rightly judged, it is necessary to take an account of its jurisdiction and various factors which either further or limit that jurisdiction. The Chapter on Jurisdiction of the ICJ analyses the sources of the jurisdiction of the Court and how well they place in the hands of the Court the authority to resolve the disputes brought before it for
adjudication. Also considered at length is the advisory jurisdiction of the Court along side its contentious jurisdiction. Besides, the concept of optionality of jurisdiction, which, as a member feature in respect of the ICJ, with its good and bad effects on the efficacy of the Court, has been given due considerations.

And the legal effect of its advisory opinions when compared to the binding effect of its contentious competence. It examines which organs, both principal and subsidiary, are empowered to request such an opinion and under what circumstances, as well as the prerequisite conditions required for the Court to be enabled to be seized of such a request. This is followed by an analysis of what constitutes a “legal question” as the subject matter of a request, allowing the Court to exercise its advisory competence, including the distinction between legal and other questions. It is demonstrated that although advisory opinions are not legally binding per se, the practice of the requesting organs, such as the Security Council and the General Assembly and the specialized agencies as recipients, has been to follow such advice.

Chapter V explores on the functioning procedure of the ICJ deals with the procedure followed by the Court from institution of proceedings upto delivering of judgment. Even the post judgment phase in a case involving review, revision or interpretation of the judgment has been brought within the ambit of this chapter. It is expected to gain the knowledge of the merits as well as demerits of the procedure followed by the Court and to put forth suggestions by which the procedure of the Court may be improved towards better efficiency and outcome.

Chapter VI explores the importance of the ICJ rests upon the States’ willingness to accept and excuse the judgments rendered by its and by study which does not take into account this aspect is considerably incomplete. Therefore, in this chapter which deals with the Execution and Enforcement of decisions, the outcome of the judgments at the hands of the litigating parties has been discussed, besides the machinery available for enforcement of the judgments where the concerned states show reluctance in respect of execution of the same in the normal way.
Chapter VII explores the ICJ’s judicial power to review the acts of other United Nations organs and its potential role as a constitutional Court. It distinguishes between the exercise of such power over acts of specialized agencies, for which treaty provisions exist explicitly recognizing such power, and acts of the political organs for which neither the Charter nor the Statute make any provision. It demonstrates that through its advisory or contentious jurisdiction, the ICJ has in practice expressly or impliedly exercised this power over acts of political organs on several occasions, despite the absence of any express provisions pointing to such a power. The case is made for endowing the Court expressly with the power of judicial review, describes the parameters of such power and provides examples of the manner in which such review could take place.

To an analysis of another aspect of the Court’s judicial role in the United Nations – that of appeal from the decisions of administrative tribunals established within the framework of the United Nations and its specialized agencies. The ICJ has, either by its own findings or by its attitude to the findings of the administrative tribunals, played a significant role in applying, clarifying and developing the law of the international civil service. The impact of GA Resolution 50/54 on the accomplishment of this role is also examined and the conclusion drawn that there is no apparent reason justifying the removal of the ICJ’s appellate function over the United Nations Administrative Tribunal.

The common belief that the Judges only apply and administer the law; they do not enact it may be adequately true, but the form which international law as applied by the ICJ has taken, owes, to a great extent, its existence to the contribution made by the ICJ in refining and developing it. In the chapter on the Role of the ICJ in the Development of the International Law, the contribution made by the ICJ in the fields of the constitutional law of the United Nations, the Law of the Sea, the Law of Decolonisation, the Law of Human Rights and the Law relating to Environmental Protection have been brought to light.

After studying the factors mentioned above it may be felt that there remain possibilities of making improvements in the institutional framework and functioning of the Court. The existence of some basic shortcomings may also
become evident. In the chapter on Conclusion and Suggestions which comes in the last, light has been thrown on the erstwhile achievements of the Court and some suggestions have been inserted for ensuring rectification of the defects which have been lingering on and for the modifications of the powers and procedure of the Court.

The method adopted for pursuing this study is mainly non-doctrinal and based on known facts. Besides, since the subject of the study is the functioning of the Court, the types of disputes it has handled from case to case, the decision it has given and advisory opinions it has rendered and how far the States concerned have respected the judgments of the Court, have been taken into consideration. Besides, the opinions expressed by eminent jurists, judges of the Court, etc., about the role of the ICJ, published in books, journals, newspapers, etc., have also been brought within the periphery of this study.

The contribution of the ICJ in formulating or clarifying a body of rule of international law has been of immense value. The Court is today one amongst the chief agencies for the gradual development and growth of international law by virtue of application of international law in a spirit of progressive realism.

The Court has the opportunity to take upon itself the challenges to the present system of international law and introduce necessary changes demanded by the expanding World Community and the absence of a supra national legislature. It can be make useful contributions towards establishment of an acceptable international legal order. Adjudication, which is the peaceful method of finding solutions to conflicts between parties who otherwise are vested with enough power to wage wars against one another, is the best alternative which can be acceptable to all civilized society.

ICJ must, therefore, remain immune to the suspicions as to its impartiality, objectivity and capability in order to induce submission by increasing number of States to the Court for judicial settlement of their disputes.

This study aims at probing the possibility of making the ICJ a real repository of Justice in all matters forming the basic of international disputes.
With the ceasing of the tensions within the international configuration the prospects of the functions of the ICJ are extending to areas that they have not previously reached. This suggests that appreciations of the Court as an instrument for the peaceful resolution of disputes is growing.

This is the encouraging feature of the experience of the ICJ for it shows that even if its jurisdiction is not compulsory, its permanency as an international organ enable it to play its own constructive role in the pacific settlement of International Disputes despite the constantly disintegrating International Situation.

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