CHAPTER – II
ICJ : HISTORICAL DEVELOPMENT

1. GENERAL INTRODUCTION

The origin of “the procedure of the settlement of disputes between states by a binding award on the basis of law and as the result of an undertaking voluntary accepted”¹ can be traced as far back as Greek antiquity: but, for an understanding of present day practices, it is sufficient to trace the development of the process since 1794.²

As the role of an institution is, to some extent at least, influenced by the events leading to its birth and the surrounding circumstances which furnish the background to deal with the historical perspective at this point. Since the International Court of Justice was preceded by the Permanent Court of International Justice, and the latter by the Permanent Court of Arbitration, and since there were, at an even earlier time, arbitral methods of settling disputes by a third party approach, a thorough study of the historical aspect could take one back practically to the dawn of human civilization. The object here, however, is simply to throw light on the role of the existing tribunal, the International Court of Justice, and to that end a limited survey of the past will suffice and would not be out of place.

The United Nations and the International Court of Justice stand today as the culminating points of a process which has now almost become a part of history, but it is fortunate that the process, or at least efforts in the same direction, still continue. The main objective has been to achieve international peace and security in the world community of sovereign States. As that objective is still to be attained, efforts must continue unabated. It is quite clear, not only to the politician, but also to the layman and the lawyer, that the said process has to be strong

² J.L. Simpson and Hazel Fox “International Arbitration – Law and Practice” (Stevens and Sons Limited -1959) pp. 1
enough to carry till world further beyond the present landmarks to reach the aforesaid goal. Such a backward look would appear to be justified in order to emphasize the continuity of the link with the past, even if there be a digression into history.  

Human effort sincerely made and human endeavour persistently contemplated would appear to constitute signs of progress for achieving an objective, in the international field as elsewhere. Judicial adjudication may be regarded as one of those laudable objects for the peaceful settlement of inter-State disputes for which humanity has striven in the past and may still be said to be striving. However, an equally important factor in this respect is constituted by what may be termed the 'compulsion of events', the Zeitgeist, or the overall climate in which the international community works at any particular given moment. If this climate is favourable, the wheels of human effort move forward. On the other hand, if circumstances conspire to be unfavourable, the objective may quite easily be temporarily eclipsed or efforts towards it may even fail and falter. The circumstances which give rise to any such adverse factors may be totally extraneous to the main consideration of the theme. There is sometimes, for example, an upsurge of unfavourable circumstances which becomes so point as to create a climate of division, suspicion and doubt not conducive to progress in any field of international activity. This is particularly so in the context of the present fast-increasing and quick-moving international community. History would thus reveal that human effort has to be equally matched by favourable circumstances and a helpful climate to allow international efforts to succeed in achieving an objective.

The idea of resolving international disputes through disinterested third parties deciding the dispute on the basis of law and justice, as an alternative to direct settlement of the dispute by means of violence after diplomacy has failed, is a deep-rooted human aspiration. Its origins can be found in religious sentiment which tended to recoil from the horrors of war and seek other ways of eradicating conflicts by international interests. At times the idea was expressed in Messianic

terms, as by the Prophets Isaiah and Micah "And it shall come to pass in the end of
days. And He shall judge between the nations, and shall decide for many peoples;
and they shall beat their swords into plowshares and their spears into pruning-
hooks; Nation shall not lift up sword against nation, neither shall they learn war
any more". At others, it is cast in the language of political programme, as by Hugo
Grotius, the father of modern international law: "Christian kings and states are
bound to employ this method (arbitration) of avoiding war.... And for this and
many others purposes, it would be helpful – as a matter of fact, necessary—for the
Christian" powers to hold conferences, where those whose interests were not
involved might settle the disputes of the rest and even take measures to compel the
parties to accept peace on fair terms.4

As an ideal, this concept seems to have been widespread: in practice,
however, its application was far from general. It was found, for instance, in the
early periods of Middle Eastern history and in sacred codes of the Far East5 and it
is encountered in the experience of Islam;6 But it was in Europe that the concept
most took root. Its attraction for the European mind was that it sought to transfer
the absolute values of the discipline of the law, on which the well-being of the
national society in Western Europe was thought to depend, to the problems of the
international community. The Greek city-states, for instance, possessed a well-
developed system of third-party settlement of their disputes, within the framework
of their own Hellenic culture, especially through the instrumentality of the Delphic
Amphictyonies.7 Here, indeed, there is something approaching true disinterested
third-party judgment 'between nominally equal political units—the city-states—or
the basis of a rudimentary system of law or custom by which the correct behaviour
those political units might be judged. With the growth of the big empires—
Macedonia, Rome, Byzantium—this form of third-party settlement fell into disuse,
partly, no doubt, because of the impossibility of finding any true disinterested third

4 Dejure belli ac pacis (1625) II, ch xxiii 8 English Translation from Hugo Grotius, The Law of
5 For the position in Ancient India. H. Chatterjee, International Law and Inter-State Relation in
Ancient India (Calcuta, 1958), 129
6 A Rechid, “L Islam et le droit des gens” R.A.D.I. 60 (1937) (ii) 371 M. Khadduri, War and
7 C. Phillipson “The International Law and Custom of Ancient Greece and Rome” (London,
1911)
party, and partly because the general imperialist and expansionist tendencies of those super-Powers, and their centralized system of government, would not easily be reconciled to the idea of the settlement of their disputes by application of "law" (however rudimentary international law might have been at that time). On the other-hand, the classical historical writings contain many circumstantial accounts of those Powers "deciding" disputes between their various clients and vassals through a procedure which resembles partly a system of arbitration, and partly a system of mediation and conciliation—and partly a mere concealment for force.

2. HOW THE COURT CAME INTO BEING

The International Court, which is now expected to play such a vital role in the preservation of peace, was not created in a day. States resolved to constitute the Court after much hesitation and delay. The greatest obstacles in its way were the false notions of sovereignty and the complete independence of states. After the withdrawal of the Church from the exercise of any direct influence on secular affairs, and the decline of the Holy Roman Empire, a type of state, in principal completely independent of way outer factors, was born. Lawyers, philosophers and statesmen created, from the sixteenth century onward, the theory of the omnipotence of the power of the state. Bodin was one of its first and the most famous promoter in the international life of the state, and Vattel, two centuries later, its chief theorist in the field of international relations. The notion of state sovereignty, or of the fullest independent power, was the source of theories which sanctioned the anarchy in international life. One of its most important implications was that every state was permitted to be a judge in its own cause. The ideas of bellum justum and bellum injustum were discarded, and the states were considered entitled to decide, without any restrictions, in what manner they were to defend their interests including the possibility of having recourse to war. No outer factors, states, or organizations of nations, could impose on a state their will or decision.8

Though no settlement was binding upon them, from earliest times, there are

found diplomatic procedures for the settlement of disputes between states or peoples or governments. Nor is the fact very surprising, for some form of negotiation must accompany any close contact between persons or authorities not subordinated one to another. In western history three principal forms of diplomatic procedure identified themselves for this purpose, namely, negotiations, good offices and mediation. Despite these names there is really no hard and fast line between these nominate methods.\(^9\)

If a disagreement arose between the parties, usually they tried first to settle the matter by direct negotiations. If no successful result could be achieved, third parties could act. By offering their good offices they attempted to persuade the litigants that they should not be discouraged, that the matter could be settled and, that they should reopen the negotiations. By exerting pressure on both parties, or on the party which took the more intransigent position, renewed parleys—and possibly more successful ones—could be brought about.

By mediation, a third party or parties assumed a more active role. They participated in the negotiations and tried to reconcile the litigants. The traditional rules of good offices, mediation and other pre-judicial methods of settlement of international disputes have been codified in the Conventions for the Pacific Settlement of International Disputes at The Hague, in 1899 and 1907, which provide that "in case of serious disagreement or dispute, before an appeal to arms, the signatory Powers agree to have recourse, as far as circumstances allow, to the good office or mediation, of one or more friendly Powers" (Article 2). Both good offices and mediation are declared to "have exclusively the character of advice, and never have binding force" (Article 6). It is only against the anarchic background of the customary principle that each state is the final judge in its own suit, that such provisions acquire the significance attributed to them.

The Conventions also provided for the creation of Special Commissions of Inquiry with the purpose of finding the facts giving rise to the dispute. In cases where international tension arose out of different views in respect to some factual

situation, this procedure gave satisfactory results. These were the traditional ways of dealing with international disputes if the parties did not deem it proper or wise to wage a war. Until the wider recourse to arbitration in the latter part of the nineteenth century and in the present century, and until the establishment of an international judicial tribunal and the development of the technique of settling disputes through international organs, such as the League of Nations and the United Nations, even serious disputes were mostly handled by these traditional methods of diplomacy. It is true that such methods appear somewhat outmoded by comparison with the highly refined and specialized modes of dealing with disputes, evolved under the League of Nations and the United Nations. But they still have their place in the international structure, whether as a preliminary to or concurrently with these newly developed means of settlement. Hence in Article 33 of the United Nations Charter, it is specially declared that "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", inter alia, by negotiation, conciliation or mediation; and it is provided in the same article that the Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means. These three methods of settlement, viz. negotiation, good offices and mediation, have also been specially provided for in the Pact of Bogota, 1948, between the American States, repeating some of the stipulations in modified form of earlier treaties on peaceful settlement and security. Clauses of modern multilateral conventions providing for the settlement of disputes between parties as to their interpretation or application, usually provide for recourse to arbitration or judicial settlement only after failure to effect settlement by diplomacy.

From the aforementioned non-binding means of settling disputes, a necessary development was made when arbitration came to be employed. In logic (and largely in history), arbitral settlement of disputes presents itself as the main break-away from the basic postulate, of the diplomatic methods, namely, that each state remains the final judge in its own suit. This introduction of third-party settlement is a halting process of many phases. For instance, in early arbitrations
an equal number of arbitrators from each side, with no umpire, reproduced the absolute control of each side over the terms of settlement, which characterized diplomatic methods. The arbitrators were not merely agents of the state for negotiation nor however, were they really there to give an impartial decision on the dispute. Yet the distinguishing characteristics of mature international arbitration are tolerably clear.\textsuperscript{10} The importance of arbitration justifies a short summary of its history, followed by the examination of various legal aspect of arbitration.\textsuperscript{11}

3. ARBITRATION

The word “arbitration” is ineptly used to cover the peaceful settlement of disputes generally. Strictly it is only one of the methods of peaceful settlement and as a method it is applicable not only in international disputes but also in controversies of all kinds, whether between business groups, management and labour, or individuals.\textsuperscript{12}

3.1 History of Demands for Third-Party Decision

Among the institutions of human society, the institution of third-party judicial settlement of international disputes has perhaps been the slowest and the longest in maturing. In spite of centuries of the highest and noblest efforts of practical statesmanship, it can hardly be said that its foundations have been securely laid. It will still require years of endless struggle to make it as useful an institution in the international field as it is in the national field. But even then, whether we shall be able to reach that ideal is a doubtful proposition.

3.2 Arbitration in the Ancient World

The history of arbitration, as we shall see in the following pages, is a long story of slow progress. As a means of third-party settlement, it is to be found from

\textsuperscript{11} Alina Kaczorwska “Public International Law” (Old bailey press 2002) pp, 347.
the earliest time. There were perhaps a few scattered instances of third-party settlement in the ancient Oriental world, the true character of which can hardly be determined in the absence of necessary details.\(^\text{13}\) It is generally known, however, that the Greeks looked upon the idea of arbitration with a large degree of favour and often resorted to it among themselves. But it may be noted 'at the outset that arbitration among the Greeks was limited to the Hellenic world, and so was not truly international. They never agreed to arbitrate their differences with foreign countries. The foreigner was a "barbarian" and was treated with contempt. He was considered inferior and was regarded as an enemy. Equality was entirely lacking, and the element of confidence, so essential to the success, of arbitration, was wanting. These arbitrations were therefore inter-Grecian rather than international; for the Greeks considered themselves as members of one and the same family.\(^\text{14}\)

Though it is true that the Hellenic states were politically separate and distinct, their language was the same; their religion had a common origin; and their gods spoke a Greek-dialect. Their laws were different, but they were Greek in the sense that they had no suggestion of the foreigner in their make-up. There were thus a thousand bonds between them—religion, language, art, love of athletics, a common origin—the bond of political identity alone being lacking. "Here was a case where a Greek city could, hope to have its differences with another Greek city decided by Greek judges of their own choice, on the basis of respect for Greek law."\(^\text{15}\) Generally, private individuals and sometimes neutral city states were chosen as arbitrators. The arbitrator, who was bound in the most solemn manner scrupulously to discharge his trust, conducted the business with religious care, heard the parties or their agents, and received their proofs. The sentence, drawn up in duplicate, was usually deposited in the temples or other

\(^{13}\) Jackson H. Ralston, "International Arbitration from Athens to Locarno" (Stanford, Calif, 1929), pp.153-4.


\(^{15}\) J.B. Scott, Sovereign States and Suits (New York, N.Y., 1925), pp. 107-08; Morris, n. 2, p. 2. The most common subject of disputes among the Grecian cities was as to frontiers. But matters of commerce and of religion were also fruitful causes of trouble and frequently the people to the verge of war. War, indeed, was not infrequent; but the Greek spirit was said to have been inclined to arbitration. Morris, ibid., and Ralston, n. 1, p. 158.
public places, and both parties bound themselves by oaths to execute it.\(^\text{16}\)

### 3.3 Roman Period

If the Greeks resorted to arbitration for the settlement of controversies of "secondary importance" and only among themselves, it was never approved in theory or applied in practice by ancient Rome. That great Republic not only looked upon the foreigner as an inferior but, ever since its origin, aspired to universal domination and devoted its foreign policy to this end. Treaties of peace, of friendship, and of alliance were indeed made with foreign peoples, but in the hope of their ultimate subjection. Considering them as inferiors, Rome neither could, nor would, submit to their decision. The claim of superiority over other nations, which was the very negation of arbitration, was completely realized when Rome became the mistress of the world. There was no question of equal rights between a sovereign and its subjects, and other peoples under the Roman Empire could only present petitions.\(^\text{17}\) In fact, at first, the Senate, and afterwards the Emperor, as absolute "arbitrators", gave audience to representatives of peoples who had petitions to present. But the Romans are not reported to have played the role with very good faith. Thus, in a boundary dispute between Africans and the people of Area, they, as arbitrators, decided the point at issue by seizing the disputed territory themselves. There was a similar case about 180 B.C. between Nola and Naples, which Cicero proclaimed as "surely deceit and not arbitration".

### 3.4 Arbitration in the Middle Ages

Arbitration, therefore, in ancient times, seems to have been the consequence of the lack of a complete and unified political organization, between peoples otherwise bound together by common, religion, literature, and general civilization. After the fall of the Roman Empire, the Church established its supremacy, and Christianity created a strong tie between nations bound together

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by that religious doctrine. The Church acquired great influence, and the Popes regarded themselves as representatives of God on earth, above sovereigns. Innocent III declared himself the sovereign mediator on earth, a claim inconsistent with arbitration, because the Pope would act as sovereign judge and not as arbitrator appointed by the parties, and an arbitration, if it existed at all, would be forced, not voluntary.18

By the second half of the Middle Ages, the supremacy of the Popes came to be challenged by the German Emperors, who regarded themselves as successors of the Roman Caesars. They also attempted, like the Popes, to constitute themselves as natural arbitrators between kings. Their pretensions, however, did not succeed, and in the few cases in which they figured as arbitrators, everything was excluded which might have implied their supremacy over other monarchs.19

Feudalism, which extended all over Europe, also helped in the development of arbitration during the Middle Ages. It naturally encouraged the vassals to accept their lords as judges of their respective grievances. But the relation of superior to inferior was fatal to arbitration in the usual sense of the word.

But although the instances of arbitration are quite numerous during Middle Ages, they are trifling in number and importance compared with the multitude of controversies settled by the sword. Moreover, strictly speaking, they cannot be called arbitrations because the Church, at the height of its power, imposed its will upon parties in controversy. The Papacy was in reality more of an intervener than an arbiter. Similar was the case with the Emperor. In fact, in arbitrations anterior to be seventeenth century it was very difficult to separate cases of mediation or intervention from those of arbitration, either because the terminology was not very definite or perhaps the distinction was not very clear by that time in the minds of the negotiators. Thus Ralston tells us that the arbitrators were called without

18 Scott, n. 2, p. 202 According to Revon: “The popes were not merely judges but also legislators; they made the law and the same time that they made it, they interpreted it to their own fashion, leaving no remedy to the states submitting to their sentence. In fact by the political intrigues in which they were engaged, they often became judges and parties in the same cause; their sentence was not objective but subjective, thus no impartiality, above all.... they esteemed themselves sovereign; consequently they could not recognize above them any principle of justice”,. Quoted by Ralston, n. 1. p. 175.
19 For further discussion, Ralston, n. 1, pp. 182-3.
distinction "arbiters", "arbitrators", and "amiable compusiteurs", no distinction being made between the terms, a difference later made-by the French Code being too subtle and too learned for the writers of the compromise of the Middle Ages.20

Whatever the true nature of these arbitrations, as a means of third-party settlement they continued to be used quite frequently throughout the Middle Ages. As absolute monarchies gradually came to be established in Europe, however, in the words of Merignhac, arbitrations became more rare. They diminished in number during the fourteenth and fifteenth centuries and from the end of the sixteenth century to the French Revolution they had almost disappeared from the international practice.21

It is not difficult to discern the reasons for the neglect of this "civilized" means of settlement of international disputes during this long and, in several respects, gloomy period. From the beginning of the sixteenth to the opening of the nineteenth century, we find the Great War movements of European nationalities—aggression, bloodshed, and desolation on colossal scale. The feudal lords were replaced by kings and emperors in whom the warlike spirit still lived. "I saw", said Grotius, writing at this time," throughout all Christendom a readiness to make war which would cause the very barbarians to blush for shame."22 This period of international aggression and crime—the age of the Inquisition, of the acquisition of colonies; the age of the Thirty Years War, and of the Seven Years War, or rather the age of perpetual war—reached its culmination at the opening of the nineteenth century in the Napoleonic campaigns. There was no place, as we have said, for any "civilized" method of settlement of international disputes during this period. As Rousseau explained: could they [sovereigns] submit themselves to a tribunal of men who boasted that their power was founded exclusively on the sword, and who bowed down to God only because He is in heaven.23

20 Ralston, np. 1 p. 179.
21 Quoted by Penfield, n. 5, p. 237.
In fact, up to the end of the eighteenth century, there was little or no attention paid to arbitration except by a handful of philosophers or idealistic writers who were themselves very general and always vague and, in any case, ineffective being much ahead of their times.  

3.5. Arbitration Under Jay's Treaty and After

The practice of arbitration revived only after the appearance of the United States on the horizon of the international scene. But it is interesting and important to note that, as though it were some unwritten law of nature, arbitration as a means of settling international disputes, appears to have been inseparably connected with the existence of a number of sovereign political units, politically independent, but joined together by common ties in many other respects. That is what we found during the Greek times; and it was the same story during the Middle Ages. The practice of arbitration even during modern times has not been very different.

In the early years of the nineteenth century, as is well known, it was the United States and Great Britain which did most to put life into this old, almost dead, practice. In the words of a great scholar, with great insight and personal knowledge, "there are probably not two countries in the world under separate sovereignty whose citizens have more closely interwoven interests than those of Canada [or Great Britain] and the United States or whose national interests are in greater degree common". The new republic owes its separate existence to a revolutionary war in which the thirteen colonies attained independence because they were a little less half-hearted than the mother country. But though blood is no sure guaranty against bloodshed", the community of race was reinforced by other factors and common interests which created a predisposition in favour of resort, not to force, but to investigation and adjudication. These reasons Corbett has


P.E. Corbett, The settlement of Canadian – American Disputes (New Haven, Conn., 1937), p. 1

As President Taft also said: "The two peoples have the same language and literature, the same law and civil liberty and the same origin and history ... (Moreover) the jealousies and encroachments of neighbours in the thickly populated regions of Europe have not been present to stir up strife." "United States Supreme Court the Prototype of a World Court", Judicial Settlement of International Disputes (Washington, D.C. 1915), no. 21 p. 17.
himself succinctly stated in one of his recent studies: on the American side was at first weakness that might have tempted the more powerful state to dictate terms. But the United States was a huge and distant country where it was difficult and costly to bring overwhelming force to bear. Canada presented an exposed British flank—a valued possession that might easily be lost. During the early years of the new republic, European politics continued to be too threatening to Britain to permit the detachment of large military and naval resources for trails-Atlantic action. Moreover, the rising American nation was a valuable market and an immensely important source of food and raw materials that war would cut off. Reinforcing these considerations was a common tradition of respect for law and legal procedures.26

In spite of all this, as Corbett goes on to tell us the whole story, as the United States became more established and powerful, the choice of arbitration or negotiations rather than war hung delicately in the balance, and in 1812 resort was actually had to arms. It is interesting to note how, in the course of nearly a hundred and sixty-five years of the practice of modern arbitration, the Governments took their decision to arbitrate only after a serious calculation of the values at stake and the risks involved. It is also instructive to see "the intermingling in one process of negotiation and arbitration, with the threat of force at times not in the remote background".

3.6. Access of Arbitration

As Jennings has written, 'the adjudicative process can serve, not only to resolve classical legal disputes, but it can also serve as an important tool of preventive diplomacy in more complex situations.27

In determining whether a body established by states to settle a dispute is of a judicial, administrative or political nature. As to courts and tribunals before which individuals may appear, see above, chapter 5, p. 234 with regard to criminal

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responsibility; above, chapter 7, p. 321, with regard to the regional human rights courts and above, chapter 18, p. 938, with regard to bodies concerning economic issues look at the nature of the procedure followed by those states before the body in question.

The procedure of arbitration grew to some extent out of the processes of diplomatic settlement and represented an advance towards a developed international legal system. In its modern form, it emerged with the Jay Treaty of 1794 between Britain and America, which provided for the establishment of mixed commissions to solve legal disputes between the parties.28

The procedure was successfully used in the Alabama Claims arbitration29 of 1872 between the two countries, which resulted in the UK- having to pay compensation of 16 Million Dollars for the damage caused by a Confederate warship built in the UK. This is the first glaring example to show the importance of Arbitration. This success stimulated further arbitrations, for example the Behring Sea and British Guiana and Venezuela Boundary arbitrations at the close of the nineteenth century.30

The 1899 Hague Convention for the Pacific Settlement of Disputes included a number of provisions on international arbitration, the object of which was deemed to be under article 15, 'the settlement of differences between states by judges of their own choice and on the basis of respect for law'. This became the accepted definition of arbitration in international law. It was repeated in article 37 of the 1907 Hague Conventions and adopted by the Permanent Court of International Justice in the case concerning the Interpretation of Article 3, paragraph 2, of the Treaty of Lausanne and by the International Court.31

International arbitration was held to be the most effective and equitable manner of dispute settlement, where diplomacy had failed. An agreement to arbitrate under article 18 implied the legal obligation to accept the terms of the award. In addition, a Permanent Court of Arbitration was established.\(^{32}\) It is not really a court since it is not composed of a fixed body of judges. It consists of a panel of persons, nominated by the contracting states (each one nominating a maximum of four), comprising individuals 'of known competency in questions of international law, of the highest moral reputation and disposed to accept the duties of an arbitrator. Where contracting states wish to go to arbitration, they are entitled to choose the members of the tribunal from the panel. Thus, it is in essence machinery facilitating the establishment of arbitral tribunals. The PCA also consists of an International Bureau, which acts as the registry of the Court and keeps its records, and a Permanent Administrative Council, exercising administrative control over the Bureau. Administrative support was provided in this context by the Bureau in the Heathrow Airport User Charges arbitration. The PCA has been used in a variety of cases from an early date.

Between 1900 and 1932 some twenty disputes went through the PCA procedure, but from that point the numbers began to fall drastically, although more recently the PCA has started to play an increasingly important role.\(^{33}\) It has served as the registry in, for example, the two phases of the Eritrea/Yemen arbitration and for the Eritrea Ethiopia Boundary Commission and Claims Commission and in the Larsen v. Hawaiian Kingdom arbitration. It is currently involved in the provision of facilities in cases such as the Max arbitration between the UK and Ireland and Saluka Investments v. Czech Republic. The PCA has also adopted, for example, Optional Rules for Arbitrating Disputes between Two States, Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State, Optional Rules of Arbitration Involving International Organizations and States, and so on.


and Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment in 2001. The International Law Commission itself formulated a set of Model Rules on Arbitral Procedure, which was adopted by the General Assembly in 1958.

Arbitration tribunals may be composed in different ways. There may be a single arbitrator or a collegiate body. In the latter case each party will appoint an equal number of arbitrators with the chairman or umpire being appointed by either the parties or the arbitrators already nominated. In many cases, a head of state will be suggested as a single arbitrator and he will then nominate an expert or experts in the field of international law or other relevant disciplines to act for him. Under the PCA system and in the absence of agreement to the contrary, each party selects two arbitrators from the panel, only one of whom may be a national of the state. These arbitrators then choose an umpire, but if they fail to do so, this task will be left to a third party, nominated by agreement. If this also fails to produce a result, a complicated process then ensues culminating in the drawing of lots.

States are not obliged to submit a dispute to the procedure of arbitration, in the absence of their consent. This consent may be expressed in arbitration treaties, in which the contracting states agree to submit certain kinds of disputes that may arise between them to arbitration, or in specific provisions of general treaties, which provide for disputes with regard to the treaty itself to be submitted to arbitration although the number of treaties dealing primarily with the peaceful settlement of disputes has declined since 1945.

Consent to the reference of a dispute to arbitration with regard to matters that have already arisen is usually expressed by means of a compromise, or special agreement, and the terms in which it is couched are of extreme importance. This is because the jurisdiction of the tribunal is defined in relation to the provisions of the treaty or compromise, whichever happens to be the relevant document in the particular case. However, in general, the tribunal may determine its competence in interpreting the compromise and other documents concerned in the case.

34 The Argentina–Chile case, 38 ILR, p. 10 and the Beagle Channel case, HMSO, 1977; 52 ILR, p. 93. Note also the Interpretation of Peace Treaties case, I.C.J. Reports, 1950, p. 221; 17 ILR, p. 318
The law to be applied in arbitration proceedings is international law, but the parties may agree upon certain principles to be taken into account by the tribunal and specify this in the compromise. In this case, the tribunal must apply the rules specified. For example, in the British Guiana and Venezuela Boundary dispute, it was stated that occupation for fifty years should be accepted as constituting a prescriptive title to territory. And in the Trail Smelter case, the law to be applied was declared to be US law and practice with regard to such questions as well as international law.

Agreements sometimes specify that the decisions should be reached in accordance with 'law and equity' and this means that the general principles of justice common to legal systems should be taken into account as well as the provisions of international law. Such general principles may also be considered where there are no specific rules covering the situation under discussion. The rules of procedure of the tribunal are often specified in the compromis and decided by the parties by agreement as the process commences. Hague Convention 1 of 1899 as revised in 1907 contains agreed procedure principles, which would apply in the absence of express stipulation. It is characteristic of arbitration that the tribunal is competent to determine its own Jurisdiction and therefore interpret the relevant instruments determining that Jurisdiction. Once an arbitral award has been made, it is final and binding upon the parties, but in certain circumstances the would itself may be regarded s a nullity." There is disagreement amongst lawyers as to the grounds on which such a decision may be taken. It is, however, fairly generally accepted that where a tribunal exceeds its powers under the compromis, its award may be treated as a nullity, although this is not a common occurrence. Such excess of power (exces de pouvoir) may be involved where the tribunal decides a question not submitted to it, or applies rules it is not authorized to apply. The main example of the former is the North-Eastern Boundary case between Canada and the United States,-where the arbitrator, after being asked to decide which of two lines constituted the frontier, in fact chose a third line.

It is sometimes argued that invalidity of the compromis is a ground of nullity, while the corruption of a member of the tribunal or a serious departure from a fundamental rule of procedure is further possibilities as grounds of nullity. Article 35 of the Model Rules on Arbitral Procedure drawn up by the International Law Commission, for example, provides for a successful plea of nullity in three cases: excess of power, corruption of a tribunal member or serious departure from a fundamental rule of procedure, including failure to stale the reasons for the award.\(^\text{36}\) 'Essential error has also been suggested as a ground of nullity, but the definition of this is far from unambiguous.' It would appear not to cover the evaluation of documents and evidence, but may cover manifest errors' such as not taking into account a relevant treaty or a clear mistake as to the appropriate municipal law. Of course, once a party recognizes the award as valid and binding, it will not be able to challenge the validity of the award at a later stage. In certain circumstances, it may be open to a party to request a revision or re-opening of the award in order to provide for rectification of an error or consideration of a fact unknown at the time to the tribunal and the requesting part which is of such a nature as to have a decisive influence on the award.

Arbitration as a method of settling disputes combines elements of both diplomatic and Judicial procedures. It depends for its success on a certain amount of goodwill between the parties in drawing up the compromise and constituting the tribunal, as well as actually enforcing the award subsequently made. A large part depends upon negotiating processes. On the other hand, arbitration is an adjudicative technique in that the award is final and binding and the arbitrators are required to base their decision on law. It will be seen in the following section just how close arbitration is to judicial settlement of disputes by the International Court of Justice, and it is no coincidence that the procedure of arbitration through the PCA began to decline with the establishment and consolidation of the Permanent Court of International Justice in the 1920s.

In recent years, there has been a rise in the number of inter-state ar-

Arbitration. The Rann of Kutch case, the Angh-French Continental Shelf case, the Beagle Channel case and the Taba case were all the subject of arbitral awards, usually successfully. More recent examples include the Eritrea/Yemen arbitration and the Eritrea/Ethiopia case. It may be that further such issues may be resolved in this fashion, although a depends on the evaluation of the parties as to the most satisfactory method of dispute settlement in the light of their own particular interests and requirements.

Arbitration is an extremely useful process where some technical expertise is required, or where greater flexibility than is available before the international Court is desired. Speed may also be a relevant consideration. Arbitration may be the appropriate mechanism to utilize as between states and international institutions, since only states may appear before the ICJ in contentious proceedings. The establishment of arbitral tribunals has often been undertaken in order to deal relatively quietly and cheaply with a series of problems within certain categories, for example, the mixed tribunals established after the First World-War to settle territorial questions, or the Mexican Claims commissions which handled various claims against Mexico. An attempt was made to tackle issues raised by the situation in the Former Yugoslavia by the establishment of an Arbitration Commission. However, the Commission, while issuing a number of Opinions on issues concerning, for example, statehood, recognition, human rights and boundary matters, was not able to as an arbitration tribunal as between the parties to the conflict.

3.7 Demands for Better Machinery

This was the situation at the end of the nineteenth century. The abundant experience of the century had demonstrated the value of arbitration as a method of settling international disputes; but it had also clearly exposed its defects and deficiencies and the need for some more adequate machinery to facilitate a recourse to arbitration and of a code of international procedure to bring the issue to

a decision. During the nineteenth century, several projects for the establishment of an international court with a permanent body of judges and a fixed procedure came to be put forward. Thus plans for the creation of an international court containing useful suggestions were made by Bluntschli, Lorimer, David Dudley Field, J. S. Mill, Leone Levi, Edmund Hornley, Maurice Adier, M. Bara, M. Goblet de Alviella, Elihu Burritt, Ladd, and others. Apart from these plans of private jurists and philosophers, a number of national and international societies and groups adopted different schemes and projects for the establishment of an international tribunal. Thus, for example, the Inter-Parliamentary Conference, composed of British and French members of Parliament, adopted an elaborate draft of a permanent court of arbitration in Brussels in 1895 which was later used as a basis of discussion at The Hague in 1899. By the beginning of the twentieth century, there was, therefore, a strong movement in favour of the creation of such a court, and national Parliaments in various countries had adopted memorials to this end.

3.8. The Hague Peace Conferences, 1899 and 1907

By the end of the nineteenth century, arbitration had become a widely spread international custom; and it was natural that its discussion should occupy a considerable place in the deliberations of the Hague Peace Conferences of 1899 and 1907. The conclusion of the convention for the Pacific Settlement of International Disputes was the most positive of the achievements of the Conference of 1899.

The Convention established, in Chapter II of Part IV, the misnamed Permanent Court of Arbitration. It is little more than a panel of names from which arbitrators may be selected, when the occasion arises. The Convention allows governments party to it to nominate a maximum of four persons of known competency in questions of international law, of the highest moral reputation and

41 Garner, n. 37, pp. 654 ff.; Wehberg, n. 29, Chapter 7.
42 Hudson, n. 31 p. 6.
disposed to accept the duties of Arbitrator." Such people's are nominated for terms of six years, and in the event of their death or resignation may be replaced in the same manner as they were nominated. When a dispute arises between parties to the Convention, which they wish to refer to a tribunal of the Permanent Court of Arbitration, each appoints two arbitrators from the panel. The four arbitrators thus chosen select an umpire; If the four arbitrators are evenly divided on the selection of the umpire, the choice of umpire .is entrusted to a third Power selected by agreement between the parties. If the parties cannot agree upon the third Power, each party chooses a different Power and the choice of umpire is made by agreement between the two Powers thus chosen.

The only permanent feature of the Permanent Court of Arbitration is the Bureau established in accordance with Article 22 of the Convention. The services of the Bureau are available for tribunals formed from the Permanent Court of Arbitration, and may also be placed at the disposal of other tribunals" and commissions of inquiry. Chapter III lays down the rules of procedure which apply in default of agreement to the contrary between the parties. The formulation of these rules in 1899 was a valuable corrective to the extreme informality of some of the earlier arbitrations. As amended in 1907, they are still today cited as authority when disputes arise upon points of procedure, and they have influenced the drafting of many compromise.

Between 1902 and 1905, recourse was had to the machinery established by the Convention of 1899 for the settlement of four disputes: the Pious Fund case (United States and Mexico) the Venezuelan Preferential Claims case (United Kingdom, Germany, Italy and Venezuela) the Japanese House Tax case (United Kingdom, France, Germany and Japan), and the Muscat Dhows case (United Kingdom and France). In all these cases, the issues were of secondary importance. They served, however, to put the provisions of the Convention of 1899 to the test, and to show where improvements might be attempted, when the second Hague Peace Conference assembled in 1907.

The Convention for the Pacific Settlement of International Disputes of 1907 provides that of the two arbitrators appointed by a party to a dispute, only
one can be its national or chosen from among the persons selected by it as members of the Permanent Court. Article 53 of Part III empowers the Permanent Court to settle the *compromise* if the parties so agree, or on certain conditions on the application of one of the parties. The conditions for the exercise of the latter power are, however, so restrictive that recourse has never been had to it. A new Part IV in the Convention of 1907 provides for arbitration by summary procedure. Under these provisions, the tribunal consists of three members who have power to settle the time-limits within which the parties must submit their cases, and the proceedings are entirely in writing. This procedure was invoked in the Dreyfus Brothers case (France and Peru); but the proceedings were much delayed by the war of 1914-18. The Convention of 1899 declared in Article 16 that: *In questions of a legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognized by the Signatory Powers as the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle.*

The Conference of 1907 cautiously added to Article 16 the words: *Consequently, it would be desirable that, in disputes regarding the above-mentioned questions, the Contracting Powers should, if the case arises, have recourse to arbitration, in so far as circumstances permit.*

The Final Act of the Conference of 1907, with a magnificence of language masking the disappointment of high hopes, stated that the Conference was unanimous in admitting the principle of compulsory arbitration, in declaring that certain disputes, *in particular those relating to the interpretation and application of international agreements, might be submitted to compulsory arbitration without any restriction, and in proclaiming that, although it had not yet been feasible to conclude a Convention in this sense ... the collected Powers ... had succeeded in the course of this long collaboration in evolving a very lofty conception of the common welfare of humanity.*

*Behind the formulae lay the frustration of all endeavours to reach agreement at either Conference on proposals of varying scope for the acceptance of compulsory arbitration. Each of the various proposals found considerable*
minors in opposition, and it was held impossible to proceed further.

Yet the Conference of 1907 contemplated that a state might have to choose between arbitration and war. Under the Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, a refusal by a debtor state to reply to an offer of arbitration, or its refusal to agree to the settlement of the *compromise*, or to submit to the award, frees the state of the creditors from the obligation not to have recourse to war.

A proposal for a Judicial Arbitration Court, which was to have had a permanent character (which the so-called Permanent Court of Arbitration does not, in fact, enjoy), and which was to consist of judges, not selected by the parties ad hoc, but as representatives of the various judicial systems of the world, foundered upon the opposition of the smaller Powers, who were fearful that, in the selection of judges, the principle of the sovereign equality of states might be infringed. The Conference of 1907 could do no more than draw attention to the advisability of adopting a draft convention for the creation of a Judicial Arbitration Court, as soon as agreement had been reached respecting the selection of judges and the constitution of the Court.

The Conference appeared to have made better progress in actually adopting a Convention for an International Prize Court to hear appeals by neutrals and, in certain cases, by enemy subjects against decisions of national prize courts. The Convention has, however, never entered into force.\(^43\)

### 3.9 Vital Interests, Independence or Honour

In 1903 the United Kingdom concluded with France the Agreement providing for the settlement by Arbitration of Certain Classes of Questions which may arise between the two Governments. This Agreement envisaged reference to the Permanent Court of Arbitration of differences of a legal nature or relating to the interpretation of treaties, provided, nevertheless that they do not affect the vital interests, the independence, or the honour of the two Contracting States, and do

\(^{43}\) J. L. Simpson and Hazel Fox *International Arbitration Law and Practice* (Stevens and Sons Limited London 1959) p.15.
not concern the interests of third Parties " (Article I). This was to become a stock formula for bilateral arbitration treaties of the period. By 1905 the United Kingdom had concluded treaties embodying it with ten other European states, and it was widely adopted by other Powers. Attempts, which had been made at various times since 1897, to negotiate an arbitration treaty with the United States had all proved unavailing, largely owing to the misgivings of the Senate in Washington. In 1908, however, it at length proved possible to conclude the Arbitration Convention between the United Kingdom and the United States. This Convention, in deference to the authority of the Senate, had to include a provision that any special agreement concluded under it should not be binding until confirmed by the Governments in an exchange of notes. It also adopted the "vital interests, independence or honour" formula of the European treaties. The formula became common form in arbitration treaties concluded by the United States, and is to be found in the Treaty between the United States and Liberia concluded as late as 1926.44 Under treaties of this type, the question—whether the obligation to seek arbitration in a particular dispute had arisen or not—was left largely to the subjective judgment of the states concerned.45

3.10 The Permanent Court of Arbitration

Because so many disputes were arbitrated during the nineteenth century and it seemed desirable to encourage an even greater use of the procedure, the Permanent Court of Arbitration was set up in 1899 at The Hague. Its constitution’s a portion of the Convention for the, Pacific Settlement of International Disputes, and like the entire Convention, it underwent some slight modifications in 1907. There is an International Bureau attached to the Court to serve as a registry, to communicate with individual states, and to have charge over the archives.

Each state which is a member of the Court names four persons to a panel from which arbitrators are selected for specific disputes. Each disputant is entitled

to select two persons from the panel, of whom only one can be its own national or chosen from among the persons named by it to the panel. These four arbitrators so selected together choose an umpire; if the votes are equally divided, the umpire is named by a complicated process defined in Article 45 of the Convention.

When the Permanent Court of Arbitration was set up, the expectation was that the nations would bring many cases before it. As a matter of fact, there were a fair number referred to the Court during the first fifteen years of its existence; seventeen awards were handed down prior to the opening of World War I. Since 1920 it has handled only two cases, owing no doubt to the availability of a court of justice, first the Permanent Court of International Justice and now the International Court of Justice of the United Nations.46

One of the most important cases that has been before the Permanent Court of Arbitration was the North Atlantic Fisheries case, decided in 1910. It dealt with the age-old problem of the fishing rights of Americans in Canadian waters under the treaty of 1818. Seven questions relating to those rights were submitted to the Court, and were answered, some in favor of the British contention and others for the United States. The award of the Court brought to an end a controversy which had recurred frequently for nearly a century, and it thus contributed notably to a better relationship between the United States and its neighbor to the north.

In 1928 the Court heard the last case to be referred to it—the Palmas Island case between the United States and The Netherlands. The dispute in the case arose out of the fact that the Palmas Island, located near the Philippines, was found by the United States to be under the Dutch flag although it had been ceded by Spain to this country after the Spanish-American War. The Dutch maintained that they had been in occupation for many years, while the United States argued that the island had been discovered by Spain and ceded to us. The award of the court supported the Dutch claim, giving force to international law in its stress upon effective occupation as a legal claim to territory.

46 The two cases were (1) the Norwegian claims against the United States (1922), and (2) the Palmas Island case between the United States and The Netherlands (1928).
Because arbitration was criticized as lacking some of the judicial qualities characteristic of courts within nations, a movement was launched early in the present century to set up for the world a court of Justice whose bench would be fixed, permanent, beyond the control of Litigants, and strictly bound in its decisions by international law. The Permanent Court of Arbitration, so it was commonly said, was neither "permanent" nor, in the proper sense, a "court." The only permanent thing about it was the lengthy panel of names; each case was heard by a different tribunal, which, composed of arbitrators rather than judges, did not have the essential detachment of a genuine court.

The first court of justice to be set up for disputes between nations was the Central American Court of Justice (1907). The seat of the Court was first placed at Cartago, Costa Rica, but later it was moved to San Jose, where it was provided with a building by Mr. Andrew Carnegie, the donor of the Peace Palace at The Hague, which has housed the Permanent Court of Arbitration, the Permanent Court of International Justice, and the International Court of Justice. The building at San. Jose, however, was not completed until 1917, so that the Court was able to occupy it only a few months before it went out of existence in March, 1918.

The Central American Court of Justice was a novel, and in some ways a remarkable, experiment in international organization. Certainly it represented a conception of justice in the affairs of nations several steps ahead of anything that the great powers of the world were able to achieve at that time. The Court was composed of five regular judges, one appointed by each of the five Central American states party to the convention of December 20, 1907, by which it was set up. Each state also appointed two substitute judges. All of the judges, regular and substitute, served for five-year terms, and each was paid a salary of $8000 per year. To hear a case, all five judges or their substitutes had to be in attendance; a judge was not disqualified by the fact that the state of which he was a national was a party in court.

The jurisdiction of the Central American Court was more extensive than that of any international tribunal before or since. It included "all controversies or
questions which may arise among them, of whatsoever nature and no matter what
their origin may be, in case the respective Departments of Foreign Affairs should
not have been able to reach an understanding." The Court's jurisdiction was broad
enough to cover cases filed by a national of one country against the government of
another country. By special agreement the Court could hear cases between one of
the Central American states and a state in some other part of the world, but, in
fact, no such case was ever submitted. Under an "optional clause" which was
signed by all the members except Costa Rica, the Court could deal with conflicts
between the legislative, executive, and judicial branches of a government, but in
such cases "the public law of the respective state" was to be followed. The wide
area of compulsory jurisdiction in disputes between states and in controversies
involving states and the citizens of other states, combined with optional
jurisdiction in other types, marked the court as an agency destined to play a role of
importance within the region which it served.

During its lifetime of approximately ten years, the Central American Court
of Justice dealt with ten cases. Five of the cases were brought by individuals
against a state, and all of them were decided against the individuals concerned.
The initiative in three of the cases was taken by the Court itself, a procedure
which was regarded as legal under the Constitution of the Court.

In 1916 the Central American Court heard two cases involving the Bryan-
Chamorro Treaty, signed in 1914 by the representatives of the United States and
Nicaragua, by which the United States was given canal rights, a naval base in the
Gulf of Fonseca, and a 99-year lease of Corn Islands. The cases were brought by
Costa Rica and El Salvador against Nicaragua. The decisions of the Court were
regarded as unsatisfactory both by the United States and Nicaragua. Consequently,
Nicaragua gave notice in 1917 of her intention to terminate the convention of 1907
by which the Court had been set up; on March 12, 1918, the Court ceased to exist.
To take its place, the Central American states established in 1923 a new
International Central American Tribunal, an arbitration tribunal, whose jurisdic-
tion was quite limited.
In 1907, the same year in which the Central American Court was set up, the Government of the United States proposed to the conference then in session at The Hague that an international court of justice be established. The project had general support, but inability to agree on the method of choosing judges finally led to its abandonment. In the years which followed, there was growing agitation in favour of such a court, but nothing much was accomplished toward its creation until the Covenant of the League of Nations was written in 1919. Article 14 of that document placed upon the Council the duty of working out the details of a plan. As a consequence, the Permanent Court of International Justice came into existence in 1921. It was superseded after World War II by the International Court of Justice. These essential features of International Arbitration have been preserved to this day\(^\text{47}\) and have exercised a potent influence on the development of International adjudication proper, through the International Court.\(^\text{48}\)

### 4. THE LEAGUE OF NATIONS

The establishment of the League of Nations by the Peace Treaties of 1919 changed this. Especially significant was the differentiation between the Council and the Assembly. The Council was conceived as a small executive body in which the political responsibility and power were concentrated. It was composed of a number of permanent members, who were the surviving Great Powers which were members of the League and elected members on the other hand, the Assembly which met once a year in regular session was the general deliberative body of the total membership. The League was equipped with an administrative organ,\(^\text{49}\) the Secretariat, and a regular budget. Obviously, the existence of such a pattern of international organization opened new perspectives for a permanent international judicial organ.

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\(^{48}\) A Merignhac “Traité Théorique et pratique de L’arbitrage International” (Paris, 1895) and J.H. Ralston “The Law and Procedure of International Tribunals” (Stanford, 1926).

By the time the early drafts of the constitution of the League of Nations were circulating at the beginning of 1919, the notion that permanent machinery for international adjudication must be included seems to have been accepted. It was perceived that the establishment of the League, in which the Principal Allied and Associated Powers would have a predominant position (they would be permanent members of the Council), opened the way to a solution of the problem of the composition of such a tribunal. It was also felt that the existence of a regularly established international organization might facilitate a solution for the question of the extent to which the principle of compulsory arbitration could become feasible. Obviously, however, a great deal of work was required before these ideas could be translated into the language of reality. Article 12 of the Covenant contained a general obligation to submit to arbitration or settlement by the League Council any dispute likely to lead to a rupture, as well as provisions for the execution of decisions, and Article 13 contained a general declaration about the types of dispute which were regarded as generally suitable for submission to arbitration. \(^50\) These included disputes as to: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which if established would constitute a breach of any international obligation; or (d) the extent and nature of the reparation to be made for any such breach. The first of these categories had appeared in Article 38 of the Hague Convention of 1907. The others, however, are new, and indicate the extent of the intellectual advance achieved since 1907. If the matter could be disposed of merely by means of definitions and classifications, the four categories together are broad enough to cover every international dispute, though not necessarily every type or instance of international tension which might occur. This formula has come to exercise a significant and on the whole fruitful influence on the work of The International Court.

Articles 12 and 13 contained general obligations binding on the Members of the League, obligations which were vague and of indefinite scope it is true, but nonetheless obligations. That was as far as the Peace Conference could go in the

\(^{50}\) These obligation were completed by article 15 giving the council competence for disputes which were not settled by arbitration for judicial settlement after the adoption of statute of PCIJ, the references to arbitration in the covenant were changed to "arbitration or judicial settlement."
time at its disposal. It could not establish the permanent judicial organ, and it therefore decided to leave future developments to the organs of the League. Article 14 of the Covenant consequently imposed on the Council the duty of formulating plans for the establishment of what was termed the Permanent Court of International Justice, which would be competent to hear and determine any dispute of an international character which the parties thereto submit to it. This Article also introduced a completely novel idea into international practice, by providing that the Court might give an advisory opinion upon any dispute or question referred to it by the Council of the Assembly.

The Assembly, after further amendment, then adopted the Statute of the Permanent Court of International Justice, and opened its Protocol of Signature on 16 December 1920. It decided that the Statute would come into force as soon as it was ratified by the majority of the members of the League. This process was completed by the beginning of September the next year, and the Statute then came into force. The first election of judges took place in 1921, and the Court was formally inaugurated in January 1922. The first case to come before the Court an advisory opinion was filed in May, 1922; and the first contentious case was instituted a year latter.51

Thus was the concept of a permanent international judicial organ translated into reality.

4.1 Creation of the Permanent Court of International Justice

The establishment of the permanent court of International Justice represented a considerable advance.52 Previous attempts to establish a permanent, as distinct from a purely ad hoc international tribunal among a large group of states.53 The Permanent Court of International Justice, a truly permanent court on a world-wide scale—Though his first draft of a League of Nations Covenant,
President Woodrow Wilson made no provision for a world court, he respected the desire of American and foreign advocates of judicial settlement—especially the French, the Italians, and small European neutrals—for a court and Article 14 of the League Covenant required the Council to "formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice".54

Over a period of several years beginning in 1917, certain European, states, which did not participate in the First World War, took an active interest in the creation of an international court. The Swedish, Danish' and Norwegian Governments prepared a Joint plan which was published in January 1919. Early next year (16-27 February 1920), a conference of five neutral states, Denmark, the Netherlands, Norway, Sweden, and Switzerland was held at The Hague, which adopted a project for the establishment of a world court. The committee of jurists which later drafted the Statute of the Permanent Court found a "very valuable source of information in the plan of Five Powers".

In accordance with its mandate, the Council invited a committee of jurists consisting of the members; several of whom had been engaged in the work of the Hague Conferences of 1899 and 1907 and some of whom later had a prominent part in the work of the Court itself,55 to draft the Court's Statute. This Court, it was said, should not he an arbitration tribunal to be created ad hoc whenever the parties concerned agreed to have recourse to it, but "a seat raised in the midst of the nations, where judges are always present, to whom can always be brought the appeal of the weak and to whom protests against the violation of right can be addressed". The Committee met at The Hague from 16 June to 24 July 1920, and was able to adopt unanimously a "draft-scheme" of 62 articles, with only a mention of reservations by Adatci and Ricci-Busatti in its report.56

55 As pointed out by secretary general of the League of Nation five of the ten members of committee were "Nationals of the five great powers and five nationals of small powers" Hudson n. 83 p. 15.
56 These reservations related to the proposed compulsory jurisdiction in the draft. ibid. p., 648-727.
The most important and difficult problem concerned the election of judges, which, as we have seen, had baffled and defeated the Hague Conference in 1907. It was solved largely due to the conception of the Court as an organ of the League of Nation. The existence of the Assembly, organized on the principle of state equality which had been, so much emphasized in 1907, and the Council of the League, organized to take account of the hegemony of the Great Powers who had always insisted on permanent representation on any court that might be created, afforded a possible escape from the deadlock of 1907. The creation of the Assembly and the Council showed that the principle of equality of states and special consideration for the Great Powers wore no longer irreconcilable, yet the solution evolved by the Committee of Jurists was the result of an intense discussion.

When the discussion opened in the 1920 Committee of Jurists, the principle of equality of states was greatly emphasized. Hagerup (of Norway) declared that "the principle of equality of states is the Magna Carta of the smaller states" and warned that political considerations should not come into account in the solution of juridical problems and that if one tried to introduce an element of inequality into the scheme for the Court, the scheme would fall to the ground as did the scheme of 1907. De Lapradelle (France), Loder (Netherlands), and Ricci Busatti (Italy) also supported this principle. On the other hand, Lord Phillimore (Great Britain) urged that "the Court must have a material force behind it", and this could be possible only "if it includes representatives of “Great Powers”, without whom it would lack “back bone". Elihu Root of the United States hinted a solution. It might be "possible [said Root] that the solution of the problem would be found by articulating the new organization with the political organization of the League". "Would it be possible", he asked, "to vest the power of election of judges both in the Assembly and the Council". Though roots suggestion was regarded by certain members, who had been insisting on the recognition of the principle of state equality, as "premature" at that stage, and a few other proposals regarding the election of judges were made and rejected, gradually support developed for his idea. Root put his suggestion in a concrete form in a memorandum providing an election by the Council and the Assembly from a list of name furnished by the

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57 Baran Descamps Proposed election by members of the permanent court of arbitration p. 132-2.
members of the Permanent Court of Arbitration, each national group proposing no fewer than two and not more than four names. Dr Lapradelle supported this proposal by stating that "as the question before the Committee was the creation of a new organism forming a part of the League of Nations, it is only right that the election should be entrusted to the two chief organs of the League."58

The major problem relating to the election of judges having been solved, it was not difficult for the Committee to devise other provisions regarding the organization of the Court. As to the size of the Court, the members of the Committee of Jurists stressed the necessity of a Court "large enough to represent the various systems of legal thought, yet small enough to include only persons of eminence; large enough to admit challenges and to offset inevitable absences, yet small enough to enable effective conferences to be held."59 It was also suggested that the number should be susceptible of increase as more states were admitted to the membership in the League and as the Court's jurisdiction was extended. Most plans submitted to the Committee suggested fifteen judges. Root-Phillimore plan suggested eleven judges and four supplementary judges. Adatci wanted thirteen judges; Loder, nine; Lord Phillimore proposed that the number should be fixed at fifteen plus a small number of deputy judges. Hagerup was in favour of fifteen; De Lapradelle thought that eleven should be the minimum. Ricci Busatti maintained that too much distinction should not be drawn between the new Court and the Court of Arbitration. He therefore, felt that the Court should consist of fifteen to twenty names and in every case a tribunal should be formed ad hoc. The final plan adopted by the Committee provided for a Court of fifteen members—eleven judges and four deputy judges—with power given to the Assembly, acting upon the proposal of the Council, to increase the number to Fifteen judges and six deputy judges.60

The 1929 Committee of Jurists, established to amend the Statute of the Permanent Court of International Justice, proposed the omission of the Assembly's

58 Hagerup also gave support to Roots plan, 156-7.
60 The idea of including deputy judges seems to have come from the Hague project of 1907, and was thought useful to serve the practical purpose of filling vacancies, and the political purpose of satisfying states which had no nationals among the judges. Hudson, n. 83. pp. 148-149; Proces Verbaux, n. 91, pp. 200, 400, 457-465.
power to increase the number of judges, "to avoid the risk of an exaggeration which might cause misconception". It also proposed the abolition of the post of deputy judges, as "practical experience" suggested the desirability of this course, the assimilation of two classes of judges, and the increase of the number of ordinary judges from eleven to fifteen.61 These proposals were accepted by the 1929 Conference of Signatories and incorporated into the Statute of the Permanent Court.62

The Court was thus to be "composed of a body of independent judges elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial office, or are jurisconsults of recognized competence in international law" (Art. 2). Each of the fifteen judges was to be a national of a different state [Art. 10(2)], and the Court could be supplemented by ad hoc judges if one or both of the parties had no judge of their nationality upon the bench of the Court (Art. 31). The independence of the judges, as we shall see in detail below, was carefully safeguarded. No judge was subject to recall, either by the state of which he was a national or by the electoral bodies of the League of Nations; during his term of office he might be dismissed only by the unanimous action of his colleagues (Art. 18).

The Committee of Jurists suggested that the members of the Court should be elected for a period of nine years and might be reelected after the expiry of that term. Several of the preliminary plans submitted to the Committee also suggested a term of nine years, though a few others suggested a term of six years, twelve years, or life tenure. The Committee in its report said that this period would ensure continuity of jurisprudence, and "make it possible for states to eliminate judges who though not actually-unfit for their duties, no longer justify the confidence that the states at one time reposed in them". While the reelection of useful judges "who have done good service and have deserved well of the League of Nations by their enlightened and impartial administration of justice" was envisaged, there was also

appreciation of the desirability of the Court's having new blood every nine years. In any case, the Committee pointed out, "the free play afforded to states at the time of election, by a general redistribution of seats every nine years is very desirable".

Leaving details of some of the provisions to be dealt with later, this, in bare outline, was the organization of the Court suggested by the Committee of Jurists to the Council of the League. When this plan came before the Council, Bourgeois (France) said that it gave satisfaction to the cherished principle of equality "to exactly the same degree as in the Covenant", and he thought that "by its very existence" the League had made it possible to solve the difficulty. Without any change of substance in regard to organization, the Council, and the Assembly accepted the plan of the Permanent Court of International Justice.

A "dream of centuries" thus came to be realized. The first election of the members of the Court was held in 1921 and the Court, started functioning in June 1922. Although its Statute had been ratified by only fifty-one states, almost all the then existing states of the world (all Nepal, Saudi Arabia, Vatican, and Yemen) took some part in concluding hundreds of treaties which conferred jurisdiction on the Court. The Court continued to function until the invasion of the Netherlands in 1940. During the eighteen years of its existence, in the sixty-six international disputes which came before it, the Court gave thirty-two judgments, twenty-seven advisory opinions, and more than two hundred orders. Its decisions, some of which were of major importance commanded universal respect, and all of them were faithfully accepted and complied with. Its jurisprudence became a new storehouse of international law. It was indeed a World Court, though its activity was largely confined to disputes of European origin.

5. THE SAN FRANCISCO CONFERENCE

Even while the guns of the second world war roared and men died in battlefields around the world, the United Nations conference on International Organization opened at San Francisco once again. In 1945 the President of the

63 Records of the First Assembly, Committee I, p. 466.
64 The most important amendment that came to be made in the council and in the Assembly related to the question of obligatory jurisdiction of the court. Hudson, n. 83, pp. 118-20

59
United States took lead in the establishment of an institution for world peace.

A crucial problem throughout the negotiations both at Dumbarton Oaks and in San-Francisco concerned the voting procedure in the new organization. The experience of the League of Nation had shown that the unanimity rule was a major obstruction in reaching a decision for the preservation of international peace.

The most significant event that took place in the field of international judicial organization during the year 1945 was the adoption of the statutes of the PCIJ. The event marked at once an end of a chapter of history which recorded an astonishing success and opened a promising prospect for the continuance of the international administration of justice.

5.1 The Birth of the International Court of Justice

The general lines to be followed in the drafting of the new statute were forged in the conversations conducted at Dumbarton Oaks by representatives of the United State of America, the United Kingdom, the union of Soviet Socialist Republic, and China from 21 August to 7 October 1944. The proposals resulting from those conversations contained the following specific suggestions:

1. There should be an international court of justice which should constitute the principal judicial organ of the organization.

2. The court should be constituted and should function in accordance with a statute which should be annexed to and be part of the charter of the organization.

3. The statute of the court of international justice should be either (a) the statute of the permanent court of international justice contained in force with such modifications as may be desirable or (b) a new statute in the preparation of which the statute of the permanent court of international justice should be used as a basis.

4. All members as the organization should Ipso facto be parties to the statute of international court of justice.

5. Conditions under which states not members of the organization may become parties to the statute of I.C.J. should be determined in each case by
the General Assembly upon the recommendations of the Security Council.

The proposals also envisaged a continuance of the advisory jurisdiction of the court in some degree in the suggestion that:

Justice able disputes should normally be referred to the I.C.J the Security Council should be empowered to refer to the court, for advice legal questions connected with other disputes. An informal understanding was reached at Dumbarton Oaks, that in advance of the projected United Nations Conference, a committee of jurists would be convoked to prepare a draft of the statute of the future court.

Acting on behalf of itself and three other government which had been represented at Dumbarton Oaks, to government of the United Oaks, to government of the United State on 24 March 1945, issued invitations to the United Nation to send representatives to a preliminary meeting of jurists to be held in Washington, to prepare draft as statute for the I.C.J. Forty-four states accepted this invitation under the chairmanship of Green H. Hackworth (USA) and with Jules Basdevant (France) as reporter, the committee of Jurists met on 9 April 1945, and completed its works on 20 April. The permanent court of international justice accepted an invitation to be represented unofficially at the meeting of the committee, and judge Hudson was designated as its representative.

At its first meeting the committee of jurists decided to take the statute of the P.C.I.J. as the basis of its work. Thereafter the discussions proceeded on a text submitted by American representative. This proposed a revision of twenty-five of sixty-eight articles and the addition of an articles on amendment; changes were suggested in eleven articles with a view to substituting the United Nation for the league of Nation: Substantive changes were suggested in eleven articles: and slight modifications were suggested in three articles. For the most part of the discussions were conducted in the English Language, but the committee of jurists and the report thereon were in the Chinese, English, French, Russian and Spanish Languages.

As explained by its reporter, the committee of jurists proceeded to a revision, article by article, of the statute of permanent court of international
justice. This revision consisted, on the one hand, in the effecting of certain adaptations of the form rendered necessary by the substitution of the United Nation for the league of Nation: on the other hand. In the introduction of certain changes judges desirable and now possible. The committee’s draft safeguarded the arrangement and numbering of the articles as in the statue of the permanent court, and it introduced a useful innovation in numbering the paragraphs as each article.

On certain questions, it was deemed to be more prudent course to avoid any attempt to prejudge the decision which might later be taken by the United Nation conference, and the following topics were referred by the committee of Jurists.

1. The question whether the court of the justice should be a new court or a continuance of the court established in 1920;

2. The question as to the manner in which candidates should be nominated on the election of judges and;

3. The question whether the optional feature of the jurisdiction conferred should be retained or replaced by a provision for compulsory jurisdiction. On the second and third questions the committee presented alternative draft.

Fifty states were represented at the united Nation conference on International Organization, held at San-Francisco from 25 April to 26 June 1945. This conference entrusted the consideration as the draft prepared by the Washington committee of jurists to committee I of commission-IV. The P.C.I.J. accepted on invitation to be represented unofficially of the meeting of the committee I, and president Gurrero and Judge Hudson assisted in its deliberation.

In twenty-two meetings from 4 May to 14 June 1945, committee-I prepared a draft of the articles which later become Article 92 to 96 of the charter as well as draft as the stature of the ICJ.

The Washington draft, taken as a basis as its works, was submitted by committee-I to a first reading, during the course of which opportunity was given for the presentation of amendments to the adoption of the text of statute, articles by article: only after the accomplishment of this task was well advanced did it
arrive at proposals for texts to be included in the Charter, from time to time, sub-committees were charged with the consideration of particular topic. After the text proposed by committee. I had been adopted by commission-IV on 15 June they were submitted to some reshaping at the hands of the Co-ordination committee, with the aid of an advisory committee of jurists.

On 25 June 1945, the Steering Committee of the conference reported: “The statute of the International Court of Justice which is to form an integral part of the Charter, was not formally considered by the steering committee, since it had been thoroughly discussed by the United Nation committee of jurists, which met in Washington before this conference, by Technical Committee – I of committee II, and by the co-ordination committee and the advisory committee of jurists. The steering committee had made before it, on 23 June a statement of the drafting changes made in the statute by the co-ordination committee and the advisory committee of jurists. These changes were designed merely to clarify certain passages in the statute as adopted by commission IV and to bring the statue as a whole into compete accord with the charter”.

The final text of the new statute was annexed to the charter of the united nation which was signed on 26 June and brought into force as a result of the deposits of ratification by twenty-nine states an 24th October 1945.

5.2. Decision to Create a New Court - I.C.J

Judicial settlement comprises the activities of all international and regional courts deciding disputes between subject of international law, in accordance rules and principles of international law. there are a number of such bodies. However, by for the most important of such bodies, both of prestige and jurisdiction, is the International Court of Justice.

As regard the work of the committee of Jurists at Washington and the conference of San Francisco the problem raised in the Dumbarton Oaks proposal

65 Sub Committee A reported on the question of old of new court on 22 May: Sub committee B and C reported on Articles 8-12 of the statute on 22 May and 25 May of respectively; sub-Committee- D reported on Articles 36 of the statute on 31 May, 13 Document of the Conference pp. 524, 537, 549-557.
was that – the statute of the court of international justice should be either (I) the statute of the permanent court of international justice continued in force with such modifications as may be desirable or, (II) a new statute in the preparation of which the statute of the permanent court of international justice should be used as basis. Yet the choice between these alternatives was one of the matter referred at Washington, and no decision on it was taken at San Francisco, until the work on the drafting on the statute was already well advanced.

It is important to underline the fact that the approaches to a decision as this question no dissatisfaction with the permanent court was voiced at anytime, either at Washington or at San-Francisco. Nor was any criticism expressed of its record in dealing with the cases brought before it. The case was quite contrary. The report made by professor Basdevant on behalf as the committee of jurists referred to “the respect attaching to the name of the Justice” it states that “The P.C.I.J had functioned for twenty years to the satisfaction of the litigants” and that “If violence had suspended its activity, at least this institution had not failed in its test.”.

Even more effusive was the report made by sub-committee – A committee-I on 21 May 1945 which referred to “the debt of the United Nation to the experience of the permanent court not only in respect of the constitution but also in matters of jurisdiction, organization and procedure”, and which proposed that “the fullest use should be made of the valuable experience and achievements of the permanent court”. The reporter of committee – I, Nasrat Al-Fursy, stated that the permanent court’s exercise of the jurisdiction conferred on it had “produced a general satisfaction throughout the world”, and the committee – I “Pays tribute to this remarkable achievement, which had led to the accumulation of rich experience”.67 In his report to the president offer the signature of the Charter, the Chairman of the American delegation stated that “there was unanimous agreement that the P.C.I.J. had rendered effective service and had made an excellent record.”68

In line with thus appreciation, a strong current of opinion both at

67 Documents of the conference, p. 382. The report was also published in 31 American Bar Association (1945), pp. 420-425.
68 Department of state publication, n. 2349 p. 139.
Washington and at San-Francisco supported the first at the Dumbarton Oks alternatives, and favoured the continuance in force with modification of the statute drawn up in 1920 and revised in 1936. This course was presented as affording.

The best way of assuring the advantage of continuity with the experience of the past, and of safeguarding is the gains of a viable and successful international institution.

However, in the first place, the existing statute included no provision for the procedure to be followed in effecting a modification of its text: hence the normal procedure for introducing modifications would have required the assent of all the states parties. It is true that in time of turmoil in the past, multipartite international instruments have on some accessions been modified without the assent of all the parties:69 but that procedure hardly commended itself in connection with the adoption of a basic instrument relating the administration of international justice. Yet for various reasons it would have been extremely difficult to organize consultation with all the states parties to the existing statute. Many of the states parties were not represented at San-Francisco,70 and the states there represented did not maintain diplomatic relations with some of these states. Nor is the fact to be ignored that in some of the states parties to the existing statutes government were in power which were, to say that least, not all together popular, and an the part of the some of the delegates at San-Francisco there was reluctance to consult with those governments. In any event, consultation would have involved effort and time as well as a risk of possible dissent. Moreover, consultation was not facilitated by the adoption of the Dumbarton Oaks proposal that the statute should be made an integral part of the Charter: for this reason, the period of the time which would have been required might have delayed the signing of the charter, and conceivable the whole programme for launching the charter and the organization might have been jeopardized.

A further complication resulted from the fact that the protocol of signature as 16 December 1920, to which the statute was annexed, was open to signature

69 A Notable example was the convention the revision of the Berlin and Burssels Act, signed at St. German, 10 September, 1919, I: For other cases of modification without unanimous consent, Tobin, H.J. Termination of Multipartite Treaties, New York, 1933, p. 206.
70 These included Albania, Astria, Bulgarija, Finland, Germany, Hungary, Ireland, Italy, Japan, Poland, Portugal, Romania, Slam, Spain, Sweden and Switzerland.
and ratification only by members of the League of Nations, it was not open to accession by other states. A number of the states represented at San Francisco had not become parties to the statutes of the permanent court, and until a modification of the text applicable should have been brought in to force, same as them could not become parties to the instrument. Such states were in a somewhat anomalous situation for participating in the modification of the 1920 statute, without frank avowal that the United Nation were taking over the existing court.

Committee I referred the question of an old or a new court to a sub-committee which on 21 May 1945 reported: “After considering the reasons advanced for and against the two alternatives, the sub-committee decided by a vote of seven to three to recommend that the court should be a new institution, believing that the consequences of the other solution would be more grave, from the point of view of international law and practical reasons”.

The adoption of this report by committee I put effective seal on the decision that the statute to be annexed to the charter should be new statute, not continuing but replacing the statute of 1920, and technically, the court of the future should be a new court, the committee’s consideration of the question was summed up by its reporter in the following language.

The basic question which had to be resolved by the first committee was weather the permanent court of international justice should be continued as an organ of the new organization, or whether a new court should be established. This question was considered in all its aspect, both at meetings of the full committee and at a number of meetings of a sub-committee. After blanching to advantages to be gained and the objections to be overcome in the adoption of either course, the First-Committee decided to recommend the establishment of a new court. This course commended itself to the first-committee as a more in dealing with the provisions proposed for inclusion in the Charter, under which all member of the organization will Ipso facto be parties to the statute and other states not member of

The states in this category included the United States of America, Costa Rica, Ecuador, Egypt, Guatemala, Hundwas, Iraq, Lebanon, Liberia Mexico, Philippine, Common Wealth Saudi Arabia, Syria, The Union of Soviet Socialist.

For example, Lebanon, Philippine, Commonwealth, Syria and others. Nor it is clear then an ex member of the league of nation could become a parties to the protocol on December 16, 1920.

Document of the conference, p. 383, As fifty – two states become parties to the statute of the permanent court, the figures given in the edited report are not exact.
the organization may become parties to the statute only on conditions to be laid down in each case by the General Assembly upon the recommendation of the security council. Some of the members of the first committee regarded the maintenance of this provision as essential to the acceptability of the charter and the statute by all members of the United Nation.

Moreover, the creation of new court seems to be the simpler and at the same the more expeditious course to be taken. If the permanent court were continued, modifications in its statute would be required as a result of the discontinuance of the League of Nation only 32 of the 41 states now parties to that statute are represented at the United Nation conference in San Francisco, and the negotiations with the parties not thus represented which would be required for effecting modification in 1920 statute would encounter difficulties and might be very protected. Moreover, a large number of states are represented at the United Nation Conference which are not parties to the 1920 statute, and as it is not open to all of them for accession, some of them could have no part in the negotiations entitled by the process of modification. On the whole, therefore, though the creation of a new court will involve important problems, this course seems to the first committee to crease fewer difficulties then would the continuance of the P.C.I.J. and it may make possible the earlier functioning of the court of the future.

The question then arose though it was little discussed as to the name of the new court. It might have been possible to Christian the new court as the P.C.I.J. it in same quarters that name had been commented upon the word “permanent” seemed to smack of unfulfilled prophecy, and the qualification of the “Justice” as “International” were thought to be too limitative – The objections to it was not determining. A new court seemed to require a distinguishing name, and the reference in the Dumbarton Oaks proposal was at hand to supply it.

Hence it was laid down that the International Court of Justice will replace the permanent court of International Justice. However, it was decided that, new court will step in the shoes of the old – it will have the same seat (at Hague): it will be elected by the same general process: no substantial change has been made

74 At San-Francisco the Cuban Delegation submitted a half of a statute of “a new permanent court of International Justice” 3 documents of the conference, p. 516.
75 A new election of Judges could have been held in any event – indeed it was six years overdue.
in the jurisdiction conferred, and it will be exercised by the same successful procedure. It was therefore, possible for the reporter of the committee – I to say: “The creation of the new court will not break the chain of continuity with the past. Not only will the statute of the new court be based upon the statute of the old court, but this fact will be expressly set down in the charter. In general, the new court will have the same organization as the old, and the provision concerning its jurisdiction will follow very closely those in the old statute. Many of the features of the old statute were elaborated from idea which had already been current during reveal decades, and its provision with reference to procedure – which it is now proposed to retain – were to a large extent borrowed from the Hague Conventions on Pacific Settlement of 1899 and 1907. In a similar way the 1945 statute will gain what had come down from the past. To make possible the use of precedent under the old statute the same numbering of the articles has been follow in the new statute.

In the sense, therefore, the new court may be looked upon as the successor to the old court which it replaced. The successor will be explicitly contemplated in some of the provisions as the new statute, not apply in Article 36, paragraph 4, and Article 37, hence, continuity in the progressive development of the judicial process will be implied safeguarded.

Nor it is to be thought that the new court will be excessively an organ of the United Nations. Both the Charter and the statute negative that conception. The charter (Article 93) includes a provision by which the way may be opened for states not member of the United Nation to become parties to the statute: and the latter specifically envisages (Article -4) possible participation by such states in the election of Judges and Article 69 in the adoption of amendments. Moreover, the statute expressly provides (Article 35) that states not member of the United States may be permitted to have access to the court: and they may be permitted to accept the court’s compulsory Jurisdiction. Like the court which it replaces, therefore, the new court is conceived to be a world court, serving the whole community of states.
5.3 The Provisions of the United Nations Charter Relating to the I.C.J

While the Charter provides in Article 7 for the establishment of “International court of Justice” as one of the organ principal of the united nation, the constitutional basis of the court thus established is to be found in its Articles 92 to 96. The UN Charter forced a direct link between the ICJ and United Nation.76

According to Article 92 of the charter provides that the court shall be Principal Judicial organ of the United Nation. “It shall function in accordance with the annexed Statute, which is based upon. The statute of the permanent court of International justice and form an integral part of the present charter” this formula, together with Article-I of the statute, at one hand the same time expresses the decision to establish a new court and to maintain a degree of continuity in the administration of International Justice.77

Articles 92 carries out ideas enunciated in the Dumbarton Oaks proposals. It first provides that I.C.J shall be the principal judicial organ of the united nation. Materials available; do not supply content for the characterization “Principal judicial organ”78 but it would seem to leave open the way for the creation by the united nation of other judicial organs. The further provision in the Article that the court “shell function in accordance with the annexed statute, which is based upon the statute of the permanent court of international justice and forms an integral part of the present charter”, Simplifies the constitutional position of the court within the U.N.O., and it supplies a legal basis for continuity between the old court and the new. One consequence of making the statute apart of the charter may be that various provisions of the charter must be taken in to consideration in the interpretation of the statue.

The provisions in Article 93, paragraph I, that “All member of the united nations are Ipso facto parties to the statute of the statute of I.C.J.”, states merely a consequence of the integral partition of the court in the new organization.

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78 Proposal 12 of the International law of the Future suggested that the P.C.I.J should be “the chief judicial organ of the community of states” A.V.I.K. Vol. 38, 1944 supplement. p. 59.
Paragraph 2 adds that “A state which is not a member of the united nation may become a party to the statute of the I.C.J. on condition to be determined in each case by the General Assembly upon the recommendation of the Security Council”. The substance of the provision had been forecasted in the Dumbarton Oaks proposals.

Article 94, drafted by committee – I at San Francisco, is in time with the suggestion made by the Washington committee of jurists concerning the execution of decision. Though it had been invoked, but on one occasion79, the provision in paragraph -4 of Article 13, in the covenant of the League of Nation served as useful precedent, but the actual text of article 94 may be thought to go somewhat beyond it:

1. Each member of the united nation undertaken to comply with the decision of the International court of Justice in any case to which it is a party.

2. If any party to a case fails to perform the obligation incumbent upon it under a judgment rendered by the court, the other party may have recourse to the Security Council which may, if it deems necessary, make recommendation or decide upon measures to be taken to give effect to the judgment.

Article 95 provides that “Nothing in the present charter shall prevent. Members of the united nation from entrusting the solution of their differences to other tribunals by viture of agreement already in existence or which may be concluded in the future. This is an adoption of the provision in Article -2 of the 1920 statute that the permanent court “shall be in addition to the court of Arbitration organized by the convention of the Huage of 1899 and 1907 and the special tribunal of arbitration to which states are always at liberty to submit their disputes for settlement.”

Article 96 is a substantive amplification of the provision in Article 14 of the covenant that “The court may also give an advisory opinion upon any dispute or question referred to it by the council or by the Assembly” the new text goes beyond the limited provision in chapter VIII, A, 6 of the Dumbarton Oaks proposals which referred to possible request by the security Council only. Under

79 In a dispute concerning the execution of the Award in the Rhodope Forest’s case in 1934. League of Nation, Official Journal 1934, pp. 1932, 1433, 1477
the first paragraph of Article 96 “The General Assembly or the Security Council may request the I.C.J. to give an advisory opinion on any legal question” though the subject of a request is limited to “any legal question”, it may possible actual include a question as to “The existence of any fact which, if established, would constitute a breach of an international obligation”.

Paragraph -2 of Article 96 contains an important innovation in providing that “other organs as the united nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the court of legal questions within the scope of their activities.”

5.4 Analysis of New Statute and Court

Though only English and French versions constituted the text of the old statute, the text of the new statue consists of versions in Chinese, English, French, Russian and Spanish. As the five version are “equally authentic” under Article III of the charter, each of them is to be seen in the process of interpretation yet the historical fact that English and French were employed of to the working languages at San Francisco and the provision (in article 39 of the statute) that “the official languages as the court shall be French and English”, may be thought to justify a process as interpretation which proceeds in the beginning of any rate, on the basis of the versions of these languages.

The point should be emphasized that, although the International court of justice is in a technical sense a new court, to all intents and purposes it is a continuation of the old permanent court of international justice. The new name for the tribunal has been explained by Professor Hudson on the ground that “the word permanent seemed to smack of unfulfilled prophecy, and the qualification of ‘justice’ as ‘international’ was thought to be too limitative. There is a new statute for the present court, but in most places it reads word for word like the old statute; there are a few difference of some significance, but most of the differences are stylistic rather than substantive in nature.

81 Though Article III refers to the version as “texts” it would seem clear that there is but a single text, of which each version forms only a part. Strictness of vocabulary on this point might serve to facilitate interpretation.
That the International Court of Justice was not to be regarded as break with the permanent court of Intentional justice as made plain in the report of Committee 1 at San Francisco, as follows: “The creation of the new Court will not break the chain of continuity with the past, not only will the Statute of the new Court be based upon the Statute of the Court, but this fact will be expressly set down in the Charter. In General the new Court will have the same organization the same organization as the old, and the provisions concerning its jurisdiction will follow very closely those in the old statute. Some legal basis for the continuity is provided in Article 92 of the United Nations charter, which asserts that the statute of the new court" is based upon the statute of the Permanent Court of International Justice.

This leads to the conclusion that, when the charter uses the expression that the statute of the court is an integral part of the charter, it intends the charter and the statute are to be read as one instrument.82 That does not mean that there is any subordinate status in the statute in relation to the charter. Indeed, the co-ordination committee expressly rejected such a view by deciding to omit, from the official signed text, the heading Annex which was once proposed for the statute. The fact that the statute, is annexed to the charter is primary a matter of drafting convenience, and avoids distributing its contents through after chapters of the charter. What it does mean, however, is that those portions of the charter which are of general application to the organization as a whole, and to each one of its organ individually, are applicable also to the court. In particular, the principles and purposes for which the organization exists apply to the court as much as to any other organ. As Sir Gladwyn Jebb one said: ‘To act in conformity with the decision and finding of the court must...necessary be to act in conformity with purposes and principles of the United Nations’.83

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82 Support for this solution of the interpretative problem is also to be found in the judgment of the court in the Ambatielos case (Jurisdiction) 1952, 28 at p. 41. of Judge McNair, at p. 61.