CHAPTER – III
ICJ : ORGANIZATION OF THE COURT

1. GENERAL INTRODUCTION

In the practically unorganized international community the structure of courts or other bodies for the settlement of international disputes, as in fact the very willingness to submit a dispute to third-party settlement, depends upon the consent of the parties and the degree of control that they are prepared to forgo in the settlement of their disputes. Thus during the past century and a half of the history of international relations, apart from a number of political institutions, there have been established several more or less formal international bodies having different powers to settle international disputes. The organization of the personnel of the court corresponds to the nature of the Court’s function as part of the general diplomatic machinery at the disposal of States. On the one hand, the system of nomination and election of judges is in practice designed to reflect political considerations, a general objective which is not obscured by the somewhat roundabout language in which the relevant provisions are couched. On the other hand, the depoliticized treatment which the Court is called upon to give to the matters referred to it in the exercise of its judicial competence is reflected in the removability of the judges and their accountability for their judicial actions, the pre-determined composition of the Court for a given case subject only to the disqualification ad hoc of certain judges and the appointment of judges ad hoc, and the completely independent character of the Registrar and the Registry of the Court. If political factors momentarily enter into play at the time of the election of the judges, once elected the Court is granted every facility to maintain the proper degree of judicial independence.

This state of affairs broadly corresponds with that commonly found in regard to the constitution and functioning of municipal tribunals. Even in those countries the most devoted to the conception of the rule of law as it has developed in the liberal traditions of Western Europe, the Executive, in the last resort,
appoints the judges or initiates their appointment. However much this power may be confined by provisions designed to obstruct the uninhibited play of political aspirations, in the ultimate analysis an appointment is made not only because the candidate meets the relevant professional qualifications, but because the Executive has confidence in him. Once appointed, his independence is secured by various devices which are concerned on the one hand with his fundamental permanence, and on the other with his unaccountability for his judicial actions. No alternative satisfactory system has yet been discovered. In particular, it has not been found practical to confer the power of appointment of new judges on the existing judges, or on the legal profession as a whole, without the intervention in one form or another of the political arm of the government. This aspect of international judicial organization thus closely resembles the similar aspects of judicial organization inside the State.

Normally the expression ‘The Court’ is understood as the collectivity of the judges or, as is sometimes put, the Bench. It is through the judges collectively that most of the Court’s activities are accomplished. However, the judges cannot function in a vacuum. They are dependent upon their staff, the Registrar and his assistants, and, at times, upon other persons such as assessors and experts. The Statute also envisages the constitution of Chambers, i.e. smaller collectivities of judges, for certain defined purposes. Again, the Court and its Chambers demand, if they are to function with any degree of effectiveness, the full co-operation of the litigating States. Finally, witnesses may be called by the parties or by the Court. In order to give a complete picture of the personnel organization of the Court, all these different elements have to be considered.

2. FORMATION OF THE COURT

2.1 Judges and their Qualifications

Great judges make great courts. It is generally recognized that the quality of justice depends as much on the quality of the men who administer the law as on the content of the law they administer. The character and personality of the judges are of great importance in the administration of justice, whether in the national or
in the international field.\(^1\) The efficient processes of trial, the successful determination of disputes, the enforcement of law, and the acceptable interpretation of agreements, all depend in considerable measure upon the quality of the personnel who fill the judicial office. Improvement of judicial organization and court procedure is most essential, but the relation of the character of the Judiciary to these improvements cannot be overestimated. The courts, however well organized, will be ineffective if the judges who man them are lacking in the necessary qualifications.

What qualification of a judge are essential and sufficient for the effective fulfillment of his task and command for him the respect of the community? It is practically impossible to give a precise answer to this question. But it may be asserted without hesitation that he must be a man of character and ability. The character of a judge is an important as, perhaps more important than, his academic qualifications. He should be absolutely honest, absolutely courageous, and blessed by God with an understanding heart.\(^2\) Character, however, is not enough. A judge must be a man of great ability, a man learned in the law and with the wisdom to apply it soundly in the cases that come before him. “Knowledge in the fullest sense of learning and education”, explains an American judge, “legal and general, and professional experience is the handmaidens of such wisdom.”\(^3\) A legal ignoramus has not place on the bench, nor ordinarily has a legal scholar without practical experience in the affairs of states.\(^4\)

Judges with all these attributes\(^5\) are not easy to find, but which of them can be eliminated without damaging the prospect of even-handed justice and the confidence among states that judicial method is the best method to solve international disputes? It is in fact all the more essential in the international field to

\(\text{1. R.P. Anand, "International Courts and Contemporary Conflicts", Asia Publishing House, 1974, pp.98.~}
\(\text{2. John J. Parker, The Judicial Office in the United States, New York University Law Quarterly Review, Vol. 23, pp. 227-228, where he explains the necessary qualifications of a judge in the national field which, it may be asserted, are equally applicable to an international judge.~}
\(\text{3. Arthur, T. Vanderbilt, Judges and Jurors: Their Functions, Qualifications and Selection (Boston, Mass, 1956), p. 30.~}
\(\text{4. Learned Hand, Spirit of Justice (New York, N.Y., 1952), pp. 27, 132.~}
\(\text{5. An impressive list of the essential qualities of good judge contained in the Canons of Ethics, adopted by the American Bar Association, which, there is little doubt, should be equally applicable to all judges, national as well as international. Quoted by Vanderbilt, n. 2, pp.28-29.~}
find such conscientious, independent, impartial, disinterested, and upright judges, because here, unlike in the national field, there is always a great skepticism about the impartially and disinterestedness of the “foreign” judges. It is due to this reason that H. Lauterpacht calls the problem of impartiality of judges the Cape Horn of international judicial settlement.⁶

The demands for these qualities from an international judge are, therefore, more rigorous. He must raise himself not only above his own interests, as it is demanded of a national judge, but above the immediate self-interests of his country. Even to talk of patriotism is a sort of provincialism for him. As M. Loder, member of the 1920 Committee of Jurists, who he later became a judge of the Permanent Court of International Justice, so well put it:

The true judge has no nationality. He is the priest of justice; he carries the scales; he defends truth against falsehood; he looks neither to the right nor to the left; he takes no thought of private interests nor of political ambitions. He is not a French-man, a Greek or a Bolivian; he is first and last a judge.⁷

The statute lies down, in general terms, the qualifications required of the judges. An article 2 provides:

The court shall be composed of a body of independent judges elected regardless of their nationality from among person of high moral character who possess the qualification, required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.

This provision, taken virtually unchanged from Article 2 of the former statute (P.C.I.J.) did not give rise to much discussion at the Washington

⁷. Documents Concerning the Action Taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption by the Assembly of the Status of the Permanent Court (Geneva, 1921), p. 230.
Committee of jurists\(^8\) or at San Francisco, although a proposal was submitted which would have the judges elected on the exclusive basis of their technical qualification and their high moral character.\(^9\) This Article is declaratory of principles to be observed in the nomination and election of candidates. It neither imposes nor does it intend to impose any enforceable or disqualification upon person. Once they have been duly elected. If and to the extent that this provision is executory, it operates on the nominators and on the electors but not on the person elected. No person duly elected can subsequently be disqualified because of non-compliance with the term of this Article. The provision regarding nomination and election of judges exist in independence of Article 2, and neither the statute nor the charter contains any mention of how to establish the existence of the qualifications desired by Article 2. It may be observed that the two alternative qualification of this Article – qualification for appointment to the highest judicial office in the candidates’ own country and recognized competence in international law – are not complementary to one another. However, the order in which these two qualifications are stated is not logical. The court is international not because it is constituted of judges of different nationalities, but because it is a court applying international law; and the value of its pronouncement, and the weight of its authority, stand in direct ratio to the recognized competence as international lawyers or the judges constituting the majority for a given decision. The Article, as it stands, is liable to misconception, in so far as concerns the world ‘independent’. At San Francisco it was explained that the judges ‘Should be only impartial but also independent of control by their own countries or the United Nation organization.'\(^{10}\)

The expression ‘regardless of nationality’ appearing in Article 2 is qualified by Article 3, which was modified. Before 1945 this Article simply state that the Court shall consist of fifteen members. At Washington it was proposed to add there to the words: ‘no two or of whom may be national of the same state or member of the United Nation’ formally the object of this addition was attained by

means of the stipulation of Article 10(2) of the statute by which, if more then one national of the same member of the League was elected by the Assembly and the Council, only the eldest of them was to be considered as elected. The object of the Washington Committee was established directly in Article 3 the rule desired indirectly from Article – 10 of the statute. At San Francisco the draft was further revised to take into account the problem of dual nationality, by providing that for the purposes of membership in the court a person who could be regarded as a national of more then one state shall be deemed to be a national of the one in which he ordinarily exercises civil and political rights. It was understood at San Francisco that following the earlier practice, this new wording of the Article would not disqualify the election of several judges from different member of the British Commonwealth of Nations. It presumably would not disqualify the election of more than one judge from the Republics of the Soviet Union. However, particular problem worth mentioning has arisen regarding the nationality of judges. Another directive – addressed, more particularly to the electors, i.e., to the states, and therefore indirectly to those responsible for nominating candidates – appears in Article – 9:

At every election the electors shall bear in mind not only that the person to be elected should individually possess the qualification required, but also that in the body as a whole the representation of the main form of civilization and of the principal legal systems of the world should be assured.

This provision taken from the old statute – is also to be regarded as an abstract statement of principle. When placed in its context of the system of election as a whole, its real effect is to postulate the political factor in the distribution of places on the court, and is particular that the permanent member of

13. Since 1946 there have been always at least two and at times three, commonwealth judges on the court.
the Security Council will have judges of their nationality on the court. In that respect it is a more refined version of other provisions of the charter concerning the principle of what is called ‘equitable geographical distribution’ as a guide to the composition of various other organs of the United Nation. At the same time, this Article is possible not without direct influence on the performance of their judicial functions by the judges.

Comparing Article – 9 with Article – 2, it appears that statute establishes a double general criterion, namely professional qualification (Article – 2) and political qualification, included in the conception of representation of the principal legal systems of the world (Article – 9) unless great care is taken, these two test might be found to be contradictory. In order to avoid this result and to preserve the professional authority of the court, it is believed that the desideratum of Article – 9 is postulated as the primary objective which may, in appropriate circumstances, be attained by the electing persons, from the candidates nominated, who are not necessarily jurisconsults of recognized competence in international law provided, in that eventually they are qualified to hold that the highest judicial appointments in their own countries. The emphasis of Article – 9 upon the principle legal systems of the world indicates that the court is intended as a world court applying universal international laws. The efficacy of the electoral system to achieve this end depends not solely, or even primarily, upon the method by which the balloting is conducted, but upon the supply of duly qualified candidates. If the spirit of Article – 2 is not applied in the first stage – that of nomination – then the electors will not be able to meet the responsibilities, which Article – 9 seeks to impose upon them. In addition, Article – 9 provides that the electors shall bear in mind that in the whole body ‘the representation of the main form of civilization and of the principal legal systems of the world should be assured’. In pursuance of the ‘Root-phillmore’ plan, which involves two stages – nomination and election – the candidates are first nominated by the national groups in the permanent court of

14. The same principle was adopted by the General Assembly in Article – 8 of the statute of the International Law Commission contained in resolution 174 (III) of 21 November, 1947. The Report of the Committee on the progressive development of International law and its codification laid special emphasis on this provision. G.A.O.R., (II) 6\(^\circ\), at p.174 (Doc. A/AC.10/5/or/331). But the contrary and more idealistic, interpretation of these provisions by judge Azerodo in his individual opinion in the Reparation case I.C.J., Rep., (1949) at p.194
Arbitration, additional national groups being formed to comprise any members of the United Nation not represented in that Court,\textsuperscript{15} no group ‘nominating more than four persons, not more then two of whom,’\textsuperscript{16} shall be of their own nationality. ‘Each national group is recommended to consult its highest court of justice, its legal faculties and schools of law, and its national academics and national section of international academies devoted to the study of law.’\textsuperscript{17}

The nomination of candidates by the ‘national groups’ of the permanent court of Arbitration is cumbersome and probably fails to give effect to its apparent object, namely, that of ensuring a procedure of nomination of independent governmental influence. For the national group of the permanent court of Arbitration are themselves nominated by governments. However, in view of the paramount importance of the process of nomination – and of election of judges generally – it is not certain that such influence exercises by Government is improper. On the contrary, it would seem desirable that the election of the judges and of the court should be preceded by adequate preparation and consultation, conducted by Governments within the framework of appropriate machinery with a view to removing, the election from the hazards of varying conducted on a purely political basis.

A list of candidates having been prepared in this way, the General Assembly and the Security Council proceed ‘independently of one another’ but in effect simultaneously to elect the member of the court,\textsuperscript{18} no person shall be considered as elected who does not obtain an absolute majority of votes both in the General Assembly and in the Security Council. In the event of two or more nationals of the same state obtaining an absolute majority of the votes of both these bodies, only the oldest of these is considered as elected.\textsuperscript{19} It is expressly stated that the vote of the Security Council in the matter shall be taken without any distinction between its permanent and non-permanent members.

\textsuperscript{15} Statute of ICJ Art. 4.
\textsuperscript{16} Statute of ICJ Art. 5.
\textsuperscript{17} Statute of ICJ Art. 6.
\textsuperscript{18} Statute of ICJ Art. 8.
\textsuperscript{19} Statute of ICJ Art. 10.
If necessary, three meetings of each body must be held, and failing their coincidence in electing the same person even after three meetings, a joint conference between the two bodies taken for the purpose of removing, by the vote of an absolute majority, what would otherwise be deadlock (such a joint conference become in fact necessary at the first election in 1921) failing agreement between the Security Council and the General Assembly by this means, the judges already appointed proceed to fill up the remaining vacancies from among persons who have obtained votes either in the Security Council or in the General Assembly.

The member of the court is elected for nine years and is re-eligible. In order to ensure a periodic renewal of the court the same article, as revised in 1945, provided that of the judges elected at the first election, the terms of five judges shall expire at the end of three years and the term of five more judges shall be expire at the end of six years. The result is that every three years five judges are elected by the General Assembly and the Security Council – in addition to, any vacancies can be filled on account of resignation, death or dismissal of any member. A member of the court cannot be dismissed unless in the opinion of the other members he has ceased to fulfill the required condition. When engaged on the business of the court, judges enjoy diplomatic privileges and immunities. The term of this provision are wider than those of Article – 105 of the Charter relating to the representative of member of the United Nation and of the officials of the organization. The privileges and immunities granted to these persons are much as are necessary for the independent exercise of their functions in connection with the organization. They elect their President and Vice-President, and appoint their Registrar.

20. On the interpretation of the world ‘meeting’, see poll use in B.Y.L.L. 23 (1946), pp. 58-60. The General Assembly in 1946, interpreted that term as meeting a ‘ballot’ with the result that after the first ballot the meeting was terminated. The Security Council concurred in that interpretation.
27. Statute of ICJ Art. 22.
the provision shall not prevent the court from sitting and exercising its functions elsewhere whenever it considers it desirable. The same applies, subject to the consent of the parties to the chambers of the court provided for in the statute. These provisions probably imply a legal obligation of Holland and of any other party to the statute to permit the court to function within their territories.

Normally, the court consists of the fifteen judges. If a court of fifteen members cannot be constituted, a quorum of nine will suffice. Judges and judges ad hoc receive remuneration out of the funds of the court. In general it is provided that the expenses of the court shall be borne by the United Nation in such a manner as shall be decided by the General Assembly. The latter body also fixed the salaries of the judges and of the Registrar. No judge when actively performing his duties in the court may exercise any political or administrative function or engage in any other occupation of a processional nature. A provision which, through aimed at divorcing them as far as possible from the interests of their own states, probably also excludes them from discharging political or administrative function of an international character. Nor may any member of the court act as agent, counsel, or advocate in any case whether national or international.

2.2 The President

The Court elects its President and Vice-President, who each hold office for three years. The President is responsible for directing the work of the Court, as well as for its proper administration. He also performs important diplomatic and representative functions, both vis-à-vis the host government (the Netherlands) and in relation to others, and if necessary he will represent the Court in the meetings of the General Assembly. When the Court is not sitting, he has extensive powers to make orders for the procedure of pending cases. He directs the Court’s deliberations, and he is ex officio a member of the Drafting Committee which

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29. Statute of ICJ Art. 32, 33. For details see Hudson, Permanent Court, pp. 184, 317.
30. Statute of ICJ Art. 16.
prepares the final texts of the Court’s decisions, whether or not he concurs in the decision.

It is obligatory for the President to reside at The Hague (no such obligation is imposed on the other judges), and when he is away the Vice-President has to be continuously available. The President, together with the Registrar, signs all formal orders, judgments and advisory opinions: this is for purposes of authentification and does not commit the signatories to their contents.\(^{33}\)

Independence of judges is essential to the proper functioning of the ICJ. Indeed, if the ICJ is to serve any effective purpose it is vital that states have confidence in the integrity of its judges.\(^{34}\) The Stature of the ICJ reinforces the principle of impartiality and freedom from governmental influence by stating in art 20 that each judge before taking his duties must make a solemn declaration in open court that ‘he will exercise his powers impartiality and conscientiously’. Judges are not allowed to perform any political or administrative function or to engage in any other occupation of a professional nature. Under art 17 of the Statute:

‘(1) No member of the Court may act as agent, counsel, or advocate in any case.

(2) No member may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity.’

2.3 Ad hoc Judges

The system is of course too well known for it to be necessary to describe it, at the same time, there are one or two aspects to which to draw particular attention.

Article 31 of the Statute of the Court, the basic text in regard to judges \textit{ad hoc}, states in its first paragraph that: ‘Judges of the nationality of each of the parties shall retain their right to sit in the case before the Court’. The article thus begins by dealing with the case not of judges \textit{ad hoc} but of a Member of the court who has the nationality of the State party to a dispute before it, and in confirming the right of such a judge to continue to sit, the text confirms the nature of the Court as ‘a body of independent judges, elected regardless of their nationality from among persons of high moral character’.\textsuperscript{35} There is therefore no question of any conflict with the principle \textit{nemo judex in sua causa}, since an individual judge is in no way to be identified with the interest of the State of which he happens to be a national. Article 31 of the Statute then proceeds to deal with the case in which ‘the Court includes upon the Bench a judge of the nationality of one of the parties’, and provides that the other party may choose a judge \textit{ad hoc}. In the third paragraph, the statute contemplates the situation in which ‘the court includes upon the Bench no judge of the nationality of the parties’.

These provisions must be read together, for the following reasons. At first sight, it may appear that there is an inconsistency between the provision that an elected judge of the nationality of the parties should continue to sit, and provision for the appointment of judges \textit{ad hoc}. If it is taken as fundamental that the integrity of the judge will not permit him to cast his vote in favour of the State of which he is a national merely because of such national allegiance, there is no need to counterbalance that vote with the vote of a judge \textit{ad hoc} appointed by the other party. This however is to misunderstand the purpose and function of the judge \textit{ad hoc}; if such purpose were to provide a counterbalancing vote, then paragraph 3 of Article 31 would be pointless, since if neither party has an elected judge on the Bench, balance is already achieved and the complication of the inclusion of two judges \textit{ad hoc} on the Bench would be unnecessary.\textsuperscript{36} The point is that the presence of a national judge on the Bench does ensure to his national State a

\textsuperscript{35} Statute of ICJ Art. 2.

\textsuperscript{36} For this reason, parties to cases of this kind sometimes agree mutually to waive the right to appoint a judge \textit{ad hoc} (ef. Art. 35, para 2, of the Rules), or simply refrain from such appointment, as in the current case concerning \textit{Border and Transborder Armed Actions (Nicaragua V. Honduras)}.
certain advantage, notwithstanding his rigorous impartiality. The true function of the judge *ad hoc* is one of understanding and interpretation.

When a case is present to an international tribunal, however complicated the factual circumstances, the basis of the essential ‘judicial syllogism’ remains the same. The Court has to be provided with the facts, and offered the interpretation of international law which the party considers to be correct, so that it can then draw the appropriate conclusion. Furthermore, setting aside questions of regional custom, and the provision of particular treaties, international law is universal, and is not dependent upon the municipal legal concepts of an individual exponent of it. Nevertheless, the fact remains that a court composed of fifteen members of different nationalities will show a variety of different approaches to the same problem of international law; this will be apparent to anyone who has studied the separate and dissenting opinions of judges attached to the successive decisions of the Court. The particular approach adopted by a party to a case may not be shared by all, or indeed any, Members of the Court, but what is essential is that it should be fully understood before it is accepted or rejected. It is in this respect that the national judge, whether elected or appointed *ad hoc*, plays an essential role. If during the deliberation it becomes apparent that, despite the best efforts of counsel for the party, the case presented by that party has not been clearly understood; the national judge is best place to appreciate this, and to expound to his colleagues just what it is that the relevant party had in mind.

This does not of course mean that the judge in question necessarily considers that party’s view to be right, and that the Court should adopt it as a basis for its decision; but he can ensure that any rejection of that approach – whether he himself favours such rejection or not – is reasoned in such a way as to reassure the party that its point of view has been understood, and that justice has been done. The institution of *ad hoc* judges provides a means to inspire confidence among the parties that their viewpoint and interest will receive full attention and consideration. Again, it ensures that noting will be done in secrecy without the knowledge of the *ad hoc* judges since they have total equality in every respect with the other Members of the Court. Recognizing the fact that the Court is
dealing with sovereign States as parties, the institution of *ad hoc* judges, which does not find a place in municipal legal systems and also has been criticized by jurists as an unsound institution, is nevertheless one with utility in the international context.\(^{37}\)

3. **DIPLOMATIC STATUS OF THE COURT PRIVILEGES AND IMMUNITIES**

One consequence of the integration of the Statute with the Charter is that the conventional basis for the diplomatic privileges and immunities of the personnel of the Court has been broadened. Article 19 of the Statute, by which the members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities, has been maintained unchanged.

On 13 February, 1946 the General Assembly adopted a resolution inviting the judges of the court to consider and to formulate recommendation on the privileges, immunities and facilities necessary “for the court’s exercise of its functions and the fulfillment of its purposes in the country as its seat and elsewhere.”\(^{38}\) To give effect to this resolution negotiation were conducted between representatives of the court and the Netherlands Government which resulted in “an agreement on the general principles that should govern the matters”, in so far as the matter concern the Netherlands. This agreement was confirmed in an exchange of notes between the President of the Court and the Netherlands Minister for Foreign Affairs on 26 June, 1946.\(^{39}\) The agreement does not cover “the question of precedence” which has given some concern in the past: on 11 December, 1946, the General Assembly adopted a resolution approving the agreement thus reached.

The matter of privileges and immunities in courtiers other then the Netherlands was also studied by the court and its conclusion were communicated to the Secretary General.\(^{40}\) The series of recommendations adopted by the General

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Assembly on 11 December, 1946 relate to privileges and immunities of the judges, the Registrar and immunities of the judges, the Registrar and other court officials, agents and counsels, assessors, witnesses and experts and they provide for the recognition by states of Laissez Passer issued by the Court.

Article 19 provided that “the member of the court, when engaged on the business of the court, shall enjoy diplomatic privileges and immunities”. This is clearly the rule of international law. The General Assembly Resolution of 11 December, 1946 recommended the member states to recognize their court own Laissez Passer to its judges and officials. The effect of the obligation of Article 19 in a municipal court depends on whether the particular state has incorporated the rule into its municipal law or not. A new paragraph 3 to Article 42 now also provides that “agents, counsel and advocates ad parties before the court shall enjoy the privileges and immunities necessary to the independent exercise of their duties.” The great proliferation of international agencies after 1945 led to a more vigorous campaign to protect their officials under municipal legal systems.

It further lays down that:

1. No member of the court may exercise any political or administrative function, or engage in any other occupation of a professional nature, any doubt on this point shall be settled by the decision of the court.

2. No member of the court may act as agent, counsel, or advocate in any case. No member may participate in the decision of any case in which he has previously taken part as agent, counsel or advocate for one of the parties or as a member of a national or international court, or of a commission of enquiry, or in other capacity. Any doubt on this point shall be settled by the decision of the court.

43. For the 12 accepting states see I.C.J. Year Book 1946-47, 88.
44. Inspired by difficulties of the Bulgarian Agent in 1939 in the case of the Electrically Company of Sofia and Bulgaria.
45. Statute of ICJ Art. 16.
46. Statute of ICJ Art. 17.
3. No member of the court can be discussed unless, in the unanimous opinion of the other members, he has ceased to fulfill the required conditions. Formal notification therefore shall be made to the Secretary General by the Registrar. This notification makes the place vacant.47
And also the salaries, allowances, and compensation shall be free of all taxation.48

4. CHAMBERS OF THE COURT

The Statute also envisages the possibility of cases being decided by smaller collectivities of judges than the full court, collectivities known under the appellation ‘Chamber’. The Statute provides for two types of Chambers, those with a jurisdiction limited to a particular type of case or even a particular case, and a Chamber of Summary Procedure with general jurisdiction.49

The Court normally sits in its full composition subject to leave of absence, sickness, etc., but in no circumstances may the number of titular judges taking part in case fall below nine.50 The number of judges who participate in a case is not unduly large considering the nature of the issues that come before the Court, though it is larger than is customary for the supreme courts of the common law countries.

The Statute also makes it possible for Chambers of the Court to be constituted. Two kinds of Chambers are envisaged.

It is obligatory for the Court to form annually a Chamber for Summary Procedure consisting of five judges. The object here is to maintain in existence a small court specially attuned to the speedy dispatch of business, and a special summary procedure is also laid down in the Rules of Court.51 However, States show no disposition to avail them of this facility. In fact, in the combined

47. Statute of ICJ Art. 18.
50. Statute of ICJ Art. 25.
existence of the Permanent Court and the present Court, only one case has been referred to the Chamber for Summary Procedure.

Apart from this statutory Chamber, the Court is empowered from time to time to form one or more chambers for dealing with particular categories of cases; for example, labour cases and cases relating to transit and communications, or for any other case for which the formation of a chamber may be requested by the parties. The minimum number of judges to constitute a chamber of this type is three.\textsuperscript{52} There is no instance of the invocation of this procedure, and indeed it is probable now that this type of case is more suitable for settlement through the expert machineries of the various Specialized Agencies (including their special types of arbitral tribunals in which technical experts are also given a place).

5. THE REGISTRAR AND THE REGISTRY

The Court has its own officials who are recruited specially and who are technically not part of the United Nations Secretariat. The Statute confers on the Court power to appoint its Registrar and such other officers as may be necessary.

The Registrar, who is elected by secret ballot and by an absolute majority of votes from among candidates proposed by members of the Court, serves for a period of seven years and is eligible for re-election provided that his candidature is again proposed by a member of the Court. A Deputy-Registrar is appointed in the same way. The other officers of the Court are appointed by the Court on the proposal of the Registrar.

The Registry Staff consists of not more than 30 officials, who form a highly trained cadre which can be supplemented whenever necessary by temporary assistance. Their duties have been officially classified under four heads, which in fact overlap: judicial, diplomatic, administrative and linguistic. They are specified in greater detail in the Court’ Instructions for the Registry. Apart from the Registrar and Deputy-Registrar, the other officers are accorded the usual diplomatic titles.\textsuperscript{53}

\textsuperscript{52} Statute of ICJ Art. 26.
\textsuperscript{53} See I.C.J. Yearbook, 1946-47, 55-87, for a description of the organization of the Registry, the Staff Regulations and the Instructions for the Registry.
6. COMPETENCE OF THE COURT

The Charter of the United Nation lays down that all its members are *Ipso facto* parties to the Statute of the I.C.J. It also makes provision for adherence to the statute on the part of states which are not member of the United – Nation. It lays down that any such state may become a party to the Statute of the I.C.J. on condition to be determined in each case by the General Assembly on the recommendation of the Security Council (Article 93(2)).54

Switzerland availed herself of that provision and become a party in 1950. The importance of becoming a party to the statute lies, inter alia, in the fact that only a state which is a party to the statute can effectively become a signatory to the optional clause of Article 36 of the Statute and thus, by accepting the reciprocal obligations, secure for itself the benefits of the obligatory jurisdiction of the court.55 It is true that by virtue resolution adopted in 1946 by the Security Council, a state which is not a party to the statute may sign the optional clause, but it is expressly provided that such signature cannot be relied upon against states which are parties to the statute unless they specifically agree. In addition, the same resolution permits states which are not parties to the statute to become parties to disputes before the court by accepting its jurisdiction with reference either to a particular disputes56 or to all disputes or particular classes of them. Such states must undertake to comply in good faith with the decision of the court and with the corresponding obligations of Article 94 of the Charter.

Before defining the jurisdiction of the Court we may recall the general principle of the International Law that no state can be compelled to litigate against its will. Further, the statute lays down in Article 34, that only states may be parties to disputes before the court.

54. See also, to the same effect, Article 35 of the statute, which lays down, in addition, that the condition thus determines shall in no case place the parties in a position of inequality before the court.

55. Switzerland accepted in 1948 the obligations of the optional clause to take effect on the date on which he become a party to the statute. Liechtenstein did the same in 1950.

56. Security Council, Official Records, First Year, Second Series, No. 19, p. 467. Thus in 1948 the Government of Hyderabad – whose statehood was contested by India made a declaration submitting to the court the dispute with India concerning interpretation and application of the Principal Agreement, concluded in 1947, governing the relation between the two countries.
The rigidity of that rule, which is to some extent the result of the uncritical adoption of the view that only states are and can be subjects of international law, is mitigated in fact by two sets of provisions. In the first instance, by virtue of the same Article, the Court may request any of public international organization information relevant to the case before it. Such organizations may present information to the court on their own initiative, and the court is bound to receive it. Whenever the court is concerned with a case involving the constitution of public international organization, or of an international connection adopted under that constitution, the public international organization concerned is to be notified and is entitled to receive copies of all written proceeding. The statute does not define a public international organization. It can be defined as a body created by a treaty between states and composed, at least in part, by representative of states. Secondly, although the United Nation, not being a state can not appear as a party before the court, it may through the General Assembly or the Security Council request the court to give an advisory opinion on any legal question. This includes, presumably, a legal question involving a dispute to which the United Nation is a party. It is symptomatic of the inadequacy of Article 34 of the Statute. That although the court has held that the United Nation is a subject of international law and can put forward an international claim, the United Nation is precluded from bringing that claim before its own principal judicial organ. The statute also provides that any other organ as the United Nation and the specialized agencies – i.e., Public International Organization brought in to organic association with the United Nation – which may be so authorized by the General Assembly may request the court for an advisory opinion any legal question arising within the scope of their activities.

7. STATES NOT PARTIES TO THE STATUTE

States which are not parties to the statute can participate in cases before the court, by virtue of Article 35 (2) of the statute. According to that provision, the condition under which court ‘shall be open’ to states which are not parties to the

statute shall, subject to the special provisions contained in treaties in force, be laid down by the security council, but in no case shall such condition place the parties in a position of inequality before the court. By Paragraph (3), when a state which is not a party to the statute or which is not otherwise bearing a share of the expenses of the court is a party to a case, the court shall fix the amount towards the expenses of the court.

It is of interest to compare Article 35 (2) of the statute with Article 93 (2) of the Charter. The principal difference is that by the former, only the Security Council has any competence, whereas, under the latter the Security Council has competence to make a recommendation and the General Assembly has competence to decide. This apparently is a relic from the League of Nation. Then, the council and the assembly had equal powers, the council frequently acting as a kind of executive organ. But under the charter, the powers of the two organs are not co-extensive, and the security council is not to be regarded as the successor, explicitly or implicitly of the council of the league, nor it is the general executive organ of the United Nation. The provisions of Article 35 (2) of the statute accordingly appear a little odd within the general framework of the United Nation, for the duty there by imposed upon the Security Council differs in kind, and not in degree, from the duties imposed upon it by Article 93 (2) of the Charter, this indeed, is brought out by the second difference. Article 35 (2) of the statute seems to require a single decision in principle by the Security council, applicable at large, though this does not preclude the capacity of the Security Council, to impose specific conditions applicable to a single case. Article 93 (2) of the Charter, on the other hand, as interpreted by the committee of experts of the Security Council, requires a specific recommendation by the Security Council, and a specific decision by the General Assembly, in each case, i.e., in each case of each state applying to be admitted to the statute, and precludes a recommendation and a decision operative at a large and whenever any state should desire to become a party to the statute. Thirdly, Article 35 (2) of the statute makes an exception, not specifically mentioned in Article 93 (2) of the Charter for ‘the special provision
contained in treats in force’. Fourthly, Article 35 (2) of the statute specifically maintains the principle of equality before the court. The Security Council considers this matter on the initiative of the President of the Court who, on 1st May 1946, requested information on decision on the Security Council might seem fit to take, in accordance with Article 35 (2) of the statute, in the matter of access to the court by states not parties to the statutes.58 The President explained that the Court was engaged in drafting its rules and had to consider in particular what provisions should be promulgated in order to give effect to the Article. The International Court of Justice could not anticipate what general or special measures would be taken by the Security Council, and in the absence of any decision on that point, the court was faced with the alternative either of reserving this point in drafting its rules, or of introducing into those rules a provision which might subsequently prove inadequate. An accompanying memorandum by the Secretary-General drew the attention of the Security Council to the relevant documentation and provision of the statute.

At its 50th meeting on 10 July, 1946, the Security Council referred the matter to the committee of experts, whose report was approved by the Council at its 76th meeting on 15 October, 1946. On that occasion, also, the council rejected a proposed resolution, the effect of which would have excluded states whose regimes had been installed with the help of armed forces of countries which had fought against the United Nation so long as those regimes were in power. A similar proposal had been before the committee of experts, but the committee had been unable to accept it, being itself guided by the principle of giving the freest possible access to the court to states not parties to the statute. On the general question the committee recognized the analogy between the problem which it faced, and the problem which had confronted the council of the League of Nation in 1922. It therefore, recommended an analogous solution which would take into

account the changes necessary to adopt the text of the League of Nation resolution to the provisions of the new statute, but placing no new obligation on states not parties to the statute. In particular, it was stipulated that such a state should undertake to accept all the obligations imposed upon a member of the United Nation under Article 94 of the Charter. The Committee further emphasized that a state party to the statute could not, without its consent be brought before the court by a state not a party to the statute, the Security Council adopted the recommendations of the committee of experts which, in effect, would impose one general condition, namely,

that such state shall previously have deposited with the Registrar of the Court a declaration by which its accepts the jurisdiction of the court, in accordance with the Charter of the United Nation and with the terms and subject to the conditions of the statute and rules of the Court, and undertakes to comply in good faith with the decision or decisions of the court and to accept all the obligations of a member of the United Nation under Article 94 of the Charter.

Unlike states whose status as parties to the statute follows from Article 3, 4 or 93 (2) of the Charter, the state-hood of those appearing before the court under Article 35 (2) of the statute is not the subject of a preliminary political and binding decision by the General Assembly upon the recommendation of the Security Council. That means that it may be challenged and that, in accordance with the Resolution of 15 October, 1946, the court has power to decide thereon. Indeed, the court may be called upon to decide that question even without a challenge by another state, simply by virtue of the exercise of the depositary functions for these declaration, a task entrusted to the Registrar. The Security Council’s resolution is entirely silent regarding the authority from whom the declaration should emanate, the form it should take, and the need for satisfaction. In this respect there is a marked contrast between that resolution, and the decision to admit named states as
parties to the statute. Presumably, therefore, the matter is regulated by general international law according to which the declaration should emanate from the treaty-making power (i.e. in United Nation practice, the head of the state, head of the Government of Foreign Minister) of a recognized state. This may give rise to question of great delicacy.

Article 35 (2) of the statute does not, in as many words, limit the right it gives only to independent states; though it is admitted that it would be consonant with the general economy of the statute, and of the Charter, to interpret the word ‘state’ as if it was ‘independent state’. This point of view is confirmed in two recent examples of state practice, where metropolitan states were parties to litigation partly on their own behalf, and partly on behalf of political merits which it is arguable enjoy some recognizable international personality as states, even though they are not independent states. In the US Nationals in Morocco case, the applicant government France, specifically stated, in answer to a request from the court, that the French Republic was proceeding in the case both on its own account and as protecting power in Morocco, the judgement of the court to be binding upon France and Morocco. In its judgement the court recorded that ‘Morocco, even under the protectorate, has retained its personality as a state’, although, it nowhere explicitly mentioned that the judgement was binding on Morocco, merely quoting its earlier order which recited the French declaration to that effect. In the Minquiers and Ecrehos case, the Government of the United Kingdom was exposing the claim of the Island of Jersey was on of the British Counsel. The judgement, naturally, makes no mention of this particular detail.

Nevertheless, it may be asked whether dependent territories enjoying a recognized international personality are not possessed of sufficient capacity to support procedural statutes before the court. International practice does not absolutely deny them procedural capacity before international tribunals. For example, in the Ottoman public deptt Arbitraion Case (1925), held pursuant to Article 46 and 47 of the treaty of Lausanne, the Levant States under French
Mandate and Iraq, Palestine and Transjordan under British Mandate, were parties, 59 in the Radio-Orient Company Case (1940) the Levant states under French mandate were likewise parties against Egypt. In each of these cases the agent of the dependent territories were nominated by the authorities of the dependent territories and the arbitral awards were binding thereon. The dependent territories do not normally possess full treaty making power, and any special agreement would have to be negotiated and concluded with the metropolitan authorities. The same is true of any declaration under the Resolution of 15 October, 1946.

Thus is a sufficient safeguard against frivolous litigation, and there seems no objection in principle to recognizing the procedural capacity of dependent states before the International Court, at least to some degree.

The jurisdiction of the Court (Article 36) may be classified as either voluntary or obligatory. It is (I) voluntary is regard to ‘all cases which the parties refer to it’ by a special, ad hoc agreement. 60

It is (II) obligatory by virtue (a) of special clauses in treaties other then those referring specially to pacific settlement. This category includes disputes under various treaties such as international labour conventions, most of so-called legislative treaties establishing international unions, constitutions of specialized agencies of the United Nation, treaties of commerce, 61 alliance trusteeship agreement and many other which provide for the reference to the court of disputes as to the interpretation of their provisions, (b) of treaties of pacific settlement providing for judicial settlement usually in conjunction with conciliation or with arbitration and conciliation (c) of the so-called ‘optional clause’ of Article 36 of the statute of the court which any member of the United Nation of any party to the statute may choose to make binding upon itself. The committee of jurists who

60. Lauterpacht, "The Development of International Law by the permanent court of International Justice", 1934, pp. 29-33.
drafted the statute in 1920 proposed that the court’s normal and regular jurisdiction should be compulsory in all cases of a legal nature as enumerated in Article 13 of the covenant but, mainly owing to the opposition of some of the great powers, this provision was deleted from the statute before it was adapted by the Assembly. It was replaced by a provision of Article 36 of the statute optional clause.

8. THE COMPOSITION OF THE BENCH

The composition of the Court can vary from case to case owing to the _ad hoc_ disqualification of certain judges, or by the addition of judges _ad hoc_. The rationale for these provisions of the Statute differs, the former being part of the arrangements designed to ensure the independence of the judges and the removal of any factor which might be regarded as incompatible with the detachment which should characterize the judicial process. Some of these provisions also apply to judges _ad hoc_.

The system of triennial partial elections to the court may, it seems, necessitate some flexibility in the interpretation of the provisions which regulate the composition of the court. In a given case, and the principle that the collectivity of judges should not change during the trial of a case cannot be applied too rigidly. The formal enunciation of this principle is found in Article 13 (3). By this, the members of the court shall continue to discharge their duties until their places have been filled, and though replaced, they shall finish any cases which they may have begun.

9. DECISIONS OF THE COURT

9.1 The Court Deliberation

The formal aspects of the preparation and publication of judgments and advisory opinions are regulated by Articles 54 to 58 of the statute, together with Articles 74 and 75 of the rules. The manner in which the court deliberates upon
disputes which are submitted to it and ‘upon advisory opinions which it is asked to
give’ is governed by Article 30 of the Rules and the Resolution regarding the
Court’s judicial practice, originally adapted by the permanent court and
provisionally adapted by the present court.

With regard to the method of deliberation all questions are decided by a
majority of votes of the judges present. In the event of equality of votes of
President or Acting Presiding has a casting vote (Article 54). The deliberations
take place in private and remain secret (Article 54 (3)). By Article 30 of the Rules,
only the judges and the assessors (if any) shall take part in the deliberations, the
Registrar or his substitute being present. No other person is admitted except in
pursuance of a special decision of the court. Every judge who is present shall state
his opinion together with the reasons on which it is based, and any judge may
request that a question which is to be, voted upon shall be drawn up in precise
terms in both the official languages and distributed to the court. The decision of
the court shall be based upon the conclusion concerned in by a majority of judges
after final discussion – the judges voting in inverse, order of their precedence. The
judgement itself is prepared by a drafting committee of three judges, consisting of
the President (or Acting President) ex-officio, and two other judges, whose identify
is not disclosed, chosen by secret ballot and by absolute majority of votes.

Finally, no detailed minutes are prepared of the private meeting of the court for
deliberations upon judgement of advisory opinions. By Article 57 of the statute, if
the judgement does not represent in whole or in part the unanimous opinion of the

62. Note that in the Political, organ of the United Nations, the rule is different and equality of votes
signifies, the rejection of the proposal. See Rule 97 of the General Assembly’s Rules of
procedure.

63. Mutatis mutandis, and unless otherwise decided by the court, these rules, with the exception of
the requirement that every judge present shall state his opinion together with the reasons on
which it is based, also apply to deliberations by the court in private on any administrative matter.
Attempts are occasionally made to identify the judge or judges who wrote the majority opinion,
but such attempts are entirely unauthorized and unsubstantiated, and are to be deprecated. For
example, see the memorandum submitted by the American Bar Association to the U.S. Senate,
86th Congress, 2nd Session, hearing before the committee on Foreign Relations on S. Res.94
(Washington, 1960) at pp. 360-61.
judges, any judge shall be entitled to deliver a separate opinion. In 1948, the court defined a ‘dissenting opinion’ as the opinion of a judge who disagreed with a judgement or advisory opinion, and an ‘individual opinion’ as opinion given by a judge who supported the view of the majority. Yet it seems that this distinction is not rigidly followed, and indeed cannot easily be applied especially when the dispositive of the judgement consists of more than one clause, and the acceptance of one does not necessarily imply acceptance of the others. Although, the institution of separate and dissenting opinion in not always appreciated by lawyers trained in legal systems where the institution is not found, the practice is common in international litigation and its existence is believed essential to the proper function of the International Court.

The separate opinions, whether individual or dissenting, perform several functions. Thanks to the greater freedom of expression of emphasis enjoyed by the individual judges, many of them do little more then underpin the an anonymous collective opinion of the majority, which owing to the process by which it was put together, cannot always articulate fully and expressively the underlying principles which were applied. In other cases, the individual opinion may indicate other general underlying principles which its author believed should have been more appropriately applied in the concrete case. Such an opinion may have a value of its own in correcting any misleading impression which could be obtained from the majority opinion. The fact that certain ideas only appear in a separate opinion does not mean that the court did not find it necessary to base its decision on them, something quite different. In another directing opinions are sometimes encountered flatly contradicting both the underlying principles and their

64. Under the statute of the permanent court, this right was only formally reserved to dissenting judges. The Washington Committee of jurists regarding its innovation as confirming existing practice, U.N.C.I.O., Vol. 14, pp. 173, 211, 275. on that practice, see Hudson, Permanent Court, p.558.
65. I.L.C., Year book, 1947-48, p.68. This definition has been dropped in later issues of the year book.
application by the majority, the individual opinion may in the course of time come to be seen by enlightened and informed opinion as expressive of better law.

Above all, the publications of these opinions focus attention on the nature of the discussion in the Council Chamber. For a full understanding of the real implications of any judgement or advisory opinion in terms of the rule of law applied, not merely the pleadings, which will indicate how the parties presented the issue, but also the individual opinions appended to the judgement, which will illustrate the main lines of the discussion in the court when it withdrew to deliberate on the case, must be consulted. But for the successful performance of any of these functions, it is desirable that the individual opinion shall be as concise as feasible, and not go beyond the limits fixed by the statute.

The characteristic feature of the arrangement for producing judgement – which confers rights as well as duties upon members of the court, is the accent it places upon the active participation of every judge, in the deliberation of the court. The method follows in some continental systems of appointing a rapporteur from among the judges, charged with preparing the draft judgement, is not followed in the International Court, the procedure of which emphasizes the collective task of the bench. The strict observance of secrecy in all that pertains to the court’s judicial deliberations underlines this feature. This latter aspect – which is essential if the judicial independence of the court is to be a reality – is need of overriding importance, and it permits a judge, although obliged to participate in the private deliberations of the court, not to make public, directly or indirectly, how voted. The result is that while the majority decisions are anonymously given, it is not always possible to tell from the term of the operative clause of the judgment the precise constitution of the majority.67

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67. This aspect is discussed in detail, for contentious cases, in Liaccuras, "The International Court of Justice: Materials on the record of the International Court of justice in contentious cases" (Durham, N.C., no date (1962); for a striking instance, see the "Maritime Safety Committee" Case where the court's opinion was adopted by nine vote to five, with two only of the dissenting judges identifying themselves in its opinion, the court had noted the political implication of the question put to it, and it is possible that this reticence on the part of all the judges except the two identified themselves (one of whom was the President of the Court) may be connected with the wider implications of the case. If that supposition is correct, the condition of secrecy will have justified itself in that case, even though, as has been strongly pointed out by Sir. H. Lauterpacht, such secrecy is in general liable to detract from the authority of the court's pronouncement. For this view and Lauterpacht, "The Development of International Law by the International Court" (London, 1958), p.68.
The informal Inter-allied committee, considered that on the whole, the existing method of producing judgements was satisfactory, exceptionally, it thought that the anonymous option of the majority put the majority of some disadvantage as compared with the dissenting judges, whose opinions ‘read more cogently and persuasively than the decision of the court itself, for the reason that they are individual productions, and consequently have a force and coherence which may be absent from a judgement which represents a synthesis of a number of individual opinion’. Hence Article 30 of the Rules of Court was left substantially unchanged and, on 6th May 1946, the court decided to adapt ‘provisionally’ the method of deliberation adapted by the permanent court in its resolution regarding the judicial practice of the court of 20th February, 1931 and revised on 17 March, 1936.

9.2 The Judgement

By Article 58 of the statute the judgement is signed by the President and Registrar. This is for the purpose of authentication only, and committee neither of its signatories to its contents. The judgement is read in open court, due notice having been given to the agents. A copy of every judgement is send to every member of the United Nation and to every state entitled to appear before the court. Article 39 of the statute regulates the language of judgements. If the parties have agreed to conduct the proceeding wholly in one of other of the official languages, the judgement shall be given in that language. If not, the judgement shall be given in both official languages. The court always determines which version is authoritative.
9.3 The Law Applicable by the International Court of Justice

A court of International Law must in its work make some assumptions concerning the conception and the source of validity of that law yet these basic problems are no more the stock in trade of an International Court then the basic theories of Physics and Chemistry are part of the stock in trade of an engineering shop. And it is but a little more sanguine to caste the judges in the role of theoreticians of International Law, then to caste practical engineers in the role of theoreticians of Physics or Chemistry. Much less should it be expected that the court’s work bring any revolutionary transformation of existing law. No doubt the judges have added, and will add further to materials and problems available for theorizing and even revision of prevailing theories. But the promulgation and evaluation of theories remain a task apart.

The practical task of the court is to determine according to law conflicts presented of it. The answers it gives are of necessity based on legal techniques, the traditional materials and the ideals available to the judges, though these will include by reason of the history of International Law and the varied training of judges, those of many municipal legal systems which impact upon international law. In so far as these fall short in guidance, and as a non-liquet is not open, the court may be required to devise an answer as satisfactory to the parties as is consistent with the development of general rules binding on all states wit the particular matter. The task cannot be an easy one at either level in view of the age old confusions affecting the authoritative materials of International Law.

Nor can it, except rarely, be a more mechanical and technical one since those parts of International Law which yield an indubitable answer are as unlikely to dominate the work of the International Court, as are the settled rules of the English common law to dominate that of the House of Lords. Such settled questions elude but rarely the quieting hold of solicitors and counsel, the self-wisdom of clients, the learning wisdom and discretions in granting level to appeal of the lower courts, not to speak of the terror of costs as a deterrent and the
readiness to abide by a settled rule is, perhaps, even stronger with states than with private litigations. The legal advisor of a state measures is centuries the chance that the rule which now favours his client may in future prejudice his client. The advisor of private clients has no such leveler of their immediate interests. In the result, the work of the International Court approximates, in its law-creating component, that of a final appellate court rather than one of first instance. And though, as observed above, its role is a practical one, and not that of theoretician of International Law, its practical work is likely to provide material of great importance for legal theory. And this is an essential balance in which to essay the meaning of Article 38 of the statute concerning the law to be applied by the court.

The chronic disagreements as to the governing rules of International Law which frustrated the 1907 attempts to establish a court, still confronted the draftmen in 1920. This meant, on the one hand, that the way must be left open for judicial filling of substantive gaps in settled rules, while, on the other hand, giving some assurance to states that the law applied by the court would not be arbitrary. The draftmen’s solution is found (still unaltered). In Article 38, paragraph 1 of the statute, directing to the court to apply:

a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting states.

b) International customs as evidence of a general practice accepted as law;

c) The general principles of law recognized by civilized nations.

d) subject to the provisions of Article. Article 59, judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. Speaking broadly, this directs the court to apply relevant rules settled either by treaty or custom, and to create or settle rules where to rule or no settled rule exists in a positivist sense covering the case before it. Finally, Article 38, Paragraph 2 authorized the court in special circumstances to decide *ex aequo et bono* whether or not a settled rules of international law governing it exists.
9.4 Critique of Statement of Law

In appearance and in their general structure the judgements and advisory opinions of the present court are generally unchanged from those of the permanent court. Nevertheless, a gradual evolution in their substance, originasing already in the days of the permanent court, can be discerned. Even then signs could be seen of a tendency towards ellipsis in the reason in point of law. Others from the obligatory formal elements, notably the ‘summary of proceeding’ and ‘statement of facts’ were also beginning to considerably shorten. A word is required on this latter aspect, for it is believed to indicate a subtle change in the conception of the characteristic of international judgement.

As for the reasons in point of law – ellipsis has become a common feature and, as has been seen, proposals have been made for a radical alteration in the process of producing judgement in order to overcome that feature. Here, again, the ellipsis is nevertheless relative: and if frequently disappears when the judgement is studied in the light of the pleadings. The question can be reduced to the following: should the court strive for the largest possible majority for its decisions, at the cost of eliminating every word that gives rise to controversy; or should it place cogency of reasoning for the general public of the head of its concern, voting only on the operative provisions of the judgement, and leaving the statement of reasons in point of law to the skill and energy of the individual judges? Is not the later a peculiar, and sometimes confusing feature of the common law courts, and, for that reason, too strange to be introduced into an International Court, most of whose litigants are not familiar with the common law system? and is it true that anonymous judgements and advisory opinions are, in fact, so lacking in cogency and coherence as is sometimes suggested? Is it not equally a fact that, as has recently been pointed out, ‘although dissenting judges differ from the Court as to the actual conclusion, they may well, in the course of so doing, make general statements or explanations of principle which are in themselves not in any way in consistent with the view of the court, but merely differently applied to the factors?
Indeed the juxtaposition of the court’s decision and the separate and dissenting opinions frequently does little more than sharpen the focus of the former, for so often the difference concern the application of principles to concrete facts, and not the principles themselves apart from their intrinsic merits, they act as a fail, to the views of the court and, being the work of a single hand, have a character and individuality which cannot be expected of decisions or opinions. Embodying the combined views of some ten or twelve judges while doubtless the most satisfactory decision from the point of view of the particular case is a single unanimous decision, this would often present less of interest to the lawyer than a decision, embodying a substantial majority view, accompanied by a few separate or dissenting opinions.  

In considering this problem reference may be made to the particulars of voting in the court, the figures are impressive and indicate that sparingness of work and reasons has enabled the court to reach a number of important decisions with almost or complete unanimity – a remarkable break down of its homogeneity. Nevertheless, elapsing undoubtedly has its dangers, one of which is that order to secure a substantial majority for the operative clause the court might not consider it necessary to decide all the possible legal issues arising in the case, so that, in effect the judgement does not so much represent the joint opinion of the judges as the common denominator of their, divergent views. It is when this occurs that the judgement appears to lack cogency and completeness.

If excessive laconism and failure to give adequate consideration to all the issues are carried too far the court will deprive itself of what is possibly its greatest asset, the high regard in which it is held, a regard which has grown out of the thoroughness and meticulous scholarship of its reasoning and the conviction thereby untendered in public opinion at large and in legal and delamatic opinion in particular to some extent unwelcome tendencies of this character which could be disconcerted in the earlier years of the new court’s existence may have since been

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