CHAPTER – IV
ICJ: THE COURT’S JURISDICTION

1. GENERAL INTRODUCTION

Emphasis has already been laid on the fact that the jurisdiction of the Court, like that of any international judicial or arbitral body, is based upon the consent of States. The application of this principle is however complicated as a result of the fact that the Court is a permanent institution.

In the first place, the Court is a treaty-based institution, created and regulated by the United Nations Charter and the Statute of the Court (which is in fact an ‘integral part’ of the Charter: Article 92); this means that the general scope of its jurisdiction, and the conditions of its exercise, are defined ne verietur by those instruments. Jurisdiction in this sense, relating to access to the Court, and to the general nature of the powers it possesses, is thus a function of the will of the body of States parties to the Charter and Statute, not of the will of the specific parties to a given dispute. The consent of the parties to the dispute cannot therefore abrogate or modify statutory provisions of this kind;¹ it is in fact those provisions that determine how, for example, the necessary consent may be given for the creation of jurisdiction in specific cases.

Secondly, the jurisdiction of the Court may be, and frequently is, asserted on the basis of treaty instruments of a general nature conferring future jurisdiction over a range or category of disputes. When the instrument was concluded, no such disputes will have been in existence, but the possibility that such may arise will have been foreseen, and consent given in advance to the binding determination of them was by the Court. When a dispute is subsequently brought before the Court on the basis of a clause of this kind, that advance consent creative of jurisdiction is still operative (assuming that the treaty has not been denounced), but it may well not be accompanied, at the time that the matter is brought to the Court, by actual

¹. Discussing Article 35, para 2, of the Statute, the Court has observed that ‘it would have been inconsistent with the main thrust of the text to make it possible in the future for States to obtain to the Court simply by the conclusion between themselves of a special treaty….‘: Legality of the Use of Force, (Serbia and Montenegro v Belgium), Judgement I.C.J. Reports 2004, p.319, para 102.
contemporary consent or willingness to have that particular dispute settled by
decision of the Court. The respondent State may therefore seek to deny that the
general consent given in the past applies to the specific dispute, because, for
example, it does not really fall within the category of disputes contemplated, or
because any conditions attached to it have not been met in the specific case. The
Court, in order to be satisfied that consent to its dealing with the dispute has
actually been given, will have to analyse, in sometimes painstaking detail, the
provisions of the relevant instruments in order to trace a link between the ‘blanket’
consent given by the respondent and the facts of the particular case. The principle
remains simple; has the respondent State given consent to jurisdiction? Its
application may however involve much subtle and complex argument.

The Court’s approach in this vital aspect of its function has shown the
flexibility necessary for it to adhere to the straight path of pursuing the true will
and intention of the litigants before it. In this respect the Court has rightly moved
in the direction in which the will of the States has taken it. There has been no
display of a radical attitude by the Court in pursuing ‘progressive and
developmental’ aspects by extending its jurisdiction at the cost of the overriding
principle of consent on which both the Court and the law it administers are based.
The Court has maintained its sense of integrity at every step. This well-established
approach of the Court to respect the will and wish of the parties must help to
inspire confidence in the community that the Court has no intention to examine
and adjudicate on the merits of every case brought before it, if this is shown to be
against the clear desire of the litigants as expressed in a treaty or agreement.

The assessment of the functional efficiency of any judicial tribunal
necessitates the consideration of its jurisdiction. Any such attempt without an
account being taken of the extent and nature of its jurisdiction even in the case of a
Municipal Tribunal is meaningless as no meaningful conclusion can be reached. In
the international sphere, if the performance of a tribunal is to be measured it is
essential to grasp the concept of jurisdiction thereof. The yardstick to be applied is
possibly a comparative evaluation with the performance of a Municipal Tribunal,
but the nature and scope of jurisdiction on the international plain are extremely of
a different character. Any study of the working of the ICJ must incorporate an
indepth probe into its jurisdictional competence and has been regarded as the key
element in the assessment of the functioning of the Court.
What makes the concept of jurisdiction, in case of the ICJ, stand apart from concerning the municipal Courts, is the principle that the jurisdiction of the ICJ depends on the consent of the State parties to the case before it. Unless the state, which is a sovereign state has agreed that the Court shall have such jurisdiction the Court can not assume jurisdiction. Even where jurisdiction the Court has been agreed to by the states the nature and extent of such jurisdiction will be as agreed to by the States. Even when agreement of the States exists, all jurisdiction which such agreements bestow on the Court, is not homogenous and equally applicable in respect of each and every sovereign state.

Keeping in view this principle, jurisdiction of the ICJ can be understood by organizing the same for analytical purposes in different categories. Nagendra Singh has categorized jurisdiction into three kinds viz., *jurisdiction rationae temporis*, *jurisdiction rationae materiae* and *jurisdiction rationae personae*.

These can be explained as under.

*Jurisdiction rationae temporis* is that which relates to the chronological scope of the jurisdiction of a tribunal, the events or periods of time which it is entitled to consider. Jurisdiction *rationae materiae* covers the types of cases which can be brought before the tribunals apart from such obvious types of Courts as divorce or family Courts, commercial Courts, admiralty Courts, etc. This category also includes Courts whose jurisdiction extends only to cases brought against defendants to be found within their corresponding geographical domain.

*Jurisdiction rationae personae* defines jurisdiction by the personality or status of the parties, for example, an administrative tribunal may only have jurisdiction in proceedings brought by civil servants or persons claiming through them. A brief account of the position of the ICJ in relation to each of these categorized is as follows.

This is only one limitation on jurisdiction *rationae temporis* and that is by the will of the individual States parties before it. The essential principle mentioned above implies that all jurisdiction of the ICJ depends upon the consent forthcoming from state parties. Every state is within its right to limit its acceptance of jurisdiction by reference to specific dates or periods and this is commonly done,

quite as a practice. The purpose behind this restraint on jurisdiction may obviously be to exclude revival of old claims or to bar judicial scrutiny of certain historical events. The exclusion of jurisdiction over disputes arising out of events occurring between May 5, 1948 and July 20, 1949 by Israel as per its 1956 declaration is one such instance. Unless such exclusions are expressly made the Court may not presume that an acceptance of jurisdiction excludes disputes arising out of events, lying anterior to the date of the acceptance. The Court, being concerned with the history of events taking place the World over, affecting relations between States, has to examine the disputes underlying them regardless of when the proceedings were brought. Events taking place even before the present Court was instituted have been subjected to examination. One example of such reference is the Ambatielos Case. The Court has the power to apply a judgement in the future and it can order that a particular line of conduct shall cease, for example, in Military and Paramilitary Activity in and Against Nicaragua the Court has in fact emphasized that it is essential, if the Court is to exercise jurisdiction, that its decision be capable of having some forward reach.

Jurisdiction Rationae Materiae of the Second category has been defined in the Statute of the ICJ in an extremely wide, though not endless manner.

All cases which the parties refer to the Court and all matters specially provided for in the Charter of the United Nations or in the Treaties and Convention in force come within the compass of the jurisdiction of the Court. To endorse jurisdiction respecting a certain case it is necessary to establish that some question of law is involved. This may not essentially be a matter of international law alone; it may as well be a matter of the municipal law of the particular country. The Free Zones of Upper Savoy and the District of Gex dealt with by the PCIJ is an illuminating case on a contrario basis. The argument forming base of that case provided that the Court after pronouncing its decision on certain legal questions was to settle all the provisions of the treaty of Versailles which provided that France and Switzerland settle the Statutes of certain territories constituting Free Zones the PCIJ rather than exercising this power pronounced the following note:

5. Cameroons v. United Kingdom, I.C.J. Reports 1963, p.34.
6. PCIJ Series A/B/No. 46, p.162.
"The settlement of such matter is not a question of law, but is a matter depending on the interplay of economic interests on which no Government can afford to be controlled by an outside organ. Such questions are outside the sphere in which a Court of Justice, concerned with the application of rules of law can help in the solution of disputes between States”.

In the History of the PCIJ and the ICJ this one is a solitary case in which the Court declined jurisdiction in a matter on the ground of its extra legal character. How extensive the jurisdiction of the Court in this respect is, can be appreciated by the evidence of the above mentioned case.

Article 65, para 1 of the Statute provides:

“The Court may give an advisory opinion in any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request”

This provision leads to the observation that the advisory jurisdiction of the Court is also equally wide in principle.

Article 34, para 1 of the Statute provides the most essential limitation on jurisdiction *rationae personae* whereby only states may be parties in cases before the Court. Whether other subjects of international law including individuals, could be made entitled to be parties in cases before the Court, is an interesting question.

As provided in Article 35, para 1 the Court shall be open to the states parties to the present Statute. This category includes all members of the United Nations plus some other States – Switzerland, Liechtenstein and San Marino. Only such States who are the parties to the Statute may sue or be sued before the Court. This however does not imply that any of such States can sue every such other State. The consent of the States concerned must be in existence to establish a jurisdictional link between them so that any dispute brought by one of them may be accepted for instituting adjudication. Provision of this kind separates the jurisdiction of the ICJ from that of the Municipal Court.

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7 Statute of ICJ, Art. 65 para. 1.
HOW JURISDICTION IS CONFERRED

THE INDIVIDUAL STATES

PARTIES TO THE STATUTE

OTHERS

CONSENT OF THE STATES

Compulsory Jurisdiction

Treaty Consent

Bilateral Treaty (General)

Special Agreement

Multi-lateral Treaty (General)

Security Council Resolution

Statute, Article 36 (1)

Convention

Secretariat

Statute, Article 36 (1)

Recommendation for Judicial settlement

Administrative functions only

Notification of Interim Measures

The Contentious Jurisdiction of the International Court of Justice

THE SPECIALIZED AGENCIES

OTHERS


I.A.E.A.  O.A.S.

INTERNATIONAL INTER-GOVERNMENTAL ORGANIZATIONS

The Contentious Jurisdiction of the International Court of Justice
2. JURISDICTIONAL ASPECTS OF THE ICJ: BASIS OF THE JURISDICTION

According to Article 34, paragraph 1, of the Statute of the Court, “only States may be parties in cases before the Court”. Article 35, paragraph 1, of the Statute provides that the Court shall be open to the State parties to the Statute. Article 36, paragraph 1, also, provides, “the jurisdiction of the Court comprises all cases which the parties refer to it”. Therefore, there are three significant points:

2.1 Consent of the Parties

Lauterpacht was an ardent supporter of the view that International Court could never play its proper role in international community except on the basis of a quasi-universal compulsory jurisdiction. He also believed that there are certain classes of international issues, which were inherently incapable by their nature of ever being put on a satisfactory footing without constant recourse to adjudication, and without the possibility of such recourse on a compulsory basis. Despite this outlook, Lauterpacht strongly affirmed, in the course of his judicial pronouncements, the principle of consent is the basic foundation and sine qua non of international jurisdiction.

It is a general principle that the Court has not other jurisdiction than that conferred upon it by the parties. In other words, a State cannot be compelled to resort to the Court for settlement of its dispute without its consent. The principle has been invoked several times by the Court. For instance, in the Eastern Carelia case, in 1923, the dispute between Finland and Russia was referred for an advisory opinion and held that “answering the question would be substantially equivalent to deciding the dispute between the parties, and no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement”. In 1950, the ICJ, in its advisory opinion in the Interpretation of Peace Treaties case, where

9. Rosenne, supra note 1, at p.563.
10. The Status of Eastern Carelia case, (1923) PCIJ, Series B, No. 5, at p. 27 and for facts of the case, p. 79.
the issue was related to the formation of a commission to hear disputes concerning the interpretation or execution of peace treaties concluded between Allied Powers and Bulgaria, Hungary and Rumania in 1947, stated that the consent of parties to a dispute is the basis of the Court’s jurisdiction in the contentious cases. *The Anglo Iranian Oil Co. case* had been the subject of an objection on the ground of lack of jurisdiction by Iran. On 26 April 1933, Iran granted an oil concession to a British corporation, the Anglo-Iranian Oil Company. In March 1951, the Iranian Majlis and Senate passed certain laws nationalizing the oil industry in Iran. The UK then adopted the cause of the Company and brought the case before the ICJ by application of 26 May 1951. But Iran rejected the jurisdiction of the Court. The ICJ stated that the general rules laid down in Article 36 of the Court’s Statute are based on the principle that the jurisdiction of the Court depends on the consent of the parties. *The Monetary Gold case* is another example in which the Court emphasized on the consent of the disputing parties. This case brought before the ICJ by Italy against the France, United Kingdom and the United States of America, in 1953. The Court had been requested to determine certain legal questions upon which depended the delivery to Italy or to the United Kingdom of a quantity of Monetary gold removed by Germans from Rome in 1943, recovered in Germany and found to belong to Albania. The United Kingdom pointed out that the Court had found that Albania was under an obligation to pay compensation to the United Kingdom for the damage caused by the explosions in the Corfu Channel in 1946. Italy contended, in the first place, that she had a claim against Albania arising out of the measures of confiscation allegedly taken by the Albania in 1945. In the second place, it averred that her claim should have priority over that of the United Kingdom. In the determination of these questions the Court stated that adjudication upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law, namely, that the Court can only exercise jurisdiction over a State with its consent, and made it clear that “where, as in present case, the vital issue to be settled

concerns the international responsibility of a third State, the Court cannot without the consent of the third State, give a decision on that issue binding upon it.

The consent of the State can be given in different ways; it can be given before the dispute arises by means of compromissory clause in a treaty, or a declaration under Article 36 (2) of the Statute of the Court. Consent can also be given after a dispute has arisen by means of a special agreement between the parties or in response to the unilateral reference of a dispute to the Court.

2.2 Parties to the disputes

As mentioned, only states may be parties to contentious proceedings of the Court, i.e., individuals cannot bring cases before the Court. A notable example was the Anglo-Iranian Oil Co. case, in which the Court found that it did not have jurisdiction because the dispute was not one between states.

The Court is open to all states, whatever or not are parties to the United Nations or the Statute of the ICJ Judge Oda, in the Border and Transborder Armed Actions case14 (Nicaragua v. Honduras), said that the Court’s Jurisdiction must rest upon the free will of sovereign states to grant the Court the competence to settle the dispute in question. This case was concerned in the dispute between Nicaragua and Honduras regarding the alleged activities of the armed bands, said to be operating from Honduras, on the border between Honduras and Nicaragua and in Nicaragua territory. In this case, the Court delivered its judgement, on 20 December 1988, and found that it had jurisdiction to entertain the Application filed by Nicaragua.

2.2.1 United Nations Members

According to Article 93 (1) of the UN Charter, all members of the UN, on the basis of membership in the UN are ipso facto and without any declaration or other legal instrument, parties to the Statute of the ICJ. It follows from the legal position that all UN members are automatically parties to the Statute. Article 35 (1) of the Statute provides that the Court shall be open to parties to the Statute, i.e.,

parties to the Statute are entitled to submit their cases to the Court. Jurisdiction of
the Court, however, depends on its recognition by the parties.

2.2.2 Other Parties to the Statute

According to Article 93 (2) of the UN Charter, non-member states of the
UN may become parties to the Statute of the ICJ on conditions of the determined
in each case by the General Assembly upon the recommendation of the Security
Council. They may recognize its jurisdiction according to Article 36 of the Statute.
In the first phase, the applicant State shall previously have deposited with the
Registrar of the Court a declaration by which it accepts the jurisdiction of the
Court, in accordance with the Carter of the UN. According to the terms and
conditions of the Statute and Rules of the Courts, the parties undertake to comply
in good faith the decision or decisions of the Court and accept all the obligations
of the UN under Article 94 of the Charter. For instance, five states, i.e.,
Switzerland, Liechtenstein, Japan, San Marino and Nauru have become parties to
the Statute. The General Assembly adopted, in resolution 91 (1), 11 December
1946, the conditions, which were initially elaborated, in the case of Switzerland,
by a Committee of Experts of the Security Council. The General Assembly
followed that precedent in the other cases. The conditions were as follows: (a)
general acceptance of the provisions of the Statute; (b) acceptance of all the
obligations of a member of the United Nations under Article 94 of the Charter,
including the complementary obligations under Articles 25 and 103 in so far as
relates to Article 94; and (c) an undertaking to contribute to the expenses of the
Court such equitable amount as the General Assembly might assess from time to
time after consultation with the Government concerned.

Accordingly, if a State is a party to the Statute, or has otherwise fulfilled
the conditions laid down by the General Assembly and Security Council, it is
competent to refer any dispute to the Court.

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15. Liechtenstein became a party to the Statute in 1950; San Marino in 1954; and before being
admitted to membership in the United Nations, Japan also became a party to the Statute under
the same conditions (See G.A. Res. 363 (IV), Dec. 1949; 806 (VII), Dec. 9, 1953; and 805
(VII), Dec. 9, 1953).
16. See 1 SCOR 2nd Series, No. 20 485, No. 22 501. For definition of conditions under which the
ICJ shall be open to States not parties to the Statute see YBUN 410 (1946-47).
2.2.3 Kinds of Disputes

Although there are technically no limitations on the subject-matter of cases submitted to the ICJ, but only legal disputes are admissible by the Court. Furthermore, all matters specially provided for in the Charter of the United Nations are within the Court’s Jurisdiction. In this regard Article 36, para 1, of the Statute of the ICJ states: “The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force”. Article 36, para 3, of the Charter of the UN, also, provides that legal disputes as a general rule, should be referred by the parties to the ICJ in accordance with the provision of the Statute of the ICJ. Article 36 para 2, of the Statute provides about jurisdiction of the Court in all legal disputes concerning the interpretation of a treaty, any question of international law, the existence of any fact which, if established would constitute a breach of an international obligation and the nature or extent of the reparation to be made for the breach of an international obligation. But it is clear that the Court will not decline its jurisdiction merely because the dispute between the State parties has “political” or “military” overtones. As Martin Dixon says, the Court is not concerned with the political inspiration which may have led a State to choose pacific settlement and may accept jurisdiction even through the legal issue has political consequences. Therefore, the simple fact is that a dispute has political aspect does not make it non-justice able. The Court has consistently rejected the assertions that the mixture of legal and political issues in a dispute brought before


18. Hans Kelsen believes that the dispute is legal if it is to be decided according to norms of positive law. It is political dispute if it is to be decided according to other norms (Kelsen, supra note 7. at p. 484).

19. In the Corfu Channel case (Preliminary Objections) the United Kingdom argued that Art. 36, para 1, of the Statute could be referred to Art. 36, para 3, of the Charter, which provides for reference of legal disputes to the Court on the recommendation of the Security Council, I.C.J. Reports 1947-48, p. 15.


21. In the Military and Paramilitary Activities in and against Nicaragua case (Nicaragua v. United States), the Court found the dispute admissible despite the fact that the Security Council was seized of another aspect of the dispute, I.C.J. Reports 1984, p.932. Furthermore, in the Lokerbie case (Libya v. United Kingdom) the Court declined to exercise aspects of its jurisdiction because the Security Council had taken concrete enforcement action under the Charter, I.C.J. Reports 1992, para 22.
it would constitute a legitimate reason to refuse to decide the legal issues presented. For instance, in the *Hostages Case*, in the opinion of the Iranian Government, the problem involved was not one of mere application of the treaties upon which the American case was based, but resulted from an overall political situation containing much more fundamental and complex elements, thus precluding the Court from examining the applicant’s claims divorced from the whole political dossier of the relations of the two States over the past 25 years. The Court, in the 1979 Order of Provisional Measures answered: “no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important”. The Court continued that, since the present dispute involved the interpretation or application of multilateral conventions, it was “one which in its very nature falls within international jurisdiction”.

Moreover, the Court may give an advisory opinion at the request of the General Assembly or the Security Council on any legal question, or at the request of the other organs of the United Nations and specialized agencies on legal questions arising within the scope of their activities.

3. METHODS OF JURISDICTION

The jurisdiction of the Court falls into two distinct parts: contentious jurisdiction, its capacity to decide differences between States; and advisory jurisdiction, its capacity to give advisory opinions when requested so to do by particular qualified entities under the UN Charter.

3.1 Contentious Jurisdiction

The term “contentious” in reality is used to qualify Court’s jurisdiction in respect of cases before it in which two or more parties, i.e., States contend to settle any international dispute existing between them. Therefore, the contentious jurisdiction of the Court is essentially concerned with the decision on a “dispute”.

The power of the Court to decide disputes are defined in its Statute and are known as its contentious jurisdiction. The Statute of the Court emphasizes the centrality of dispute for the work of the Court. Article 38, para 1, states that the function of the Court is “to decide in accordance with international law such disputes as are submitted to it”. The Court, for example, in the Nuclear Tests cases, he said: “The existence of a dispute is the primary condition for the Court to exercise its judicial function”. In the case, between Australia and France, the proceedings instituted before the Court on 9 May 1973 concerned the atmospheric nuclear tests conducted by France in the South Pacific. The original and ultimate objective of Australia was to obtain a termination of those tests. France announced its intention to cease the conduct of such tests by a public statement of its President. The Court found that the objective of Australia has in effect been accomplished, inasmuch as further nuclear tests in the atmosphere in the South Pacific however halted. The disputes having thus disappeared, the claim no longer had any object and there was nothing on which the Court could give judgment. On the other hand, Article 34 (1) of the Statute provides that only States may be parties before the Court. This article obviously excludes individuals, corporations and international organizations as parties before the Court.

Another aspect that is pointed to it is that the Court has often referred to the fact that the contentious jurisdiction of the Court in a case depends on the will of the parties. The principle rests on parties in the settlement of dispute and is a natural consequences of the sovereign equality of States.

In the Application of the Convention on the Prevention and Punishment of the Crime of Genocide case (Bosina and Herzegovina v. Yugoslavia, Serbia and Montenegro), the dispute has arisen over the interpretation of the Genocide

26. References to “dispute” appear in Articles 1, 2, 12, 27, 32, 33, 34, 35, 36, 37, 38 and 52 of the UN Charter, Articles 36, 38, 40 and 60 of the Statute, and Articles 38, 39, 88 of the Rules of Court. See Resenbe, *supra* note, 1, vol. 2, at p. 517.
27. For merits of the case 28 YBUN 831 (1974).
Convention in which it was not clear, whether either Bosnia-Herzegovina or Yugoslavia was capable of being a party to a dispute before the Court. Though the ICJ accepted the *locus standi* of both, but it is only by virtue of Article 35 (2) of the Statute, as both appeared to be parties to a treaty (the Genocide Convention) which has a provision to disputes concerning its subject-matter to the ICJ. There are various ways in which the parties can confer jurisdiction on the Court to adjudicate disputes.

### 3.1.1 Conventional Jurisdiction

Article 36 (1) of the Statute refers to “all matters specially provided for [...] in treaties and conventions in force”. A large number of multilateral and bilateral treaties contain clauses awarding the jurisdiction of the ICJ with respect to questions that might arise from the interpretation and application of the agreements.\(^{31}\) For example, Article 1 of both, the Vienna Conventions, i.e. Vienna Convention on Diplomatic Relations, 1961, and the Vienna Convention on Consular Relations, 1963, provides that disputes arising out of the interpretation or application of the Convention lie within the jurisdiction of the ICJ.\(^{32}\) In the case of the *United States Diplomatic and Consular Staff in Tehran*,\(^{33}\) the Court found jurisdiction under Article 1 of the optional protocols, to which both Iran and the USA had instituted proceedings against Iran in an arising out of the situation at its Embassy in Tehran and Consulates at Tabriz and Shiraz, and the seizure and detention of its diplomatic and consular staff in Tehran and two more citizens of the United States as hostages. The USA has at the same time requested the indication of provisional measures. Iran took no part in the proceedings. Its position was however defined in two letters addressed to the Court by its Minister for Foreign Affairs on December 1979 and 16 March 1980 respectively. In these letters the Minister mentioned *inter alia* that the Court could not and should not take cognizance of the case.

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According to Article 14 (2) of the Treaty of Friendship, Commerce and Navigation, between the United States and Nicaragua in 1956, which provides for submitting of disputes over the interpretation or application of the treaty to the ICJ unless the parties agree to settlement by some other specific means? The Court, in the *Military and Paramilitary Activities in and against Nicaragua case*, found the jurisdiction. This case was concerned with a dispute between the Government of the Republic of Nicaragua and the Government of the USA arising out of military and paramilitary activities in Nicaragua and the waters of its coasts, responsibility for which was attributed by Nicaragua on the USA.

However, there are different kinds of methods whereby States may grant jurisdiction to the Court by express agreement. This can be done in the following manners:

i) Jurisdiction of the Court can be accepted by States before the dispute arises by means of a compromisory clause in a bilateral or multilateral treaty in force. Even the treaties concluded during the League of Nations period are within the provisions of the Court. In this regard, a number of multilateral agreements have been concluded with the general aim of promoting peaceful settlement of disputes. For example, the *General Act of 1928*, the *Pact of Bagota*, in 1948, and the European Convention for the Peaceful Settlement, 1957. Most of these treaties include an article providing that disputes as to the interpretation or application of the agreement can be referred to the Court. In this case, although the jurisdiction of the Court is by the consent of the parties, it can be described as “compulsory jurisdiction” but often used to describe simply jurisdiction arising under Article 36 (1) of the Statute.

A majority of bilateral treaties, also, contain provisions granting jurisdiction in advance over classes of disputes arising from their subject-matter,

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36. According to Art. 37 of the Statute of the ICJ, “whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute be referred to the International Court of Justice”.
for example, the Treaty of Friendship, Commerce and Navigation between the US and Nicaragua of 1956. Thus, in the *Nicaragua case (Jurisdiction phase)*\(^{39}\) the Court decided that jurisdiction existed by virtue of the above-mentioned treaty.

In the Northern Cameroons case\(^{40}\), between the Federal Republic of Cameroons and the United Kingdom, the Republic of the Cameroons sought a declaration that the United Kingdom had failed to carry out its obligations under the Trusteeship Agreement with respect to the territory. The dispute was submitted to the Court under the terms of Article 19 of the agreement. It was provided in Article 19 that any dispute whenever arise between the administering authority and another Member of the United Nations, relating to the interpretation or application of the provisions of this Agreement, it must be referred to the Court. Proceedings in this case were instituted by an Application of 30 May 1961 in which the Government of Cameroons asked the Court to declare that, in the application of the Trusteeship Agreement for the Territory of the Cameroons under British Administration, the UK failed to respect certain obligations flowing from that Agreement. The UK raised preliminary objections.

Article 37 of the Statute of the ICJ between that “whenever a treaty or convention in force provides for reference of a matter of a tribunal to have been instituted by League of Nations, or to the Permanent Court of International Justice the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice”. But, in this regard, it is essential that the Treaty should still be in force, and that the parties to the Treaty should also be parties to the Statute.

In the *Haya de la Torre case*\(^{41}\) the ICJ found its jurisdiction under the Protocol of Friendship and Co-operation of 1934 between Colombia and Peru. The origin of the Colombian-Peruvian Asylum case lies in the asylum granted on 3 January 1949, by the Colombian Ambassador in Lima to M. Victor Raul Haya de la Torre, head of a political party in Peru, the American People’s Revolutionary Alliance. On 3 October 1948, a military rebellion broke out in Peru, the American

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People’s Revolutionary Alliance. On 3 October 1948, a military rebellion broke out in Peru and proceedings were instituted against Haya de la Torre for the instigation and direction of that rebellion. He was sought out by the Peruvian authorities, but without success; and after asylum had been granted to the refugee, the Colombian Ambassador in Lima requested a safe-conduct to enable Haya de la Torre, whom he qualified as a political offender, to leave the country. The Peru refused, claiming that Haya de la Torre had committed common crimes and was not entitled to enjoy the benefits of asylum. Being unable to reach an agreement, the two Governments submitted to the Court certain questions concerning their dispute. In a judgment delivered on 20 November 1950, the Court had found that, in this case, the asylum had not been granted in conformity with the Convention on Asylum signed at Havana in 1928. Colombia instituted proceedings before the Court by an Application, which was filed on 13 December 1950 and asked the Court to state in what manner this judgment was to be executed, and furthermore, to declare that, in executing that judgment, she was not found to surrender Haya de la Torre. Peru, for her part, also, asked the Court to state in what manner Colombia should execute the judgement.

ii) Article 36 (1) of the Statute stipulates that the Court shall have jurisdiction over “all cases which the parties refer to it”. Thus a form of *compromise* might be agreed upon where jurisdiction rests essentially on special agreement (*ad hoc consent*). In other words, the classic method by which the parties refer a case or matter to the Court is by a special agreement by which two or more States agree to refer a particular and defined case or matter to the Court for decision. As Rosenne says, conclusion of a special agreement between the States concerned only produces effects in terms of proceedings in the Court when it is formally notified to the Court as that expression used in Statute and Rules of the Court”. In this regard Article 46 of the Rules of the Court regulates the procedure in cases introduced by special agreement, unless the parties agree otherwise or the Court decides otherwise. Therefore, special agreement (*compromise*) is an express form of consent, to the jurisdiction of the Court, given by the parties at the time of a

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42. Martin Dixon MA, *supra* note 26, at p. 262.
43. I.C.J. Reports 1953, p. 47.
particular dispute and in respect of that dispute alone, whereby the parties agree by

treaty to refer a specific matter to the Court.

In the Minquiers and Ecrehos case, between France and the United

Kingdom, the parties expressed their consent in the form of a special agreement

concluded between the United Kingdom and France on 29 December 1950. The

Court found that sovereignty over the islets and rocks of the Ecrehos and

Minquiers, in so far as these islets and rocks are capable of appropriation, belongs

to the United Kingdom. The case concerning Sovereignty over Certain Frontier

Land was submitted to the Court by Belgium and the Netherlands under a

Special Agreement concluded between the two Government on 7 March 1957.

Between 1946 and 1996, the following case have been instituted, in the

ICJ, by special agreement: Minquiers and Ecrehos, Frontier Land, North Sea

Continental Shelf (two cases), Tunisia/Libya Continental Shelf, Gulf of

Maine, Libya/Malta Continental Shelf, Frontier Dispute (Burkina

Faso/Malia), Land, Island and Maritime Frontier Dispute, The Gabcikovo-

Nagymaros Project (Pending) and the Kasikili/Sedudu Island (Pending) cases.

In the Confu Channel case the special agreement replaced the Court’s prorogated

jurisdiction in a case instituted by the application.

The Court has stated that when proceedings are instituted by special

agreement it must not exceed the jurisdiction conferred upon it by the parties, but

at the same time it must also exercise that jurisdiction to its full extent.

44. Rosenne, supra note 1, Vol. II, at p. 663.
46. Supra note 55.
47. Supra note 57.
54. Gabcikovo-Nagymaros Project case, about the damming up of the Danube river between

55. I.C.J. Reports 1948, p.15.
56. For more information, Rosenee; supra note 1, Vol. II, at p. 663.
3.1.2 Forum Prorogatum

The consent of a State to the Court’s jurisdiction may be established by means of acts subsequent to the initiation of proceedings, is known as the doctrine of forum prorogatum or consent post-hoc. It means that the Court exercises jurisdiction in cases in which the respondent State tacitly consents to submit to the jurisdiction.\(^58\) According to this doctrine, the consent of the parties in a dispute to submit to the jurisdiction of the Court need not be in any particular form and in certain circumstances the Court will infer it from the conduct of the parties. The Court is seized with a unilateral application to which the other party pleads on merits, without contesting the jurisdiction. This is treated as an acceptance of the jurisdiction, rather like an estoppel by conduct.\(^59\) The PCIJ in the Minority School Case stated:

The consent of a State to the submission of a dispute to the Court may not only result from an express declaration, but may also be inferred from acts conclusively establishing it.

This case has been brought before the Court by German Government, on 2 January 1928, for a judgment interpreting certain articles of the German-Polish Convention of 15 May 1922, relating to Upper Silesia.

The ICJ has taken the view that consent post-hoc may arise where the plaintiff State has accepted the jurisdiction of the Court by a unilateral application followed by a separate act of consent of the other party, either by a communication to the Court or by taking part in the initiation of proceedings.\(^60\)

In the Corfu Channel case,\(^61\) the Court said: “The Government of Italy, by [its] separate and successive acts, the adoption of the Washington Statement, the deposit […] of the declaration of a acceptance of the jurisdiction of the Court and the filing of the application has referred a case to the Court within the meaning of Article 36 (1) of the Statute. They have thus conferred jurisdiction on the Court to

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58. Rosenne, supra note 1, at p. 583; Martin Dixon MA, supra note 26, at p. 345; Fitzmaurice, supra note 9, at p.752.
60. See, The Corfu Channel case, I.C.J. Reports 1948, p. 27.
61. Rosenne, supra note 1, at p. 583.
deal with questions submitted in the application of the Italian Government.” In this case, also, Albania in its letter of 2 July 1947, agreed to appear before the Court in the action brought by the United Kingdom. The Court may also deduce its jurisdiction from the conduct of proceedings if the conduct is unconditionally attributed to an assumed acceptance of the Court’s jurisdiction by the State so acting.62

Anand says that *forum prorogatum* is really “an illustration of the principle of estoppel by word or by conduct which may be derived from a formal agreement conferring jurisdiction on the Court after proceedings have begun, or successive independent statement of consent”.63

On the contrary, Rosenne says that the Court will not exercise jurisdiction if the conduct of the State in a case is consistent with an intention that it should not exercise jurisdiction.64 For example, in the *Anglo-Iranian Oil Co. case*,65 Iran in addition to contesting the jurisdiction of the Court, also contested the admissibility of certain claims put forward by the applicant (U.K.). The applicant thereupon suggested that objection to the admissibility are not objections to the jurisdiction to the admissibility are not objections to the jurisdiction and can only be decided if the Court has jurisdiction and a formal conclusion was therefore submitted that by the action the respondent has conferred jurisdiction upon the Court on the basis of the principle of “*forum prorogatum*”. The Court did not accept this contention and said that the principle of *forum prorogatum*, if it be applied to the present case, would have to be based on some conduct of the Court. No element of consent can be deducted from such conduct on the part of the Government of Iran. Consequently, the submission of the U.K. on this point cannot be accepted. Accordingly, in this case, Iran’s refusal to accept invitation of the U.K. to appear before the Court led to the conclusion that it refused to confer jurisdiction based on *forum prorogatum*. The doctrine of *forum prorogatum* is implicitly deducted

63. I.C.J. Reports 1948, p. 31 (Preliminary Objection).
As Verma says, the procedure underlying the principle of *forum prorogatum* would seem to be potentially useful as a means to extent the jurisdiction of the Court and as a means in which a State can submit to the jurisdiction of the Court by avoiding the formal procedural requirements of its internal law for entering into a treaty or making a declaration under Article 36 (2) of the Statute to accept the Court’s jurisdiction and at the same time not binding itself for the future.

3.1.3 How Jurisdiction is Conferred

The parties may confer jurisdiction on the Court through Special agreement or compromises exclusively meant for the settlement of a particular dispute. There have been in existence treaties, wholly devoted to the settlement of international disputes and providing for reference to be made to the Court. Clauses granting jurisdiction to the Court are contained in many multilateral as well as bilateral treaties. Where the consent of the respondent State is tacit, jurisdiction is assumed by the Court on the basis of *forum prorogatum*. This principle may benefit the respondent State which wants the Court to exercise jurisdiction. It may save the respondent State from gang through the formalities of making a declaration or concluding a treaty for the purpose. Neither the Statute nor the Rules of the Court provide for any particular form in which the consent should be expressed. Expression of Consent though treaty agreement or declaration is not a prerequisite of jurisdiction.

3.1.4 Provision in the U.N. Charter not binding on its Members to take their Disputes to the ICJ

According to Article 33 of the U.N. Charter, the parties to any dispute endangering maintenance of international peace and security shall seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their own
When deemed necessary the Security Council should call upon the parties to settle their dispute by such means. Article 36 of the Charter provides that Security Council may recommend appropriate procedures for methods of adjustment at any stage of a dispute as referred to in Article 33. It should also take into consideration any procedures already adopted by the parties. Reference of legal disputes to the ICJ in accordance with the provision of the Statute of the Court, as a general rule, should also be taken into consideration by the Security Council when making recommendations under that Article.

Recommendations made by the Security Council to the parties to go to the ICJ for the settlement of their legal dispute are not a provision specially provided for in the Charter of the United Nations. Article 36, para 1 of the Charter talks about recommendations and not decisions. Under Article 25 of the Charter only decisions and not recommendations are legally binding on the United Nations members. So back-door introduction of compulsory jurisdiction based on recommendations of the Security Council in the Corfu Channel (Preliminary Objections) Case recommended the dispute between the two Governments to be referred to the ICJ. In this case, two British destroyers, while passing through the Corfu Channel struck mines and the explosions damaged the vessels and heavy loss of life resulted. Britain raised the matter in the Security Council of the United Nations alleging that for the presence of the mines, in the Channel Albania was responsible. Great Britain submitted an application to the Registrar of the Court in accordance with the recommendation of the Security Council and under Article 40, para 1 of the Statute. The U.K. Government took the plea that the Security Council recommendation was binding on Albania under Article 25 of the United Nations Charter. Albania rejected the interpretation given by the United Kingdom Government to Article 25 and stated that Article 25 related solely to the decision. It also pointed out that its acceptance of the compulsory jurisdiction of the Court

68. Statute of ICJ, Art. 36, para 1.
70. Statute of ICJ, Art. 33, para 1.
was wanting and therefore the U.K. was not entitled by a unilateral application to refer the dispute to the Court.\textsuperscript{72}

3.1.5 Consent to Confer Jurisdiction upon the Court does not require a Particular Form

The basis of the jurisdiction of the Court is solely the consent or will of the parties. It is a fundamental principle of international law that no State can without its consent, be compelled to submit its disputes with other States either to mediation or to conciliation or to any other kind of pacific settlement. In the \textit{Corfu Channel (Preliminary Objections)} case facts of which have already been mentioned, the Court held that:

“While the consent of the parties confers jurisdiction on the Court neither the Statute nor the Rules require that the consent should be expressed in any particular form.”

In this case the Government of Albania requested the Court to place on record that the Albanian Government in accepting the Security Council recommendations is only obliged to submit the above mentioned dispute to the Court in accordance with the provisions of the Statute of the ICJ and to give judgment and that the applications addressed to the Court by the Government of the United Kingdom having submitted the said application contrary to the provisions of Article 40, para 1 and Article 36, para 1 of the Statute: Article 40, para 1 of the Statute says:

Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by written application addressed to the Registrar. In either case the subject of the dispute and the parties shall be notified”.\textsuperscript{73}

It was held by the ICJ that the Albanian contention that the application can not be entertained because it has been filed contrary to the provisions of Article

\textsuperscript{72} I.C.J. Reports 1948, pp. 17-19.

\textsuperscript{73} Statute of ICJ, Art. 40, para 1.
40, para 1 and Article 36, para 1 of the Statute, is essentially founded upon the assumption that the institution of proceeding by application is only possible where compulsory be instituted by special agreement is a mere assertion which is not justified by either of the text cited. Article 32 (now 38) para 1 and 2 of the Rules does not require the applicant as an absolute necessity but only as far as possible “to specify in the application, the provisions on which it founds” the jurisdiction of the Court. It clearly implies both by its actual terms and by reason that the institution of proceedings by application is not exclusively reserved for the domain of compulsory jurisdiction.

In submitting the case by means of an application the Government of the United Kingdom gave the Albanian Government the opportunity of accepting the jurisdiction of the Court. This acceptance was given in the Albanian Governments letter of July 2, 1947 in which it declared, “It is prepared notwithstanding this irregularity in the action taken by the Government of the United Kingdom, to appear before the Court”.

3.1.6 Jurisdiction Clause in a Treaty

Parties to a treaty may include suitable jurisdictional Clause in the treaty giving the Court power to decide disputes arising out of the treaty. In the ICAO Council Case a declaration signed in January 1946 at Tashkent and exchange of letters which took place in February that year by which over flights were resumed on the same basis as the prior to August 1, 1965, Pakistan contended this resumption as based on the Chicago Civil Aviation Convention and the International Air Services Transit Agreement. At the same time India maintained that these agreements had been suspended during the hostilities and were never revived. India also maintained that resumption of over-flights could take place based on ‘Special regime’ according to which they could take place in principle and essentially after grant of permission by India, whereas under the treaty regime they took place as of right. Pakistan denied the creation of any new regime and pointed out that because the Agreement of 1966 was not registered with the United

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74. Rules of ICJ, Art. 38, para 1 and 2.
75. India v. Pakistan, I.C.J. Reports 1972, p. 46.
Nations Secretariat in accordance with Article 102 of the Charter, India could not invoke it. As a result of hijacking and diversion to Pakistan of an Indian Air-Craft in February 1971 all over-flights of Indian territory by Civil Aircraft of Pakistan were suspended by India. Contending that India was in breach of the treaties, Pakistan referred the matter to the Council of International Civil Aviation Organisation. An appeal from the decision of the ICAO Council on the Preliminary Objections raised by Pakistan was instituted by India. Article 84 of the convention of International Civil Aviation, 1944 and Article 11 of the International Air Services Transit Agreement 1944 and Article 36 and 37 of the Statute of the ICJ were relied on by India for the foundation of the jurisdiction of the Court. Pakistan objected to the Court’s jurisdiction. As per this ‘since it is one of the principal contentions of India that treaties (those Aerial Agreements) were not in force at all (or at any rate note in operation) between the parties, India could not have any [jus standi] to invoke their jurisdictional clauses for the purposes of appealing the Court. Pakistan further added that the Court had not jurisdiction under Article 36 (1) of the Statute which required treaties and conventions to be in force and alleged that they were atleast suspended between India and Pakistan.

The Court held that the contention of Pakistan was not well founded and for that gave very sound reasons. It explained that India affirmed that treaties were suspended between herself and Pakistan and that was not the same thing as saying that they were not in force in the definitive sense or even that they had wholly ceased to be in a merely unilateral suspension per se could not render jurisdictional Clauses inoperative, since one of their purposes might be precisely to enable the validity of the suspension to be tested. It maintained that if a mere allegation as yet unestablished, that a treaty was not long operative, could be used to defeat its jurisdictional clauses, all such clauses would become potentially a dead letter and thus the means of defeating jurisdictional clauses would never be wanting.

The Court said that the argument based on preclusion could also be turned against Pakistan. It was questionable whether Pakistan could utilize the Indian denial of the force of the treaties before the Council. The Pakistani argument that
India’s appeal to the Court on the basis of the jurisdictional clauses of the treaties, necessarily involved an implied admission that those treaties were in force, was to attempt to place India into an inescapable dilemma. But it was not accepted by the Court. The Court made it clear that the parties were free to invoke the jurisdictional clauses without being made to run the risk of destroying the case on the merits of that process itself.

3.1.7 Treaties Conferring Jurisdiction upon the Court

There are treaties which are wholly devoted to the settlement of international disputes and which make provision for reference to the Court. Treaties conferring jurisdiction on the Court are many. Treaties are of two kinds in essence. Treaties for the settlement of disputes or of a particular class of disputes and treaties to settle to the Court. Following may be taken as examples of first kind – The General Act for Pacific Settlement of International Disputes (1929; revised 1949), the Brussels Treaty (Treaty for collaboration and for Collective Self-Defence, 1948), the European Convention for the Peaceful Settlement of Disputes (1957) and the American Treaty of Peaceful Settlement (Pact of Bagota) 1948. These apply only to relatively small groups of States and have also been accepted by various States subject to reservations.

Of the second kind there are numerous bilateral treaties and a certain number of multi-lateral treaties.

3.2 Compulsory Jurisdiction

Once the initial difficulty of actually constituting the Court has been disposed of, the fundamental question is about the substantive jurisdiction of the Court. The subject being of vital importance received anxious consideration, was exhaustively discussed, and aroused widely divergent opinions.

When an authority designed to adjudicate exclusively between states is in question, it is plain that the source of jurisdiction can only be found in consent by the parties to resort to the tribunal. There exists no superior power capable either in fact or law of creating a jurisdiction or imposing resort to it. The Permanent
Court of International Justice laid it down as well established in international law that no state can, *without its consent*, be compelled to submit its disputes with other states either to mediation or to arbitration or to any other kind of pacific settlement.76 But upon the foundation of consent two systems of jurisdiction can be built. They can be combined in various degrees and the distinction between them becomes more or less marked according to one element or the other predominates. In their extreme form they can be contrasted as follows: one system limits jurisdiction to particular disputes submitted to the tribunal by an agreement made *ad hoc* after the dispute has arisen, the other is a system whereby a number of states agree by means of a single general convention to confer jurisdiction in all disputes which may arise between them upon a given tribunal, and to allow the reference of each particular dispute to the tribunal at the instance of either party to the dispute, i.e. “unilateral arraignment”.

The latter system is conveniently, but not very accurately, known as “compulsory jurisdiction”, and the former can by way of contrast be described as “voluntary jurisdiction”. The above description of compulsory system is only designed to give a broad idea of the principle involved. In its practical application reservations are generally considered essential in regard to the character of the disputes that are to be submitted to judicial settlement. The adherents of the compulsory principle are, therefore, faced with the necessity of defining the disputes suitable for inclusion. Thus Article 36, which provides for the jurisdiction of the International Court of Justice, says in paragraph I that “the jurisdiction of the Court comprises all the cases which the parties refer to it and all matters specially provided for in treaties and conventions in force”. Paragraph 2, which provides for the typical cases of the compulsory jurisdiction says that the parties to the Statute may “recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning” the four categories of disputes.77

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77 R.P. Anand "Compulsory Jurisdiction of the International Court of Justice" (Hope India publication revised second edition 2008) New Delhi p. 27.
It is, however, clear that to base the Court’s jurisdiction a submission by the disputes must be shown. Merely by being a party to the Statute, therefore, a state gives no jurisdiction to the Court any more than did a state’s participation in the Permanent Court of International Arbitration. Indeed, the acceptance of the Statute means nothing more than consent by a state that the Court may exercise the jurisdiction which may be conferred upon it in accordance with the Statute. A party to the Statute is not bound, by the acceptance of the Statute, to make any use of the Court or submit to the Court’s exercise of contentious jurisdiction, in any dispute in which it may be involved. By becoming a party, therefore, a state merely consents to the Court’s functioning under the Statute. There must be a further act of submission which may be made by an agreement to submit future disputes, or by an ad hoc compromise or special agreement in respect of a dispute already arisen, before the Court acquires jurisdiction.

At San Francisco Conference it was argued that the time had come when the Court should be given compulsory jurisdiction, i.e., all members of the United Nations should bind themselves in advance to the Court's having the right to consider legal disputes between them. This would have meant that if one party to the Statute of the Court filed a case against another party to the Statute, the Court would automatically and, without reference to the other party, have the right to try the case. This proposal was rejected because some of the delegates feared that such a provision might make the Statute totally unacceptable to their countries. Instead, the Statute of the Court provided that it would be optional for the States to recognize the compulsory jurisdiction of the Court. The compulsory jurisdiction of the Court may be recognized by the States in two ways:-

3.2.1 By Making Declarations for the Recognition of the Jurisdiction of the Court

The Statute under Article 36, Para 2 provides that it is open to a State party to the Statute to declare that it recognizes, in relation to other States which are parties, and which have accepted the same obligation, the jurisdiction of the Court in all legal disputes concerning the interpretation of a treaty; any question of

International Law; the existence of any fact which, if established, would constitute a breach of an international obligation; the nature or extent of the representation to be made for the breach of an international obligation. In the case concerning the Right of Passage over Indian Territory it was stated by the Court that: "by the deposit of its Declaration of Acceptance with the Secretary-General, the accepting State become a party to the system of the optional clause in relations to the other declarant States, with all the rights and obligations deriving from Article 36. The contractual relation between the Parties and the compulsory jurisdiction of the Court resulting there from are established, \textit{ipso facto} and without special agreement,' by the fact of the making of the declaration...For it is on that very day that the consensual bond, which is the basis of the optional clause, comes into being between the States concerned."\textsuperscript{79} The Permanent Court of Justice had a similar provision, the 'optional clause' as it is called, for accepting compulsory jurisdiction.

In Legality of Use of Force (Yugoslavia v. Belgium) case\textsuperscript{80}. Judge Oda has very rightly observed that

"The 'optional clause' in effect plays a double role: one positive in that it may occasion enable a unilateral application to succeed, and the other negative, in that it may sometimes result in respondent being brought to the Court against it will".

The Court decides the case on the basis of the optional clause declaration. However, in order for the Court to have jurisdiction on the basis of optional clause declarations, there must exist a 'legal dispute' between the parties. In Territorial and Maritime Dispute (Nicaragua v. Colombia),\textsuperscript{81} the Court found that there is no extant legal dispute between the parties on the question of sovereignty over the three islands (San Andues, Providencia and Santa Catalina) the Court cannot have jurisdiction over this question on the basis of the optional clause declarations.

\textsuperscript{79} I.C.J. Reports 1957, p. 140.
\textsuperscript{80} The judgment of the International Court of Justice was delivered on June 2, 1999.
\textsuperscript{81} Judgment was delivered on December 13, 2007.
3.2.2 By the Declarations made under the Statute of the Permanent Court of International Justice

The Statute of the present Court provides under Article 36, Para 5 that such of those declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which were in force when the Statute was signed shall be deemed, as between parties to the present Statute, to be binding with respect to the new Court. They would be binding, of course, only for the unexpired period, and they would be subject to such other terms and conditions as the declarations had stipulated. Thus, the declaration as to the acceptance of the compulsory jurisdiction of the Court shall be deemed to have been made by those States which had accepted the compulsory jurisdiction of the Permanent Court of International Justice for the unexpired period. In the case concerning Military and Paramilitary Activities in and Against Nicaragua between Nicaragua and the United States of America, the Court decided in 1984 that it has jurisdiction to decide the case on the basis of the declaration made by Nicaragua on September 24, 1929 wherein it recognized the compulsory jurisdiction of the Permanent Court of International Justice, which it claimed continues in force although objected by the United States of America. Such jurisdiction is also called transferred jurisdiction. The Court may decide a case under transferred jurisdiction when the treaty or convention is in force between the litigating States and when all the parties to the dispute have become parties to the new Statute.

The declaration for the acceptance of compulsory jurisdiction of the Court is deposited by a State with the Secretary-General of the United Nations, who transmits copies thereof to the parties to the Statute and to the Registrar of the Court. The declaration may be made with or without conditions or reservations. The Statute of the Court under Article 36, Para 3 refers the conditions. They are: firstly, condition of 'reciprocity' on the part of several or certain States, and secondly, the condition for a 'certain time.'
Past practice of the States show that compulsory jurisdiction of the Court has not been accepted by many States is clear from the following chart:—

<table>
<thead>
<tr>
<th>Year</th>
<th>States Accepting Compulsory Jurisdiction</th>
<th>States Parties to the Statute</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>1945</td>
<td>23</td>
<td>51</td>
<td>45%</td>
</tr>
<tr>
<td>1950</td>
<td>35</td>
<td>61</td>
<td>57.37%</td>
</tr>
<tr>
<td>1960</td>
<td>39</td>
<td>85</td>
<td>45.88%</td>
</tr>
<tr>
<td>1970</td>
<td>46</td>
<td>129</td>
<td>35.65%</td>
</tr>
<tr>
<td>1980</td>
<td>47</td>
<td>157</td>
<td>29.93%</td>
</tr>
<tr>
<td>1990</td>
<td>53</td>
<td>162</td>
<td>32.71%</td>
</tr>
<tr>
<td>2000</td>
<td>63</td>
<td>190</td>
<td>33.15%</td>
</tr>
<tr>
<td>2008</td>
<td>67</td>
<td>193</td>
<td>32.64%</td>
</tr>
</tbody>
</table>

The above figures suggest that presently only 32.64% States parties to the Statute have accepted the compulsory jurisdiction of the Court. They are not enthusiastic in accepting it. Moreover, those States which have made the declarations accepting the compulsory jurisdiction of the Court have made a number of reservations. In addition to the conditions of 'reciprocity' and time limit as provided in the Statute States have also put a number of other conditions. For instance, reservation as to domestic jurisdiction is most controversial. A few States have reserved for themselves to decide which questions are of a domestic character and which were international for the purpose of determining jurisdiction of the Court. The number of States accepting the compulsory jurisdiction of the Court, and the reservations which the States have made at the time of making the declaration, have considerably reduced the competence of the Court to decide a number of important disputes of the States. If the jurisdiction of the Court has to

82 Amongst the Big Powers, the then USSR never accepted the compulsory jurisdiction. China withdrew in 1972 when People's Republic of China replaced the Nationalist Chiang Kai Shek Government as the legal representative of the Chinese people at the United Nations. France terminated its declaration in 1973. USA withdrew its declaration on October 8, 1985 when it lost the case against Nicaragua, UK is the only permanent member which has accepted the compulsory jurisdiction of the Court.
be made meaningful, it is desirable that the States accept the compulsory jurisdiction of the Court with minimum of reservations.

While acceptance of jurisdiction is by means of unilateral declaration of acceptance, the use of the expression in relation to any other State accepting the same obligation suggests that the effect of such a declaration is to create a series of bilateral relations with other States that have made declarations of acceptance.

Hans Kelsen pointed out that the unilateral declaration of one State together with the unilateral declaration of another constitutes an agreement. This agreement is a general agreement in so far as the states by making the declaration referred to in Article 36 (2) of the Statute, in relation to one another, agree to recognize the jurisdiction of the Court in all legal disputes, in case one party brings the dispute before the Court.83 Judge Anzilotti, in the dissenting opinion in Electricity Company of Sofia and Bulgaria cases, took the same view of the legal relation created between the two States by their declarations. He said, in effect “the declarations resulted in an agreement between the States accepting the compulsory jurisdiction of the Court”. The facts are as follows. In 1898 the municipality of Sofia granted a concession for the distribution of electric current for light and power to French Company, which in 1909 transferred its rights to a Belgian company, the Electricity Company of Sofia and Bulgaria. The works of the Belgian Company were taken over by the municipality of Sofia in 1916. the Belgian Government instituted the proceedings by filling an application with the Registry of the Court, relying upon the declarations made by Belgium and Bulgaria accepting the compulsory jurisdiction of the Court as provided for Article 36 (2) of the Statute of the Court.84

Waldock says that the origin and the treaty character of the declaration, the practice of States in making their declarations and the jurisprudence of the Court leave no real doubt of the consensus nature of the juridical bond established between States by their declarations. He also says that the unilateral character of

84. Anand, supra note 2, at pp. 521-22.
the act by which a State gives its adherence to the obligations of the optional clause should not be denied.

Judge Alvarez termed a declaration under the optional clause a “multilateral act of a special character”. He said: “It is multilateral in the sense that it results in relations with a number of States, but Walck said that the relation between any given pair of States which have made declaration is not precisely of the same character as that which exists between parties to a multilateral treaty. The relations between parties under the optional clause are more a bilateral than a multilateral character.”

Rosenne says that by making a declaration, a State makes a general offer to all other States doing likewise. The State announces its intention to invoke the jurisdiction of the Court as applicant against any other State which has made a similar declaration. There is no direct agreement between any of the States making declarations. That agreement will concretize only when a concrete dispute is brought before the Court by an application. Only making a declaration sets the process of compulsory jurisdiction in motion.

It results from all above-mentioned discussion that though the making of a declaration is a unilateral act, but it changes into a bilateral agreement when a dispute is realized by an application before the Court.

It is interesting to note that once an application has been made to the Court under an effective declaration of acceptance of the compulsory jurisdiction of the Court, the subsequent lapse or withdrawal of the acceptance cannot debar the Court of jurisdiction. For instance, in the Nottebohm case, between Liechtenstein and Guatemala, in 1955, the Guatemalan acceptance expired on 26 January 1952. The Court was called upon to consider the effect of the lapse of Guatemalan declaration of acceptance of the jurisdiction of the Court by Liechtenstein’s application to the Court that was made in December 1951. Guatemala argued that as from midnight 26th/27th January the Court no longer had

85. Rosenne, supra note 1, at p. 727.
86. Anand, supra note 2, at p. 176.
87. I.C.J. Reports 1953, pp. 120-23.
88. I.C.J. Reports 1957, pp. 125 at 146.
jurisdiction to hear the dispute. But the Court rejected this argument and took the view that it could exercise its power, and argued that “an extrinsic fact such as the subsequent lapse of the declaration by reason of the expiry of the period or by denunciation, cannot deprive the Court of jurisdiction which is already established”. In the Right of Passage over Indian Territory case (between Portugal and India), Portugal filed an application referring its dispute with India to ICJ under Article 32 (2) of the Statute. India raised preliminary objections relating to the jurisdiction of the Court, among others, on the wording of the declaration of Portugal to terminate “by notifying the Secretary-General of the United Nations and with effect from the moment of such notification”. Such a notification, according to the Court’s observation, would not have retroactive effect so as to cover cases already pending before the Court, but “once the Court has been seized of a disputes, unilateral action by the respondent State in terminating its Declaration, in whole or in part, cannot divest the Court of jurisdiction”.89

On the other hand, “the prior lapse of a declaration, by however brief a period, suffices to prevent the establishment of the Court’s jurisdiction by means of an application based upon the expired declaration”.90 In this regard Waldock said that there is an absurdity of a system of compulsory jurisdiction which permits a right of immediate termination of the obligation by unilateral act. The remedy would be to tighten up the time-limit provision in Article 36 (3), and to require declaration to be made for not less than a specified minimum period, and even after that, the declarations should be terminable only after one year or at least six months notice.91

The declaration accepting the compulsory jurisdiction of the Court can be withdrawn by the States. The effect of the withdrawal is that other States, which have already accepted the jurisdiction of the Court, have been deprived of the right they had to bring proceedings before it, against the withdrawing State. However, the withdrawal cannot be effective without allowing a reasonable period to elapse. In the case concerning Military and Paramilitary Activities in and

89. Anand, supra note 2, at p. 176..
Against Nicaragua, the International Court of Justice stated that the right of immediate termination of declaration with indefinite duration is far from established. It appears from the requirements of good faith that the withdrawal of declaration requires a reasonable time to lapse. The Court, however, did not specify that what would be the reasonable time.\(^92\)

The above three sources of jurisdiction were clearly indicated by Judge Hackworth in the Anglo-Iranian Oil case when he stated that from the principle of consent ".......it necessarily follows that unless a State by special agreement, by treaty or convention or by a declaration made under the optional clause of Article 36, Para 2 of the Statute occupied jurisdiction the Court is without jurisdiction." It is to be noted that in the above cases, stage at which consent is given is different. While in the ad hoc jurisdiction, consent is given ad hoc, in cases of voluntary and compulsory jurisdiction, consent is given ante ad hoc.

### 3.2.3 Indian Declaration

India accepted the compulsory jurisdiction of the Court by making a declaration in 1974.\(^93\) This declaration has revoked and replaced the earlier declaration made on September 14, 1959. The declaration made in 1974 contains a number of reservations. Firstly, it shall be valid until such time as notice may be given to terminate such acceptance'. It means that the acceptance of the compulsory jurisdiction of the Court can be withdrawn at any time by giving notice. Secondly, 'condition of reciprocity' has been laid down. Thirdly, the jurisdiction of the Court extends to all disputes other than (a) disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method or methods of settlement; (b) disputes with the Government of any State which is or has been a member of the Commonwealth of Nations; (c) disputes in regard to matters which are essentially within the domestic jurisdiction

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93 For the text of the declaration See IJIL Vol. 14 (1974) p. 450. Earlier, (British) India had submitted its declaration in 1940 accepting the compulsory jurisdiction of the Permanent Court of International Justice with some, reservations. India after its independence revised this declaration in 1956. In 1959, it further revised the declaration which has been revoked by the declaration of 1974.
of the Republic of India; (d) disputes relating to or connected facts or situations of hostilities, armed conflicts, individual or collective actions taken in self-defence; (e) disputes with regard to which any other party to a dispute has accepted the compulsory jurisdiction of the Court exclusively for or in relation to the purpose of such disputes; (f) disputes where the jurisdiction of the Court is or may be founded on the basis of a treaty concluded under the auspices of the League of Nations, unless the Government of India specially agree to jurisdiction in each case; (g) disputes concerning the interpretation or application of a multilateral treaty unless all the parties to the treaty are also parties to the case before the Court or Government of India specially agree to the jurisdiction; (h) the disputes with the Government of any State which, India has no diplomatic relations or which has not been recognized by the Government of India; (i) disputes with non-sovereign States or territories; (j) disputes with India relating to (i) the status of its territory or the modification of its frontiers or any other matter concerning boundaries; (ii) the territorial sea, the continental shelf and margin the exclusive economic zone, and other zones of national maritime jurisdiction; (iii) the condition and status of its islands, bays and gulf; (iv) the air space superjacent to its land the maritime territory; and (v) the determination and delimitation of its maritime boundaries; (k) disputes prior to the date of that declaration. The above reservations in the declaration accepting the compulsory jurisdiction of the Court reveal that hardly any dispute can be brought before the Court. If States would make similar reservations, the jurisdiction of the Court would become meaningless.

3.2.4 Aerial Incident of August 10, 1999 (Pakistan v. India)

Pakistan on September 21, 1999 instituted proceedings before the Court against India in respect of a dispute concerning the destruction of a Pakistani aircraft, Atlantique on August 10, 1999. In its application, Pakistan contended that the unarmed aircraft of the Pakistan navy was on a routine training mission with 16 personnel on board when while flying over Pakistan air space it was fired upon with air to air missiles by Indian air force planes, without warning, resulting in the death of all the persons.
Pakistan maintains that the above act constituted breaches of the obligation to refrain from the threat or use of force under Article 2 Para 4 of the Charter of the United Nations and of the provisions of the Agreement of April 6, 1991 between Pakistan and India on Prevention of Air space violations and of the obligations under customary international law not to use force against another State and not to violate the sovereignty of another State. Pakistan therefore requested the Court to judge and declare that the acts of India constituted breaches of these various obligations for which India bears exclusive legal responsibility and that India is under an obligation to make reparations to Pakistan for the loss of the aircraft and as compensation to the heirs of those killed.

India on November, 2, 1999 stated that it has preliminary objections to the assumption of jurisdiction by the Court.

The Court on June 21, 2000 decided that it does not have jurisdiction to adjudicate the case brought by Pakistan. The decision which was adopted by a vote of 14 to 2 was based partly on the parties declarations of acceptance of compulsory jurisdiction of the Court and reservations attached to them. One of the reservations in India's declaration indicated that it would consider disputes with any State 'which is or has been' a member of the Commonwealth of Nations excluded from the Court's jurisdiction. As Pakistan is a member of the Commonwealth, the Court could not adjudicate the case. The Court, however stressed that the fact that it did not have jurisdiction did not mean that an act was in conformity with international law and reminded the parties that despite its lack of jurisdiction, they were still obliged to settle their dispute peacefully.

3.3 Transferred Jurisdiction

Article 36, para 5 of the Statute of the ICJ says that declaration made under Article 36 of the Statute of the PCIJ and which are still in force shall be deemed as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the ICJ for the period which they still have to run and in accordance with their terms.94

In the *Aerical Incident Case*,\textsuperscript{95} Israel’s reliance on the Bulgarian declaration 1921 and Article 36, para 5 of the Statute as the basis of Bulgarian consent was contested by Bulgaria.

The Court interpreted Article 36, para 5 as containing two conditions: (i) the State having made the declaration should be a party to the Statute of the ICJ; and (ii) the declaration should still be in force.\textsuperscript{96} According to the Court since the Bulgarian declaration had lapsed before Bulgaria was admitted to the United Nations, that declaration could not be said to be ‘still in force; and thus second condition was not satisfied. In the Court’s view the Bulgarian declaration of 1921 had lapsed and was no longer in force in consequence of the dissolution of the PCIJ in 1946. The Court interpreted Article 36, para 5 emphasizing that there was nothing in it to reveal any intention of preserving all the declarations which were in existence at the time of the signature or entry into force of the Charter regardless of the moment when a State having made a declaration became a party to the Statute.

Justices Lauterpacht, Wellington Koo and Percy Spender in their joint dissenting opinion gave a different interpretation to Article 36, para 5 that the second condition that the declaration must be “still in force” means that the period for which it has been made must not have expired. These dissenting Judges allege that the majority judgment had added two further conditions to Article 36, para 5: (i) the declarant state must have participated in the Conference of San Francisco, and (ii) the declarant state must have become a party to the Statute of this Court prior to the date of dissolution of the PCIJ, i.e. prior to 18\textsuperscript{th} April, 1946. According to these Judges the words “as between the parties to the present Statute in Article 36, para 5 can only mean States which become parties to the new Statute at any time. These judges pointed out that the purpose was to maintain those declarations immediately and automatically with regard to the original members of the United Nations and also to preserve them potentially with regards to other declaring states until the time – a reasonable time – when they become parties to the Statute.

\textsuperscript{95}Israel v. Bulgaria, I.C.J. Reports 1959, p. 127.  
\textsuperscript{96}I.C.J. Reports 1959, p. 144.
Article 1 of the Statute of ICJ requires the constitution and functioning of the ICJ in accordance with the provisions of the Statute. Jurisdiction of the Court has been dealt with in Articles 36 and 37. Article 36, para 6 provides that in the event of a dispute as to whether the Court had jurisdiction the matter shall be settled by the decision of the Court. In *Nottebohm’s Case* the Court ruled that, Article 36 para 6 of the Statute suffices to invest the Court with power to adjudicate on its jurisdiction.

Besides this provision, “the judicial character of the Court and the rule of general internal law are sufficient to establish that the Court is competent to adjudicate on its jurisdiction”. In the *Fisheries Jurisdiction Case*, the Court said that any question as to the jurisdiction of the Court deriving from an alleged lapse, through changed circumstances was resolvable through the ‘accepted judicial principle enshrined in Article 36, para 6 of the statute;’. Moved by Icelands’ failure to appear, the Court said that it in accordance with its statute and its settled jurisprudence must examine proprio motu the question of its jurisdiction to consider the application of Germany. It further said, the duty of the Court to make this examination on its own initiative is reinforced by the terms of Article 53 of the Statute.

Article 53 says that whenever one of the parties does not appear before it or fails to defend its case it (Court) before finding upon the merits, has to satisfy that it has jurisdiction.

In the *ICAO Council Case* the Court assumed jurisdiction to decide whether ICAO Council had jurisdiction in a case between Pakistan and India. Pakistan contended that Article 84 of the convention of International Civil Aviation 1949, which provided for appear to the Court from the decision of the Council referred to the decision on the merits and not on the point of jurisdiction. The Court said “a jurisdictional decision is a decision of a substantive character and it should in principle, be regarded as being on a par with the decision on the merits as regards any right of appeal that may be given.

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In the event of dispute over jurisdictional competence of the ICJ, its decision is final. This gives great impetus and functional freedom to the Court.

3.4 Advisory Jurisdiction

In the advisory practice, the same distinction exists between ‘jurisdiction’ and ‘competence’, based respectively on an objective and on a subjective element, as is found in the contentious practice and the two concepts are based in broadly the same sense. As in the contentious practice, the Court’s advisory competence is a unitary one. Division of the material into sections dealing with jurisdiction and discretion as though they were completely isolated and independent phenomena of the advisory practice is liable to mislead. With this caveat, however, such an approach has to be followed.

As seen, one of the principal innovations at San-Francisco was the insertion into the statute, provisions regarding the advisory jurisdiction of the Court. However, the wording of Article 65 (1) is incomplete. That provision indicates two of the elements of the advisory jurisdiction, namely that the request must be made by a duly authorized organ, and that the Court must be asked to give an opinion on a legal question but the Statute passes complete silence over the third element, namely, the addressee of the opinion. Both Article 96 of the Charter and Article 65(1) of the Statute use the verb ‘give’ in a general way and syntactically in an absolute construction which is theoretically capable of several interpretations. When the Court was faced concretely with this problem of interpretation, it explained that an advisory opinion ‘is given not to the states, but to the organ which is entitled to request it’.100 It is this aspect which is the real distinguishing mark of the advisory jurisdiction and which, as far as the Court is concerned, enable it to make judicial pronouncements which are not per se possessed of binding force as between parties and which therefore, entitles it to act independently of any formal expression of consent on the part of states individually. In consequence of Article 65 (1) and this interpretation of the word ‘give’ there are, strictly speaking, normally no ‘parties’ in advisory proceeding.

except where by virtue of collateral argument not effecting the manner in which the Court functions, states have agreed to accept the advisory competence either as an alternative to the contentious jurisdiction or where no contentious jurisdiction exists.

It is inherent, in this concept, that the limits of the functions conferred on the Court in the concrete case are determined in advance, and outside the Court proceeding, by the requesting organ. A particularly significant application of this principle is seen in those cases where the advisory opinion is requested on a preliminary question of procedure. In such cases – the Court has been careful in its opinion not to prejudice the problem of the merits.101 This feature has been underlined in some of the decision of the permanent Court. In the Interpretation of the Greco-Bularian Agreement (1927) case, the permanent Court explained that since the right to request opinion was given only to the two organs mentioned in the covenant, the Court was ‘therefore bound by the term of the question as formulated, in this case by the council’. Two questions have been formulated, the second conditional on an affirmative answer to the first. The Court, however, found itself unable to comply with desire, and pointed out that to ignore the condition at the request of the parties ‘would be in effect to allow the two interested Governments to submit a question for the advisory opinion of the Court’.102 In the same case the Court refrained from expressing any opinion on a question which emerged from the Court’s reasoning, but which had not been discussed either before the requesting organ, or before the Court. A matter which must still be regarding as unsettled is whether, in exercise of the advisory jurisdiction, a legal question directed exclusively to the establishment of facts may be answered by the Court. The doubts arise from several causes. For example, the establishment of facts is certainly comprised within the judicial function, and for

101. Thus, *Turkey and Iraq Frontier* case, series B, 12, at p.18, Peace Treaties Case, I.C.J Reports 1950, p.70.

102. Series A/B, 45, at p.87 Nevertheless, and somewhat ambiguously, the Court left open the question whether it was possible for an understanding between the representatives of the interested governments, reached in the course of advisory proceeding to serve as a kind of ‘special agreement’ initiating a contentious proceeding before the court. The reason given for that reserve was that in the present case the wishes expressed by the respective representatives contemplated only an ‘extension’ of the advisory procedure.
certain aspects of contentious cases it is obligatory for the Court to establish facts. The compulsory, jurisdiction under Article 36(2) of the statute extends to the existence of any facts which, if established, would constitute a breach of an international obligation. On the other hand, unless there is agreement on the facts as to the point of departure for the determination of the law applicable to those facts, non-contentious, and non-advisory, judicial procedures are not likely to be appropriate machineries for the establishment of facts. Both Courts have regularly made relatively simple finding of facts, established on the basis of the documentation submitted to the Court, but these instances can hardly be regarded as conclusive, since the Court was never faced with the problem of establishing known facts in the course of rendering an advisory opinion. But having regard to the broad discretion which the Court possesses in regard to the exercise of the advisory jurisdiction, and as regards the procedure to be adopted, it is probably that each instance would have to be decided, on its own merits, in which factors such as the degree of co-operation with the Court forthcoming from the state directly concerned would be determining.

It is not a matter for discussion, being inherent in the quality of the Court, as a judicial organ, that it has the power to interpret any request for advisory opinion. This has been applied by the Court both to establish the object for which the question was put and to establish an interpretation of the question itself.

The Court is not obliged, should doubts arise over the intention of the requesting organ, to apply to the requesting organ for clarification. In fact, although the problem has arisen in a surprisingly large number of cases, the Court never has acted in that way. In itself interpreting the meaning of the questions, the Court has paid attention to many different, features, including the circumstances in which the request came to be made, the terms of the resolution embodying the

103. The principal instances of the interpretation of the request by the court are found in the Tunis and Morocco Nationality Decrees, Eastern Carelia, Personal work of the Employer, European Commission of the Danube, Jurisdiction of Darning Courts, Darning and the ILO, Polish National in Danzig, admission, peace treaties, U.N. administrative tribunal, South-West Africa (votiny) South-West Africal Committee, Maritimg Safety Committee and Certain Expenses Cases.
request discussions in the requesting organ prior to the adoption of the request, and occasionally divergences between the English and French version of the request.\textsuperscript{104}

In undertaking this interpretative function, the Court seems concerned to place such a meaning on the question as will bring the particular case, in the light of the circumstances which have presented themselves to the Court, within the scope of the judicial function as applied in advisory cases. The Court has invariable resorted to processes of liberal interpretation of the question when there was a possible discrepancy between the questions as framed and the actual legal question as developed in the written and oral proceeding. In order to appreciate fully the significance of the process of interpretation in a concrete case, it is probably desirable to examine with some meticulousness such aspects as the nature of the vote by which the resolution incorporating the request was adopted, participation in the advisory proceedings, as well as more general issues of judicial policy as these have become manifest in the course of accumulated judicial experience.\textsuperscript{105}

3.4.1 Legal Question

The decision of the requesting organ to avail itself of Article 96 of the Charter and to adopt a request for an advisory opinion carries an implication that the question is a legal question. The requesting organ makes a political determination that, to that formulated question it desires a legal answer produced by the application of the judicial techniques of the Court advisory jurisdiction. But determination of the characteristic of the question is not binding on the Court which, in accordance with Article 65 of the statute may only give an advisory opinion on a legal question, and which therefore, has to satisfy itself that it is in a position to give that legal answer. In the early years the Court seemed to have regarded Article 96 of the character and 65 of the statute together as equally governing its jurisdiction in advisory matters and when the question arose relied...
on both of those provisions. However, the Court has made it plain that the concept of ‘legal question’ applicable for a political organ is not necessarily the same as the concept of legal question applicable for the Court – that the word ‘legal question’ of Article 96 of the character may not always carry the same implication as in Article 65 of the Statute.

The jurisprudence of the present Court on the meaning of the expression ‘legal question’ discloses that the Court has approached the problem by relating the term of reference sent to it by the requesting organ to its normal judicial activities as an International Court; and although it has never, in the advisory cases, employed the formal description of legal dispute appearing in Article 36 (2) of the Statute, it has used language closely resembling that used in connection with the contentious jurisdiction.

The contention that in the concrete case the question was not a ‘legal question’ with in the contemplation of the character and statute has, for the most part, been raised in connection with advisory opinions concerned with the interpretation of the character. In this connection, the Court has proceeded by establishing that the character is international treaty, that the interpretation of an international treaty comes within the normal scope of the exercise of the judicial function, and that there were no particular reasons to prevent the Court from performing that normal judicial function in relation to the charter in the concrete case. The Court has also emphasized that since it can answer any legal question put to it by the General Assembly, the Court’s determination, by the process of interpretation, that it was asked an abstract question does not lead to the conclusion that it may not answer the question.

106. Admission, Competence of the Assembly and Reservations cases.
107. This interpretation is fully consistent with the practice of the United Nations. It is characteristics of the application of the character, that a determination by one organ acting under one provision of the character is not binding upon another organ acting under a different provision of the character.
108. Thus, in the Peace Treaties case the Court said that a question relating to the interpretation of the terms of a treaty, was one which ‘by its very nature’ lies within the competence of the Court, I.C.J. Reports 1950, pp. 70-71.
109. The view of the informal Inter-Allied Committee that a general International Organisation, if it possesses anything in the nature of a regular constitution, will require authoritative legal advice on points affecting the constitution, may be recalled.
Further, the Court has always been required to give attention more particularly to the word ‘any’ appearing in Article 96(1) of the Charter as well as in Article 65 of the Statute. This question arose in the Reservations case where it was argued that the presence in the convention of a compromissory clause excluded the advisory jurisdiction of the Court in a case concerning the interpretation of the contention. Categorically rejecting this contention, the Court explained that Article 96 of the Charter confers upon the General Assembly and the Security Council, in general term the right to request this Court to given an advisory opinion “On any legal question”\(^{110}\).

On the whole, this doctrine is, so far, limited to request made by the General Assembly the right of which to request advisory opinions on any legal question is not subject to material limitation. As the right of the Security Council is an extensive, the doctrine probably also applies to opinions requested by that organ. It may not necessarily apply to opinion requested by that organ authorized under Article 96(2) of the Charter, because of the material limitation upon the nature of the legal question which may be put to the Court imposed by the different authorizations conferred by the General Assembly. If the legal question put by one of these organs or specialized Agencies must relate to something arising within the scope of the activities of that organ or specialized agency, and not be otherwise excluded from the scope of the authorization, then it is unlikely that it will be completely ‘abstract’.

Having regard to this interpretation of the Character and Statute, it appears that resolution 17 (II) of the General Assembly, by which the organ of the United Nations and of the specialized Agencies were recommended to have greater use of the advisory procedure, is an important expression of policy on the part of the General-Assembly. Clearly, however, it relates to the propriety of the organs and specialized Agencies concerned, exercising their right to request advisory opinions. It does nothing to modify by enlargement that right, or the jurisdiction of

\(^{110}\) I.C.J. Reports 1951, p.20. This specific reference to Article 96(1) of the Charter mean that this interpretation may not necessarily apply where the request is made under Article 96(2). The General-Assembly has also given a wide interpretation to the word ‘any’ by refusing to accept as a general proposition that only ‘difficult’ or ‘important’ legal questions may be put to the Court, provided they were not ‘hypothetical’ or ‘futile’, U.N. Repiratory Article 96, para 74-76.
the Court. It is doubtful furthermore, if this resolution can have any effect upon the
decision of the Court on the propriety of its exercising jurisdiction in a given case.
Although such a decision is a subjective one, it must, it is submitted be reached by
the Court in the application of judicial techniques, and the judicial view of
propriety may not necessarily coincide with the political view.

3.4.2 The Court’s discretion

In the cases considered in the preceding section, the Court did not consider
the discretion aspect of the advisory competence until it was satisfied that the
question put to it conformed to the judicial requirement for a legal question. That
follows the logical sequence for the question of propriety can normally arise for
the Court only if the Court has jurisdiction, and strictly speaking raises issues that
are distinct at least as a matter of formulation, from issues of jurisdiction.
Nevertheless, experience shows that in most case states desirous of preventing the
giving of the opinion will raise both types of issues, and when that happens, it is
not always easy to draw a clear distinction between them.

It follows from the Statute, and has been emphasized in the jurisprudence,
that the discretion which the Court possesses is twofold. The permissive wording
of Article 65 gives the Court a general discretion whether or not to answer the
question put to it, and Article 68 gives the Court a wide discretion with regard to
the procedure to be followed in the concrete case. It may happen that the propriety
of the Court’s rendering the requested opinion will depend upon whether the Court
is able to devise a form of procedure that is appropriate for the case, and is not in
contradiction with the mandatory provision of the Statute.

The combined jurisprudence of the permanent Court and the present Court
indicates that two general principles, and the interplay between them, have been
developed to guide the Court in the exercise of its discretion. The first principle
that the Court, being a Court of Justice, can not, even in giving advisory opinions,
depart from the essential rules guiding its activity as a Court.111 The second

111. Series B.5, p.29, for the generalization of this principle as Article 68 of the Statute of the
permanent Court. For reaffirmation of this principle by the present Court, See Certain Expenses
case, where the Court said that it had ‘always been guided by that principle’. I.C.J Reports 1963,
p.30 For application of the principle without citation of the Eastern Carelia case, See
principle, which is peculiar to the present court, is that since the court is a principal organ of the United-Nations it is under a duty to co-operate with other organs; consequently, a request for an advisory opinion should not in principle be refused, and only compelling reasons should lead the Court to refuse to give the requested opinion.

3.4.3 Consideration Based on Court’s Judicial Character

The most important contention relating to the judicial character of the Court was to the effect that as the request related to a legal question actually pending between two states, the power of the court to give the advisory opinion could not be exercised without the consent of the States parties to the dispute, and that since the consent was not forthcoming, the court would not give the opinion. This is, in fact, a mixed question of jurisdiction and propriety.

This line of argument is based upon the general principle of international law concerning the consensual basis of the Court’s jurisdiction in contentious judicial proceedings and it assumes that the advisory procedure constitutes such a judicial proceeding.

The Court first explained the difference between the principle governing contentious procedure and those which are applicable to advisory opinions. It admitted that the consent of States, parties to a dispute, is the basis of the Court’s jurisdiction in contentious cases. But this was not so in advisory proceedings, even where the request relates to a legal question actually pending between states. The reason for this is the formal one: ‘the court’s reply is only of an advisory character: as such it has not binding force. It follows that no state whether a member of the United-Nation or not, can prevent the giving of an Advisory opinion which the United Nations.112 Considers to be desirable in order to obtain enlightenment as to the court of action it should take. The limits to this duty derive from the court’s being the principal judicial organ. It was an account that its power

112. The use, in this, context, of the words ‘United Nations’ is remarkable. The request was made by the General-Assembly and the General Assembly is not synonymous with the United Nations. Ideas of what is desirable may very considerably from one organ to another: and indeed the possibility of the veto preventing any expression of opinion by the Security Council may prevent a desire for enlightenment from reaching the court, even if the United Nation want such enlightenment.
to answer the request was challenged. Here the Court explained the purport of Article 65 of the Statute:

Article of the Statute is permissive. It gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the request. In the opinion of the Court, the circumstances of the present case are profoundly different from those which were before the permanent court of International Justice in the Eastern Carelia Case (Advisory Opinion No. 5). When that Court declined to give an opinion because it found that the question put to it was directly related to the main point of a dispute actually pending between two states, so that answering the question would be substantially equivalent to deciding the dispute between the parties, and that at the same time it raised a question of fact which could be elucidated without bearing both parties.113

As has been observed, the present request for an opinion is solely concerned with the applicability to certain disputes of the procedure for settlement instituted by the peace treaties, and it is justifiable to conclude that it in no way touches the merits of those disputes. Furthermore, the settlement of these disputes is entrusted solely to the commissions provided for the Peace Treaties. Consequently, it is for these commissions to decide upon any objections which may be raised to their jurisdiction in respect of any of these disputes, and the present opinion in no way prejudices the decisions that may be taken on those objections. It follows that the legal position of the parties to these disputes cannot be in any way compromised by the answers that the court may give to the questions put to it.

113. It may also be pointed out that in that case, the Council of the League may have anticipated that without the consent of the Russian Government the Court would not be able to pursue the examination, series B.5, p.29.
It is true that Article 68 of the Statute provides that the Court in exercise of its advisory functions shall further be guided by the provisions of the statute which apply in contentious cases. But according to the same article these provisions would be applicable only ‘to the extent to which it’ (the court) recognizes them to be applicable. It is therefore, clear that their application depends on the particular circumstances of each case and that the court possesses a large amount of discretion in the matter. In the present case the Court is dealing with a request for an opinion, the sole object of which is to enlighten the General Assembly as to the opportunities which the procedure contained in the Peace Treaties may afford for putting an end to a situation which has been presented to it. That being the object of the request, the Court finds in the opposition to it made by Bulgaria, Hungary and Romania no reason why it should abstain from replying to the request.

The issue arose in a different form in the ILO Administrative Tribunal (UNESCO) case, where the court was asked whether it was possible for it to remain faithful to the requirements of its judicial character in that case. The difficulty was occasioned by Article 34 (1) of the Statute, which created a certain procedural inequality between the Executive Board of UNESCO and the official and the Court asked whether its Statute and its judicial character ‘do or do not in the way’ of its complying with the request. The inequality was two fold, for it related both to the origin and to the progress of the advisory proceedings. The Court seems to have regarded as irrelevant the inequality that was antecedent to the examination of the question by the Court, on the grand that it did not affect the manner in which the Court undertook that examination. But the position was different with regard to the actual procedure, where the inequality followed from the Statute. The judicial character of the Court required that both sides directly affected by the proceeding should be in position to submit their views and
arguments to the Court. The Court overcame that difficulty by adopting a special procedure to which all concerned had consented, and to which no objection had been raised. The court found that the requirements of the good administration of justice had not been impaired, and that it had adequate information to enable it to deal with the question. ‘In view of this, there would appear to be no compelling reason, why the Court should not lend its assistance in the solution of a problem congruently a specialized agency of the United Nation authorized to ask for an advisory opinion of the Court.’

3.4.4 Jurisdiction in special Advisory Procedures

The advisory opinion in the ILO Administrative Tribunal (UNESCO) case indicates that a clear distinction has to made between the court’s general advisory jurisdiction based exclusively an Article 65 of the Statute, and any special jurisdiction creased by an independent instrument regulating the invocation of the advisory jurisdiction and its consequences in given circumstances. The problem arose out of the second question contained in the request. The court was satisfied that the first question related to an aspect regulated by Article XII of the Statute of the administrative Tribunal, which dealt with two clearly defined cases. Those cases related to the circumstances in which the advisory jurisdiction could be invoked in order to challenge a decision of that Tribunal. The Court did not find that the second question put to it challenged the Tribunal’s decision in the term of Article XII, and considered that it could not answer the question within the framework of Article XII of the Statute. The court said:

Undoubtedly, UNESCO has the general power to ask for an advisory opinion of the Court on questions within the scope of its activity. But the question put to the court has not been put in reliance upon the general power of UNESCO to ask for an advisory opinion. It has been expressly linked with Article XII. In its

114. In reaching this decision the Court expressly rejected the arguments advanced with force in several of the individual opinions, that the court was incompetent ratione personal and ratione material because of the provisions of Article 34 and Article 38 of the Statute, both of which were applicable, to the advisory as much as to the contentious jurisdiction of the court. See particularly the dissenting opinion of Judge Cordova.
terms and by virtue of the place which it occupies in the resolution requesting the advisory opinion. Question II as put to the Court refers to the judgment which the Executive Board has challenged in relation to the jurisdiction of the tribunal which rendered these judgments, it is on that basis that the question must be considered by the Court. The court has found that the object of that question is outside the matter which, in the judgment have been challenged, is germane to the jurisdiction of the tribunal. In the request for an advisory opinion, question II has been placed within the orbit of Article XII. Actually, it is outside that article. Accordingly, it cannot be considered by the court for the purpose of acting upon the request made to it.\textsuperscript{115}

Nevertheless, the dispositive of the advisory opinion did not fully dispose of the matter in jurisdictional terms the court’s reply simply stated that ‘this question does not call for an answer by the Court’.

The court did not directly explain its negative attitude. However, the reason is believed to be directly connected with the court’s procedural discretion. The court’s discussion of the issue of its discretion is ultimately connected with Article XII of the Administrative Tribunal’s Statute, and gives expression to the court’s concern not to imperil. The working of the regime established by that Statute for the judicial protection of officials. For that reason the Court agreed to adopt a special procedure. No such special procedure would be normally justifiable in the case of an advisory opinion asked under a general power possessed by the requesting organ.

The refusal of the court to answer the second question emphasizes that the special procedure in recourse from the administrative tribunal is an extra ordinary

\textsuperscript{115} Article XII, p.99 of the statute of Administrate Tribunal. Yet the court did consider some of the issues argued at length before the tribunal and in the written statements submitted to the court, discussing some of these in summary fashion. Ibid., pp.99-100. Some of these remarks appear to be abiter dicta, although their presence in the advisory opinion may reflect some of the criticism made in relation to the manner of which the Court approached its task in the South-West Africa (Vating) case.
procedure which cannot be combined with, or substituted for the normal advisory procedure, and that in reaching its decision the court will have regard to the substance and not merely the form, of the issue raised by the question. There is no reason why that doctrine should be confined to the special form of advisory procedure which was invoked in that case.

3.4.5 Revision of Advisory Opinion

The question of the power of the court to revise an earlier opinion has not arisen in advisory proceedings, but has been raised in argument in subsequent contentious proceeding and passed upon by the court in general terms. The argument has been based on the condition imposed by Article 61 of the Statute for the revision of a judgment, and the pronouncements of the Court, while not referring specifically to Article 61, have been couched in terms which evoke the substantive provisions of that Article. It follows from the general nature of the advisory competence that advisory proceedings for the revision of an earlier opinion would not, possess any derivative character but, as in cases of interpretation, would have to form the object of a new request should such a request be made the original request, the problem of the court’s discretion to render the opinion might arise.

3.4.6 Treatment of Preliminary Question

The related preliminary issues of the court’s jurisdiction and competence have been prevalent throughout the advisory experience of the present court. Article 65 of the statute has, in relation to these preliminary questions in advisory proceedings, a function similar to that performed by Article 36(6) of the Statute in contentious proceedings. It is in these respects that the advisory practice shows the most marked difference from the contentious practice where, as has been seen, the separation of these questions from the merits of a claim is a partly necessitated by the fact that international law recognizes the right of a state not to plead to the merits before its obligation to submit to the jurisdiction is judicially established. In the recent advisory cases in which preliminary questions have been raised, this procedure has not been followed. The narrow confines in which the court’s
approach to the legal question forces the issue has the advantage that, whether the matter is one of jurisdiction in the narrow sense or of competence in the broader sense, it is possible for the court to a large extent to pass over the historical development which led to the concretization of the case. Indeed, it can almost be deduced from the cases that the court will be both to go beyond the preamble to the resolution requesting the advisory opinion, unless compelled to do so by the substance of the questions. This makes it unnecessary for the court to enquire it to the propriety of the making of the request by the requesting organ or specialized agency. But it does not, on the other hand, absolve the Court from enquiring into the capacity of the requesting organ to make the request or from considering its own competence in the matter. In this connection, it is true that the rules of court which specially relate to the advisory procedure do not compel the Court to differentiate between the preliminary and the substantive question upon which its opinion is requested. On the other hand, it is clear that the court has the power to do so and the conclusion may be reached that the present procedure for the treatment of preliminary question in advisory cases is not one forced upon the court by the statute or by the rules of court.

The question of the desirability of the court’s proceeding in this manner is not one that permits an unqualified answer when the texts governing the activities of the Court are couched in such broad language, leaving so extended a measure of discretion to the court in the treatment of a particular case, it would be hazardous to attempt an unequivocal and dogmatic answer to the question: what is, and what is not, a desirable manner of proceeding.

116. For this reason it is submitted that the court was wrong in not dealing with a Polish objection to its jurisdiction in the *South West Africa* (Status) case, despite the fact that it is clear from the previous jurisprudence of the Court that this objection would have been dismissed. It follows from this conclusion that when, once the issue of competence has been raised in the written pleading, the representatives of the Government participated in the oral stage pass in silence over this issue, they must be assumed to have tacitly accepted the competence of the Court. The rule applicable in contentious proceedings that the jurisdiction of the court can be established by conduct should be equally applicable in advisory proceeding.

117. The following are instances in which the permanent court considered separately preliminary questions, but not preliminary objection in relation to advisory cases: *Customs Union Case*, series A/B 41, p.88, C.53, pp.186, 201-9; *Danzing Legislative Decrees* case series A/B 65, p.69, C.77, p.171, in the *Eastern Carelia* case the court asked the Finnish representative to give his views concerning whether the court had ‘competence’ to give affect to the request, series B.5, p.12.
The key is found in the fundamental difference between the advisory and contentious procedure. However, in the present context the difference is not to be approached as though it were only a matter of form. It seems necessary to establish whether in the circumstances of the particular case the organization at large or whether it is being asked to make a judicial settlement of a dispute or a question actually pending between two or more states, or between the organization and a state. It is in the latter event that the analogy with the contentious procedure becomes close enough to warrant the introduction of a formal preliminary objection procedure. Consideration of justice would seem to require that the respondent state should not be called upon to make any pleading written or oral, on the merits if the competence of the court should be disputed by it until the preliminary question has been judicially decided. Conversely, the same consideration requires that states in the position of respondent, or quasi-respondents in this type of proceedings, should be enabled to argue fully the question of jurisdiction in isolation from the argument on the merits.\footnote{It will be noted that in the Peace Treaties case the Governments which, in their written statements, put forward objection by the court did not include in their statements any observation on the substance of the questions passed by the request.}

The separation in contentious cases of the jurisdictional issues from the merits is not an excess of formalism due to the state system of the international society. It is a necessity due to the complex structure of the international society and the particularly place in it taken by the judicial method of settling disputes.

The fact that preliminary objections are more frequently met in proceeding instituted by way of application, emphasizes their special place in the international judicial process. In some respects the request for an advisory opinion, especially when its adoption was opposed can be regarded as an application: certainly when it relates to a legal question actually pending between two states it assumes a very close resemblance to the invocation of the doctrine of forum prorogatum. For this reason it should assimilate to itself the essential features of the contentious procedure.

Considerations such as these are not normally operative when the court is acting in its capacity of advisory at large to the organization. In such cases there is
no consideration of abstract justice which would require or justify isolating the jurisdictional issue from the substance of the question.

More difficult is the case where the preliminary question relates not to jurisdiction but to the propriety of the court’s giving the request opinion. This issue is peculiarly acute in the advisory procedure. It is submitted that here, too, the solution is to be sought in the circumstances of the case itself, and not in the superficial nature of the objection.

The separation of the preliminary question from the substantive issue need not lead to any unnecessary protraction of the proceedings. In the two advisory cases before the permanent court in which the preliminary question was isolated from the substance, the arguments on the preliminary question were heard at the commencement of the oral arguments. The court announced its decision immediately, and the formal order embodying its decision was issued subsequently. In this way it is possible to overcome difficulties inevitable when the court is called upon to decide differing nations is one and the same vote.

3.4.7 Advisory Proceedings

From the beginning the permanent court considered that advisory opinions should be given by the full court,119 and not by chambers, and a provision to that effect was included first as Rule 71 of the Rules of Court of 1922 and later as Rule 84 (1) of the Rules of 1936. Both these text used the expression ‘full court’. In the revision of 1946, the word ‘full’ was omitted from the English version, the French version remained unchanged.120

By Article 83 of the Rules, if the advisory opinion is requested upon a legal question actually pending between two or more states, Article 31 of the Statute, relating to the appointment of judges ad hoc and the right of the national judges to sit in the case, shall apply, together with the provisions of the Rules relating to the application of that Article. This provision may be some what broader then the corresponding provision of the Rules of 1936, which limited the application of

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119. Subject of Article 16, 17 and 24 of the Statute.
120. The expression ‘full court’ also appears in Article 25 of the Statute. The reason for the alteration of the English version of the Rules is not clear.
Article 31 of the Statute to advisory cases in which the question related to an existing dispute between two or more members of the League of Nations or States.

3.4.8 The Seisin of the Court

The mere adoption of the request by the requesting organ does not in itself suffice to seize the Court of the case and institute the proceedings. Article 65(2) of the Statute requires the questions to be ‘laid before the Court by means of a written request’. Although, the San-Francisco Conference has decided to simplify the provisions regarding the signature of the request. Court requires official notification of the request which is customarily contained in formal letter from the Secretary Council of the requesting organization addressed to the President of the Court or the Registrar. The form of this letter is stereotyped, simply containing the text of the question or questions on which the opinion is requested, a certified copy of the English and French versions of the resolution containing the full request being enclosed. The date of the receipt of that letter in the Registry is the date of the institution of the proceedings, and the occasion for the opening of the folio in the General list.

The normal practice of the Secretary-General of the United Nations is to forward the official notification of the request as soon as it is administratively convenient. Nevertheless, the turning of this step rests with the Secretary-General and is not a matter of concern for the Court.

3.4.9 Accompanying Documents

Article 65(2) of the Statute requires that the written request shall be ‘accompanied by all documents likely to throw light upon the question. These documents correspond, basically, to the statement of facts required in certain phases of the proceedings in contentious cases, though they are naturally not limited merely to statement of facts. Several of the requests of the General-Assembly have contained a general instruction to the Secretary-General to

122. U.N. Repertory, Article 93, para 24.
transmit the relevant document to the Court, but more frequently the requests are silent on that matter. In all such cases, the Secretary General is left to his discretion, and he enjoys wide latitude in making up the sets of documents. Furthermore, the adoption of the request constituted the necessary authority to incur the expenses of submitting the documents, and written and oral statement, to the Court.\textsuperscript{124}

For the most part, the accompanying documents consist of systematically arranged extracts from the relevant \textit{official records}, and if these are bulky or complicated, the Secretary-General adds explanatory notes. If the \textit{official records} are not sufficient to throw light upon the question however, the Secretary-General may prepare such additional documentation as he finds appropriate. By Article 15 of the instructions for the Registry, the Registrar is entitled to ask for additional information from the Secretary General of the United Nations, or from the competent authorities of other organs and specialized Agencies referred to in Article 96(2) of the Charter.

Article 65(2) of the Statute is not normally interpreted literally in the sense that the documents physically accompany the request, but the usual practice is for them to be transmitted to the Court within the time-limit fixed for the receipt of the written statement.\textsuperscript{125}

However, the court has the right to insist on receiving the documents before adopting its preliminary decisions on the procedure to be followed in the case.\textsuperscript{126}

3.4.10 Principal Feature of Advisory Procedure

There are two principal, and characteristic, differences between the advisory and the contentious procedures. The first is that since there are normally no parties in advisory cases, the role of the states and International organization concerned is confined to that of an \textit{amicus curiae} nature, and consists in furnishing

\textsuperscript{124} G.A.O.R.J. (V) 6th, p.87.
\textsuperscript{125} The practice nevertheless has the disadvantage that states remain in ignorance of the documents being transmitted to the court by the Secretary-General during the period in which they are considering their own written statement.
\textsuperscript{126} \textit{Maritime Safety Committee} case, pleadings, p.448 in that case the decision is to wait until receipt of the documents before deciding what status should be invited to furnish information and as regards the time-limits.
the Court with information on the question under consideration. The second is that the Court has an extremely broad discretion with regard to the procedure to be followed. Article 68 of the Statute and Article 82 of the Rules contain no more then general directives which apply to supplement the very few substantive procedural provision of those two instruments and relating exclusively to the advisory procedure. By Article 66 of the Statute, all states entitled to appear before the Court as well as certain International organizations have general right in relation to advisory cases, but it is completely within the discretion of the Court in what form and at what stage of the proceedings, those right may be exercised. Unlike contentious cases, the rigid division of the proceeding in to sharply defined written and oral phases is not an obligatory feature of the Statute and provided the Court is satisfied that it possesses sufficient information, the fact that states may or may not have availed themselves of their right to furnish the Court with information does not in itself prevent the court from giving the opinion.

Article 82 of the Rules requires the Court above all to consider whether the request for the advisory opinion relates to a legal question actually pending between two or more states. Article 82(2) of the Rules enables the Court, if it is of opinion that a request necessitates an early answer, to take the necessary steps to acceptance the procedure. The League Council frequently requested the permanent Court to avail itself of that provision. It has not been formally invoked in the present Court, which, however, normally disposes of its advisory business with dispatch.

3.4.11 Development of Procedural Law Relating to Advisory Opinions

The advisory jurisdiction of the Court can be invoked much more easily and conveniently by an appropriate authorized body than can either of the jurisdictions contemplated by Article 36 of the Statute be activated by one or both parties to a dispute. Moreover, there is little difference in actual effect, since for enforcing the verdict of the Court there is in any event no sanction other than that of World opinion.

The invocation of the advisory jurisdiction by the organs and other agencies of the United Nations have been recommended as a regular feature, the feasibility and desirability of which is supplied ground by the following reasons:

1. Every dispute has generally some legal aspect providing thereby a justification for invoking the jurisdiction of the Court;
2. Major disputes which count are generally brought before the United Nations in some form or the other whether in the form provided by the Security Council or that of the General Assembly;
3. The Court is not likely to refuse assistance, sought from it by international organizations unless there are compelling reasons to do so;
4. It is for the General Assembly to initiate this practice and with new members admitted in recent years in such large numbers, many of whom would be disinterested and hence impartial, it should not be difficult to make a beginning;
5. For the Court to be fully utilized ways have to be found of feeding it with work; and
6. This is the least expensive proceeding from the view point of States.

3.4.12 Guidance to National Court's Through Advisory Opinions of ICJ: The US Proposal

In the declaration of acceptance of the compulsory jurisdiction of the ICJ, many States have reserved the resolution of certain disputes of international character to the jurisdiction of their National Courts. Hearing on such disputes by the ICJ is thus obstructed. The National courts in proceedings involving international matters are supposed to apply the principles of international law in spirit as well as intent. It therefore becomes necessary to ensure the approaches in the two for a on identical lines particularly because appeal from one does not lie to the other.

This is possible of achievement if the United Nations General Assembly establishes a link between the two. The initiative taken by the United States House
of Representatives through its resolution of December 17, 1982, seeking to establish a Special Committee in the General Assembly on Advisory Opinions from the World Court is, worth the mention.

The idea of the possibility of a link between the National Courts and the ICJ has roots in much earlier times. Hersch Lauterpacht in 1929 wrote:

“One may consider the possibility of a development in which the highest national tribunal will prefer to ask competent international tribunals, preferably the PCIJ, sitting in its full strength, for an opinion on difficult or unsettled questions of international law which do not involve national interests.”

Jenks has also made recommendations on similar lines.

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128. The British Year Book of International Law, 1929, pp.94-95.