A TREATISE ON THE PERMANENT COURT OF INTERNATIONAL JUSTICE, 1920–1942

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THE PERMANENT COURT

OF

INTERNATIONAL JUSTICE

1920-1942

A TREATISE

BY

MANLEY O. HUDSON

JUDGE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE
MEMBER OF THE PERMANENT COURT OF ARBITRATION

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PREFACE

Since the publication of the author's treatise on the Permanent Court of International Justice in 1934, important developments have taken place and both the structure and the procedure of the Court have been changed. The Revision Protocol of September 14, 1929, which entered into force on February 1, 1936, introduced a number of amendments into the Statute of the Court; new Rules of Court were promulgated on March 11, 1936, effecting significant changes in the Court's practice and procedure; elections of judges were held in 1935, 1936, 1937, and 1938; the Court's jurisprudence has been developed along lines not previously followed; and numerous States have acted to extend the Court's jurisdiction and support.

These events called for an elaboration of the earlier treatise, and when the war led to a suspension of the Court's activities in 1940, the time seemed to be opportune for the work to be undertaken. Two years have been devoted to the task, and an effort has been made to produce a new treatise which would be a more or less complete record of the establishment, the organization, and the accomplishment of the Court during the period from 1920 to 1942. While the present volume follows the general lines of the earlier treatise, it is the result of a fresh approach to the materials. New chapters have been added on the proposed International Criminal Court and the Institution of Proceedings; a chapter on the Exercise of Contentious Jurisdiction has been omitted and the material redistributed; and the original treatise has been rewritten in view of the whole record and in the light of the author's experience.

The present treatise is based upon a conception of the work of the Court as a continuation of the process of international adjudication which began to be developed during the nineteenth century, and it is assumed that in spite of its present inactivity the Court is assured of a continuing existence. Circumstances make it impossible to foretell when and how the activities of the Court will be resumed, but it seems unthinkable that this twenty years of human experience will be disregarded in the course

of the events which are to come. Whether as a history of the past or as a guide for the future, the author ventures to hope that this volume may serve as a starting-point for the investigations of those who are interested in the administration of international justice according to law.

The author has had the valuable assistance of Mr. Louis B. Sohn in the preparation of this treatise. A grant-in-aid by the Bureau of International Research of Harvard University and Radcliffe College is also gratefully acknowledged.

MANLEY O. HUDSON

Cambridge, Massachusetts,
January 1, 1943.

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PART I

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CHAPTER 1

THE PERMANENT COURT OF ARBITRATION

§1. Arbitration in the Nineteenth Century. Arbitration as a method of settlement of international disputes has had a long history,[1] but its continuous modern development dates from the close of the eighteenth century.[2] Resort to arbitration, more frequent in the later than in the earlier part of the nineteenth century,[3] usually depended upon an *ad hoc* agreement between the States concerned, and the *ad hoc* tribunal ceased to function when the dispute was disposed of. Agreements in advance to have resort to arbitration, hardly known before 1850,[4] were usually quite restricted in scope, but increasingly States began to agree to arbitrate special questions.[5] Compromissory clauses were included in some of the multipartite instruments of the later part of the nineteenth century: *e.g.*, in Article 16 of the Universal Postal Convention of October 9, 1874,[6] Article 55 of the General Act of Brussels of July 2, 1890,[7] and Article 57 of the Convention on Railway Freight Transportation of October 14, 1890.[8] A multipartite arbitration treaty, based upon a

[1] On the history of arbitration in ancient times, see V. Martin, *La vie internationale dans la Grèce des cités* (1940); A. Raeder, *L'arbitrage international chez les Hellenes* (1912); M. N. Tod, International Arbitration Amongst the Greeks (1913). On the history of arbitration in the nineteenth century, see 5 Moore, International Arbitrations, pp. 4851–5042.

[2] For lists of arbitrations during the nineteenth century, see 2 *Anales de la Corte de Justicia Centroamericana* (1912), pp. 58-64; W. E. Darby, International Tribunals (4th ed., 1904), pp. 771–917; H. La Fontaine, *Pasicrisie Internationale* (1902), pp. 651–8; J. H. Ralston, International Arbitration from Athens to Locarno (1929), pp. 345–55; A. M. Stuyt, Survey of International Arbitrations 1794 -1938 (1939).

[3] De Lapradelle and Politis, *Recueil des Arbitrages Internationaux*, I (1905), II (1924), record 28 cases for the period from 1798 to 1855, and 42 cases for the period from 1856 to 1872. La Fontaine, *Pasicrisie Internationale*, p. viii, lists 43 cases for the period from 1794 to 1860, and 134 cases for the period from 1861 to 1900. Stuyt, *op cit.*, lists over 400 cases, almost half of which were decided since 1900.

[4] For a list of arbitration treaties concluded between 1828 and 1914, see Denys P. Myers, "Arbitration Engagements," World Peace Foundation Pamphlet Series, Vol. V (1915), No. 5. See also W. R. Manning, Arbitration Treaties among the American Nations (1924), p. ix.

[5] The progress of international arbitration is reflected in various national constitutions, particularly those of Brazil (1891), Dominican Republic (1929), Netherlands (1922), Spain (1931), Uruguay (1917), and Venezuela (1874, 1914, 1922, 1925, 1931).

[6] 65 British and Foreign State Papers, p. 13.

[7] 82 *idem*, p. 55.

[8] 82 *idem*, p. 771.

"plan" adopted by the first Conference of American States held at Washington in 1889–90, was signed by representatives of eleven American States on April 28, 1890, but it was not brought into force.[9] Progress both in the conduct of arbitrations and in the negotiation of agreements to arbitrate paved the way for a regularization of the process of arbitration; and at the end of the nineteenth century the time seemed to be ripe for the creation of a permanent agency for arbitration. Once that step had been taken the conclusion of arbitration agreements proceeded at an almost feverish pace.[10]

§2. The Hague Conventions on Pacific Settlement of International Disputes. The Convention on Pacific Settlement of International Disputes of July 29, 1899, the greatest achievement of the Peace Conference at The Hague in 1899, was in a sense a codification of the law of pacific settlement up to that time. The Convention first entered into force on September 4, 1900,[11] when ratifications were deposited at The Hague by seventeen of the twenty-six signatory States;[12] nine of the signatories deposited ratifications thereafter.[13] The opening of the Convention to accession by non-signatories had been the subject of protracted debate in 1899,[14] and the result (Article 60) was indecisive.[15] By a protocol of June 14, 1907,[16] the parties to the Convention agreed that States not represented at the Peace Conference of 1899 but invited to the Second Peace Conference of 1907 might accede to the Convention, and on June 15, 1907, a *procès-verbal* was opened at The Hague for recording

[9] 7 Moore, Digest of International Law, p. 71; J. B. Scott, International Conferences of American States (1931), p. 40.

[10] Some of these agreements are published in *Traités Généraux d'Arbitrage communiqués au Bureau International de la Cour Permanente d'Arbitrage*, 1st series (1911), 2d series (1914), 3d series (1921, 1928), 4th series (1929), 5th series (1932), 6th series (1938), which contain the texts of 125 treaties concluded between 1899 and 1914, and of 150 treaties concluded between 1915 and 1935. See also Chr. L. Lange, *L'Arbitrage obligatoire en 1913* (Brussels, 1914).

[11] The Convention itself contains no provision concerning the date of its entry into force, and all of the signatories had not deposited ratifications until June 12, 1907. The Convention was clearly in force prior to that date, however, and it would seem that September 4, 1900 is the date to be selected for this purpose.

[12] Ratifications were deposited on September 4, 1900 by the United States of America, Austria-Hungary, Belgium, Bulgaria, Denmark, France, Germany, Great Britain, Italy, Netherlands, Persia, Portugal, Roumania, Russia, Siam, Spain, and Sweden-and-Norway.

[13] China (November 21, 1904), Greece (April 4, 1901), Japan (October 6, 1900), Luxemburg (July 12, 1901), Mexico (April 17, 1901), Montenegro (October 16, 1900), Serbia (May 11, 1901), Switzerland (December 29, 1900), and Turkey (June 12, 1907).

[14] 1 *Actes et Documents*, pp. 140–42.

[15] In a report made to the Ministry of Foreign Affairs by the French delegates on December 31, 1899, it was stated (p. 45) that a closed convention was desired by the British to prevent the accession of the Transvaal, by the Italians to prevent the accession of the Pope, and by the United States to prevent the accession of Latin-American States.

[16] For the text, see 2 Martens, *Nouveau recueil général* (3d ser.), p. 4; 100 British and Foreign States Papers, p. 276.

the accessions;[17] seventeen Latin-American States thus became parties to the Convention of July 29, 1899, by accession.[18] In 1907 the Second Peace Conference at The Hague undertook a reexamination of the 1899 Convention with a view to its "improvement," [19] with the result that a new Convention on Pacific Settlement of International Disputes, opened to signature on October 18, 1907, was designed (Article 91) to replace the earlier Convention "as between the contracting Powers." The new Convention first entered into force on November 27, 1909,[20] when ratifications were deposited by eleven of the forty-three signatories;[21] sixteen of the signatories deposited ratifications thereafter,[22] and four States have acceded to the Convention.[23] Sixteen States which ratified or acceded to the 1899 Convention did not ratify or accede to the 1907 Convention, however;[24] for such States the 1899 Convention remains in force both *inter se* and *vis-à-vis* those States which ratified or acceded to both of the Conventions of 1899 and 1907. Though the Conventions of 1899 and 1907 both provide (Articles 61, 96) for the possibility of denunciation, neither has been denounced by any State.[25]

The two Conventions effect a useful codification of the law with reference to good offices and mediation. They provide for the creation

[17] 2 Martens, *Nouveau recueil général* (3d ser.), p. 6; 2 Scott, Hague Peace Conferences of 1899 and 1907, p. 254.

[18] The opening of the 1899 Convention to accession by Latin-American States was due, at least in part, to the efforts of the United States of America and Mexico, whose Governments were authorized by the Second International Conference of American States, meeting at Mexico in 1902, to negotiate to this end. By a protocol signed at Mexico on January 15, 1902, fifteen American States had recognized the principles set forth in the Hague Convention of 1899 to be "a part of Public International American Law." See Scott, International Conferences of American States, p. 61.

[19] Costa Rica, Honduras and Korea did not accept the invitations to the 1907 Conference.

[20] Article 95 of the 1907 Convention provided that it *produira effet, pour les Puissances qui auront participé au premier dépôt de ratifications, soixante jours après la date du procès-verbal de ce dépôt, et pour les Puissances qui ratifieront ultérieurement ou qui adhéreront, soixante jours après que la notification de leur ratification ou de leur adhésion aura été reçue par le Gouvernement des Pays-Bas.* The date of the *procès-verbal* of the first deposit of ratifications was November 27, 1909, so that the Convention first entered into force on that date, though its substantive provisions became operative only sixty days later, on January 27, 1910.

[21] By the United States of America, Austria-Hungary, Bolivia, China, Denmark, Germany, Mexico, Netherlands, Russia, El Salvador, Sweden. The ratifications of Bolivia and El Salvador seem to have been notified rather than deposited on November 27, 1909.

[22] Belgium, Brazil, Cuba, France, Guatemala, Haiti, Japan, Luxemburg, Norway, Panama, Paraguay, Portugal, Roumania, Siam, Spain, Switzerland. Paraguay's ratification was not deposited until April 25, 1933.

[23] Czechoslovakia, Finland, Nicaragua and Poland. Ethiopia proposed to accede in 1935, but it is not clear that the accession was consummated. See U. S. Bulletin of Treaty Information, No. 72 (1935), pp. 2–6.

[24] Argentine Republic, Bulgaria, Chile, Colombia, Dominican Republic, Ecuador, Great Britain, Greece, Italy, Montenegro, Persia, Peru, Serbia, Turkey, Uruguay, Venezuela.

[25] The two Conventions continued in force despite the war of 1914–18, but it is to be noted that they were not mentioned in Articles 282–8 of the Treaty of Versailles or in the corresponding articles of other treaties of peace.

of International Commissions of Inquiry, and set forth in some detail the procedure to be followed with reference to such Commissions. They attempt (Articles 15, 37) to systematize international arbitration having "for its object the settlement of differences between States by judges of their own choice, and on the basis of respect for law." A large part of the Conventions is, therefore, devoted to arbitral procedure, and in 1907 a chapter was added on arbitration by summary procedure. It is in connection with this system of arbitration that provision is made in the Conventions for the creation and maintenance of the Permanent Court of Arbitration.

§3. Legal Basis of the Permanent Court of Arbitration. The Permanent Court of Arbitration exists under the two Conventions on the Pacific Settlement of International Disputes, of 1899 and 1907. By Article 20 of the 1899 Convention the "signatory Powers" undertook to organize a Permanent Court of Arbitration; by Article 41 of the 1907 Convention, the "contracting Powers" undertook to maintain the existing Permanent Court of Arbitration "as established by the first Peace Conference." Of the forty-seven States which became parties to one or both of the Conventions, more than forty are continuing to be in some way active in their support of the Court. The annual report of the Administrative Council for 1939 lists forty-four *Puissances Contractantes*, and forty-three States which had appointed members of the Permanent Court of Arbitration;[26] the list does not include Austria,[27] Czechoslovakia,[28] Montenegro,[29] or the Union of Soviet Socialist Republics.[30]

§4. Structure of the Permanent Court of Arbitration. The organization of the Permanent Court of Arbitration may be said to embrace three institutions: (1) the panel of members of the Court; (2) an Administrative Council; and (3) an International Bureau.

(1) The members of the Permanent Court of Arbitration are designated by the States parties to one or both of the Conventions of 1899

[26] *Rapport du Conseil Administratif*, 1939, pp. 6, 11–27.

[27] Austria did not consider itself bound by conventions concluded by Austria-Hungary, but in 1937 it consented to being considered a party to the Hague Conventions. U. S. Bulletin of Treaty Information, No. 100 (January, 1938), p. 3.

[28] The report of the Administrative Council for 1939 does not list Czechoslovakia among the *Puissances Contractantes*, but it lists four members of the Permanent Court of Arbitration appointed by the Czechoslovak Government in 1936.

[29] The territory of Montenegro later became part of the territory of Yugoslavia.

[30] The Conventions of 1899 and 1907 were ratified by the Emperor of Russia, but the Union of Soviet Socialist Republics has not in any way participated in maintaining the Permanent Court of Arbitration; in 1923, payment of the arrears in the Russian contributions from 1917 was undertaken by the other States.

and 1907. Each State may name at most four members, who are required (Articles 23, 44) to be "of known competence in questions of international law, of the highest moral reputation, and disposed to accept the duties of arbitrator." A State may designate as members persons who are not its nationals; two or more States may join in designating a member of the Court, or they may act separately to designate the same person. The appointments are for terms of six years, but they are renewable. The persons designated are inscribed as members of the Court in a list which is duly notified to all the States parties to the Convention. During its earlier years, the members of the Court numbered less than seventy-five; in later years they have numbered about 150.[31] They are in no sense judges. In 1900 it was planned that the members of the Court should hold a solemn inaugural meeting,[32] but the plan was abandoned and no attempt has since been made to assemble the members. In a strict sense of the term they cannot be said to form a *body*, and they have never functioned as such. They form instead a panel from which *ad hoc* tribunals may be constituted. Most of the members of the Court have never been called upon to serve on tribunals; in forty years the Court has had almost five hundred members, less than thirty of whom have served as members of constituted tribunals.[33]

(2) The Administrative Council of the Permanent Court of Arbitration is composed of the Minister of Foreign Affairs of the Netherlands, who acts as President, and of the diplomatic representatives accredited at The Hague by States which are parties to one or both of the Conventions of 1899 and 1907.[34] As the Administrative Council has the direction and control of the International Bureau, it meets with some frequency and at least annually. Its first meeting was held on July 19, 1900, before any ratifications of the 1899 Convention had been deposited. The minutes of the Council are not published, but it publishes an annual report on its work and on the functioning of its administrative services.

[31] Some of the States do not keep their national groups filled; since 1912 Great Britain has not had more than three members, and for much of the period not more than one. The report of the Administrative Council for 1939 lists 152 members as of February 20, 1940, appointed by 43 States.

[32] *Rapport du Conseil Administratif*, 1901, p. 1.

[33] Eight of the thirty-six members of nineteen tribunals were not members of the Permanent Court of Arbitration. Of the fifteen members who have been designated by the United States of America down to 1940, three have been called upon to serve on tribunals. See Hudson, "American Members of the Permanent Court of Arbitration," 35 American Journal of International Law (1941), pp. 135–9.

[34] Some of the parties to one or both of the Conventions, particularly Latin-American States, are not represented at The Hague.

Its *règlement d'ordre*,[35] adopted on September 19, 1900, is still in force, as is also the *règlement* for the International Bureau adopted by it on December 8, 1900.[36] Its competence is strictly limited to administration, and hence it has no authority to deal with questions arising in the conduct of an arbitration.[37] The Council nominates one member of the Council of Directors of the *Fondation Carnegie* which administers the Peace Palace at The Hague.

(3) The International Bureau of the Permanent Court of Arbitration is established in the Peace Palace at The Hague.[38] It consists of the Secretary-General of the Permanent Court of Arbitration,[39] who has the rank of Minister-Resident, and a small staff; this staff formerly included a first secretary, but in recent years it has consisted of three subordinates. The Secretary-General and all of the personnel of the Bureau have always been of Dutch nationality, though this is not required by the Conventions.[40] The Bureau acts as the registry of the Permanent Court of Arbitration (Articles 22, 43); it serves as the channel for communications relating to the creation of tribunals, and it has charge of the archives and conducts the administration. It may also act as the registry for commissions of inquiry meeting at The Hague; and it is authorized to place its premises and staff at the disposal of States engaged in any special arbitration. The Secretary-General of the Permanent Court of Arbitration usually acts as secretary-general of tribunals created within the framework of the Court, and frequently as secretary-general of special arbitral tribunals meeting at The Hague.

[35] For the text see 94 British and Foreign State Papers, p. 722. For an English translation, see U. S. Foreign Relations, 1900, p. 792.

[36] For the text see 94 British and Foreign State Papers, p. 724. For an English translation, see U. S. Foreign Relations, 1900, p. 797.

[37] The Administrative Council has on at least one occasion refused to interfere in matters falling within the competence of an arbitral tribunal. *Rapport du Conseil Administratif*, 1904, p. 15.

[38] First established in 1900 at 71 Prinsegracht, the Bureau was moved to the Peace Palace when that building was dedicated on August 28, 1913.

[39] During forty years four men served as Secretary-General: Baron Melvil de Lynden, October 1, 1900, to August 1, 1901; Mr. L. H. Ruyssenaers, August 29, 1901, to October 1, 1905; Baron Michiels van Verduynen, October 1, 1905, to February 4, 1929; and Dr. C. Crommelin, April 18, 1929, to the present. The mandate of Dr. Crommelin was last renewed on April 18, 1939, for five years.

The office of Secretary General, not referred to in the Hague Conventions, is provided for in the *règlement d'ordre* of the Administrative Council of September 19, 1900.

[40] Article 21 of the Statute of the Permanent Court of International Justice provides that "the duties of Registrar of the Court shall not be deemed incompatible with those of Secretary-General of the Permanent Court of Arbitration." When a vacancy in the latter office was about to be filled in 1929, the Registrar drew this provision to the attention of the President of the Administrative Council of the Permanent Court of Arbitration. Publications of the Permanent Court of International Justice, Series E, No. 5, p. 246.

In 1939, the Administrative Council contemplated the confiding of the Secretary-General's functions to a permanent Netherlands official.

§5. Finances of the Permanent Court of Arbitration. The Conventions of 1899 and 1907 provide (Articles 29, 50) that the expenses of the International Bureau shall be borne by the contracting States in the proportion fixed for the International Bureau of the Universal Postal Union; this proportion is changed from time to time as the Universal Postal Convention is revised.[41] By agreement with the Swiss Government a member of the Universal Postal Union may choose that one of seven classes to which it wishes to belong, and the number of units of the expenses of the Bureau of the Postal Union which it is to pay will depend upon the class into which it places itself. This system for meeting the expenses of the International Bureau of the Permanent Court of Arbitration works because the expenses are not large and no State's contribution is very burdensome.[42] The annual budget of the International Bureau of the Permanent Court of Arbitration is drawn up by a financial commission on which the various States are represented in rotation, and adopted by the Administrative Council. A budget of 49,500 florins was voted for the year 1900; actual expenses in 1904 were 24,514 florins. The authorized budget has been as high as 105,500 florins (in 1914); for 1940, it was 73,207 florins. Payments of contributions have usually been made to the Netherlands Government which has advanced funds for meeting the expenses of the Bureau.[43] At times the arrears of payments have been considerable, some of the contracting States having failed to make any payments for periods of as much as ten years. The Conventions provide (Articles 57, 85) that each party to an arbitration pays its own expenses, and the expenses of the tribunal are borne by the parties in equal parts; members of tribunals usually receive honoraria in addition to their expenses, the amounts of the honoraria being determined by the Governments concerned.[44]

[41] It now depends on Article 25 of the Buenos Aires Convention of May 23, 1939.

[42] In 1940, each unit was 144.40 florins. States in the first class contributed 25 units and those in the seventh class one unit. The United States of America, the Argentine Republic, China, France, Germany, Great Britain, Italy, Japan, Poland and Spain were in the first class in 1940. When China was not a member of the Universal Postal Union, its membership in a class for this purpose was fixed by special agreement.

[43] For many years the annual reports of the Administrative Council listed the contributions "payable to the Government of the Netherlands"; beginning with the report published in 1938, contributions are listed as "payable to the International Bureau."

[44] For some years the usual honorarium was 25,000 gold francs. In the *Venezuelan Preferential Claims Case* agreement was reached that the arbitrators should receive an honorarium of $5000 and an additional sum of $1500 for expenses. U. S. Foreign Relations, 1904, p. 516. In the *North Atlantic Coast Fisheries Case* each member of the tribunal received £3000; the members of the special tribunal in the *United States-Norwegian Arbitration* in 1922 each received $10,000. Exceptionally, the *compromis* of July 31, 1913 in the case relating to *Religious Properties in Portugal* fixed the honoraria to be paid to members of the tribunal and provided for a deposit with the Bureau of the Permanent Court of Arbitration for this purpose; each member of the tribunal was to receive 1200 francs per week, including four weeks to be allowed for study of the documents of the written proceedings.

§6. Position of Members of the Permanent Court of Arbitration. A member of the Permanent Court of Arbitration must hold himself in a position to accept invitations to act as arbitrator, but any particular invitation may be declined. Indeed, no specific duties are imposed upon the members by the Conventions. The Statute of the Permanent Court of International Justice (Articles 4 and 5) provides for the nomination of candidates in the election of judges by certain national groups in the Permanent Court of Arbitration, and since 1920 these groups have usually accepted invitations to present nominations.[45] Nor does one have any specific privileges as a member of the Permanent Court of Arbitration; Article 24 of the 1899 Convention provides that a member of the Court should enjoy diplomatic privileges and immunities while in the exercise of his duties and outside the territory of his own State, but the corresponding Article 46 of the 1907 Convention limits the enjoyment of such privileges and immunities to members of tribunals.[46] On the other hand, certain disabilities may rest on the members of the Permanent Court of Arbitration. In the *Venezuelan Preferential Claims Case* in 1904 the British Government protested against the appointment of Louis Renault (French) as counsel before the tribunal because he was a member of the Permanent Court of Arbitration;[47] this objection did not prevail, but provision was included in the 1907 Convention (Article 62) that a member of the Court may not act as agent, counsel or advocate before an arbitral tribunal except on behalf of the State which appointed him.[48] In the *Orinoco Steamship Company Case* in 1910, the United States-Venezuelan *compromis* stipulated that no member of the Court should appear as counsel before the tribunal.

§7. Nature of the Permanent Court of Arbitration. The name of the Permanent Court of Arbitration is really a misnomer,[49] and by creating

[45] See §233, *infra*.

[46] A French law of December 2, 1903, provided that alien members of a tribunal created under the Hague Convention of 1899 and sitting in France should enjoy diplomatic privileges and immunities. Dalloz, *Jurisprudence générale*, 1904, Part IV, p. 7; 98 British and Foreign State Papers, p. 848.

[47] *Deuxième Conférence de la Paix*, 2 *Actes et Documents*, p. 964. A similar protest in general terms was made by counsel for Venezuela on the ground that if members of the Permanent Court of Arbitration acted as counsel before tribunals, they would possess advantages over counsel not members. *Idem*, p. 961.

[48] This disability does not prevent a member of the Court from giving legal advice to a State engaged in a dispute. See the rapporteur's statement to the Second Conference in 1 *Actes et Documents*, p. 432.

[49] The 1920 Committee of Jurists which drafted the Statute of the Permanent Court of International Justice declared that "the name Permanent Court is not quite fitted to the Permanent Court of Arbitration at The Hague." Minutes of the 1920 Committee of Jurists, p. 698.

expectations which could not be fulfilled, it may have been responsible for some deception of popular opinion.[50] The Permanent Court of Arbitration is not really a Court. Nor is it in any accurate sense a tribunal, though it is often referred to as "the Hague Tribunal"; instead it is a device for facilitating the creation of *ad hoc* tribunals. It is permanent only in the sense that a panel is permanently available from which arbitrators may be chosen, that the Administrative Council is constituted as a continuing body, and that a permanent International Bureau exists to facilitate the creation of tribunals. Having no existence as a court, the Permanent Court of Arbitration possesses no competence; the 1907 Convention (Article 53) appears to confer upon it a limited competence to draw up a *compromis* at the request of but one of the parties to a dispute, under certain conditions, but the provision confers no competence in fact and no *compromis* has ever been drawn up under it.

§8. Alternative Methods of Arbitration. The 1899 and 1907 Conventions on Pacific Settlement of Disputes are in no sense agreements to arbitrate; an effort was made at the Second Peace Conference to incorporate such an agreement into the 1907 Convention, but it failed completely. Nor are two States parties to one or both of the Conventions under any duty, when they have agreed to arbitrate a difference, to employ the agencies provided for by the Conventions or to follow the procedure therein outlined. The statement (Articles 21, 42) that the Permanent Court is "competent for all arbitration cases unless the parties agree to institute a special tribunal" means merely that a tribunal may be recruited for any case out of the membership of the Court. Numerous arbitrations since 1900 have been conducted wholly outside the framework of the Conventions.[51]

The Conventions seem to envisage three methods of arbitration: (1) arbitration conducted by a tribunal of the Permanent Court of Arbitration which for this purpose must be composed of members of the Permanent Court of Arbitration (Articles 24, 25); (2) arbitration con-

[50] Not infrequently arbitration treaties have contained provisions for the submission of differences "to the Permanent Court of Arbitration at The Hague"; *e.g.*, Article 7 of the United States-Swiss Treaty of February 16, 1931. 129 League of Nations Treaty Series, p. 465. See also the French and German declarations of June 2, 1934, relating to the Saar. League of Nations Official Journal, 1934, pp. 651–2. Article 4 of the United States-British agreement of January 27, 1909, in the *North Atlantic Coast Fisheries Case*, provided for reference of future differences "to the Permanent Court at The Hague for decision" by summary procedure. The illusory character of such provisions is not always appreciated.

[51] For lists of arbitrations since 1900, see H. M. Cory, Compulsory Arbitration of International Disputes (1932), pp. 235–238; A. M. Stuyt, Survey of International Arbitrations 1794–1938 (1939).

ducted by a special arbitral tribunal (Articles 26, 47); and (3) arbitration under Chapter 4 of the Convention of 1907 by a summary procedure to be conducted by a tribunal which may or may not be composed of members of the Permanent Court of Arbitration. While the Conventions refer chiefly to disputes between signatory or contracting States, they also provide (Articles 26, 47) that the jurisdiction of the Permanent Court of Arbitration may be extended to disputes between such States and other States, or between other States.

§9. Cases before Tribunals of the Permanent Court of Arbitration. It is not always simple to say what is a case before a tribunal of the Permanent Court of Arbitration. Down to 1934, the annual reports of the Administrative Council of the Permanent Court of Arbitration listed twenty-one *affaires d'arbitrages jugées;* since 1934, the list is entitled *affaires d'arbitrages jugées à la Cour Permanente d'Arbitrage ou avec la coopération de son Bureau International,* and two cases have been added to it.[52] To understand the precise role played by the Permanent Court of Arbitration, it is necessary to examine the facts as to each of the listed cases in some detail.[53] On the other hand, it is to be noted that certain arbitrations not listed in the reports of the Administrative Council, notably the American-Russian Whaling Claims Arbitration under declarations exchanged August 26, September 8, 1900,[54] and the American-British Claims Arbitration under a special agreement of August 18, 1910,[55] may be said to have had as much connection with the Conventions on Pacific Settlement as some of the arbitrations that are listed.

§10. United States of America–Mexico: *Pious Fund Case* (1902).[56] Under provisions of a convention of July 4, 1868, claims made against

[52] These are the arbitration between China and the Radio Corporation of America, and that between the French High Commissariat for the States of the Levant under French Mandate and Egypt; neither of these was, properly speaking, a case before a tribunal of the Permanent Court of Arbitration.

[53] Two convenient collections of the awards have been published: James Brown Scott, Hague Court Reports (1916) and Hague Court Reports, second series (1932); George Grafton Wilson, The Hague Arbitration Cases (1915). See also Scott, *Les Travaux de la Cour Permanente d'Arbitrage de la Haye* (1921). In 1934 the International Bureau of the Court published a useful volume entitled *Analyses des Sentences,* which covers twenty arbitrations in the period from 1902 to 1934. For useful bibliographies, see *idem,* pp. 111–8; Carnegie Endowment for International Peace Library, Reading List No. 30, March 9, 1931.

[54] The arbitrator, Mr. Asser, was a Member of the Permanent Court of Arbitration, and the hearings were held in the premises of the Court at The Hague, from June 27 to July 4, 1902.

[55] This agreement provided for the arbitration of certain pecuniary claims before a tribunal constituted in accordance with Articles 87 and 59 of the Hague Convention of 1907, and the procedure was to be regulated by certain provisions of the Convention. U. S. Treaty Series, No. 573.

[56] *Recueil des Actes et Protocoles concernant le litige du "Fonds Pieux des Californies,"* published by the *Bureau International de la Cour Permanente d'Arbitrage,* The Hague, 1902;

Mexico by the Roman Catholic Bishops of San Francisco and Monterey, California, were submitted to a mixed claims commission, and in an award given on November 11, 1875,[57] the umpire of the mixed commission (Sir Edward Thornton) upheld a claim to twenty-one years' interest on the Pious Fund, amounting to 904,700.79 Mexican dollars. This sum was promptly paid by the Mexican Government; but further instalments of interest were later claimed by the Bishops, and in 1891 their claim was espoused by the Government of the United States which contended that the matter was *res judicata*.[58] The United States having proposed a second arbitration, the Mexican Government suggested a possible reference of the dispute to "the Hague Tribunal."[59] By a "protocol of agreement" (*protocolo de compromiso*) of May 22, 1902, the two Governments referred the dispute to a *special* tribunal consisting of four arbitrators, two (non-nationals) to be named by each Party, and "an umpire to be selected in accordance with the provisions of the Hague Convention." The United States named as arbitrators Sir Edward Fry (British) and F. de Martens (Russian); Mexico named T. M. C. Asser (Netherlands) and A. F. de Savornin Lohman (Netherlands); the four arbitrators selected as umpire Henning Matzen (Danish). The five members of the tribunal were all members of the Permanent Court of Arbitration, though this was not required by the protocol of agreement. Emilio Pardo, Mexican Minister at The Hague, who served as agent of Mexico, was assisted by two Belgian counsel, one of whom, A. M. F. Beernaert, was a member of the Permanent Court of Arbitration. The agent of the United States, Jackson H. Ralston, and several of the counsel assisting him had previously been employed as counsel by the Bishops of California; one of the American counsel, Baron Descamps (Belgian), was a member of the Permanent Court of Arbitration.[60] The Secretary-General of the Permanent Court of Arbitration served as secretary-general of

Scott, Hague Court Reports, p. 1. See also Descamps, *Mémoire sur le fonctionnement du premier tribunal d'arbitrage constitué au scin de la Cour Permanente de la Haye* (1903), 16 p.; Renault, "*Un premier litige devant la Cour d'Arbitrage de la Haye*," 18 *Annales des sciences politiques* (1903), pp. 38–74; Villaseñor y Villaseñor, *Reclamaciones á Mexico por los fondos de Californias* (1902), 272 p.

[57] A rectification was made on October 24, 1876. The two awards by Sir Edward Thornton are published in Scott, Hague Court Reports, pp. 48–54.

[58] U. S. Foreign Relations, 1902, p. 738.

[59] *Idem*, p. 778.

[60] In a report made by W. L. Penfield as agent of the United States in the Venezuelan arbitration of 1903 (p. 18), it is stated that "in the Pious Fund Case the Mexican Government employed a member of the permanent panel [of the Permanent Court] as one of its advocates. Thereupon the American claimant employed another member of the panel as one of his counsel. This counsel was not employed by the United States Government, but as an act of favor to the claimant he was permitted to appear." See also U. S. Foreign Relations, 1904, p. 514.

the tribunal, which met from September 15 to October 14, 1902. The tribunal decided that French should be its official language, and the *procès-verbaux*, which were in skeleton form, were in French.[61] The documents of the written proceedings consisted of a memorial, an answer, a replication and a rejoinder; the oral arguments consumed a period of ten days. By its unanimous award (*sentence*), signed by all members of the tribunal and handed down on October 14, 1902, the tribunal held that because of the identity of parties and of subject-matter the claim was *res judicata;* that in consequence 1,420,682.67 Mexican dollars were payable down to February 2, 1902; and that 43,050.99 Mexican dollars would be payable each year thereafter. The Mexican Government made a prompt payment of the sums found to be due.[62] After the award was given, the members of the tribunal addressed a note to the president of the Administrative Council giving their suggestions on the procedure to be followed before the Permanent Court of Arbitration: these suggestions related to the functioning of the International Bureau as an intermediary for communications; the choice of presidents of the tribunals; the choice of languages, and the appointment of agents and counsel with reference to such choice; the distinction between *l'instruction* and *les debats;* and the desirability of omitting in any future *compromis* provision relating to a revision of the award.[63]

§11. Germany, Great Britain, Italy–Venezuela: *Preferential Claims Case* (1904).[64] By a series of protocols of February 13, 1903,[65] the Government of Venezuela entered into agreements with the Governments of

[61] In addition to the official *procès-verbaux*, an elaborate "record of proceedings" was made privately; it is published in U. S. Foreign Relations, 1902, Appendix II, pp. 501–862.

[62] On July 13, 1903, the American Minister at The Hague informed the International Bureau that Mexico had paid the $1,420,682.67, plus one instalment of $43,050.99. *Rapport du Conseil Administratif*, 1903, p. 5.

[63] The note, not published by the International Bureau, is to be found in *Deuxième Conférence de la Paix, 2 Actes et Documents*, p. 951; 5 American Journal of International Law (Supp., 1911), p. 73. Replies to this note were made by the Belgian and Russian Governments.

[64] *Recueil des Actes et Protocoles concernant le litige entre l'Allemagne, l'Angleterre et l'Italie, d'une part, et le Vénézuéla, d'autre part*, published by the *Bureau International de la Cour Permanente d'Arbitrage*, The Hague, 1904; Scott, Hague Court Reports, p. 55. See also Basdevant, "*L'Action coercitive anglo-germano-italienne contre le Vénézuéla* (1902–1903)," 11 *Revue générale de droit international public* (1904), pp. 362–458; Gaché, *Le Conflit vénézuélien et l'Arbitrage de la Haye* (1905), 217 p.; Hershey, "The Venezuelan Affair in the Light of International Law," 51 American Law Register (1903), pp. 249–67; Jacobson, *Le premier grand procès international à la Cour de la Haye* (1904), 36 p.; Mallarmé, "*L'arbitrage vénézuélien devant la Cour de la Haye* (1903–4)," 13 *Revue générale de droit international public* (1906), pp. 423–500; Tello, *Venezuela ante el conflicto con las potencias aliadas, Alemania, Inglaterra e Italia en 1902 y 1903* (1905).

[65] Venezuela also concluded protocols relating to the settlement of claims with the United States of America (February 17, 1903), Mexico (February 26, 1903), France (February 27, 1903), Netherlands (February 28, 1903), Belgium (March 3, 1903), Sweden-and-Norway (March 10, 1903), and Spain (April 2, 1903). On the work of these various claims commissions, see Ralston, Venezuelan Arbitrations of 1903 (1904).

Germany, Great Britain and Italy with reference to the settlement of the claims which had led the latter Governments to blockade the Venezuelan coast in the latter part of 1902. The Venezuelan Government recognized in principle the justice of certain claims made by the other Governments and undertook to satisfy them, and with respect to other claims of those Governments reference to a mixed commission was agreed upon. For the purpose of meeting claims in the first category, the Venezuelan Government undertook to assign a certain percentage of the customs revenues of two Venezuelan ports, and it was agreed that "any question as to the distribution of the customs revenues so to be assigned and as to the rights of Great Britain, Germany and Italy to a separate settlement of their claims, shall be determined, in default of arrangement, by the tribunal at The Hague, to which any other Power interested may appeal." Thereafter on May 7, 1903, three separate protocols were entered into by Venezuela with Germany, Great Britain and Italy providing that the question whether Germany, Great Britain, and Italy were entitled to preferential treatment in the payment of their claims against Venezuela should be submitted for "final decision to the tribunal at The Hague"; it was further provided that any nation having claims against Venezuela might join in the arbitration as a party. Under this latter provision the United States of America, Belgium, France, Mexico, Netherlands, Spain, and Sweden-and-Norway joined with Venezuela as parties in the arbitration provided for, and some of these States formally adhered to one or more of the protocols of May 7, 1903. The Emperor of Russia was asked to name three arbitrators "from the members of the Permanent Court of The Hague," not nationals of any of the signatory or creditor Powers. The Emperor first designated N. V. Mourawieff (Russian), Charles E. Lardy (Swiss), and Henning Matzen (Danish); when the two latter declined to serve because their States were interested as creditor Powers, the Emperor designated Heinrich Lammasch (Austrian) and F. de Martens (Russian). M. Mourawieff was chosen by his colleagues as president. The protocols had fixed a meeting of the tribunal for September 1, 1903, but only one arbitrator was present on that day and the tribunal was not duly organized until October 1, 1903. Eleven States were represented before the tribunal by agents or counsel or both; the French Government's agent, Louis Renault, was a member of the Permanent Court of Arbitration, and British and Venezuelan objections to his appointment did not prevail. A proposal was made that the tribunal should treat Germany, Great Britain, and Italy as claimants and the other States as respondents; but the tribunal

required a simultaneous presentation of cases and counter-cases, and it decided that representatives of the parties should take part in the oral proceedings in the alphabetical order of the names of the States represented. Several of the second group of States did make common cause, however.[66] Memorials and counter-memorials were submitted to the tribunal by most of the parties. The Secretary-General of the Permanent Court of Arbitration served as secretary-general of the tribunal. In the unanimous award (*sentence*) given on February 22, 1904, after thirteen meetings devoted to the hearings, the tribunal upheld the claim of Germany, Great Britain and Italy to preferential treatment. A statement in the award invited the Government of the United States of America to see to the execution of that part of the award which dealt with an equal sharing of the expenses among the parties to the arbitration; this mandate having been declined by the Government of the United States, it was assumed by the Secretary-General of the Permanent Court of Arbitration. Following a precedent set by the tribunal in the *Pious Fund Case*, the members of the tribunal addressed a note of observations to the President of the Administrative Council after the award was given;[67] the note dealt with the desirability of completing the written proceedings before the meeting of the tribunal, the appointment of members of the Permanent Court of Arbitration as agents or counsel, the usefulness of stenographic reports in French and English, and the desirability of placing at the disposal of the International Bureau a fund for meeting preliminary expenses in arbitration cases.[68] The Russian Government later expressed its views concerning this note in a memoir communicated to the International Bureau.[69]

§12. France, Germany, Great Britain–Japan: *Japanese House Tax Case* (1905).[70] Under a protocol of August 28, 1902,[71] this case was

[66] Throughout the arbitration and the negotiations leading up to it the Governments of the United States of America and Venezuela were in close cooperation; the American Minister at Caracas, Herbert W. Bowen, handled the negotiations for Venezuela, and he was one of the three "counsel" who represented both Governments throughout the arbitration.

[67] *Deuxième Conférence de la Paix, 2 Actes et Documents*, p. 957.

[68] This last recommendation led to a provision in Article 52 of the 1907 Hague Convention, and it was followed in the *Casablanca Case*, in the *Orinoco Steamship Company Case*, and in the *Palmas Island Case*.

[69] See *Rapport du Conseil Administratif*, 1905, p. 5.

[70] *Recueil des Actes et Protocoles concernant le litige entre l'Allemagne, la France et la Grande Bretagne, d'une part, et le Japon, d'autre part*, published by the *Bureau International de la Cour Permanente d'Arbitrage*, The Hague, 1905; Scott, Hague Court Reports, p. 77. See also, Anonymous, "*L'arbitrage des Baux Perpétuels au Japon*," 12 *Revue générale de droit international public* (1905), pp. 492–516; Simon, *Natur und völkerrechtliche Tragweite des Urteils des Haager Permenenten Schiedsgerichtshofes vom 22 Mai 1904 betreffend die zeitlich unbegrenzte Ueberlassung von Grundstücken in Japan an Fremde* (1908), 48 p.

[71] The protocol was signed in French on behalf of France and Japan, in German on behalf of Germany and Japan, in English on behalf of Great Britain and Japan, and in Japanese on

referred to a tribunal consisting of three "members of the Permanent Court of Arbitration at The Hague." The protocol provided that France, Germany and Great Britain should be a single party in the arbitration. Each party was to name an arbitrator and the arbitrators were to choose an umpire; failing their choice, the umpire was to be named by the King of Sweden and Norway. Louis Renault (French) was designated by the Governments of Germany, France and Great Britain, and Itchiro Motono (Japanese) by the Government of Japan; these two members chose as umpire (*surarbitre*) Gregers Gram (Norwegian). The Secretary-General of the Permanent Court of Arbitration served as secretary-general of the tribunal. The tribunal decided that French should be the language of the tribunal, but that the parties might present their communications in French or in English; a request by the European Governments that the use of German should also be authorized led the Japanese delegation "to claim for the Japanese language the same right as would be accorded to other languages," and neither request was granted. The Japanese Government designated as its agent M. Miyaoka (Japanese) and as its counsel Baron Descamps (Belgian), a member of the Permanent Court of Arbitration; acting collectively the three European Governments named three agents. As the proceedings were almost entirely written, the tribunal held but four meetings. The tribunal was asked to say whether, under the treaties in force, buildings and lands held under perpetual leases were exempt from taxation other than that stipulated in the leases. This question was answered in the affirmative by an award given on May 22, 1906; though he signed the award, M. Motono dissented both as to the tribunal's conclusion and as to the reasons given for it. At the closing session of the tribunal, the president made some remarks to which the Japanese Government later took formal exception. The Japanese Government accepted the result of the judgment, and the exemption from taxation was respected; in 1937 the abolition of the perpetual leases was agreed upon, to become effective in 1942.[72]

§13. France–Great Britain: *Muscat Dhows Case* (1905).[73] In accordance with the provisions of an arbitration convention of October 14,

behalf of the four States: these may be considered as versions of a single instrument, though the form was unusual.

[72] See Hudson, "Liquidation of Perpetual Leases in Japan," 32 American Journal of International Law (1938), pp. 113–6.

[73] *Recueil des Actes et Protocoles concernant le Différend entre la France et la Grande-Bretagne*, published by the *Bureau International de la Cour Permanente d'Arbitrage*, The Hague, 1905; Scott, Hague Court Reports, p. 93. See also, Bressonet, "*L'Arbitrage franco-anglais dans l'affaire des boutres de Mascate*," 13 *Revue générale de droit international public* (1906), pp. 145–164; Brunet-Millon, *Les boutriers de la mer des Indes: Affaires de Zanzibar et de Mascate* (1910), 372 p.; Firouz Kajare, *Le Sultanat d'Omân* (1914), 269 p.

1903, the British and French Governments entered into an agreement (*compromis arbitral*) on October 13, 1904, providing that a dispute as to the scope of a declaration of March 10, 1862 concerning Muscat should be referred to arbitration, and that "the decision of the Hague tribunal should be final." [74] It was agreed that two arbitrators and an umpire, not nationals of either party, should be chosen from "among the members of the Hague tribunal." Each party was to designate an arbitrator, and the two arbitrators were to choose an umpire (*surarbitre*); but if they could not agree within one month, the choice of the umpire was to be entrusted to the King of Italy. The British Government designated Melville W. Fuller (American), and the French Government designated A. F. de Savornin Lohman (Netherlands); the arbitrators having failed to agree upon the choice of an umpire, the King of Italy designated Heinrich Lammasch (Austrian). Though the agents of the parties agreed that French and English might be used "respectively" in the pleadings, the tribunal decided that French would be the language of the tribunal, except that the parties should be permitted to use English: the *procès-verbaux* of the tribunal's four meetings were drawn up in French, accompanied by an official English translation. The proceedings were mainly written. The questions involved concerned the issuance to Muscat subjects of papers authorizing them to fly the French flag, and the extent to which jurisdiction could be exercised by Muscat over owners or crews of dhows who were Muscat subjects but in possession of such papers. The unanimous award of the tribunal, drawn up in French with an official English translation, was given on August 8, 1905.

§14. France–Germany: *Casablanca Case* (1909).[75] The arrest of certain deserters from the French Foreign Legion in Casablanca on September 25, 1908, led to a dispute between the French and German Governments which by a protocol of November 10, 1908, they agreed to submit to arbitration. The *compromis*, signed on November 24, 1908, provided for a tribunal consisting of five members of the Permanent Court of Arbitration; each Government was to choose two arbitrators, one of whom might be its national, and the four arbitrators were to choose an umpire. The French Government chose Sir Edward Fry (British) and

[74] Details of the agreement were later modified by agreements of January 13 and May 19, 1905.

[75] *Protocoles des Séances du Tribunal Arbitral, constitué en exécution du Protocole signé à Berlin le 10 novembre 1908 et du Compromis du 24 novembre 1908;* the award was published as an annex to the report of the Administrative Council for 1909; Scott, Hague Court Reports, p. 110. See also de Boeck, *La sentence arbitrale de La Haye (22 Mai 1909)*, 15 p.; Gidel, "*L'arbitrage de Casablanca*," 17 *Revue générale de droit international public* (1909), pp. 326–407.

Louis Renault (French); the German Government chose Guido Fusinato (Italian) and J. Kriege (German). These arbitrators chose as umpire K. H. L. de Hammarskjöld (Swedish). Communications were to be exchanged through the International Bureau. The Secretary-General of the Permanent Court of Arbitration acted as secretary-general of the tribunal. The parties agreed in advance to place a fund in the hands of the Bureau for meeting the expenses of the arbitration. Article 5 of the *compromis* provided that the tribunal should meet at The Hague, but that it might move temporarily or delegate one or more of its members to move to any place where it desired to pursue an inquiry. Six sessions of the tribunal were held, May 1–22, 1909; only the opening and closing sessions were held in public, but the International Bureau was authorized to make the *procès-verbaux* of the closed sessions open to qualified persons. The unanimous award given on May 22, 1909, was followed by the signing of a *procès-verbal* in which each of the two Governments expressed its regret for the conduct for which its officials were blamed in the award.[76]

§15. Norway–Sweden: *Maritime Frontiers Case* (1909).[77] Under a Convention of March 14, 1908, Norway and Sweden agreed to submit to arbitration a question as to that part of their maritime boundary which had not been fixed by a Royal resolution of March 15, 1904.[78] The tribunal was to consist of a Norwegian and a Swedish member, and of a president chosen by the Queen of the Netherlands if the parties could not agree. The Norwegian Government selected F. V. N. Beichmann, and the Swedish Government K. H. L. de Hammarskjöld; the two Governments selected J. A. Loeff (Netherlands) as President. Only M. Hammarskjöld was at that time a member of the Permanent Court of Arbitration. At the hearing on August 28, 1909, therefore, the President declared that the tribunal was a *juridiction spéciale*, not constituted under Article 24 of the Hague Convention of 1899; hence the tribunal addressed to the Administrative Council of the Permanent Court of Arbitration a request to be permitted to use the premises of the Court. The Secretary-General of the Permanent Court of Arbitration acted as secretary-general of the

[76] 102 British and Foreign State Papers, p. 602; Scott, Hague Court Reports, p. 120.

[77] *Recueil des Comptes rendus de la visite des lieux et des Protocoles des seances du Tribunal arbitral, constitué en vertu de la Convention du 14 mars 1908, pour juger la question de la délimitation d'une certaine partie de la frontière maritime entre la Norvège et la Suède*, published by the *Bureau International de la Cour Permanente d'Arbitrage*, The Hague, 1909; Scott, Hague Court Reports, p. 121. See also, Strupp, "*Der Streitfall zwischen Schweden und Norwegen*," I, 2 *Das Werk vom Haag* (2d ser.), pp. 49–140; Waultrin, "*Un conflit de limites maritimes entre la Norvège et la Suède: l'affaire des Grisbâdarna*," 17 *Revue générale de droit international public* (1910), pp. 177–189.

[78] On this resolution see Scott, Hague Court Reports, p. 136.

tribunal. The Convention provided that the procedure should be governed generally by Articles 62–85 of the Hague Convention of 1907. The proceedings consisted of three phases. In the first phase, at a series of meetings in *chambre du conseil* from April 17 to 28, 1909, the tribunal made preparation for the later phases of the proceedings, and established in twelve articles dispositions for the procedure to be followed. In the second phase, the tribunal made a series of visits to the scene (*visites des lieux*), holding eleven meetings at different places in the disputed zone, from July 14 to July 21, 1909. In the third phase, from August 28 to September 22, 1909, the Court heard the arguments of the parties at The Hague, the cloture being pronounced on October 18. The oral proceedings before the Court were in French, but special permission was given to make citations in German. Only the opening and closing sessions were held in public, but the *procès-verbaux* of the private sessions were published. The unanimous award was handed down on October 23, 1909, fixing the maritime frontier between the two States at certain definite points.

§16. United States of America–Great Britain: *North Atlantic Coast Fisheries Case* (1910).[79] Under a "special agreement" of January 27, 1909, concluded in pursuance of an arbitration convention of April 4, 1908, the American and British Governments agreed to refer certain questions to an arbitral tribunal chosen from the members of the "Permanent Court at The Hague" in accordance with the provisions of Article 45 of the Hague Convention of 1907;[80] three months were allowed for a direct agreement between the parties on the composition of the tribunal, and such agreement was reached. The two governments designated Heinrich Lammasch (Austrian), Louis M. Drago (Argentinian),

[79] The protocols are to be found in North Atlantic Coast Fisheries, Tribunal of Arbitration constituted under a Special Agreement signed at Washington, January 27, 1909, between the United States of America and Great Britain, published by the Permanent Court of Arbitration, The Hague, 1910. More complete proceedings, including documents presented to the tribunal, were published in 12 volumes, U. S. Senate Document No. 870, 61st Cong., 3d sess.; Scott, Hague Court Reports, p. 141. See also, Anderson, "The Final Outcome of the Fisheries Arbitration," 7 American Journal of International Law (1913), pp. 1–16; Balch, "*La Question des Pêcheries de l'Atlantique*," 11 *Revue de droit international et de legislation comparée* (1909), pp. 415–34, 516–42; Basdevant, "*L'Affaire des pêcheries des côtes septentrionales de l'Atlantique entre les États-Unis d'Amérique et la Grand-Bretagne devant la Cour de la Haye*," 19 *Revue générale de droit international public* (1912), pp. 421–582; Borchardt, "The North Atlantic Coast Fisheries Arbitration," 11 Columbia Law Review (1911), pp. 1–23; Drago, "*Un Triomphe de l'Arbitrage*," 19 *Revue générale de droit international public* (1912), pp. 5–40; Drago, *El arbitraje de las pesquerías del Atlántico norte entre la Gran Bretaña y los Estados Unidos de América* (1911), 232 p.; Lansing, "The North Atlantic Coast Fisheries Arbitration," 5 American Journal of International Law (1911), pp. 1–31; Scott, "*Der nordatlantische Fischereistreit zwischen Grossbritannien und den Vereinigten Staaten von Nordamerika*," I, 2 Das Werk vom Haag (2d ser.), pp. 143–519. [80] Great Britain had not ratified the 1907 Convention, however.

A. F. de Savornin Lohman (Netherlands), George Gray (American) and Charles Fitzpatrick (Canadian). Upon request the Netherlands Government placed a special *locus* at the disposal of the tribunal. The special agreement provided that "the language to be used throughout the proceedings shall be English." The forty-one meetings of the tribunal, which were held in public, began on June 1 and ended August 12, 1910. The award was given on September 7, Mr. Drago dissenting in part.[81] The tribunal was called upon to answer seven elaborate questions relating to the execution of the provisions of a Convention of October 20, 1818, as to fishing rights. It was asked, also, to recommend rules and procedure for the determination of future questions on the subject, the parties having agreed that future differences might be "referred informally to the Permanent Court at the Hague for decision by the summary procedure" provided for in Chapter 4 of the Hague Convention of 1907. Pursuant to this provision, the tribunal recommended a series of rules for the consideration of the parties; with some changes these rules were embodied in an agreement signed at Washington July 30, 1912. The special agreement of January 27, 1909, had also provided (Article 3) for a procedure by which either of the two States might challenge the reasonableness of legislation or executive acts of the other, the tribunal being authorized to refer such questions to a commission of three expert specialists; in its award, the tribunal called upon the parties to designate national members of this commission, and it appointed a third non-national member.[82] The tribunal also contemplated that it might later meet to deal with a report from this commission, but it recommended that the parties should adopt a procedure which would make this unnecessary.[83]

§17. United States of America–Venezuela: *Orinoco Steamship Company Case* (1910).[84] Four claims of the Orinoco Steamship Company

[81] Article 9 of the special agreement provided that a member of the tribunal might "record his dissent when signing."

[82] The commission of experts seems to have been duly constituted. *Rapport du Conseil Administratif*, 1910, p. 12.

[83] At a conference in Washington on January 12, 1911, American and British representatives agreed that it was unnecessary to refer any question to the commission of experts or to reconvene the arbitral tribunal. U. S. Foreign Relations, 1911, p. 271.

[84] *Protocoles des Séances du Tribunal d'Arbitrage constitué en exécution du compromis signé entre les États-Unis d'Amérique et les États-Unis du Vénézuela le 13 février 1909*, published by the *Bureau International de la Cour Permanente d'Arbitrage*, The Hague, 1910; official English translations of the protocols and the award were published by the *Bureau;* Scott, Hague Court Reports, p. 226. See also, Dennis, "The Orinoco Steamship Company Case before the Hague Tribunal," 5 American Journal of International Law (1911), pp. 35–64; Nippold, "*Der Orinoko-Streitfall zwischen den Vereinigten Staaten von Amerika und den Vereinigten Staaten von Venezuela*," I, 3 *Das Werk vom Haag* (2d ser.), pp. 1–64; Nys, "*La revision de la sentence arbitrale*," 12 *Revue de droit international et de législation comparée* (1910), pp. 595–641;

against the Government of Venezuela were brought before the United States-Venezuelan mixed claims commission established under a protocol of February 17, 1903, and the national commissioners having disagreed, they were made the subject of an award given by Harry Barge (Netherlands), as umpire, on February 20, 1904, an award of $28,224.93 being made in favor of the claimant.[85] Three years later the United States demanded a re-submission of the entire case to an impartial tribunal, and a formal demand was made that this and other cases be submitted to arbitration before the Permanent Court of Arbitration.[86] This was one of the questions which led to a discontinuance of diplomatic relations between the two Governments in 1908, and it was broached when relations were resumed at the end of that year.[87] By a protocol of agreement of February 13, 1909, the Governments of the United States and Venezuela agreed to arbitrate certain claims, including that of the Orinoco Steamship Company,[88] before a tribunal composed of three arbitrators chosen "from the Permanent Court at The Hague." The tribunal was not to include a national of either party, and it was expressly provided that no member of the Permanent Court of Arbitration should appear as counsel before the tribunal. The United States chose as arbitrator Gonzalo de Quesada (Cuban), and Venezuela chose A. M. F. Beernaert (Belgian);[89] the two arbitrators chose Heinrich Lammasch (Austrian) as umpire. The sessions of the tribunal, from September 28 to October 19, 1910, were held in public. Both the English and French languages were used in the proceedings; the minutes and the award were in French, accompanied by an unauthoritative English translation. The tribunal was directed by the protocol to decide "in accordance with justice and equity." By its unanimous award of October 25, 1910, it declared the previous decision of Umpire Barge to be void in part, and to that extent it proceeded to give a fresh decision, awarding to the United States on behalf of the Orinoco Steamship Company a further sum which with interest totalled over $60,000; this sum was promptly paid by Venezuela.[90]

Scelle, "*Une instance en revision devant la Cour de la Haye, l'affaire de la Orinoco Steamship Company*," 18 *Revue générale de droit international public* (1911), pp. 164–202.

[85] Ralston, Venezuelan Arbitrations of 1903 (1904), p. 83; Report of Robert C. Morris, Agent (1904), p. 266. [86] U. S. Foreign Relations, 1908, pp. 774, 786, 802.

[87] U. S. Foreign Relations, 1909, p. 611.

[88] The Protocol of February 13, 1909, also provided for the arbitration of claims on behalf of the Orinoco Corporation and its predecessors in interest, and of the United States and Venezuela Company; but both of these claims were settled by direct negotiation.

[89] Venezuela had previously designated Roque Saenz Peña (Argentinian) who withdrew his acceptance when be became President of the Argentine Republic.

[90] $64,412.59 was paid by the Venezuelan Government in December, 1910. United States Foreign Relations, 1911, p. 753.

§18. France–Great Britain: *Savarkar Case* (1911).[91] On July 8, 1910, a Hindu prisoner escaped from a British merchant vessel at Marseilles and was restored to British custody by the French police; subsequently, the British Government refused to comply with a French demand for the restitution of the fugitive. By an agreement of October 25, 1910, an arbitral tribunal was asked to say whether "in conformity with the rules of international law" the fugitive should be restored to the French Government. The tribunal was to be composed of five members of the Permanent Court of Arbitration chosen by agreement of the parties, each party being permitted to name one of its nationals as a member. The British Government named Count de Desart and the French Government Louis Renault; the other members chosen by the two Governments were A. M. F. Beernaert (Belgian) as President, Gregers Gram (Norwegian) and A. F. de Savornin Lohman (Netherlands). The tribunal met from February 14 to 17, 1911; only the opening and closing sessions were held in public. Savarkar's request to be permitted to intervene was denied. The unanimous award, given in French and English on February 24, 1911, answered the question in the negative.

§19. Italy–Peru: *Canevaro Case* (1912).[92] By a protocol of April 25, 1910, concluded in execution of a general arbitration convention of April 18, 1905, the Italian and Peruvian Governments agreed to submit "to the Permanent Court of Arbitration of The Hague" for decision according to law, a claim made by three Canevaro brothers against the Peruvian Government. The two Governments agreed to designate the members of the arbitral tribunal within four months, but the protocol made no further provision concerning the creation of the tribunal; by an exchange of notes on April 27, 1910, an agreement was reached that the tribunal should be formed in accordance with Article 87 of the Hague

[91] *Protocoles des Séances et Sentence du Tribunal d'Arbitrage entre la France et la Grande-Bretagne*, published by the *Bureau International de la Cour Permanente d'Arbitrage*, The Hague, 1911; Scott, Hague Court Reports, p. 275. See also, Anzilotti, "*Estradizione in transito e diritto d'asilo*," 6 *Rivista di diritto internazionale* (1912), pp. 258–268; van Hamel, "*Les Principes du droit d'extradition et leur application dans l'affaire Savarkar*," 13 *Revue de droit international et de législation comparée* (1911), pp. 370–403; Kohler, "*Der Savarkarfall*," 5 *Zeitschrift für Völkerrecht* (1911), pp. 202–211; Robin, "*Un différend franco-anglais devant la Cour d'arbitrage de la Haye (affaire de l'Hindou Savarkar)*," 18 *Revue générale de droit international public* (1911), pp. 303–352; Strupp, *Zwei praktische Fälle aus dem Völkerrecht* (1911), pp. 12–26.

[92] *Protocoles des Séances et Sentence du Tribunal d'Arbitrage constitué en exécution du compromis signé entre l'Italie et le Pérou le 20 avril 1910*, published by the *Bureau International de la Cour Permanente d'Arbitrage*, The Hague, 1912; Scott, Hague Court Reports, p. 284. See also, de Boeck, "*La sentence arbitrale dans l'affaire Canevaro*," 20 *Revue générale de droit international public* (1913), pp. 317–371; Kohler, "*Die Lehren des Canevarofalles*," 7 *Zeitschrift für Völkerrecht* (1913), pp. 1–10; Zitelmann, "*Der Canevaro-Streitfall zwischen Italien und Peru*," I, 3 *Das Werk vom Haag* (2d ser.), pp. 167–247.

Convention of 1907.[93] The Italian Government designated Guido Fusinato, and the Peruvian Government designated Manuel Alvarez Calderón, and these two chose Louis Renault (French) as umpire. The three members of the tribunal were members of the Permanent Court of Arbitration, and the Secretary-General of the Permanent Court of Arbitration filled the role of secretary-general of the tribunal. On October 24, 1910, regulations of procedure were drawn up by the tribunal, and time-limits were fixed for the presentation of memorials and counter-memorials.[94] The tribunal decided that French should be its language, but the parties were authorized to use also Spanish and Italian. There were no oral proceedings in the case. Meetings of the tribunal were held on April 20 and 22, 1912, and the unanimous award was given on May 3, 1912; the tribunal declared that one of the Canevaro brothers could not be considered an Italian claimant, but it upheld the claims of the other brothers against the Peruvian Government.

§20. Russia–Turkey: *Russian Indemnity Case* (1912).[95] The Treaty of Constantinople of January 27/February 8, 1879, required Turkey to pay indemnities to Russian subjects and institutions for damages sustained during the war then closed. A controversy arose over a claim for payment of interest on the indemnity, and by a *compromis* of July 22/August 4, 1910, the Ottoman and Russian Governments agreed to submit the question to arbitration. Each party was to choose two members of the tribunal and the four members were to choose the umpire; in case the four arbitrators should not agree upon a choice of an umpire, the choice was to be made by a third State chosen by the parties, and if they could not reach agreement on the third State within two months, each of them was to choose a third State and the umpire was to be chosen jointly by the two States selected; if the two States thus selected failed to choose an umpire within two months, each of them was to designate two persons, members of the Permanent Court of Arbitration and nationals of neither of the parties, and the four persons thus designated were to make the

[93] Neither Italy nor Peru had ratified the 1907 Convention, however.

[94] *Rapport du Conseil Administratif*, 1911, p. 15.

[95] *Protocoles des Séances et Sentence du Tribunal d'Arbitrage constitué en vertu du compromis d'arbitrage signé à Constantinople entre la Russie et la Turquie le 22 juillet/4 août 1910*, published by the *Bureau International de la Cour Permanente d'Arbitrage*, The Hague, 1912; Scott, Hague Court Reports, p. 297. See also, Anzilotti, "*Der russisch-türkische Streitfall über die Kriegsentschädigung aus dem Jahre 1877*," 2 *Jahrbuch des Völkerrechts* (1914), II, pp. 134–147; Korff, "*Der russisch-türkische Streitfall vor dem Haager Schiedsgericht*," 2 *Jahrbuch des Völkerrechts* (1914), II, pp. 119–133; Meurer, "*Der russisch-türkische Streitfall*," I, 3, *Werk vom Haag* (2 ser.), pp. 249–342; Ruzé, "*Un arbitrage russo-turc*," 15 *Revue de droit international et de législation comparée* (1913), pp. 351–371; Strupp, "*Ein russisch-türkischer Streitfall vor dem Haager Schiedsgericht*," 6 *Zeitschrift für Völkerrecht und Bundesstaatsrecht* (1913), pp. 533–566.

choice by lot drawn under the supervision of the International Bureau of the Permanent Court of Arbitration.[96] The Ottoman Government chose Hérante Abro Bey and Ahmed Réchid Bey, the Russian Government chose Baron Michel de Taube and André Mandelstam; the Swiss Government, being called upon to choose the umpire, chose Charles Edward Lardy (Swiss). As only Lardy and de Taube were at that time members of the Permanent Court of Arbitration, the tribunal was called a *special* tribunal, and its use of the premises of the Permanent Court of Arbitration was specially authorized. The Secretary-General of the Permanent Court of Arbitration was secretary-general of the tribunal. The *compromis* provided that French was to be the sole language of the tribunal. The tribunal met on February 15, 1911, and took a series of decisions concerning the procedure to be followed, fixing the time-limits for the presentation of a memorial, a counter-memorial, a reply and a rejoinder. Oral arguments were heard by the tribunal at eight sessions held from October 28 to November 6, 1912, the cloture being announced on the latter date. Only the opening and closing sessions of the tribunal were held in public. In its unanimous award given on November 11, 1912, the tribunal declared the Russian claim to be admissible, but decided that the Turkish Government was not bound to pay interest-damages.

§21. France–Italy: *Carthage* and *Manouba Cases* (1913).[97] In execution of provisions of an arbitration convention of December 25, 1903, renewed December 24, 1908, the French and Italian Governments agreed on January 26, 1912, that the questions arising from the capture and arrest of the French steamer *Carthage* by Italian naval forces should be referred for examination to the "Court of Arbitration at The Hague"; and that the questions arising out of the temporary seizure of the French steamer *Manouba* by Italian naval forces should "likewise be submitted for examination to the high jurisdiction established at The Hague." Two

[96] Such a procedure had been outlined in Article 45 of the 1907 Convention, but this seems to be the only case in which it was prescribed by a *compromis*.

[97] *Compromis, Protocoles des Séances et Sentences du Tribunal d'Arbitrage Franco-Italien*, published by the *Bureau International de la Cour Permanente d'Arbitrage*, The Hague, 1913; Scott, Hague Court Reports, pp. 329, 341. See also, Anzilotti, "*Le questioni di diritto sollevate dagli incidenti del 'Carthage' et del 'Manouba,'*" 7 *Rivista di diritto internazionale* (1913), pp. 200–236, 398–413, 502–517; Basdevant, *La Leçon juridique des Incidents du Carthage, du Manouba, et du Tavignano* (1914), 25 p.; de Boeck, "*Les incidents franco-italiens des navires le 'Carthage,' le 'Manouba' et le 'Tavignano,'*" 39 *Journal du droit international-privé* (1912), pp. 449–486; Fiore, "*Der 'Manouba'—Fall,*" 1 *Jahrbuch des Volkerrechts* (1913), pp. 539–543; Ruzé, "*Un arbitrage franco-italien. L'affaire du 'Carthage' et l'affaire du 'Manouba,'*" 16 *Revue de droit international et de législation comparée* (1914), pp. 101–136; Scelle, "*Die Fälle 'Carthage,' 'Manouba,' 'Tavignano,' in französischer Auffassung,*" 1 *Jahrbuch des Völkerrechts* (1913), pp. 544–567.

compromis were signed on March 6, 1912, providing for a tribunal of five arbitrators to be chosen by the two Governments from among the members of the Permanent Court of Arbitration. The two Governments agreed on the selection of five arbitrators—K. H. L. de Hammarskjöld (Swedish), President, Guido Fusinato (Italian), J. Kriege (German), Louis Renault (French) and Baron Michel de Taube (Russian). The Secretary-General of the Permanent Court of Arbitration acted as secretary-general of the tribunal. The *compromis* provided that, except as special rules were laid down for it, the procedure should be governed by the provisions of the Hague Convention of 1907. The tribunal began its meetings at The Hague on March 31, 1913; only the opening and closing sessions were held in public. Two awards were given on May 6, 1913. It was held that the Italian authorities did not act properly in capturing the *Carthage* and seizing the *Manouba*, and that the Italian Government was bound to pay certain amounts for the loss and damage sustained by private persons in consequence.

§22. France–Italy: *Tavignano Case* (1912). The seizure of the French coastal steamer *Tavignano* by Italian naval forces on January 25, 1912, led to a dispute which the French and Italian Governments agreed on April 15, 1912, to submit to an international commission of inquiry, and, if necessary, to the arbitral tribunal which had been created to deal with the *Carthage* and *Manouba* cases. The definitive agreement for the commission of inquiry was made on May 20, 1912, and the report of the commission of inquiry was given on July 23, 1912.[98] Thereafter by a *compromis* of November 8, 1912, the arbitral tribunal was asked to deal with the case and to pronounce on the questions of law involved and on the responsibility and reparation due. The tribunal was asked to take account of the report of the commission of inquiry, and each of the parties was to file a memorial and a counter-memorial within fixed time-limits. On May 2, 1913, the parties reached agreement for a direct settlement of the case and for withdrawing it from the tribunal; on the following day, the tribunal took note of declarations made by the agents of the parties, and declared the case closed.[99]

§23. Netherlands–Portugal: *Timor Case* (1914).[1] The effort to delimit

[98] Scott, Hague Court Reports, p. 413.

[99] *Rapport du Conseil Administratif*, 1913, pp. 11–13.

[1] *Sentence Arbitrale rendue en exécution du compromis signé à la Haye le 3 avril 1913 entre les Pays-Bas et le Portugal*, published by the *Bureau International de la Cour Permanente d'Arbitrage*, Neuchâtel, 1914; Scott, Hague Court Reports, p. 354. See also, Fokkens, *De Nieuwe Regeling der Grenzen Tusschen Nederlandsch-en Portugeesch Timor* (n.d.), 64 p.; Heyman, *De Timor-Tractaten, 1859 en 1893* (1895), 96 p.

the boundaries between Netherlands and Portuguese possessions in the Island of Timor, in execution of a convention of October 1, 1904, led to a dispute which by a *compromis* of April 3, 1913 the two Governments agreed to submit to a single arbitrator chosen from among the members of the Permanent Court of Arbitration; failing agreement between the Governments, the choice was to be made by the President of the Swiss Confederation. The two Governments chose Charles Edward Lardy (Swiss) as arbitrator. French was the language of the tribunal. The *compromis* provided that through the intermediary of the International Bureau of the Permanent Court of Arbitration each of the parties should submit to the arbitrator within definite time-limits a memorial and a second memorial; after the exchange of these memorials no communication written or verbal was to be made to the arbitrator unless he should seek additional information from one or both of the parties. The submission of the memorials was completed on March 30, 1914, and without any further proceedings the arbitrator gave an award at Paris on June 25, 1914. On the basis of the treaties and the general principles of international law, the arbitrator gave an interpretation of provisions of the Convention of 1904 conforming to the conclusions submitted by the Netherlands Government. There seems to have been no secretary of the tribunal, but the parties were notified of the award by the International Bureau.

§24. France, Great Britain, Spain–Portugal: ***Religious Properties in Portugal Case*** (1920).[2] By a *compromis* of July 31, 1913, in which the parties were described as signatories of the Hague Convention of 1907,[3] the British, French and Spanish Governments agreed with the Portuguese Government to refer to arbitration claims relating to properties of British, French and Spanish nationals seized in Portugal following the proclamation of the Portuguese Republic. The tribunal was to be constituted "according to the summary procedure set forth in Chapter IV" of the 1907 Hague Convention; it was composed of three arbitrators who were named in the *compromis*, all of them members of the Permanent Court of Arbitration—Elihu Root (American), A. F. de Savornin Lohman (Nether-

[2] *Compromis, Protocoles des Séances et Sentences du Tribunal d'Arbitrage entre la Grande-Bretagne, l'Espagne et la France et le Portugal*, published by the *Bureau International de la Cour Permanente d'Arbitrage*, The Hague, 1920; Scott, Hague Court Reports (2 ser.), p. 1. See also, Anonymous, "Arbitration of Claims relating to religious properties between France, Great Britain, Spain and Portugal," 8 American Journal of International Law (1914), pp. 338–341; Ruzé, "*Sentences arbitrales au sujet des réclamations relatives aux biens des nationaux britaniques, espagnols et français*," 29 *Revue générale de droit international public* (1922), pp. 283–294.

[3] Great Britain had not ratified the Hague Convention of 1907.

lands), and Charles Edward Lardy (Swiss). The tribunal was directed to decide in accordance with the conventional law applicable, and that failing with the general principles of law and equity. Each of the parties appointed an agent and the Portuguese Government appointed two assistant agents. The Secretary-General of the Permanent Court of Arbitration was the secretary-general of the tribunal. The procedure was entirely written. A separate memorial and counter-memorial was prescribed for each of the claims, but by an arrangement signed at Lisbon on August 13, 1920, the tribunal was authorized to give one award with reference to all of the French claims, and one with reference to all of the British claims. Meetings of the tribunal were held on September 2 and 4, 1920. Two awards were given as to the British and French claims, respectively, on September 2, 1920, certain of the claims being allowed. Two days later the tribunal gave nineteen separate awards on the Spanish claims: many of these claims were declared to be inadmissible, one was held to be without object, and with reference to one it was held that the Portuguese Government had no obligation.

§25. France–Peru: *Dreyfus Case* (1921).[4] By a *compromis* of February 2, 1914, the French and Peruvian Governments agreed to arbitrate the claims of certain French creditors "who had been represented in 1910 by the Banque de Paris et des Pays-Bas," with a proviso taken from a Peruvian law of December 31, 1912 which authorized the arbitration that not more than 25 million francs could be demanded by the French Government; the two Governments also submitted to the tribunal certain other French claims mentioned in the Peruvian authorization law, the arbitration of which had previously been envisaged in a lapsed protocol of May 7, 1910. Each of the Governments was to appoint an arbitrator within six months, and within three months after the appointments an umpire was to be selected in accordance with the provisions of Article 87 of the Hague Convention of 1907; any point of procedure not covered by the *compromis* was to be dealt with in accordance with the provisions for summary procedure in Chapter 4 of that Convention.[5] The French Government appointed Louis Sarrut a member of the tribunal, and the Peruvian Government named Francisco Garciá Calderón;[6] the two arbitrators

[4] *Compromis, Protocoles des Séances et Sentence du Tribunal d'Arbitrage entre la France et le Pérou*, published by the *Bureau International de la Cour Permanente d'Arbitrage*, The Hague, 1921; Scott, Hague Court Reports (2 ser.), p. 31. See also, Ruzé, "*France et Pérou [l'arbitrage franco-péruvien]*," 29 *Revue générale de droit international public* (1922), pp. 256–283; Wilson, "Hague Court Award in the French Claims against Peru," 16 American Journal of International Law (1922), pp. 431–432.

[5] Peru had not ratified the Hague Convention of 1907.

[6] The French Government had previously named Louis Renault, and the Peruvian Government Lizardo Alzamora. 63 *Boletin de relaciones exteriores* (Lima, 1920), p. 161.

chose as umpire E. Picot (Swiss). The Peruvian Government later named Anselmo Barreto to replace Francisco Garciá Calderón, but the former either declined or resigned; finally, in 1921, the Peruvian Government named Federico Elguerra. M. Picot having died on May 9, 1921, the arbitrators chose Frédéric Ostertag (Swiss) to succeed him. As it was finally constituted, only one member of the tribunal was a member of the Permanent Court of Arbitration. The Secretary-General of the Permanent Court of Arbitration was secretary-general of the tribunal. The International Bureau of the Permanent Court of Arbitration served as intermediary for communications between the parties and between the parties and the members of the tribunal. The tribunal was to have met at The Hague within six weeks after the filing of the memorials of the parties, *i.e.*, six weeks after January 26, 1921; but as its membership was not complete, the first meeting was not held until October 3, 1921. At this meeting, which was public, the president characterized the tribunal as a special tribunal, not created under Article 45 of the Hague Convention of 1907, and he stated that for this reason a special request had been made for the use of the premises of the Permanent Court of Arbitration; no oral arguments were presented, but a member of the tribunal asked the French agent to enumerate the French creditors "who had been represented in 1910 by the Banque de Paris et des Pays-Bas." The award, given at a second meeting of the tribunal on October 11, 1921, dealt with four principal and five minor claims. Most important was the claim made on behalf of Dreyfus Frères et Cie., growing out of a contract for the sale of guano of 1869;[7] as to some of the claims, the only contest related to the allowance of compound interest.

§26. United States of America–Norway: *Seizure of Ships Case* (1922).[8] In the course of the war of 1914–1918, the United States requisitioned certain contracts under which ships were being constructed in the United States for Norwegian nationals. Though the United States expressed its willingness to pay for the property taken, agreement was not reached as to the amounts due on fifteen Norwegian claims, and by a

[7] Certain questions as to this claim had previously been before a so-called Franco-Chilean tribunal, and sums paid by reason of its award of July 5, 1901, were deducted in computing the amount due in 1921; for the award, see Descamps and Renault, *Recueil international des traités du XXe siècle*, 1901, pp. 188–427.

[8] Proceedings of the Tribunal of Arbitration between the United States of America and Norway, published by the International Bureau of the Permanent Court of Arbitration, The Hague, 1922; Scott, Hague Court Reports (2 ser.), p. 39. See also, Scott, "United States-Norway Arbitration Award," 17 American Journal of International Law (1923), pp. 287–290; Garner, "An arbitration case between Norway and the United States," The British Year Book of International Law, 1923/24, pp. 159–162; Smith, "An Arbitration with Norway," 16 American Journal of International Law (1922), pp. 81–84.

special agreement of June 30, 1921, the United States and Norway agreed that the claims should be submitted to arbitration "conformably to the Convention of the 18th October, 1907, for the Pacific Settlement of International Disputes and the Arbitration Convention concluded by the two Governments" on April 4, 1908, and renewed on June 16, 1913 and March 30, 1918.[9] Each of the parties was to appoint an arbitrator, and a third arbitrator was to be chosen by the two parties or, if they failed to agree, by the President of the Swiss Confederation. The United States appointed Chandler P. Anderson, and Norway appointed Benjamin Vogt. At the request of the parties the President of the Swiss Confederation first named Max Huber (Swiss) as president of the tribunal, but he was unable to serve, and just prior to the opening of the hearings James Vallotton (Swiss) was named to replace him. Thus, none of the arbitrators was a member of the Permanent Court of Arbitration, and they constituted a special tribunal. The tribunal's use of the premises of the Permanent Court of Arbitration was specially authorized. The Secretary-General of the Permanent Court of Arbitration was the secretary-general of the tribunal. The tribunal was to decide upon the Norwegian claims "in accordance with the principles of law and equity"; on the same basis it was also to examine any claim made by certain American citizens, Page Brothers, against any Norwegian claimant, arising out of a transaction on which the latter's claim was based, and determine what portion of any sum awarded to such claimant should be paid to those American citizens. Twenty-seven meetings of the tribunal, from July 22 to September 1, 1922, were devoted to the oral proceedings, which by a letter of October 11 the President declared to be closed. English was the language of the tribunal. Only the president and Mr. Vogt were present at the final session of the tribunal[10] at which the award was given, on October 13,

[9] For the correspondence which preceded the signing of the agreement, see U. S. Foreign Relations, 1921, II, pp. 571–596.

[10] In the "Proceedings" of the tribunal published by the International Bureau, an "annex" (pp. 161–162) was added at the request of the agent of the United States, the agent of Norway offering no objection, containing a declaration of protest made by the agent of the United States "immediately after the close of the final meeting"; in 17 American Journal of International Law (1923), p. 399, it is stated that this declaration was "made in Open Court." The agent of the United States read a letter addressed to him by Chandler P. Anderson, in which the latter stated that he had "refused to be present when the award is announced," because the other members of the tribunal had "disregarded the terms of submission and exceeded the authority conferred" on the tribunal; Mr. Anderson also stated that he had addressed a similar communication to the agent of Norway and to the Secretary-General of the Permanent Court of Arbitration. According to the "annex," M. Vallotton then stated that "we have heard nothing of this protest until this moment, and I do not think that the dissenting vote of an Arbitrator should be presented by the Agent of one of the Parties."

In a note by "C.P.A." in 17 American Journal of International Law (1923), p. 399, it is said that Mr. Anderson's letters "were delivered when the award was announced"; and that

1922. The tribunal upheld the fifteen Norwegian claims, on which the United States was directed to pay to Norway a total of $11,995,000 with the privilege of deducting the sum of $22,800 to be paid to Page Brothers. On February 26, 1923, the United States paid the amount awarded, with interest, totalling $12,239,852.47. At the time of making the payment, the Secretary of State of the United States declared that "the award cannot be deemed by this Government to possess an authoritative character as a precedent"; to which the Government of Norway replied that this question fell "within the jurisdiction of the Court of Arbitration concerned irrespective of the opinions of the parties in the previous case of arbitration." [11]

§27. United States of America–Netherlands: *Island of Palmas Case* (1928).[12] Sometime after Spain ceded the Philippine Islands to the United States in 1899, the United States claimed that the Island of Palmas (Miangas) was embraced in the cession. This island was also claimed by the Netherlands, and the question was the subject of diplomatic exchanges between the two Governments over a period of almost twenty years. By a special agreement of January 23, 1925, made in pursuance of an arbitration convention of May 2, 1908, the United States and the Netherlands agreed to refer the dispute "to the Permanent Court of Arbitration at The Hague." [13] The arbitral tribunal was to consist of a single member of the Permanent Court of Arbitration, and if the parties could not agree the choice of the arbitrator was to be made by the President of the Swiss Confederation; the parties selected Max Huber (Swiss), a member of the Permanent Court of Arbitration. The International Bureau of the Permanent Court of Arbitration served as the intermediary for communications between the arbitrator and the parties. The Secretary-General of the Permanent Court of Arbitration seems to have acted

"the American arbitrator was denied the right to file a dissenting opinion, or to note his dissent, because the Special Agreement creating the Tribunal did not expressly provide therefor." In this connection, it is to be noted that the provision concerning dissents in Article 52 of the 1899 Hague Convention was not included in the corresponding Article 79 of the 1907 Convention.

[11] U. S. Foreign Relations, 1923, II, pp. 626–629.

[12] Arbitral award rendered in conformity with the special agreement concluded on January 23, 1925, between the United States of America and the Netherlands, published by the International Bureau of the Permanent Court of Arbitration, 1928; Scott, Hague Court Reports (2 ser.), p. 83. See also, Fuglsang, *Der Amerikanisch-holländische Streit um die Insel Palmas vor dem Ständigen Schiedshof im Haag* (1931), 148 p.; Jessup, "The Palmas Island Arbitration," 22 American Journal of International Law (1928), pp. 735–752; Nielsen, The Island of Palmas Arbitration before the Permanent Court of Arbitration at The Hague (1925), 51 p.; Versfelt, The Miangas Arbitration (1933), 156 p.; de Visscher, "*L'Arbitrage de l'Ile de Palmas (Miangas)*," 10 *Revue de droit international et de législation comparée* (1929), pp. 735–762.

[13] 33 League of Nations Treaty Series, p. 446.

as secretary-general of the tribunal, the award being signed by him as "secretary-general." The *compromis* required each of the parties to deposit £100 with the arbitrator "by way of advance of costs"; the amount of the "costs of procedure" was later fixed by the arbitrator at £140. The proceedings, entirely in writing, were begun with the filing of a memorandum by each of the parties in October, 1925; each party filed a counter-memorandum and "further written explanations," and the agent of the United States also filed a rejoinder; the proceedings were declared closed on March 3, 1928. The award of April 4, 1928 was in the English language. The Island of Palmas (Miangas) was held to form in its entirety a part of Netherlands territory.

§28. France–Great Britain: *Chevreau Case* (1931).[14] The French Government made a claim in this case on behalf of the widow of a French national who had been detained by British forces in Persia in 1918, and later deported to India and Egypt. On March 4, 1930, the British and French Governments agreed upon the arbitration of the matter, and they later selected as arbitrator F. V. N. Beichmann (Norwegian), a member of the Permanent Court of Arbitration. The *compromis* provided that matters of procedure not covered by its provisions should be governed by Chapter 3 of the Hague Convention of 1899;[15] and acting under Article 49 of the Convention, the arbitrator promulgated an *ordonnance* concerning the procedure on May 4, 1931. The various documents of the written proceedings were transmitted to the arbitrator directly by the parties, but the Secretary-General of the Permanent Court of Arbitration served as secretary-general of the tribunal, and the latter's use of the premises of the Permanent Court of Arbitration was authorized by the International Bureau. Oral arguments were presented at closed meetings held on May 5, 6, 7, 8, 1931, and a witness called by the British agent was examined and cross-examined "in accordance with the English system." In the award given on June 9, 1931, the claim was upheld in part, and an indemnity of £2100 was allowed. The parties requested that the award should be kept secret for a period of three months, after which period it was to be "available to accredited inquirers and those who

[14] *Compromis, Protocoles des Séances et Sentence du Tribunal d'Arbitrage constitué en vertu du compromis signé à Londres le 4 mars 1930 entre la France et le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord*, distributed by the *Bureau International de la Cour Permanente d'Arbitrage* (not printed); *Grotius Annuaire International*, 1934, pp. 243–282. A translation of the award is published in 27 American Journal of International Law (1933), p. 153. See also Hudson, "The Chevreau Claim between France and Great Britain," 26 American Journal of International Law (1932), pp. 804–807.

[15] Great Britain had not ratified the Hague Convention of 1907.

practice in the Peace Palace"; it became available for publication only in June, 1932.

§29. United States of America–Sweden: *Kronprins Gustaf Adolf* and *Pacific Case* (1932).[16] The Swedish Government having advanced a claim against the United States based upon the alleged detention of two Swedish motor-ships during the course of the war of 1914–1918, and the United States having disclaimed liability in this connection, the United States and Sweden agreed on December 17, 1930 to submit the difference to arbitration,[17] pursuant to the Hague Convention of 1907 and an American-Swedish arbitration convention of October 27, 1928. Three questions —as to the violation of treaties of 1783 and 1827, the liability of the United States, and the amount of reparation due—were submitted for decision to a "sole arbitrator," not a national of either party, provision being made that if the two parties could not agree on the choice of an arbitrator a tribunal of three non-national members would be set up, each party choosing a member, and the two parties choosing a president of the tribunal. The parties selected as arbitrator Eugène Borel (Swiss), a member of the Permanent Court of Arbitration. The International Bureau of the Permanent Court of Arbitration served as intermediary for communications between the parties and the arbitrator, but the secretary appointed by the arbitrator was not in any way connected with the Permanent Court of Arbitration. The tribunal held an informal meeting at Washington on May 5, 1932, and announced rules for the hearings which were held at a series of nineteen closed meetings from May 9 to June 2. In the award of July 18, 1932, it was held that the United States had not detained the Swedish motor-ships in contravention of the treaties of 1783 and 1827. After some delay a copy of the award was communicated to the International Bureau at The Hague. The award itself does not purport to issue from a tribunal of the Permanent Court of Arbitration, and there is but slight reason for the inclusion of the case in the list of *Affaires d'arbitrage jugées* in the reports of the Administrative Council in 1932 and subsequently.

§30. Tribunals of the Permanent Court of Arbitration. The foregoing survey indicates that in the twenty-one cases listed nineteen *ad hoc*

[16] Arbitral Decision rendered in conformity with the special agreement concluded on December 17, 1930, between the Kingdom of Sweden and the United States of America (no place, no date). The oral argument, a photographic reprint of the arbitral decision, and the record of the preceedings of the tribunal were published by the United States Department of State, Publications Nos. 358–361, 402, 610, and 611, Arbitration Series Nos. 5(1)–5(6). See also, O'Neill, "United States-Sweden Arbitration," 26 American Journal of International Law (1932), pp. 720–734.

[17] 125 League of Nations Treaty Series, p. 233.

tribunals were created. Six of these tribunals consisted of five members, nine of three members, and four of one member. Six of them were "special" arbitral tribunals. Two of them applied the summary procedure provided for in the 1907 Hague Convention. Most of the thirty-six men who were members of the tribunals served but once in that capacity, but Louis Renault (French) and de Savornin Lohman (Netherlands) were members of five tribunals; Heinrich Lammasch (Austrian) was a member of four tribunals; Guido Fusinato (Italian), K. H. L. de Hammarskjöld (Swedish) and Charles Edward Lardy (Swiss) were members of three tribunals; and Sir Edward Fry (British), de Martens (Russian), J. Kriege (German), Baron Michel de Taube (Russian) and F. V. N. Beichmann (Norwegian) each served on two tribunals. Difficulties were encountered in the constitution of several of the tribunals even after the method of constitution had been agreed upon.

Eight of the tribunals included an umpire. The normal function of an umpire is to decide in case of a difference between other members of the tribunal; "in legal terminology, an umpire is a person called in to decide between arbitrators who have failed to make an award." [18] This is not the conception of the office which is embodied in the Hague Conventions, however; Articles 34, 51 and 52 of the 1899 Hague Convention and Articles 57, 78 and 87 of the 1907 Convention reduce the role of an umpire to that of president of a tribunal which takes its decisions by a majority vote. Under the system of the Hague Conventions each award is the award of the tribunal, and not merely of an umpire; this was emphasized by Article 52 of the 1899 Convention which required an award to be signed by each member of the tribunal, but Article 79 of the 1907 Convention provided for signature only by the president and the registrar.

With reference to the role of the International Bureau of the Permanent Court of Arbitration, the tribunals did not develop a consistent practice. The more elaborate provisions of the 1907 Hague Convention paved the way for some approach to uniformity in the various *compromis*, however, and a larger role was assigned to the International Bureau in the later cases. The Bureau sometimes lacked funds which it might usefully have employed, for instance with respect to stenographic accounts of oral proceedings.

§31. Awards of the Tribunals. The awards of the tribunals lack the continuity and consistency which would constitute them a body of cumu-

[18] 6 Moore, International Adjudications (1933), p. ix.

lating jurisprudence.[19] Perhaps in some of the cases they were not adequately grounded on citations of existing law.[20] Yet they achieved with considerable satisfaction the object of international arbitration as stated in the Hague Conventions, *viz.*, "the settlement of disputes between States on the basis of respect for law." They have served and they will continue to serve as important jural materials for the development of international law.[21] It is unfortunate that the Hague Conventions did not provide for the systematic publication and distribution of the awards and the proceedings of the tribunals relating to them; no serial form was developed, the publication was sometimes delayed, and in several of the cases undue restrictions were placed upon it.

§32. Appreciation of the Hague Conventions. After a study of the work of the tribunals created with reference to the Hague Conventions for pacific settlement, one is compelled to reach the conclusion that over a period of forty years these Conventions have served a very useful purpose. Unquestionably, States have been aided in their desire to resort to arbitration both by the procedural provisions in the Conventions and by the agencies which constitute the Permanent Court of Arbitration. If the latter has not resulted in giving system and symmetry to international arbitration, it has given impetus to developments which approach those ends. The existence of the panel of members of the Court has frequently served to facilitate the selection of arbitrators though it has not always offered escape from the difficulties of selection, and it has greatly encouraged the extension of agreements to arbitrate. The International Bureau has served, even in arbitrations not entrusted to members of the Permanent Court of Arbitration, as an impartial body through which negotiations could be conducted and communications could be effected; it has offered a *locus* in which tribunals may have their seats, and it has furnished a trained personnel upon which tribunals might rely. It would be easy to criticize the procedural provisions of the Conventions, but they have exercised a big influence on arbitration in general, and particularly on the drafting of the Statute of the Permanent Court of International Justice.

[19] The following observation by Joseph H. Choate at the Second Peace Conference in 1907 still holds true: "The present Permanent Court has not gone far in the direction of establishing and developing international law. Each case is isolated, lacking both continuity and connection with the other." Scott, Proceedings of the Hague Peace Conferences, 1907, II, p. 596.

[20] For a severe criticism of the earlier awards, see Wehberg, The Problem of an International Court of Justice (translation by Charles G. Fenwick, 1918), pp. 29ff. On the other hand, some of the criticism of the awards has proceeded on misconceptions of the nature of the judicial process. See 1 Moore, International Adjudications (1929), p. xc.

[21] See the digest of the awards, in *Fontes Juris Gentium*, Series A, Sec. 1, Vol. 2.

Since 1921 the Permanent Court of Arbitration has been overshadowed by the Permanent Court of International Justice, and the importance of the former Court has tended to diminish, as shown by the less frequent resort to it. Of the twenty-one cases surveyed in this chapter only four were due to references to arbitration since 1921, and in three of the four cases one of the States engaged was not a party to the Protocol of Signature of December 16, 1920 setting up the Statute of the Permanent Court of International Justice. Yet situations may arise in which States will prefer tribunals composed of arbitrators of their own choice to the Permanent Court of International Justice with its fixed personnel, and even with the latter in existence the Permanent Court of Arbitration may serve a useful purpose in the future.[22] When its abolition was proposed by the Argentine delegation to the First Assembly of the League of Nations in 1920, the proposal received no support, it being "thought that this Court would still have a role to fill in certain international disputes which lend themselves more easily to arbitral decisions than to an award based on strict rules of law." [23] Apart from this possibility, however, the fact that the national groups in the Permanent Court of Arbitration were given the function of nominating candidates in the elections of members of the Permanent Court of International Justice has tended to assure the continuance of the Permanent Court of Arbitration.

[22] The French-Greek *compromis* of July 15, 1931, in the first *Lighthouses Case*, provided for a reference to the Permanent Court of International Justice to be followed by a possible submission of certain questions to an arbitral tribunal which was directed to conform to the procedure laid down in the Hague Convention of 1907. Publications of the P.C.I.J., Series C, No. 74, p. 11.

[23] Records of First Assembly, Committees, I, pp. 514, 526.

CHAPTER 2

INTERNATIONAL COMMISSIONS OF INQUIRY

§33. The Hague Convention of 1899. The Convention on Pacific Settlement of International Disputes of July 29, 1899, contained (Article 9) a recommendation that for international disputes involving neither honor nor vital interests and relating to points of fact, States should, so far as circumstances permit, institute international commissions of inquiry to elucidate the facts.[1] The members of such commissions were to be appointed in accordance with the scheme laid down in Article 32 of the Convention for the appointment of members of arbitral tribunals. Agreements made *ad hoc* were to define the facts to be investigated and the powers of the commission. The parties were to supply commissions with all facilities necessary for understanding the facts in question, and both sides were to be heard. The report of a commission signed by all of the members was to be limited to a statement of facts; and it was expressly stated that a report should not have the character of an arbitral award, the parties to a dispute being free to decide as to the effect to be given to it.

§34. The Hague Convention of 1907. Experience gained in connection with a single commission of inquiry set up in 1904 to deal with the North Sea Incident, was made the basis of proposals by various delegations at the Second Peace Conference for extensive modifications of the provisions in the 1899 Convention relating to commissions of inquiry, and Articles 9–14 of the 1899 Convention were expanded into Articles 9–36 of the 1907 Convention. New provisions were added for assessors, agents, counsel, and advocates, and for the summoning of witnesses; the procedure was elaborately set forth and assimilated in some measure to judicial procedure; and the International Bureau of the Permanent Court

[1] See generally, Albert Beaucourt, *Les Commissions internationales d'Enquête* (Arras, 1909); Maurice Bokanowski, *Les Commissions internationales d'Enquête* (Paris, 1908); Milosch Boghitchévitch, *Die Enquête-Kommissionen des Völkerrechtes* (Berlin, 1905); N. Politis, "*Les Commissions internationales d'Enquête*," 19 *Revue générale de droit international public* (1912), pp. 149–188; André Le Ray, *Les Commissions internationales d'Enquête au XXme Siècle* (Saumur, 1910).

of Arbitration was given the function of acting as registry for commissions sitting at The Hague. Provisions were added in the 1907 Convention that a report by a commission of inquiry would be valid though one of the members should refuse to sign it, and that the report should be read at a public sitting of the Commission; but no attempt was made to change the nature of the report.

§35. Great Britain–Russia: *North Sea Incident Inquiry.*[2] In consequence of a suggestion made by the French Government, the British and Russian Governments reached an agreement on November 12/25, 1904 to entrust to a commission of inquiry the "task of elucidating by means of an impartial and conscientious investigation the questions of fact connected with the incident which occurred during the night of October 8–9/21–22, 1904, in the North Sea (on which occasion the firing of the guns of the Russian fleet caused the loss of a boat and the death of two persons belonging to a British fishing fleet, as well as damages to other boats of that fleet and injuries to the crews of some of the boats)."[3] The British and Russian Governments each appointed one of its own admirals to serve on the commission, and the American and French Governments each appointed admirals as members; on the invitation of the four members thus appointed, the Austrian Emperor appointed an Austrian admiral as a fifth member.[4] The British and Russian Governments appointed assessors to sit with the commission, and each Government was represented before the commission by an agent. The commission met at Paris, holding more than thirty meetings between December 22, 1904 and February 25, 1905.[5] Numerous witnesses were heard. The International Bureau of the Permanent Court of Arbitration did not participate in the functioning of the commission. The report given on February 25, 1905 was chiefly limited to a narration of events; the commissioners were not unanimous in placing the responsibility for the incident upon the Rus-

[2] Also known as the *Hull Affair*, and as the *Dogger Bank Affair*.

See A. Mandelstam, "*La Commission Internationale d'Enquête sur l'Incident de la Mer du Nord*," 12 *Revue générale de droit international public* (1905), pp. 161–190, 351–415; R. de la Penha, *La Commission internationale d'enquête sur l'incident Anglo-Russe de la Mer du Nord* (Paris, 1906).

[3] For the text of the British-Russian declaration, see *Archives diplomatiques*, 1904, IV, p. 1323; Scott, Hague Court Reports, pp. 410, 614. For the correspondence relating to the North Sea Incident, see British Parliamentary Papers, Russia No. 2 (1905), Cd. 2350; 33 Martens, *Nouveau recueil général* (2 ser.), pp. 641–709.

[4] In default of agreement among the four members, the designation of the fifth member was to have rested with the Austrian Emperor.

[5] The *procès-verbaux* were printed but labelled "confidential"; they are published in *Archives diplomatiques*, 1905, II, pp. 450–491. For the *règlement* of the commission, see *idem*, I, p. 102.

sian admiral who had ordered the firing.[6] The incident was closed by the payment of £65,000 to the British Government by the Russian Government.

§36. France–Italy: *The Tavignano, Camouna* and *Gaulois Inquiry.* By an agreement signed at Rome, May 20, 1912, the French and Italian Governments undertook to establish a commission of inquiry "conformably to Part III of the Hague Convention of October 18, 1907," [7] to clear up the circumstances as to the capture and detention of the French mail steamer *Tavignano* by an Italian vessel on January 25, 1912, and as to the firing upon the *Camouna* and *Gaulois* by an Italian torpedo boat on the same day.[8] The commission was to be composed of three members, two naval officers appointed by the French and Italian Governments and a naval officer named by the British Government. It was entrusted with the task of investigating, marking and determining the exact geographic point where the *Tavignano* was captured and where the *Camouna* and the *Gaulois* were pursued and fired upon; of determining exactly the hydrography, configuration and nature of the coast and of the neighboring banks; and of making a written report on the results of its investigation. It was to meet at Malta, with power to meet elsewhere, and to make its report within fifteen days after its first meeting. On points not covered by the agreement, it was to be guided by the provisions of the Hague Convention of 1907. On July 23, 1912, the commission made a report, which, because of the uncertainty of the evidence and documents presented to it, was very inconclusive.[9] On November 8, 1912, the French and Italian Governments agreed to submit the *Tavignano Case* to an arbitral tribunal previously created to deal with the *Carthage* and *Manouba* cases; [10] this tribunal was to pronounce upon the facts, decide questions of law, and determine the amount of reparation which might be due. On May 2, 1913, before the tribunal had begun its deliberations, an agreement was reached by which the Italian Government undertook to pay to the French Government the sum of 5000 francs to indemnify the individuals who had suffered losses, and the French Government undertook to consider the affair as definitely settled.[11]

[6] For the text of the report, see *Archives diplomatiques*, 1905, II, p. 491; Scott, Hague Court Reports (1916), pp. 404, 609.

[7] Italy had not ratified the Hague Convention of 1907.

[8] For the text of the agreement, see Scott, Hague Court Reports, pp. 417, 617.

[9] For the text of the report, see *idem*, pp. 413, 616.

[10] An agreement of April 15, 1912, had envisaged the possibility of this course. See §21, *supra.*

[11] Scott, Hague Court Reports, pp. 421, 612. See §23, *supra.*

§37. Germany–Netherlands: *The Tubantia Inquiry.* On March 30, 1921, the Governments of Germany and the Netherlands agreed to submit to a commission of inquiry the question of the cause of the sinking of the Netherlands steamship *Tubantia* on March 16, 1916.[12] Each party chose a member of the commission, the Danish and Swedish Governments were asked to choose one member each, and the Swiss Government was asked to choose a jurist as president of the commission. The procedure of the commission was to be in accordance with the applicable provisions of the Hague Convention of 1907; its meetings were not to be public and the protocols were not to be published; but the final report was to be read in public session and published. Memorials were deposited by the parties with the International Bureau of the Permanent Court of Arbitration. The commission opened its meetings at The Hague on January 18, 1922; both witnesses and experts were heard. In its report of February 17, 1922, the commission reached the conclusion that the *Tubantia* was sunk by the explosion of a torpedo launched by a German submarine,[13] and on the basis of this report a settlement was reached by the German and Netherlands Governments.

§38. Appreciation of the Hague Commissions of Inquiry. In forty years, three commissions of inquiry were created under the provisions of the Hague Conventions.[14] Each of these commissions was charged with the investigation of a war-time incident between a belligerent and a neutral state; in one instance, that of the North Sea Incident, the situation may be said to have been quite serious.[15] The commissions were so restricted in their reports that their usefulness was very limited. Perhaps the provisions of the Hague Conventions may be thought to have influenced later developments,[16] though it is notable that they were not referred to by the Government of the United States in launching a plan for permanent international commissions of investigation on April 24, 1913.[17]

[12] For the text of the convention, see 20 Martens, *Nouveau recueil général* (3 ser.), p. 613. An English translation is published in Scott, Hague Court Reports (2 ser.), p. 143.

[13] The report was published by the *Bureau International de la Cour Permanente d'Arbitrage.* See also, Scott, Hague Court Reports (2 ser.), pp. 135, 211; 16 American Journal of International Law (1922), p. 485.

[14] Apparently a fourth commission of inquiry was set up by Germany and Spain in the *Tiger Case* in 1918, but the report seems not to have been published. See *Rapport du Conseil Administratif*, 1918, p. 12; Stuyt, Survey of International Arbitrations (1939), p. 443.

[15] See R. de la Penha, *op. cit.*, pp. 22ff. Various commentators referred to the sinking of the U.S.S. *Maine* at Havana in 1898 as the kind of incident for which the commission of inquiry might have been particularly useful.

[16] The Hague provisions for commissions of inquiry were embodied in the treaty on compulsory arbitration signed at Mexico, January 29, 1902. Scott, International Conferences of American States, p. 100.

[17] U. S. Foreign Relations, 1913, p. 8.

Nor is it possible to trace to the Hague Conventions many of the characteristics of permanent commissions of investigation and conciliation established by numerous treaties since 1919.[18] In a sense, however, it may be said that the provisions in Article 15 of the Covenant of the League of Nations have developed out of the provisions in the Hague Conventions; [19] the commissions of inquiry provided for by the Central American Convention signed at Washington, February 7, 1923,[20] and by the Inter-American Convention signed at Santiago, May 3, 1923,[21] also have many of the features of the Hague commissions. Certainly a significant departure was made by the Peace Conference in 1899 in providing this means of establishing the facts involved in a dispute, and efforts since that time have proceeded more smoothly because the initial step had been taken.

[18] See Habicht, Post-War Treaties for the Pacific Settlement of International Disputes (1931), pp. 107off.

[19] See Hershey, Essentials of International Public Law and Organization (1927), p. 465. One may trace to the Hague Conventions, also, the Commission of Enquiry as to labor conventions, provided for in Articles 25–29 of the Constitution of the International Labor Organization.

[20] For the text, see 2 Hudson, International Legislation, p. 985.

[21] For the text, see *ibid.*, p. 1006. See also the Inter-American Convention of January 5, 1929, and the additional protocol of December 26, 1933. 4 *idem*, p. 2635; 6 *idem*, p. 618.

CHAPTER 3

THE CENTRAL AMERICAN COURT OF JUSTICE

§39. Federation in Central America. The organization of an international court in Central America was greatly facilitated by the fact that since their independence began the five Central American States have had a tradition of unity and solidarity. This tradition has persisted in spite of frequent dissensions, and it has found expression in numerous attempts at federation. Under the Spanish regime, the Captaincy-General of Guatemala included in its five provinces[1] the territory now possessed by the five States; this dependency declared its independence in 1821. Two years later the Republic of the United Provinces of Central America was formed, and it continued for some years. Later attempts at union were made, especially in 1840, 1842, 1847, 1852, 1872, 1885, and 1895, all of which proved more or less abortive,[2] as were the latest attempts in 1921 and 1934.[3] Unanimous agreement of the five States was not easy to achieve; during a large part of the time distances were great and communications difficult; and no pressing need made union imperative. Yet the attempts at federation, renewed from time to time over a period of a century, had the effect of encouraging cooperation in many fields, and led to efforts in 1902, 1907, 1921 and 1923 to create a judicial agency for the handling of disputes between the five States.

§40. The Treaty of Corinto of 1902. On January 20, 1902, four of the Central American States (Costa Rica, Honduras, Nicaragua and El Salvador) signed a treaty at Corinto, providing for obligatory arbitration and for a permanent tribunal of arbitration to be instituted on Septem-

[1] On the history of these provinces, see the arbitral award given by the King of Spain on December 23, 1906. 35 Martens, *Nouveau recueil général* (2d ser.), p. 563; 100 British and Foreign State Papers, p. 1096.

[2] A note on these attempts is published in U. S. Foreign Relations, 1917, p. 29. See also L. Moreno, *Historia de las Relaciones Interestatuales de Centroamerica* (Madrid, 1928); Dana G. Munro, The Five Republics of Central America (1918), c. 8; "The Central American League of Nations," World Peace Foundation, Pamphlet Series, Vol. VII (1917); W. F. Slade, "The Federation of Central America," 8 Journal of Race Development (1917), pp. 79–150, 204–275.

[3] For the Treaty of Union of January 19, 1921, see 5 League of Nations Treaty Series, p. 19; 1 Hudson, International Legislation, p. 600. For the Treaty of Central American Confraternity of April 12, 1934, see 6 Hudson, *op. cit.*, p. 824.

ber 5 of that year.[4] Each State was to nominate an arbitrator and an alternate to serve for terms of one year; the arbitrators named by parties to a dispute were not to sit; no seat of the tribunal was named, nor were any permanent officials provided for. Difficulties relating to boundaries, or with reference to boundary treaties, might be submitted by the interested governments to a foreign arbitrator of American nationality. The treaty was ratified by Honduras on February 6, 1902, by El Salvador on March 24, 1902, and by Costa Rica on April 7, 1902.[5] The tribunal was installed at San José on October 2, 1902, and regulations were adopted on October 9, 1902.[6] A meeting of the tribunal to deal with difficulties between Honduras and Nicaragua was held in February, 1907, without achieving any result.[7] On the whole, the system provided for by the Treaty of Corinto was highly artificial. That treaty was not referred to in the treaty of peace signed by representatives of four republics (not including Costa Rica) [8] at San Salvador, November 2, 1903, but it was "continued in force" by Article 4 of the treaty of peace signed by representatives of four republics (not including Nicaragua) at San José, September 25, 1906.[9] In February, 1907, the President of Honduras stated that the treaty of 1902 had been declared to be nonexistent.[10]

§41. The Central American Peace Conference of 1907. In 1906 difficulties between Guatemala and El Salvador, involving also Honduras, led to proposals of settlement by the United States and Mexico, which resulted in a preliminary convention of July 20, 1906, signed on board the U.S.S. *Marblehead*.[11] This was soon followed by the treaty of peace of September 25, 1906,[12] which, like the preliminary convention, envisaged arbitration by the Presidents of the United States and Mexico.[13] On

[4] The text is published in 31 Martens, *Nouveau recueil général* (2d ser.), p. 243; W. R. Manning, Arbitration Treaties among the American Nations, p. 303; U. S. Foreign Relations, 1902, p. 881.

[5] Information as to ratification by Nicaragua is lacking; but an arbitrator was named by Nicaragua to sit in the tribunal.

[6] Minutes of Central American Peace Conference, 1907, Appendix 1, pp. 7–10. For the text of the *Acta de Instalación* and the *Reglamento*, see Descamps and Renault, *Recueil International des Traités*, 1902, pp. 165, 166; Costa Rica, *Memoria de Relaciones Exteriores*, 1903, pp. 5–13.

[7] U. S. Foreign Relations, 1907, II, p. 608; Costa Rica, *Memoria de Relaciones Exteriores*, 1907, pp. 58–63; Moreno, *op. cit.*, p. 159.

[8] U. S. Foreign Relations, 1904, p. 351.

[9] U. S. Foreign Relations, 1906, I, p. 857; 3 Tejada, *Tratados de Guatemala*, p. 391.

[10] U. S. Foreign Relations, 1907, II, p. 617. See also Costa Rica, *Memoria de Relaciones Exteriores*, 1907, pp. 71–73.

[11] U. S. Foreign Relations, 1906, I, p. 851; Descamps and Renault, *Recueil International des Traités*, 1906, p. 742.

[12] 3 Tejada, *Tratados de Guatemala*, p. 391; U. S. Foreign Relations, 1906, I, p. 857.

[13] In 1907, various proposals were made for arbitration between Honduras and Nicaragua to be conducted by the two heads of states. This seems to have been thought by Nicaragua to be inconsistent with the Treaty of Corinto. U. S. Foreign Relations, 1907, II, p. 608.

September 25, 1906, also, a convention was signed setting up a Central American International Bureau.[14] Difficulties which arose between Honduras and Nicaragua in 1907 led the United States and Mexico to propose a conference at Washington;[15] preceding this conference, a peace protocol was signed by representatives of the five States at Washington on September 17, 1907.[16] Representatives of the five States were present at the conference which was held from November 14 to December 20, 1907;[17] delegates of the United States and Mexico also attended the conference, but they did not actively participate in its deliberations. A proposal to revive the union of Central American States created a sharp division, being favored only by the delegations of Honduras and Nicaragua. A project for an arbitral court of justice was presented by the delegation of El Salvador.[18] Nine instruments were signed on December 20, 1907: a general treaty of peace and amity with an additional convention, a convention establishing the Central American Court of Justice with an additional protocol, an extradition convention, two conventions establishing an International Central American Bureau and a pedagogical institute, a convention concerning future Central American Conferences, and a convention concerning railway communications.[19]

§42. Influence of the Peace Conferences at The Hague. The Central American Peace Conference of 1907 assembled but a few weeks after the adjournment of the Second Peace Conference at The Hague, and its consideration of the problem of a permanent tribunal was influenced in some measure by the latter's revision of the Convention on Pacific Settlement of International Disputes, and by its project for the creation of a Permanent Court of Arbitral Justice.[20] The influence seems to have been confined to a stimulus to action, however, for few ideas were borrowed from the work of the Second Peace Conference. During the year 1907, Guatemala, Nicaragua and El Salvador had adhered to the 1899 Hague

[14] U. S. Foreign Relations, 1906, I, p. 863; Descamps and Renault, *op. cit.*, 1906, p. 757.

[15] U. S. Foreign Relations, 1907, II, p. 644.

[16] *Ibid.* Meetings of a preliminary conference were held in Washington on September 11 and 16, 1917; the minutes are included in the Minutes of the Central American Peace Conference, 1907, pp. 5–11.

[17] Preparatory meetings were held on November 12 and 13.

[18] Minutes, pp. 38, 58–66, 127; *Conferencia Centroamericana de Washington* (Managua, 1908), p. xii.

[19] The texts of these instruments are to be found in U. S. Foreign Relations, 1907, II, pp. 692–711, and in 2 American Journal of International Law (Supp., 1908), pp. 219–265. Following the Conference of 1907, six Central American Conferences were held from 1909 to 1914, dealing primarily with economic and fiscal matters. Rodríguez Cerna, *Nuestro Derecho Internacional* (1938), pp. 136–147.

[20] Luis Anderson, "Peace Conference of Central America," 2 American Journal of International Law (1908), p. 144.

Convention on Pacific Settlement of International Disputes, and the same States later signed and ratified or adhered to the 1907 Convention; yet the scheme of tribunals which might be organized in the Permanent Court of Arbitration does not seem to have been taken into account by the Conference held at Washington in 1907.[21]

§43. Instruments Relating to the Central American Court of Justice. By Article 1 of the general treaty of peace and amity of 1907, the five States bound themselves always to "observe the most complete harmony, and decide every difference or difficulty that may arise amongst them, of whatsoever nature it may be, by means of the Central American Court of Justice, created by the Convention which they have concluded for that purpose on this date." The Convention for the establishment of the court contained 28 articles and a provisional article to which was annexed an article relating to the court's jurisdiction, "in order that the Legislatures may, if they see fit, include it in this Convention upon ratifying it";[22] the Convention was also supplemented by an additional protocol, correcting the text of Article 3. It was to remain in force during a period of ten years, counted from the date of the latest ratification; the ratifications were to be exchanged by means of communications addressed to the Government of Costa Rica, which was to notify the other contracting States. The Convention was ratified by Nicaragua, February 15, 1908;[23] by Costa Rica, February 28, 1908;[24] by El Salvador and Honduras,[25] March 4, 1908;[26] and by Guatemala, March 12, 1908.[27] These ratifications were duly notified to Costa Rica in accordance with the provision in the Convention.[28] All the States, except Costa Rica, included the annexed article in the Convention as ratified.[29]

[21] The Conference was also influenced to some extent by the Inter-American treaty of January 30, 1902, concerning pecuniary claims, the text of which was published in the Minutes of the Central American Peace Conference, 1907, Appendix 1, p. 11.

[22] The minutes of the Conference state that the annexed article "was approved in the form of a recommendation," on December 13, 1907. Minutes, p. 70.

[23] *Convenciones Internacionales de Nicaragua* (1913), pp. 146, 182.

[24] *Coleccion de las leyes y decretos, Republica de Costa Rica*, 1908, *primer semestre*, pp. 92, 129.

[25] 1 Ramirez, *Pactos Internacionales de El Salvador* (1910), p. 114.

[26] 1 *Tratados Vigentes de Honduras* (1913), pp. 19, 32.

[27] 27 *Recopilación de las Leyes de Guatemala*, 1908–1909, pp. 349, 372.

[28] 1 Ramirez, *op. cit.*, pp. 114–122.

[29] It is not clear whether five ratifications of the annexed article were required to give it force. Both the provisional and the annexed articles are included in the text of the convention published in 1 *Tratados Vigentes de Honduras* (1913), p. 29; in *Convenciones Internacionales de Nicaragua* (1913), p. 155, and in 1 Ramirez, *Pactos Internacionales de El Salvador* (1910), p. 92. The two articles are expressly included in Decree No. 749 of Guatemala, March 11, 1908. 27 *Recopilación de las Leyes de Guatemala*, 1910, p. 349. On the other hand, on March 25, 1908, Costa Rica in giving notice of its ratification of the Convention stated that the annexed article was not ratified. Costa Rica, *Memoria de Relaciones Exteriores*, 1908, p. 55.

§44. Composition of the Central American Court of Justice. By Article 6 of the Convention of December 20, 1907, the court was to consist of five justices (*magistrados*), one of whom was to be appointed by the Legislative Power of each of the five Republics; two substitute justices were to be appointed at the same time by the same authority in each Republic. All appointments were to be for five years. Only jurists were to be appointed who possessed the qualifications which the laws of each country prescribed for the exercise of high judicial office, and who enjoyed the "highest consideration, both because of their moral character and their professional ability." The practice of his profession, or the holding of a public office, was declared to be incompatible with the office of a justice (Article 11). As the court represented "the national conscience of Central America," a justice might sit in a case in which the State appointing him was a party. Attendance of all five justices was required for a quorum of the court. A president and a vice-president were to be elected (Article 12) at the first annual session; the regulations (Article 53) provided for the annual election of these officers. The court was to organize the personnel of its office by designating a clerk, a treasurer, and the necessary subordinate employees. A single officer, called secretary-treasurer, served from 1908 to 1914, and his successor served from 1914 until the closing of the court; the other officials consisted of a chief clerk (*official mayor*), a first and a second clerk, a bookkeeper and an archivist.

During the first five-year period, the justices were as follows: *Costa Rica*, José Astúa Aguilar; *Guatemala*, Angel María Bocanegra; *Honduras*, Carlos Alberto Uclés; *Nicaragua*, José Madriz, succeeded in 1910 by Francisco Paniagua Prado who was succeeded in 1911 by Daniel Gutiérrez Navas; *El Salvador*, Salvador Gallegos, succeeded in 1909 by Manuel I. Morales. During the second five-year period, the justices were: *Costa Rica*, Nicolás Oreamuno;[30] *Guatemala*, Angel María Bocanegra; *Honduras*, Saturnino Medal; *Nicaragua*, Daniel Gutiérrez Navas; *El Salvador*, Manuel Castro Ramirez. Of the eleven men who held the office of justice during the ten years, only one continued in office for the whole period.

Unfortunately, the justices of the court seem to have been looked upon not as international officials of all five States, but as officials of their respective States. This was an inevitable consequence of the provisions of the Convention of 1907, which established no method for a cooperative

[30] Apparently, Marciano Acosta, substitute justice, was sitting as Costa Rican judge at the time of the closing of the court. 46 Pan American Union Bulletin (1918), p. 540.

election of the justices. Their appointment by each State gave them a representative character, and they were required by the Convention (Article 9) to "take oath or affirmation prescribed by law before the authority that may have appointed them." A further circumstance giving the justices a national character was that some of them seem to have received their salaries directly from the States appointing them.

§45. Salaries and Expenses. The salaries of the justices appointed by States other than that in which the court had its seat, were fixed by the Convention (Article 7) at $8,000 (*pesos en oro americano*) annually; the salary of the justice appointed by the State in which the court had its seat was to be fixed by the government of that State. The provision (in Article 7) is not clear, but the inference is that each State was to bear the salary of the justice which it had appointed, though payment was to be effected through the treasury of the court. No provision seems to have been made for the payment of the justices' travelling expenses.[31] Each of the five States was to pay $2,000 (*pesos oro*) annually toward the ordinary and extraordinary expenses of the court; and each State bound itself to remit its contribution to the treasurer of the court, quarterly in advance. The published accounts are somewhat incomplete,[32] but they indicate that some payments were made to the justices directly by their governments, and that considerable arrears in payments existed at various times.

§46. Seat of the Central American Court of Justice. The 1907 Convention provided (Article 5) that the court should sit in Cartago, Costa Rica, but that it might temporarily sit elsewhere. At the beginning, the Government of Costa Rica placed a building at the court's disposition; but at its inaugural session announcement was made of a gift of $100,000 by Andrew Carnegie, to provide a permanent home for the court. This gift was partly used for a building which was not yet completed when it was destroyed by earthquake in 1910; the headquarters of the court were at once transferred to San José, where all later meetings were held. A Convention was signed at Guatemala City, January 10, 1911, amending Article 5 of the 1907 Convention, to provide for the removal of the seat of the court to San José.[33] An unsuccessful effort was made by the

[31] Article 9 of the Rules of Court provided for the payment by the court of travelling expenses of substitutes.

[32] 3 *Anales de la Corte de Justicia Centroamericana*, p. 14; 4 *idem*, Nos. 11–13, p. 43; 5 *idem*, pp. 109–110; 7 *idem*, p. 16. See also Costa Rica, *Memoria de Relaciones Exteriores*, 1913, pp. 48–53; 1917, pp. 83–86.

[33] For the text of the Convention, see U. S. Foreign Relations, 1911, p. 93; 1 *Tratados Vigentes de Honduras* (1913), p. 431. It was ratified by Costa Rica, January 30, 1911; Guatemala, April 28, 1911; El Salvador, March 24, 1911; Nicaragua, December 20, 1911; and Honduras, March 19, 1912.

municipality of Cartago to secure the return of the court to that city.[34] On May 22, 1911, Andrew Carnegie made a second gift of $100,000 for a building for the court at San José, to be erected under the supervision of the Government of Costa Rica; the construction of this building was completed late in 1917.[35] When the court ceased to exist, in March, 1918, the possession of the building (*Casa Amarilla*) was handed over to the Costa Rican Government, and it now houses the Costa Rican Ministry of Foreign Affairs.

§47. Sessions of the Court. The inaugural session of the court was opened with ceremony on May 25, 1908,[36] and this became the date for beginning the sessions of the succeeding years. The earthquake in Costa Rica on May 3, 1910, prevented a formal session of the court from that time until June, 1911; except for that interim, the court seems to have remained in more or less continuous session, but the records available are so incomplete that information is lacking as to the number of meetings actually held. Article 49 of the rules adopted on December 2, 1911, provided that "the sessions of the Court shall be secret, except as otherwise decided";[37] Articles 43 and 44 of the rules required full records to be kept, and to be signed by all the justices, but no complete *procès-verbaux* were published in the *Anales*.[38]

§48. Status of the Justices. The Convention of 1907 provided (Article 10) that "whilst they remain in the country of their appointment the regular and substitute justices shall enjoy the personal immunity which the respective laws grant to the magistrates of the Supreme Court of Justice, and in the other contracting Republics they shall have the privileges and immunities of diplomatic agents." This was slightly expanded, as to the use of shields and flags, by Article 33 of the rules. On September 21, 1908, El Salvador recognized the status of the justices and of the substitutes to be that of ministers of the first class, assigning to the secretary of the court the status of a *chargé d'affaires;*[39] but the status of the justices was chiefly important in Costa Rica where the seat of the Court was located. In 1913, and again in 1916, Costa Rica proposed

[34] Costa Rica, *Memoria de Relaciones Exteriores*, 1915, p. xvii.

[35] "New Palace of the Central American Court of Justice," 44 Pan American Union Bulletin (1917), pp. 734–739.

[36] Representatives of the United States and Mexico participated in the inaugural ceremony.

[37] For the text of the 1911 rules, see 1 *Anales*, p. 350; 8 American Journal of International Law (Supp., 1914), p. 190.

[38] Though official, the *Anales* became a review of propagandist tendency rather than a record of judicial activity.

[39] 3 *Anales*, p. 10.

to the other States a permanent arrangement by which the justices would be given the status of diplomatic agents of the first class;[40] but this proposal was viewed by other States as tending to place the justices in the position of political representatives. In 1917, in proposing amendments to the Convention of 1907, the permanent commission of the court suggested a clarification of Article 10 of the Convention "to avoid the difficulties which have arisen in practice."[41] At no time were the privileges and immunities of the justices clearly defined.[42]

§49. Jurisdiction of the Court. By Article 1 of the Convention of 1907, the five States bound themselves to submit to the court "all controversies or questions which may arise among them, of whatsoever nature and no matter what their origin may be, in case the respective Departments of Foreign Affairs should not have been able to reach an understanding." The court was also given jurisdiction over cases between a government and an individual who was a national of another State, either if they were cases of an international character, or if they concerned alleged violations of a treaty or convention; in such cases, it was not necessary that the individual's claim be supported by his own government, but it was essential in a claim against a government that local remedies should have been exhausted or that a denial of justice should be shown. "By common accord" any case between a contracting government and an individual might be submitted to the court. The court might also take jurisdiction over international questions submitted to it by special agreement between one of the Central American States and a State outside of Central America, but no such question was ever submitted. The rules of court adopted on December 2, 1911, distinguished between the ordinary and the extraordinary or compromissory jurisdiction of the court. By Article 22 of the Convention, the court was also given competence to determine its own jurisdiction, "interpreting the Treaties and Conventions germane to the matter in dispute, and applying the principles of international law."[43] By the annexed article, included in the Convention as ratified by all of the States except Costa Rica, the court was given jurisdiction over conflicts between the legislative, executive and judicial branches of a government "when as a matter of fact the

[40] *Ibid.*, p. 11; 5 *idem*, p. 104. [41] 7 *idem*, p. 37.

[42] *Cf.*, S. Basdevant, *Les fonctionnaires internationaux* (1931); J. Secretan, *Les immunités diplomatiques des représentants des États Membres et des agents de la Société des Nations* (1928). *Cf.*, §370, *infra*.

[43] This provision was obviously taken from Article 48 of the 1899 Hague Convention on Pacific Settlement of International Disputes. See Minutes of the Central American Peace Conference, 1907, p. 65.

judicial decisions and resolutions of the National Congress are not respected"; in such cases Article 4 of the ordinance of procedure required the court to be guided by "the public law of the respective State." Article 18 of the Convention gave the court power to issue interim orders in any pending case "to the end that the difficulty shall not be aggravated and that things shall be conserved *in statu quo* pending a final decision"; this power was exercised on several occasions.

§50. Rules of Court. Article 26 of the Convention conferred on the court power to formulate rules of procedure and to determine the form and terms (*plazos*) not prescribed by the Convention, its decisions being communicated to the States. Consideration of the court's *reglamento* seems to have been begun on June 17, 1908,[44] but the rules were not adopted until December 2, 1911.[45] It is difficult to account for this delay.[46] The rules adopted go beyond the terms of the Convention in many particulars; the most significant departure was made in Article 4 in the provision that "whenever for any reason the Court shall disintegrate," that is, lack the quorum of five judges required by Article 6 of the Convention, "the judges present shall be constituted into a permanent commission" for the purpose of securing a quorum, attending to correspondence and directing the administration. The rules made liberal provision for the challenging of judges (Article 25); laid down strict standards of incompatibility (Article 38); and outlined the general organization of the court.

§51. Ordinance of Procedure. The ordinance of procedure adopted on November 6, 1912,[47] in exercise of the power conferred on the court by Articles 13 and 26 of the Convention, deals with numerous questions also covered by the rules of December 2, 1911. It gives detailed prescriptions for the procedure to be followed before and by the court. It provides (Article 35) for three kinds of judicial resolutions: decisions (*sentencias*), decrees (*autos*), and orders (*providencias*). Each action (*demanda*) had to be declared admissible before notification to the defendant, which was then to be given thirty or sixty days for filing its answer; this period could be prolonged by twenty days. In arriving at a decision, the justices were to vote on interrogatories framed by the President, and detailed

[44] 3 *Anales*, p. 7.

[45] 1 *idem*, pp. 339–353. An English translation of the rules is published in 8 American Journal of International Law (Supp., 1914), pp. 179–94.

[46] See the note in 1 *Anales*, p. 382; 3 *idem*, p. 7.

[47] 2 *Anales*, pp. 193–210. An English translation of the ordinance is published in 8 American Journal of International Law (Supp., 1914), pp. 194–213.

requirements were laid down (Article 81) as to the record of the votes. Each judicial resolution required a majority of the votes; in case no majority was possible, Article 23 of the Convention provided for calling in a substitute justice. The ordinance dealt at length with the challenge of judges, Article 15 envisaging a challenge of all members of the tribunal, for which a special deposit of $1,000 was required; and it prescribed in detail the manner in which evidence should be presented.

§52. Decisions. The court's decisions were required by the Convention (Article 24) to be in writing, with a statement of reasons; this was supplemented by the requirement of a special *libro de fallos*, in Article 39 of the ordinance of procedure. Every final or interlocutory decision required the concurrence of at least three justices, though if such concurrence could not otherwise be attained, the substitute justices were to be called in. The Convention required the decisions to be signed by all the justices of the court; but when the first decision was about to be given by the court, two of the justices refused to sign it. In most of the decisions, the *acts* of the court are set forth, showing the questions put and the votes of each of the justices on each question. The decisions were not published in any uniform style; some of the later decisions appear in the *Anales*. Article 15 of the Convention provided that the decisions of the court should be final.[48]

§53. Law Applicable. The Convention provided that on points of fact the court was to be governed by its free judgment; on points of law, by the "principles of international law." The ordinance of procedure of November 6, 1912, provided (Article 72) that the court should consider the facts of a controversy "with absolute freedom of judgment," and the questions of law involved "according to the treaties and the principles of law." In the decisions of the court, there is little to indicate an attempt to formulate any special doctrines of Central American public law, though the views of the court, particularly in *El Salvador* v. *Nicaragua*, were influenced by the tradition of federation in Central America.

§54. The Seating of Justice Gutiérrez Navas. On the elevation of Justice Madriz to the presidency of Nicaragua, Paniagua Prado was

[48] The Guatemalan delegation at the Conference of 1907 was desirous of making it clear that this did not modify the previous agreement in Article 5 of the Convention of July 20, 1906, for reference to arbitration to be conducted by the Presidents of the United States of America and Mexico; a declaration by the Guatemalan delegation was entered in the record of the session of December 14, 1907, by which Guatemala reserved "the right of resort to the good offices and friendly mediation of their Excellencies, the Presidents of the United States of America and Mexico, in the event of any difficulty in the execution of the findings" of the court. Minutes of the Central American Peace Conference, 1907, pp. 61, 72.

elected to fill the vacancy in the court and he took his seat on January 27, 1910.[49] It seems that in September, 1910, a new government in Nicaragua desired to relieve Justice Paniagua Prado, and a telegram signed by four of the justices was sent to the Nicaraguan Ministry of Foreign Affairs insisting upon a strict adherence to the Convention of 1907.[50] Arrears in the payment of his salary by Nicaragua caused Justice Paniagua Prado to return home. On January 13, 1911, the Provisional Assembly in Nicaragua elected Gutiérrez Navas as justice; its action was later confirmed by the Constitutional Assembly, and Gutiérrez Navas took the oath as a justice of the court. Upon his appearance at San José, the question arose whether his election was valid; on June 22, 1911, three justices ruled that his credentials were in proper order, Justice Uclés dissenting.[51] A storm of public protest followed, as indicated by letters published at the time.[52] In the case of *Salvador Cerda* v. *Costa Rica*, the incumbency of Justice Gutiérrez Navas was unsuccessfully challenged.[53] He continued to serve until the end of the first five-year period, and was reelected in 1913 for a second period of five years; he was at one time president and on several occasions vice-president of the court.

§55. Cases before the Court. Five cases came before the court in each of its periods of five years. Of the ten cases, five were brought by individuals, and in each of them the plaintiff's case was declared to be inadmissible. In three cases the court itself took the initiative. In only two cases was an affirmative judgment rendered.

(1) *Honduras and Nicaragua* v. *Guatemala and El Salvador*. This case first came before the court as a result of its own initiative.[54] Having been advised, "through the instrumentality of the President of Costa Rica," of events indicating an invasion of Honduras and of a protest by Nicaragua to El Salvador which had invested these events "with an international character," the court felt itself "bound by its high mission to exhaust the resources of its friendly and well-intentioned intervention for the maintenance of peace and harmony." On July 8, 1908, telegrams were

[49] 1 *Anales*, p. 67.

[50] These facts are recorded in *Protesta del Doctor Francisco Paniagua Prado, Magistrado de la Corte de Justicia Centroamericana* (Nicaragua, 1911), p. 5. This protest was addressed to the court from León de Nicaragua, June 14, 1911.

[51] Article 12 of the rules adopted on December 2, 1911, provided that the appointment of justices was an "act of exclusive responsibility of the State" making the appointment.

[52] 1 *Anales*, pp. 12–123; 2 *idem*, pp. 55–7, 179–82.

[53] 1 *idem*, pp. 201–208.

[54] But see the telegrams published in Costa Rica, *Memoria de Relaciones Exteriores*, 1909, pp. vii–xi.

despatched to the Presidents of Guatemala, El Salvador, Honduras, and Nicaragua, urging a resort to the court; and in a telegram to the President of Costa Rica, the use of his good offices was urged to the end that the conflict be brought before the court.[55] Complaints were subsequently lodged with the court by Honduras and Nicaragua against Guatemala and El Salvador, alleging that protection and encouragement had been given to a revolutionary movement in Honduras, claiming a violation of neutrality, and asking for interim protection. Two interlocutory decrees were issued by the court on July 13, 1908, calling upon Guatemala and El Salvador to refrain from military action and to take other measures and calling upon Guatemala, El Salvador, and Nicaragua to maintain the *status quo* and to safeguard their neutrality with respect to the conflict in Honduras.[56] The final conclusions and decision (*sentencia*) on the complaint by Honduras were handed down on December 19, 1908;[57] as the decision was signed by only three of the justices, it would seem to have lacked validity as a decision under Article 24 of the 1907 Convention. Guatemala had entered a plea of inadmissibility on the ground that no negotiations between the parties had been conducted prior to Honduras' filing a complaint, and hence that the court lacked jurisdiction under Article 1 of the 1907 Convention;[58] this plea was rejected. After an examination of the evidence submitted, the three justices held that El Salvador and Guatemala were "acquitted of the charges" and under no liability for damages. A dissenting opinion by Justice Madriz (Nicaragua), dated December 28, 1908, was later published privately.[59] One commentator on the case asserted soon afterward that "the Court performed its delicate mission under trying circumstances," and that its intervention had "prevented the outbreak of war in Central America";[60]

[55] The telegrams are reproduced in the Court's decision. See also 2 American Journal of International Law (1908), p. 836.

[56] 2 American Journal of International Law (1908), p. 838. Nicaragua's position in the case is somewhat equivocal.

[57] Published by the court (183 pages), at San José in 1908; also in *Libro Rosado de El Salvador* (1908). For English translations, see 3 American Journal of International Law (1909), pp. 434–436, 729–736. See also Castro Ramírez, *Cinco años en la Corte de Justicia Centroamericana* (1918), p. 31.

[58] *Defensa por el señor representante y abogado de Guatemala con motivo de la demanda del Gobierno de Honduras contra los de El Salvador y Guatemala* (Guatemala, 1908).

[59] *Voto del Magistrado por Nicaragua en la Corte de Justicia Centroamericana* (San José, 1908). Justice Bocanegra (Guatemala) also gave a separate explanation of his vote. 5 Martens, *Nouveau recueil général* (3d ser.), p. 358.

[60] James Brown Scott, in 3 American Journal of International Law (1909), p. 436. See also, Joseph Wheless, "The Central American Court of Justice," 21 Case and Comment (1914), p. 551; Gordon Ireland, Boundaries, Possessions and Conflicts in Central and North America (1941), pp. 152–4.

another commentator declared that the case constituted a victory of arbitration over diplomacy.[61]

(2) *Diaz* v. *Guatemala*. On December 3, 1908, Pedro Andrés Fornos Diaz, a national of Nicaragua, filed a complaint against Guatemala alleging false arrest, imprisonment and expulsion, and asking for an indemnity. Deliberations of the court were held on January 13 and 16 and on February 3 and 10, 1909; on the last date Justices Astúa Aguilar (Costa Rica), Bocanegra (Guatemala), and Martínez Suárez (El Salvador) voted against, and Justices Uclés (Honduras) and Madriz (Nicaragua) voted for admitting the complaint. Before the decision was given, the plaintiff unsuccessfully challenged one of the justices, alleging that he had furnished a copy of the plaintiff's complaint to a representative of Guatemala; under the practice, the complaint was to be communicated to the defendant only after it was declared to be admissible. In its resolution of March 6, 1909, the court held the complaint inadmissible because of lack of jurisdiction;[62] hence no appearance was entered on behalf of Guatemala. Though the personal security of the plaintiff while in Guatemala was "under the protection of the principles governing the Commonwealth of Nations, as international rights of man," he had not exhausted his local remedies, and this was a condition of the court's jurisdiction. The court refused to admit, by way of substitute, the allegation and proof that it was impossible and useless for the plaintiff to pursue local remedies, on the ground that this would constitute a defamation of Guatemala; *travaux préparatoires* were resorted to, indicating that such an exception had been rejected when the Convention of 1907 was being drafted. All five of the justices signed the resolution, though two of them had voted for the admissibility of the complaint.

(3) *The 1910 Revolution in Nicaragua*.[63] On April 11, 1910, Justice Paniagua Prado (Nicaragua) suggested that the court offer to mediate in the Estrada revolution which had been in progress in Nicaragua since the previous October. On April 27, 1910, telegrams were sent by the court to the leaders of the contending parties in Nicaragua, proposing an armistice for eight days to enable the court to mediate; copies of these telegrams were sent to the other Central American States.[64] The proposal

[61] J. Basdevant, "*Premier litige porté devant la Cour Centre-Américaine*," 16 *Revue générale de droit international public* (1909), pp. 99–107.

[62] *Resolución dictada en la demanda del Dr. don Pedro Andrés Fornos Diaz contra el Gobierno de la República de Guatemala* (San José, 1909). For an English translation, see 3 American Journal of International Law (1909), pp. 737–747. See also Castro Ramírez, *op. cit.*, pp. 38–41.

[63] 1 *Anales*, pp. 146–164.

[64] This action of the court was warmly approved by the Secretary of State of the United States. U. S. Foreign Relations, 1910, p. 744; 1 *Anales*, p. 149.

of the court was declined by the Nicaraguan leaders. The earthquake of May 3, 1910 made it more difficult for the court to continue its activity, but after its removal to San José, a "permanent commission" was constituted to deal with the matter, consisting first of two and later of four justices and the secretary. Offers of mediation were repeated and declined; on June 27, 1910, the President of the court communicated to the Nicaraguan leaders a draft of bases for the settlement of the dispute, but the draft was not accepted.

(4) *Cerda* v. *Costa Rica*.[65] On September 27, 1911, Salvador Cerda, a national of Nicaragua living in Costa Rica, filed a complaint against Costa Rica, alleging a denial of the equal rights guaranteed to all Central Americans by the Treaty of Washington and of the rights given to him by the Constitution of Costa Rica. The plaintiff challenged the legality of Justice Gutiérrez Navas' (Nicaragua) incumbency on the court. In its resolution of October 14, 1911, the court denied the capacity of the plaintiff to challenge a judge, declaring that "only the Governments signatories of the Convention establishing the Court have the right to raise questions as to the legality of its organization." As the plaintiff had not proved his Nicaraguan nationality, or the deprivation of rights complained of, and had not exhausted local remedies in Costa Rica, his demand was rejected. Justice Uclés (Honduras) wrote a dissenting opinion, dealing chiefly with the challenge. There is no indication that the Government of Costa Rica was represented in this case.

(5) *The 1912 Revolution in Nicaragua*.[66] On August 5, 1912, the court took cognizance of the existence of a new revolution in Nicaragua, and it decided to set up a commission to visit Nicaragua and to offer mediation if it seemed wise. This commission, later called a Peace Commission, consisted of the Costa Rican, Salvadoran and Honduran justices, with the secretary. On August 9 the commission left for Nicaragua, where it remained until September 3. Having received no replies to its telegrams addressed to President Diaz, the commission conferred with General Mena and General Zeledón, leaders of the rebelling forces. General Mena was disposed to accept its proposal of an armistice, and desired the members of the commission to represent him at Managua; General Zeledón was also willing to accept the arrangements for an armistice suggested by the commission. In Managua, the commission was received by President Diaz and his Minister of Foreign Affairs "with irreproachable courtesy," but its proposal of a five-day truce and of a

[65] 1 *Anales*, pp. 199–214, 357–60.

[66] 2 *Anales*, pp. 129–150.

conference to consider bases of peace was rejected without discussion. In its report to the Court on October 6, 1912, the commission charged the Government of Nicaragua with ignoring its efforts to secure peace. Costa Rica, Honduras, El Salvador, and the International Central American Bureau congratulated the court on the efforts of the commission.[67] The Government of El Salvador urged the court to take a firm stand in favor of peace, but did not institute a proceeding before the court; on October 27, 1912, the court replied that it considered further action useless, and the matter was closed.

(6) *Molina Larios* v. *Honduras*.[68] On November 28, 1913, Felipe Molina Larios, a national of Nicaragua, filed a claim for imprisonment, illegal search and expulsion against Honduras, alleging that on his arrival at Tela by boat from Costa Rica, he had been arrested by order of the commandant of the port and held *incomunicado* for five days, that his luggage and correspondence had been examined, and that he had later been expelled from Honduras by order of the President. The plaintiff attributed his failure to exhaust local remedies to his inability to re-enter Honduras. The court gave its decision (*sentencia*) on December 10, 1913, declaring the case inadmissible because of the failure to exhaust local remedies. This decision, signed by the five justices, was concurred in by the justices of Nicaragua, Honduras and Guatemala. On December 17, 1913, the justices of El Salvador and Costa Rica filed a joint dissenting opinion declaring that Article 2 of the 1907 Convention [69] should be interpreted *con criterio humano*, in the sense that it must have been possible to invoke the local remedies against such deprivation as the plaintiff alleged; the plaintiff having shown that access to the courts of Honduras had not been open to him, the dissenting justices were of the opinion that the case was within the jurisdiction of the court.[70] Honduras does not seem to have been represented before the court.

(7) *Bermúdez y Núñez* v. *Costa Rica*.[71] On December 12, 1913, Alejandro Bermúdez y Núñez, a Nicaraguan national, filed a claim with the court alleging his expulsion by Costa Rica. The plaintiff had left Costa Rica, and on his return he was allowed to remain there only fifteen days; *habeas corpus* having been denied, the plaintiff claimed that

[67] *Anales*, pp. 185–192.
[68] 3 *Anales*, pp. 26–67.
[69] Article 2 of the convention of 1907 gives the court jurisdiction in cases brought by individuals, "provided that the remedies which the laws of the respective country provide against such violation shall have been exhausted or that denial of justice shall have been shown."
[70] See also Castro Ramírez, *op. cit.*, p. 61.
[71] 4 *Anales*, Nos. 9–11, pp. 1–119; Castro Ramírez, *op. cit.*, pp. 82–106.

the decrees concerning refugees invoked against him applied only to foreigners and not to Central Americans who were given equal rights with Costa Rican citizens by Article 6 of the General Treaty of Peace and Amity signed at Washington in 1907. The plaintiff asked to have his right to return to Costa Rica declared, but did not ask for damages. The representative of Costa Rica who appeared before the court renounced the exception of inadmissibility under Article 2 of the Convention of 1907, concerning the exhaustion of local remedies; Costa Rica based its defence on the fundamental right of a State to deny asylum to aliens who constitute a menace or danger to society, and to prevent any conspiracy or expedition directed against the government of a neighboring State with which it is at peace. The decision (*sentencia*) of the court, handed down on April 7, 1914,[72] declared that the claim was without foundation, that residents in a country are under obligation to respect its neutrality, and that the Costa Rican decree of expulsion was legal in view of the fact manifest in the complaint itself that the plaintiff had been taking part in a revolution against the Government of Nicaragua. Dissenting opinions were filed by Justices Castro Ramírez (El Salvador) and Medal (Honduras), who thought that the plaintiff had been deprived of the rights assured to him by the provisions of the General Treaty of Peace and Amity of 1907.

(8) *Election of González Flores as President of Costa Rica.*[73] On May 7, 1914, five individuals, nationals respectively of the five Central American States, by cablegram from Guatemala City, lodged with the court a protest against the election by the Costa Rican Congress of Alfredo González Flores as President of Costa Rica. The court was asked to declare the election void as contrary to the Constitution of Costa Rica, to order a new election in conformity with the Constitution, and to declare that President Jiménez should continue until the election of his successor. The court did not take cognizance of this request, since it was not presented in proper form; on June 20, 1914, another request in the prescribed form was sent to the court from San José, signed by the Guatemalan and Salvadoran nationals in the name of the same group. On July 3, 1914, the court handed down a unanimous decision (*sentencia*) declaring the protest to be inadmissible because it sought intervention in the internal affairs of Costa Rica and did not present a case of an international character. The action of nullifying an election was said to

[72] 4 *Anales*, Nos. 9–11, p. 84.
[73] 4 *Anales*, Nos. 11–13, pp. 1–12. See also Castro Ramírez, *op. cit.*, pp. 106–110.

be a political one, and as such not within the competence of the court; this was particularly true as to Costa Rica, since that State had not accepted the annexed article of the 1907 Convention which gave the court jurisdiction over conflicts between the different branches of a government.

(9) *Costa Rica* v. *Nicaragua*.[74] On March 24, 1916, Costa Rica instituted a proceeding against Nicaragua seeking a declaration by the court that Costa Rica's rights were violated by a Convention between Nicaragua and the United States of America of August 5, 1914, relating to an interoceanic canal, the so-called Bryan-Chamorro Convention.[75] The complaint dealt at length with Costa Rica's protests, both against an earlier convention of February 8, 1913 and against the convention of August 5, 1914 which superseded it Costa Rica contended that its perpetual rights of free navigation on the San Juan River derived from Article 6 of the Cañas-Jerez Treaty of April 15, 1858 [76] would be jeopardized by the Bryan-Chamorro Convention. Costa Rica also alleged a violation of Article 8 of the same treaty, to which a broad interpretation had been given by the Cleveland award of March 28, 1888,[77] and by which Nicaragua had agreed not to conclude new agreements for canalization or transit without first hearing the opinion of the Costa Rican Government; Article 8 stipulated that if no injury to the natural rights of Costa Rica should be involved, its opinion was to be advisory. Costa Rica also claimed a violation of Article 9 of the General Treaty of Peace and Amity of 1907, which provided that merchant ships of each State should be considered upon the sea, along the coast and in the ports of all the Central American States as national vessels enjoying the same privileges as the latter. The court was asked to say that in view of the treaty relations of the parties Nicaragua lacked capacity to enter into the Bryan-Chamorro Convention, and that this Convention was therefore void. Costa Rica requested that both Nicaragua and the United States be notified of the action,[78] and that pending a final decision an interim decree be issued for the maintenance of the *status quo ante*.

[74] 5 *Anales*, pp. 87–103, 122–228; Costa Rica, *Memoria de Relaciones Exteriores* (1916), pp. 63–137; U. S. Foreign Relations, 1916, pp. 841–845.

[75] For the text of the Convention, see 9 Martens, *Nouveau recueil général* (3d ser.), p. 350; U. S. Treaty Series, No. 624.

[76] Costa Rica, *Colección de Tratados* (1907), p. 159; 48 British and Foreign State Papers, p. 1049.

[77] U. S. Foreign Relations, 1888, I, p. 456.

[78] On March 27, 1916, Costa Rica notified the United States directly that the proceeding had been instituted. U. S. Foreign Relations, 1916, p. 837. See also Costa Rica, *Memoria de Relaciones Exteriores* (1916), p. 63.

On April 1, 1916, the Minister of Foreign Affairs of Nicaragua addressed a letter to the secretary of the court, asking that the latter refuse to consider the Costa Rican complaint;[79] this was confirmed by a second communication of April 28, 1916. Justice Gutiérrez Navas being absent, the court lacked a quorum for considering the matter until April 24. On May 1, 1916, it adopted a resolution upholding its jurisdiction, ordering that Nicaragua be notified of the complaint and be given sixty days for filing its answer, and directing that in the interim the parties should maintain the *status quo ante;* but it refused to order a notification to the United States "because that government is not a party to this litigation."[80] Each of the justices filed a separate opinion, and Justice Gutiérrez Navas (Nicaragua) dissented.[81]

The resolution of May 1 did not prevent the exchange of ratifications of the Bryan-Chamorro Convention, which took place on June 22, 1916. On August 25 the court received from the Nicaraguan Minister of Foreign Affairs a communication dated August 1 contesting the jurisdiction of the Court, and declaring that in the event of an adverse decision by the court Nicaragua would not abide by it.[82] Meanwhile, on August 16, the court had granted an extension of twenty days for Nicaragua's reply; this extension was cancelled on August 31, and the case was declared to be ready for hearing. On September 11, the date set for the hearing, arguments were presented by counsel for Costa Rica, but no appearance was made on behalf of Nicaragua. On September 22, fourteen interrogatories drafted by the President were voted on by the justices; the justices were at this time unanimous in upholding the jurisdiction of the court, but on most of the questions submitted Justice Gutiérrez Navas was in a minority of one. These votes served as bases for the judgment (*sentencia*) signed by the five justices and handed down on September 30, 1916.[83] After affirming its jurisdiction the court declared that Nicaragua had violated, to the injury of Costa Rica, the rights assured to the latter by the Cañas-Jerez Treaty of April 15, 1858, by the Cleveland Award of March 22, 1888, and by the General Treaty of Peace and Amity of December 20, 1907; but it explicitly refused to

[79] U. S. Foreign Relations, 1916, p. 843.
[80] 5 *Anales*, pp. 87–89; U. S. Foreign Relations, 1916, p. 841.
[81] 5 *Anales*, pp. 90–103.
[82] *Ibid.*, p. 122.
[83] 5 *Anales*, pp. 130–176. For English translations see U. S. Foreign Relations, 1916, p. 862; 11 American Journal of International Law (1917), p. 181. The latter indicates erroneously (p. 229) that Justice Gutiérrez Navas was not present when the decision was handed down.

make a declaration as to the validity of the Bryan-Chamorro Convention.

In a spirited exchange of communications with the secretary of the court,[84] the Government of Nicaragua repeated its refusal to abide by the decision. In a letter of November 9, 1916, sent to the Governments of Costa Rica, Guatemala, Honduras and El Salvador, the secretary of the court reviewed the whole history of the case; [85] a year later, on November 24, 1917, Nicaragua sent an extended statement of its attitude to the same Governments, continuing to assert that there had been an *excès de pouvoir*.[86]

(10) *El Salvador* v. *Nicaragua*. On August 28, 1916, El Salvador instituted a proceeding against Nicaragua asking that Nicaragua be enjoined from carrying out the obligations which it had assumed with the United States of America in the Bryan-Chamorro Convention of August 5, 1914, and asking for an interim injunction against any disturbance of the *status quo ante*.[87] El Salvador contended that the execution of that Convention would violate its rights of condominium with Honduras and Nicaragua in the Gulf of Fonseca,[88] said to be an "historic bay"; and that by providing for a lease of Great Corn and Little Corn Islands the Convention violated "primordial interests of El Salvador as a Central American State," each Central American State being said to have an interest in a federation which would embrace the whole territory of Central America undismembered by any cession. It was also contended by El Salvador that the Convention violated Article 9 of the General Treaty of Peace and Amity of 1907, as to the admission of merchant ships. Three additions to the original complaint were admitted by the Court, "in obedience to the universal rules of legal procedure." [89] By resolution of September 6, 1916, Justice Gutiérrez Navas dissenting, the court declared that diplomatic negotiations had been exhausted and that the complaint was admissible; it ordered that Nicaragua be notified and allowed sixty days for reply, and directed the two parties to maintain

[84] U. S. Foreign Relations, 1916, pp. 888–890.

[85] *Idem*, p. 893; Costa Rica, *Memoria de Relaciones Exteriores* (1917), p. 58. For the replies, see 6 *Anales*, pp. 1–6.

[86] U. S. Foreign Relations, 1917, p. 1104.

[87] The complaint, dated August 14, 1916, is not published in the *Anales*. An English translation is to be found in U. S. Foreign Relations, 1916, p. 853. A translation was also published in Washington, by Gibson Brothers, in 1917.

[88] This claim led to a protest by Honduras which claimed Fonseca Bay as its territory. Honduras, *Memoria de Relaciones Exteriores*, 1915–16, p. 158; U. S. Foreign Relations, 1916, p. 890.

[89] 6 *Anales*, p. 10. The additions to the complaint were dated August 15, September 30, October 2, 1916.

the *status quo ante* until a final decision should be pronounced.[90] The time-limit for filing a reply was later extended. The answer of Nicaragua, filed on February 6, 1917, denied the jurisdiction of the court on the grounds that a third State was involved and that diplomatic negotiations had not been exhausted with reference to the claim made by El Salvador. Various documents were filed by Nicaragua as evidence. On February 9, 1917, the Court declared the written proceedings to be closed, and fixed February 19 as the date for the hearing; at this hearing oral arguments were presented by counsel for El Salvador and for Nicaragua.[91] On March 2, the justices voted on twenty-four interrogatories framed by the President; while they were unanimous in upholding the jurisdiction of the Court, on most of the questions submitted Justice Gutiérrez Navas was in a minority of one.

The judgment (*sentencia*) of the court, signed by the five justices, was handed down on March 9, 1917;[92] and on March 12, 1917, Justice Gutiérrez Navas (Nicaragua) filed a dissenting opinion.[93] The court overruled Nicaragua's objection to the jurisdiction, declared itself competent to deal with the case, and sustained most of El Salvador's contentions. It held that "by the concession of a naval base in the Gulf of Fonseca, the Bryan-Chamorro Convention of August 5, 1914, menaces the national security of El Salvador and violates her rights of condominium in the said Gulf." It also held that the Convention violated Articles 2 and 9 of the General Treaty of Peace and Amity of December 20, 1907. Under Article 2 of this General Treaty, "every disposition or measure which may tend to alter the constitutional organization" of any State "is to be deemed a menace to the peace" of the five republics; four justices agreed that "the concessions for a naval base in the Gulf of Fonseca and the lease of Great Corn Island and Little Corn Island" constituted a violation of Article 2, for "under the principles of public law there is an alteration of constitutional order—in perhaps its most serious and transcendental form—when a State supplants, in all or part of the national territory, its own sovereignty by that of a foreign country." The court concluded that "the Government of Nicaragua is under the obligation—availing itself of all possible means provided by international law—to re-establish and maintain the legal status that existed prior to the Bryan-Chamorro Convention."

[90] 5 *Anales*, pp. 229–231; 6 *idem*, pp. 7–9. [91] *Ibid.*, pp. 21–95.
[92] 6 *Anales*, pp. 96–170. For English translations, see 11 American Journal of International Law (1917), p. 674; U. S. Foreign Relations, 1917, p. 1001.
[93] 6 *Anales*, p. 171.

On March 10, 1917, the representative of Nicaragua filed a protest, declaring that as the decision was null and void it would not be respected by Nicaragua; [94] on April 16, 1917, the Nicaraguan Ministry of Foreign Affairs addressed the court in this sense,[95] and the court made a reply to this latter communication on July 14, 1917. On September 20, 1917, it requested the Governments of Costa Rica, Guatemala and Honduras to give their moral support to the end that the decision might be respected by Nicaragua. On November 24, 1917, Nicaragua addressed a note to each of the other States explaining and justifying its attitude.[96]

§56. The Bryan-Chamorro Convention. The Bryan-Chamorro Convention of August 5, 1914, which exercised such a disturbing influence on Central American relations, was the culmination of protracted negotiations in which the United States sought protection for the Panama Canal in view of the possible construction of a second interoceanic canal.[97] On December 1, 1900, identical protocols were signed by the United States and Costa Rica,[98] and by the United States and Nicaragua,[99] envisaging future negotiations concerning a canal across Nicaraguan territory. On February 8, 1913, representatives of the United States and Nicaragua signed a convention (the Chamorro-Weitzel Convention) which provided for a grant by Nicaragua of the rights necessary for the construction of such a canal; [1] about this time the Nicaraguan President seems to have desired the inclusion of a broad provision for intervention by the United States, similar to provisions in the Cuban-American treaty of 1903,[2] but the text which had been signed did not include such provisions, and the proposal to add them led the United States Senate to withhold its assent. The 1913 Convention was therefore superseded

[94] 6 *Anales*, p. 199. [95] 7 *idem*, p. 18.

[96] U. S. Foreign Relations, 1917, p. 1104.

[97] "Six different treaties were negotiated during the 19th century between the United States and Nicaragua regarding an interoceanic canal." The United States and Nicaragua, A Survey of the Relations from 1909 to 1932, Department of State Latin American Series, No. 6 (1932), p. 29n.

[98] 1 U. S. Treaties and Conventions, p. 351. In 1916 the Costa Rican Minister in Washington disputed the validity of this protocol. U. S. Foreign Relations, 1916, pp. 838–840, 846–849.

[99] 2 U. S. Treaties and Conventions, p. 1290. Mr. Chandler P. Anderson expressed the view that neither of these protocols entered into force. Anderson, The Disturbing Influence in Central America of the Nicaraguan Canal Treaty with the United States of America (Washington, 1917).

[1] A text was included in an annex to the Costa Rican complaint of March 24, 1916. Negotiation of this Convention was conducted in great secrecy. A spirited defense of the Convention by George T. Weitzel is published in Senate Document, No. 334, 64th Congress, 1st session. See also George A. Finch, "The Treaty with Nicaragua Granting Canal and Other Rights to the United States," 10 American Journal of International Law (1916), p. 344.

[2] U. S. Foreign Relations, 1914, p. 953.

by a Convention of August 5, 1914, signed at Washington by W. J. Bryan on behalf of the United States, and Emiliano Chamorro on behalf of Nicaragua; ratifications of the latter convention were exchanged on June 22, 1916. The text of the Bryan-Chamorro Convention followed quite closely that of the Chamorro-Weitzel Convention of 1913; Nicaragua granted to the United States "in perpetuity . . . the exclusive proprietary rights necessary and convenient for the construction, operation and maintenance of an interoceanic canal by way of San Juan River and the great Lake of Nicaragua or by way of any route over Nicaraguan territory." For the protection of these rights, Nicaragua agreed to lease to the United States for a period of ninety-nine years Great Corn Island and Little Corn Island in the Caribbean Sea,[3] and granted for a similar term the right to establish, operate and maintain a naval base at any place to be selected by the United States "on the territory of Nicaragua bordering upon the Gulf of Fonseca." These leases and grants were renewable at the option of the United States for a further period of ninety-nine years. It was also provided that the territory leased and the naval bases were to be subject exclusively to the laws and sovereign authority of the United States during the period of the lease and its possible extension. In consideration of these various stipulations the United States agreed to pay Nicaragua $3,000,000 at the time of the exchange of ratifications, and this sum was later paid.

§57. Protests against the Bryan-Chamorro Convention. In consenting to the ratification of the Bryan-Chamorro Convention, the Senate of the United States took note of protests which had been made by Costa Rica, Honduras and El Salvador, and it was agreed by the United States and Nicaragua that nothing in the Convention was intended to affect existing rights of any of those States.

(*a*) Costa Rica's protests to Nicaragua and to the United States were based chiefly on the alleged incapacity of Nicaragua to conclude the 1913 and 1914 Conventions, and on the "contemptuous slight" of Costa Rica's rights;[4] the United States denied that the execution of the conventions would affect any interest of Costa Rica, and expressed a willingness to conclude a similar agreement with Costa Rica.

[3] The United States did not take immediate possession of these islands. U. S. Foreign Relations, 1923, II, p. 615.

[4] U. S. Foreign Relations, 1913, p. 1022; 1914, pp. 959, 962, 967; 1915, pp. 1108, 1110; 1916, pp. 811, 814, 818. See also Costa Rica, *Memoria de Relaciones Exteriores*, 1913, pp. viii–xv; 1915, pp. xii, 58ff.

(*b*) In 1913, Honduras protested against the proposed establishment of a naval base in the Gulf of Fonseca.[5]

(*c*) On October 21, 1913, El Salvador protested to the United States against the proposed establishment of a naval base in the Gulf of Fonseca,[6] and the protest was renewed on February 9, 1916;[7] the protest also relied upon Article 3 of the General Treaty of 1907 relating to the neutrality of Honduras.[8] In its protest to Nicaragua on April 14, 1916, El Salvador contended that the Bryan-Chamorro Convention would injure "primordial" interests of all Central America.[9]

(*d*) Colombia also protested to Nicaragua in 1913 against the proposed lease of the Great Corn and the Little Corn Islands, both of which were claimed as Colombian territory.[10] On February 6, 1916, a similar protest was made to the United States, reliance being placed upon an award by the President of the French Republic of September 11, 1900;[11] in reply the United States referred to a statement by the French Minister of Foreign Affairs which seemed to limit the award of 1900 to claims at issue between Colombia and Costa Rica, the parties to the arbitration.[12]

§58. Effect of the Judgments on the Bryan-Chamorro Convention. In the case of *El Salvador* v. *Nicaragua*, the Central American Court of Justice declared that Nicaragua had an obligation to restore the *status quo ante*, but it refused to pronounce the Bryan-Chamorro Convention to be void. Its judgments that the rights of Costa Rica and of El Salvador had been violated by Nicaragua might have had as consequence that these States were entitled to reparation from Nicaragua; yet it can hardly be deduced that for this reason Nicaragua lacked capacity to enter into the Bryan-Chamorro Convention as an instrument governing its relations with the United States. Even if Nicaragua lacked the power to grant to the United States all that it purported to grant, the Bryan-Chamorro

[5] Honduras, *Memoria de Relaciones Exteriores*, 1915–16, p. xvi.

[6] U. S. Foreign Relations, 1913, p. 1027. Thirty years earlier El Salvador had urged the construction of a Nicaraguan canal by the United States. *Idem*, 1883, p. 57.

[7] *Idem*, 1916, pp. 814, 827. See also *idem*, 1914, pp. 956, 960, 962.

[8] *Cf.*, Salvador Rodríguez González, "The Neutrality of Honduras and the Question of the Gulf of Fonseca," 10 American Journal of International Law (1916), p. 509.

[9] Included as an annex to El Salvador's complaint filed with Central American Court of Justice in 1916.

[10] Colombia, *Informe de Relaciones Exteriores*, 1915, pp. 176–200; U. S. Foreign Relations, 1913, p. 1032.

[11] U. S. Foreign Relations, 1916, p. 812. See also José Umaña Bernal, "*El Tratado Chamorro-Bryan*," 8 *Revista Jurídica* (Colombia, 1917), p. 122.

[12] U. S. Foreign Relations, 1916, p. 833. By a treaty signed at Managua, March 24, 1928, of which ratifications were exchanged on May 5, 1930, Colombia recognized Nicaragua's sovereignty over the Great Corn and Little Corn Islands. 105 League of Nations Treaty Series, p. 337.

Convention would seem to have been valid in international law, and the grants were effective to the extent of the power possessed by Nicaragua.

Some countenance may have been given to the claims of Costa Rica with reference to the San Juan River and Salinas Bay by a protocol signed by representatives of the United States and Costa Rica on February 1, 1923; yet the operative provision of this protocol, like that of the protocol of December 1, 1900, related only to future negotiations, and the 1923 protocol was expressly made subject to ratifications which were never exchanged.[13] Following an exchange of notes of May 22, 1939, between the United States and Nicaragua,[14] relating to the canalization of the San Juan River, a convention between Costa Rica and Nicaragua was signed on April 5, 1940, by which Nicaragua recognized that Costa Rica possesses certain rights in the San Juan River; ratifications of this convention were exchanged on June 21, 1940.[15]

§59. Closing of the Court. The General Treaty of Peace and Amity of 1907 provided (Article 19) that it should remain in force for a period of ten years, reckoned from the date of the exchange of ratifications, and that if one year before the expiration of this period no party had given special notice of intention to terminate the treaty the period of ten years should be extended until one year after such notice was given. The 1907 Convention which created the court contained no corresponding provisions for extension, its only provision being (Article 17) that it should remain in force "during the ten years counted from the last ratification." Under the apprehension that a year's notice was required, Nicaragua gave notice on March 9, 1917, of an intention to terminate the 1907 Convention;[16] in reply the Government of El Salvador expressed the view that as both the General Treaty of 1907 and the Convention of 1907 contained provisions relating to the Court, a denunciation was ineffective unless it applied to both instruments.[17] As no agreement was reached for an extension, the 1907 Convention ceased to be in force on March 12, 1918, ten years after the deposit by Guatemala of the last ratification. At its final session on that date, the court decided to hand over its archives and property to the Costa Rican Government.[18]

§60. Effort to Revive the Court. For some months prior to the expiration of the 1907 Convention, efforts were made to find some way in which

[13] U. S. Foreign Relations, 1923, I, pp. 834–6. See also Jesse S. Reeves, "Clearing the Way for the Nicaragua Canal," 17 American Journal of International Law (1923), pp. 309–13.
[14] Department of State Press Releases, Vol. 20, pp. 439–44.
[15] República de Nicaragua, *La Gaceta*, Vol. 44, pp. 1781–6.
[16] U. S. Foreign Relations, 1917, p. 30.
[17] *Idem*, p. 31.
[18] U. S. Foreign Relations, 1918, p. 247.

the court might be kept alive. Discussion first centered on the possibility of holding the conference envisaged in Article 17 of the Convention itself for the event of a suspension of the Court caused by a change in the political status of one of the States. On July 17, 1917, the Government of Costa Rica proposed to the Governments of Guatemala, Honduras and El Salvador that a conference be held at San José on September 15, 1917, to revise the Washington Conventions of 1907.[19] The Government of Honduras accepted the idea of a conference and suggested a reconstruction of the union of the five States. The Government of El Salvador was also favorable to the holding of a conference, and suggested to the United States and Mexico that they should be represented; the United States declined this suggestion because of its non-recognition of the Tinoco Government in Costa Rica.[20] A date was set for the conference, October 12, 1917, but it was never held. As some of the exchanges between the Governments were placed before the court, the justices took cognizance of these negotiations. The court's permanent commission, composed of the justices of Guatemala, Honduras and El Salvador, reported on the reforms which might be embodied in a revised convention, and made proposals dealing with the following topics:[21] clarification of the provision of Article I of the 1907 Convention as to exhaustion of efforts at diplomatic settlement, and of the requirement that private persons must exhaust local remedies; provision for arbitrators to be appointed by States outside of Central America when parties before the court; provision for a permanent commission to take certain action without the concurrence of all of the justices; provision as to the diplomatic status of justices, and definition of their terms of office; provision for rotation in the office of president; amendment of Articles 14 and 15 to permit the filing of proofs after the filing of complaints; more flexible provisions for the calling of substitutes to constitute a quorum; relief from the necessity of the signature of each decision by all the justices; provision for securing moral support for the court's decisions; amendment of the General Treaty of Peace and Amity to provide for equality of Central Americans in civil and political rights based on residence, and to forbid any State to enter into treaties affecting other States without previous consent.

§61. Successor to the Court. Several years elapsed after the closing of the Central American Court of Justice before any attempt was made

[19] U. S. Foreign Relations, 1917, p. 39. [20] *Idem*, p. 43.
[21] 7 *Anales*, pp. 32–42. See also Costa Rica, *Memoria de Relaciones Exteriores*, 1917, p. 74.

to establish a successor to it. In the Treaty of Union between Costa Rica, Guatemala, Honduras and El Salvador of January 19, 1921, provision was made (Article 5) for a Supreme Court of the Federation, which was to have a competence to deal with legal differences between two or more States.[22] This treaty was ratified by three States, and therefore came into force according to its terms on May 12, 1921; a "Political Constitution of the Republic of Central America" was adopted at Tegucigalpa, September 9, 1921,[23] and a central government was actually set up at Tegucigalpa, but it endured for only a brief period and plans for the federation were soon abandoned.[24]

At a Conference on Central American Affairs, held in Washington from December 4, 1922, to February 7, 1923, the 1907 treaties and conventions[25] were, to a large extent at least, superseded by a series of twelve new treaties and conventions, signed on February 7, 1923. These included a treaty of peace and amity, a convention for the establishment of international commissions of inquiry (to which the United States was also a party), and a convention for the establishment of an International Central American Tribunal.[26] By the latter convention, the five States bound themselves to submit to a new International Central American Tribunal "all controversies or questions which now exist between them or which may hereafter arise, whatever their nature or origin," if they are not settled by diplomatic means or referred to some other tribunal; but questions or controversies "which affect the sovereign and independent existence" of any State were excluded. The new tribunal was to be constituted from time to time as occasion might arise, and was to consist of persons to be selected from a permanent list of thirty jurists. Each of the five States was to name six persons for this list, four to be its nationals and two to be named from lists submitted by other Latin-American States and by the United States; the designations were to be communicated to the Ministry of Foreign Affairs of Honduras. Persons named on the permanent list were to serve for five years, and they were to enjoy the rank, privileges and immunities of ministers plenipotentiary while serving on the tribunal. In case a State should desire to submit a

[22] For the text of the treaty, see 5 League of Nations Treaty Series, p. 10; 1 Hudson, International Legislation, p. 600.

[23] *La Gaceta de Honduras*, Sept. 29, 1921, pp. 873–883. An excellent documentation is to be found in 40 Guatemala, *Recopilación de las Leyes*, 1921–22, pp. 233–326.

[24] See 11 League of Nations Treaty Series, p. 392.

[25] The General Treaty of 1907 seems to have been denounced by Nicaragua in 1920.

[26] For the texts, see Proceedings of the Central American Conference of 1923, pp. 287, 296, 392; 2 Hudson, International Legislation, pp. 901, 908, 985.

dispute to the tribunal, notice was to be given to the other State, and a protocol was to be signed, "in which the subject of the disputes or controversies shall be clearly set forth"; each State was to select an arbitrator from the permanent list, though it could not select one of its own appointees, and a third arbitrator was to be selected by the interested governments, or that failing by the other arbitrators, or that failing by lot. Two or more States having a common interest were to be considered as a single party for organizing a tribunal. If it should prove impossible for the States to agree, an alternative method of organizing the tribunal was provided. No permanent seat was fixed for the tribunal; and as no provision was made for a permanent budget, the expense of the tribunal in each case was to be borne by the parties. Decisions were to be taken by majority vote, and two annexes to the convention set forth elaborate rules of procedure, those in one annex being Articles 63–84 of the 1907 Hague Convention on Pacific Settlement of International Disputes.

The 1923 Convention was ratified by four States, and came into force according to its terms on March 12, 1925, the date of the third ratification.[27] The Convention was to remain in force until January 1, 1934, "regardless of any prior denunciation, or any other cause"; and thereafter, it was to continue in force until one year following any State's notification of an intention to denounce it, though one or two denunciations were not to terminate the Convention for other States so long as the latter remain three in number. The failure of El Salvador to ratify it may have crippled the attempts to put the provisions of the Convention into effect. The permanent list was not completed, and no tribunal has been organized under the Convention to deal with any dispute.[28] Some of the parties to the Convention have ratified the General Treaty of Inter-American Arbitration and the General Convention of Inter-American Conciliation,

[27] The convention was not registered with the Secretariat of the League of Nations, however. *Cf.*, 28 American Journal of International Law (1934), p. 546.

[28] Fifteen nominations were made by the Government of the United States in compliance with Article 3 of the Convention. 20 American Journal of International Law (1926), p. 142. Costa Rica, Guatemala and Nicaragua each designated six persons. U. S. Treaty Information Bulletin No. 15, p. 1. Apparently no designations were made by Honduras or El Salvador. In 1930 Honduras relied upon the non-existence of a complete list in refusing to submit a dispute with Guatemala to the International Central American Tribunal.

In June, 1928, the Government of the United States suggested that a boundary dispute between Guatemala and Honduras be referred to a tribunal to be created under the convention. By a treaty signed at Washington on July 16, 1930, of which ratifications were exchanged October 15, 1931, the Governments of Guatemala and Honduras agreed to an arbitration of their boundary dispute by a special tribunal. The parties were unable to agree as to the capacity in which this tribunal should act, and a preliminary question was formulated to enable the tribunal to decide whether it should act as the International Central American Tribunal created by the convention of February 7, 1923, or as a special boundary tribunal. On January 8, 1932, the special tribunal, consisting of Charles Evans Hughes, Luis Castro-Ureña, and

both of January 5, 1929; but apparently the 1923 Convention has not been denounced.[29]

The Convention of 1923 may be taken as an admission that the Convention of 1907 was too ambitious. The latter followed the Permanent Court of Arbitral Justice projected at The Hague in 1907; while the former is modelled on the Permanent Court of Arbitration. The creation of the Permanent Court of International Justice seems to have had little influence on this effort in Central America; indeed the Protocol of Signature of December 16, 1920, was not signed by Honduras, and though it was signed by the four other States, it was not ratified by Costa Rica or Guatemala.[30]

A Central American Conference held at Guatemala City in 1934 drew up a Treaty of Confraternity which was signed on behalf of the five Central American States on April 12, 1934; it contained a general provision for arbitration, and it continued in force the 1923 conventions to the extent that they had not been denounced.[31]

§62. Appreciation of the Central American Court of Justice. The Central American Court of Justice seems to have been doomed to failure from the outset. The provisions of the Convention of 1907 gave it no chance to succeed, and opened to the justices temptations which were bound to wreck their efforts. In the first place, the justices were given no independent position. Even if the five-year term was not too short, the method of election, the national oath, and the way in which salaries were paid, prevented their enjoying sufficient independence of their governments; the deposing of Justice Paniagua Prado in 1910 indicates the insecurity of their tenure. In the second place, the jurisdiction of the court was too large.[32] Even if it was proper, in view of the widespread conception of Central America as a unit, to allow individuals to bring suits against governments, it was improper to give the justices the temptation to initiate proceedings on the court's own responsibility, and the annexed

Emilio Bello-Codesido, decided this preliminary question, holding that it was bound to act as a special boundary tribunal and not as the International Central American Tribunal. Guatemala-Honduras Boundary Arbitration, Opinion and Judgment of the Special Tribunal on the Preliminary Question, Washington, 1932. The final opinion and award of the special tribunal was given on January 23, 1933. 137 League of Nations Treaty Series, p. 231. See F. C. Fisher, "The Arbitration of the Guatemalan-Honduran Boundary Dispute," 27 American Journal of International Law (1933), p. 403.

[29] The 1923 Treaty of Peace and Amity was denounced by Costa Rica and El Salvador, prior to January 1, 1934.

[30] El Salvador's ratification of the Protocol of Signature of December 16, 1920 was deposited at Geneva on August 29, 1930; and Nicaragua ratified the Protocol in 1939.

[31] 10 *Diario de Centro América*, No. 31 (1934), p. 6; 6 Hudson, International Legislation, p. 824. The Treaty of Confraternity has not been brought into force.

[32] See Jean Eyma, *La Cour de Justice Centre-Américaine* (Paris, 1928), pp. 40–58.

article accepted by four States was merely a courting of trouble. Contemporary opinion in Central America seems to have regarded the court not simply as a judicial institution, but also as a political agency for conciliation and mediation and for the maintenance of peace. Was it not the guardian of "the national conscience of Central America"? No court could hold a judicial prestige which undertook the offices assumed by this court in the revolutions in Nicaragua in 1910 and 1912. In 1917, a Nicaraguan communication to the United States accused the court of having "degenerated . . . into a center of lively intrigues." [33] In the third place, the court never developed a satisfactory procedure. The extent of its jurisdiction was such that its requirement of a preliminary determination of admissibility may have been necessary, but it was surely a mistake to make that determination without the ordinary safeguards of judicial action.

Nor can it be said that the court exercised any great influence during its short lease of life. None of the five cases in which individuals were parties was a case of great practical importance, and the fact that all of them were dismissed or declared to be inadmissible robs them of any great significance in the development of the court's jurisprudence. Of the five so-called cases in which only States were parties, three were undertaken on the court's own initiative and were of no jurisprudential importance; two of these cases were very properly before the court and presented problems of a legal nature which might have given tests of its usefulness except for the fact that in both the ambitions of an overshadowing outside State deprived the action of the court of reality.

Yet it is a matter for regret that this experiment in the administration of international justice was so short-lived, and that the Convention of 1907 was not revised and renewed in 1918. This was the first international court in modern history to be endowed with continuing functions. It had behind it a tradition of solidarity in Central America. Its creation followed a period of frequent international dissension. It was called upon to meet a real and pressing need. Its experience during ten years ought to have been made the basis for changes in its constituent law, and the suggestions made toward this end by the justices of the court in 1917 pointed toward some of the reforms which might have been effected. In a period of greater relative stability, a useful future for the court might have been possible. It is unfortunate that the court's lease on life expired during a World War, during a period of revolution in Mexico, and during a time of unusual unrest in Central America itself.

[33] U. S. Foreign Relations, 1917, p. 35.

CHAPTER 4

THE PROPOSED INTERNATIONAL PRIZE COURT

§63. Proposals for the Creation of an International Prize Court. During the eighteenth and nineteenth centuries, numerous proposals were advanced for the creation of an international prize court in which neutral States might be represented.[1] In 1875, the *Institut de Droit International* began a study of the question, and in its *règlement international des prises maritimes* of 1887, it envisaged the creation by each belligerent at the beginning of each war of an international tribunal for prize appeals, the belligerent to name the president and one member of the tribunal as well as the three neutral States which should each choose a member;[2] the proposal of the Institute was never acted upon by any belligerent.[3] At the Second Peace Conference at The Hague, proposals for the creation of an international prize court were offered by both the British and the German delegations.[4] The German proposal envisaged the creation after the beginning of hostilities of an appellate tribunal composed of five members; each belligerent would choose an admiral as a member, and three members would be chosen from the members of the Permanent Court of Arbitration by three neutral States of which one State should be named by each belligerent and a third by the two first-named; appeals would be lodged with this tribunal either by a belligerent State or by an individual person; the International Bureau of the Permanent Court of

[1] See 2 Oppenheim, International Law (2 ed.), p. 559.

[2] *Annuaire de l'Institut de Droit International*, 1887–88, pp. 212, 239.

[3] In a few cases international tribunals have passed upon claims based upon the action taken by national prize courts. See, *e.g.*, *The Napier*, 3 Moore's Digest of International Arbitrations, p. 3152; *The Circassian*, 4 *id.*, p. 3911. In a circular note of November 3, 1909, the Secretary of State of the United States referred to the following additional cases as having been before an international tribunal after they had been decided by the Supreme Court of the United States: *The Hiawatha*, 2 Black 635, 4 Moore's Digest of International Arbitrations, 3902; *The Springbok*, 5 Wallace 1, 4 Moore 3928; *The Sir William Peel*, 5 Wallace 517, 4 Moore 3935; *The Volant*, 5 Wallace 179, 4 Moore 3950; *The Science*, 5 Wallace 178, 4 Moore 3950; *The Peterhoff*, 5 Wallace 28, 4 Moore 3838; *The Dashing Wave*, 5 Wallace 170, 4 Moore 3948; *The Georgia*, 7 Wallace 32, 4 Moore 3957; *The Isabella Thompson*, 3 Wallace 155, 3 Moore 3159; *The Pearl*, 5 Wallace 574, 3 Moore 3159; *The Adela*, 6 Wallace 266, 3 Moore 3159. See U. S. Foreign Relations, 1910, p. 600.

[4] 2 *Actes et Documents*, pp. 1071, 1076. The subject was not on the agenda of the 1907 Conference.

Arbitration would serve as the registry of the court. According to the British proposal, each State with a merchant marine in excess of 800,000 tons would designate a judge and a deputy-judge of the proposed court; all the judges would sit in each case, except those appointed by the States parties to the litigation. The German and the British proposals were carefully studied by the Second Peace Conference, and the result was the adoption of the Prize Court Convention of 1907.

§64. The International Prize Court Convention of 1907. At the close of the Second Peace Conference, on October 18, 1907, a convention providing for the creation of an international prize court was opened to signature,[5] and it was eventually signed on behalf of 33 States,[6] though in some cases with important reservations.[7] June 30, 1909 was set as the date for the deposit of ratifications, if the States then ready to ratify could furnish the proposed court with nine judges and nine deputy-judges; as this condition was never met, the deposit contemplated did not take place.[8] The Convention was to apply "as of right" only when all belligerents engaged in a war were parties to the Convention; conceivably, it might have been applied, *i.e.*, the court might have functioned, with the consent of a single belligerent, though a State not a party was also engaged in the war. The limitation was a serious one, however, and even if the Convention had been brought into force its application might have been very restricted. The Convention was to remain in force for twelve years, and to be "renewed tacitly from six years to six years unless denounced."

§65. Judges of the Proposed Court. The International Prize Court was designed to be composed of judges and deputy-judges appointed for six-year periods by the contracting States; only "jurists of known proficiency in questions of international maritime law and of the highest moral reputation" were to be appointed. Fifteen judges were to constitute a full court, though nine were to constitute a quorum. The task of apportioning the fifteen judicial seats was not really solved by the 1907 Conference. Article 15 of the Convention, to which various States made

[5] For the text of the convention, see 1 *Actes et Documents*, p. 668; Scott, Hague Conventions and Declarations of 1899 and 1907 (1915), p. 188.

[6] Eleven States represented at the Second Peace Conference, including Russia, failed to sign the convention. It was signed on behalf of Great Britain and Japan only after the conclusion of the London Naval Conference in 1909.

[7] Chile, Cuba, Ecuador, Guatemala, Haiti, Persia, El Salvador, Siam, Turkey and Uruguay signed the Convention with reservations as to Article 15 relating to the method of appointment of judges.

[8] Several States seem to have been ready to proceed to the deposit of ratifications however, in the sense that parliamentary approval had been secured.

reservations, provided that the judges appointed by the United States of America, Austria-Hungary, France, Germany, Great Britain, Italy, Japan and Russia should always be summoned to sit; while judges and deputy-judges appointed by other States were to sit by *rota* as provided for each of six years in a table annexed to the Convention. This arrangement was defended as being consistent with the principle of equality of States and as making allowance for differences in the size of the naval and merchant fleets of various States. Special provision (Article 16) was made, however, to allow a belligerent in a war to have the judge appointed by it take part in the settlement of all cases arising from that war; in this case, one of the judges entitled to sit by the *rota* was to be eliminated by lot. Various provisions in the Convention were designed to invest the judges with independence; they were to be reimbursed for travelling expenses and to receive *per diem* allowances, to enjoy diplomatic privileges and immunities when serving outside their own countries, and to take oaths of office before the Administrative Council of the Permanent Court of Arbitration. Regular meetings of the judges, apart from the cases arising in a particular war, were not envisaged, though provision was made (Article 49) for a meeting for the adoption of rules.

§66. **Administration of the Proposed Court.** The Convention provided that the Administrative Council of the Permanent Court of Arbitration should perform for the Prize Court the same functions as it performs for the Permanent Court of Arbitration, though when serving the former it was to be composed of representatives only of the contracting States. The International Bureau of the Permanent Court of Arbitration was to serve as the registry of the Prize Court, and the Secretary-General as its registrar. The Administrative Council was to apply to the States for funds for the Court; Article 47 of the Convention left in doubt the method of apportioning the general expenses, merely providing that they were to be borne by the contracting States "in proportion to their share in the composition of the Court as laid down in Article 15 and in the annexed table." The seat of the Prize Court was to be at The Hague, and, except in the case of *force majeure*, it could not sit elsewhere without the consent of the belligerents. A president and a vice-president were to be elected by the court itself, presumably when it was called together to deal with cases arising in a particular war.

§67. **Recourse to the Proposed Court.** Jurisdiction in matters of prize was recognized by the Convention to be vested, in the first instance, in the national prize courts of the belligerent captor. Appellate jurisdic-

tion might also be exercised by national courts, as the Convention would have left it to the national law to say whether recourse to the international court should be immediate or after a national appeal; yet the national courts were to be limited to entertaining one appeal following the original suit. Provision was also made that if the national courts failed to give judgment within two years after the date of capture, the case could be taken directly to the International Prize Court. Recourse was to be allowed to the latter [9] on the ground that the national judgment was wrong in fact or in law in two classes of cases: (1) when the judgment affected the property of a neutral State or individual; (2) when the judgment affected enemy property and related either to cargo on a neutral ship, or to an enemy ship captured in the territorial waters of a neutral State which has made no diplomatic claim, or to a seizure alleged to be in violation of an international convention or the laws of the captor. Proceedings might be instituted in certain of these cases, either by a neutral State, or by a neutral individual, or by a national of an enemy State; but no proceeding could be instituted by a private person against his own State. A neutral individual might be forbidden by his own State to institute a proceeding, or the State might undertake the proceedings in his place. The privilege of resorting to the court was restricted to contracting States and their nationals.

A proceeding in the International Prize Court was to be instituted by a written declaration in the national court which had given judgment, or by a notice addressed to the International Bureau within 120 days after the rendering or notification of the judgment in the national court; this period was subject to extension. If the declaration was made before a national court, or if notice of the declaration was given to the national court by the International Bureau, the national court was to be bound to transmit the record of the case to the International Bureau within seven days.

The provisions in the Convention for proceedings in the international court following proceedings in a national court have had little influence on later developments, though they have led to suggestions that the Permanent Court of International Justice should be given appellate juris-

[9] The Convention employs the term *recours*, but it does not employ the term *recours en appel;* the Conference purposely avoided referring to the proposed Court as an appellate court. 1 *Actes et Documents*, p. 184. The term *recours* has frequently been translated as *appeal*, but the English term *recourse* would seem a better equivalent. See U. S. Foreign Relations, 1910, p. 631.

diction.[10] The opening of the proposed court to individuals has also had little influence on later developments, though it has exercised a certain spell over doctrinal writings.[11]

§68. Procedure in the Proposed Court. The Convention provided for both written and oral procedure. The court was to have power to call for evidence, without resorting to compulsion or threats. The hearing of a case might proceed even though one party failed to appear, if it had been duly notified. The court's judgment, reached by majority vote, was to give the reasons on which it was based, and it had to be signed by the president and registrar. The judgment was to be pronounced in a public sitting, and thereafter the record was to be transmitted to the national prize court. The court was to have power to draw up its own rules of procedure, and to propose modifications in the procedural provisions of the Convention.

§69. Effect of Judgments of the Proposed Court. The provisions of the Convention with reference to the effect of the court's judgments were by no means complete. If the court pronounced a capture to be valid, the vessel or cargo in question was to be disposed of in accordance with the laws of the belligerent captor. If it pronounced void a capture which the national prize court had pronounced valid, the international court was to order a restitution of the vessel or cargo in question; but no machinery was created for the execution of such orders by the court. If the national prize court had pronounced a capture to be void, the international court might still allow damages. The contracting States were to undertake to submit in good faith to the decisions of the international court and to carry them out with the least possible delay.

§70. Law Applicable in the Proposed Court. When called upon to decide a question of law, the proposed court was to be governed first of all by the provisions of any treaty in force between the belligerent captor and the State which was the other party or a national of which was the other party. In the absence of applicable treaty provisions, the court was to apply (Article 7) the rules of international law, and where no generally recognized rules exist, it was to give judgment "in accordance with the general principles of justice and equity." In certain cases, also, the court was to apply the national law of the belligerent captor; though it was

[10] See particularly the proposals by Lord Robert Cecil in 1919. Miller, Drafting of the Covenant, I, p. 63. In 1929, it was proposed to confer appellate jurisdiction on the Permanent Court of International Justice. See §435, *infra*.

[11] *Cf.*, S. Segal, *L'individu en droit international positif* (Paris, 1932), pp. 61–72.

expressly recognized that the court might disregard a failure to comply with the procedure required by the laws of the captor, if it should be of opinion that the consequences of complying therewith would be unjust and inequitable.

§71. The London Naval Conference of 1908–1909. After the Convention for the creation of the International Prize Court was opened to signature on October 18, 1907, it soon became apparent that its ratification was dependent upon the question of the law which the court would apply. No attempt was made at the Second Peace Conference to codify the existing law of maritime warfare. On February 27, 1908, the British Government proposed that a conference should be held "with the object of arriving at an agreement as to what are the generally recognized principles of international law within the meaning of paragraph 2 of Article 7 of the Convention, as to those matters wherein the practice of nations has varied, and of then formulating the rules which, in the absence of special treaty provisions applicable to a particular case, the court should observe in dealing with appeals brought before it for decision." [12] It was stated that the impression had been gained at the Second Peace Conference "that the establishment of the International Prize Court would not meet with general acceptance so long as vagueness and uncertainty exist as to the principles which the court, in dealing with appeals brought before it, would apply to questions of far-reaching importance affecting naval policy and practice." As "the rules by which appeals from national prize courts would be decided affect the rights of belligerents in a manner which is far more serious to the principal naval Powers than to others," the invitations were extended only to the Governments of Austria-Hungary, France, Germany, Italy, Japan, Russia, Spain, and the United States of America, and later to the Netherlands. After a preliminary exchange of views on questions formulated by the British Government, representatives of these States met at London, December 4, 1908–February 26, 1909, and drew up a *Déclaration relative au droit de guerre maritime*, commonly known as the Declaration of London.[13] Though it was agreed that the rules contained in the Declaration "correspond in substance with the generally recognized principles of international law," many of these rules were new and the Declaration had a clearly legislative character. Opened for signature on February 26, 1908, the Declaration was signed on behalf

[12] British Parliamentary Papers, Misc. No. 4, 1909, Cd. 4554. See also 8 Gooch and Temperley, British Documents on the Origins of the War, 1898–1914, pp. 306ff.

[13] British Parliamentary Papers, Misc. No. 5, 1909, Cd. 4555. See Scott, The Declaration of London (1919).

of all the States represented at the London Conference; some of these States proceeded to initiate the process of ratification,[14] but no ratification was deposited and the Declaration did not enter into force. Its fate was both mourned and acclaimed.[15]

§72. Modification Proposed by the United States of America. At a session of the London Naval Conference on February 22, 1909, the delegation of the United States of America pointed out that certain States might encounter constitutional difficulties in connection with the ratification of the Convention for the creation of the International Prize Court,[16] and proposed that the Conference should draw up a protocol permitting any State to include in its ratification of the Convention a provision that instead of an appeal from its national courts to the International Prize Court, any prize case to which the State was a party might be submitted for inquiry *de novo* into the responsibility of the captor, with power in the International Prize Court to fix the damages to be paid by the captor for an illegal seizure.[17] The consideration of this proposal by the Conference led to a *vœu* in the Final Protocol suggesting the conclusion of an arrangement to give effect to it.[18] Following the adjournment of the Conference, the Government of the United States, on March 5, 1909, expressed its intention to push its proposal; on November 3, 1909, it sent an identic circular note to the Governments represented at the London Conference, making the proposal more definite. At a conference in Paris in March, 1910, representatives of the American, British, French, and German Governments drafted an additional protocol for giving effect to the proposal. On May 24, 1910, the Netherlands Government transmitted a draft protocol to the signatories of the Convention, and on September 19, 1910, this protocol was opened to signature.[19]

[14] The Declaration was submitted to the Senate of the United States, which on April 24, 1912, advised and consented to its ratification. A bill introduced into the British Parliament in 1910 to provide for appeals to the International Prize Court was later withdrawn; a second bill introduced in 1911 was passed in the House of Commons but failed of passage in the House of Lords.

[15] "The Declaration of London, even if it had been ratified by the belligerent Powers in the late war, was admittedly incomplete; and on the matters with which it did purport to deal would have proved both ineffective and unpractical." Sir H. Erle Richards, in 2 British Year Book of International Law, 1921–22, p. 3.

[16] The difficulty felt by the United States' delegation related to the possible reversal by an international tribunal of a judgment given by a national tribunal. The question of constitutionality was much discussed in the United States. See 1 Scott, Hague Peace Conferences (1909), pp. 477ff.; T. R. White, "Constitutionality of the Proposed International Prize Court," 2 American Journal of International Law (1908), pp. 490–506.

[17] Proceedings of the International Naval Conference held in London, 1908–1909, British Parliamentary Papers, Misc. No. 5 (1909), Cd. 4555, p. 253.

[18] *Idem*, pp. 222, 379. See also, U. S. Foreign Relations, 1909, p. 317.

[19] For the history of these negotiations, see U. S. Foreign Relations, 1910, pp. 597–639; 1911, pp. 247–251.

§73. The Additional Protocol of September 19, 1910. In the additional protocol of September 19, 1910,[20] elaborate provision was made for actions for damages for injuries caused by captures. It was provided that States prevented by difficulties of a constitutional nature from accepting the Convention in its original form might declare in the instrument of ratification or adherence that recourse against them could be exercised in the International Prize Court only in the form of an action for damages. This necessitated a modification of various provisions of the Convention, in so far as they related to actions for damages; such actions were to be begun by means of written declarations or telegrams addressed to the International Bureau of the Permanent Court of Arbitration. The protocol was to form an integral part of the Convention, and adherence to the Convention was to be subordinated to adherence to the protocol. Though it was eventually signed by all the signatories of the original Convention, no ratifications were deposited [21] and the additional protocol failed to come into force.[22]

§74. Failure of the Prize Court Convention. Despite the various efforts made to facilitate such a result, the prospect for the coming into force of the Convention creating the International Prize Court was never promising. First of all, complete agreement had not been reached in 1907 concerning the States whose appointees were to serve on the court as judges and deputy-judges. During the year 1908, interest centered on the work of the London Naval Conference, at the close of which the fate of the Prize Court Convention became bound up with the fate of the Declaration of London. During 1909 and 1910, the additional protocol was in process of being prepared for signature. By 1912, it was clear that the Declaration of London would not be ratified by certain States of greater naval strength, so that even before the outbreak of war in 1914, the effort to create an international prize court had come to grief.

Looking back on this period, one may feel that the movement was never so important as it was then thought to be.[23] If the Prize Court

[20] For the text, see 7 Martens, *Nouveau recueil général* (3d ser.), p. 73. For an English translation, see 5 American Journal of International Law (Supp., 1911), p. 95. See also George C. Butte, "The *Protocole additionnel* to the International Prize Court Convention," 6 *idem* (1912), p. 799.

[21] In a message of December 7, 1911, President Taft stated that the two instruments had been ratified on behalf of the United States. U. S. Foreign Relations, 1911, p. xxii.

[22] The solution attempted by the additional protocol influenced the drafting of Article 32 of the General Act for the Pacific Settlement of International Disputes of September 26, 1928.

[23] See Henry B. Brown, "The Proposed International Prize Court," 2 American Journal of International Law (1908), pp. 458–489.

was the "advance guard" of more extensive international judicial organization, as one observer stated,[24] it may be doubted whether its successful functioning could have exercised much influence on judicial settlement in general. The conception, the plan, and some of the details have since been useful; but it is significant that with the advances made in international organization after 1919, suggestion was seldom made that such an institution is needed in the twentieth-century world,[25] and the effort to establish a prize court was not resumed.

[24] Elihu Root, in Proceedings of the American Society of International Law, 1912, p. 13.
[25] See, however, the suggestion of Edwin Borchard, in 19 Iowa Law Review (1934), p. 175.

CHAPTER 5

THE PROPOSED COURT OF ARBITRAL JUSTICE[1]

§75. Need for Such an Institution. When the Second Peace Conference met at The Hague in 1907, its agenda contained the following item: "Improvements to be made in the provisions of the Convention relative to the peaceful settlement of international disputes as regards the Court of Arbitration and the international commissions of inquiry." It soon became clear, however, that the current opinion was not to be satisfied with mere improvements in the 1899 Convention; experience had been gained which seemed to the representatives of some States to justify the taking of a further step in international organization. The Permanent Court of Arbitration had existed since 1900, and four tribunals created within its framework had given awards; but its inadequacy as a judicial institution was widely appreciated, and many of the delegations at the Second Peace Conference were convinced that it ought to be supplemented by the creation of a more permanent agency, with truly judicial characteristics. The chief criticisms of the process of arbitration set out in the 1899 Convention were that it was "difficult, time-consuming and expensive to set in motion,"[2] and that it afforded no basis for the cumulation of a body of jurisprudence. The 1907 Conference was seized with projects of the American and Russian delegations looking toward converting the Permanent Court of Arbitration into a truly per-

[1] See generally, Auguste Malauzat, *La Cour de Justice Arbitrale* (Paris, 1914); James Brown Scott, An International Court of Justice (New York, 1916); James Brown Scott, The Status of the International Court of Justice (New York, 1916); Hans Wehberg, *Das Problem eines internationalen Staatengerichtshofes* (English translation by Fenwick, The Problem of an International Court of Justice, Oxford, 1918).

[2] *Deuxième Conférence Internationale de la Paix, 2 Actes et Documents*, p. 595. The criticism of the expense was hardly justified by the facts with reference to the four tribunals which had then been created out of the Permanent Court of Arbitration. The expense of the International Bureau was 42,499 florins in 1900, but less than 30,000 florins in all but one of the succeeding years down to 1907. The extra expense of the Bureau for the *Pious Fund Case* was 208 florins; for the *Venezuelan Preferential Claims Case*, 1278 florins; for the *Japanese House Tax Case*, 433 florins; for the *Muscat Dhows Case*, 630 florins. Honoraria were also paid to the arbitrators by the parties and each party bore the expense of presenting its case. See Wehberg, The Problem of an International Court of Justice (Fenwick's translation), pp. 99ff.

manent body holding annual meetings. The American, British and German delegations later united in presenting a draft to the Conference; if the consideration of this draft did not convince the delegations of all the States represented that a new institution was needed, it enabled most of them to unite on this point and to join in the recommendation finally adopted by the Conference.

§76. Action of the Hague Conference of 1907. The Final Act of the Second Peace Conference, of October 18, 1907, signed on behalf of all States represented with the exceptions of Paraguay and Turkey,[3] contained the following *vœu:* "The Conference recommends to the signatory Powers the adoption of the annexed draft convention for the creation of a Court of Arbitral Justice and the bringing it into force as soon as an agreement has been reached respecting the selection of the judges and the constitution of the Court." To this *vœu* was annexed a draft convention (*projet d'une convention*) relating to the establishment of a Court of Arbitral Justice.[4]

§77. The Draft Convention of 1907. The draft convention annexed to the *vœu* in the Final Act of the Second Peace Conference contained 34 articles. It called for the creation of a court "of free and easy access, composed of judges representing the various judicial systems of the world, and capable of ensuring continuity in arbitral jurisprudence." This was to be accomplished "without altering the status of the Permanent Court of Arbitration." The new court was to have its seat at The Hague, and to meet at least annually; its needs were to be served by the Administrative Council and the International Bureau of the Permanent Court of Arbitration. It was to be competent to deal with all cases submitted to it, in virtue either of a general treaty or of a special agreement. A delegation of three judges, elected annually by the court, was to act in cases of arbitration by summary procedure as laid down in the Convention on Pacific Settlement of International Disputes, and to conduct inquiries; it was also to be competent to settle the *compromis*, either if the parties agreed to leave this to the court, or upon the invitation of a single disputant in defined categories of cases. Only contracting States were to be allowed access to the court. The procedure outlined was to be supple-

[3] With a reservation by Switzerland as to the *vœu* concerning the creation of a Court of Arbitral Justice. 1 *Actes et Documents*, pp. 333, 580, 723. Other delegations made reservations when the *vœu* was adopted by the Plenary Conference, chiefly with reference to the principle of the equality of States. *Idem*, pp. 333–334. The delegations of Belgium, Denmark, Greece, Rumania, Switzerland and Uruguay abstained from voting on the adoption of the *vœu*.

[4] 1 *Actes et Documents*, p. 702.

mented by rules drawn up by the court, and the court was to be given power to suggest to the States changes to be made in the procedure as established by the convention. The judgments were to contain statements of the reasons upon which they were based, but no direction was given as to the law which the court should apply. The convention was to be concluded for a limited period of twelve years, with a provision for automatic renewal subject to a possibility of denunciation.

§78. The Question of Electing the Judges. The draft convention of 1907 dealt mainly with the simpler problems involved in the creation of a court; the chief difficulty at the Second Peace Conference was to find some method by which the judges should be selected, and on this the draft was silent. One of the earliest proposals before the Conference, made by the Bulgarian delegation, called for the appointment of a competent person by each State and for the election of the judges by these persons from among themselves. The American, British and German delegations, proceeding upon the basis of population, and considering the criteria of industry and commerce, proposed that while each State should appoint one judge, certain States should have a permanent representation in the court, and that other States should have representation for varying periods of years according to a table of rotation; after some vacillation, these delegations also proposed that parties to a case should be represented among the judges on the court. The Brazilian delegation envisaged the appointment of a judge by each State, and a division of the judges into three groups, each of which groups should sit in rotation for a period of years. Numerous other proposals were advanced.[5] Finally the American delegation proposed that a free election of fifteen judges should be held, a nomination to be made by each State and a vote to be taken through correspondence conducted by the International Bureau of the Permanent Court of Arbitration; this proposal received but scant support, and upon its defeat the effort to arrive at an agreement at the Second Peace Conference was abandoned.

§79. Negotiations Following the Hague Conference of 1907. Initiative toward further steps for putting into force the draft convention of 1907 was taken by the Government of the United States of America. On February 22, 1909, the American delegation at the International Naval Conference in London proposed the adoption of a protocol providing

[5] Denys P. Myers analyzed the various proposals, as follows: (1) rotation; (2) direct appointment; (3) indirect appointment; (4) direct election; (5) indirect election. Proceedings of the American Society for Judicial Settlement of International Disputes, 1913, p. 168.

that signatories of the convention creating the International Prize Court might stipulate in their ratifications of that convention that the prize court should be competent to deal with arbitral cases submitted to it by the signatories, and that it should accept this jurisdiction and follow in such cases the provisions of the 1907 draft convention for the establishment of a Court of Arbitral Justice;[6] the International Naval Conference pronounced itself incompetent to deal with the proposal.[7] Later in 1909, the Government of the United States, in a circular letter addressed to the British, French, German, Italian, Japanese, Netherlands, Russian and Spanish Governments, repeated the proposal made at the London Conference, that the International Prize Court should be invested with the jurisdiction and functions of the proposed Court of Arbitral Justice.[8] The German Government suggested that the proper way of effecting this purpose would be by means of a supplementary convention, for drafting which a conference was suggested; the British and French Governments also suggested a conference. Informal negotiations were conducted at Paris in March, 1910, by "delegates" of the American, British, French and German Governments, and a draft convention was formulated *ad referendum*, looking toward the creation of the Court of Arbitral Justice by a limited number of States.[9] A second meeting of these "delegates" was held at The Hague in July, 1910, at which the draft convention was revised.[10] These draft conventions were predicated upon the choice of a judge by each party to the convention, the judges to participate in the work of the court by the *rota* annexed to the convention for creating the International Prize Court. Further progress depended upon bringing into force the International Prize Court Convention, however, and failure of efforts in that direction made it impossible to go forward with the plan for creating a Court of Arbitral Justice.

§80. Results of the Effort. Though the Court of Arbitral Justice planned in 1907 was never established, the promulgation of the *projet* by the Second Peace Conference had a profound effect on world opinion in

[6] Proceedings of the International Naval Conference held in London, 1908–1909, British Parliamentary Papers, Misc. No. 5 (1909), Cd. 4555, p. 253.

[7] *Idem*, p. 223.

[8] U. S. Foreign Relations, 1910, p. 597. The date of the circular letter is usually given as October 18, 1909. 4 American Journal of International Law, Supplement (1910), p. 114. The procedure suggested by the United States was clearly unsatisfactory, as various of the replies to the circular letter pointed out.

[9] U. S. Foreign Relations, 1910, p. 615.

[10] For an account of this whole effort, see the letter and memorandum addressed by Dr. James Brown Scott to the Minister for Foreign Affairs of the Netherlands, January 12, 1914. Scott, An International Court of Justice (1916). See also, Scott, The Status of the International Court of Justice (1916).

the succeeding years, and it later assisted in establishing a conviction, already quite general in 1914, that a new judicial institution was needed. Moreover, it supplied a set of definite ideas which could be used in fresh efforts in the future, and the 1907 *projet* naturally served as a point of departure when the Statute of the Permanent Court of International Justice was being drafted in 1920. Credit is therefore due to the men who struggled so valiantly to establish the Court of Arbitral Justice, for without their effort, the world might have been unprepared to take the step forward which was achieved in 1920.

CHAPTER 6

THE PROPOSED INTERNATIONAL CRIMINAL COURT

§81. Recommendation of the 1920 Committee of Jurists. At the Peace Conference in Paris in 1919, a commission suggested the creation of an *ad hoc* international "high tribunal" to deal with four categories of "violations of the laws and customs of war and of the laws of humanity," [1] and an abortive provision was included in Article 227 of the Treaty of Versailles for a "special tribunal" to try the former German Emperor. In 1920 the Committee of Jurists which drafted the Statute of the Permanent Court of International Justice adopted a recommendation that a separate High Court of International Justice be created, "competent to try crimes constituting a breach of international public order or against the universal law of nations"; [2] this *vœu* was the subject of a protracted debate,[3] but it may not have represented a very firm conviction on the part of some of the members of the Committee.[4] It was received without enthusiasm by the Council of the League of Nations; [5] and it led to no positive result in the First Assembly of the League of Nations, where the view was expressed that "there is not yet any international penal law recognized by all nations," and that "if it were possible to refer certain crimes to any jurisdiction, it would be more practical to establish a special chamber in the [Permanent] Court of International Justice." [6] In spite of this reception, however, the recommendation continued to stimulate interest during the years following 1920, and among both organizations and publicists the idea of an international criminal court found favor. It was considered at successive meetings of the International

[1] The commission's report is published in 14 American Journal of International Law (1920), pp. 95–154. Reservations were made by the American and the Japanese members of the commission. *Cf.*, 3 Miller's Diary at the Peace Conference, pp. 458–526.

[2] Minutes of the 1920 Committee of Jurists, p. 748.

[3] *Idem*, pp. 498–515.

[4] See the explanation by Elihu Root, who was a member of the 1920 Committee of Jurists, in Proceedings of the American Society of International Law, 1921, p. 69.

[5] Minutes of the Council, 10th session (1920), pp. 181–182.

[6] Records of the First Assembly, Committees, I, p. 589. The Third Committee of the First Assembly concluded that "there is no occasion for the Assembly of the League of Nations to adopt any resolution on this subject."

Law Association, which approved it in 1926; [7] *the Interparliamentary* Union, at its conference in Washington in 1925, considered a proposal to confer criminal jurisdiction on the Permanent Court of International Justice; [8] and an International Congress of Penal Law, held at Brussels in 1926, adopted a resolution favoring the exercise of criminal jurisdiction by an international court.[9] More significant, however, is the literature which was inspired, revealing the spell which the idea of an international criminal court exercised on many minds.[10] Yet the effort which was later made to establish such a court proceeded along wholly different lines.

§82. The 1937 Conference on Terrorism. The assassination of the King of Yugoslavia and the French Minister for Foreign Affairs at Marseilles on October 9, 1934, led the French Government to propose to the Council of the League of Nations the adoption of "international measures" for the suppression of political crimes, including the creation of an international criminal court,[11] and on December 10, 1934 the Council set up a committee of experts to prepare a draft of a convention "to assure the repression of conspiracies or crimes committed with a political and terrorist purpose." [12] On May 27, 1937, the Council decided to convoke a Conference to consider the two drafts prepared by this Committee, one dealing with the prevention and punishment of terrorism, and the other dealing with the creation of an international criminal court; thirty-five States or Members of the League of Nations were represented at this Conference, held in Geneva, November 1–16, 1937.[13] Two conventions were opened for signature on November 16, 1937: a Convention for the Prevention and Punishment of Terrorism was signed by representatives of twenty-four States,[14] and a Convention for the Creation of an International Criminal Court was signed by representatives of thirteen States.[15] Five years later, no State had deposited a

[7] International Law Association, Report of 31st Conference (1922), p. 86; Report of 33rd Conference (1924), pp. 74–111; Report of 34th Conference (1926), pp. 130–142, 183.

[8] *Union Interparlementaire, Compte-rendu de la XXIIIe Conference*, 1925, pp. 46–50, 475, 801.

[9] *Actes du Congres International de Droit Penal*, 1926, p. 634.

[10] See the bibliographies in Series E of the Publications of the Permanent Court of International Justice.

[11] League of Nations Official Journal, 1934, pp. 1731, 1839.

[12] *Idem*, p. 1760. The committee completed its work at a third session on April 26, 1937.

[13] The proceedings of the Conference are published in League of Nations Document, C. 94. M. 47. 1938. V.

[14] The text is published in League of Nations Document, C. 546. M. 383. 1937. V; 7 Hudson, International Legislation, p. 862.

[15] The text is published in League of Nations Document, C. 547. M. 384. 1937. V; 7 Hudson, International Legislation, p. 878.

ratification of the second of these Conventions, and as only India had deposited a ratification of the first Convention [16] there was little prospect that either of them would ever be brought into force.

§83. The 1937 Convention on Terrorism. The two Conventions of November 16, 1937 are closely related, and in many respects the Convention on the Creation of an International Criminal Court is dependent on the Convention on Terrorism. The latter defines "acts of terrorism" as "criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public." Various acts are enumerated, and a party to the Convention was to make these acts committed on its own territory criminal offenses if they are directed against another party and if they fall within the definition of "acts of terrorism": these include, *inter alia*, (*a*) wilful acts causing death or grievous harm to heads of States or their spouses, or to persons charged with public functions when the act is directed against them in their public capacity; (*b*) wilful destruction of property devoted to a public purpose; (*c*) wilful acts calculated to endanger life; (*d*) attempts to commit the foregoing offenses; (*e*) manufacture, supply or possession of arms or explosives with a view to committing such offenses; (*f*) conspiracy to commit, incitement to or participation in such offenses. Provision was made for the cooperation of special police services with such services in other countries, for the extradition of offenders, and for the punishment of offenses committed abroad. The Convention was to enter into force on the ninetieth day after three ratifications or accessions had been deposited at Geneva.

§84. The Convention on the International Criminal Court. The Convention for the Creation of an International Criminal Court was made to depend on the Terrorism Convention as follows: it was opened to signature only by the signatories of the Terrorism Convention; the deposit of a ratification or accession was made conditional on the deposit by the same State of a ratification of or accession to the Terrorism Convention; its entry into force was to be subject to the entry into force of the Terrorism Convention; and the Court was to be created for the trial "of persons accused of an offense dealt with" in the Terrorism Convention, its rôle being limited to "the struggle against offenses of an international character." The date of the entry into force of the Court Convention was left to later determination by representatives of the ratifying or acceding States,

[16] In 1939 Mexico proposed to adhere to the Terrorism Convention with a reservation as to political offenses. *Diario Oficial* of Mexico, March 1, 1939, p. 4.

to be convoked by the Netherlands Government after seven ratifications or accessions had been deposited; these representatives were also to arrange for a "common fund" out of which certain expenses were to be met, and to "decide what modifications are necessary in order to attain the objects of the present Convention."

§85. Composition of the Proposed Criminal Court. The proposed International Criminal Court was to be permanent, with its seat at The Hague. It was to consist of five judges and five deputy-judges of different nationalities, chosen from among jurists who are "acknowledged authorities on criminal law" and who have been or are qualified to be judges of national criminal courts. The choice was to be made by the Permanent Court of International Justice, from among nominees designated by the parties to the Convention. The members of the Court were to serve for ten years, their terms being staggered so that one judge and one deputy-judge would be elected each two years; only five members of the Court would sit in any case. The salaries of the judges, on a scale to be fixed by the parties to the Convention, were to be payable by the States of which they were nationals. The Court was to elect its President and Vice-President for a term of two years, and the Registrar of the Permanent Court of International Justice was to be invited to serve as registrar of the new Court.

§86. Jurisdiction of the Proposed Criminal Court. The Court's jurisdiction was to be entirely optional. Without being obliged to do so, States which were parties to the Convention creating the Court might commit to it for trial persons accused of certain of the offenses provided for in the Convention on Terrorism, and in this way discharge some of the obligations created by the latter Convention. The prosecution was to be conducted by the committing State, unless that burden were assumed by the State against which the offense was directed or by the State on whose territory the offense was committed. A private person who has been the victim of an offense might be permitted to become a *partie civile* before the Court. Accused persons were to be defended by "advocates belonging to a Bar," appointed by the Court if necessary, and the file of the case was to be communicated to the accused. Witnesses and experts were to be heard in the presence of counsel for the accused; hearings were to be in public, unless otherwise determined by the Court in a reasoned judgment. The accused might be held in custody, provision being made by the State on whose territory the Court is sitting. Sentences involving loss of liberty were to be executed by a designated State, and the com-

mitting State could not evade this duty; the enforcing State was to have the power of pardon, to be exercised only after consultation with the President of the Court, and it was to be entitled to substitute for a death penalty the most severe penalty involving loss of liberty provided by its national law.

§87. Law Applicable by the Proposed Criminal Court. The International Criminal Court was to have wide powers to determine its own practice and procedure, and to frame rules to that end. It was to apply that substantive criminal law "which is the least severe," taking into consideration the law of the territory on which the offense was committed and the law of the "country" which committed the accused for trial. If it should have to apply the law of a State of which no sitting judge is a national, it might invite a jurist expert in that law to sit with the Court in a consultative capacity as a legal assessor. In deciding disputes as to its jurisdiction, the Court was to apply the provisions of the Convention creating it, as well as those of the Terrorism Convention, and "the general principles of law."

§88. Appreciation of the Plan for the Proposed Criminal Court. The Convention for the creation of an International Criminal Court might have filled a real need in relieving States of embarrassing burdens cast upon them more or less accidentally; and it might have served a useful purpose in assuring States that due regard would be had for their special interests in the repression of terrorist activities within or without their own borders. Even if one were convinced of the need for a permanent tribunal, however, he may have doubts as to the practicability of certain features which the Convention would have attributed to it. While the conceptions embodied in the plan are not to be condemned as bold innovations, it is difficult to avoid an impression of their artificiality. Nor is it easy to be confident of the continuing good-will with which such an institution would need to be endowed. Some of the ideas expressed in the Convention may be useful in connection with future legislation, but the prospect for the actual functioning of such an international criminal court is not promising.

PART II

CREATION OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

CHAPTER 7

PROVISIONS FOR A COURT IN THE COVENANT OF THE LEAGUE OF NATIONS

§89. The Situation in 1919. The progress of a World War from 1914 to 1918 served to convince people in many countries that international organization was essential to maintaining peace in the future, and when the hostilities were brought to a close in 1918 an unparalleled opportunity seemed to exist for launching a new effort in this direction. It had then become clear that no result was to be expected from the effort of the Second Peace Conference to create a Court of Arbitral Justice, and that a fresh attempt would have to be made which could not be limited by the discussions at The Hague in 1907. If an effective League of Nations was to be launched, the opinion of the time regarded it as essential that it should include a court to administer justice according to law, and the task of creating such a court became at once more simple because it could be undertaken in connection with plans for a larger organization. Inevitably, therefore, the revival of effort in this direction came to be associated with the League of Nations.

§90. Drafts Prior to the Peace Conference. The creation of an international court was foreseen in numerous unofficial drafts of the Covenant prior to the Peace Conference in 1919,[1] but preliminary consideration by governmental agencies of plans for the League of Nations seems to have put little stress on the importance of a court. A draft of a statute of the League of Nations prepared by a British committee in 1918 contained no

[1] See particularly 2 Marburg, Development of the League of Nations Idea (1932), pp. 721ff.; Kluyver, Documents on the League of Nations (1920), pp. 339ff.; Phillimore, Schemes for Maintaining General Peace, British Peace Handbooks, XXV, No. 160, pp. 49ff.; Wehberg, *Die Pariser Völkerbundakte* (1919), pp. 58ff.; Wheeler-Bennett, Information on the World Court (1929), pp. 19–30; Lange, "*Préparation de la Société des Nations pendant la guerre*," in *Les Origines et l'Œuvre de la Société des Nations*, I (1923), pp. 1–46; New York State Bar Association Proceedings, 1918, pp. 90ff.

An "American Society for the Judicial Settlement of International Disputes," organized in the United States in 1910, published six volumes of proceedings and 29 numbers of a pamphlet entitled "Judicial Settlement of International Disputes." A "World's Court League," which advocated the establishment of an International Court of Justice, published in New York five volumes of a review entitled "The World Court," from 1915 to 1919.

reference to a court, though it envisaged the settlement of disputes by arbitration or in consequence of reports on the facts by an international conference.[2] A French committee which elaborated a report in 1918 suggested the creation of an international tribunal and the assurance of the execution of its decisions by an international council.[3] A suggestion advanced by Colonel House (United States) in 1918 also provided for a court, with judges elected by the delegates of the members of a league;[4] it is significant that in presenting this draft to President Wilson, Colonel House stated that while he had been opposed to a court in the past, "in working the matter out it has seemed to me a necessary part of the machinery," and that "in time the court might well prove the strongest part" of that machinery.[5] President Wilson followed many of Colonel House's suggestions in his "first draft" for a league, but he made no reference to a court except in a general provision for the reference of disputes to arbitration and in a single reference to "judicial decision or arbitration" for disputes between members and non-members.[6] Nor did the proposals put forward by General Smuts at the end of 1918 envisage the creation of a court.[7] However, a draft for an international judicial organization, elaborated by committees of the Danish, Norwegian and Swedish Governments in 1918, contained detailed provisions for a court.[8]

§91. Proposals at the Peace Conference. In January 1919, Lord Robert Cecil (Great Britain) circulated at Paris a "draft sketch of a League of Nations" which referred to a "judicial body," explained as "the existing Hague organization, with any additions or modifications made by the League, or by the Peace Treaties."[9] In January 1919, also, President Wilson formulated two drafts[10] which like his earlier draft indicated that he did not think a court important; yet these drafts provided for arbitration and for a possible appeal from an arbitral decision to a Body of Delegates,[11] and they continued to refer to the settlement of

[2] 2 Miller, Drafting of the Covenant, p. 3.
[3] *Conférence de la Paix, Procès-verbaux de la Commission de la Société des Nations*, No. I, p. 11; 2 Miller, Drafting of the Covenant, p. 403.
[4] 2 *idem*, p. 7. See also, Seymour, Intimate Papers of Colonel House, IV, pp. 30ff.
[5] 1 Miller, Drafting of the Covenant, p. 13.
[6] 2 *idem*, p. 12.
[7] *Ibid.*, p. 23.
[8] *Betänkande rörande en Internationell Rättsordning . . . jämte förslag till Konvention* (Stockholm, 1919). A French translation of this draft convention and of the report concerning it was published at Stockholm in 1919.
[9] 2 Miller, Drafting of the Covenant, p. 62.
[10] *Ibid.*, pp. 65, 98.
[11] Such provisions were largely taken from Colonel House's draft of July 16, 1918. For a criticism of them, see Lansing, The Peace Negotiations (1921), pp. 126ff.

disputes by "judicial decision or arbitration." A "British Draft Convention" of January 20, 1919, provided for "the creation of a permanent Court of international justice," [12] though no definite plans were suggested and the provision was only incidental to the outline of a procedure for handling international disputes. It is interesting to note that this draft provided for a possible submission by a conference or council of disputes or questions to "a court of international law," adding that "in such case, the decision of the Court shall have no force or effect unless it is confirmed by the Report of the Conference or Council"; it also provided that pending the creation of a permanent court of international justice, the court of international law referred to was to be constituted "from among the members of the Permanent Court created by the Convention for the Pacific Settlement of International Disputes." [13]

On January 25, 1919, at a plenary session of the Preliminary Peace Conference, a resolution approving the principle of the League of Nations and creating a committee "to work out the details" was adopted without reference to a court. Thereafter, Lord Robert Cecil seems to have insisted on some reference to a permanent court of international justice in lieu of certain provisions for arbitration,[14] though the Cecil-Miller draft [15] of January 27, 1919, barely mentioned it. Cecil's suggestion at this time was the most complete outline of a court yet considered; [16] provisionally, five of nine judges were to be nominated by the Principal Allied and Associated Powers and were to select the other four judges from persons nominated by other members of the League. In his "notes on a Permanent Court," Lord Cecil conceived of it as both a court of appeal and a court of first instance; he foresaw difficulty in agreeing on a method of electing the judges "if the small states maintained the attitude they adopted in 1907," but asserted that if these States entered the League "they must and will abandon the doctrines of Barbosa." [17] On January 31, at a conference of American and British representatives, it was "agreed that the provisions regarding the method of arbitration and particularly the appeal provisions" in President Wilson's drafts "were not essential, and that a general provision might be inserted for the creation of a Per-

[12] 2 Miller, Drafting of the Covenant, p. 106.
[13] 2 *idem*, p. 111.
[14] 1 *idem*, p. 61.
[15] 2 *idem*, p. 131.
[16] 1 *idem*, p. 62.
[17] As a representative of Brazil, M. Ruy Barbosa had played a prominent rôle at the Second Peace Conference at The Hague in 1907. He was elected a judge of the Permanent Court of International Justice in 1921.

manent Court." [18] Shortly afterward, the Hurst-Miller draft was placed before the League of Nations Commission by President Wilson.

§92. The Commission on the League of Nations. When the Commission set up under the resolution of January 25, 1919, began its work on February 3, 1919,[19] it had before it the Hurst-Miller draft presented by President Wilson, the text adopted by the French Ministerial Commission in 1918 submitted by M. Bourgeois, and an Italian draft scheme submitted by M. Orlando.[20] The Italian draft definitely envisaged the creation of an international court of justice; it was to be composed of judges appointed by all the contracting States; the International Bureau of the Permanent Court of Arbitration was to serve as its registry; the court was to sit in sections, a section being composed of the President, one judge chosen by each litigant, and four judges elected by the court; the court was to have jurisdiction of cases submitted by *compromis* and of cases referred to it by the Council of the League of Nations on the demand of one party to a dispute. At its first meeting, the Commission decided to take the Hurst-Miller draft as the basis of its deliberations. Article 11 of this draft was as follows: [21]

> The High Contracting Parties agree that whenever any dispute or difficulty shall arise between them which they recognise to be suitable for submission to arbitration, and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration, and will carry out in full good faith any award or decision that may be rendered.

When this Article 11 was considered on February 6, the Commission accepted the following addition proposed by Lord Robert Cecil:

> For this purpose the court of arbitration to which the case is referred shall be the court agreed on by the parties, or stipulated in any Convention existing between them.

[18] 1 Miller, Drafting of the Covenant, p. 67. Explanations were later given that there was not time at the Peace Conference to draft plans for the Court.

[19] The original members of the Commission were: *United States*, President Wilson and Colonel House; *British Empire*, Lord Robert Cecil and General Smuts; *France*, M. Léon Bourgeois and M. Larnaude; *Italy*, M. Orlando and M. Scialoja; *Japan*, Baron Makino and Viscount Chinda; *Belgium*, M. Hymans; *Brazil*, M. Pessôa; *China*, Dr. V. K. Wellington Koo; *Portugal*, M. Jayme Batalha Reis; *Serbia*, M. Vesnitch. Later the following were added: *Czechoslovakia*, M. Krámař; *Greece*, M. Venizelos; *Poland*, M. Dmowski; *Rumania*, M. Diamandy.

[20] The three drafts are reproduced in an annex to the minutes of the first session. Two sets of minutes exist, one in English and the other in French, but neither seems to have been approved by the Commission. Both texts are reproduced in 2 Miller, Drafting of the Covenant, pp. 229–394, 395–538, and for convenience Miller's texts are referred to. The texts are also to be found in Miller's Diary at the Peace Conference, but it is less generally available.

[21] Articles 11 and 12 seem to have been drafted by Hurst. 1 Miller, Drafting of the Covenant, p. 69.

Article 12 of the Hurst-Miller draft was as follows:

> The Executive Council will formulate plans for the establishment of a Permanent Court of International Justice, and this Court will be competent to hear and determine any matter which the parties recognise as suitable for submission to it for arbitration under the foregoing article.

When this Article 12 was considered on February 6, the text was changed at President Wilson's suggestion to read:

> The Executive Council shall formulate plans for the establishment of a Permanent Court of International Justice, and this Court shall when established be competent to hear and determine any matter which the parties recognise as suitable for submission to it for arbitration under the foregoing article.

M. Bourgeois drew attention to the fact that no mention had been made of the Permanent Court of Arbitration, which he thought had rendered notable services, but no change was made in consequence; throughout this whole period, an issue was drawn as to the connection between the system of Peace Conferences at The Hague and the new organization.[22] On February 13, these articles were reported by a drafting committee as Articles 13 and 14, and as adopted by the Commission on that date they read as follows:

> *Article 13.* The High Contracting Parties agree that whenever any dispute or difficulty shall arise between them which they recognise to be suitable for submission to arbitration and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject matter to arbitration. For this purpose the Court of arbitration to which the case is referred shall be the Court agreed on by the parties or stipulated in any Convention existing between them. The High Contracting Parties agree that they will carry out in full good faith any award that may be rendered. In the event of any failure to carry out the award, the Executive Council shall propose what steps can best be taken to give effect thereto.
>
> *Article 14.* The Executive Council shall formulate plans for the establishment of a Permanent Court of International Justice and this Court shall,

[22] The issue continued to give difficulty. See 7 Miller, Diary at the Peace Conference, p. 330. "The omission, which may be called systematic, in the acts of the Paris Conference, of any reference to the work of the first two Peace Conferences was a phenomenon of diplomatic history which was difficult to explain." Baron Descamps, in Minutes of the 1920 Committee of Jurists, p. 155.

when established, be competent to hear and determine any matter which the parties recognise as suitable for submission to it for arbitration under the foregoing Article.

The articles appear in this form in the draft Covenant which was reported to the Preliminary Peace Conference on February 14, 1919, and published on that date.

§93. Consultation with Neutral States. On March 20 and 21, 1919, some of the members of the Commission on the League of Nations met with representatives of certain neutral States to consider the draft Covenant. The representatives of the Netherlands and Switzerland proposed amendments to Article 13; and those of Denmark, Norway, Sweden and Switzerland proposed amendments to Article 14.[23] A Spanish representative insisted upon the principle of equality of States which was embodied in these proposals, and which he wished to see admitted. The proposals by neutral States did not lead to any modification of the draft, however.

§94. Later Work of the Commission on the League of Nations. On March 18, 1919, President Wilson and Lord Robert Cecil agreed upon an addition to Article 14 of the following words: "and also any issue referred to it by the Executive Council or Body of Delegates." [24] This embodied the conception of what was later called an advisory opinion; it had appeared in the draft of the French Ministerial Commission of 1918, in Colonel House's draft of July 16, 1918, in the British draft convention of January 20, 1919, and in the Italian draft submitted to the Commission at its first meeting, though for some time it had dropped out of the drafts under active consideration. At a meeting of the Commission on March 24, several amendments and additions were proposed to Article 14 as it appeared in the draft of February 13, 1919, notably by Lord Robert Cecil, M. Larnaude and M. Hymans; a significant addition suggested by Lord Robert Cecil would have inserted after the word "determine" the words "any dispute or difference of an international character including." [25] Lord Robert Cecil also proposed the addition which he had agreed upon with President Wilson on March 18. M. Larnaude proposed that the

[23] 2 Miller, Drafting of the Covenant, pp. 592ff. See also, Kluyver, Documents on the League of Nations (1920), pp. 168ff.

[24] 2 Miller, Drafting of the Covenant, p. 585.

[25] The English minutes state that this proposal was adopted; the French minutes do not mention the adoption.

court should be "competent to hear and determine: (*a*) any matter (Fr., *toute question*) which is submitted to it by the Body of Delegates or the Executive Council; (*b*) any matter arising out of the interpretation of the Covenant establishing the League; (*c*) any dispute" submitted by the parties with the consent of the Court and the Executive Council.[26] A drafting committee set up on March 26, suggested several important changes in the drafts of Articles 13 and 14; provisions which finally became the second paragraph of Article 13 and the third sentence of Article 14 were adopted by the Commission on April 11, on the report of this committee. Several observations made at this time are of interest in view of later developments: M. Larnaude seems to have argued in favor of the selection of the judges by the Council rather than by the Assembly; Lord Robert Cecil thought that "in reality, the Assembly would establish the Court," but he assumed that nominations of judges would be made to the members of the League by the Council; M. Krámař thought that the Court "would have to decide not only questions of law, but political questions as well." Except for paragraphing, Articles 13 and 14 assumed their final form in the English version in a draft of April 5, approved on April 11, 1919; in the French version, they assumed final form on April 21, 1919.[27] In the following form, the two articles were adopted by the Preliminary Peace Conference on April 28, 1919, included in the conditions of peace communicated by the Allied and Associated Powers to the German delegation on May 7, 1919, and later embodied in the Treaty of Versailles:

Article 13

Les Membres de la Société conviennent que s'il s'élève entre eux un différend susceptible, à leur avis, d'une solution arbitrale et si ce différend ne peut se régler de façon satisfaisante par la voie diplomatique, la question sera soumise intégralement à l'arbitrage.

The Members of the League agree that whenever any dispute shall arise between them which they recognise to be suitable for submission to arbitration and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration.

[26] This proposal followed almost textually a recommendation by an unofficial Inter-Allied League of Nations Conference held in London, March 11–13, 1919. See Kluyver, Documents on the League of Nations, p. 309. M. Larnaude modified his proposals as a result of discussions in the Commission.

[27] 2 Miller, Drafting of the Covenant, p. 791. See also 1 *idem*, pp. 505ff.

Parmi ceux qui sont généralement susceptibles de solution arbitrale, on déclare tels les différends relatifs à l'interprétation d'un traité, à tout point de droit international, à la réalité de tout fait qui, s'il était établi, constituerait la rupture d'un engagement international, ou à l'étendue ou à la nature de la réparation due pour une telle rupture.

Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which if established would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration.

La Cour d'arbitrage à laquelle la cause est soumise est la Cour désignée par les Parties ou prévue dans leurs conventions antérieures.

For the consideration of any such dispute the court of arbitration to which the case is referred shall be the court agreed on by the parties to the dispute or stipulated in any convention existing between them.

Les Membres de la Société s'engagent à exécuter de bonne foi les sentences rendues et à ne pas recourir à la guerre contre tout Membre de la Société qui s'y conformera. Faute d'exécution de la sentence, le Conseil propose les mesures qui doivent en assurer l'effet.

The Members of the League agree that they will carry out in full good faith any award that may be rendered, and that they will not resort to war against a Member of the League which complies therewith. In the event of any failure to carry out such an award, the Council shall propose what steps should be taken to give effect thereto.

Article 14

Le Conseil est chargé de préparer un projet de Cour permanente de justice internationale et de le soumettre aux Membres de la Société. Cette Cour connaîtra de tous différends d'un caractère international que les Parties lui soumettront. Elle donnera aussi des avis consultatifs sur tout différend ou tout point, dont la saisira le Conseil ou l'Assemblée.

The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

§95. The German Counter-Proposals. On May 9, 1919, the German delegation at the Peace Conference communicated to the President of the Conference a program containing suggestions on the League of Nations,[28] and on the following day the President replied that the German *projet* would be sent to the competent commission formed by the Allied and Associated Powers.[29] No later meeting of the Commission on the League of Nations was held, but a smaller committee drafted a reply sent on May 22, which contained the following paragraph:[30]

> The proposals of the German Government for the composition, jurisdiction and procedure of a Permanent Court of International Justice (paragraphs 14–15, 29–36) have been carefully reviewed, and will be submitted for detailed consideration to the Council of the League of Nations, when it prepares a plan for the establishment of a Permanent Court in accordance with Article 14 of the Covenant.

As no change was made in the text of Articles 13 and 14 of the Covenant in consequence of the German suggestions, it is unnecessary to examine them in detail, though they contained several interesting points; it was proposed that compulsory jurisdiction over legal disputes should be conferred on a court, which was also to have jurisdiction over complaints of private persons in certain contingencies. The comment on the draft Covenant made by the German delegation on May 29, 1919, did not deal in detail with Articles 13 and 14, but insisted on a recognition of the principle of state equality and on Germany's admission to the League of Nations. Nor did the Allied and Associated Powers refer to a court in their final reply.

§96. The Austrian Counter-Proposals. The final conditions of peace communicated to the Austrian delegation contained the text of the Covenant in its final form, though the Austrian delegation had previously indicated a desire that Austria should be admitted to membership in the League of Nations, and this desire had been favorably received by the Allied and Associated Powers. With its note of June 23, 1919, the Austrian delegation submitted suggestions for the text of Articles 12, 13 and 14 of the Covenant and an explanatory statement by Professor Lammasch;[31] these suggestions contained elaborate and somewhat definite provisions for creating a court. In his letter of July 8, 1919, the

[28] 2 Miller, Drafting of the Covenant, p. 744.
[29] 1 *idem*, p. 539.
[30] *Ibid.*, p. 540.
[31] For the text, see Kluyver, Documents on the League of Nations, pp. 142ff. For English and French translations, see Documents presented to the 1920 Committee of Jurists, pp. 130ff.

President of the Peace Conference stated that these proposals would be submitted to the Council of the League of Nations when it undertook the preparation of plans under Article 14 of the Covenant.[32]

§97. The Covenant in the Treaties of Peace. The Covenant of the League of Nations became Part I of the treaties of peace between the Allied and Associated Powers and Germany, Austria, Bulgaria and Hungary, signed respectively at Versailles on June 28, 1919, at St. Germain-en-Laye on September 10, 1919, at Neuilly-sur-Seine on November 27, 1919, and at Trianon on June 4, 1920.[33] Each of these is a separate and distinct instrument, and the parties to the various instruments are not identical.[34] Some of the language of the Covenant is limited in its application to the treaty of which the Covenant forms a part, notably paragraph 1 of Article 5;[35] in a strict sense, therefore, one may say that there are four Covenants, though logic is not to be pressed so far as to say that they call for the creation of four Leagues of Nations. The Treaty of Versailles was the first of the four instruments to come into force, and the League of Nations was organized under the Covenant in that treaty;[36] yet it is not possible to say that the League of Nations exists solely under the Covenant as embodied in the Treaty of Versailles. The fact of the Covenant's inclusion in other treaties must be taken into account;[37] and this is done more easily since most of the obligations of the Covenant are

[32] Almond and Lutz, The Treaty of St. Germain (1935), p. 269.

[33] The Treaty of Versailles came into force on January 10, 1920; the Treaty of St. Germain on July 16, 1920; the Treaty of Neuilly-sur-Seine on August 9, 1920, and the Treaty of Trianon on July 26, 1921. The Covenant was also embodied in the abortive Treaty of Sèvres, signed by representatives of the Allied Powers and Turkey on August 10, 1920.

[34] The signatories to the Treaty of Versailles were the United States of America, the British Empire, France, Italy, Japan, Belgium, Bolivia, Brazil, Cuba, Czechoslovakia, Ecuador, Germany, Greece, Guatemala, Haiti, Hedjaz, Honduras, Liberia, Nicaragua, Panama, Peru, Poland, Portugal, Rumania, Serb-Croat-Slovene State, Siam, Uruguay. Of these States, Bolivia, Brazil, Ecuador, Germany, Guatemala, Haiti, Hedjaz, Honduras, Liberia, Peru, and Uruguay were not signatories to the Treaty of St. Germain, or to the Treaty of Trianon; Bolivia, Brazil, Ecuador, Germany, Guatemala, Haiti, Honduras, Liberia, Nicaragua, Panama, Peru, and Uruguay were not signatories to the Treaty of Neuilly. China was a signatory of all these treaties except the Treaty of Versailles. Austria signed the Treaty of St. Germain only, Hungary the Treaty of Trianon only, and Bulgaria the Treaty of Neuilly only. Rumania and the Serb-Croat-Slovene State acceded to the Treaty of St. Germain, and Rumania acceded to the Treaty of Neuilly.

[35] This paragraph was added at a late stage of the drafting. See 1 Miller, Drafting of the Covenant, p. 498.

[36] Certain States became members of the League of Nations by acceding to the Covenant in the Treaty of Versailles. See Kluyver, Documents on the League of Nations, pp. 230–250. For the invitations to various States to accede, see 30 *La Paix par le Droit* (1920), p. 43.

[37] China is a member of the League of Nations by reason of ratification of the Treaty of St. Germain. League of Nations Official Journal, 1920, p. 300. See, also, Hudson, "Membership in the League of Nations," 18 American Journal of International Law (1924), pp. 436–58, and "The Members of the League of Nations," 16 British Yearbook of International Law (1935), pp. 130–52.

imposed on Members of the League of Nations, and membership does not result in all cases from a State's signing and ratifying one of the treaties of peace. In spite of the reference to "the present Treaty" in Article 5, the Covenant has properly been regarded as a single instrument, forming a basic part of a general European settlement, and neither its setting nor its language is subject to a narrow or technical interpretation.[38] Articles 13 and 14 are identical in all four of the treaties, and they have been accepted by all Members of the League regardless of the method by which they became such.

§98. The Name of the Court. The name of the Court was fixed by the language of Article 14 of the Covenant, though conceivably it might have been open to the Members of the League of Nations to decide upon a different name when adopting the plans formulated by the Council. At the Second Peace Conference at The Hague in 1907 various names of a proposed court were discussed; "High International Court of Justice," and "International Court of Justice" were employed in drafts, but were finally discarded for "Court of Arbitral Justice."[39] This name had the disadvantage of raising questions as to possible differences between arbitration and adjudication, and it found little favor in subsequent usage. In numerous suggestions and drafts prior to the Peace Conference at Paris, various terms had been employed: "international court," "permanent international court," "international tribunal," "court of international law," "court of international justice," "international court of justice," and others. In the work of the Peace Conference itself various names were used, also: Colonel House proposed the creation of an "International Court"; the French Committee spoke of an "International Tribunal" (*Tribunal international*); the Italian draft spoke of an "International Court of Justice" (*Corte internazionale di giustizia*); Lord Robert Cecil at first used the expression "an arbitral court." The expression "permanent court of international justice" first appears in the records of the Peace Conference in the British draft convention of January 20, 1919, not as a name but as a descriptive phrase. It was accepted in the Hurst-Miller draft and retained in the later drafts of the Covenant.

The name has obvious advantages: it emphasizes both the international character and the "permanence" of the new institution. The draftsmen

[38] In a note of May 6, 1919, Clemenceau, Wilson, and Lloyd George stated that "the Articles of the Covenant are not subject to a narrow or technical construction." 1 Miller, Drafting of the Covenant, p. 489.

[39] See particularly, Scott, The Project Relative to a Court of Arbitral Justice (1920), pp. 18–19.

of the Covenant desired to create something more than a system of *ad hoc* tribunals; one of the principal criticisms of the Permanent Court of Arbitration was that it was not what its name implied, not permanent. The name given in the Covenant also emphasizes the judicial nature of the new institution, which was to be a *court of justice;* in the minds of some persons the process of justice was to be distinguished from the process of arbitration. Yet the name has disadvantages, also: it is very similar to the name of the Permanent Court of Arbitration, so similar that public opinion does not easily distinguish between the two institutions. Nor is the order of words altogether happy; it was perhaps a permanent international court of justice rather than a permanent court of international justice which was intended.[40] Some attempts have been made to show that the name itself tended to prescribe certain characteristics of the court to be created; in a memorandum submitted to the Committee of Jurists in 1920, the Secretariat of the League of Nations stated that it is "a tenable position that the expression 'court of justice' in the first sentence [of Article 14] indicates that the Covenant has a tendency to make the Court competent to hear and determine disputes submitted to it by one party only." [41] It was also thought that "the expressions 'permanent' and 'of justice,'" in Article 14 were "to be taken as meaning 'accessible at all times' and 'applying the law.'" [42] Judge Loder seems to have found in the expression "court of justice" some suggestion of compulsory jurisdiction.[43] Such deductions are clearly negatived by the history of the drafting of the Covenant, though the records do not indicate that very serious consideration was given to the name.

§99. The Council's Mandate to Formulate Plans. The first sentence of Article 14 confers a mandate on the Council to formulate plans (Fr., *un projet*) for the Court and to submit them to the Members of the League of Nations; only the English version adds "for adoption." No mention is made of the Assembly of the League of Nations in this connection, though it was clearly open to the Members of the League to employ that agency in connection with their consideration and adoption of the plans formulated. The report of the French Ministerial Commission had suggested that the Court be organized by an "international body," which was to consist of representatives of all members. The Hurst-Miller draft

[40] Sir Robert Borden (Canada) suggested "permanent international court of justice." 7 Miller, Diary of the Peace Conference, p. 234.
[41] Documents presented to the 1920 Committee of Jurists, p. 7.
[42] *Idem*, p. 113.
[43] 2 British Yearbook of International Law, 1921–22, p. 12.

presented by President Wilson on February 3, 1919, referred only to the Council, and this was maintained in later drafts. The Swedish Government proposed on March 21, 1919, that the task of creating the Court should be confided to the Assembly,[44] and on April 7, 1919, the Swedish delegation renewed this suggestion with a view to avoiding any "shadow of suspicion" that the creation of the Court was to be guided by political considerations.[45] When the matter was considered by the League of Nations Commission on April 11, 1919, Lord Robert Cecil stated that "in reality, the Assembly would establish the court." The action taken by the Council in submitting the plans to the Assembly in 1920 was generally regarded at the time as "an act of courtesy, at the same time justified by practical considerations." [46]

The mandate of the Council was limited to formulating and submitting plans for the establishment of the Court. Once these plans had been formulated and submitted, it would seem that so far as Article 14 is concerned, the Council had no further duty with reference to such plans; and once the Court was established, it would seem that the first sentence of Article 14 confers on the Council no further competence with respect to it. In other words, the Council was thereafter *functus officio* in this respect; the force of the first sentence of Article 14 was spent when the plans were submitted and adopted, and an incorporation of Article 14 into the Statute by reference did not revive the provision. Therefore, the Council has no mandate under Article 14 to propose amendments to the Statute adopted in 1920, though it may proceed to do so independently of the exhausted mandate conferred upon it. Yet it can hardly be said that this view prevailed in practice.

§100. Provisions in Article 14 on the Competence of the Court. The purpose to be served by the second and third sentences of Article 14 was not clearly indicated by the records of the Peace Conference. Were they merely indications to the Council as to the nature of the plans to be formulated? Or were they agreements in advance by Members of the League of Nations as to the nature of the Court to be created? If the latter, how far did they restrict the Members of the League of Nations in their subsequent adoption of plans? Early drafts of Article 14 were based on the desire to postpone all questions as to the nature of the court to be established, though they connected Article 14 with the provisions

[44] 2 Miller, Drafting of the Covenant, p. 640.
[45] 1 *idem*, p. 451.
[46] Léon Bourgeois, in Records of First Assembly, Committees, I, p. 299.

for arbitration contained in the preceding article; the Hurst-Miller draft, placed before the League of Nations Commission on February 3, 1919, stated that the Court should "be competent to hear and determine any matter which the parties recognize as suitable for submission to it for arbitration under the foregoing article." On February 6, 1919, the Commission accepted a proposal of President Wilson to add the expression that the Court "when established" should be thus competent; this would clearly have meant that the Peace Conference was to determine the character of the Court to some extent. The words "when established" were dropped by the League of Nations Commission on the report of its drafting committee on April 11, 1919, and at the same time the reference to Article 13 was eliminated. The final texts of the second and third sentences in Article 14 may be interpreted as agreements that the plans to be submitted to Members of the League should provide for the competence set forth. They were thus limitations on the mandate conferred on the Council,[47] though it must be noted that this interpretation does not seem to have been placed upon them by the Council. Certainly these sentences did not preclude the Members of the League from later establishing a court of lesser or greater competence.[48]

§101. Disputes of an International Character. The expression "dispute of an international character" was first used in Lord Robert Cecil's proposal at a meeting of the League of Nations Commission on March 24, 1919. Previous drafts had stated that the Court should be "competent to hear and determine any matter which the parties recognise as suitable for submission to it for arbitration under the foregoing article"; Lord Robert Cecil proposed to insert after the word "determine" the words "any dispute or difference of an international character including." The inclusion of these words pointed toward the Court's possessing obligatory jurisdiction, and for this reason the drafting committee modified the text,[49] dropping the words "including any matter." The expression "of an international character," originally a part of a proposal which was intended to confer on the Court obligatory jurisdiction, was thus retained as a proposed limitation on the Court's voluntary jurisdiction.

[47] M. Adatci (Japan) expressed this view before the Committee of Jurists in 1920, using it to show that the mandate of the Committee of Jurists was similarly limited. Minutes of the 1920 Committee of Jurists, p. 541. The question as to the limits of its competence gave great difficulty in the eleventh meeting of the Committee of Jurists. *Idem*, pp. 233–248.

[48] The 1920 Committee of Jurists considered it obvious "that the constituent Statute of the Court can confer upon it the degree of competence which the States drawing up the Statute wish to give it." *Idem*, pp. 727–8.

[49] See 7 Miller, Diary at the Peace Conference, pp. 312, 468.

What is a "dispute of an international character"? It would seem that any dispute between States would have that character, and that a dispute between nationals of different States or between a State and a national of another State would lack it. The international character is not dependent on the subject-matter of the dispute; this provision is not in juxtaposition to the provision in Article 15 as to disputes arising out of matters which by international law are solely within the domestic jurisdiction of one of the parties.

A construction seems to have been given to this expression in Article 14 by the British Government which would exclude from the Court's competence any dispute between two members of the British Commonwealth of Nations, though both are Members of the League of Nations; [50] as it was explained by Sir Cecil Hurst to the 1929 Committee of Jurists, "although the Dominions were autonomous, a dispute between two of them or between a Dominion and Great Britain was not an international matter and could not technically be brought before the Court." [51] This view has not been taken by all members of the British Commonwealth of Nations, however.[52]

§102. **Advisory Opinions.** The third sentence of Article 14 provides that "the Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly." The provision seems to have grown out of suggestions to be found in various early drafts of the Covenant.[53] Colonel House's draft of July 16, 1918, proposed (Article 10) that "the Delegates may at their discretion submit to the Court such other questions as may seem to them advisable." [54] The report of the French Ministerial Commission of 1918 proposed that "the

[50] In its protest against the registration of the Irish "treaty" of December 6, 1921, the British Government took the position that neither the Covenant of the League of Nations nor "any conventions concluded under the auspices of the League, are intended to govern the relations *inter se* of the various parts of the British Commonwealth." 27 League of Nations Treaty Series, p. 449. See also, 44 *idem*, p. 266. However, the 1931 British Commonwealth Merchant Shipping Agreement was registered at the request of the Union of South Africa, without protest. 129 *idem*, p. 177. *Cf.*, 135 *idem*, p. 225.

[51] Minutes of the 1929 Committee of Jurists, p. 72. Sir Cecil Hurst had previously expressed the view that "the common allegiance to the Crown prevents the relations between the different communities of the Empire from being international relations." Great Britain and the Dominions (Chicago, 1928), p. 55.

[52] In 1929 the South African Government held the view that disputes between members of the British Commonwealth of Nations were "justiciable by the International Court of Justice." Journal of the Tenth Assembly of the League of Nations, p. 293. See also *idem*, p. 314.

[53] An earlier suggestion that a court be given such competence had been made by Lammasch, in *Der Völkerbund zur Bewahrung des Friedens* (1918), p. 13. *Cf.*, L. von Bar, *Der Buren-Krieg* (1900), pp. 43–53.

[54] 4 Seymour, Intimate Papers of Colonel House, p. 31; 2 Miller, Drafting of the Covenant, p. 8.

International Tribunal shall pronounce on all questions submitted to it either by the International Body or by a State having any dispute with another." [55] The British draft convention of January 20, 1919, based on the Cecil draft of January 16, 1919, included a provision for references to a court by the Conference or Council, and it was added that "in such case, the decision of the Court shall have no force or effect unless it is confirmed by the Report of the Conference or Council." [56] Similarly, the Italian draft presented to the League of Nations Commission on February 3, 1919, suggested that a court should have jurisdiction over "cases referred to it by the Council and brought forward by one of the parties only." [57] Yet this idea was not embodied in the earlier drafts actually discussed by the Commission. On March 24, 1919, Lord Robert Cecil proposed an additional text on which he and President Wilson had previously agreed, to the effect that the Court should be competent to hear and determine "any issue referred to it by the Executive Council or Body of Delegates." This addition was explained by the British delegation as follows: The power of the Council and Assembly to refer disputes to the Court for advice "will be indispensable for the settlement of some classes of disputes; but of course the opinion of the Court will have no force or effect unless confirmed by the Report of the Council or Assembly. It therefore in no way introduces the principle of obligatory arbitration." [58] The addition was later redrafted by the British delegation to read, "and also to advise upon any dispute or question referred to it by the Council or by the Body of Delegates." [59] The term "advisory opinion" was introduced by the drafting committee [60] on April 5, 1919, when Article 14 assumed its final form, but there was no extended consideration of its use, and the draftsmen do not seem to have been guided by any analogy to advisory opinions given by national courts.

§103. Article 14 in Relation to Other Articles of the Covenant. No specific reference to a court was made in any article of the original Covenant other than Article 14. By Article 12, the Members of the League agreed to submit certain disputes "either to arbitration or to enquiry by

[55] 2 Miller, Drafting of the Covenant, p. 239.

[56] 1 *idem*, p. 52; 2 *idem*, p. 111.

[57] *Ibid.*, p. 252. The Italian proposal had been published in 12 *Rivista di diritto internazionale* (1918), p. 268.

[58] 1 Miller, Drafting of the Covenant, p. 416. On the other hand, Miller was of the opinion that the addition went "the whole length of permitting the Executive Council or Body of Delegates to compel arbitration." *Ibid.*, p. 290.

[59] 2 *idem*, p. 670. Miller explained that the substitution of "give an advisory opinion" for "advise" indicated "that the function to be exercised is a judicial one." 1 *idem*, p. 406.

[60] 2 *idem*, p. 676.

the Council." The process of arbitration was elaborated in Article 13, but the obligation of Members under Article 13 was limited to the arbitration of disputes "which they recognize to be suitable for submission to arbitration"; certain disputes were enumerated as "generally suitable"; and the parties to a dispute were to agree on the "court of arbitration" to be resorted to. In earlier drafts of the Covenant, Article 14 contained a reference to "the foregoing article," but it was dropped on March 31, 1919; though the word *arbitration* continued to be used in Article 15 to cover both arbitration and judicial settlement, this change in Article 14 seems to have had the effect of divorcing the conception of judicial settlement in Article 14 from the conception of arbitration in Articles 12 and 13.

By the fourth paragraph of Article 13, "the Members of the League agree that they will carry out in full good faith any award (Fr., *les sentences*) that may be rendered and that they will not resort to war against a Member of the League which complies therewith." Does this obligation apply to judgments of the Court created under Article 14? [61] If the reference to Article 13 had been retained in Article 14, there can be no doubt that the answer would have been in the affirmative; the suppression of that reference left the matter open to possible doubt, however, and the resolution of this doubt was one of the objects of amendments to the Covenant within a few years after it came into force.

§104. Amendments to the Covenant. No amendment has been made to Article 14 of the Covenant; but on September 26, 1924, amendments came into force which added explicit references to *judicial settlement* after the references to *arbitration* in Articles 12, 13 and 15.[62] The distinction between judicial settlement and arbitration is somewhat artificial [63] but the amendments may be thought to emphasize the broad use of the latter term in the original text of the Covenant. In Article 12, an amendment inserted the words "or judicial settlement" after "arbitration," and the words "or the judicial decision," after "award of the arbitrators." Corresponding amendments were made in Articles 13 and 15, and the following new paragraph was inserted in Article 13: "For the

[61] At the first Assembly of the League of Nations, Lord Robert Cecil stated that "according to the Covenant, judgments were to be enforced." Records of First Assembly, Committees, I, p. 287.

[62] For the texts of the protocols of amendment, see 1 Hudson, International Legislation, pp. 24, 26, 28.

[63] See Documents presented to the 1920 Committee of Jurists, pp. 113–8; J. Garnier-Coignet, "*Procédure judiciaire et procédure arbitrale*," 6 *Revue de droit international* (1930), pp. 123–47.

consideration of any such dispute, the court to which the case is referred shall be the Permanent Court of International Justice, established in accordance with Article 14, or any tribunal agreed on by the parties to the dispute or stipulated in any convention existing between them." These amendments had been proposed by the Second Assembly in 1921; the Committee of the Assembly stated in reporting them that "these proposals do not constitute changes in substance. They are merely drafting amendments. The procedure before the Permanent Court of International Justice has the same importance, under the existing text, as it would have under a text containing the modifications which are now proposed." [64] In spite of this statement it would seem possible to give greater effect to the amendment to the last paragraph of Article 13; the obligation to carry out "in full good faith any award *or decision* that may be rendered," and not to "resort to war against a Member of the League which complies therewith," would now seem to apply quite clearly to the judgments of the Permanent Court of International Justice. It is also provided that "in the event of any failure to carry out such an award *or decision*, the Council shall propose what steps should be taken to give effect thereto." Even a non-member of the League of Nations may have an obligation to carry out a judgment of the Court if it has accepted the invitation provided for in Article 17 of the Covenant.

§105. Other Parts of the Peace Treaties. The inclusion of the Covenant in Part I of each of the four treaties of peace necessitates some consideration of other parts of those treaties which refer to the Court.[65] Part XIII of the Treaty of Versailles [66] bears a close connection with the Covenant, inasmuch as it provides for the International Labor Organization which is described as machinery "associated with that of the League of Nations," and of which all Members of the League of Nations are members. Articles 415–420, 423, and 426 of Part XIII refer to the Court; their substance was largely limited to a conferring of competence on the court to be created. Article 418 provided for the Court's indication of appropriate measures "of an economic character," which Governments "would be justified in adopting against a defaulting Government." It is doubtful whether these articles placed any limitation on the Members

[64] Records of Second Assembly, Plenary, p. 698.

[65] It is also to be noted that certain separate but contemporary treaties referred to the Court; for example, the treaties for the protection of minorities of 1919 and 1920, and the Aerial Navigation Convention of October 13, 1919.

[66] The same text constitutes Part XIII of the Treaty of St. Germain, Part XII of the Treaty of Neuilly, and Part XIII of the Treaty of Trianon.

of the League in creating the Court; and in view of the provisions actually adopted in 1920, no difficulty has arisen from them.

The Treaty of Versailles did not contain the provisions on the protection of minorities to be found in the other treaties of peace. Article 69 of the Treaty of St. Germain, Article 57 of the Treaty of Neuilly, and Article 60 of the Treaty of Trianon confer a special jurisdiction on the Court with respect to such provisions, and provide that its decision "shall be final and shall have the same force and effect as an award under Article 13 of the Covenant."

§106. The Court and the League of Nations. The history of the drafting of the Covenant leaves no doubt that the Permanent Court of International Justice was envisaged at Paris as a part of the organization of the League of Nations. It was to be created by the Members of the League of Nations, after a consideration of plans formulated by the Council of the League of Nations; and it was to aid the Council and the Assembly in their dealing with international disputes. Most of the projects considered in drafting the Covenant proceeded on the assumption that the League to be organized should include a court as part of its machinery. While the possible participation of non-member States was not excluded, the conclusion is inescapable that the League was conceived to include a court and that the court for which provision was made was not to be independent of the organs of the League which owe their existence to the Covenant itself. Article 415 of the Treaty of Versailles refers to "the Permanent Court of International Justice of the League of Nations." When the Council of the League of Nations invited various jurists to serve on a committee to draft plans for the Court, on February 13, 1920, it therefore stated in the invitation that "the Court is a most essential part of the organization of the League of Nations."[67] And the Committee of Jurists reported in 1920: "The new Court, being the judicial organ of the League of Nations, can only be created within this League. As it is to be a component part of the League, it must originate from an organisation within the League, and not from a body outside it."[68] Though the Protocol of Signature which was drawn up in 1920 possessed an independent character, the French version of the first paragraph referred to *la Cour permanente de Justice internationale de la Société des Nations*. The annexed Statute fulfilled the conception of the Committee of Jurists in that the members of the Court are elected by the Assembly

[67] League of Nations Official Journal, March, 1920, p. 37.
[68] Minutes of the 1920 Committee of Jurists, p. 704.

and the Council of the League of Nations, and the League of Nations as such is to bear the expenses of the Court. At the inaugural meeting of the Court, President Loder spoke of it as "one of the principal organs of the League," which "occupies within the League of Nations a place similar to that of the judicature in many States." [69]

[69] League of Nations Official Journal, 1922, p. 312.

CHAPTER 8

THE ADOPTION OF PLANS FOR THE COURT

§107. Preparation by Governments. Over a period of several years beginning in 1917, certain European States which did not participate in the war of 1914–1918 took an active interest in planning for the creation of an international Court. Committees set up by the Danish, Norwegian and Swedish Governments prepared a joint plan, embodied in an *avant-projet de Convention sur une organisation juridique internationale*, which was published in January, 1919;[1] the collaboration of these committees was continued after the signature of the Treaty of Versailles, but separate drafts by the Norwegian Committee (August 29, 1919),[2] the Swedish Committee (September, 1919),[3] and the Danish Committee (November, 1919)[4] were communicated to the Secretariat of the League of Nations. In 1918, the Federal Council of Switzerland set up a consultative committee which produced drafts of a federal pact and a constitutional statute for a league of nations, the latter instrument providing for an international court of justice.[5] Late in 1919 a committee set up by the Netherlands Government prepared a *projet de règlement* for a court.[6] About this time the Netherlands Government took an important initiative in inviting the Scandinavian and Swiss Governments to send representatives to a conference for a joint consideration of their individual plans.[7] This con-

[1] *Betänkande rörande en Internationell Rättsordning* (Stockholm, 1919); Documents Presented to the 1920 Committee of Jurists, p. 168; 2 *La Paix de Versailles*, pp. 229–252. See also Kluyver, Documents on the League of Nations, p. 384 note.

[2] Documents Presented to the 1920 Committee of Jurists, p. 228; 2 *La Société des Nations* (1920), p. 432.

[3] Documents Presented to the 1920 Committee of Jurists, p. 236.

[4] *Idem*, p. 202.

[5] Documents Presented to the 1920 Committee of Jurists, p. 252. The Swiss undertaking is fully described in the Federal Council's message to the Federal Assembly concerning the question of the accession of Switzerland to the League of Nations, of August 4, 1919. See also 42 *Die Friedens-Warte* (1942), p. 28. The German proposals of April 23, 1919, referring to an international court, were very similar to those of the Swiss Committee.

[6] Documents Presented to the 1920 Committee of Jurists, p. 278.

[7] In September, 1918, with the approval of the Danish and Norwegian Governments, the Swedish Government had proposed to the Netherlands, Spanish and Swiss Governments that a conference should be held to discuss plans for a court.

ference was held at The Hague, February 16–27, 1920, with five States represented.[8] It adopted a *projet* of 55 articles, though not with unanimity on all points, the provisions of which were explained in an annexed *mémoire;* these were transmitted to the Secretary-General of the League of Nations by the Netherlands Government. The Committee of Jurists which later drafted the statute of the Court found a "very valuable source of information in the plan of the Five Powers." [9]

§108. Establishment of the 1920 Committee of Jurists. Even before the Covenant of the League of Nations came into force on January 10, 1920, it was contemplated that a committee of jurists should be set up to draft a plan for a court.[10] At its second meeting on June 9, 1919, the Organization Committee which was planning for the inauguration of the League of Nations requested the Acting Secretary-General to prepare, for consideration at a later meeting, a list of jurists who might be invited to form such a committee; [11] but no later meeting of the Organization Committee was held. At the second session of the Council of the League of Nations in February, 1920, the Secretary-General submitted a memorandum containing such a list, and on February 12 and 13, 1920, the Council voted to invite the following "to form a committee to prepare plans for the Permanent Court of International Justice and to report to the Council": Satsuo Akidzuki (Japan), Rafael Altamira (Spain), Clovis Bevilaqua (Brazil), Baron Descamps (Belgium), Luis Maria Drago (Argentina), Carlo Fadda (Italy), Henri Fromageot (France), G. W. W. Gram (Norway), B. C. J. Loder (Netherlands), Lord Phillimore (Great Britain), Elihu Root (United States),[12] and M. Vesnitch (Serb-Croat-Slovene Kingdom). Of these Akidzuki, Drago, Gram, Fadda, Fromageot and Vesnitch either declined the invitation or resigned before the meeting of the Committee. On April 11, 1920, the Council invited M. Adatci (Japan) to serve on the Committee, and on June 14, 1920, F. Hagerup (Norway), A. Ricci-Busatti (Italy) and A. de Lapradelle (France) were invited to

[8] Denmark was represented by Otto Krag; the Netherlands by B. C. J. Loder, J. Limburg and C. van Vollenhoven; Norway by Emil Huitfeldt and Mikael H. Lie; Sweden by Baron E. Marks von Würtemberg and Baron Th. Adelswärd; and Switzerland by Gaston Carlin and Eugène Huber. The *protocole de clôture*, the *projet* and the *mémoire* were published in the *Conférence de la Haye pour l'élaboration d'un projet relatif à l'établissement de la Cour Permanente de Justice Internationale, prévue à l'article 14 du Pacte de la Société des Nations, La Haye* (van Langenhuysen Frères, 1920). They are also published in *Grotius Annuaire Internationale*, 1919–1920, pp. 200ff.

[9] Minutes of the 1920 Committee of Jurists, p. 697.

[10] See 4 Seymour, Intimate Papers of Colonel House, p. 480.

[11] Kluyver, Documents on the League of Nations, pp. 256, 283.

[12] On earlier overtures made to Mr. Root, see 20 Miller, Diary at the Peace Conference, pp. 346, 351.

serve. Clovis Bevilaqua did not attend the meetings of the Committee, though a draft was presented to it in his name; he was represented by Raoul Fernandes, whose appointment as his successor was confirmed by the Council only after the adjournment of the Committee.[13] In the letter of invitation approved by the Council of the League of Nations on February 13, 1920, the Committee's attention was drawn to the plans which had been prepared by some of the States mentioned in the annex to the Covenant, and it was asked to invite other such States to "forward any proposals they may have prepared." [14] The Council also suggested that the Committee should not overlook assurances given by the Allied and Associated Powers to the Austrian and German Governments that their proposals would be examined.

§109. Personnel of the 1920 Committee of Jurists. As it was finally composed, the 1920 Committee of Jurists consisted of ten jurists, several of whom had been engaged in the work of the Hague Conferences of 1899 and 1907, and some of whom later had a prominent part in the work of the Court itself.[15] M. Adatci, at the time the Minister of Japan at Brussels, was elected a judge of the Court in 1930, and became its president in 1931. M. Altamira, a professor at the University of Madrid, was elected a judge of the Court in 1921 and again in 1930. Baron Descamps, a senator and Minister of State in Belgium, had been a delegate to the Peace Conference at The Hague in 1899. M. Fernandes had been a delegate of Brazil at the Paris Peace Conference. M. Hagerup had been Prime Minister of Norway and its first delegate at the Hague Conference of 1907. M. de Lapradelle, professor at the University of Paris, was a legal adviser to the French Foreign Office. M. Loder, a judge of the Netherlands Supreme Court, had been president of the Five-Power conference at The Hague in 1920, and he later became the Court's first president. Lord Phillimore, a member of the Privy Council in Great Britain, had been actively engaged in planning for the drafting of the Covenant. M. Ricci-Busatti, legal adviser to the Italian Ministry of Foreign Affairs, had been secretary to the Italian delegation at the Hague Conference of 1907. Mr. Root, as Secretary of State of the United States, had been responsible for the policy of the American delegation at the Hague Conference of 1907;

[13] Minutes of the Council, 8th session (1920), pp. 32, 163.

[14] No such invitation was extended.

[15] It was pointed out by the Secretary-General of the League of Nations that of the ten members of the Committee, five were "nationals of the five Great Powers and five nationals of smaller Powers." League of Nations Official Journal, June, 1920, p. 123. For biographical notes concerning the members of the Committee, see *ibid.*, pp. 71–72.

his adviser, James Brown Scott, who played an important part in the work of the Committee, had been a technical adviser at the Second Peace Conference at The Hague, and had been actively engaged in the effort to establish the proposed Court of Arbitral Justice. With this composition, the Committee was thoroughly equipped for its work.

§110. Work of the 1920 Committee of Jurists.[16] By its resolution of February 13, 1920, the Council authorized the payment of the expenses of the Committee of Jurists out of the general funds of the League, and the "formation of a small expert Secretariat to assist" the Committee. The Secretary-General announced on May 14, 1920, that this Secretariat would work under the direction of Commendatore Anzilotti, Under Secretary-General of the League of Nations, and would consist of the following members: M. Nippold, M. Winiarski and M. Åke Hammarskjöld, the last-named a member of the Secretariat of the League of Nations. As M. Nippold and M. Winiarski did not serve, M. Anzilotti acted as Secretary-General of the Committee of Jurists, with M. Hammarskjöld as his deputy. In 1919, the provisional Secretariat of the League of Nations had begun to prepare for this work by making a careful analysis of various proposals for the creation of the Court; this resulted in an elaborate memorandum to which were annexed the texts of various documents: the Italian, German and Austrian proposals at the Peace Conference, the Convention for the establishment of the Central American Court of Justice, the individual and joint drafts of the three Scandinavian committees, the Swiss *avant-projet*, the draft regulations drawn up by the Netherlands Committee, the plan of the five neutral States, a draft prepared by the Inter-parliamentary Union, and a draft prepared by the *Union Juridique Internationale*. This memorandum was presented to the members of the Committee of Jurists before the Committee's meetings began.[17]

The Netherlands Government invited the Committee to hold its meetings at The Hague, and a majority of its members expressed themselves as favoring the acceptance of this invitation.[18] At a private meeting on June 16, 1920, Baron Descamps was elected President, and M. Loder Vice-President of the Committee. Léon Bourgeois (France), who had played a prominent part in the Hague Peace Conferences of

[16] In the publications of the League of Nations, the Committee was called "Advisory Committee of Jurists"; it is sometimes referred to as the "Committee of Ten."

[17] The memorandum and the annexes were published in Documents Presented to the Committee of Jurists Relating to Existing Plans for the Establishment of a Permanent Court of International Justice, London (1920). The memorandum was largely the work of John Pawley Bate, then a member of the Legal Section of the Secretariat.

[18] M Bourgeois later explained to the Council that "the choice of The Hague had a real significance, and the reasons for the choice were understood by all. In these surroundings,

1899 and 1907, represented the Council of the League of Nations at the first meeting of the Committee. Altogether, the Committee held 35 meetings, from June 16 to July 24, 1920. An elaborate draft agenda [19] which had been prepared was not adopted. Differences which arose over the Committee's rules of procedure were soon smoothed out.[20] At the request of the Committee, its Secretariat prepared a valuable synopsis of various proposals,[21] including those annexed to the memorandum of the League Secretariat and the *projet* of the Hague Conference of 1907.

At its second meeting, Mr. Root proposed that the Committee of Jurists adopt "as the basis for consideration of the subject referred to it the Acts and Resolutions of the Second Peace Conference at The Hague in the year 1907"; [22] but some members of the Committee favored proceeding more independently, and the resolution adopted merely stated that "the Committee starts its deliberations by paying homage to the work of the two Hague Conferences which have already prepared, with an outstanding authority, the solution of the problem of the organisation of the Court of International Justice." [23] In spite of this decision, the *projet* of 1907 was continually referred to during the deliberations of the Committee, and it was precisely the question left open by that *projet*, as to the method of electing judges, which caused the greatest difficulty and to which a large proportion of the Committee's time was given. The extent of the proposed Court's obligatory jurisdiction also gave difficulty, and some members of the Committee conceived its mandate to be restricted by the limit on the mandate of the Council as set forth in the second sentence of Article 14 of the Covenant. On July 24, the Committee was able to adopt unanimously a "draft-scheme" (Fr., *avant-projet*) of 62 articles, with only a mention of reservations by M. Adatci and M. Ricci-Busatti in its report.[24] Complete *procès-verbaux* of the meetings of the Committee were promptly published.[25]

where for several centuries the traditions of International Law had been alive, our representatives set to work." Minutes of the Council, 8th session, p. 167. To the First Assembly, he stated that the meetings were held at The Hague "because it seemed desirable to show that the conferences of 1899 and 1907 had not been forgotten." Records of First Assembly, Plenary, p. 436.

[19] Minutes of the 1920 Committee of Jurists, p. 33. [20] *Idem*, pp. 31, 113.

[21] *Idem*, p. 51. [22] *Idem*, p. 41. [23] *Idem*, p. 43.

[24] These reservations related to the proposed obligatory jurisdiction. *Idem*, pp. 648, 727. The Committee also adopted three resolutions (*vœux*) which went somewhat beyond its mandate. One of these resolutions recommended to the Council and Assembly the consideration of a proposal for the establishment of a High Court of International Justice "competent to try crimes constituting a breach of international public order or against the universal law of nations." Minutes, p. 748. On the history of this resolution, see Chapter 6, *infra*.

[25] The *communiqués* of the Committee of Jurists are reproduced in 2 *La Société des Nations* (1920), pp. 889–907.

§111. The Draft-Scheme before the Council. When the draft-scheme of the Committee of Jurists came before the Council of the League of Nations at its eighth session at San Sebastian on August 3, 1920, explanations were offered by M. de Lapradelle who had been a member of the Committee. M. Bourgeois (France) made a report [26] which was adopted by the Council, in which he emphasized the solution of the difficulty as to election of judges which "the League of Nations, by its very existence, has made it possible to solve"; the seating of nationals of parties as judges; and the provisions for obligatory jurisdiction. M. Tittoni (Italy) made a reservation as to the possibility of a State's being brought before a tribunal without its assent and condemned by default, a procedure which "would in practice only be tolerated by the smaller countries"; M. de Lapradelle explained in reply that all Members of the League, as signatories of the Covenant, were "bound by a compulsory arbitration agreement." On August 4, the Council requested M. Bourgeois to continue his study of the subject, but decided to communicate the draft-scheme to Members of the League of Nations. In the covering letter to Members of the League, it was said that "the Council would regard an irreconcilable difference of opinion on the merits of the scheme as an international misfortune of the gravest kind. . . . The failure would be great, and probably irreparable." [27] It was made clear, however, that the Council would continue its examination of the draft-scheme. The matter was not on the agenda at the ninth session of the Council; but at the tenth session at Brussels, when the Council had before it observations submitted by the Belgian, British, French, Italian, Norwegian [28] and Swedish [29] Governments, extended consideration was given to the draft-scheme.

On October 23, 1920, "the Council adopted the text of a number of articles [33, 34, 35, 57*a*] drafted on its instructions by Commendatore Anzilotti, Dr. van Hamel and Sir Cecil Hurst." [30] Mr. Balfour raised a question as to the languages of the Court, objecting to the proposal of the Committee of Jurists (Article 37) that the sole official language of the Court should be French. On October 26, 1920, M. Bourgeois made an elaborate report to the Council; [31] M. Caclamanos (Greece) also made a

[26] Minutes of the Council, 8th session, p. 164.
[27] *Idem*, p. 171.
[28] M. Hagerup later explained that the Norwegian observations "emanated from a Norwegian Commission of Investigation, and not from the Norwegian Government." Records of First Assembly, Committees, I, p. 279.
[29] These also emanated from a committee. *Idem*, p. 279.
[30] Minutes of the Council, 10th session, pp. 21, 160.
[31] *Idem*, p. 162.

report on the question of languages, suggesting two official languages, "French and English." [32] The Council decided to communicate these reports to the Assembly.[33] A proposal to refer the draft-scheme back to the Committee of Jurists was not adopted. It seems also that the Secretariat was "instructed to bring the provisions of the scheme not amended by the Council into harmony with the amended parts," [34] and it proceeded to draw up an amended text of the scheme, in which amendments were included to Articles 27, 29, 33, 34, 35, 36 *bis*, 37, 56, 57 *bis;* and this text, together with a complete documentation, was placed before the Assembly in November; [35] the most significant of the Secretariat's amendments was a proposed new text of Article 33, substituting for the obligatory jurisdiction of the Court, a statement that "the jurisdiction of the Court is defined by Articles 12, 13, and 14 of the Covenant." M. Bourgeois later explained that the Council "had restricted its examination to the question whether or not the draft-scheme was in conformity with the Covenant of the League, and to the possible political consequences of certain of its articles." [36]

Such, then, would seem to have been the "plans" formulated by the Council and submitted to the Members of the League, in discharge of its mandate under Article 14 of the Covenant.

§112. **The Draft-Scheme before the Assembly.** The "plans" transmitted by the Council were referred by the First Assembly of the League of Nations to its Third Committee. Under the chairmanship of M. Léon Bourgeois (France), the Third Committee held ten meetings between November 17 and December 16, 1919, and its personnel was such as to assure a sympathetic consideration of the "plans" before it. A sub-committee of the Third Committee, under the chairmanship of M. Hagerup (Norway), devoted eleven meetings to the subject, November 24 to December 10, 1920; five of the ten members of the sub-committee had previously served on the Committee of Jurists. Further amendments to the draft-scheme were formally submitted by the Argentine, Colombian and Panamanian delegations; the Argentine delegation proposed the abolition of the Permanent Court of Arbitration, but the proposal seems to have received little consideration.[37] The general discussion in the

[32] *Idem*, p. 176.
[33] *Idem*, p. 46.
[34] Records of First Assembly, Committees, I, p. 482.
[35] *Idem*, pp. 411–495.
[36] *Idem*, p. 278.
[37] *Idem*, p. 372. The report of the Third Committee to the Assembly states that it was thought that the Permanent Court of Arbitration "would still have a rôle to fill in certain international disputes which lend themselves more easily to arbitral decision than to an award [judgment] based on strict rules of law." Records of First Assembly, Plenary, p. 457.

Third Committee related chiefly to the question of obligatory jurisdiction, and to the form to be given to the constitution of the court. The subcommittee examined the plan submitted by the Council in detail, and in its unanimous report to the Third Committee, it suggested "numerous but relatively unimportant" amendments.[38] Consideration of this report was begun by the Third Committee on December 8, 1920; the draft was further amended by the Third Committee and in the amended form it was adopted unanimously on December 11, and reported to the Plenary Assembly.

When the report of the Third Committee came before the Plenary Assembly on December 13, M. Bourgeois once more took a leading rôle. The Court's "relations with the League of Nations can be easily defined," he said; "it will be for the League to establish the Court and to draft its Statute. But from that moment, and so long as the League of Nations has not by its sovereign power altered those rules, the Court is independent."[39] Enthusiasm in the Assembly was dampened by the suppression of the provisions for obligatory jurisdiction proposed by the Committee of Jurists, a course which was attributed to the so-called "Great Powers." The opinion of many delegates seems to have been expressed by M. Fernandes (Brazil) when he said: "I was once enthusiastic; to-day I am barely confident. I am waiting."[40] M. Loder (Netherlands) exclaimed somewhat prophetically: "You are fighting against time; you will do so in vain."[41] Some further difficulty was also raised as to the manner proposed for the adoption of the draft. Only one slight amendment was made by the Plenary Assembly, however, and at a second meeting on December 13, the Assembly declared its unanimous approval of the draft Statute as amended.

§113. Form of Adoption. The question of the form in which the "Plans" should be adopted was not foreseen in the report of the Committee of Jurists,[42] but in the report adopted by the Council at Brussels it was stated that "it will be the duty of the General Assembly to draw up the terms of the future International Convention which is to be submitted for the signature of the Members of the League of Nations."[43] When the question arose at a meeting of the Third Committee of the Assembly on November 22, 1920, M. Huber (Switzerland) stated that two alternatives

[38] Records of First Assembly, Committees, I, pp. 296, 526.
[39] Records of First Assembly, Plenary, p. 437. [40] *Idem*, p. 449. [41] *Idem*, p. 445.
[42] See, however, Lord Phillimore's statement, in Minutes of the 1920 Committee of Jurists, p. 236.
[43] Minutes of the Council, 10th session (1920), p. 175.

were open, "a unanimous resolution by the Assembly and an international convention ratified by the different States";[44] for the first of these, he saw "difficulties of a constitutional order." In the sub-committee of the Third Committee, on December 10, it was suggested that there were three possible solutions: (1) a unanimous vote of the Assembly, (2) a diplomatic convention, and (3) a vote of the Assembly combined with a ratification; it was also suggested that the Court should be established by a vote of the Assembly with a privilege for any State to declare within a given time that it would not "adhere to the Court."[45] The sub-committee accepted a draft resolution proposed by M. Fromageot (France),[46] calling for both the adoption of an Assembly resolution and the opening of a protocol to signature; it was explained at the time that "the vote of the Assembly would result in the establishment of the Court as an organisation under the League of Nations, while the jurisdiction of the Court *ratione personæ* would be determined by the ratification of States."[47] In the Third Committee, the suggestion that a resolution of the Assembly might be ratified was opposed as a dangerous precedent which would weaken the authority of the Assembly. When the sub-committee's proposal had been adopted, the action was explained in the Third Committee's report to the Assembly as having been taken "in view of the special nature of the terms of Article 14 of the Covenant"; yet it would seem that any of the proposals under consideration would have been consistent with the terms of Article 14.

The question caused greater difficulty because it was never made clear what the precise rôle of the Assembly was in connection with the plans for the Court. M. Politis (Greece) stated to the Third Committee that "the discussion in the Assembly was only a stage in the preparation of the final plan to be submitted by the Council to the Governments";[48] later, however, he stated that the Assembly "filled the rôle of a diplomatic conference."[49] It would seem that the Council might be deemed to have submitted its "plans" to the Members of the League when on October 26, 1920, it resolved to communicate the amended draft-scheme to the Assembly, and that the Members of the League might be taken to have used the Assembly as an agency through which they proceeded to the "adoption" of the "plans."[50] The resolution adopted by the As-

[44] Records of First Assembly, Committees, I, p. 281. [45] *Idem*, pp. 406–407.
[46] *Idem*, p. 617. [47] *Idem*, p. 408. [48] *Idem*, p. 299. [49] *Idem*, p. 314.
[50] It may even be contended that the Council was bound to submit the plans to the Members in the Assembly. See Schücking and Wehberg, *Die Satzung des Völkerbundes* (2d ed., 1924), p. 563.

sembly on December 13, 1920, however, left it to the Council to submit the Statute to the Members of the League.

§114. Title of the Statute. Article 14 of the Covenant conferred on the Council a mandate for formulating "plans" (Fr., *un projet*) for the Court. In an address to the Committee of Jurists at The Hague on June 16, 1920, M. Bourgeois referred to *le statut* of the Court,[51] and the Committee of Jurists in its *vœux* referred to itself as constituted to prepare the "constituent statute" (Fr., *statut*) of the Court.[52] Yet the Committee of Jurists elaborated what it called a "draft-scheme" (Fr., *avant-projet*). Frequent reference was made at the First Assembly to the "constitution" of the Court. M. Bourgeois seems to have used the term *statut* at a meeting of the Third Committee on December 8, 1920,[53] and M. Hagerup used the term "organic statute" in a draft of a resolution on the same day,[54] the latter expression, as well as the term *statut constitutionnel* seem to have been used in the Third Committee on December 9, 1920.[55] No particular attention was given to the name, and the report of the Third Committee to the Assembly does not discuss it. The term "statute" seems to have expressed a certain consideration for the feelings of those delegates in the Assembly who insisted on the creation of the Court by the action of the Assembly itself; at the same time, it distinguished the action taken by the Assembly from the ordinary *resolutions* adopted by that body.[56] If the term was a novelty in international legislation, it seems to serve a useful purpose, and it has been employed in subsequent instruments.[57]

§115. The Assembly Resolution of December 13, 1920. The action taken by the Assembly on December 13, 1920, was in the form of a reso-

[51] Minutes of the 1920 Committee of Jurists, p. 5. At a meeting of the Committee of Jurists on June 29, 1920, Baron Descamps referred to the "organic statute" of the Court. *Idem*, p. 245.

[52] *Idem*, p. 747.

[53] Records of First Assembly, Committees, I, p. 298.

[54] *Idem*, p. 552.

[55] Records of First Assembly, Committees, I, p. 302. As the published record is not a verbatim report of what was said, some doubt may be felt on this point.

[56] In the beginning various views were held as to the form to be given to the results of the Assembly's deliberations, and in some quarters it was urged that the term *acts* be employed for such results when unanimously adopted. At one time it was the view of the Swiss Government that decisions adopted by the Assembly "constitute juridical acts, which in themselves impose international obligations." League of Nations Official Journal, 1922, p. 717. The distinction between resolutions and recommendations of the Assembly became important because of the nature of the vote required for each.

[57] For example, the Statute on Freedom of Transit and the Statute on the Régime of Navigable Waterways of International Concern, annexed to the Barcelona Conventions of April 20, 1921. 1 Hudson, International Legislation, pp. 631, 645.

lution approving the Statute and providing for a separate instrument relating to its acceptance.[58]

Under the first paragraph of the resolution,

> The Assembly unanimously declares its approval of the draft Statute of the Permanent Court of International Justice—as amended by the Assembly—which was prepared by the Council under Article 14 of the Covenant and submitted to the Assembly for its approval.

This had the effect, at least, of giving final form to the Statute. If it was an approval of the Statute by all of the then Members of the League, it was not an agreement by them to be bound by it; yet possibly no Member of the League could thereafter question the payment of the Court's expenses as decided upon by the Assembly, or the power of the Assembly and the Council to elect the judges.

A second paragraph of the resolution provided:

> In view of the special wording of Article 14, the Statute of the Court shall be submitted within the shortest possible time to the Members of the League of Nations for adoption in the form of a Protocol duly ratified and declaring their recognition of this Statute. It shall be the duty of the Council to submit the Statute to the Members.

The opening words of this paragraph were explained to have the purpose to "prevent this vote establishing a precedent for the future." The whole paragraph seems to be based on the theory that the Members of the League were acting on the "plans" submitted by the Council in accordance with the first sentence of Article 14. If the Assembly was merely assisting the Council in formulating plans to be submitted to the Members of the League, the question of a precedent could hardly have arisen. The concluding sentence of the paragraph had the effect of leaving to the Council the determination of the form of the protocol to be signed.

A third paragraph of the resolution provided:

> As soon as this Protocol has been ratified by the majority of the Members of the League, the Statute of the Court shall come into force and the Court shall be called upon to sit in conformity with the said Statute in all disputes between the Members or States which have ratified, as well as between the other States to which the Court is open under Article 35, paragraph 2, of the said Statute.

[58] The original draft of the Assembly resolution by M. Fromageot was adopted by the subcommittee of the Third Committee on December 10, 1920. Records of First Assembly, Committees, I, pp. 408, 617. Some modifications were made by the Third Committee. *Idem*, p. 317.

This was a departure from the usual procedure in that the Statute was to be brought into force by a majority of the Members of the League of Nations. The Peace Conference at The Hague in 1907 had not dared to suggest the possibility of a similar course; nor does it seem to have occurred to the 1920 Committee of Jurists. In the First Assembly, itself, the provision received little consideration. The reference to the cases in which the Court is to be called upon to sit has no significance; it is an inaccurate description of the Court's jurisdiction.

A fourth paragraph of the resolution provided:

> The said Protocol shall likewise remain open for signature by the States mentioned in the Annex to the Covenant.

The object of this provision, as explained by M. Hagerup to the First Assembly, was to permit the United States of America to "adhere to the Statute." [59] It opens the Protocol to signature by Ecuador and the Hedjaz, as well as by the United States of America, all other States mentioned in the Annex to the Covenant being included under the second paragraph.

§116. The Protocol of Signature of December 16, 1920. The idea of a separate and complete diplomatic instrument giving force to a Statute adopted by the Assembly appeared late in the deliberations of the First Assembly; nor did the text of this instrument receive much attention. It was assumed that the instrument would deal with the acceptance of the jurisdiction of the Court under Article 36 of the Statute. It had first been proposed that the Members of the League should ratify the Assembly resolution.[60] M. Anzilotti proposed a *procès-verbal* of signatures (Fr., *registre de signatures*).[61] M. van Hamel proposed a special convention.[62] M. Fromageot proposed a "protocol," [63] and when his proposal was adopted by the Third Committee on December 10, M. Loder expressed the wish "that the Protocol of Signature should be immediately prepared by the Secretariat, in order that it might be possible for the Government representatives to sign before leaving Geneva." [64] The Assembly's resolution of December 13, 1920, left the preparation of the "protocol" to the Council; and a draft prepared by the Secretariat was adopted by the Council without discussion on December 14, 1920,[65] and

[59] Records of First Assembly, Plenary, p. 441.
[60] Records of First Assembly, Committees, I, pp. 614–615.
[61] *Idem*, p. 549.
[62] *Idem*, pp. 298, 551. [63] *Idem*, pp. 611, 617. [64] *Idem*, p. 315.
[65] Minutes of the Council, 11th session, pp. 35, 137.

announced to the Assembly on December 17, 1920.[66] The Protocol of Signature bears the date of December 16, 1920; it was made specially available for signature at certain hours on December 17 and 18, and it seems that none of the signatures was affixed until after December 16. The title of the instrument is without legal significance.

§117. Analysis of the Protocol of Signature. By the first paragraph of the Protocol of Signature, "the Members of the League of Nations . . . declare their acceptance [Fr., *déclarent reconnaître*] of the adjoined Statute." As the Protocol itself provided that it might be signed by States mentioned in the Annex to the Covenant, it was clearly faulty drafting thus to limit the declarations of acceptance to Members of the League of Nations.[67] A second paragraph provides: "Consequently, they hereby declare that they accept the jurisdiction of the Court in accordance with the terms and subject to the conditions of the above-mentioned Statute." This provision is traceable to a confusion in the Assembly as to the effect of accepting the Statute; it can have no effect in conferring jurisdiction on the Court except on the terms of the "conditions" set forth in the Statute itself.[68] The Protocol is "subject to ratification." It was clearly faulty drafting that no provision was made for the coming into force of the Protocol itself upon the deposit of a certain number of ratifications; it was merely provided that "the Statute of the Court shall come into force as provided in the above-mentioned decision," *i.e.*, the resolution of the Assembly of December 13, 1920, and that resolution provides that the Statute shall come into force "as soon as this Protocol has been ratified by the majority of the Members of the League." As the number of Members of the League has varied from time to time, did this mean a majority of the members on December 13, 1920, or a majority on the date of the deposit of some ratification? M. La Fontaine (Belgium) had stated to the Assembly on December 13, 1920, that "the signature of twenty-two States will suffice to enable the election of the judges of the Court to be

[66] Records of First Assembly, Plenary, p. 641.

[67] This drafting was responsible for a reservation proposed by the Government of the United States in 1926. See §220, *infra*. In 1926, M. Pilotti (Italy) spoke of the Protocol of Signature as "a Convention concluded between the Members of the League for the application of the Covenant." Minutes of the 1926 Conference of Signatories, p. 16.

[68] It may be thought that a party to the Protocol of Signature has agreed to the Court's exercise of jurisdiction in disputes as to jurisdiction under paragraph 4 of Article 36, and in cases of applications for an indication of interim measures under Article 41, and in cases of applications to intervene. Judge Huber stated in 1922 that as a result of Article 53 of the Statute, "all States which had ratified the Statute had recognized the Court's right to decide, even in their absence, whether Articles 36 and 37 of the Statute were applicable in a given case." Series D, No. 2, p. 201. In 1927, Judge Anzilotti referred to the compulsory jurisdiction conferred on the Court by Article 60 of the Statute. Series A, No. 13, p. 23.

made in the next session of the Assembly," [69] as the League of Nations then had forty-two members; six States were admitted to membership in 1920, however, and in 1921 it was assumed that a deposit of the ratifications of twenty-five Members of the League was necessary to bring the Statute into force.[70]

The Protocol also provides that it "shall remain open for signature by the Members of the League of Nations and by the States mentioned in the Annex to the Covenant of the League." Numerous States have signed and ratified the Protocol since the Statute came into force in 1921. Though such action was too late to give these States a formal part in the creation of the Court, their action has had the effect of enlisting their support of the existing institution, and it may have the effect of enabling the Court to exercise, with reference to these States, certain kinds of incidental jurisdiction.

§118. The Optional Clause. In the course of the work of the 1920 Committee of Jurists, M. Ricci-Busatti was moved by the fear that the whole plan for the Court would be jeopardized by differences concerning the extent of its jurisdiction, to suggest that the organization and the competence of the Court should be dealt with in two separate draft conventions; [71] the suggestion was renewed by the Italian Council for Diplomatic Litigation, when the draft scheme of the Committee of Jurists came before the Council.[72] In the sub-committee of the Third Committee of the First Assembly, it appeared that unanimity might be reached with reference to the establishment of the Court, but not with reference to the extent of its jurisdiction.[73] M. Fernandes (Brazil) drafted an alternative text of an article for the Statute, proposing that a Member of the League be permitted to adhere to either of two texts of the article; [74] in the end the sub-committee proposed a single article of the Statute which would permit but not require extension of jurisdiction.[75]

[69] Records of First Assembly, Plenary, p. 447. M. La Fontaine doubtless meant ratification instead of signature.

[70] It did not become necessary to decide the question in 1921. In February, 1921, a report of the Secretariat had stated that the deposit of ratifications by at least twenty-four members was needed to bring the Statute into force; counting the Argentine Republic, however, the League of Nations then had forty-eight members, so that a majority was not less than twenty-five.

[71] Minutes of the 1920 Committee of Jurists, pp. 246, 582.

[72] Records of First Assembly, Committees, I, p. 498.

[73] *Idem*, pp. 380–2, 533.

[74] *Idem*, p. 553. Similar drafts were later proposed by M. Fromageot (France), M. Huber (Switzerland) and M. Hagerup (Norway). *Idem*, pp. 611, 614, 615.

[75] *Idem*, p. 566. The text was thought to be not "an amendment, but an addition to the Covenant." *Idem*, pp. 408, 611.

This draft was adopted by the Third Committee, and in reporting it to the Assembly M. Hagerup stated that it was "in conformity with the idea supported by M. Huber, the Swiss delegate, during the Hague Conference of 1907." [76] The Third Committee did not suggest a model for the declarations to be made; nor was such a model mentioned in the Assembly on December 13, 1920.[77] When the draft of the Protocol of Signature came before the Council on December 14, however, a draft of an "Optional Clause" was attached; it seems to have been approved by the Council,[78] and it was opened to signature as a separate protocol on December 17, 1920.

§119. Entry into Force of the Statute. On February 25, 1921, the Secretary-General of the League of Nations reported to the Council that the Protocol of Signature had been signed on behalf of twenty-seven Members of the League of Nations,[79] and the Council authorized the Secretary-General to proceed with steps for the conditional nomination of candidates for the first election of judges. On February 21, 1921, the first ratification was deposited by Sweden. On March 3, 1921, a "pressing appeal" was made by the Council for the ratification of the Protocol.[80] On June 21, 1921, the Secretary-General of the League of Nations reported that the Protocol of Signature had been signed by representatives of thirty-nine Members of the League of Nations, and that ratifications had been deposited by Denmark, Italy and Sweden.[81] An effort to secure the necessary number of ratifications was prosecuted with great vigor during the early months of 1921, and the Secretary-General reported that on September 1 twenty-two of the forty-one signatories had deposited ratifications, that six additional ratifications were in course of transmission for deposit, and that "the constitution of the Court is assured." [82] Perhaps it is not necessary to fix the precise date on which the Statute

[76] *Idem*, Plenary, p. 440. At the second Peace Conference at The Hague in 1907, the Swiss Delegation proposed an enumeration of questions of conventional interpretation concerning which declarations of acceptance of obligatory jurisdiction might be made. 2 *Actes et Documents*, pp. 463–4, 888. Article 16*e* of a later Anglo-American draft proposed that a separate protocol be annexed to the Convention on Pacific Settlement for signature by States desiring to accept compulsory arbitration, twenty-two possible subjects of such arbitration being listed. *Idem*, pp. 100–1, 1022–7.

[77] M. Motta (Switzerland) did refer to acceptance of compulsory jurisdiction "by means of a protocol," and M. Bourgeois (France) spoke of the opportunity to conclude "a private Covenant." Records of First Assembly, Plenary, pp. 490, 495.

[78] Minutes of the Council, 11th session (1920), pp. 35, 137. The published records may not be complete on the history of the Optional Clause.

[79] Minutes of the Council, 12th session (1921), pp. 18, 115–116.

[80] League of Nations Official Journal, 1921, p. 213.

[81] *Idem*, p. 716.

[82] Minutes of the Council, 14th session (1921), pp. 11, 58; Records of Second Assembly, Plenary, p. 161.

came into force; the provision in the Assembly's resolution of December 13, 1920, to which reference was made in the Protocol of Signature of December 16, 1920, was that the Statute should come into force "as soon as this Protocol has been ratified by a majority of the Members of the League," a deposit of the ratifications not being required for this purpose. It may be said, therefore, that the Statute came into force by September 1, 1921,[83] and this enabled the first election of judges to be held in that year. Since that date, additional States have signed and ratified the Protocol of Signature; on December 31, 1942, ratifications had been deposited by fifty-one States which were at the time Members of the League of Nations, and the Protocol of Signature had been signed on behalf of eight States which had not deposited ratifications.[84]

§120. Possibility of Denunciation. The Protocol of Signature of December 16, 1920, contains no provision that it may be denounced, and no attempt to denounce it has been made by any State.[85] As an effective denunciation would put an end to the denouncing State's obligations, the general principle would seem to be that in the absence of a provision authorizing it a denunciation of an international instrument can be effected only with the assent of all the parties to the instrument. When the question was discussed in the first Conference of Signatories of the Protocol of Signature in 1926, M. Osuský (Czechoslovakia) expressed the view that "every international convention of the same type as the Statute of the Court implied the right of denunciation, even if no formal provisions were made for it," and M. Dinichert (Switzerland) stated that the Court's Statute being "of the collective type . . . as long as there were no provisions to the contrary, a State might withdraw at will, after having given reasonable notice of its intention."[86] These views did not pass unchallenged, however. Even if it be thought that obligations with reference to maintaining international institutions should not be perpetual, international organization cannot be secure unless the assent of all States parties to an instrument is required for any change in the obligations which it creates. The obligations assumed by the parties to the Protocol of Signature are so slight that no hardship would result from an application of that general rule.

[83] The Protocol of Signature was not registered under Article 18 of the Covenant until October 8, 1921. 6 League of Nations Treaty Series, p. 379.

[84] A list of the signatures and dates of the deposits of ratifications are published in League of Nations Document, A. 6. 1939. Annex I. V., p. 9. See also the appendix, p. 666, *infra*.

[85] Special provision was made in the Protocol of September 14, 1929, concerning the Accession of the United States, for withdrawal by the United States. See §227, *infra*.

[86] Minutes of the 1926 Conference of Signatories, pp. 13, 15.

By withdrawing from membership in the League of Nations, a State does not change its position with respect to the Protocol of Signature; [87] if a party to the Protocol before its withdrawal, it continues to be such thereafter,[88] though its rights and obligations may be somewhat different after the withdrawal. Its further participation in elections of judges will be possible only on the conditions laid down by the Assembly under paragraph 2 of Article 4 of the Statute; [89] though it will have no further obligation to contribute to the general funds of the League of Nations, it may have some obligation to bear a share of the expenses of the Court; [90] and if it becomes a party in a case before the Court, it may have to make a special contribution towards the expenses of the Court, under paragraph 3 of Article 35 of the Statute.

[87] See §219, *infra*.

[88] Several States have expressly declared, in connection with their withdrawal from membership in the League of Nations, that they desired to continue to participate in the maintenance of the Court. Thus Chile in 1938, and Hungary and Peru in 1939.

The Japanese Government seems to have taken a different view. A protocol to the Japanese-Netherlands treaty of April 19, 1933, provided for negotiations if the legal situation of Japan *vis-à-vis* the Court should be modified as a result of its withdrawal from the League of Nations. 163 League of Nations Treaty Series, p. 364. A statement was made by the Japanese Ministry of Foreign Affairs on February 12, 1940, that the opening of such negotiations had been requested and that Japan had given notice of the termination of the treaty of April 19, 1933. 9 Contemporary Japan (1940), p. 386.

[89] See §242, *infra*.

[90] See §356, *infra*.

CHAPTER 9

THE REVISION OF THE STATUTE

§121. Lack of Provision for Amendment. It is an unfortunate *lacuna* in the Statute of the Court annexed to the Protocol of Signature of December 16, 1920, that it makes no provision for amendments. The possibility of including such a provision was not discussed by the 1920 Committee of Jurists, nor does it seem to have been referred to when the draft-scheme was before the First Assembly. Yet it must have been obvious that no text could be framed which would be completely satisfactory for all time to come. The omission was the more singular because of the provision which had been made for the amendment of the Covenant of the League of Nations; Article 26 permits amendments to the Covenant to "take effect when ratified by the Members of the League whose representatives compose the Council and by a majority of the Members of the League whose representatives compose the Assembly," and it takes into account the general principle that a State cannot be bound by legislation to which it has not assented by providing that "no such amendment shall bind any Member of the League which signifies its dissent therefrom, but in that case it shall cease to be a Member of the League." [1] The Covenant had not been in force for two years when various amendments were projected, including amendments to Article 26 itself, and some of these amendments have been brought into force.[2] Moreover, provision had been made for the amendment of the constitution of the International Labor Organization; Article 422 of the Treaty of Versailles provides that amendments to Part XIII "which are adopted by the [International Labor] Conference by a majority of two-thirds of the votes cast by the Delegates present shall take effect when ratified by the States whose representatives compose the Council of the League of Nations and by

[1] For a commentary on Article 26 of the Covenant, see Manley O. Hudson, "Amendment of the Covenant of the League of Nations," 38 Harvard Law Review (1925), pp. 903–942.

[2] The amendments were embodied in fourteen protocols of October 5, 1921, two protocols of September 27, 1924, and one protocol of September 30, 1938. For the texts, see 1 Hudson, International Legislation, pp. 18–42; Records of Nineteenth Assembly, Plenary, p. 146.

three-fourths of the Members." [3] In view of the situation as it existed in 1920, therefore, it was an amazing lack of foresight which caused the draftsmen of the Statute of the Court to fail to include a provision for the amendment of the Statute.

§122. Method of Amendment. Though the Statute fails to envisage any process of amendment, its provisions cannot be immutable. The general rule of international law is that a modification in an international instrument may be effected by the parties, and that rule may be applicable to the Statute of the Court. It is to be noted, however, that a revision of the Statute might have a disturbing effect on the numerous treaties concluded which confer jurisdiction on the Court; in some cases, the States parties to these treaties are not parties to the Protocol of Signature of December 16, 1920, and not even members of the League of Nations. This point did not escape attention in 1928, when M. Cassin (France) was careful to point out to the Assembly that it is "important not to interfere with the framework of an established institution" on which "a large number of States have already concluded treaties" conferring jurisdiction, such treaties being based more or less upon the Statute of the Court at the time they were framed.[4]

The question also arose whether all the parties to the Protocol of Signature can amend the Statute without the coöperation of the Assembly and perhaps of the Council of the League of Nations. Though the Statute was approved by the First Assembly in 1920 before the Protocol of Signature was opened to signature, the resolution of the Assembly did not purport to give force to the Statute. In view of the close relation of the Court to the League of Nations,[5] and particularly of the provision in Article 33 of the Statute that "the expenses of the Court shall be borne by the League of Nations," the Assembly's approval at some time was essential as a practical matter; and since there has never been a time when all the Members of the League of Nations were parties to the Protocol of Signature, such approval may have been legally necessary.[6] If all the Members of the League of Nations should become parties to the Protocol of Signature, perhaps the Statute might be amended without any action taken in the Council or Assembly; or if all the parties to the Protocol of

[3] An amendment to Article 393, projected in 1922, came into force on June 4, 1934. See 1 Hudson, International Legislation, pp. 248–253.

[4] Records of Ninth Assembly, Plenary, p. 110. See also *idem*, First Committee, p. 34.

[5] See §106, *supra*.

[6] See the remarks of Henri Rolin (Belgium), Records of Ninth Assembly, First Committee, pp. 39–40; and of Arnold Raestad (Norway), in Records of Eleventh Assembly, First Committee, p. 17.

Signature desired to divorce the Court from the League of Nations completely, the Statute might be amended by their action alone. Otherwise, however, it would seem to be necessary that any amendment of the Statute must be accepted in some way by all the Members of the League.

§123. Necessity of Unanimous Consent. Action by the parties to the Protocol of Signature with a view to the amendment of the Statute is governed by a general principle of international law that in the absence of specific provisions to the contrary the stipulations of an international instrument can be modified only with the consent of all parties.[7] If this principle had not been universally observed in connection with the maintenance of international institutions,[8] it is nevertheless generally accepted as one of the basic principles of international legislation. Applied to the Statute, it involves the necessity of consent by each State or Member of the League of Nations which may have signed and ratified, or which may have acceded to, the Protocol of Signature of December 16, 1920, before any amendment to the Statute can be put into effect. It is to be noted, however, that the general principle of international law does not require that such consent be manifested in any particular way; it may even be informal.

§124. French Proposal of 1928. For six years after the inauguration of the Court in 1922, no proposals were advanced for the amendment of the Statute. This was not altogether due to satisfaction with the work of the Court; it was due, rather, to a feeling that further experimentation was not wise until the Court had been placed on firm foundations. With the approach of a general election of judges in 1930, however, the occasion seemed to be presented for some changes to be made. Though there was no widespread dissatisfaction, some events in the history of the Court itself may have encouraged such an effort; the decision of the *Lotus Case* by an evenly divided Court in 1927, the difficulty in securing a full attendance of judges at other than the summer sessions, the frequent summoning of deputy-judges, and some delays in the disposition of cases contributed to produce a willingness to consider changes which might be made. The French delegation in the Ninth Assembly of the League of Nations took the initiative in this direction, and on September 7, 1928, it submitted a draft resolution to the Assembly on behalf of twenty

[7] The London Protocol of January 17, 1871, contains a formal statement of this principle. 61 British and Foreign State Papers, p. 1198; Hudson, Cases on International Law (2d ed.), p. 933. See also Article 10 of the Havana Convention on Treaties of February 20, 1928. 4 Hudson, International Legislation, p. 2378.

[8] By a protocol of April 21, 1926, the Convention of June 7, 1905 creating the International Institute of Agriculture, seems to have been modified without the consent of all parties. See 3 Hudson, International Legislation, p. 1857.

delegations.[9] A statement accompanying the draft mentioned "the ever-growing number of matters referred" to the Court and "certain defects revealed by eight years of work"; no explanation was offered to the Assembly as to what these defects were, however. M. Fromageot (France) explained to the First Committee that the draft resolution was "quite innocuous," that it "ought not to contain so much as the shadow of a criticism against the Court," and that "there must be no risk of upsetting an organism which was working extremely well";[10] but he failed to say why the proposed examination of the Statute was thought to be desirable. As *rapporteur* for the First Committee, M. Cassin (France) later explained that it was intended not to revise but to reëxamine the Statute "with a view to remedying such defects as experience may have brought to light."[11]

§125. Assembly Resolution of September 20, 1928. When the French proposal came before the First Committee of the Assembly, some apprehension was voiced that the process of amendment with the assent of all parties to the Protocol of Signature could not be completed before 1930. The First Committee approved the proposed draft resolution on September 15, 1928,[12] but omitted a paragraph referring to "Article 14 of the Covenant of the League of Nations, under which the Council is responsible for preparing the Statute of the Court with a view to its submission to the Assembly for approval." On September 20, 1928, the Assembly adopted the resolution in the following form:[13]

> The Assembly:
>
> Considering the ever-increasing number of matters referred to the Permanent Court of International Justice;
>
> Deeming it advisable that, before the renewal of the term of office of the members of the Court in 1930, the present provisions of the Statute of the Court should be examined with a view to the introduction of any amendments which experience may show to be necessary;
>
> Draws the Council's attention to the advisability of proceeding, before the renewal of the term of office of the members of the Permanent Court of International Justice, to the examination of the Statute of the Court with a view to the introduction of such amendments as may be judged desirable, and to submitting the necessary proposals to the next ordinary session of the Assembly.

§126. The 1929 Committee of Jurists. Having before it the Assembly's resolution, on December 13, 1928, the Council of the League

[9] Records of Ninth Assembly, Plenary, p. 55.
[10] Records of Ninth Assembly, First Committee, pp. 33–35.
[11] *Idem*, Plenary, p. 110.
[12] *Idem*, First Committee, pp. 39–40, 122.
[13] *Idem*, Plenary, p. 112.

of Nations decided to entrust the study of the Statute to a Committee of Jurists with "wide terms of reference,"[14] and it named the following to constitute the Committee: M. Fromageot (France), M. Gaus (Germany), Sir Cecil Hurst (Great Britain), M. Ito (Japan), M. Politis (Greece), M. Raestad (Norway), M. Rundstein (Poland), M. Scialoja (Italy), M. Urrutia (Colombia), M. van Eysinga (Netherlands), and Mr. Root (United States).[15] The chairman of the Supervisory Commission, M. Osuský (Czechoslovakia), was later asked to assist the Committee; and on March 9, 1929, M. Pilotti (Italy) was appointed a member.[16] On March 9, 1929, the Council decided to refer to the Committee the question of the accession of the United States of America, that question being related to the problem of revision.

The Committee of Jurists held fifteen meetings at Geneva, March 11–19, 1929.[17] The Council had invited the President and the Vice-President of the Court "to participate in the work of the Committee," and M. Anzilotti and M. Huber accepted the invitation with the reservation that their presence was not to be taken to indicate an opinion that any revision was necessary; they did not speak for the Court, however, and they did not vote.[18] The Committee drafted amendments to eighteen articles of the Statute, and proposed the addition of four new articles on advisory opinions.[19] On June 12, 1929, the Council of the League of Nations decided to communicate its report to the Members of the League of Nations and to the States mentioned in the Annex to the Covenant, and to convoke a "conference of States parties to the Statute" for the purpose of "examining the amendments."[20] In this latter action, the Council followed the precedent which it had set in 1926 in convoking a conference of signatories to deal with the proposed accession by the United States to the Protocol of Signature of December 16, 1920.[21]

[14] League of Nations Official Journal, 1929, p. 35.

[15] *Idem*, p. 56. Elihu Root was the only member of the Committee who had served as a member of the 1920 Committee of Jurists.

[16] *Idem*, p. 566.

[17] The minutes of the Committee are published in League of Nations Document, C. 166. M. 66. 1929. V. In the publications of the League of Nations, the Committee is referred to as the "Committee of Jurists on the Statute of the Permanent Court of International Justice."

[18] Minutes of the 1929 Committee of Jurists, pp. 8, 25, 92, 94. The Registrar of the Court also assisted the Committee in drafting.

[19] League of Nations Official Journal, 1929, p. 1113. A separate report was made on the accession of the United States. See §224, *infra*.

[20] *Idem*, p. 997.

[21] It seems very doubtful whether the expedient of a more or less independent conference of signatories would have been resorted to, if both the Conferences of 1926 and 1929 had not been concerned with the proposed accession by the United States of America, which was not a member of the League of Nations. It is to be noted, however, that Brazil was represented at the Conference of Signatories in 1929, after its withdrawal from the membership in the League of Nations.

§127. The Conference of Signatories of 1929. At the Conference of Signatories, which held five meetings in Geneva, September 4–12, 1929,[22] forty-eight States or Members of the League of Nations were represented,[23] including two States which had not yet signed the Protocol of Signature of December 16, 1920.[24] The work of the Conference was mainly devoted to a study of the amendments to the Statute proposed by the Committee of Jurists and to the drafting of a protocol for putting these amendments as revised and amplified into force. The Conference stopped short, however, of attempting to promulgate in any form the draft protocol and amendments which it "adopted," nor did it open the draft protocol to signature; instead, it appointed *rapporteurs* to present the results of its work to the Tenth Assembly of the League of Nations then in session.[25] On September 12, 1929, the President of the Conference, M. van Eysinga (Netherlands), addressed a letter to the President of the Tenth Assembly and to the chairman of the First Committee of the Tenth Assembly, communicating to them the texts of the draft protocol and amendments as adopted by the Conference, as well as a draft of a proposed resolution; it was suggested that the Assembly should "by a suitable resolution, adopt for its part the amendments to the Statute of the Court and the draft protocol relating thereto," and that in this event there would be no obstacle to opening the draft protocol to signature.[26]

§128. Assembly Resolution of September 14, 1929. The First Committee of the Tenth Assembly comprised among its members a large number of the men who had represented their Governments at the 1929 Conference of Signatories, as well as a number of those who had served on the 1929 Committee of Jurists. The First Committee had before it the report which had been submitted to the Council by the 1929 Committee of Jurists; consideration of this report was postponed pending the discussion of the report in the 1929 Conference of Signatories, though the chairman of the First Committee was careful to point out that the Assembly's position in the matter was safeguarded.[27] On September 13, 1929, after a brief discussion, the First Committee approved the draft

[22] The minutes of the Conference are published in League of Nations Document, C. 514. M. 173. 1929. V.

[23] *Idem*, p. 5. The *rapporteur* of the First Committee of the Tenth Assembly stated that fifty-four States or Members of the League of Nations were represented. Records of Tenth Assembly, Plenary, p. 115. But the records do not disclose any representation of South Africa, Albania, Bolivia, Costa Rica, Ethiopia, or Haiti.

[24] Nicaragua and Peru signed the Protocol of Signature on September 14, 1929.

[25] Minutes of the 1929 Conference, p. 53.

[26] *Idem*, p. 78.

[27] Records of Tenth Assembly, First Committee, pp. 7, 57.

resolution relating to the amendments and the draft protocol,[28] and its *rapporteur* informed the Assembly that the Committee was "in entire agreement with the views expressed by the Conference [of Signatories] as regards the revision of the Court's Statute." [29] With little discussion the Assembly adopted the resolution approved by the First Committee, on September 14, 1929, as follows:[30]

> The Assembly adopts the amendments to the Statute of the Permanent Court of International Justice and the draft Protocol which the Conference convened by the Council of the League of Nations has drawn up after consideration of the report of the Committee of Jurists, which met in March 1929 at Geneva and which included among its members a jurist of the United States of America. The Assembly expresses the hope that the draft Protocol drawn up by the Conference may receive as many signatures as possible before the close of the present session of the Assembly and that all the Governments concerned will use their utmost efforts to secure the entry into force of the amendments to the Statute of the Court before the opening of the next session of the Assembly, in the course of which the Assembly and the Council will be called upon to proceed to a new election of the members of the Court.

§129. The Revision Protocol of September 14, 1929. In pursuance of the decision taken by the Conference of Signatories on September 12, 1929, and of an Assembly resolution of September 14, 1929, the Protocol drafted by the Conference of Signatories was opened to signature on September 14, 1929.[31] This Protocol provided that it should "be presented for signature to all the signatories of the Protocol of December 16, 1920," and to the United States of America. Though reference is made in the Protocol to "the amendments which are set out in the Annex," the text of the Annex was drafted on a different basis, for it is there provided that certain articles of the Statute are to be replaced by a "new text" (Fr., *nouvelle rédaction*) in each case. It was provided that after the Protocol had entered into force, the new provisions should form part of the Statute and that the provisions of the original articles which had been made the subject of amendment should be abrogated; thereafter "any acceptance of the Statute" was to "constitute an acceptance of the Statute as amended." The entry into force of the amendments was not to have the effect of abrogating the original Statute and setting up a

[28] *Idem*, pp. 9, 70. [29] *Idem*, Plenary, p. 436. [30] *Idem*, p. 121.
[31] For the text, see League of Nations Official Journal, 1929, p. 1842; 1 Hudson, International Legislation, p. 582. In the publications of the League of Nations, the Protocol is referred to as a Protocol on the "revision of the Statute."

new Statute; it was merely to effect changes in an instrument continuously existing.[32]

§130. Appreciation of the 1929 Amendments. The work of the 1929 Committee of Jurists was in some measure stultified by the pressing need for bringing the amendments into force before the second general election of judges, due in September 1930; it had been insisted that the Committee should confine itself to proposing "changes which were of urgent and real importance" and which would justify "the exercise of pressure by the Council on States in order to obtain their ratifications before September 1930."[33] It would seem, also, that the oft-repeated declaration that it was not intended to "recast" the Statute had a limiting effect. The amendments varied widely in importance, but few of them effected significant changes; as *rapporteur* of the First Committee of the Tenth Assembly, M. Politis (Greece) characterized most of them as being of only "secondary importance."[34] Moreover, some of the reforms which the amendments were designed to effect could have been achieved without any modification of the Statute; the Assembly had power, for instance, to increase the number of the judges and to provide for them adequate salaries, and it exercised this power in 1930. Perhaps the most striking feature of the amendments is that they failed to deal with the chief *lacuna* in the Statute of December 16, 1920, *viz.*, its lack of provision for a method of amendment. The failure of the 1929 Committee of Jurists and the 1929 Conference of Signatories to deal with this matter may possibly be explained, however, by the fact that one of the reservations offered by the United States of America in connection with its proposed accession to the Protocol of Signature stipulated that the Statute "shall not be amended without the consent of the United States," and the Protocol of September 14, 1929, on the accession of the United States, was therefore made to provide (Article 3) that "no amendment of the Statute of the Court may be made without the consent of all the Contracting States."[35]

§131. Failure of the Revision Protocol to Enter into Force in 1930. When the study of the Statute with a view to its possible amendment was undertaken in 1928, it was intended that the amendments should be brought into force before the second general election of judges scheduled

[32] *Cf.*, Arnold Raestad (Norway), in Records of Eleventh Assembly, First Committee, p. 17.
[33] Minutes of the 1929 Committee of Jurists, p. 40.
[34] Records of Tenth Assembly, Plenary, pp. 117–118.
[35] See §227, *infra*.

for 1930. To accomplish this result, paragraph 4 of the Revision Protocol of September 14, 1929, was drafted as follows:[36]

> The present Protocol shall enter into force on September 1, 1930, provided that the Council of the League of Nations has satisfied itself that those Members of the League of Nations and States mentioned in the Annex to the Covenant which have ratified the Protocol of December 16, 1920, and whose ratification of the present Protocol has not been received by that date, have no objection to the coming into force of the amendments to the Statute of the Court which are annexed to the present Protocol.

This text clearly met the requirement that each of the signatories of the Protocol of December 16, 1920, which had ratified it, should consent to the amendments to the Statute; it was novel in providing that the consent should be required only in such form that the Council might be satisfied that it existed, *i.e.*, that there was no objection.[37] If it had been necessary to raise the question, the point might have been made that this method of bringing the amendments into force also required the assent of each State or Member of the League of Nations which had ratified the Protocol of December 16, 1920.

The progress of ratifications of the Revision Protocol was not rapid, and when the Council came to consider the matter on September 9, 1930, the situation was as follows: of the forty-five signatories which had then ratified the Protocol of December 16, 1920, only thirty-two had ratified the Revision Protocol of September 14, 1929; eight had stated that they would raise no objection to the coming into force of the amendments; Brazil and Uruguay had stated that constitutional provisions prevented their agreeing without parliamentary authorization; Cuba had expressed definite opposition; and Abyssinia and France had expressed no attitude.[38] The Council was therefore unable to satisfy itself that there was no objection, and the amendments to the Statute failed to come into force as contemplated in paragraph 4 of the Revision Protocol. In consequence, the second general election of judges in 1930 was held under the original provisions of the Statute, though the nominations had been made before the fate of the amendments was known; it was understood, however, that the judges elected would serve under the amended Statute if the amendments were brought into force during their term, and that in this event

[36] Minutes of the 1929 Conference of Signatories, pp. 51, 84.

[37] Yet A. P. Fachiri described this provision as "a revolution in the history of international agreements." 11 British Year Book of International Law (1930), p. 98.

[38] League of Nations Official Journal, 1930, p. 1313.

the deputy-judges elected would "no longer be called upon to exercise their functions." [39]

§132. Subsequent Entry into Force of the Revision Protocol. Though the conditions set for the amendments' entering into force in 1930 had not been fulfilled, the Eleventh Assembly of the League of Nations did not abandon the Revision Protocol of September 14, 1929. Instead, it decided to keep the Protocol alive, and expressed the hope that more States would proceed to ratify it as soon as possible.[40] The First Committee of the Assembly expressed the view that the Revision Protocol "could not now come into force until it has been ratified by all the States which ratified the former Protocol of December 16, 1920." [41] Such a result could not be quickly accomplished, and though the Assembly's invitations to States to ratify were repeated in 1931 and 1932, more than five years were to elapse before the desired goal was reached; even then, not all of the States concerned had formally ratified.

For a time, reservations offered by the Cuban Government seemed to present an obstacle. The Revision Protocol was signed on behalf of Cuba on January 5, 1931; on the same day a ratification was offered for deposit which contained reservations as to paragraph 4 of the Protocol and as to the amendment to Article 23 of the Statute, and a covering letter expressed the view of the Cuban Government that the Protocol would not affect the position of judges already elected.[42] The Cuban ratification could not be accepted for deposit by the League Secretariat until the reservations had been assented to by the States interested;[43] the Governments consulted raised no objection to the reservation to paragraph 4 of the Protocol (which had become *functus officio*), but some of them did not assent to the reservation to the amendment to Article 23 of the Statute; the statement in the covering letter was regarded as relating to a matter within the competence of the Court itself. After negotiations which were somewhat protracted, the Cuban Government proceeded to ratify the Protocol without further insistence on its previous reservations, and its ratification was deposited on March 14, 1932.[44]

[39] Records of Eleventh Assembly, Plenary, p. 131.

[40] Records of Eleventh Assembly, Plenary, p. 132. The view might have been taken that under the provision in Article 4 the Protocol could not be brought into force subsequently to September 1, 1930.

[41] *Idem*, p. 131.

[42] Records of Twelfth Assembly, First Committee, p. 135; League of Nations Document, C. L. 4. 1931. V.

[43] On reservations to multipartite instruments, see 32 American Journal of International Law (1938), p. 330; 33 *idem* (1939), p. 488.

[44] For a fuller treatment of this subject, see Hudson, "The Cuban Reservations and the Revision of the Statute of the Permanent Court of International Justice," 26 American Journal of International Law (1932), p. 590.

When the Sixteenth Assembly of the League of Nations met in 1935, ratifications of the Revision Protocol had been deposited by all of the forty-nine States which had ratified the Protocol of Signature of 1920, except Brazil, Panama and Peru; and all three of these States had in some way indicated an intention to proceed to ratification.[45] In a resolution of September 27, 1935,[46] the Assembly observed that the entry into force of the Revision Protocol "seems no longer to encounter any difficulty," and it requested the Council to take the necessary measures to put the Protocol into force on February 1, 1936,[47] "on condition that the States which have not already ratified have not in the meanwhile made objection to the contemplated procedure." This resolution having been communicated to the three States whose ratifications were lacking, the Brazilian Government replied that the Protocol had been "transmitted to the Legislative Power for approbation"; the Peruvian Government replied that ratification having been recommended to the Peruvian Congress it had no objection to the procedure contemplated;[48] the Government of Panama did not reply, but it had previously stated that it had no objection to the amendments' entry into force. On January 23, 1936, the Council took cognizance of the situation, and authorized the Secretary-General of the League of Nations to declare the Revision Protocol to have entered into force on February 1, 1936, "unless, contrary to all expectations, objections should be notified" before that date.[49] No objections were notified, and on February 1, 1936 the Secretary-General, acting "by order and in the name of the Council," informed the Registrar of the Court that the Protocol had come into force on that day.[50]

§133. The United States of America and the Revision Protocol. When the amendments to the Statute of the Court were being drafted in 1929, the agencies concerned with them were also occupied with the drafting of a protocol for the accession of the United States to the Protocol of Signature of 1920. The United States Protocol, opened to signature on

[45] Records of Sixteenth Assembly, First Committee, pp. 90–91; Series E, No. 11, pp. 40–41.
[46] *Idem*, Plenary, pp. 94, 124.
[47] This date was proposed by the Registrar of the Court. *Idem*, First Committee, pp. 42, 92.
[48] League of Nations Official Journal, 1936, p. 267. See also 30 American Journal of International Law (1936), pp. 273–279.
[49] League of Nations Official Journal, 1936, p. 118.
[50] On March 17, 1936, the Brazilian Government addressed a letter to the Secretary-General of the League of Nations with a view to safeguarding the legal principle that any modification of an international instrument requires the "previous and express agreement of all the contracting parties." Series E, No. 12, p. 60. A Brazilian ratification of the Revision Protocol was deposited at Geneva on January 26, 1937. 177 League of Nations Treaty Series, p. 481.

September 14, 1929, envisaged acceptance by the United States of the unamended Statute of the Court, making no reference to the amendments to the Statute for which the Revision Protocol provided. If the American adherence had become operative after the entry into force of the amendments, therefore, the United States would have accepted the Statute in a form in which it no longer existed. This possibility did not escape the attention of the 1929 Committee of Jurists,[51] but its drafts did not obviate the difficulty. The 1929 Conference of Signatories therefore inserted in the Revision Protocol a provision (paragraph 7) that "for the purposes of the present Protocol, the United States of America shall be in the same position as a State which has ratified the Protocol of December 16, 1920." This had the effect of requiring that before declaring the amendments to be in force the Council should satisfy itself that the United States did not object to the coming into force of the amendments. The 1929 Conference also suggested, to "prevent misunderstanding," that the United States should act simultaneously on the Protocol of Signature of December 16, 1920, the Revision Protocol of September 14, 1929, and the Protocol relating to United States' Accession of September 14, 1929.[52] The three protocols were signed on behalf of the United States on December 9, 1929, and on June 25, 1930, the Secretary of State of the United States informed the Secretary-General of the League of Nations that he perceived "no reason to object to the coming into force, between such nations as may have become parties thereto, of the amendments to the Statute . . . which have not been ratified by the United States." [53]

[51] Minutes of the 1929 Committee of Jurists, p. 80.
[52] Minutes of the 1929 Conference, p. 80; Records of Tenth Assembly, Plenary, p. 118.
[53] Records of Twelfth Assembly, First Committee, p. 135; Series E, No. 8, p. 59.

CHAPTER 10

THE DRAFTING OF THE STATUTE AND AMENDMENTS

§134. Agencies Concerned in Drafting the Original Statute. Four agencies were principally concerned in the drafting of the original Statute: the 1920 Committee of Jurists, the Council of the League of Nations, a sub-committee of the Third Committee of the First Assembly of the League of Nations, and the Third Committee of the First Assembly of the League of Nations. In its plenary sessions, the First Assembly of the League of Nations did little more than to confirm the results of the work of its Third Committee and the latter's sub-committee.[1] To understand the genesis of any provision of the original Statute, it may be necessary to trace the drafts through the thirty-five meetings of the Committee of Jurists, June 16–July 24, 1920;[2] through the eighth and tenth sessions of the Council of the League of Nations, at San Sebastian July 30–August 5, and at Brussels October 20–28, 1920;[3] through the eleven meetings of the sub-committee, November 24–December 10, 1920;[4] through the eight meetings of the Third Committee, November 17–

[1] The First Assembly in plenary session made only one change in the draft before it, in Article 27.

[2] "Advisory Committee of Jurists, *Procès-verbaux* of the Proceedings of the Committee," The Hague (1920), pp. iv, 779 (referred to as Minutes of the 1920 Committee of Jurists). These minutes, in many cases only summarized, were revised from original minutes taken at the time which were not published. Some quotations from the original minutes were published in James Brown Scott, The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists (1920). See also, Men and Policies, Addresses by Elihu Root (1924), pp. 321ff.

It is a difficult task to trace the provisions of the Statute through the discussions of the Committee of Jurists. Until its 17th meeting, no definite text was taken as the basis of discussion. The Root-Phillimore plan, Minutes, pp. 298–301, 326–328, served as the basis from the 17th to the 24th meetings; a text prepared by a drafting committee, *idem*, pp. 561–571, served as the basis from the 25th to the 30th meetings. The 31st meeting was devoted to a second reading, and the final draft-scheme was signed at the 32nd meeting on July 23, 1920. *Idem*, p. 671.

[3] At this time the minutes of the Council were not included in the League of Nations Official Journal; they were printed separately as Documents 20/29/14, 20/29/16 and were later published.

[4] The minutes of the sub-committee were published in Records of First Assembly, Committees, I, pp. 331–408.

December 11, 1920; [5] and through the twentieth and twenty-first plenary meetings of the First Assembly, on December 13, 1920.[6] In addition to the drafts considered by these agencies, various official reports also deserve attention. The report submitted by the 1920 Committee of Jurists to the Council contains explanations of the Committee's draft-scheme, but parts of it can hardly be taken to have represented the opinion of the Committee; though the report was considered at three meetings of the Committee of Jurists, it gives evidence of hasty preparation.[7] Two reports made to the Council by Léon Bourgeois are also of interest.[8] The report submitted to the Third Committee by its sub-committee contains explanations of various suggested amendments,[9] as does also the report submitted to the First Assembly by the Third Committee.[10] An *ensemble* of the relevant documents was published by the Secretariat of the League of Nations.[11]

§135. Influence of Previous Drafts. The work of the 1920 Committee of Jurists was greatly influenced by the deliberations of the Peace Conferences at The Hague in 1899 and 1907, and by the "Five-Power Plan" drawn up at a Conference of representatives of formerly neutral States held at The Hague in February 1920; [12] many of the Committee's proposals with reference to the procedure of the Court were borrowed from provisions in the "Five-Power Plan," [13] which had in turn adapted them from the Hague Conventions for Pacific Settlement. The *projet* annexed

[5] Minutes of the Third Committee were published in Records of First Assembly, Committees, I, pp. 273–318. The ninth and tenth meetings of the Third Committee were devoted to the resolutions of the Committee of Jurists and to the salaries of the members of the Court.

[6] Records of First Assembly, Plenary, pp. 436–501.

[7] The text of this report is published in Records of First Assembly, Committees, I, pp. 422–64; Minutes of the 1920 Committee of Jurists, pp. 693–749.

[8] Minutes of the Council, 8th session, pp. 164–9; *idem*, 10th session, pp. 162–75; Records of First Assembly, Committees, I, pp. 464, 469.

[9] Records of First Assembly, Committees, I, pp. 526–48. See also *idem*, Plenary, pp. 457–66.

[10] Records of First Assembly, Plenary, pp 457–77; *idem*, Committees, I, pp. 568–77.

[11] This *ensemble* includes. I, Advisory Committee of Jurists, Documents Presented to the Committee relating to Existing Plans for the establishment of a Permanent Court of International Justice (London, 1920), pp. v, 373; II, Advisory Committee of Jurists, *Procès-verbaux* of the Proceedings of the Committee (The Hague, 1920), pp. iv, 779; III, Documents concerning the action taken by the Council of the League of Nations under Article 14 of the Covenant and the adoption by the Assembly of the Statute of the Permanent Court (Geneva, 1921), pp. 284 (double).

Where reference is made to this *ensemble* in this chapter, I is cited as "Preparatory Documents," II as "Minutes of the 1920 Committee of Jurists," and III as "Documents." As the "Documents" are not generally available, citations are given also to the Minutes of the Council and to the Records of the First Assembly.

[12] Denmark, Netherlands, Norway, Sweden and Switzerland were represented at the Conference at The Hague. See §107, *supra*. For a synopsis of various preliminary drafts, see Minutes of the 1920 Committee of Jurists, pp. 51–99.

[13] For an analysis of the articles of the Five-Power Plan relating to procedure, see *idem*, pp. 347–350.

to the Final Act of the Hague Conference of 1907, relating to the creation of a Court of Arbitral Justice, furnished ideas for the organization of the Court, also. Indeed, a careful review of the history of the drafting of the Statute leaves the impression that it contains but few new ideas, and that many of its provisions are based either upon previous experience or upon drafts previously elaborated.[14]

§136. Drafting of the 1929 Amendments. Two agencies were occupied with the drafting of the 1929 amendments and additions to the Statute, which entered into force on February 1, 1936: the 1929 Committee of Jurists, which held fifteen meetings from March 11 to 19, 1929, and the 1929 Conference of Signatories, which held five meetings from September 4 to 12, 1929. Full reports of the proceedings of both of these bodies are available.[15]

§137. Article 1.[16] *A Permanent Court of International Justice is hereby established, in accordance with Article 14 of the Covenant of the League of Nations. This Court shall be in addition to the Court of Arbitration organized by the Conventions of The Hague of 1899 and 1907, and to the special Tribunals of Arbitration to which States are always at liberty to submit their disputes for settlement.*

This text was drafted by the 1920 Committee of Jurists, whose draft-scheme contained as an additional phrase after the word "Justice" in the first sentence, "to which parties[17] shall have direct access"; this phrase was deleted by the sub-committee of the Third Committee of the First Assembly, apparently because it was thought to be connected with the proposed system of obligatory jurisdiction which had been rejected.[18] The opening words, taken from Article 14 of the Covenant, give the Court its name, the indefinite article being replaced elsewhere in the Statute by the definite article. The reference to the Permanent Court of Arbitration was clearly inspired by a somewhat similar reference in Article 1 of the

[14] The elaborate memorandum prepared by the Secretariat of the League of Nations was seldom referred to in the work of the Committee of Jurists. For the text, see Preparatory Documents, pp. 1–119.

[15] The minutes of the 1929 Committee of Jurists were published in League of Nations Document, C. 166. M. 66, 1929. V.; the minutes of the 1929 Conference of Signatories in *idem*, C. 514. M. 173. 1929. V.

[16] This and the succeeding sections of this chapter deal with the drafting of the text of the Statute annexed to the Protocol of Signature of December 16, 1920, as amended by the Revision Protocol of September 14, 1929. Amended or new Articles are marked with asterisks. The text of the Statute includes authoritative French and English versions, the latter of which is reprinted in Appendix No. 4, *infra*.

[17] The expression "contesting parties" was used in the report of the Committee of Jurists. Minutes of the 1920 Committee of Jurists, p. 699.

[18] Documents, pp. 114, 206; Records of First Assembly, Committees, I, pp. 335, 526.

projet annexed to the first *vœu* of the Second Peace Conference at The Hague in 1907;[19] the reference to "special Tribunals of Arbitration" served the purpose of maintaining a harmony with paragraph 3 of Article 13 of the Covenant,[20] and it emphasized States' freedom to create tribunals *ad hoc*.

§138. Article 2. *The Permanent Court of International Justice shall be composed of a body of independent judges elected regardless of their nationality from amongst persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.*

This text emanated from the 1920 Committee of Jurists, and no changes were made at later stages except in punctuation. It is based in part on the *projet* of 1907 concerning a court of arbitral justice. The expression "a body of independent judges" occasioned little debate in the Committee of Jurists, which desired to make the judges, so far as possible, independent of the Governments of which they were nationals;[21] the lack of such independence had been one of the factors which wrecked the Central American Court of Justice. The requirement that the judges be elected "regardless of their nationality" seems to have been due to a desire of the Committee of Jurists to depart from the plan for choosing judges contained in the Prize Court Convention of 1907,[22] and to make it clear that the so-called Great Powers were not to be entitled to special representation in the Court. Proposals to the First Assembly by the Colombian[23] and Cuban[24] delegations that judgeships should be allotted to various continents received but scant consideration.[25] The text opens the door to the election of nationals of States which do not participate in maintaining the Court, though M. de Lapradelle expressed the opinion to the Committee of Jurists that "for the time being a judge from the United States should be excluded."[26]

[19] A draft considered by the Second Peace Conference in 1907 employed the expression "alongside of [Fr., *à côté de*] the Permanent Court of Arbitration." 2 *Actes et Documents*, p. 657.

[20] Throughout the drafting of the Statute, a tendency was manifest to emphasize the questionable distinction between adjudication and arbitration. On this distinction, see 1 Moore, International Adjudications (1929), pp. xxxviff.; Brierly, Law of Nations (2d ed., 1936), pp. 210ff. *Cf.*, Preparatory Documents, p. 113.

[21] Minutes of the 1920 Committee of Jurists, p. 121.

[22] *Idem*, pp. 120ff.

[23] Documents, p. 72; Records of First Assembly, Committees, I, p. 525.

[24] Documents p. 246; Records of First Assembly, Plenary, p. 486.

[25] Documents, p. 126; Records of First Assembly, Committees, I, p. 354.

[26] Minutes of the 1920 Committee of Jurists, p. 222.

The qualification of "high moral character" derives from the Hague Conventions for Pacific Settlement, Articles 23 (1899) and 44 (1907), whence it was copied without enthusiasm into the Hague *projet* of 1907 (Article 2); it is impossible to conceive that the electors would vote for men who lacked this qualification, and its stipulation in the Statute seems to serve little purpose. The alternative requirement that judges must "possess the qualifications required in their respective countries for appointment to the highest judicial offices," or be "jurisconsults of recognized competence in international law," was the subject of some debate in the Committee of Jurists, a similar proposal having been debated at the Hague Conference of 1907. The Hague Conventions on Pacific Settlement merely required the selection of persons "of recognized competence in questions of international law." In Article 2 of the Hague *projet* of 1907 the requirement was that judges *devront remplir les conditions requises dans leur pays respectifs pour l'admission dans la haute magistrature, ou être des jurisconsultes d'une compétence notoire en matière de droit international.* In his report to the 1907 Conference, James Brown Scott explained the second part of this alternative as follows: *Les auteurs du projet ne pouvaient méconnaître, d'ailleurs, que les autorités les plus compétentes en matière internationale se rencontrent souvent dans nos écoles et dans nos universités.*[27] On the suggestion of Lord Phillimore and Mr. Root, the 1920 Committee of Jurists agreed to adopt the requirement as stated in the Hague *projet.*[28] The drafting committee later proposed to drop this wording and to require the choice of persons "of well-known experience . . . who possess a recognised competence in international law"; M. de Lapradelle explained that this attempted "to reconcile the continental and Anglo-American points of view, the former of which preferred to have as international judges jurisconsults who were not judges by profession, whereas the latter preferred national magistrates. The Committee had wished to exclude national judges who had not specialised in international law from appointment as international judges."[29] This led Mr. Root and Lord Phillimore to emphasize "the necessity of allowing certain countries to choose their international judges from among persons holding high judicial office";[30] M. Altamira pointed out, however, that some "national judges rarely have the opportunity of dealing with international questions."[31] In the end, the Committee of Jurists' draft-scheme reproduced almost

[27] 1 *Actes et Documents*, p. 359.
[28] Minutes of the 1920 Committee of Jurists, p. 298.
[29] *Idem*, p. 553. [30] *Idem*, p. 611. [31] *Idem*, p. 612.

textually the provision of the Hague *projet* on this point, and no change was made during the later consideration of the Statute.[32]

In the 1929 Committee of Jurists, M. Fromageot proposed that the words "and experience" should be added after the word "competence"; this proposal was not adopted, but it led to a recommendation adopted by the 1929 Conference of Signatories and by the Tenth Assembly.[33]

§139. Article 3.* *The Court shall consist of fifteen members.*

The text of this Article in the original Statute, taken from the draft-scheme of the 1920 Committee of Jurists, provided for eleven judges and four deputy-judges, with power given to the Assembly, acting upon the proposal of the Council, to increase the numbers to fifteen judges and six deputy-judges. The determination that the Court should consist of a relatively small number of judges depended on two considerations. First, it was important to overcome the contention that each State should be represented in the Court, and this was possible, as the experience at the Hague Conference in 1907 had shown, only if a satisfactory plan for the elections could be agreed upon. Second, it was necessary to consider the proper number of judges to compose a working tribunal. The 1907 *projet* had left both questions open. The Prize Court Convention of 1907 (Articles 10 and 14) envisaged the appointment of a judge and a deputy-judge by each State, but only fifteen appointees were to function at any time. In some of the proposals made in connection with the work of the Paris Peace Conference, it was assumed that a scheme of election could be agreed upon and it was suggested that the Court should have fifteen members.[34] In various drafts placed before the 1920 Committee of Jurists, similar proposals were made;[35] in the Committee of Jurists, itself, the opening discussion revealed a general desire to find a method of election, and the possibility of allowing each State to appoint a judge was never seriously considered.

As to the size of the Court, at different times members of the 1920 Committee of Jurists stressed the necessity of a court large enough to

[32] The Director of the International Labor Office suggested an amendment to Article 2 which would have required for judges of a "special labor section" of the Court that they be "known for their impartiality with regard to the different economic tendencies." He also suggested an amendment to Article 3 to provide that a special section of the Court should include "judges specially elected from amongst persons of recognized competence in labor legislation and social questions." Documents, p. 76; Records of First Assembly, Committees, I, p. 559.

[33] Minutes of the 1929 Conference of Signatories, pp. 25–8, 52–3; Records of Tenth Assembly, Plenary, pp. 119–121.

[34] The Swiss proposal in 1919 envisaged a court of fifteen members, each party having a right to challenge five judges, so that only five judges would sit at any one time. Preparatory Documents, p. 259.

[35] Minutes of the 1920 Committee of Jurists, p. 55.

represent various systems of legal thought, yet small enough to include only persons of eminence; large enough to admit of challenges and to offset inevitable absences, yet small enough to enable effective conferences to be held.[36] It was also foreseen that the number should be susceptible of increase as more States were admitted to membership in the League of Nations and as the Court's jurisdiction was extended.[37] The Root-Phillimore plan suggested eleven judges and four supplementary judges;[38] M. Loder wished to have but nine judges, M. Adatci thirteen judges, Lord Phillimore fifteen judges and additional deputy-judges, M. de Lapradelle a minimum of eleven judges.[39] The only proposal greatly out of line with the Root-Phillimore plan was that of M. Ricci-Busatti, who favored a panel of fifteen or twenty judges from which tribunals should be formed *ad hoc*.[40] An Italian proposal made to the Council and First Assembly would have eliminated the restriction on the increase which might later be made;[41] a British proposal that the number of judges be decreased to nine was opposed on the ground that, as "the Great Powers would always be represented on the Court," other States could not so easily agree on the distribution of fewer places.[42]

The 1929 Committee of Jurists proposed the omission of the provision for the Assembly's power to increase the number of judges, "to avoid the risk of an exaggeration which might cause misconception";[43] the proposal was accepted by the 1929 Conference of Signatories, though the Cuban representative opposed any change in the original Article 3.[44] In 1936, Judge van Eysinga expressed the view that "ideally speaking, . . . the best composition for an international tribunal" was five judges, including two of the nationality of the parties; but he admitted that "for political considerations" this was impossible for a World Court.[45]

The idea of including deputy-judges seems to have come from the Hague *projet* of 1907. Conceiving of them as necessary for filling vacancies, Baron Descamps suggested to the 1920 Committee of Jurists that there should be six *suppléants*, in addition to nine judges.[46] M. de Lapra-

[36] Minutes of the 1920 Committee of Jurists, pp. 168ff. [37] *Idem*, pp. 181, 441.
[38] *Idem*, p. 298. *Cf.*, the scheme of Baron Descamps, *idem*, p. 373.
[39] *Idem*, pp. 168–71. [40] *Idem*, pp. 177, 183.
[41] Documents, p. 28; Records of First Assembly, Committees, I, p. 497. Various other amendments were proposed. See Documents, pp. 70, 72, 76, 117, 206.
[42] Documents, p. 117; Records of First Assembly, Committees, I, p. 340.
[43] Minutes of the 1929 Committee of Jurists, p. 119.
[44] Minutes of the 1929 Conference of Signatories, pp. 28–30.
[45] Series D, No. 2 (3d ed.), p. 662.
[46] Minutes of the 1920 Committee of Jurists, pp. 143, 195, 465. Baron Descamps proposed that in the event of the death or retirement of a judge the senior deputy-judge should take his place and "continue in office until the next general election."

delle thought the deputy-judges would serve the practical purpose of filling vacancies, and the political purpose of satisfying States which had no nationals among the judges; he also insisted upon having deputy-judges "in order to imbue future judges with the spirit which must pervade the Court," and to provide "young judges who can from time to time do duty on the Court and keep in constant touch with it." [47] British and Italian proposals were made to the Council and First Assembly that the post of deputy-judge be suppressed,[48] but these proposals had little support. The 1929 Committee of Jurists proposed the abolition of the post of deputy-judge, as "practical experience" suggested the desirability of this course; [49] it seems to have feared that judges would feel less obliged to attend the sessions if deputy-judges were at hand to take their places.[50]

§140. Article 4, paragraph 1. *The members of the Court shall be elected by the Assembly and by the Council from a list of persons nominated by the national groups in the Court of Arbitration, in accordance with the following provisions.*

This paragraph, which emanated from the 1920 Committee of Jurists, was one basis of the success which attended the effort to establish the Court. The problem of election had baffled and defeated the Hague Conference in 1907, and the solution of the problem in 1920 was largely due to the conception of the Court as an organ of the League of Nations. The existence of the Assembly and Council of the League of Nations afforded a possible escape from the deadlock of 1907. The Assembly was organized on the principle of state equality which had been so emphasized in 1907; on the other hand, the Council was organized to take account, in the allocation of permanent seats, of the wider interests in international affairs possessed by those States which had most insisted on permanent representation on any court which might be created. Until this balance had been struck, proposals for the election of a small number of judges, though actually put forward,[51] had received but scant consideration; with the advance which the creation of the Assembly and Council represented, however, it became clear that the conception of the equality of States and that of the hegemony of "Great Powers," were no longer

[47] *Idem*, pp. 200, 400, 457.
[48] Documents, pp. 28, 70; Records of First Assembly, Committees, I, pp. 496, 591.
[49] Minutes of the 1929 Committee of Jurists, p. 119.
[50] *Idem*, p. 28.
[51] See the proposal by the American delegation at the Second Peace Conference at The Hague in 1907. 2 *Actes et Documents*, p. 698.

irreconcilable. Yet the proposal made by the Committee of Jurists was evolved only through protracted discussion.

The election of judges by votes of the States from a list of nominees of the several States was suggested by Switzerland early in 1919,[52] and a somewhat similar suggestion for election by a "Congress of States" was made by the German delegation at the Peace Conference of 1919.[53] The creation of a special electoral college composed of members of the Permanent Court of Arbitration to elect the judges from among persons nominated by the States was proposed in the Scandinavian project of 1919;[54] the Swedish committee continued to insist on this proposal after the text of the Covenant of the League of Nations was established,[55] but the Danish and Norwegian Committees then proposed that the judges should be elected by the Assembly of the League of Nations from among candidates nominated by the States,[56] a suggestion which had previously been made by the Austrian delegation at the Peace Conference of 1919.[57] Early in 1919, also, the Netherlands committee proposed elections by a permanent Administrative Council modelled on that of the Permanent Court of Arbitration,[58] the candidates being nominated partly by the bodies exercising the highest legal functions in each State and the law faculties of the universities, and partly by the governments; the Netherlands proposal is interesting in that it allowed for a greater voting power of certain States in the electoral body. The Secretariat of the League of Nations seems to have suggested that one body should nominate and another body should elect the judges.[59] The "Five-Power Plan" suggested that the judges should be elected by the Assembly from among candidates nominated by the Members of the League of Nations.[60]

When the discussion was opened in the 1920 Committee of Jurists, the principle of equality of States was greatly emphasized on the one hand; and on the other hand Lord Phillimore urged that "the Court must have behind it material force," and that this would be possible "only if it includes representatives of the Great Powers." [61] A more useful approach was made by Elihu Root who drew upon an analogy in the history of the United States [62] to suggest that it might be "possible that the solution of

[52] Preparatory Documents, p. 257.
[53] *Idem*, p. 125.
[54] *Idem*, pp. 173–5.
[55] *Idem*, pp. 237–9.
[56] *Idem*, pp. 203, 229–231, respectively.
[57] *Idem*, p. 131. See also the proposals of the Inter-Parliamentary Union in 1919, and of the *Union Juridique Internationale*, *idem*, pp. 335, 345.
[58] *Idem*, pp. 279–81.
[59] *Idem*, p. 89.
[60] *Idem*, p. 303.
[61] Minutes of the 1920 Committee of Jurists, p. 106.
[62] The states of the United States have equal representation in the Senate, while representation in the House of Representatives is based upon population.

the problem would be found by articulating the new organization with the political organization of the League." "Would it be possible," he asked, "to vest the power of election of judges both in the Assembly and in the Council?" [63] Later, Mr. Root proposed "concurrent votes of the Assembly and the Council." [64] To some members of the Committee who sought a recognition of State equality, these suggestions seemed "premature." [65] Baron Descamps proposed election by members of the Permanent Court of Arbitration, a proposal which M. de Lapradelle observed "tended to renew the historical connection which was broken by the Covenant." [66] Lord Phillimore preferred direct action by Governments. Gradually, support developed for the suggestions made by Mr. Root in a memorandum providing for election by the Council and Assembly from a list of names furnished by the members of the Permanent Court of Arbitration, each national group proposing not less than two nor more than four names.[67] M. de Lapradelle came to the conclusion that since it was a question of creating "a new organism forming a part of the League of Nations, it is only right that the election should be entrusted to the two chief organs of this League." [68] It was assumed by certain members of the Committee that their own States would never be willing to submit a case to a court on which they were not represented; this raised the question of participation by judges who were nationals of parties before the Court, as well as the question of the size of the Court. These and other matters had to be discussed generally before any conclusion on the method of election could be reached, and as this discussion progressed it became apparent that the new Court would be related in many ways to the Council and Assembly of the League of Nations. Issue was not joined until the sixteenth meeting of the Committee of Jurists, by which time the question was whether the election should be by the Assembly and the Council, or by the Assembly alone; Mr. Root insisted that the former plan had the advantage of "removing any possibility of unfairness by giving the small nations the veto on everything which took place in the Council, and by giving the large nations a veto on all the decisions taken by the Assembly." [69] Baron Descamps could see this only as an "organized antagonism," but the Committee as a whole found

[63] Minutes of the 1920 Committee of Jurists, p. 109. See also Scott, Project of a Permanent Court, pp. 32ff.

[64] Minutes of the 1920 Committee of Jurists, p. 121.

[65] *Idem*, pp. 123–4.

[66] *Idem*, pp. 142, 148.

[67] *Idem*, p. 166. An account of the debate on this point is given in Scott. Project for a Permanent Court, pp. 29–48.

[68] Minutes of the 1920 Committee of Jurists, p. 150.

[69] *Idem*, p. 389.

it a possible solution. In the report of the Committee, it was said that the "only possible system for the formation of the Court was that of equal and simultaneous election by the Council and the Assembly." [70]

The device of having nominations made by members of the Permanent Court of Arbitration was simultaneously suggested by Loder [71] and Root; [72] it was offered by M. Loder as a means of preventing political intrigues ih the elections, because of the "moral weakness of all political bodies." More important, however, was the fact that the suggestion offered a link with the Permanent Court of Arbitration at a time when it was being stoutly insisted that the elections should be conducted by the members of that institution. Other reasons which have been assigned seem to be apocryphal rationalizations.[73]

When the plan proposed by the 1920 Committee of Jurists came before the Council, M. Bourgeois (France) said that it gave satisfaction to the cherished principle of equality "to exactly the same degree as in the Covenant," and he thought that "by its very existence," the League had made it possible to solve the difficulty; [74] later he insisted that "the system presented by the Committee of Jurists" be "maintained in its entirety." [75] Certain proposals were made, however, to amend the provision for nomination of candidates by the "national groups of the Permanent Court of Arbitration." A Norwegian committee attacked these provisions on the ground that the candidates of various countries might be members of the Permanent Court of Arbitration, and that the national groups of such members had been "organised for another object"; it therefore suggested direct nominations by Governments.[76] No change of substance was made by the First Assembly.

The expression "national groups in the Permanent Court of Arbitration" is not to be found in the Hague Conventions setting up the Permanent Court of Arbitration.

§141. Article 4, paragraph 2. *In the case of Members of the League of Nations not represented in the Permanent Court of Arbitration, the lists of candidates shall be drawn up by national groups appointed for this purpose by their Governments under the same conditions as those prescribed for members of the Permanent Court of Arbitration by Article 44 of the Convention of The Hague of 1907 for the pacific settlement of international disputes.*

[70] *Idem*, p. 700.
[71] *Idem*, pp. 147, 160.
[72] *Idem*, pp. 150, 166. See also Baron Descamps' proposal, *idem*, p. 374.
[73] Such reasons are stated in Scott, Project for a Permanent Court, p. 55.
[74] Documents, p. 24; Records of First Assembly, Committees, I, p. 466.
[75] Documents, p. 49; Records of First Assembly, Committees, I, p. 477.
[76] Documents, p. 31; Records of First Assembly, Committees, I, p. 501.

The draft-scheme of the 1920 Committee of Jurists took no account of the fact that some of the Members of the League of Nations, entitled to vote in the Assembly in the election of judges, would be debarred from participation in the nomination of candidates if such nomination was entrusted only to members of the Permanent Court of Arbitration; this would be true, particularly, of the British Dominions and of certain States to which accession to the Hague Conventions was not open as of right.[77] It was to take account of this fact that the British delegation in the First Assembly proposed in addition to allow Governments of Members of the League having no "national groups" in the Court of Arbitration to make nominations;[78] the sub-committee of the Third Committee adopted the more ingenious solution embodied in the text of this paragraph.[79]

§142. Article 4, paragraph 3.* *The conditions under which a State which has accepted the Statute of the Court but is not a Member of the League of Nations may participate in electing the members of the Court shall, in the absence of a special agreement, be laid down by the Assembly on the proposal of the Council.*

This paragraph had no counterpart in the original Statute. Nor was it considered by the 1929 Committee of Jurists. In the 1929 Conference of Signatories, the representative of Brazil requested that the situation of Brazil, as a party to the Protocol of Signature of 1920 but no longer a Member of the League of Nations, be "regularized"; continuing to contribute to the financial support of the Court, Brazil desired to participate in the elections of judges "on a footing of equality."[80] To meet this situation, the drafting committee of the Conference proposed additions both to Article 4 and to Article 35; the Conference adopted its proposal as to Article 4 with a slight modification.[81]

§143. Article 5, paragraph 1. *At least three months before the date of the election, the Secretary-General of the League of Nations shall address a written request to the members of the Court of Arbitration belonging to the States mentioned in the Annex to the Covenant or to the States which join the League subsequently, and to the persons appointed under paragraph 2 of*

[77] Under Articles 60 (1899), 94 (1907) of the Hague Conventions on Pacific Settlement, accession is subject to the agreement of the Contracting Powers. See §3, *supra*.

[78] Documents, p. 70; Records of First Assembly, Committees, I, p. 591.

[79] Documents, p. 117; Records of First Assembly, Committees, I, pp. 338–339. M. Ricci-Busatti had favored such a solution as "a fictitious representation on the Arbitration Court." Documents, p. 116.

[80] Minutes of the 1929 Conference of Signatories, p. 75. Brazil had ceased to be a member of the League of Nations in 1928.

[81] *Idem*, pp. 50, 76.

Article 4, inviting them to undertake, within a given time, by national groups, the nomination of persons in a position to accept the duties of a member of the Court.

This text was largely drafted by the 1920 Committee of Jurists. As it was first proposed in the Root-Phillimore plan,[82] the request was to be made to all members of the Permanent Court of Arbitration, and only to them. The Committee finally adopted a limitation which confined nominations to those members appointed by States mentioned in the Annex to the Covenant or by States which subsequently joined the League of Nations.[83] The sub-committee of the Third Committee of the First Assembly added the provision for requests to be made to persons appointed under the amended text of Article 4, paragraph 2.[84] At the suggestion of M. Negulesco (Rumania), the words "within a given time" were added by the Third Committee.[85]

§144. Article 5, paragraph 2. *No group may nominate more than four persons, not more than two of whom shall be of their own nationality. In no case must the number of candidates nominated be more than double the number of seats to be filled.*

The 1920 Committee of Jurists proposed as the text of this article: "No group may nominate more than two persons; the nominees may be of any nationality." At one time, however, the Committee had decided that a maximum of six nominations might be made by any group. Mr. Root expressed the hope that "so many concordant expressions of opinion would be obtained from the various countries that the election would be thereby virtually decided.[86] Some of the members of the Committee of Jurists had thought it desirable that members of the Permanent Court of Arbitration should meet for a common consideration of their nominations. Numerous other questions were raised in the 1920 Committee of Jurists; *e.g.*, whether members of the Permanent Court of Arbitration could nominate themselves, and whether governments should have any control of their nominations. The Third Committee of the First Assembly adopted a proposal of M. La Fontaine (Belgium) to increase the number of possible nominees to four,[87] and to divide the

[82] Minutes of the 1920 Committee of Jurists, p. 299.
[83] *Idem*, pp. 555, 623–4, 630, 674.
[84] Documents, p. 120; Records of First Assembly, Committees, I, pp. 343, 405.
[85] Documents, p. 100; Records of First Assembly, Committees, I, p. 303.
[86] Minutes of the 1920 Committee of Jurists, p. 409. *Cf.*, *idem*, p. 405.
[87] Norwegian and Swedish proposals to increase the number to six were not adopted. Documents, pp. 32, 36; Records of First Assembly, Committees, I, pp. 503, 508.

number between nationals and non-nationals,[88] thus returning to a suggestion previously made to the Committee of Jurists by Mr. Root.[89] The increase in the number of nominees was made "to give the different groups a larger opportunity to propose candidates of universally known competence but of a nationality other than that of the nominating group." [90] The second sentence of the paragraph was added by the sub-committee of the Third Committee, with little discussion, to take care of the special situation which may exist in by-elections held to fill single vacancies.[91] The proposal in 1920 that a candidate was not to be voted upon unless he had been nominated by his own national group received little support.[92]

§145. Article 6. *Before making these nominations, each national group is recommended to consult its Highest Court of Justice, its Legal Faculties and Schools of Law, and its National Academies and national sections of International Academies devoted to the study of Law.*

This text, drafted by the 1920 Committee of Jurists, was based on suggestions found in the "Five-Power Plan" and presented by M. Altamira;[93] they were opposed by M. Ricci-Busatti, who preferred to leave the nominating groups "free to consult whomsoever they might wish." [94] In its report, the Committee of Jurists stated: "only a moral obligation to take this advice exists, there is no legal obligation: the nomination is not rendered void if one of these bodies is not consulted; and even if they are all consulted there is no definite obligation to choose the name of the person who has received most support from them." [95] In the sub-committee of the Third Committee of the First Assembly, the British and Italian representatives proposed to suppress this provision, but an even vote on the proposal resulted in the maintenance of the text.[96]

§146. Article 7. *The Secretary-General of the League of Nations shall prepare a list in alphabetical order of all the persons thus nominated. Save*

[88] Documents, p. 101; Records of First Assembly, Committees, I, p. 304.
[89] Minutes of the 1920 Committee of Jurists, pp. 166, 408. This suggestion seems to have originated in the Five-Power Plan, Article 6.
[90] Documents, p. 172; Records of First Assembly, Committees, I, p. 568.
[91] Documents, p. 107; Records of First Assembly, Committees, I, p. 405. A proposal was made, both in 1920 and in 1929, that the number of nominees be limited to the number of vacancies. Minutes of the 1920 Committee of Jurists, p. 414; Minutes of the 1929 Committee of Jurists, p. 70.
[92] Records of First Assembly, Committees, I, p. 304. Sir Cecil Hurst (Great Britain) expressed the view that "selection by compatriots was a better indication of a man's worth than his reputation abroad." *Idem*, p. 303.
[93] Minutes of the 1920 Committee of Jurists, pp. 158, 329.
[94] *Idem*, p. 436.
[95] *Idem*, p. 707.
[96] Documents, pp. 28, 70, 118, 207; Records of First Assembly, Committees, I, pp. 341, 497, 527, 591.

as provided in Article 12, paragraph 2, these shall be the only persons eligible for appointment.

The Secretary-General shall submit this list to the Assembly and to the Council.

This text emanated from the 1920 Committee of Jurists, except that the arrangement was changed by the Third Committee of the First Assembly. The "Five-Power Plan" had suggested that the list should indicate the number of nominations of each candidate, without disclosing who had made the nominations; but the Committee of Jurists desired to leave the point to the determination of the Secretary-General himself.[97] The necessity of a choice from the list, from which only the joint conference may depart under Article 12, was designed to avoid any possibility that the majority of judges might be elected from outside the list of candidates submitted to the Council and the Assembly. The adoption of the text occasioned no debate in the Council or in the First Assembly.

§147. Article 8.* *The Assembly and the Council shall proceed independently of one another to elect the members of the Court.*

The 1920 Committee of Jurists proposed the following text for this article: "The Assembly and the Council shall proceed to elect by independent voting first the judges and then the deputy-judges." It had been suggested to the Committee that the Assembly and Council should act "separately," but "independent" voting was accepted as the equivalent of "separate" voting.[98] Questions were raised as to the simultaneous or successive action by the Assembly and by the Council, but no proposal was made by the Committee of Jurists in either sense; successive voting on judges and deputy-judges was accepted without much debate in the 1920 Committee of Jurists.[99] In the sub-committee of the Third Committee of the First Assembly, the Italian representative proposed the addition of the word "simultaneously," to insure that one electoral body "should not influence the other's decision"; the sub-committee rejected this proposal "which would make it impossible to establish the necessary contact between the two bodies in the election." [1]

In the original text the concluding words were, "firstly the judges, then the deputy-judges"; the substitution of the expression "the members of the Court" was due to the suppression of the post of deputy-judge in the 1929 revision of the Statute.

[97] Minutes of the 1920 Committee of Jurists, p. 432.
[98] *Idem*, pp. 298, 396.
[99] *Idem*, p. 401.
[1] Documents, pp. 118, 207; Records of First Assembly, Committees, I, pp. 341, 527.

§148. Article 9. *At every election, the electors shall bear in mind that not only should all the persons appointed as members of the Court possess the qualifications required, but the whole body also should represent the main forms of civilization and the principal legal systems of the world.*

This text was drafted by the 1920 Committee of Jurists, and no change was made by the First Assembly except for a slight re-drafting of the French version. M. Adatci suggested to the Committee of Jurists that "all different kinds of civilisation must be taken into account, among them the civilisation of the Far East, of which Japan was perhaps the principal representative." [2] Baron Descamps suggested a reference to "principal legal systems," [3] in line with the provision in Article 1 of the Hague *projet* of 1907,[4] and he supported the suggestion as an assurance to the "Great Powers" of their having nationals in the Court.[5] Some opposition was manifested on the ground that as the Court was to apply international law, "there was no need to have national systems of law represented." [6] In its report,[7] the Committee of Jurists stated that the text did not refer "to the various systems of international law"; the intention was to ensure that "no matter what points of national law may be involved in an international suit, all shall be equally comprehended." The reference to "main forms of civilization" was said to be an essential condition "if the Permanent Court of International Justice is to be a real World Court for the Society of all Nations." In the Third Committee of the First Assembly, the Colombian delegation desired to provide also for "the geographical representation of the different Continents," but a proposal in this sense was rejected.[8]

§149. Article 10, paragraph 1. *Those candidates who obtain an absolute majority of votes in the Assembly and in the Council shall be considered as elected.*

This paragraph was drafted by the 1920 Committee of Jurists. Before it was finally determined that the election should be by the Assembly and the Council, some difficulties were encountered as to possible procedure by the two bodies. It was pointed out, for instance, that representatives of some States might vote in both bodies, and to meet this inequality, it was suggested that "delegates of those States whose representatives had

[2] Minutes of the 1920 Committee of Jurists, p. 136.
[3] *Idem*, pp. 111, 356.
[4] In instructions to the American delegates to the 1907 Hague Conference, Secretary of State Root said that the "judges should be so selected from the different countries that the different systems of law and procedure and the principal languages shall be fairly represented." Quoted in *idem*, p. 403.
[5] *Idem*, pp. 362, 371. [6] *Idem*, pp. 363, 365. [7] *Idem*, p. 709.
[8] Documents, pp. 72, 101; Records of First Assembly, Committees, I, pp. 304, 354, 525.

already voted on the Council" might be excluded from voting in the Assembly.[9] At various times, also, the suggestion was made that a particular majority vote, *e.g.*, three-fourths, should be required in the Assembly; at no time does it seem to have been proposed that a simple majority should be sufficient. The Root-Phillimore plan suggested requiring "the votes of a majority of the members present and voting in each body."[10] In accepting this principle, the members of the Committee do not seem to have thought of the possible out-voting of the "Great Powers" in the Council as a result of the enlargement of the Council.[11] When the matter arose in the sub-committee of the Third Committee of the First Assembly, M. Adatci (Japan) asked whether the majority referred to was a "majority of the members present," and "it was pointed out that this question had already been decided in the affirmative by the Covenant of the League."[12]

§150. Article 10, paragraph 2. *In the event of more than one national of the same Member of the League being elected by the votes of both the Assembly and the Council, the eldest of these only shall be considered as elected.*

The opening phrase proposed for this Article by the 1920 Committee of Jurists was somewhat different: "in the event of more than one candidate of the same nationality being elected." The Committee of Jurists stated in its report that "the Court can never include more than one judge of the same nationality," this rule being thought necessary "to ensure the representation of the main forms of civilization and the principal legal systems" and "to enable as many States as possible to have a share in the composition of the Court."[13] In the sub-committee of the Third Committee of the First Assembly, the Canadian delegation raised a question as to the meaning of the term "nationality," and expressed a fear that the proposed text "might give rise to the false interpretation that a Canadian could not sit in the Court at the same time as a judge of the United Kingdom";[14] the sub-committee therefore formulated the

[9] Minutes of the 1920 Committee of Jurists, pp. 368, 385, 387. [10] *Idem*, p. 298.

[11] In 1920 the Council of the League of Nations consisted of the representatives of eight States, four of which were so-called "Great Powers" entitled to permanent representation, and the Covenant also envisaged the permanent representation of the United States of America; in 1922, the number of States non-permanently represented was increased to six, in 1926 to nine, and in 1933 to ten. The nature of the Council was radically changed when Germany, Italy and Japan had withdrawn from membership in the League, and when the Soviet Union ceased to be a member. See §253, *infra*.

[12] Documents, p. 119; Records of First Assembly, Committees, I, p. 342.

[13] Minutes of the 1920 Committee of Jurists, p. 713. See §251, *infra*.

[14] Documents, pp. 118, 120; Records of First Assembly, Committees, I, pp. 342, 344. For a discussion of a related problem, see Minutes of the 1929 Committee of Jurists, pp. 70–71, 84–87; §251, *infra*.

opening phrase which was adopted.[15] A suggestion to insert in the paragraph a general definition of nationality for the purposes of the Statute was not approved; [16] the term *ressortissant* employed in the French version may be thought to be broader than the English term *national.* No reason was advanced for preferring the eldest of the persons voted for, and this seems to have been adopted as "an artificial means for attaining a result." [17]

§151. Article 11. *If, after the first meeting held for the purpose of the election, one or more seats remain to be filled, a second and, if necessary, a third meeting shall take place.*

This text was drafted by the 1920 Committee of Jurists; it served principally to lay a basis for the application of Article 12, and it was not debated in the Third Committee of the First Assembly. It does not exclude the possibility of further meetings before a joint conference is set up.

§152. Article 12, paragraph 1. *If, after the third meeting, one or more seats still remain unfilled, a joint conference consisting of six members, three appointed by the Assembly and three by the Council, may be formed, at any time, at the request of either the Assembly or the Council, for the purpose of choosing one name for each seat still vacant, to submit to the Assembly and the Council for their respective acceptance.*

Except for a slight change, this text emanated from the 1920 Committee of Jurists. The idea of a joint conference (Fr., *commission médiatrice*) to reconcile divergent views of the Assembly and the Council first appeared in the discussions of the Committee of Jurists as a proposal for a "conciliation committee," [18] later called a "committee of mediation." [19] The suggestion seems to have been made by Mr. Root, on analogy to the conference committees set up from time to time to reconcile the divergent views of the two Houses of the Congress of the United States.[20] It was proposed to the Committee of Jurists that the joint conference should have the final power of selection,[21] but Lord Phillimore insisted that "the formal appointment should always be left to the two bodies," and this view prevailed.[22] The duty of choosing "one name for each seat still

[15] The text has the curious result of seeming to make it possible for "more than one national" of a State which is not a Member of the League of Nations to be elected.
[16] Documents, p. 121; Records of First Assembly, Committees, I, p. 344.
[17] Minutes of the 1920 Committee of Jurists, p. 557.
[18] Minutes of the 1920 Committee of Jurists, p. 127.
[19] *Idem*, p. 399.
[20] *Idem*, p. 433. See also Scott, Project of a Permanent Court, p. 67.
[21] Minutes of the 1920 Committee of Jurists, p. 381.
[22] *Idem*, p. 399.

vacant" was laid down, to prevent the joint conference from listing a number of persons and thus requiring a later choice by the Assembly and the Council.[23] M. Adatci, a member of the 1920 Committee of Jurists, stated to the Second Assembly of the League of Nations in 1921 that "when we drew up the Statute" of the Court, "we were all of opinion that necessity would never arise to have recourse to Article 12"; but a joint conference was set up in the first election in 1921.[24]

§153. Article 12, paragraph 2. *If the Conference is unanimously agreed upon any person who fulfils the required conditions, he may be included in its list, even though he was not included in the list of nominations referred to in Articles 4 and 5.*

This paragraph embodies in substance a proposal made by the 1920 Committee of Jurists, which adopted it only after prolonged debate. It was thought that unless the joint conference was given complete freedom, it might fail to achieve results; on the other hand, it was feared that too many of the judges might be chosen in this way, without regard to the limitations set for ordinary nominations. Mr. Root replied: "Such a high standard of competence and moral authority would be established by laying down that the lists should be drawn up by the members of the Permanent Court of Arbitration, that it would be inconceivable that the person selected from outside this list, would not conform to the standard." [25] The report of the Committee of Jurists indicates various situations in which a departure from the list of nominees might be desirable; and the requirement of unanimity in the joint conference is explained as a "guarantee . . . to prevent an arbitrary choice made under the political influences of two such essentially political bodies as the Assembly and the Council." [26]

§154. Article 12, paragraphs 3 and 4. *If the joint conference is satisfied that it will not be successful in procuring an election, those members of the Court who have already been appointed shall, within a period to be fixed by the Council, proceed to fill the vacant seats by selection from amongst those candidates who have obtained votes either in the Assembly or in the Council.*

In the event of an equality of votes amongst the judges, the eldest judge shall have a casting vote.

These paragraphs except for slight modifications were drafted by the 1920 Committee of Jurists. Following a suggestion made by M. de Lapradelle, the Root-Phillimore plan proposed that if differences should

[23] *Idem*, p. 557.
[24] Records of Second Assembly, Plenary, p. 256.
[25] Minutes of the 1920 Committee of Jurists, p. 433.
[26] *Idem*, pp. 712–3.

prove to be "ultimately irreconcilable," the choice should "devolve upon the judges who have already been agreed upon." [27] At one time it was proposed that the joint conference should have three days for reaching agreement.[28] In the sub-committee of the Third Committee of the First Assembly, the words "if the joint conference is not successful in procuring an election" were replaced by the words "if the joint conference is satisfied that it will not be successful in procuring an election"; the object of this amendment, which originated in a proposal of the British delegation, was to enable the joint conference to make several attempts to reach an agreement.[29] The text seems to indicate that after a failure of a joint conference the voting is not to be resumed in the Assembly and the Council.

§155. **Article 13, paragraphs 1 and 2.** *The members of the Court shall be elected for nine years.*

They may be re-elected.

This text emanated from the 1920 Committee of Jurists. Several of the preliminary plans submitted to the Committee had suggested a term of nine years, though others suggested six years, twelve years and life tenure; [30] ten years was also proposed by members of the Committee. The nine-year term was selected as a convenient compromise.[31] The Committee pointed out in its report that this term assured a "continuity of jurisprudence," and made possible an elimination of judges who had forfeited confidence.[32] Apparently little consideration was given by the Committee of Jurists to the simultaneous expiration of the terms of all of the judges. A system which would call for the election of a certain number of judges at intervals of several years might have prevented the possibility of a court composed wholly of new judges; but it may have been thought to be undesirable because judges may be re-elected, because the number eleven finally decided upon does not evenly divide, and because an election of a larger number of judges presents fewer difficulties than an election of a smaller number. The Committee of Jurists pointed out in its report that "the free play afforded to States at the time of election, by a general redistribution of seats every nine years, is very desirable." While the re-election of useful judges was envisaged, there

[27] *Idem*, pp. 150, 298.
[28] *Idem*, p. 563.
[29] Documents, pp. 121–122; Records of First Assembly, Committees, I, pp. 345–346.
[30] Minutes of the 1920 Committee of Jurists, p. 57.
[31] For the discussions, see *idem*, pp. 190–1, 194–6, 441–2, 467. Members of the Permanent Court of Arbitration are appointed for six years; but the Hague Conference of 1907 suggested a twelve-year term for judges in the proposed court of arbitral justice.
[32] *Idem*, p. 714.

was also appreciation in 1920 of the desirability of the Court's having new blood every nine years.[33]

In 1929, M. Politis expressed the view that the ideal course would be to elect the judges for life, but as he thought this change impossible to achieve he suggested a twelve-year term.[34] No amendment to this article was adopted in 1929, though it would seem that since a Court of fifteen judges was then envisaged, provision might have been made for electing groups of judges at different times.

§156. Article 13, paragraph 3. *They shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun.*

This text emanated from the 1920 Committee of Jurists. The limit placed on the continuance of the term of office is somewhat indefinite, for no precise date was fixed on which newly-elected judges should assume office; this *lacuna* in the Statute had to be filled by the rules of Court. The first sentence in this paragraph was partly due to uncertainty as to the meetings of the Assembly and the Council of the League of Nations; the Covenant does not prescribe annual meetings of the Assembly, and it was thought that the two electoral bodies might be unable to hold an election of judges' successors in time to prevent a hiatus.[35] The second sentence in the paragraph seems to have been borrowed from Article 9 of the "Five-Power Plan" drawn up at The Hague in 1920; M. de Lapradelle objected to it on the ground that if a judge failed of re-election, it would be harmful to the Court to allow him to continue to function after he had "lost the confidence of the League of Nations." [36] No change was made in the paragraph by the Council or by the First Assembly.

Doubts were expressed in 1929 as to the proper interpretation of the second sentence in this paragraph, but no amendment was proposed.[37]

§157. Article 13, paragraphs 4 and 5.* *In the case of the resignation of a member of the Court, the resignation will be addressed to the President of the Court for transmission to the Secretary-General of the League of Nations. This last notification makes the place vacant.*

The original Statute contained no provision concerning resignations; the 1920 Committee of Jurists thought it unnecessary to recognize the

[33] Minutes of the 1920 Committee of Jurists, p. 714; Records of First Assembly, Committees, I, p. 348.
[34] Minutes of the 1929 Committee of Jurists, p. 44.
[35] Minutes of the 1920 Committee of Jurists, p. 454.
[36] *Idem*, pp. 451–452.
[37] Minutes of the 1929 Committee of Jurists, p. 42.

right of a judge to resign.[38] Paragraphs 4 and 5 of this Article were drafted by the 1929 Committee of Jurists, which stated that "doubts have been felt as to the procedure to be adopted in such cases." It was thought that the transmission to the Secretary-General, upon which the resignation becomes final, should be effected by the President of the Court "in order that he may, if desirable, be able to satisfy himself that the decision of the judge concerned is irrevocable."[39] The word "last" was inserted in paragraph 5 by the 1929 Conference of Signatories.[40] The text seems to imply that a judge may resign as "of his own right," no acceptance being required.[41]

§158. Article 14.* *Vacancies which may occur shall be filled by the same method as that laid down for the first election, subject to the following provision: the Secretary General of the League of Nations shall, within one month of the occurrence of the vacancy, proceed to issue the invitations provided for in Article 5, and the date of the election shall be fixed by the Council at its next session.*

The first part of this Article, down to the word *subject*, was in the original Statute,[42] which also included a second sentence which was later put into Article 15; the proviso was added as one of the 1929 amendments. In proposing the amendment to the 1929 Committee of Jurists, M. Fromageot drew attention to the possibility of "prolonged vacancies" under the original Statute; he contended that a seat might remain vacant for fifteen months if the vacancy occurred just three months prior to a regular session of the Assembly.[43] The Committee of Jurists desired "to establish a somewhat elastic system," assuring a prompt filling of vacancies; it was appreciated that this might, if the Council should so decide, involve extraordinary sessions of the Assembly.[44]

§159. Article 15.* *A member of the Court elected to replace a member whose period of appointment has not expired, will hold the appointment for the remainder of his predecessor's term.*

This text, in the original Statute a second sentence of Article 14, emanated from the 1920 Committee of Jurists. The Root-Phillimore plan proposed that judges elected to fill vacancies should serve for nine

[38] Minutes of the 1920 Committee of Jurists, pp. 554, 612.
[39] Minutes of the 1929 Committee of Jurists, p. 119.
[40] Minutes of the 1929 Conference of Signatories, p. 31.
[41] Minutes of the 1929 Committee of Jurists, pp. 46–47.
[42] Though some doubts were expressed on this point in 1920. Minutes of the 1920 Committee of Jurists, p. 464.
[43] Minutes of the 1929 Committee of Jurists, pp. 37–38.
[44] *Idem*, pp. 119–20.

years,[45] following in this respect the system laid down in Article 3 of the Hague *projet* of 1907. Baron Descamps thought that "it would undermine the whole system of election if each judge elected at a by-election was to be appointed for nine years," and he suggested that by-elections would not always be necessary because a senior deputy-judge could fill a vacancy.[46] In the sub-committee of the Third Committee of the First Assembly, the British representative proposed to avoid a break in the continuity of the Court by allowing by-elections for the period of nine years.[47] An Amendment to this effect was supported on the ground that a judge elected for a short unexpired term would be in a "precarious position"; as the votes in the sub-committee were even, the amendment was rejected. In the Third Committee itself, the proposal to suppress the sentence was renewed and defeated.[48]

The original text of Article 15 provided for a list fixing the order in which deputy-judges should be called upon to sit, having regard "firstly to priority of election and secondly to age." At one time it was proposed that the order in which the deputy-judges were to be listed should be made to depend on the number of votes they had received in the election.[49] The abolition of the post of deputy-judge deprived the original text of Article 15 of its purpose, and it was omitted from the revised Statute.

§160. Article 16.* *The members of the Court may not exercise any political or administrative function, nor engage in any other occupation of a professional nature.*

Any doubt on this point is settled by the decision of the Court.

The latter part of the first paragraph, not included in the original Statute, was added as one of the 1929 amendments. The original text imposed the disability on deputy-judges only when they were "performing their duties on the Court." Various proposals concerning incompatibilities were made in the preliminary plans placed before the 1920 Committee of Jurists.[50] Baron Descamps insisted upon a statement as to incompatibilities in lieu of a provision for challenges.[51] Lord Phillimore thought it an "advantage for an international judge to belong at the same time to the bench of his own country," and he did not consider participation in the judicial work of the House of Lords in Great Britain to be the exercise of a political function.[52] M. Adatci thought that judges

[45] Minutes of the 1920 Committee of Jurists, p. 300. [46] *Idem*, pp. 194–5, 465
[47] Documents, p. 122; Records of First Assembly, Committees, I, p. 348.
[48] Documents, p. 101; Records of First Assembly, Committees, I, p. 305.
[49] Minutes of the 1920 Committee of Jurists, pp. 375, 565.
[50] *Idem*, p. 67.
[51] *Idem*, pp. 170, 173. [52] *Idem*, p. 191.

should "resign their national occupations in order to internationalize themselves," or as he preferred to put it "to deify themselves." [53] Mr. Root wished to prevent a judgeship "from being considered as an incident in a political career." [54] It was early agreed that the duties of a professor or a magistrate were not incompatible with those of a judge.[55] Finally the 1920 Committee of Jurists decided to propose the following text for the first paragraph: "The exercise of any function which belongs to the political direction, national or international, of States, by the members of the Court during their terms of office, is declared incompatible with their judicial duties." In its report the Committee recognized that men of the caliber desired would be needed in their own countries for positions which they would not readily leave, and it stated that "a great judge or a great professor . . . must be allowed to continue" his functions as such even after his election; it was added that "an eminent member of Parliament may retain his legislative function." [56] The proposed incompatibility covered "an active part in the political control of a particular country," as well as "international political duties" in connection with the work of the League of Nations; but it did not apply to membership in the Permanent Court of Arbitration. Some difference of opinion seems to have existed as to the consequence of a judge's engaging in an incompatible activity—it was even suggested that such conduct should be considered as a resignation.[57]

Some dissatisfaction with the proposed text was expressed in the subcommittee of the Third Committee of the First Assembly.[58] M. Fromageot (France) wished to "disengage the judge from his previous occupations"; but M. Huber (Switzerland), anticipating that the Court would have "little to do," did not wish to be too strict on this point. The article was re-drafted by the sub-committee; it assumed its final form in the Third Committee, which added the special provision as to the deputy-judges.[59]

In proposing to the 1929 Committee of Jurists that this article should

[53] *Idem*, p. 187. See also the statement by M. Loder in Records of First Assembly, Plenary, p. 444.

[54] Minutes of the 1920 Committee of Jurists, p. 462.

[55] *Idem*, p. 192.

[56] *Idem*, pp. 715–716. See also the draft of Baron Descamps, *idem*, p. 376.

[57] *Idem*, pp. 193, 573. The report of the Committee of Jurists seems quite impractical on this point. *Idem*, p. 716.

[58] Records of First Assembly, Committees, I, pp. 349–352.

[59] *Ibid.*, pp. 305, 573. In his oral report to the Assembly, M. Hagerup stated that the draft laid down "that the holding of any administrative or political post shall disqualify." *Idem*, Plenary, p. 439.

be amended, M. Fromageot suggested that members of the Court should "devote themselves exclusively to this high function," and should not "exercise any other functions";[60] but some members of the Committee wished to leave this question to "the conscience of the individual judges."[61] The drafting of the additional requirement that members of the Court may not "engage in any other occupation of a professional nature" was influenced by the consideration of the amendments to Article 23. The 1929 Committee of Jurists explained in its report that judges might be members of the Permanent Court of Arbitration, and might act as arbitrators or as conciliators when their duties on the Court permitted.[62] In the 1929 Conference of Signatories, a Cuban proposal to restrict the disability to the exercise of "political functions" was rejected, and the draft of the 1929 Committee of Jurists was adopted with the understanding that "occupation of a professional nature" was to be interpreted "in the widest sense."[63] The Conference seems to have agreed that a judge should not act as a professor, or as a director of a company.[64]

§161. Article 17, paragraph 1.* *No Member of the Court can act as agent, counsel or advocate in any case.*

In the original Statute, this disability was more limited, being confined to "any case of an international nature." The 1920 Committee of Jurists had taken as the basis of its draft the provision in Article 62 of the 1907 Hague Convention on Pacific Settlement; owing to experience in the early years of the Permanent Court of Arbitration,[65] a provision was inserted in that Article that the members of the Permanent Court of Arbitration might not "act as agents, counsel or advocates except on behalf of the Power which appointed them members of the Court." An even stronger prohibition had been included in Article 7 of the Hague *projet* of 1907. The 1920 Committee of Jurists assimilated judges and deputy-judges in this respect, but the Third Committee of the First Assembly added a second sentence of the original article, applying the disability to deputy-judges only "as regards cases in which they are called upon to exercise their functions on the Court."[66]

[60] Minutes of the 1929 Committee of Jurists, p. 42.
[61] *Idem*, p. 44.
[62] *Idem*, 90, 120.
[63] Minutes of the 1929 Conference of Signatories, pp. 33, 78.
[64] The question later arose as to the application of the provision in the amended Statute to judges elected in 1930. Records of Eleventh Assembly, First Committee, p. 15; *idem*, Plenary, p. 131.
[65] See §6, *supra*.
[66] Records of First Assembly, Committees, I, pp. 312, 406, 573.

When the paragraph was considered by the 1929 Committee of Jurists, the second sentence of the original text was dropped in consequence of the abolition of the post of deputy-judge: as to the first sentence, the Committee said in its report that in view of the new Article 16 it would not "be possible to infer *a contrario*" that a judge would be "free to exercise the said functions in a case which is national in character." [67] In the 1929 Conference of Signatories, Sir Harrison Moore (Australia) proposed the suppression of the whole paragraph, but the Conference merely deleted the words "of an international nature." [68]

§162. Article 17, paragraphs 2 and 3. *No member may participate in the decision of any case in which he has previously taken an active part, as agent, counsel or advocate for one of the contesting parties, or as a member of a national or international Court, or of a commission of enquiry, or in any other capacity.*

Any doubt on this point is settled by the decision of the Court.

This text emanated from the 1920 Committee of Jurists. Paragraph 2 is based [69] on the first paragraph of Article 7 of the Hague *projet* which provided:

> A judge may not exercise his judicial functions in any case in which he has, in any way whatever, taken part in the decision of a national tribunal, of a tribunal of arbitration, or of a commission of inquiry, or has appeared in the suit as counsel or advocate for one of the parties.

Baron Descamps would have gone further to say that a judge may not participate in a case in which he, or a member of his family or a connection up to and including the third degree has a "direct personal interest." [70] There was little discussion of the two paragraphs, either in the 1920 Committee of Jurists or in the Third Committee of the First Assembly. The 1929 Committee of Jurists construed the term "in any other capacity" to apply to participation in a commission of conciliation.[71]

§163. Article 18. *A member of the Court cannot be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfil the required conditions.*

Formal notification thereof shall be made to the Secretary-General of the League of Nations, by the Registrar.

This notification makes the place vacant.

[67] Minutes of the 1929 Committee of Jurists, p. 120.
[68] Minutes of the 1929 Conference of Signatories, p. 34.
[69] Minutes of the 1920 Committee of Jurists, p. 461.
[70] *Idem*, p. 376.
[71] Minutes of the 1929 Committee of Jurists, p. 120.

Except for a re-phrasing of the second paragraph, this text emanated from the 1920 Committee of Jurists. The Root-Phillimore draft stated the matter positively, and made dismissal depend upon a determination of incapacity or unfitness for the performance of judicial functions.[72] M. de Lapradelle wished to suppress any such article, as the colleagues of an incompetent judge would never have the moral courage to vote for his exclusion, and the danger in his retention would not be great; Lord Phillimore wished to retain such a provision to operate *in terrorem*, though he thought it probable that no action would ever be taken under it.[73] The report of the 1920 Committee of Jurists envisaged the application of this provision only in cases of infirmity due to age or illness.[74] The Italian Council for Diplomatic Litigation deemed the requirement of unanimity to be too strict, and suggested a four-fifths vote instead.[75] The sub-committee of the Third Committee of the First Assembly introduced into the article only the requirement that the notification to the Secretary-General of the League of Nations should be made by the Registrar.[76]

Various preliminary drafts had suggested a compulsory retiring age for the judges, but the suggestion was not seriously considered by the agencies engaged in the drafting of the Statute.[77]

§164. Article 19. *The members of the court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities.*

The 1920 Committee of Jurists had proposed that "the members of the Court when outside their own country, shall enjoy the privileges and immunities of diplomatic representatives." Somewhat similar provisions had been included in Articles 24 (1899) and 46 (1907) of the Hague Conventions on Pacific Settlement, in Article 5 of the Hague *projet* of 1907, and in Article 10 of the Convention of 1907 on the Central American Court of Justice. It seems to have been agreed in the 1920 Committee of Jurists that "judges should enjoy diplomatic privileges under the same conditions as diplomats," *i.e.*, "not only during their residence in Holland, but also in the countries through which they would have to travel on their way to and from their duties." [78] In the sub-committee of the Third Committee of the First Assembly, reference

[72] Minutes of the 1920 Committee of Jurists, pp. 299–300.
[73] *Idem*, p. 453.
[74] *Idem*, p. 717.
[75] Documents, p. 28; Records of First Assembly, Committees, I, p. 497.
[76] Documents, pp. 70, 127; Records of First Assembly, Committees, I, pp. 356, 591.
[77] Minutes of the 1920 Committee of Jurists, pp. 71, 197. *Cf.*, Minutes of the 1929 Committee of Jurists, pp. 32–3. See §253, *infra*.
[78] Minutes of the 1920 Committee of Jurists, p. 479.

was made to Article 7 of the Covenant of the League of Nations, on the basis of which the British representative proposed to drop the restriction contained in the words "outside their own country"; the revision of the text was voted by the sub-committee to bring it into accord with Article 7 of the Covenant, but it was agreed that "the question of the situation of judges in their own countries should not be prejudiced by the solution adopted." [79]

§165. Article 20. *Every member of the Court shall, before taking up his duties, make a solemn declaration in open Court that he will exercise his powers impartially and conscientiously.*

This Article, drafted by the 1920 Committee of Jurists, was based on Article 5 of the Hague *projet* of 1907,[80] which provided that "before taking their seat, the judges and deputy-judges must, before the Administrative Council, swear or make a solemn affirmation to exercise their functions impartially and conscientiously." In the Root-Phillimore plan it was suggested that every judge should "at the first sitting at which he is to be present, solemnly declare that he will exercise his functions in accordance with international law." M. de Lapradelle referred to the oath as not denationalizing but supernationalizing the judges.[81] The Article was not discussed in the Council or in the First Assembly.

§166. Article 21. *The Court shall elect its President and Vice-President for three years; they may be re-elected.*

It shall appoint its Registrar.

The duties of Registrar of the Court shall not be deemed incompatible with those of Secretary-General of the Permanent Court of Arbitration.

This text, drafted by the 1920 Committee of Jurists, has some points in common with the Hague *projet* of 1907. Lord Phillimore thought that "it would be dangerous to make the Presidency of the Court too important a post," and he said the President should be only *primus inter pares;* he proposed a term of office of three years, thinking that "if the president were made eligible for reelection, it was almost certain that a good president would keep his appointment for 9 years." [82] A question was raised in the Committee as to the participation of deputy-judges in the elections by the Court, but a proposal to allow their participation was rejected.[83]

The provisions concerning the Registrar occasioned little debate in the 1920 Committee of Jurists, and considering what the Registry of the

[79] Documents, pp. 128, 208; Records of First Assembly, Committees, I, pp. 356, 529.
[80] Minutes of the 1920 Committee of Jurists, p. 478.
[81] *Idem*, p. 534.
[82] *Idem*, p. 456.
[83] *Idem*, p. 459; but see *idem*, p. 486.

Court has since become, the importance of the post was unduly minimized. Several members of the Committee thought that one person should serve both the new Court and the Permanent Court of Arbitration,[84] to avoid useless expenditure and to establish a close connection between the two institutions.[85] No changes in the Committee's draft were proposed either in the Council or in the First Assembly.

§167. **Article 22.** *The seat of the Court shall be established at The Hague.*

The President and Registrar shall reside at the seat of the Court.

This text was drafted by the 1920 Committee of Jurists. Baron Descamps proposed that The Hague should be chosen as the seat of the Court, not only as "an act of courtesy to the Government of the Netherlands," but also because The Hague was already the seat of the Permanent Court of Arbitration, and because it was desirable "to separate the political functions of the League of Nations from its judicial functions by assigning different seats to the two groups of institutions." [86] M. Adatci said that "in Japan, when The Hague is mentioned, it means Peace and Justice." [87] The Hague was chosen by the unanimous vote of the Committee, because "a high tradition of pacific hopes and legal progress" surrounds it.[88] The Committee of Jurists refused to include in its draft any provision as to the removal of the seat of the Court from The Hague.[89]

Many of the preliminary drafts, including the "Five-Power Plan" (Article 13), provided that all of the judges should reside at the seat of the Court; this was also urged by some members of the 1920 Committee of Jurists, but Lord Phillimore foresaw "unfortunate consequences" if the judges were in "daily contact without occupation," [90] though he admitted that distant countries would be at some disadvantage if judges were not required to be domiciled at The Hague.[91] The decision of the question of residence seems to have turned upon an expectation that "at the outset" the Court would have little to do.[92] The requirement in the second paragraph of the Article was finally adopted as an element of the Court's "permanence." [93] The text proposed by the 1920 Committee of Jurists was not modified by the First Assembly.

[84] *Cf.*, Articles 12 and 13 of the Hague *projet* of 1907.
[85] Minutes of the 1920 Committee of Jurists, pp. 300, 305, 359, 377, 455.
[86] *Idem*, p. 203.
[87] *Ibid.*
[88] *Idem*, p. 718. M. de Lapradelle had objected to any statement of the reasons for choosing The Hague. *Idem*, p. 204.
[89] *Idem*, pp. 305, 376, 495–6.
[90] *Idem*, p. 186.
[91] *Idem*, p. 189.
[92] *Idem*, p. 718.
[93] *Idem*, p. 188.

§168. Article 23, paragraph 1.* *The Court shall remain permanently in session* [Fr., reste toujours en fonction] *except during the judicial vacations, the dates and duration of which shall be fixed by the Court.*

In the original Statute, this Article provided for an annual session of the Court, to begin on June 15 unless the Rules of Court should provide otherwise, with power given to the President to "summon an extraordinary session . . . whenever necessary." The 1920 Committee of Jurists rejected a proposal, similar to the provision in Article 14 of the Hague *projet* of 1907, that the Court would not need to meet if there was no business to come before it, stating expressly that the Court should meet annually, "even though there might be no cases to deal with." [94] In its report, the Committee envisaged a permanence limited to a half-yearly session.[95] With regard to the date fixed for the annual session, it was explained to the sub-committee of the Third Committee of the First Assembly that "June had seemed to be the most favorable month, since at that time the judges would probably be less burdened by their ordinary occupations"; [96] the dates might well have been left to be fixed by the Rules.

During the Court's earlier years, delays incident to the convoking of the Court and the frequent absence of some of the judges gave rise to some dissatisfaction. Despite the anticipation in 1920 that the Court would have "little to do," [97] many extraordinary sessions proved to be necessary, one of which, in November, 1928, had to be adjourned because of the illness of a deputy-judge whose presence was necessary to a quorum. This experience of the Court was one of the reasons for the decision in 1928 that a study of the Statute should be undertaken, and the modifications introduced into this Article were perhaps the most important of the 1929 amendments. Before the 1929 Committee of Jurists, the increase of the number of judges, permanence of sessions, the duty of attendance, the introduction of long leaves for certain judges, and the provision for more adequate salaries, were all related problems. In proposing that the Court should remain permanently in session, the 1929 Committee sought to "bring the written rules into harmony with the facts" as to extraordinary sessions; its report explained that "in principle" the Court would remain constantly in session.[98] M. Politis anticipated that "the Court would

[94] *Idem*, pp. 516, 574.
[95] *Idem*, p. 718.
[96] Records of First Assembly, Committees, I, p. 358; Documents, p. 128.
[97] Even in 1922 it seems to have been thought that the Court would sit during only one month a year. Minutes of the 1929 Committee of Jurists, p. 63.
[98] *Idem*, pp. 113, 121.

have seven months' work a year and three months' vacation; there remained two other months, which would be covered by various public holidays, travelling and so forth." [99]

§169. Article 23, paragraph 2.* *Members of the Court whose homes are situated at more than five days' normal journey from The Hague shall be entitled, apart from the judicial vacations, to six months' leave every three years, not including the time spent in travelling.*

This provision found no counterpart in the original Statute; except for the concluding phrase, the text was drafted by the 1929 Committee of Jurists as a result of a proposal made by M. Fromageot that all judges be assured "a fixed period of leave, thus permitting all alike to spend a certain period of time in their homes." [1] M. Urrutia favored a system of leaves which would facilitate acceptance of membership in the Court by judges from American countries. It was by a narrow vote that the 1929 Committee of Jurists decided to restrict the long leave to judges who lived far away from The Hague; [2] its report stated that the object was "to enable members of the Court whose ordinary residence is in a country at a considerable distance from its seat to return occasionally to their homes during their term of office." [3] The concluding phrase of the text was added by the 1929 Conference of Signatories.[4]

§170. Article 23, paragraph 3.* *Members of the Court shall be bound, unless they are on regular leave or prevented from attending by illness or other serious reason duly explained to the President, to hold themselves permanently at the disposal of the Court.*

Even under the original text of the Statute, which contained no counterpart of this provision, it would seem that judges were obligated to hold themselves at the disposal of the Court.[5] This text was added to the Statute by the 1929 amendments. A proposal that a judge should be obligated to attend on 48 hours' notice was rejected as too rigid.[6] M. Politis (Greece) stated to the 1929 Conference of Signatories that it would not be inadmissible for a judge to be three days' journey away from The Hague, but that "residence at The Hague when there was nothing to do" was not required by the article.[7] "Regular" leave seems to mean the long leave of six months, as opposed to sick leave.

[99] *Idem*, p. 56. [1] *Idem*, p. 28.
[2] *Idem*, p. 36. Article 27, paragraph 5, of the 1931 Rules, gave long leave to "judges . . . who by reason of the fulfilment of their duties in the Court are obliged to live away from their own country." [3] Minutes of the 1929 Committee of Jurists, p. 121.
[4] Minutes of the 1929 Conference of Signatories, pp. 37–38.
[5] Minutes of the 1929 Committee of Jurists, p. 28.
[6] *Idem*, pp. 30, 34; Minutes of the 1929 Conference of Signatories, p. 39. [7] *Idem*, p. 39.

§171. Article 24. *If, for some special reason, a member of the Court considers that he should not take part in the decision of a particular case, he shall so inform the President.*

If the President considers that for some special reason one of the members of the Court should not sit on a particular case, he shall give him notice accordingly.

If in any such case the member of the Court and the President disagree, the matter shall be settled by the decision of the Court.

The substance of this text was proposed by the 1920 Committee of Jurists as a substitute for a proposed right of challenging judges.[8] It clearly belongs with that part of Article 17 which deals with disqualifications; it was originally only part of a proposal which, in a sense, got lost in the draft-scheme of the 1920 Committee of Jurists.[9] Its purpose was not explained in the report of that Committee, and the debate in the First Assembly does not throw much light on the need for it. A slight amendment was made by the sub-committee of the Third Committee in paragraph 1, where "should not" (Fr., *devoir ne pas*) was substituted for "cannot" (Fr., *ne pouvoir*);[10] it was explained that this amendment was intended to make it clear that it is not an impossibility, but the moral duty of abstention, which the paragraph is aimed to cover.[11]

§172. Article 25, paragraph 1. *The full Court shall sit except when it is expressly provided otherwise.*

This provision, modeled on Article 14 of the Hague *projet* of 1907, emanated from the 1920 Committee of Jurists, in which it was the subject of a protracted debate. Preliminary drafts had manifested a desire to keep the Court small. In line with this, Baron Descamps proposed that the Court should sit in sections or in chambers;[12] Lord Phillimore thought the Court should always sit *in pleno* to "make use of all its resources";[13] M. Ricci-Busatti desired a larger number of judges from among whom tribunals would be constituted as in the Permanent Court of Arbitration.[14] No basis for excluding some members of the Court from sitting was found, and as the debate progressed the 1920 Committee of Jurists came to the view that the unity of the Court required that it should always sit *in*

[8] Minutes of the 1920 Committee of Jurists, pp. 168–74, 178, 300–301. The subject of challenges had figured very prominently in the Five-Power Plan. Lord Phillimore thought that the right of challenge was an unnecessary "continental institution." *Idem*, p. 472.

[9] *Idem*, pp. 472–5, 574, 613.

[10] Documents, p. 129; Records of First Assembly, Committees, I, p. 359.

[11] Documents, p. 208; Records of First Assembly, Plenary, p. 460.

[12] Minutes of the 1920 Committee of Jurists, pp. 49, 111, 143, 171, 377.

[13] *Idem*, p. 169.

[14] *Idem*, pp. 177, 184, 524.

pleno; [15] its proposal to this effect was embodied in the text as adopted. It reached a compromise with reference to the Court's composition for giving advisory opinions, proposing that where the question did not refer to a dispute the opinion would be given by a special commission of from three to five members; but this proposal was rejected in the First Assembly.

§173. Article 25, paragraphs 2 and 3.* *Subject to the condition that the number of judges available to constitute the Court is not thereby reduced below eleven, the Rules of Court may provide for allowing one or more judges, according to circumstances and in rotation, to be dispensed from sitting.*

Provided always that a quorum of nine judges shall suffice to constitute the Court.

The original text of these paragraphs provided for calling on deputy-judges to sit if eleven judges could not be present, and for a quorum of nine judges. In the 1920 Committee of Jurists, Lord Phillimore expressed the view that "the number eleven would be merely nominal; cases of illness and absence would always reduce the number to nine." [16] An Italian proposal to the sub-committee of the Third Committee of the First Assembly would have permitted a party to demand that a discussion or decision be postponed if less than eleven judges were prepared to sit; [17] in a contrary sense, a British proposal would have reduced the number of judges to nine, with seven to constitute a quorum.[18] Neither of these proposals was adopted. As the text failed to make any special provision for the enlargement of the Court envisaged in Article 3 of the Statute, nine judges or deputy-judges could constitute a quorum even after the number of judges was increased in 1930 to fifteen.

New texts were provided for the two paragraphs by the 1929 amendments. The new second paragraph was first proposed to the 1929 Committee of Jurists as an amendment to Article 23; it was supported by Mr. Root who, finding an analogy in the practice of the Supreme Court of the State of New York, wished to enable the Court to arrange so that some of its members might be engaged on one case while others were engaged on another.[19] The provision was designed to relieve "congestion

[15] Minutes of the 1920 Committee of Jurists, pp. 517, 526, 719.
[16] *Idem*, p. 526.
[17] Records of First Assembly, Committees, I, p. 497.
[18] *Idem*, p. 340.
[19] Minutes of the 1929 Committee of Jurists, pp. 70, 74. Mr. Root saw a "disadvantage in the presence of the full number of fifteen judges," and the Committee accepted his viewpoint in its report. *Idem*, p. 121.

of the General List," [20] and to make it possible for special leave to be given to judges not entitled to long leave. In its report, the 1929 Committee of Jurists emphasized that no ground should be given for a suspicion "that the Court has in a given case been specially composed for the purpose of affecting the decision of the case." [21] The 1929 Conference of Signatories adopted the new text after little discussion.[22]

§174. **Article 26.*** *Labour cases, particularly cases referred to in Part XIII (Labour) of the Treaty of Versailles and the corresponding portions of the other treaties of peace, shall be heard and determined by the Court under the following conditions:*

The Court will appoint every three years a special Chamber of five judges, selected so far as possible with due regard to the provisions of Article 9. In addition, two judges shall be selected for the purpose of replacing a judge who finds it impossible to sit. If the parties so demand, cases will be heard and determined by this Chamber. In the absence of any such demand, the full Court will sit. In both cases, the judges will be assisted by four technical assessors sitting with them, but without the right to vote, and chosen with a view to ensuring a just representation of the competing interests.

The technical assessors shall be chosen for each particular case in accordance with rules of procedure under Article 30 from a list of "Assessors for Labour Cases" composed of two persons nominated by each Member of the League of Nations and an equivalent number nominated by the Governing Body of the Labour Office. The Governing Body will nominate, as to one-half, representatives of the workers, and, as to one-half, representatives of employers from the list referred to in Article 412 of the Treaty of Versailles and the corresponding articles of the other treaties of peace.

Recourse may always be had to the summary procedure provided for in Article 29, in the cases referred to in the first paragraph of the present Article, if the parties so request.

In Labour cases, the International Office shall be at liberty to furnish the Court with all relevant information, and for this purpose the Director of that Office shall receive copies of all the written proceedings.

At an early stage of the planning for the Court, the Director of the International Labor Office drew attention to Articles 29–32 and 37 of the Constitution of the International Labor Organization,[23] providing for the

[20] Series D, No. 2 (3d add.), p. 542.
[21] Minutes of the 1929 Committee of Jurists, p. 121.
[22] Minutes of the 1929 Conference of Signatories, p. 39.
[23] Articles 415–18 and 423 of the Treaty of Versailles.

jurisdiction of the Court with respect to certain types of labor cases; his communication was transmitted to the 1920 Committee of Jurists,[24] but the latter's draft made no special provision for labor cases. Subsequently, the Director formulated a number of amendments, proposing that some of the judges should be required to be experts in labor legislation and social questions, and that the Court should include representatives of workmen and employers when labor cases were being heard. These proposals were placed before the First Assembly.[25] In the sub-committee of the Third Committee, the French representative supported the latter suggestion.[26] The British delegation proposed a plan for a special chamber of five judges for labor cases,[27] to be assisted by four assessors acting in an advisory capacity; [28] it was explained that a special chamber was necessary to prevent the Court's being too large after assessors had been added, and to create a small body of judges who might specialize on labor questions. Some members of the sub-committee favored the hearing of labor cases by the full court, in order to maintain the representative character of the Court,[29] but a small chamber was decided upon with a view to developing specialists.[30] In reporting to the Third Committee, the sub-committee suggested that labor disputes might present features "not of an exclusively legal character." [31] Appearing before the Third Committee, the Director of the International Labor Office was somewhat critical of the draft offered by the sub-committee; he desired that "a special *locus standi* before the Court might be given the International Labor Office," and insisted that assessors be given the character of real judges.[32] As a result of his insistence, the Third Committee added the last paragraph of Article 26,[33] which clearly applies only to contentious cases.[34] The final text of the Article is something of a hodge-podge; some of its provisions apply to proceedings before the full Court as well as to proceedings before the special chamber.

[24] Minutes of the 1920 Committee of Jurists, pp. 248, 257.
[25] Documents, pp. 74–80; Records of First Assembly, Committees, I, pp. 557–565.
[26] Documents, pp. 129, 151; Records of First Assembly, Committees, I, pp. 360, 394.
[27] Documents, p. 70; Records of First Assembly, Committees, I, p. 592.
[28] Documents, p. 146; Records of First Assembly, Committees, I, p. 388.
[29] Documents, pp. 149ff.; Records of First Assembly, Committees, I, pp. 390ff. This insistence led to the reference to Article 9 of the Statute.
[30] Documents, p. 153; Records of First Assembly, Committees, I, pp. 396–397.
[31] Documents, p. 209; Records of First Assembly, Plenary, p. 460.
[32] Documents, p. 105; Records of First Assembly, Committees, I, p. 309. M. Thomas stated that conflicts between capital and labor "were far from involving mere points of law." Documents, p. 106; Records of First Assembly, Committees, I, p. 310.
[33] The Third Committee would have given the International Labor Office a "right" to furnish information, but the final text weakens the provision.
[34] Series D, No. 2, p. 98.

Various modifications of the original text were included in the 1929 amendments: (1) in the second paragraph of the original text, slight drafting changes were introduced into the fourth and fifth sentences; (2) the third paragraph of the original text was deleted, to allow the participation of national judges in all cases and because of the new fourth paragraph added in Article 31; (3) a new paragraph was added as a fourth paragraph, to allow a resort to summary procedure. No objection to these amendments was made by the Director of the International Labor Office when he was consulted by the 1929 Committee of Jurists,[35] and the text proposed by the latter was adopted by the 1929 Conference of Signatories.[36]

§175. Article 27.* *Cases relating to transit and communications, particularly cases referred to in Part XII (Ports, Waterways and Railways) of the Treaty of Versailles and the corresponding portions of the other treaties of peace, shall be heard and determined by the Court under the following conditions:*

The Court will appoint every three years a special Chamber of five judges, selected so far as possible with due regard to the provisions of Article 9. In addition, two judges shall be selected for the purpose of replacing a judge who finds it impossible to sit. If the parties so demand, cases will be heard and determined by this Chamber. In the absence of any such demand, the full Court will sit. When desired by the parties or decided by the Court, the judges will be assisted by four technical assessors sitting with them, but without the right to vote.

The technical assessors shall be chosen for each particular case in accordance with rules of procedure under Article 30 from a list of "Assessors for Transit and Communications Cases" composed of two persons nominated by each Member of the League of Nations.

Recourse may always be had to the summary procedure provided for in Article 29, in the cases referred to in the first paragraph of the present Article, if the parties so request.

The original text of this Article was due to a proposal made to the First Assembly of the League of Nations by the British delegation,[37] adapted by the sub-committee of the Third Committee to conform in a general way to the article on labor cases. The Second Committee of the First Assembly was at the same time considering plans for a Transit and

[35] Minutes of the 1929 Committee of Jurists, pp. 53, 69.
[36] Minutes of the 1929 Conference of Signatories, pp. 38–40.
[37] Records of First Assembly, Committees, I, p. 592.

Communications Organization of the League of Nations, and as that Organization was to possess competence to act as an agency of conciliation with reference to disputes,[38] some fears were expressed that the Court might be brought into conflict with it; emphasis was placed on the technical character of transit and communications questions, and on the optional character of the chamber's jurisdiction.[39] The First Assembly in plenary session made a slight amendment in the second paragraph as to assistance by assessors, substituting "when desired by the parties or decided by the Court" for the words "on all occasions."[40] The reference to Part XII of the Treaty of Versailles covers especially Articles 336, 337, 376 and 386.

The 1929 amendments made various modifications of the original text: (1) a slight drafting change was made in the fourth sentence in the second paragraph; (2) the third paragraph of the original text was deleted, as in Article 26; (3) a new paragraph was added as a fourth paragraph, as in Article 26. Consulted by the 1929 Committee of Jurists with reference to the proposed changes, the League of Nations Advisory and Technical Committee on Communications and Transit pointed out that the special chamber provided for by Article 27 had never been resorted to; it expressed the opinion that the Court *in pleno* should deal with cases relating to transit and communications, and that the assessors were not likely "to afford the Court any real assistance" in dealing with the technical aspects of such cases; and as an alternative to the suppression of the article, it suggested that resort to summary procedure should be permitted.[41] Despite this reply, the 1929 Committee of Jurists proposed to maintain the article as modified,[42] and this course was approved by the 1929 Conference of Signatories. In the latter body, however, the representative of Denmark proposed a special chamber for international commercial disputes to replace the special chamber for transit and communications cases.[43]

[38] See Article 7 of the *règlement* adopted at Barcelona, April 6, 1921, and Article 18 of the Statute of the Organization adopted at Geneva on September 2, 1927. 1 Hudson, International Legislation, p. 617; 3 *idem*, p. 2106.

[39] Records of First Assembly, Committees, I, pp. 310, 397–400.

[40] *Idem*, Plenary, pp. 498–9.

[41] Minutes of the 1929 Committee of Jurists, p. 69.

[42] *Idem*, pp. 74, 122.

[43] Minutes of the 1929 Conference of Signatories, p. 40. The Danish proposal was later realized in the rules adopted by the Council of the League of Nations on January 28, 1932, providing for a permanent group of experts for dealing with economic disputes. League of Nations Official Journal, 1932, pp. 463, 596. See Hudson, in 26 American Journal of International Law (1932), p. 353.

§176. Article 28. *The special chambers provided for in Articles 26 and 27 may, with the consent of the parties to the dispute, sit elsewhere than at The Hague.*

This text originated in the First Assembly, as it relates only to articles which were not discussed in the 1920 Committee of Jurists. A British draft [44] included it as a part of the proposal for special chambers, and as such it was adopted with little discussion.[45] No suggestion was ever made for requiring the consent of the States in whose territory the chambers were to sit, in line with Article 44 of the Statute, and with Article 60 of the 1907 Hague Convention on Pacific Settlement. The view was taken in the sub-committee of the Third Committee of the First Assembly that the extra expense of a meeting elsewhere than at The Hague would be borne by the parties, but a proposal to include a provision to this effect was rejected.[46]

§177. Article 29.* *With a view to the speedy despatch of business, the Court shall form annually a Chamber composed of five judges who, at the request of the contesting parties, may hear and determine cases by summary procedure. In addition, two judges shall be selected for the purpose of replacing a judge who finds it impossible to sit.*

The original text of this Article emanated from the 1920 Committee of Jurists (Article 26), which borrowed the conception from Articles 86–90 of the 1907 Hague Convention on Pacific Settlement; the earlier Hague Convention of 1899 having contained no provisions on summary procedure, the French delegation at The Hague in 1907 suggested the addition of a provision for compulsory summary arbitration procedure where a convention to which more than two States were parties was the subject of the dispute.[47] The Hague *projet* of 1907 (Articles 6, 18) also envisaged a summary procedure, and it was proposed in various drafts submitted to the Committee of Jurists in 1920.[48] Such a general opinion existed that the proposal was not debated at length in the 1920 Committee of Jurists,[49] and the draft was easily arrived at after the determination that the Court should normally sit *in pleno*.

[44] Documents, p. 71; Records of First Assembly, Committees, I, p. 592.
[45] Documents, pp. 107, 155; Records of First Assembly, Committees, I, pp. 312, 400.
[46] Documents, pp. 155, 209–10; Records of First Assembly, Committees, I, pp. 400, 531.
[47] 2 *Actes et Documents*, pp. 764, 874–5. [48] Minutes of the 1920 Committee of Jurists, p. 89.
[49] *Idem*, pp. 619–20, 647. M. Hagerup "stated that the archives of the various Foreign Offices contained many questions left unsolved, because there had been hesitation to set going the cumbersome machinery of arbitration," and he proposed a section of summary procedure "to make possible a rapid and inexpensive procedure" for such cases; M. de Lapradelle would have conferred on a single judge power to deal with such cases, following the French *procédure des référés;* M. Ricci-Busatti insisted that the parties be allowed to choose three judges for this purpose. *Idem*, pp. 517, 524–6.

When the Article was considered by the 1929 Committee of Jurists, it was thought that the exclusion of national judges from the Chamber for Summary Procedure might account for the fact that so little use had been made of this chamber.[50] Hence, it was proposed to increase the membership from three to five judges, as this would allow two national judges to be included on each occasion. A second sentence was added, also, to provide for substitutes, the precise language being borrowed from the second paragraph of Articles 26 and 27.

§178. **Article 30.** *The Court shall frame rules for regulating its procedure. In particular, it shall lay down rules for summary procedure.*

This text, based upon Article 32 of the Hague *projet* of 1907, emanated from the 1920 Committee of Jurists which from the beginning showed a desire to leave the Court a large measure of freedom in the control of its procedure.[51] A proposal of Baron Descamps to require approval of the rules of procedure by the Council and the Assembly of the League of Nations was not taken up by the Committee.[52] The Council suggested the addition of a reference to rules "governing the conditions under which the Vice-President shall take up his duties," [53] but this reference was abandoned by the sub-committee of the Third Committee of the First Assembly.[54] For summary procedure, the 1920 Committee of Jurists envisaged rules derived from the 1907 Hague Convention, which would expressly require written procedure; [55] a question raised in the 1920 Committee of Jurists as to the power of the Court to supply by its Rules omissions in its Statute was answered affirmatively.[56] A free hand was left to the Court to determine the contents of its Rules, though at one time limitations on its power were suggested.[57]

§179. **Article 31.*** *Judges of the nationality of each of the contesting parties shall retain their right to sit in the case before the Court.*

If the Court includes upon the Bench a judge of the nationality of one of the parties, the other party may choose a person to sit as judge. Such

[50] Minutes of the 1929 Committee of Jurists, pp. 49–50.
[51] Minutes of the 1920 Committee of Jurists, p. 248.
[52] *Idem*, p. 50.
[53] Documents, pp. 56–57; Records of First Assembly, Committees, I, p. 487.
[54] Documents, pp. 129, 210; Records of First Assembly, Committees, I, pp. 360, 531.
[55] Minutes of the 1920 Committee of Jurists, p. 719.
[56] *Idem*, p. 647.
[57] Following the Brussels meeting of the Council in 1920, a provision was drafted which would have required the Court to apply in the first place rules laid down in special agreements, and in the second place the rules contained in the 1907 Hague Convention. Documents, p. 58; Records of First Assembly, Committees, I, p. 489.

person shall be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5.

If the Court includes upon the Bench no judge of the nationality of the contesting parties, each of these parties may proceed to select a judge as provided in the preceding paragraph.

The present provision shall apply to the case of Articles 26, 27 and 29. In such cases, the President shall request one or, if necessary, two of the members of the Court forming the Chamber to give place to the members of the Court of the nationality of the parties concerned, and, failing such or if they are unable to be present, to the judges specially appointed by the parties.

Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point is settled by the decision of the Court.

Judges selected as laid down in paragraphs 2, 3 and 4 of this Article shall fulfil the conditions required by Articles 2, 17 (paragraph 2), 20 and 24 of this Statute. They shall take part in the decision on terms of complete equality with their colleagues.

This text, the substance of which was drafted by the 1920 Committee of Jurists (as Article 28), represents one of its principal achievements, for the scheme for electing the judges would probably never have been adopted without it.[58] The article at once distinguishes the Court from national courts, the considerations governing the creation of the latter being quite different. M. Adatci supported the participation of national judges as essential to the completeness of the Court's examination of a case, and he proposed the appointment of judges *ad hoc* wherever a litigant state did not have a representative among the judges sitting in the Court.[59] Lord Phillimore proposed the appointment of judges *ad hoc*, to sit as "assessors with voting powers,"[60] but this qualification was dropped in the Root-Phillimore plan.[61] M. de Lapradelle suggested that if both parties had nationals among the judges, they should be allowed to participate; that if only one party had a national among the judges he should give up his seat, and both parties should then be represented by assessors; and that if neither party had a national among the judges then the appointment of assessors "would be avoided."[62] He assumed that "a national judge would always record his disapproval of a sentence unfavorable to his country";[63] Lord Phillimore dissented from this,

[58] *Cf.*, Article 16 of the 1907 Prize Court Convention.
[59] Minutes of the 1920 Committee of Jurists, pp. 29, 98, 165, 168, 529.
[60] *Idem*, pp. 169, 199.
[61] *Idem*, p. 327. [62] *Idem*, pp. 172, 198, 531, 535. [63] *Idem*, p. 531.

citing the *Alaska Boundary Arbitration*.[64] M. Loder opposed the participation of national judges as "a characteristic essentially belonging to arbitration," [65] and desired to limit them to acting in an advisory capacity; he was also troubled about the possibility of an even number of judges.[66] M. Ricci-Busatti thought it a difficulty that judges should derive their authority from different sources, ordinary judges from their international election and judges *ad hoc* from appointment by their own Governments.[67] Mr. Root insisted that "nations should be able to go before the Court with the certainty that their case would be fully understood"; he urged the participation of national judges chiefly, however, as a practical way for getting States to consent.[68] It was the practical appeal of the provision which led to its adoption, relatively late in the deliberations of the Committee of Jurists.[69] In its report the Committee admitted that it would be "logical" that national judges should abstain from sitting, and that its proposal made the Court resemble a court of arbitration more nearly than a court of justice; but it replied that "States attach much importance to having one of their subjects on the Bench when they appear before a Court of Justice." [70]

In his report to the Council at Brussels, Léon Bourgeois (France) stated that the essential condition in this respect was "complete equality." [71] Norwegian and Swedish committees proposed to amend the draft by excluding national judges in every case.[72] In the First Assembly the sub-committee of the Third Committee gave little consideration to the article; it accepted an Italian amendment adding the second sentence in the fifth paragraph; but it refused to accept a second Italian proposal to add to the last paragraph a provision that judges *ad hoc* should not "be included in the quorum of nine or of eleven judges stipulated in Article 25," as in the opinion of the sub-committee that went without saying.[73] The Third Committee adopted the amended draft without discussion.

The 1929 amendments effected a number of changes in this article as it appeared in the original Statute: (1) in the first paragraph, "each

[64] *Idem*, p. 533. In the award of the Alaska Boundary Tribunal of October 20, 1903, Baron Alverstone, who had been appointed by Great Britain, joined with the members appointed by the United States in upholding the United States' contentions on certain points. See U. S. Foreign Relations, 1903, p. 543; 98 British and Foreign State Papers, p. 152.
[65] Minutes of the 1920 Committee of Jurists, pp. 169–70, 531.
[66] *Idem*, p. 534.
[67] Minutes of the 1920 Committee of Jurists, p. 532.
[68] *Idem*, pp. 532, 538. [69] *Idem*, pp. 539, 565. [70] *Idem*, p. 722.
[71] Documents, p. 48; Records of First Assembly, Committees, I, p. 475.
[72] Documents, pp. 34, 36; Records of First Assembly, Committees, I, pp. 505, 508–9.
[73] Documents, pp. 129–30, 210; Records of First Assembly, Committees, I, pp. 360–1, 532.

of the contesting parties" was substituted for "each contesting party"; (2) in the second paragraph, "one of the parties" was substituted for "one of the parties only," and some redrafting was necessitated by the disappearance of the deputy-judges; (3) in the third paragraph, "each of these parties may proceed to select" was substituted for "each of these may proceed to select or choose"; (4) a new paragraph was added as a fourth paragraph, providing for national judges in the chambers; (5) in the final paragraph, the drafting was modified, a reference to Article 16 was suppressed, and "on terms of complete equality" was substituted for "on an equal footing."

Interesting suggestions were made during the course of the discussion in the 1929 Committee of Jurists. M. Pilotti proposed that judges *ad hoc* should be chosen from a list of assessor judges, two of whom would be named by each Member of the League of Nations on analogy to the provision in Article 27.[74] Sir Cecil Hurst raised the question as to the meaning of the term "nationality" with reference to the British Empire, desiring "to coordinate the practice of the Court and that of the Council of the League" in this respect; he contended that an English judge would not be qualified to represent the local law of a Dominion as would a national judge, yet he denied the possibility of the Court's dealing with a dispute between the United Kingdom and a Dominion, as "the relations between them were not international."[75] Convinced by a close study of the Statute that an amendment was not necessary, Sir Cecil Hurst merely requested that his interpretation be embodied in the Committee's report; but in the face of considerable opposition, voiced particularly by M. Politis, this request was withdrawn.[76]

The precise texts of the amendments proposed in Article 31 were only hurriedly considered by the 1929 Committee of Jurists,[77] and no change was made in them by the 1929 Conference of Signatories. In the latter body, M. Cohn (Denmark) expressed the view that equality would be better attained if each party could appoint a judge *ad hoc* where only one of the parties had a national among the judges, such national being required to retire from the bench for that particular case.[78]

[74] Minutes of the 1929 Committee of Jurists, p. 54.

[75] Minutes of the 1929 Committee of Jurists, pp. 70–72.

[76] *Idem*, pp. 84–87. *Cf.*, Walter Pollak, "The Eligibility of British Subjects as Judges of the Permanent Court of International Justice," 20 American Journal of International Law (1926), pp. 714–25.

[77] Minutes of the 1929 Committee of Jurists, p. 92.

[78] Minutes of the 1929 Conference of Signatories, p. 41. A similar suggestion had been made by M. de Lapradelle in 1920. Minutes of the 1920 Committee of Jurists, pp. 198–9, 537–8.

§180. Article 32.* *The members of the Court shall receive an annual salary.*

The President shall receive a special annual allowance.

The Vice-President shall receive a special allowance for every day on which he acts as President.

The judges appointed under Article 31, other than members of the Court, shall receive an indemnity for each day on which they sit.

These salaries, allowances and indemnities shall be fixed by the Assembly of the League of Nations on the proposal of the Council. They may not be decreased during the term of office.

The salary of the Registrar shall be fixed by the Assembly on the proposal of the Court.

Regulations made by the Assembly shall fix the conditions under which retiring pensions may be given to members of the Court and to the Registrar, and the conditions under which members of the Court and the Registrar shall have their travelling expenses refunded.

The above salaries, indemnities and allowances shall be free of all taxation.

The drafting of this Article, both in the original and in the amended form, depended on various problems connected with the duties of the judges. The proposals of the 1920 Committee of Jurists were influenced by the then prevailing anticipation that the Court would have "little to do"; the original Statute provided for the judges' receiving an "annual indemnity," supplemented by "a grant for the actual performance of their duties," instead of an "annual salary." At various times the 1920 Committee discussed the proper amount of a judge's remuneration; Mr. Root thought that the salary of 6,000 florins, proposed for the judges of a Court of Arbitral Justice in Article 9 of the Hague *projet* of 1907, was "quite out of the question"; [79] Lord Phillimore suggested "the same sum as that paid to the highest English judges, that is to say, 6,000 pounds"; [80] M. de Lapradelle proposed that the salary should be twice that of the best-paid judge in any country.[81] A proposal that deputy-judges should have the same remuneration as judges, led to an extended debate; a suggestion was also made that a deputy-judge should receive one-third of the salary of a judge.[82] The Committee of Jurists

[79] Minutes of the 1920 Committee of Jurists, p. 486.

[80] *Idem*, pp. 480, 483.

[81] *Idem*, p. 196. M. de Lapradelle thought that high salaries would lead to more frequent use of the Court.

[82] *Idem*, pp. 484–5, 487, 492.

finally concluded that it did not have the necessary information for proposing a definite remuneration, and it thought that the Council and Assembly should have a free hand in dealing with the question; hence its report did not deal with the subject.[83] The *rapporteur* of the Council, M. Léon Bourgeois (France), intimated that the fixed remuneration of the judges should be small, but that a liberal allowance should be paid for each day spent on active duty. In the sub-committee of the Third Committee of the First Assembly, the provision for pensions was redrafted and made applicable to all of the Court's personnel.[84]

In the 1929 Committee of Jurists, the proposed amendment of Article 23 to provide for the Court's remaining permanently in session and to require judges to be permanently at the disposal of the Court, necessitated a fresh consideration of the whole "system of remuneration," with the result that Article 32 was completely redrafted.[85] The principal changes, proposed by the 1929 Committee of Jurists and adopted without discussion by the 1929 Conference of Signatories, were the following: (1) the annual indemnity and the *per diem* grants were consolidated into an annual salary; (2) the power to fix the Registrar's salary was conferred on the Assembly, instead of on the Council; (3) new provision was made for Assembly regulations governing the payment of pensions and the refunding of travelling expenses to the judges and the Registrar; and (4) a provision was added that the salaries, indemnities and allowances provided for should be "free of all taxation." [86]

§181. Article 33. *The expenses of the Court shall be borne by the League of Nations, in such a manner as shall be decided by the Assembly upon the proposal of the Council.*

This text was drafted by the 1920 Committee of Jurists (Article 30). The Root-Phillimore draft proposed that "the expenses of the Court shall be borne by the League of Nations"; [87] it was also proposed to the Committee that States Members of the League of Nations should contribute to the expenses in equal shares.[88] The text adopted left it to the Assembly to decide such questions as contributions by States not members of the League of Nations,[89] though the Assembly probably has no other power than that of reaching an agreement with such States as to the

[83] *Idem*, pp. 196–7, 577.
[84] Documents, pp. 130, 210; Records of First Assembly, Committees, I, pp. 361, 532.
[85] Minutes of the 1929 Committee of Jurists, pp. 55–6, 72, 123.
[86] A similar provision had been included in the Assembly's resolution of December 18, 1920. Records of First Assembly, Plenary, p. 766.
[87] Minutes of the 1920 Committee of Jurists, p. 326.
[88] *Idem*, pp. 377, 495.
[89] *Idem*, pp. 577–8.

contributions which they will pay. In the sub-committee of the Third Committee of the First Assembly, an Italian proposal was made that since the expenses of the Court should be borne as were other expenses of the League itself the article should be deleted; this proposal was withdrawn on its being pointed out that the article was indispensable for the purpose of having the Members of the League not parties to the Protocol of Signature support a part of the cost.[90] During the discussion of Articles 34 and 35 it was stated that the distinction between States to which the Court is open by right and those which merely have access to it, lay chiefly in the distribution of the expenses.[91]

The text of this Article was sharply criticized before the 1929 Committee of Jurists by Mr. Scialoja and Mr. Urrutia, but no amendment was proposed by the Committee; M. Osuský declared that to touch the Article "would be to upset the entire financial system of the League."[92]

§182. Article 34. *Only States or Members of the League of Nations can be parties in cases before the Court.*

This text grew out of a proposal by the 1920 Committee of Jurists (Article 31) that "the Court shall have jurisdiction to hear and determine suits between States." In the Committee of Jurists, the Prize Court Convention of 1907 was referred to as conferring a wider competence.[93] Access to the court of arbitral justice proposed in 1907 would have been limited, under Article 21 of the Hague *projet*, to the contracting States. M. Loder was opposed to the exclusion of individuals as parties, and his views received some support from M. de Lapradelle,[94] Lord Phillimore thought that "a State would never permit itself to be sued before a court by a private individual";[95] Mr. Root thought that the Court should be able to deal with private interests only when a Government "made them international by adopting them as its own";[96] Baron Descamps wished the Court to be able to deal with "cases between States acting on their own behalf, and cases between States having taken up the cause of their

[90] Documents, pp. 29, 131; Records of First Assembly, Committees, I, pp. 362, 498.
[91] Documents, p. 140; Records of First Assembly, Committees, I, p. 378.
[92] Minutes of the 1929 Committee of Jurists, p. 73. At the same time, M. Osuský envisaged "individual contracts" with States not Members of the League of Nations but parties to the Protocol of Signature.
[93] Minutes of the 1920 Committee of Jurists, p. 205.
[94] *Idem*, pp. 205–206, 209–11. In 1919, the German Government's proposals for a League of Nations envisaged a Tribunal which should be competent to deal with complaints of a private person against a State when the State's tribunals had declared themselves incompetent, and with disputes between nationals of different States based upon treaties. Preliminary Documents, p. 127. *Cf.*, the proposals made by the Interparliamentary Union in 1914. *Idem*, p. 335.
[95] Minutes of the 1920 Committee of Jurists, pp. 206–7.
[96] *Idem*, p. 207.

subjects";[97] M. Ricci-Busatti stated that "private individuals are not subjects of international law and it is entirely within the realm of that law that the Court is called upon to act."[98] The protection of minorities was referred to in the discussion,[99] and a proposal dealing with claims submitted by States on behalf of individuals and national minorities [1] was considered but rejected.[2] A question was raised as to a special *locus standi* for the League of Nations,[3] but it was not discussed. The decision on the exclusion of individuals [4] was said in the Committee's report to have been taken "without prejudice to any subsequent development" of the Court.[5]

The text proposed by the 1920 Committee of Jurists was redrafted by the sub-committee of the Third Committee of the First Assembly, to assimilate all Members of the League of Nations to States for the purposes of this article. It was recognized that States might "present themselves as joint parties before the Court";[6] yet it was agreed in the sub-committee that the Council of the League of Nations could not be a party before the Court.[7]

When a proposal was made to the 1929 Committee of Jurists that Article 34 be amended to provide that the League of Nations might be a party before the Court, President Anzilotti expressed the view that the text of Article 34 did not "prejudge the question whether an association of States could, in certain circumstances, appear before the Court," and that "if the League possessed a collective personality in international law, Article 34 would not exclude it from appearing before the Court." [8]

[97] *Idem*, pp. 209, 216.
[98] *Idem*, p. 208.
[99] *Idem*, pp. 204, 216–7.
[1] *Idem*, p. 566.
[2] *Idem*, p. 580. During the drafting of the Polish Minorities Treaty at the Paris Peace Conference, Lord Robert Cecil made a proposal to the Committee on New States that "as soon as the Permanent Court of International Justice shall have been established and shall have settled the necessary procedure, any Polish citizen or group of citizens" aggrieved by a violation of the stipulations for protection of minorities "may appeal to that Court, and the Court may give such decision and make such order as it shall think right." The Committee on New States submitted alternative texts to the Supreme Council, which on June 17, 1919, "decided that States only, and not individuals, should have the right of appeal to the Permanent Court of International Justice." Minutes of the Committee on New States, pp. 45, 77; 13 Miller, Diary at the Peace Conference, pp. 103, 170.
[3] Minutes of the 1920 Committee of Jurists, p. 579.
[4] *Idem*, pp. 539, 580.
[5] *Idem*, p. 723.
[6] Documents, p. 210; Records of First Assembly, Committees, I, p. 532.
[7] Documents, p. 140; Records of First Assembly, Committees, I, p. 378. In its session at Brussels, the Council had reached this conclusion also. Minutes of the Council, 10th session, pp. 170–171. The International Labor Office had proposed that the Court should have jurisdiction over disputes between the League of Nations and its officials. Documents, p. 78; Records of First Assembly, Committees, I, p. 562.
[8] Minutes of the 1929 Committee of Jurists, pp. 59, 60.

§183. Article 35, paragraphs 1 and 2. *The Court shall be open to the Members of the League and also to States mentioned in the Annex to the Covenant.*

The conditions under which the Court shall be open to other States shall, subject to the special provisions contained in treaties in force, be laid down by the Council, but in no case shall such provisions place the parties in a position of inequality before the Court.

The text proposed for this Article by the 1920 Committee of Jurists was influenced by the Committee's attitude toward obligatory jurisdiction. It was thought that no obligation could be imposed on States not members of the League of Nations, or even on Members of the League in respect of suits by non-members;[9] yet Article 17 of the Covenant seemed to afford a basis for a wider competence for the Court, and a reference to Article 17 of the Covenant was stoutly insisted upon.[10] Article 21 of the Hague *projet* of 1907 had limited access to the proposed court of arbitral justice to the "contracting States," but when this was referred to, Lord Phillimore drew attention to the changes wrought since 1907.[11] It was not difficult for the Committee to agree that the Court should be open to States named in the Annex to the Covenant; and in wishing to leave it for the Council to determine the conditions under which the Court should be open to States not members of the League of Nations, the Committee seems to have had in mind chiefly a condition as to payment of a share of the Court's expenses.[12] The text proposed by the 1920 Committee of Jurists (as Article 32 of its draft) was as follows:

> The Court shall be open of right to the States mentioned in the Annex to the Covenant, and to such others as shall subsequently enter the League of Nations. Other States may have access to it. The conditions under which the Court shall be open of right or accessible to States which are not Members of the League of Nations shall be determined by the Council, in accordance with Article 17 of the Covenant.

This draft was considerably revised by the sub-committee of the Third Committee of the First Assembly. For meeting the situation of

[9] Minutes of the 1920 Committee of Jurists, pp. 265, 267–8, 270, 648, 724.

[10] *Idem*, pp. 223, 268, 289, 327, 580–582.

[11] *Idem*, p. 224. *Cf.*, Article 47 of the 1907 Hague Convention on Pacific Settlement.

[12] Minutes of the 1920 Committee of Jurists, pp. 220, 291–2, 580–581. There was some disposition in the 1920 Committee of Jurists to say that States not members of the League of Nations should not be permitted to nominate judges *ad hoc* but should take the Court as they might find it. *Idem*, p. 222.

British Dominions, the Canadian delegation proposed a definite statement that the Court should be open to the Members of the League of Nations, and this was accepted by the sub-committee; [13] the Third Committee later explained in its report to the Assembly that the phrase "Members of the League" included future as well as present Members. The sub-committee was particularly solicitous that the conditions to be set by the Council for States not Members of the League and not mentioned in the Annex to the Covenant should not "place the parties in a position of inequality"; it wished also to take account of provisions in various treaties of peace under which certain States not members of the League might come before the Court.[14] The report of the Third Committee recognized that the conditions of access to be fixed by the Council should be "in conformity with Article 17 of the Covenant," [15] though it seems difficult to say just what this means.

§184. Article 35, paragraph 3.* *When a State which is not a Member of the League of Nations is a party to a dispute, the Court will fix the amount which that party is to contribute towards the expenses of the Court. This provision shall not apply if such State is bearing a share of the expenses of the Court.*

The first sentence of this paragraph emanated from the sub-committee of the Third Committee of the First Assembly. The second sentence was added by the 1929 Conference of Signatories, as a result of a proposal made by the Brazilian representative; [16] it was intended to avoid the requirement of a double payment for the Court's expenses to be made by States which might be parties to the Protocol of Signature but not members of the League of Nations.

§185. Article 36. *The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in Treaties and Conventions in force.*

The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or ratifying the protocol to which the present Statute is adjoined, or at a later moment, declare that they recognize as compulsory ipso facto *and without special agree-*

[13] Documents, p. 145; Records of First Assembly, Committees, I, p. 385.
[14] Documents, pp. 141, 144–5; Records of First Assembly, Committees, I, pp. 378–9, 384–5.
[15] Documents, p. 210; Records of First Assembly, Plenary, p. 462. Paragraph 1 of Article 17 of the Covenant provides for invitations to States not members of the League, "upon such conditions as the Council may deem just."
[16] Minutes of the 1929 Conference of Signatories, pp. 42, 49–51. See also Minutes of the 1929 Committee of Jurists, pp. 62, 73–74, 124.

ment, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning:

(a) *the interpretation of a treaty;*

(b) *any question of international law;*

(c) *the existence of any fact which, if established, would constitute a breach of an international obligation;*

(d) *the nature or extent of the reparation to be made for the breach of an international obligation.*

The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain Members or States, or for a certain time.

In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

This Article was the result of the greatest contest waged in the creation of the Court. In the 1920 Committee of Jurists, the desire prevailed to confer on the Court a broad compulsory jurisdiction as had been suggested in various preliminary plans,[17] though the experience of the Hague Peace Conferences in 1899 and 1907 had not been such as to justify large hopes of success in this direction.[18] The actual wording of Article 14 of the Covenant seemed to some members of the Committee to exclude a possibility of compulsory jurisdiction,[19] though Articles 12 and 13 of the Covenant supplied a counterbalancing argument. At one time, the Committee considered a possible recommendation that Article 14 of the Covenant should be modified.[20] It was taken for granted that only Members of the League of Nations could be asked to confer compulsory jurisdiction on the Court. Viewing the provisions of the Covenant as expressing only "a general intention," Mr. Root thought that the committee was free to make any recommendations which it deemed useful; recalling the failure of the attempt to create an international prize court, he thought that the limits of compulsory jurisdiction should be clearly laid down, since "States would not accept a court which had the right to settle disputes in accordance with rules established" by itself.[21] Lord Phillimore proposed that "in the absence of any special

[17] Minutes of the 1920 Committee of Jurists, p. 81.

[18] This experience was frequently referred to in the Committee of Jurists, and not too accurately.

[19] See especially *idem*, pp. 228, 231, 233ff., 541–3. M. de Lapradelle proposed that the English text of the Covenant be taken as the basis of the Committee's work. *Idem*, p. 287.

[20] Minutes of the 1920 Committee of Jurists, pp. 231–2, 241–2.

[21] *Idem*, pp. 240, 286, 309, 619.

convention to the contrary," the Court should "be deemed to be the Court of Arbitration mentioned in Article 13 of the Covenant." [22] Several members of the Committee desired to confine the compulsory jurisdiction to defined categories of disputes, as had been suggested in the "Five Power Plan," and Baron Descamps proposed a transaction limiting it to "cases of a legal nature" which he proceeded to define.[23] For the definition of "cases of a legal nature," the enumerations in paragraph 2 of Article 13 of the Covenant were later adopted.[24] The draft finally adopted by the Committee contained three articles relating to obligatory jurisdiction, which was limited, however, to disputes which could not be settled by diplomatic means, following in this respect Articles 20 (1899) and 41 (1907) of the Hague Conventions on Pacific Settlement.[25] The report of the Committee stated its desire to "take an important step in the direction" indicated by the 1907 Hague Conference; great reliance was placed on Article 13 of the Covenant, somewhat in neglect of its limited text. Reservations made by M. Adatci and M. Ricci-Busatti were mentioned in the report.[26]

This proposal by the 1920 Committee of Jurists was the outstanding feature of the draft-scheme to occupy the attention of the Council and the Assembly of the League of Nations. When the Council met at San Sebastin in 1920, M. Tittoni (Italy) at once stated that "it was unprecedented for one State to bring another State before a tribunal without its assent and to condemn it by default; and such a procedure would in practice only be tolerated by the smaller countries." [27] When the Council later met at Brussels, it had before it the report of the Italian Council for Diplomatic Litigation which suggested that provisions for obligatory jurisdiction should be left to a "separate convention," [28] and a note by Mr. Balfour (Great Britain) observing that the draft-scheme went "considerably beyond the Covenant." [29] The Council proceeded to approve a series of amendments eliminating obligatory jurisdiction; [30] and a suggestion was made that this feature of the draft should be referred to

[22] *Idem*, p. 252. [23] *Idem*, pp. 243, 254–6, 272.

[24] In addition to the four classes of disputes enumerated in Article 13 of the Covenant, the draft of the Committee of Jurists contained a fifth class: "(e) The interpretation of a sentence passed by the Court." This was taken from the Five-Power Plan.

[25] *Idem*, pp. 583, 615–19.

[26] *Idem*, pp. 725–9.

[27] Documents, p. 20; Minutes of the Council, 8th session, p. 33.

[28] Documents, p. 29; Records of First Assembly, Committees, I, p. 498. See also Minutes of the 1920 Committee of Jurists, pp. 246, 582, 727.

[29] Documents, p. 38; Records of First Assembly, Committees, I, p. 511.

[30] Documents, p. 44; Minutes of the Council, 10th session, p. 161.

"authorities on international law" for further study.[31] M. Bourgeois, as *rapporteur*, stated that "in reality a modification in Article 12 and 13 of the Covenant is here involved," and since it would give to the Court jurisdiction which had been conferred on the Council, he thought the Council should take no initiative to such an end.[32] He added that the Council was not opposed to compulsory jurisdiction, however, and that the matter might be considered at a future date.

In the First Assembly, the debate was very heated. The Argentine delegation urged obligatory jurisdiction to avoid making the Court "merely an arbitration tribunal," and this received the support of the Brazilian, Panamanian, and Portuguese representatives, some of whom insisted squarely that if certain articles of the Covenant conflicted with the idea of obligatory jurisdiction they would have to be amended. Lord Robert Cecil (South Africa) thought that jurisdiction could not be given to the Court relating to matters involving "vital interests," and he preferred to leave the Court to "develop organically." [33] M. Hagerup (Norway) favored the solution of the Committee of Jurists,[34] but fell back on the Italian suggestion of a special treaty to provide for it. Even M. Loder (Netherlands) abandoned his stand in face of the danger of an irreconcilable disagreement.[35] M. La Fontaine (Belgium) attributed the opposition to "the two fetiches of unanimity and sovereignty," and he urged that the jurisdiction of the United States Supreme Court be taken as a model.[36] Sir Cecil Hurst (Great Britain) saw the "true solution" in mutual bipartite treaties;[37] in the sub-committee of the Assembly's Third Committee this idea was supported by M. Politis (Greece), who foresaw "a network of separate conventions extending the jurisdiction of the Court." [38]

The sub-committee adopted the amendments approved by the Council because it did "not seem possible to arrive at unanimity except on the basis of the principles laid down in the Council's draft";[39] but the struggle was renewed in the Third Committee. M. Fernandes (Brazil) proposed that alternative texts be adopted, to either of which a Member of the

[31] Documents, p. 43; Minutes of the Council, 10th session, p. 45.
[32] Documents, p. 47; Minutes of the Council, 10th session, pp. 167ff.
[33] Documents, pp. 89–90, 91; Records of First Assembly, Committees, I, pp. 285–6, 287.
[34] Documents, p. 92; Records of First Assembly, Committees, I, p. 289.
[35] Documents, p. 91; Records of First Assembly, Committees, I, p. 288.
[36] Documents, p. 94; Records of First Assembly, Committees, I, p. 292.
[37] Documents, p. 95; Records of First Assembly, Committees, I, p. 294.
[38] Documents, p. 142; Records of First Assembly, Committees, I, p. 380.
[39] Documents, p. 211; Records of First Assembly, Committees, I, p. 533.

League of Nations might adhere. [40] This idea was adopted by the subcommittee, on special reference, in the form of an optional provision for obligatory jurisdiction.[41] M. Huber (Switzerland) welcomed this by saying that "to make possible a universal agreement on compulsory jurisdiction" would constitute "almost as great a step in advance as the establishment" of the Court.[42] The provision for an optional declaration accepting obligatory jurisdiction was thus adopted by the Third Committee,[43] though the "optional clause" was not drafted until later.[44] In the plenary meeting of the First Assembly on December 13, 1920, the effort to retain obligatory jurisdiction was renewed, particularly by M. Loder (Netherlands), M. La Fontaine (Belgium), and M. Blanco (Uruguay), but the draft was adopted unanimously without any amendment dealing with the Court's jurisdiction.

The enumerations in Article 36 follow almost textually those in paragraph 2 of Article 13 of the Covenant, which had been expanded from Articles 16 (1899) and 38 (1907) of the Hague Conventions on Pacific Settlement, and from a *vœu* of the Hague Peace Conference of 1907.[45] The last paragraph of Article 36 was proposed by the 1920 Committee of Jurists in a different form, as a part of its suggestion of obligatory jurisdiction; it was then to apply only to "a dispute as to whether a certain case comes within any of the categories above mentioned." As it was retained by the Third Committee of the Assembly, there is nothing to indicate that disputes as to whether the Court has jurisdiction must arise out of other provisions in Article 36.

§186. Article 37. *When a treaty or convention in force provides for the reference of a matter to a tribunal to be instituted by the League of Nations, the Court will be such tribunal.*

This text originated in a suggestion by the Council [46] which was

[40] Documents, p. 168; Records of First Assembly, Committees, I, p. 553. A somewhat similar proposal had been considered at the Second Peace Conference at The Hague in 1907, where the Swiss delegation proposed an enumeration of matters in treaties concerning which declarations of acceptance of obligatory jurisdiction might be made. 2 *Actes et Documents*, pp. 463–4, 888. Article 16*e* of a later Anglo-American draft proposed that a separate protocol be annexed to the Convention on Pacific Settlement for signature by States desiring to accept compulsory arbitration, and twenty-two possible subjects of such arbitration were listed. *Idem*, pp. 100–1, 1022–7. See §118, *supra*.

[41] Documents, p. 170; Records of First Assembly, Committees, I, p. 566.

[42] Documents, p. 107; Records of First Assembly, Committees, I, p. 313.

[43] Documents, pp. 108, 110; Records of First Assembly, Committees, I, pp. 313, 317.

[44] The optional clause attached to the Protocol of Signature first appears in the draft approved by the Council on December 14, 1920. Minutes of the Council, 11th session, p. 137.

[45] The enumerations were included in Article 13 of the Covenant from the "Phillimore Plan" of March 20, 1918. See Miller, Drafting of the Covenant, II, p. 4. See §453, *infra*.

[46] Documents, p. 44; Minutes of the Council, 10th session, p. 161.

re-drafted by the sub-committee of the Third Committee of the First Assembly;[47] having proposed a general obligatory jurisdiction, the 1920 Committee of Jurists had not found it necessary to deal with this point.[48] When the Council rejected obligatory jurisdiction, the point became important because of certain articles in the 1919–1920 Treaties of Peace, particularly Articles 336 and 376 of the Treaty of Versailles and corresponding articles of other Peace Treaties.[49]

§187. Article 38.* *The Court shall apply:*

1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

2. International custom, as evidence of a general practice accepted as law;

3. The general principles of law recognized by civilized nations;

4. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

This provision shall not prejudice the power of the Court to decide a case ex æquo et bono, *if the parties agree thereto.*

The enumerations in the first paragraph were drafted by the 1920 Committee of Jurists (Article 35), which, however, proposed to make the order enumerated an order of successive application. Baron Descamps' original proposal of such enumeration met with some opposition;[50] his reference to the "legal conscience of civilized nations," based on the preamble of the Hague Conventions concerning the laws and customs of war on land, recalls the conception on which the Central American Court of Justice was established.[51] M. de Lapradelle preferred to say that the Court should "judge in accordance with law, justice and equity," to which M. Hagerup replied that "equity was a very vague conception . . . not always in harmony with justice."[52] The question was discussed whether the Court could ever refuse to decide because there was no law on the question before it, because of a *non liquet*.[53] Frequent reference was made to Article 7 of the Prize Court Convention of 1907; mentioning

[47] Documents, p. 143; Records of First Assembly, Committees, I, p. 382.

[48] See the Minutes of the 1920 Committee of Jurists, p. 724.

[49] On the effect of Article 37, see §427, *infra*. A proposal that the Court should replace the Permanent Court of Arbitration in treaties providing for reference to the latter received little consideration. Minutes of the 1920 Committee of Jurists, pp. 238, 290; Records of First Assembly, Committees, I, p. 534.

[50] Minutes of the 1920 Committee of Jurists, pp. 294ff., 306, 322–5. The proposal by Baron Descamps follows quite closely the suggestion made by Count Kamarowsky in 1881. See Kamarowsky, *Le Tribunal International* (trad. par Westman, 1887), p. 513.

[51] See §44, *supra*.

[52] Minutes of the 1920 Committee of Jurists, pp. 295, 296.

[53] *Idem*, pp. 296, 307ff., 314, 317, 332, 338. See §550, *infra*.

the fate of the Prize Court Convention, Mr. Root thought that "the world was prepared to accept the compulsory jurisdiction of a Court which applied the universally recognized rules of international law," but it was not "disposed to accept the compulsory jurisdiction of a Court which would apply principles, differently understood in different countries";[54] he later submitted a redraft of Baron Descamps' ideas which met with general approval.[55] Lord Phillimore explained the expression "general principles of law" to mean "maxims of law."[56] The proposed requirement of a "successive order" gave some difficulty.[57]

The Council of the League of Nations approved the addition in sub-paragraph (4) of the introductory phrase, "subject to the provisions of Article 59."[58] In the sub-committee of the Third Committee of the First Assembly, the Argentine delegation wished to add a reference to "the rules drawn up by the Assembly of the League of Nations in the performance of its duty of codifying international law";[59] but this was rejected. The concluding paragraph of Article 38, which had been mentioned but not proposed by the Committee of Jurists,[60] was adopted by the sub-committee after little discussion;[61] it was explained as giving "a more flexible character" to the provision.[62] The sub-committee also dropped an introductory phrase as to successive order, which had been opposed by the Italian Council for Diplomatic Litigation.[63] The report of the sub-committee lists it as one of the Court's important tasks "to contribute, through its jurisprudence, to the development of international law";[64] some years later, however, Mr. Scialoja (Italy) declared that those who created the Court did not intend "that it should act as a factory of international law or that its judgments should build up a system of international law."[65]

The 1929 amendments effected no change in the English version of Article 38; in the French version of sub-paragraph 4, the words *des différentes nations* were added to "bring it into literal conformity with the English text."[66]

[54] *Idem*, pp. 308ff.
[55] *Idem*, pp. 344, 584.
[56] *Idem*, p. 335.
[57] *Idem*, pp. 332–3, 337–8.
[58] Documents, p. 44; Minutes of the Council, 10th session, p. 161.
[59] Documents, pp. 68, 145; Records of First Assembly, Committees, I, pp. 386, 519.
[60] Minutes of the 1920 Committee of Jurists, pp. 296, 332–3, 549.
[61] Documents, pp. 145, 157; Records of First Assembly, Committees, I, pp. 385–6, 403.
[62] Documents, p. 211; Records of First Assembly, Committees, I, p. 534.
[63] Documents, p. 29; Records of First Assembly, Committees, I, p. 499.
[64] Documents, p. 211; Records of First Assembly, Committees, I, p. 534.
[65] Minutes of the 1929 Committee of Jurists, p. 33.
[66] *Idem*, p. 62.

§188. Article 39, paragraphs 1 and 2. *The official languages of the Court shall be French and English. If the parties agree that the case shall be conducted in French, the judgment will be delivered in French. If the parties agree that the case shall be conducted in English, the judgment will be delivered in English.*

In the absence of an agreement as to which language shall be employed, each party may, in the pleadings, use the language which it prefers; the decision of the Court will be given in French and English. In this case the Court will at the same time determine which of the two texts shall be considered as authoritative.

Following a number of the preliminary drafts including the "Five-Power Plan," [67] the 1920 Committee of Jurists proposed (in Article 37) that the Court's official language should be French. When its draft-scheme came before the Council at Brussels, Mr. Balfour (Great Britain) observed that "the Treaty of Versailles puts the two languages on an equality," and that "the League of Nations itself carries on its business in French and English"; and he thought it would be "unfortunate to make an exception in respect of the Permanent Court." [68] Viscount Ishii (Japan) supported this view.[69] On October 27, 1920, M. Caclamanos (Greece) presented a report to the Council,[70] suggesting a re-draft of the Article in substantially its final form; when this re-draft was adopted by the Council, M. Bourgeois (France) abstained from voting. No substantial change was made in the text as drafted by the Council.

§189. Article 39, paragraph 3.* *The Court may, at the request of any party, authorize a language other than French or English to be used.*

The 1920 Committee of Jurists had proposed that the Court might "at the request of the contesting parties" authorize the use of a language other than French. In the Third Committee of the First Assembly, as in its sub-committee also, the Spanish delegation sought to provide that the Court's authorization of the use of a language other than French or English could not be refused if requested by all the parties to a dispute; but this proposal was rejected.[71]

[67] Minutes of the 1920 Committee of Jurists, p. 99. The Hague Conventions on Pacific Settlement of 1899 and 1907 and the *projet* of 1907 left the matter of languages to the tribunal.

[68] Documents, p. 39; Records of First Assembly, Committees, I, p. 512. Mr Balfour also insisted that the United States of America should have an opportunity to express an opinion on this question.

[69] Documents, p. 42; Minutes of the Council, 10th session, pp. 20–1.

[70] Documents, p. 51; Minutes of the Council, 10th session, pp. 44, 176.

[71] Documents, pp. 73, 102, 134, 212; Records of First Assembly, Committees, I, pp. 306, 367, 535, 598.

The 1929 Committee of Jurists proposed the substitution of the words "at the request of any party" for the phrase in the original Statute, "at the request of the parties," to make it clear that the Court's authorization of the use of a language other than French or English could be given though requested by only one party; it was explained to the Committee that the Court had thus interpreted even the original Statute.[72]

§190. Article 40, paragraphs 1 and 2. *Cases are brought before the Court, as the case may be, either by the notification of the special agreement, or by a written application addressed to the Registrar. In either case the subject of the dispute and the contesting parties must be indicated.*

The Registrar shall forthwith communicate the application to all concerned.

To this, as to most of the articles relating to procedure, the 1920 Committee of Jurists seems to have given little consideration. Article 38 of its draft-scheme provided, in place of paragraph 1:

> A State desiring to have recourse to the Court shall lodge a written application addressed to the Registrar. The application shall indicate the subject of the dispute, and name the contesting parties.

This was based on Article 30 of the "Five-Power Plan." The text was re-drafted and given its final form by the sub-committee of the Third Committee of the First Assembly,[73] in order to distinguish between cases submitted by the unilateral action of a State and cases submitted by the agreement of two or more States. The 1920 Committee of Jurists explained "all concerned" in the second paragraph to mean "the contesting parties and also any others who might conceivably feel called upon to intervene in the case." [74]

§191. Article 40, paragraph 3.* *He [the Registrar] shall also notify the Members of the League of Nations through the Secretary-General, and also any States entitled to appear before the Court.*

The purpose of this paragraph as it was included in the original Statute seems to have been "to take the place of a provision regulating publicity"; but it is also related to intervention.[75] It has been interpreted to apply to both applications and special agreements.[76]

[72] Minutes of the 1929 Committee of Jurists, pp. 62, 124. See Series C, No. 3–I, p. 18.
[73] Documents, p. 134; Records of First Assembly, Committees, I, p. 368.
[74] Minutes of the 1920 Committee of Jurists, p. 734.
[75] *Idem*, pp. 587, 734.
[76] Series D, No. 2 (3d add.), p. 580.

The concluding phrase, "and also any States entitled to appear before the Court," was added by the 1929 amendments; the report of the 1929 Committee of Jurists explained that it was designed "to bring the text of the Statute into line with Article 73 of the present [1926] Rules of Court," the substance of which was to be embodied in the text of a new Article 66 of the Statute.[77] The category of "States entitled to appear before the Court" is one of uncertain limitations.[78]

§192. Article 41. *The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to reserve the respective rights of either party.*

Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and the Council.

The 1920 Committee of Jurists drafted the second paragraph of this Article in its final form; for the first paragraph, it suggested (as Article 39):

> If the dispute arises out of an act which has already taken place or which is imminent, the Court shall have the power to suggest, if it considers that circumstances require it, the provisional measures that should be taken to preserve the respective rights of either party.

The report of the Committee stated that the idea of interim protection was taken from various treaties between the United States and other States, some of the so-called "Bryan Treaties";[79] a somewhat similar provision had been included in Article 18 of the 1907 Convention creating the Central American Court of Justice. M. Fernandes' suggestion that the provisional measures should be supported by effective penalties was rejected by the Committee of Jurists, which took the view that "there is no question here of a definite order, even of a temporary nature, which must be carried out at once."[80] The sub-committee of the Third Committee of the First Assembly substituted "indicate" for "suggest" in the text proposed by the 1920 Committee of Jurists;[81] the introductory phrase was dropped by the Third Committee, so that "all possible cases would be covered,"[82] and the remainder of the paragraph was slightly re-drafted. In its report the Third Committee stated that the article as amended covered "omissions which infringe a right as well as positive

[77] Minutes of the 1929 Committee of Jurists, p. 124.
[78] See §417, *infra*.
[79] Minutes of the 1920 Committee of Jurists, p. 735.
[80] *Idem*, pp. 588, 608, 735.
[81] Documents, p. 134; Records of First Assembly Committees, I, p. 368. The term *indicate*, which had been employed in Article 32 (418) of the Constitution of the International Labor Organization, was considered to be stronger than *suggest*.
[82] Documents, p. 103; Records of First Assembly, Committees, I, p. 307.

acts." [83] The word "reserve" in the English version seems to have crept in as a printer's error for "preserve." [84]

In 1929 a proposal was made to add to Article 41 a provision enabling the President to act for the Court, similar to that in Article 57 of the 1926 Rules; but it was thought that the situation was adequately covered by Article 30 of the Statute.[85]

§193. **Article 42.** *The parties shall be represented by agents.*

They may have the assistance of counsel or advocates before the Court.

This text was drafted by the 1920 Committee of Jurists (as Article 40) in substantially its final form. The Hague Conventions on Pacific Settlement, Articles 37 (1899) and 62 (1907), provided for agents and counsel or advocates, as did also the Netherlands' draft of 1919 and the "Five-Power Plan"; [86] and the provision seems to have been borrowed by the 1929 Committee of Jurists with little discussion.[87] The sub-committee of the Third Committee of the First Assembly declined to accept an amendment proposed by the Argentine delegation that the second paragraph should read, "they may have counsel or advocates to represent them or to plead before the Court"; [88] it also rejected an amendment proposed by the Director of the International Labor Office.[89] In its report the sub-committee said that only agents could represent the parties, but that agents might also be advocates.[90]

§194. **Article 43.** *The procedure shall consist of two parts: written and oral.*

The written proceedings shall consist of the communication to the judges and to the parties of Cases, Counter-Cases and, if necessary, Replies; also all papers and documents in support.

These communications shall be made through the Registrar, in the order and within the time fixed by the Court.

A certified copy of every document produced by one party shall be communicated to the other party.

The oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel and advocates.

[83] Documents, p. 172; Records of First Assembly, Plenary, p. 467. See the German request of October 14, 1927, in the *Chorzów Factory Case*, Series A, No. 12, pp. 6–7.

[84] Though the word "preserve" was included in previous drafts, it was rendered as "reserve" in the text approved by the First Assembly on December 13, 1920. Records of First Assembly, Plenary, p. 475.

[85] Minutes of the 1929 Committee of Jurists, pp. 63–4.

[86] *Cf.*, Articles 25 and 26 of the Prize Court Convention of 1907.

[87] Minutes of the 1920 Committee of Jurists, pp. 340, 588, 650.

[88] Documents, pp. 68, 135; Records of First Assembly, Committees, I, pp. 370, 520.

[89] Documents, p. 80; Records of First Assembly, Committees, I, p. 564.

[90] *Idem*, p. 535. *Cf.*, Minutes of the 1929 Committee of Jurists, p. 65.

This text was in substance drafted by the 1920 Committee of Jurists in three separate articles (Articles 41–43), based on provisions in the "Five-Power Plan," [91] and on Articles 39, 40, 45 (1899) and Articles 63, 64, 70 (1907) of the Hague Conventions on Pacific Settlement. The Committee of Jurists stated in its report that "whereas in the case of the Permanent Court of Arbitration of The Hague the former [written procedure] only need be used, as it alone is essential, both phases, written and oral, are equally necessary in the case of the Permanent Court of International Justice." [92] Its proposals were re-arranged by the sub-committee of the Third Committee of the First Assembly, at the suggestion of the Italian delegation.[93]

§195. Article 44. *For the service of all notices upon persons other than the agents, counsel and advocates, the Court shall apply direct to the government of the State upon whose territory the notice has to be served.*

The same provision shall apply whenever steps are to be taken to procure evidence on the spot.

No change was made in this text as proposed by the 1920 Committee of Jurists (in Article 43). The bases of its proposal seem to have been Articles 25 and 76 of the 1907 Hague Convention on Pacific Settlement,[94] which had been re-phrased in various preliminary drafts, particularly in Article 49 of the "Five-Power Plan." [95] It is to be noted that action by a State may have to be authorized by its local law, as was recognized in Article 76 of the 1907 Hague Convention on Pacific Settlement; [96] and on some occasions the article may be of little use in the absence of such authorization.

§196. Article 45.* *The hearing shall be under the control of the President or, if he is unable to preside, of the Vice-President; if neither is able to preside, the senior judge shall preside.*

The original text of this Article emanated from the Committee of Jurists (Article 44), whose draft dealt with "the proceedings" instead of "the hearing," and with the "direction" instead of the "control" of the President; it followed Article 34 of the "Five-Power Plan," which was based on the provisions in Article 38 of the 1907 Prize Court Convention and in Article 26 of the 1907 *projet*. The changes were made by the sub-

[91] Minutes of the 1920 Committee of Jurists, pp. 340–1, 736–7.
[92] *Idem*, p. 737.
[93] Documents, pp. 30, 135, 212; Records of First Assembly, Committees, I, pp. 370, 499, 535.
[94] Minutes of the 1920 Committee of Jurists, p. 589.
[95] See also Article 25 of the Hague *projet* of 1907.
[96] *Cf.*, 46 U. S. Statutes 1005; 48 *idem*, 117.

committee of the Third Committee of the First Assembly, without explanation.

The 1929 amendments, which left the French version unchanged, substituted "if he is unable to preside" for "in his absence," and "if neither is able to preside" for "if both are absent." It was pointed out to the 1929 Committee of Jurists that under the Court's Rules the President could not preside if he were a national of a party in the case before the Court.[97]

§197. Article 46. *The hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted.*

The 1920 Committee of Jurists proposed on this subject (in Article 45): "the hearing in Court shall be public, unless the Court, at the written request of one of the parties, accompanied by a statement of his reasons, shall otherwise decide." The "Five-Power Plan" (Article 34) had proposed simply that the debates should take place in public session. This represented a decided departure from the provision in Articles 41 (1899), 66 (1907) of the Hague Conventions on Pacific Settlement, that the discussions "are public only if it be so decided by the tribunal, with the assent of the parties." [98] In its report, the 1920 Committee of Jurists stated that it wished to reverse "the diplomatic custom of secrecy inherent in the jurisdiction of the Court of Arbitration," and it emphasized the "exceptional" character of a decision to sit in secret which the Court might or might not take at the request of both parties.[99] In the sub-committee of the Third Committee of the First Assembly, M. Fromageot (France) proposed "to return to the principle of 1907 which made non-publicity the rule and publicity the exception"; "States must not be assimilated to individuals," he said, and hence "it must not be necessary to conduct suits between States in such a way as to embitter their mutual relations." M. Hagerup (Norway) feared that publicity "would open the way for influences which would interfere with the course of justice," and he declared that "the question had not been sufficiently examined at The Hague." M. Ricci-Busatti (Italy) thought that "publicity would prevail in practice, if not openly, then by indirect means." The final text of the article was adopted by the sub-committee by a close vote.[1] In practice, hearings before the Court are invariably public.[2]

[97] Minutes of the 1929 Committee of Jurists, p. 65.
[98] But see Article 39 of the 1907 Prize Court Convention. *Cf.*, §28, *supra.*
[99] Minutes of the 1920 Committee of Jurists, p. 738.
[1] Documents, pp. 135, 137; Records of First Assembly, Committees, I, pp. 370, 372–3.
[2] The records are published in Series C of the Court's publications.

§198. Articles 47 and 48. (47) *Minutes shall be made at each hearing, and signed by the Registrar and the President.*

These minutes shall be the only authentic record.

(48) *The Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence.*

These texts were proposed by the 1920 Committee of Jurists (in Articles 46 and 47); they were not the subject of extended discussion, either in the Committee of Jurists [3] or in the First Assembly. Articles 35 and 41 of the "Five-Power Plan," following Articles 41 and 49 (1899) and 66 and 74 (1907) of the Hague Conventions on Pacific Settlement, clearly served as their bases.

§199. Articles 49 and 50. (49) *The Court may, even before the hearing begins, call upon the agents to produce any document, or to supply any explanations. Formal note shall be taken of any refusal.*

(50) *The Court may, at any time, entrust any individual, body, bureau, commission or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.*

The draft-scheme of the 1920 Committee of Jurists contained the substance of these texts (in Articles 48 and 49). They were never a subject of extended discussion. Article 49 is clearly based on Articles 44 (1899) and 69 (1907) of the Hague Conventions on Pacific Settlement, only the phrase "even before the hearing begins" having been added. A proposal by M. Adatci to add in Article 50 a provision permitting consultation of "technical bodies constituted by the Council of the League of Nations" was considered and rejected.[4]

§200. Article 51. *During the hearing, any relevant questions are to be put to the witnesses and experts under the conditions laid down by the Court in the rules of procedure referred to in Article 30.*

The draft-scheme of the 1920 Committee of Jurists had proposed the following text (in Article 50):

> During the hearing in Court, the judges may put any questions considered by them to be necessary, to the witnesses, agents, experts, advocates, or counsel. The agents, advocates and counsel shall have the right to ask, through the President, any questions that the Court considers useful.

The first sentence of the Committee's draft was based on Articles 47 (1899) and 72 (1907) of the Hague Conventions on Pacific Settlement,

[3] Minutes of the 1920 Committee of Jurists, pp. 589, 590, 650.
[4] *Idem*, p. 589.

substantially reproduced in Article 40 of the "Five-Power Plan"; but it omitted a *caveat* that questions put were not to be taken as expressions of opinion by the tribunal or its members. The matter was not discussed at length by the 1920 Committee of Jurists.[5] In the sub-committee of the Third Committee of the First Assembly, the British delegation proposed to delete the second sentence of the draft, Sir Cecil Hurst explaining that the draft was "based on the Continental system of procedure," and that "the British Government, in accordance with the Anglo-American system, would prefer to give more liberty to the judges," so that they might permit advocates to question witnesses directly. The final text was substituted for the proposal of the Committee of Jurists by a narrow vote.[6]

§201. Article 52. *After the Court has received the proofs and evidence within the time specified for the purpose, it may refuse to accept any further oral or written evidence that one party may desire to present unless the other side consents.*

This text, drafted by the 1920 Committee of Jurists (as Article 51), was never discussed at any length.[7] A substantially similar provision is to be found in Articles 42 (1899) and 67 (1907) of the Hague Conventions on Pacific Settlement.

§202. Article 53. *Whenever one of the parties shall not appear before the Court, or shall fail to defend his case, the other party may call upon the Court to decide in favour of his claim.*

The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.

The substance of this Article was contained in the draft-scheme of the 1920 Committee of Jurists (as Article 52). A somewhat similar provision appeared in Article 15 of the Convention creating the Central American Court of Justice, in Article 40 of the 1907 Prize Court Convention, and in a number of the preliminary drafts including the "Five-Power Plan." In view of the proposal for obligatory jurisdiction, it seemed necessary to include a provision for judgments by default, though this was the subject of some opposition.[8] In the report of the 1920 Committee of Jurists, special justification is given of the requirement that a

[5] *Idem*, p. 590.
[6] Documents, pp. 71, 135, 212; Records of First Assembly, Committees, I, pp. 369, 536, 593.
[7] Minutes of the 1920 Committee of Jurists, pp. 590, 650.
[8] *Idem*, pp. 237–8, 247, 253, 590.

State should support its claim before it may be entitled to a default judgment; and it is stated that in formulating this Article the Committee "drew its inspiration from the example set by English national legal practice, and the legal practice of the American Supreme Court in interstate litigation." [9] At the suggestion of the Italian delegation, the subcommittee of the Third Committee of the First Assembly dropped a proposed requirement that the judgment be "supported by substantial evidence." [10]

§203. Article 54. *When, subject to the control of the Court, the agents, advocates and counsel have completed their presentation of the case, the President shall declare the hearing closed.*

The Court shall withdraw to consider the judgment.

The deliberations of the Court shall take place in private and remain secret.

The substance of this Article appeared in the draft-scheme of the 1920 Committee of Jurists (as Article 53). It was never the subject of extended consideration.[11] The ideas were taken from provisions in Articles 50 and 51 (1899) and 77 and 78 (1907) of the Hague Conventions on Pacific Settlement, whence they had been embodied in Articles 44 and 45 of the "Five-Power Plan."

§204. Article 55. *All questions shall be decided by a majority of the judges present at the hearing.*

In the event of an equality of votes, the President or his deputy shall have a casting vote.

This text, drafted by the 1920 Committee of Jurists (as Article 54), was not the subject of much discussion, either in the Committee of Jurists,[12] or in the First Assembly. It re-states Article 27 of the Hague *projet* of 1907, but omits a provision for not counting the vote of a junior judge when the votes are equal.[13] The casting vote of the President had been proposed in preliminary drafts, particularly in Article 45 of the "Five-Power Plan."

When the Article was considered by the 1929 Committee of Jurists, the question was raised whether a judge might abstain from voting on a question before the Court; and it seems to have been agreed that absten-

[9] *Idem*, p. 740.

[10] Documents, pp. 30, 136; Records of First Assembly, Committees, I, pp. 370, 499. The Italian Council for Diplomatic Litigation considered these words "useless and dangerous."

[11] Minutes of the 1920 Committee of Jurists, pp. 591, 650, 741.

[12] *Idem*, pp. 591, 650.

[13] Such a provision was contained in earlier drafts before the 1920 Committee of Jurists, however. *Idem*, p. 570.

tion was not "compatible with the duties of a judge." [14] A similar view has on occasion been taken by the Court itself, at any rate as concerns final votes on judgments or opinions.[15]

§205. Article 56. *The judgment shall state the reasons on which it is based.*

It shall contain the names of the judges who have taken part in the decision.

This Article, drafted by the 1920 Committee of Jurists (as Article 55), was never a subject of lengthy discussion.[16] It was based almost textually on Article 28 of the Hague *projet* of 1907, and Article 79 of the 1907 Hague Convention on Pacific Settlement. The "Five-Power Plan" contained a substantially similar provision.

§206. Article 57. *If the judgment does not represent in whole or in part the unanimous opinion of the judges, dissenting judges are entitled to deliver a separate opinion.*

The 1920 Committee of Jurists had proposed (in Article 56) that dissenting judges should "be entitled to have the fact of their dissent or reservations mentioned" in the judgment, but that the "reasons for their dissent or reservations" should not be expressed. Article 52 of the 1899 Hague Convention on Pacific Settlement provided for a record of dissent, but this provision was omitted in Article 79 of the 1907 Hague Convention. No provision for dissenting opinions was included in the Hague *projet* of 1907; but a provision for inclusion in the judgment of "the purport of the dissenting findings" appeared in Article 46 of the "Five-Power Plan." The 1920 Committee of Jurists refused to accept a suggestion that reasons for dissent might be stated,[17] this being thought particularly undesirable in the case of national judges.[18] When its draft-scheme came before the Council of the League of Nations, M. Bourgeois (France) suggested an amendment to assure that "the play of the different judicial lines of thought would appear clearly"; [19] and the Council approved a provision that "if the judgment does not express wholly or partially the unanimous opinion of the judges, those dissenting have the right to add to it a statement of their individual opinion." [20] In the sub-committee of the Third Committee of the First Assembly, M. Loder

[14] Minutes of the 1929 Committee of Jurists, p. 65.
[15] Series E, No. 9, p. 174. See also §529, *infra*.
[16] Minutes of the 1920 Committee of Jurists, pp. 591, 650.
[17] *Idem*, p. 591.
[18] *Idem*, pp. 531, 570, 742.
[19] Documents, p. 50; Records of First Assembly, Committees, I, p. 478.
[20] Documents, p. 44; Minutes of the Council, 10th session, p. 161.

(Netherlands) found this idea "foreign to Continental procedure" and fraught with "danger to the authority of the Court," chiefly because of the national judges.[21] Though the Italian Council for Diplomatic Litigation proposed the suppression of the article, the sub-committee decided to retain it.[22] The French version differs from the English in providing for the *joinder* of *individual* opinions.

The consideration of this Article by the 1929 Committee of Jurists led M. Fromageot to propose that the judgments of the Court should be given in the name of the Court alone, with no indication of divisions among the judges and no dissenting opinions; he wished to make it impossible for Governments to know how their nationals on the Court had voted, and he deemed it unwise to put the independence of the judges to the test of openly opposing their own Governments.[23] Sir Cecil Hurst thought that this proposal would "destroy the Court." Mr. Root thought that "no member of the Court would consent to rest under an imputation of acquiescing in views which he did not hold, and the judges would naturally defend themselves in private." [24] M. Politis stated that even if the representatives of Anglo-Saxon countries were to ask for the suppression of dissenting opinions, he would feel himself obliged to oppose the request, because he felt these opinions to be of such "immense advantage to international law." [25] The Vice-President of the Court, M. Huber, stated that the possibility of publishing dissenting opinions "made it necessary for the Court to examine very carefully the different points of view brought forward by the judges, and to state clearly the reasons for its awards." [26] At a later date, Sir Cecil Hurst proposed an amendment to Article 57 which would recognize, in addition to dissenting opinions, separate opinions by judges who found themselves in the majority of the Court but did not agree with the statement of reasons given for the majority's conclusions; he argued in favor of this amendment that the judgments of the Court were unnecessarily long, and that the existing system of the Court weakened the judgments by making it necessary for them "to embody several views." [27] President Anzilotti stated that this was already the procedure followed by the Court in practice, and the 1929 Committee of Jurists decided that Article 57 should not be amended; several members of the Committee expressed the view that the Court's judgments were too long, however.

[21] Documents, p. 136; Records of First Assembly, Committees, I, p. 371.
[22] Documents, pp. 138, 213; Records of First Assembly, Committees, I, pp. 374–5, 536.
[23] Minutes of the 1929 Committee of Jurists, p. 50.
[24] *Idem*, p. 51. [25] *Ibid.* [26] *Idem*, p. 52. [27] *Idem*, pp. 65–6.

§207. Article 58. *The judgment shall be signed by the President and by the Registrar. It shall be read in open Court, due notice having been given to the agents.*

This Article, drafted by the 1920 Committee of Jurists (as Article 57), was never discussed at length.[28] It is based on Articles 79 and 80 of the 1907 Hague Convention on Pacific Settlement, and on Article 28 of the Hague *projet* of 1907.[29] A proposal of the Argentine delegation to require signature also by the participating judges was not taken up in the First Assembly.[30]

§208. Article 59. *The decision of the Court has no binding force except between the parties and in respect of that particular case.*

This text found no place in the draft-scheme of the 1920 Committee of Jurists, though it is clearly in line with Article 84 of the 1907 Hague Convention on Pacific Settlement; it was due to a proposal by the Council of the League of Nations at its meeting in Brussels.[31] Mr. Balfour (Great Britain) foresaw that the decisions of the Court would "have the effect of gradually moulding and modifying international law," and he wished to leave it open to a State to protest "not against any particular decision," but "against any ulterior conclusions to which that decision may seem to point."[32] M. Bourgeois (France) therefore proposed what became the final text, and it was said to be a statement of what Article 63 of the Statute, concerning the effect of intervention, "indirectly admits."[33] Little consideration was given to this Article in the First Assembly. A proposal made by the Argentine delegation was in a sense opposite to the concluding phrase in the Article;[34] an Italian proposal to add a provision that the Court's decisions should have "the same force and validity as the awards made by virtue of Article 13 of the Covenant," was thought to be "superfluous."[35] The Panamanian delegation to the First Assembly

[28] Minutes of the 1920 Committee of Jurists, pp. 592, 650.

[29] It was explained to the Hague Conference of 1907 that the signature by the President guarantees only the authenticity of the judgment, and does not indicate that the judgment expresses his views. 1 *Actes et Documents*, p. 389.

[30] Documents, p. 69; Records of First Assembly, Committees, I, p. 520.

[31] Documents, p. 44; Minutes of the Council, 10th session, p. 161. A similar provision was contained in Article 46 of the Swiss *avant-projet* of 1919, and in Article 53 of the Five-Power Plan.

[32] Documents, p. 38; Records of First Assembly, Committees, I, p. 512.

[33] Documents, p. 50; Records of First Assembly, Committees, I, p 478.

[34] Documents, p. 68; Records of First Assembly, Committees, I, p. 519. Similarly Lord Cecil's "Suggestions" in 1919 had provided that the Court's decisions should be "binding precedents" for itself. 1 Miller, Drafting of the Covenant, p. 62.

[35] Records of First Assembly, Committees, I, pp. 376–7, 537. *Cf.*, Article 69 of the Peace Treaty of St. Germain of September 10, 1919, and similar provisions in the Minorities Treaties of 1919–20.

would have given to the Court power to suggest measures to be taken to give effect to its decisions, but it was thought that such a proposal would run "counter to the provisions of the Covenant." [36]

§209. Article 60. *The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.*

This text was proposed by the 1920 Committee of Jurists (in Article 58), with the phrase "in the event of uncertainty" in the English version instead of "in the event of dispute." It was based on Articles 54 (1899) and 81–2 (1907) of the Hague Conventions on Pacific Settlement, and on provisions in Articles 47 and 52 of the Five-Power Plan. The proposal was not discussed at length, either in the Committee of Jurists,[37] or in the First Assembly. An Argentine proposal to include sanctions in the Article was rejected on the ground that it appeared "to contain an amendment or addition to the Covenant." [38]

§210. Article 61. *An application for revision of a judgment can be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.*

The proceedings for revision will be opened by a judgment of the Cour expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.

The application for revision must be made at latest within six months of the discovery of the new fact.

No application for revision may be made after the lapse of ten years from the date of the sentence.

With exception of the fourth paragraph, this text follows a draft by the 1920 Committee of Jurists (in Article 59); it is based upon Articles 55 (1899) and 83 (1907) of the Hague Conventions on Pacific Settlement, and the same ideas appear in some form in most of the preliminary drafts.[39] A time-limit for presenting an application for revision was added by the

[36] Records of First Assembly, Plenary, pp. 455, 491.
[37] Minutes of the 1920 Committee of Jurists, pp. 591, 650.
[38] Documents, pp. 64, 67, 139–40, 213; Records of First Assembly, Committees, I, pp. 376–7 514, 520, 537.
[39] Minutes of the 1920 Committee of Jurists, pp. 91–3.

Committee of Jurists; and because of its fear "that a party might delay compliance with a sentence until the expiration of this period" in the hope of discovering some new fact, the third paragraph was added.[40] In the first paragraph, the sub-committee of the Third Committee of the First Assembly dropped the qualification "new" in respect of the fact which might base an application for revision; and in the fifth paragraph, on an Italian proposal, it substituted "ten years" for the "five years" proposed by the Committee of Jurists.[41] On a proposal by the Canadian delegation, the fourth paragraph was added by a narrow vote, though M. Ricci-Busatti (Italy) pointed out that "the discovery of the new fact constitutes a very indefinite point of departure."

§211. **Article 62.** *Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene as a third party.*

It will be for the Court to decide upon this request.

This text was drafted by the 1920 Committee of Jurists (in Article 60).[42] It explained that a State may intervene as a plaintiff, or as a defendant, or to claim "exclusive rights," or to ask the withdrawal of a party;[43] but it wished to exclude "political intervention," and it left open the question whether the intervening State might designate a judge *ad hoc* if it had no national on the bench.[44] The text was not extensively discussed in the First Assembly; the sub-committee of the Third Committee refused to add a provision allowing intervention by the International Labor Office and similar international institutions.[45]

§212. **Article 63.** *Whenever the construction of a convention to which States other than those concerned in the case are parties is in question, the Registrar shall notify all such States forthwith.*

Every State so notified has the right to intervene in the proceedings: but if it uses this right, the construction given by the judgment will be equally binding upon it.

This text, substantially that proposed by the 1920 Committee of Jurists (in Article 61), was based on Articles 56 (1899) and 84 (1907) of the Hague Conventions on Pacific Settlement. It provides for inter-

[40] *Idem*, pp. 592, 621, 650, 744.

[41] Documents, pp. 30, 139, 213; Records of First Assembly, Committees, I, pp. 375, 499, 536.

[42] Minutes of the 1920 Committee of Jurists, pp. 587–8, 592–4, 621.

[43] *Idem*, p. 745.

[44] *Idem*, p. 593, see §400, *infra*.

[45] Documents, pp. 30, 155, 213; Records of First Assembly, Committees, I, pp. 400, 499–500, 537.

vention as a matter of right in certain cases.[46] In preliminary drafts, the concluding provision gave the judgment the effect of *res judicata* as to the intervening party.[47] The Article was the subject of little discussion in the First Assembly.

§213. Article 64. *Unless otherwise decided by the Court, each party shall bear its own costs.*

This text, drafted by the 1920 Committee of Jurists (in Article 62), was adopted without much discussion, both in the Committee of Jurists [48] and in the First Assembly. Article 29 of the Hague *projet* of 1907 provided that "each party pays its own costs and an equal share of the costs of the trial"; Articles 57 (1899) and 85 (1907) of the Hague Conventions on Pacific Settlement are similar in effect.[49] In the sub-committee of the Third Committee of the First Assembly, the British delegation suggested an addition which would enable a departure from the rule to be made "by the agreement of the parties"; the British view was that "the costs of the suit should be borne by the losing party, except in the case of agreement between the parties." [50] In its report, the sub-committee stated that the text does not prevent "division of the costs between the parties in accordance with an agreement between them." [51]

§214. Article 65.* *Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request, signed either by the President of the Assembly or the President of the Council of the League of Nations, or by the Secretary-General of the League under instructions from the Assembly or the Council.*

The request shall contain an exact statement of the question upon which an opinion is required, and shall be accompanied by all documents likely to throw light upon the question.

It was a curious turn of events which led to the failure of the original Statute to mention the Court's advisory jurisdiction. Article 14 of the Covenant laid it down that "the Court may also give (Fr., *donnera aussi*) an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly." The discussion of advisory opinions in the 1920 Committee of Jurists was not illuminating. The Root-Phillimore draft would have restricted them to "any subject or question" sub-

[46] Minutes of the 1920 Committee of Jurists, pp. 594, 746.
[47] *Idem*, pp. 571, 594, 643–4.
[48] *Idem*, pp. 594, 651.
[49] *Cf.*, the more elaborate provisions in Article 46 of the Prize Court Convention of 1907.
[50] Documents, pp. 71, 139; Records of First Assembly, Committees, I, pp. 376, 593.
[51] Documents, p. 213; Records of First Assembly, Committees, I, p. 537.

mitted by the Council or Assembly;[52] Mr. Root was at one time opposed to the Court's giving an advisory opinion "with reference to an existing dispute," though he seems to have abandoned this position.[53] M. de Lapradelle thought that a request for an opinion on a "theoretical question" might be dealt with by a limited number of judges. In its report the 1920 Committee of Jurists referred to the Court's advisory jurisdiction as being "apart from its judicial competence." An opinion given "in the abstract" would be "simply advisory," so that "the Court must not be bound by this opinion should the question come before it as a concrete case"; nor would the opinion have the force of a binding sentence if a dispute were involved, but in this case the Committee suggested that national judges should sit.[54] In Article 36 of its draft-scheme, the Committee of Jurists proposed the following text:

> The Court shall give an advisory opinion upon any question or dispute of an international nature referred to it by the Council or Assembly.
>
> When the Court shall give an opinion on a question of an international nature which does not refer to any dispute that may have arisen, it shall appoint a special Commission of from three to five members.
>
> When it shall give an opinion upon a question which forms the subject of an existing dispute, it shall do so under the same conditions as if the case had been actually submitted to it for decision.

The First Assembly had before it a suggestion by the Argentine delegation that any Member of the League of Nations should be permitted to request an advisory opinion, and a suggestion by the Director of the International Labor Office that the International Labor Conference or the Governing Body of the International Labor Office should be permitted to make such a request. When consideration of the draft of the Committee of Jurists was begun by the sub-committee of the Third Committee, M. Ricci-Busatti (Italy) declared that "in practice it would be impossible for the Court to draw a distinction between the cases contemplated in the second and third paragraphs of Article 36" as drafted; and the subcommittee seems to have concluded that "the report explaining the difference in procedure between the two cases had not been sufficiently discussed" by the Committee of Jurists.[55] M. Fromageot (France) even thought "it was to be regretted that the Covenant gave to the Court

[52] Minutes of the 1920 Committee of Jurists, p. 548.
[53] *Idem*, pp. 584–5.
[54] *Idem*, pp. 730–731.
[55] Documents, p. 146; Records of First Assembly, Committees, I, pp. 386–387.

advisory capacities." M. Hagerup (Norway) mentioned the Aaland Islands dispute as one in which an advisory opinion might have been requested.[56] On the proposal of the Italian delegation, the sub-committee decided to delete the last paragraph of the draft before it; but when a re-draft was undertaken, the drafting committee reported unanimously that the whole article should be suppressed as unnecessary, for under Article 14 of the Covenant "the Court could not refuse to give advisory opinions."[57] This recommendation was approved by unanimous vote of the sub-committee, which explained in its report that the draft of the Committee of Jurists "here entered into details which concerned rather the rules of procedure of the Court"; and it was said that advisory opinions "should, in every case, be given with the same quorum as that required for the decision of disputes."[58] The suppression of the article does not appear to have been further discussed by the Third Committee.

It must be concluded from this history that the draftsmen of the original Statute failed to appreciate the importance of the Court's advisory jurisdiction.

When a study of the Statute with a view to its possible revision was undertaken in 1929, a tendency was manifest to attribute the action of the First Assembly to a desire to leave the Court free; after the experience of the intervening years, however, Jonkheer van Eysinga thought that "it was possible to form an accurate idea of the working of the procedure in respect of advisory opinions," and that the complete freedom of the Court was no longer necessary; he therefore proposed to the 1929 Committee of Jurists that the Rules be studied with a view to the incorporation of some of their provisions into the Statute.[59] This view was supported by Vice-President Huber, as tending to a "codification" of the experience gained. Already in 1926, the Conference of Signatories which dealt with the proposed accession by the United States of America to the Protocol of Signature had agreed that certain provisions of the Rules relating to advisory opinions might be given the same force which they would have had if they had been embodied in the Statute.[60] In a memorandum submitted to the 1929 Committee of Jurists, the Director of the International Labor Office emphasized the need for coordinating Article 14 of the Covenant and Article 37 (423) of the Constitution of the Inter-

[56] See Minutes of the Council, 7th session (1920), p. 61.
[57] Documents, p. 156; Records of First Assembly, Committees, I, p. 401.
[58] Documents, p. 211; Records of First Assembly, Committees, I, p. 534.
[59] Minutes of the 1929 Committee of Jurists, pp. 66–68.
[60] Minutes of the 1926 Conference of Signatories, pp. 46, 53, 77, 83.

national Labor Organization, and he urged that the Court itself should "formulate an authoritative interpretation, bringing these two clauses into line";[61] though this memorandum provoked some discussion, it was merely communicated to the Council. Pointing out that this was "particularly desirable today in view of . . . the possible accession of the United States" to the Protocol of Signature, the 1929 Committee of Jurists proposed that the substantive provisions of the Rules with reference to advisory opinions be "transferred" to the Statute "in order to give them a permanent character."[62]

The 1929 Committee of Jurists proposed for the new Article 65 of the Statute the precise text of Article 72 of the 1922 Rules, in which no change had been made in the revised Rules of 1926; this proposal was adopted by the 1929 Conference of Signatories.

§215. Article 66.* 1. *The Registrar shall forthwith give notice of the request for an advisory opinion to the Members of the League of Nations, through the Secretary-General of the League, and to any States entitled to appear before the Court.*

The Registrar shall also, by means of a special and direct communication, notify any Member of the League or State admitted to appear before the Court or international organization considered by the Court (or, should it not be sitting, by the President) as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time-limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.

Should any Member or State referred to in the first paragraph have failed to receive the communication specified above, such Member or State may express a desire to submit a written statement, or to be heard; and the Court will decide.

2. *Members, States, and organizations having presented written or oral statements or both shall be admitted to comment on the statements made by other Members, States, or organizations in the form, to the extent and within the time-limits which the Court, or, should it not be sitting, the President, shall decide in each particular case. Accordingly, the Registrar shall in due time communicate any such written statements to Members, States, and organizations having submitted similar statements.*

This text was borrowed with some changes from Article 73 of the 1926 Rules: the first paragraph is identical with the first paragraph of Article

[61] Minutes of the 1929 Committee of Jurists, pp. 102–104.
[62] *Idem*, p. 125.

73, except for the omission of a requirement (in the English version only) of notice to members of the Court; the second and third paragraphs are identical with the second and third paragraphs of Article 73,[63] though in the French version of the second paragraph a slight change was made to produce conformity with the English version; the fourth paragraph (numbered "2") reproduces verbatim the fourth paragraph of Article 73, except that the words "States, Members" are changed to "Members, States." The draft proposed by the 1929 Committee of Jurists would have omitted the references to international organizations; the Director of the International Labor Office protested against this omission, and after a lengthy discussion the 1929 Conference of Signatories decided to maintain the references as in Article 73 of the 1926 Rules.[64]

§216. Article 67.* *The Court shall deliver its advisory opinions in open Court, notice having been given to the Secretary-General of the League of Nations and to the representatives of Members of the League, of States and of international organizations immediately concerned.*

This text follows, with slight changes, the text of the first sentence of Article 74 of the 1926 Rules; it clearly negatives any possibility of the Court's giving secret advisory opinions. The 1929 Committee of Jurists proposed to suppress the reference to international organizations, but it was maintained by the 1929 Conference of Signatories.[65]

§217. Article 68.* *In the exercise of its advisory functions, the Court shall further be guided by the provisions of the Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.*

The 1929 Committee of Jurists proposed the following text for this article:

> In the exercise of its advisory functions, the Court shall apply Articles 65, 66, and 67. It shall further be guided by the provisions of the preceding chapters of this Statute to the extent to which it recognizes them to be applicable to the case.

This was explained in the Committee's report to take "account of the fact that the Court may be called upon to give advisory opinions both in contentious and in non-contentious matters," and it was said that certain provisions of the Statute applicable in the former would not be applicable

[63] The second and third paragraphs of Article 73 of the 1926 Rules were due, in part, to an analogy drawn from Articles 62 and 63 of the Statute. Series D, No. 2 (add.), p. 225.
[64] Minutes of the 1929 Conference of Signatories, pp. 43–46, 49, 74–75.
[65] Minutes of the 1929 Conference of Signatories, pp. 42–6, 49.

in the latter cases, *e.g.*, Article 31.[66] When the proposal came before the 1929 Conference of Signatories, the first sentence was suppressed as serving no useful purpose.[67] After a discussion "with an enthusiastic gentleman from across the Atlantic," [68] Sir Cecil Hurst (Great Britain) proposed a re-drafting of the second sentence, in the interest of clarity.[69] In supporting this proposal, M. Fromageot (France) thought it essential that when asked for an advisory opinion relating to a dispute, the Court should hear the parties to the dispute; "it was therefore quite natural to lay down in the Statute of the Court that, in regard to advisory opinions, the Court should proceed in all respects in the same way as in contentious cases." [70] In line with these views,[71] the Conference modified the text of the Article. Though the modified text may lend itself to misconstruction,[72] it leaves the control of advisory procedure in the hands of the Court.

[66] Minutes of the 1929 Committee of Jurists, p. 125.

[67] Minutes of the 1929 Conference, p. 48.

[68] Mr. S. O. Levinson, of Chicago.

[69] Minutes of the 1929 Conference, pp. 46–47, 75.

[70] *Idem*, p. 48. It is to be noted that the Court had previously on September 7, 1927, amended Article 71 of its Rules by inserting as paragraph 2: "On a question relating to an existing dispute between two or more States or Members of the League of Nations, Article 31 of the Statute shall apply. In case of doubt the Court shall decide." See Series E, No. 4, pp. 72–8.

[71] M. Fromageot's statement is reproduced in the letter of President van Eysinga to the President of the Assembly and the Chairman of the First Committee. Minutes of the 1929 Conference, p. 79.

[72] In a report to the United States Senate, on June 1, 1932, the new Article 68 was construed to make applicable the rule that "if the question in reference to which the advisory opinion of the Court is requested is involved in a dispute between two nations, the request will not be entertained or the opinion given, except the parties to the controversy join in the request or assent to the action solicited." 72d Congress, 1st session, Senate Report No. 758, p. 9. *Cf.*, Series D, No. 2 (3d add.), pp. 374–5, 837.

CHAPTER 11

PARTICIPATION OF STATES NOT MEMBERS OF THE LEAGUE OF NATIONS

§218. Possibility of Participation by Non-Member States. From the beginning it was anticipated that States not members of the League of Nations might participate in the maintenance of the Court. Certain States which have never been members of the League may become parties to the Protocol of Signature of December 16, 1920; or States which are parties may withdraw from membership in the League. The resolution adopted by the First Assembly of the League of Nations on December 13, 1920, provided (paragraph 4) that the protocol to which the Statute was to be annexed should "remain open for signature by the States mentioned in the Annex to the Covenant." When this provision was drafted by the sub-committee of the Third Committee of the First Assembly,[1] its *rapporteur*, M. Hagerup (Norway), explained that "this means that the United States of America can adhere to the Statute"; [2] but the terms were also applicable to Ecuador and Hedjaz, which were mentioned in the Annex to the Covenant but not then members of the League of Nations.[3] The provision in the Assembly resolution was also embodied in the fourth paragraph of the Protocol of Signature of December 16, 1920, where it was stated that the Protocol of Signature should "remain open for signature by the Members of the League of Nations and by the States mentioned in the Annex to the Covenant of the League." [4]

The United States of America was the only State which expressed a desire to sign or accede to the Protocol of Signature at a time when it was not a member of the League of Nations. The problem of the participation of States not members of the League of Nations in the maintenance of the Court is therefore, in part, a problem as to the accession by

[1] Records of First Assembly, Committees, I, pp. 408, 617.

[2] *Idem*, Plenary, p. 441.

[3] Ecuador became a member of the League of Nations in 1934; Hedjaz was joined with Nejd in 1927, and in 1932 the name of the Kingdom was changed to Saudi Arabia.

[4] The French version, which is clearly defective, provided that the Protocol should remain open *à la signature des États visés à l'annexe du Pacte de la Société.*

the United States; but it is also a problem of the continued participation of States which have ceased to be members of the League of Nations and which while they were members had become parties to the Protocol of Signature of December 16, 1920.

§219. Effect of Withdrawal from the League of Nations. Under Article 1 of the Covenant, a Member of the League of Nations may "withdraw from the League"; two years' notice of its intention to withdraw must have been given, and the withdrawal is conditioned upon the fulfilment of "all its international obligations and all its obligations" under the Covenant. Costa Rica withdrew from the League in 1927, Brazil in 1928, Germany and Japan in 1935, Paraguay in 1937, Guatemala, Honduras and Nicaragua in 1938, Italy and El Salvador in 1939, Chile and Venezuela in 1940, Hungary, Peru and Spain in 1941, and Rumania in 1942. Notices of intention to withdraw given by Spain in 1926 and by Mexico in 1932 were cancelled before the expiration of the two-year period. Austria ceased to be a member in 1938, and the Union of Soviet Socialist Republics in 1939.[5] Of the eighteen States which have ceased to be members of the League, all but Costa Rica, Guatemala, Honduras, Nicaragua and the Union of Soviet Socialist Republics had previously become parties to the Protocol of Signature of December 16, 1920.

Clearly during the two-year period following its notification of intention to withdraw, a State remains a member of the League of Nations, and its position as a party to the Protocol of December 16, 1920, is in no way affected by the notification. Nor is that position changed by an effective withdrawal; despite the fact that the 1920 Protocol of Signature opens with a reference to "the Members of the League of Nations," that instrument is quite independent of the Covenant of the League of Nations, so that a State may continue to be a party to it after withdrawal from membership in the League. In giving notice of their intention to withdraw from the League, the Governments of Chile, Hungary and Peru expressed a willingness to continue their participation in the maintenance of the Court.[6] A State may contribute to meeting the expenses of the Court without membership in the League; and contributions were in fact made by Brazil in 1937 and 1940, and by Japan in 1937.

Article 4 of the revised Statute envisages the possibility of participation in the election of the members of the Court by "a State which has accepted the Statute of the Court, but is not a Member of the League of

[5] The position of Albania and Ethiopia is somewhat doubtful.
[6] On the attitude of Japan, see §120, *supra*.

Nations," on conditions which in the absence of a special agreement are to "be laid down by the Assembly on the proposal of the Council." On October 3, 1936, acting on the proposal of the Council, the Assembly decided that such States, if they express a desire to participate, "shall *ipso facto* be admitted to vote in the Assembly," and that in any election held before January 1, 1940, Germany, Brazil, and Japan should if they expressed a desire "be admitted to vote in the Council." [7] Representatives of both Brazil and Japan participated in the elections of 1936, 1937, and 1938, voting both in the Council and in the Assembly.[8]

If a State which ceased to be a Member of the League of Nations has not become a party to the Protocol of Signature of December 16, 1920, perhaps it may later become a party to that Protocol even though it was not mentioned in the annex to the Covenant, but no pronouncement has been made on this point.[9]

§220. The United States' Proposal of 1926.[10] The texts of the 1920 Protocol of Signature and the Statute of the Court were communicated to the Government of the United States on February 4, 1921, and their receipt was acknowledged on August 15, 1921.[11] On February 24, 1923, the President of the United States transmitted a message to the Senate, asking for its advice and consent to the accession by the United States to the Protocol of Signature of December 16, 1920, upon certain "conditions and understandings" set out by the Secretary of State in an accompanying letter of February 17, 1923.[12] On January 27, 1926, the Senate of the United States adopted a resolution giving its "advice and consent"

[7] Records of Seventeenth Assembly, Plenary, pp. 105–106, 130. This latter decision was taken "as a provisional measure and without prejudging any question of principle."

[8] See §242, *infra*.

[9] But *cf.*, Series E, No. 15, p. 39 note; U. S. Foreign Relations, 1926, I, pp. 10–1.

[10] The texts of documents relating to the United States' proposal are collected in Hudson, The World Court, 1921–1938 (World Peace Foundation, Boston, 1938), pp. 237–321.

[11] U. S. Foreign Relations, 1920, I, p. 31. The text of the Protocol and Statute had been sent to President Wilson on December 14, 1920. *Idem*, p. 16.

[12] These "conditions and understandings" were as follows:

"1. That such adhesion shall not be taken to involve any legal relation on the part of the United States to the League of Nations or the assumption of any obligations by the United States under the Covenant of the League of Nations constituting Part I of the Treaty of Versailles.

"2. That the United States shall be permitted to participate through representatives designated for the purpose and upon an equality with the other States members, respectively, of the Council and Assembly of the League of Nations, in any and all proceedings of either the Council or the Assembly for the election of judges or deputy judges of the Permanent Court of International Justice, or for the filling of vacancies.

"3. That the United States will pay a fair share of the expenses of the Court as determined and appropriated from time to time by the Congress of the United States.

"4. That the Statute for the Permanent Court of International Justice adjoined to the Protocol shall not be amended without the consent of the United States." U. S. Foreign Relations, 1923, I, p. 17.

to the proposed accession by the United States "subject to the following reservations and understandings," to be accepted "through an exchange of notes" by "the Powers signatory to such Protocol":[13]

1. That such adherence shall not be taken to involve any legal relation on the part of the United States to the League of Nations or the assumption of any obligations by the United States under the Treaty of Versailles.

2. That the United States shall be permitted to participate through representatives designated for the purpose and upon an equality with the other States, members, respectively, of the Council and Assembly of the League of Nations, in any and all proceedings of either the Council or the Assembly for the election of judges or deputy-judges of the Permanent Court of International Justice or for the filling of vacancies.

3. That the United States will pay a fair share of the expenses of the Court as determined and appropriated from time to time by the Congress of the United States.

4. That the United States may at any time withdraw its adherence to the said Protocol and that the Statute for the Permanent Court of International Justice adjoined to the Protocol shall not be amended without the consent of the United States.

5. That the Court shall not render any advisory opinion except publicly after due notice to all States adhering to the Court and to all interested States and after public hearing or opportunity for hearing given to any State concerned; nor shall it, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest.[14]

[13] U. S. Senate Document No. 45, 69th Congress, 1st Session. For detailed studies of the reservations, see Hudson, "The American Reservations and the Permanent Court of International Justice," 22 American Journal of International Law (1928), pp. 776–796; Kraus, "*La Cour . . . et les États-Unis d'Amérique*," 7 *Revue de droit international et de législation comparée* (1926), pp. 281–320.

An earlier draft of the second part of the fifth reservation, which had not been proposed by the Secretary of State, provided: "That the United States shall be in no manner bound by any advisory opinion of the Permanent Court of International Justice not rendered pursuant to a request in which it, the United States, shall expressly join in accordance with the statute for the said court adjoined to the protocol of signature of the same to which the United States shall become signatory." The final form of the reservation, introduced in the Senate on January 23, 1926, seems to have been due to a memorandum by a "well-known international jurist . . . in official life," presented to the Senate on January 18, 1926. 67 Congressional Record, p. 2293. It was subsequently reported that John Bassett Moore, at that time a judge of the Court, had assisted in drafting the resolution. New York Times, January 28, 1926, p. 1. Judge Moore later referred to Senator Thomas J. Walsh as the "principal draftsman" of the reservation. 50 Harvard Law Review (1937), p. 418 note.

[14] A further "understanding," set out in the Senate resolution but of which acceptance by other States was not stipulated for, would have required that recourse to the Court for the settlement of a difference between the United States and any other State could be "had only by agreement thereto through general or special treaties" between the parties. This followed a stock form which had been employed by the United States in a reservation to the 1907 Hague

On February 12, 1926, the Government of the United States communicated the text of this resolution to the various signatories of the Protocol of December 16, 1920, asking to be informed whether the reservations and understandings were acceptable.[15] On March 2, 1926, the Secretary of State of the United States addressed a communication to the Secretary-General of the League of Nations, informing him of the adoption of the Senate's resolution, and stating that the signature of the United States would not be affixed to the said Protocol until the Governments of the States signatory thereto should have signified in writing their acceptance of these "conditions, reservations, and understandings."[16] When this communication came before the Council of the League of Nations on March 18, 1926,[17] the Council expressed the opinion that as the Protocol of Signature of 1920 is a "multilateral instrument," "the special conditions on which the United States desire to accede to it should also be embodied in a multilateral instrument," and could not "appropriately be embodied in a series of separate exchanges of notes"; it proposed to all the Governments which had received from the United States a copy of the Senate resolution that their replies should indicate "the need of a general agreement," and it invited these Governments and that of the United States to be represented at a conference with the object of framing such a general agreement.

§221. The Conference of Signatories of 1926. Forty signatories of the Protocol of Signature were represented at the Conference of Signatories held at Geneva, September 1–23, 1926;[18] the Government of the United States declined the invitation to be represented, observing that no "useful purpose could be served by the designation of a delegate," that the reservations were "plain and unequivocal," and that no "new agreement" was necessary to give effect to them beyond the "assent of each signatory by direct exchange of notes."[19] This left the Conference

Convention on Pacific Settlement; it was intended to limit the power of the Executive by requiring the advice and consent of the Senate to any *compromis*.

A second statement was made in the Senate resolution to the effect that adherence by the United States should not be construed to require a departure from the "traditional policy" of non-entanglement in the political affairs of other States, or an abandonment of the "traditional attitude toward purely American questions." This, too, is a stock form which had been employed by the United States in reservations to the 1899 and 1907 Hague Conventions on the Pacific Settlement. Its significance is not juridical.

[15] For an explanation of this course, see U. S. Foreign Relations, 1926, I, pp. 2–3.

[16] League of Nations Official Journal, 1926, p. 628.

[17] *Idem*, pp. 535–536.

[18] The minutes of the Conference were published by the Secretariat of the League of Nations. Document V. Legal. 1926. V. 26. Not all of the States represented at the Conference had ratified the Protocol of Signature of December 16, 1920.

[19] Minutes of the 1926 Conference of Signatories, p. 71.

"incomplete," as its President, Jonkheer van Eysinga (Netherlands), pointed out at the beginning of its deliberations, in that it had to proceed without any clarification of the views of the Government of the United States.[20] Emphasis was laid on the fact that the signatories were represented solely in their capacity as signatories, and not as members of the League of Nations; and to avoid any impression that the reservations of the United States were being considered by an organ of the League of Nations, the Conference met, not at the Secretariat, but at the International Labor Office.[21] The reservations of the United States were studied "with a strong desire to satisfy them in the largest possible measure," and conclusions were formulated in the Final Act to serve "as the basis of the replies" to be sent by the signatories to the Government of the United States; the President of the Conference was directed to transmit to the Government of each of the signatories a model of a letter of reply to the United States. The Conference also expressed the view that the proposed adhesion by the United States "necessitates an agreement between the United States and the signatories of the Protocol," and a preliminary draft of a "protocol of execution" was annexed to the Final Act and recommended to the signatories and the United States.[22]

§222. Proposed Acceptance of United States' Reservations. The 1926 Conference of Signatories found no difficulty in accepting the first three reservations proposed by the United States; nor did it raise any objection to the fourth reservation, though it proposed that "in order to assure equality of treatment . . . the signatory States, acting together and by not less than a majority of two-thirds, should possess the corresponding right to withdraw their acceptance of the special conditions attached by the United States . . . in the second part of the fourth reservation and in the fifth reservation."[23] With reference to the first part of the fifth reservation, the Conference drew attention to Articles 71–74 of the Rules of Court, and particularly to the amendments to Articles 73 and 74 effected by the Court on July 31, 1926, after the United States had offered its reservations;[24] and it expressed a willingness to study "the possible incorporation of certain stipulations of principle" in the proposed

[20] This had the result of leading delegates to the Conference to scan the records of the debates in the United States Senate, as published in the Congressional Record, in their effort to understand the United States' position. See the study by Quincy Wright, in 21 American Journal of International Law (1927), pp. 1–25.

[21] Minutes of the 1926 Conference of Signatories, pp. 10–11.

[22] *Idem*, pp. 75–79.

[23] *Idem*, p. 77.

[24] It cannot be said that the Court had been led by the proposals of the United States to make the amendments in its rules adopted in 1926, for the revision had been on its agenda

protocol of execution. The second part of the fifth reservation gave considerable concern, however, because it was feared that the fifth reservation might have the effect of diminishing the value of advisory opinions to which "great importance" was attached by Members of the League of Nations. A distinction was drawn between an advisory opinion relating to a dispute to which the United States might be a party, and an advisory opinion relating to a dispute or question with regard to which the United States should claim an interest though not a party. With reference to the former case, the Conference merely referred to the Court's "advisory opinion No. 5 (Eastern Carelia)" which seemed to the Conference "to meet the desire of the United States." [25] With reference to the latter case, the Conference was prepared to assure to the United States a "position of equality with States represented either on the Council or in the Assembly of the League of Nations"; but as no decision had yet been taken on the question whether unanimity was required in the Council or the Assembly for the adoption of a request for an advisory opinion, the Conference found it "impossible to say with certainty whether in some cases, or possibly in all cases, a decision by a majority is not sufficient." It therefore envisaged a "supplementary agreement" to deal with "the manner in which the consent provided for in the second part of the fifth reservation will be given," but no attempt was made at the time to draft such a "supplementary agreement."

§223. Results of the 1926 Conference. The Conference of Signatories achieved its purpose to a very limited extent. Its suggestions led to a large measure of uniformity in the replies made by certain signatories to the Government of the United States, though some signatories did not reply in the sense recommended.[26] On the other hand, the recommendations of the Conference were not received with favor by the Government of the United States, and for more than two years the negotiations were not resumed. The signing of a treaty for the renunciation of war as an

since June 17, 1925. When the resolution adopted by the United States Senate on January 27, 1926, was mentioned at a meeting of the Court on July 26, 1926, Judge Moore stated that he "thought that the Court should discuss and decide any question without reference to the situation in the United States." Series D, No. 2 (add.), p. 198. "On July 30, 1926, the Court decided to abstain from any decision or discussion on the question of the American reservations; and the President construed the Court's vote as implying that the Court wished to assume a purely passive attitude and not to lend itself even to indirect coöperation in the work of the Conference called to consider the American reservations." Series E, No. 3, p. 195.

[25] Minutes of the 1926 Conference of Signatories, p. 79.

[26] Twenty-four Governments followed the recommendations of the Conference of Signatories in their replies to the United States; fifteen sent mere acknowledgments; five unconditionally accepted the reservations; and three indicated that they would accept. See Series E, No. 4, p. 126; U. S. Foreign Relations, 1926, I, pp. 26–38.

instrument of national policy, on August 27, 1928, may have produced some willingness on the part of the Government of the United States to give more hospitable consideration to the recommendations of the Conference, and on the eve of the assembling of the Committee of Jurists charged with the study of the Court's Statute with a view to its amendment, the United States reopened the negotiations. In a letter addressed to each of the signatories on February 19, 1929,[27] the Secretary of State of the United States referred to "some elements of uncertainty in the bases" suggested by the Conference of Signatories, "which seem to require further discussion." Inasmuch as the powers and procedure of the Council might be changed by an amendment of the Covenant, and "the ruling of the Court in the Eastern Carelia case and the rules of the Court are also subject to change at any time," the view was expressed that the draft protocol of 1926 "would not furnish adequate protection to the United States." It was said that "there seems to be but little difference" of opinion regarding the substance of the "rights and interests" of the United States "as an adherent to the Court Statute," and "an informal exchange of views" was suggested. On February 19, 1929, also, the Secretary of State informed the Secretary-General of the League of Nations of the letters addressed to the signatories. On March 9, 1929, the Council of the League of Nations requested the Committee of Jurists created under its resolution of December 14, 1928, "to consider the present situation as regards accession of the United States of America" and "to make any suggestions which it feels able to offer with a view to facilitating such accession on conditions satisfactory to all the interests concerned." [28] The membership of Elihu Root in the 1929 Committee of Jurists seemed to offer a happy augury for this course, and the general situation gave promise of better results than in 1926.

§224. The 1929 Committee of Jurists. The Committee of Jurists created to study the Statute of the Court with a view to its amendment began its consideration of the question of the accession of the United States at its first meeting on March 11, 1929. Mr. Root offered a "suggested re-draft of Article 4 of the [draft] protocol of 1926," [29] dealing chiefly with "the manner in which shall be made known whether the

[27] U. S. Department of State, Publication No. 44, p. 33.

[28] League of Nations Official Journal, 1929, p. 564. M. Scialoja later stated that "the Council would be glad if the Committee could discover the means of satisfying the desiderata of the United States . . . whilst safeguarding the dignity of the League." Minutes of the 1929 Committee of Jurists, p. 10.

[29] For the text, see Minutes of the 1929 Committee of Jurists, p. 9. These minutes were published by the Secretariat of the League of Nations, as Document C. 166. M. 66. 1929. V.

United States claims an interest and gives or withholds its consent" to the Court's giving an advisory opinion; he emphasized that "his proposals were intended to cover exceptional and extremely improbable cases." [30] Though the members of the Committee were at first disposed to deal with the precise points made in the letter addressed to the various signatories by the Secretary of State on February 19, 1929, various re-drafts of Root's suggestions were offered and referred to a sub-committee, which reported a draft [31] based upon a proposal submitted by Sir Cecil Hurst.[32] This draft was adopted by the Committee in amended form on March 18, 1929,[33] with an explanatory report,[34] and communicated to the Council of the League of Nations. On June 12, 1929, the Council "adopted" the report and draft protocol, and directed that the texts be communicated to the Government of the United States and to the signatories to the Protocol of December 16, 1920; it also decided to place the question on the agenda of the Tenth Assembly and to transmit the texts to the Assembly, in view of its "being, like the Council, a body whose procedure in regard to the method of seeking advisory opinions from the Court would be affected by the adoption of the protocol proposed." [35] On August 31, 1929, the Council referred the report and the draft protocol to the Conference of Signatories which was to convene a few days later; and similar action was later taken by the Tenth Assembly.

§225. The Conference of Signatories of 1929. At the opening session of the second Conference of Signatories on September 4, 1929, the Secretary-General of the League of Nations stated that he was informed [36] that the Secretary of State of the United States was of the opinion that the draft protocol drawn up by the Committee of Jurists would effectively meet the reservations of the United States and would constitute a satisfactory basis for the adhesion of the United States.[37] No change was proposed in this text by the Conference of Signatories, and on September 5, 1929, the President of the Conference addressed a letter to the President of the Tenth Assembly and to the chairman of its First Committee, stating that the Conference had accepted the draft protocol "unanimously and

[30] *Idem*, p. 15.

[31] *Idem*, p. 106. The sub-committee consisted of Mr. Root and Sir Cecil Hurst; its draft was not limited to a re-draft of Article 4 of the 1926 draft protocol.

[32] *Idem*, p. 16. [33] *Idem*, pp. 82, 132. [34] *Idem*, p. 130.

[35] League of Nations Official Journal, 1929, p. 998.

[36] The Secretary-General did not at the time divulge that the source of his information was an *aide-mémoire* of August 14, 1929, from the Minister of the United States at Berne. This was later published by the U. S. Department of State. Publication No. 44, p. 41.

[37] Minutes of the 1929 Conference of Signatories, p. 9.

without alteration," and had decided to refer it to the First Committee of the Tenth Assembly.[38]

§226. Action of the Tenth Assembly. The draft protocol prepared by the Committee of Jurists was unanimously approved by the First Committee of the Tenth Assembly, without discussion;[39] and on September 14, 1929, it was adopted without discussion by the Tenth Assembly.[40] Opened to signature on September 14, 1929, the Protocol was promptly signed by representatives of a large number of States.[41]

§227. Analysis of the Protocol for the Accession of the United States.[42] The preamble to the Protocol of September 14, 1929, set forth an agreement "upon the following provisions" regarding the adherence [43] of the United States "subject (Fr., *sous condition*) to the five reservations formulated by the United States in the resolution adopted by the Senate on January 27, 1926." This statement seems to indicate that the five reservations offered by the United States are being consented to, *in toto*, and that in connection with the giving of this consent certain stipulations are to be laid down in the following provisions; it is the "adherence," and not the "following provisions," which is subject to the reservations. The text of the Senate resolution was not annexed to the Protocol, though M. Politis had suggested that course to the 1929 Committee of Jurists;[44] but it may possibly be taken to have been incorporated into the Protocol by the reference in the preamble.

(1) *Article 1. The States signatories of the said Protocol accept the special conditions attached by the United States in the five reservations mentioned above to its adherence to the said Protocol upon the terms and conditions set out in the following Articles.*

This provision constitutes an acceptance by the Signatories of "the special conditions attached by the United States," though the acceptance seems to be limited by the concluding phrase. The French version, "*acceptent, aux termes des conditions spécifiées dans les articles ci-après,*" makes it clear that the acceptance is subject to the provisions in the following articles; yet the acceptance of the reservations would seem to be

[38] *Idem*, p. 74.
[39] Records of Tenth Assembly, First Committee, p. 8.
[40] *Idem*, Plenary, p. 122.
[41] The Protocol was eventually signed on behalf of fifty-six States or Members of the League of Nations. League of Nations Document, A. 6. 1939. Annex I. V., pp. 71–2.
[42] See, also, Philip C. Jessup, The United States and the World Court (1929), pp. 14–58.
[43] The text of the Protocol uses the word "adherence" (in French *adhésion*). In the publications of the League of Nations, the word "accession" is used in the title given to the Protocol. Adherence, adhesion and accession have the same significance in this connection.
[44] Minutes of the 1929 Committee of Jurists, pp. 78–80.

complete, to the extent that their substance is not covered or diminished by a later article of the Protocol.

(2) *Article 2. The United States shall be admitted to participate, through representatives designated for the purpose and upon an equality with the signatory States Members of the League of Nations represented in the Council or in the Assembly, in any and all proceedings of either the Council or the Assembly for the election of judges or deputy-judges of the Permanent Court of International Justice, provided for in the Statute of the Court. The vote of the United States shall be counted in determining the absolute majority of votes required by the Statute.*

The first sentence of this article follows quite closely the second reservation offered by the United States, though it omits a specific reference to the filling of vacancies; the second sentence was not included in the reservations. The text was drafted at the 1926 Conference of Signatories, and no change was later made. It would have the effect of amending Articles 4, 8, 10, and 12 of the Statute, by creating electoral bodies consisting of the Assembly and the Council of the League of Nations plus representatives of the United States of America; in line with this provision, Article 4 of the Statute was amended by the Revision Protocol of September 14, 1929.

(3) *Article 3. No amendment of the Statute of the Court may be made without the consent of all the Contracting States.*

This text, which originated in the 1926 Conference of Signatories, generalizes a provision in the fourth reservation proposed by the United States. It adds nothing to the situation which would exist if it were omitted. Unfortunately, it tends to perpetuate the *lacuna* in the Statute due to its failure to provide an easier method of amendment in line with the provision in Article 26 of the Covenant of the League of Nations; fortunately, however, it does not specify any form for the giving of consent, and it leaves open the possibility of a future resort to the method of amendment adopted in the Revision Protocol of September 14, 1929.

(4) *Article 4. The Court shall render advisory opinions in public session after notice and opportunity for hearing substantially as provided in the now existing Articles 73 and 74 of the Rules of Court.*

The first part of the fifth reservation offered by the United States was "that the Court shall not render any advisory opinion except publicly after due notice to all States adhering to the Court and to all interested States and after public hearing or opportunity for hearing given to any State concerned." The 1926 Conference had proposed as a provision of its

draft protocol that "the Court shall render advisory opinions in public session." The amplification contained in the 1929 text would constitute an addition to the Statute which would make it impossible for the Court to effect any substantial change in Articles 73 and 74 of the Rules of Court as they were adopted on March 24, 1922, and amended on July 31, 1926. Since the Revision Protocol of September 14, 1929, has come into force, however, most of the substantial provisions of Articles 73 and 74 of the Rules have been incorporated into the Statute as Articles 66 and 67 thereof, and Article 4 of the Protocol for the adhesion of the United States has lost much of its intended force.

(5) *Article 5, paragraph 1. With a view to ensuring that the Court shall not, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest, the Secretary-General of the League of Nations shall, through any channel designated for that purpose by the United States, inform the United States of any proposal before the Council or the Assembly of the League for obtaining an advisory opinion from the Court, and thereupon, if desired, an exchange of views as to whether an interest of the United States is affected shall proceed with all convenient speed between the Council or Assembly of the League and the United States.*

Article 5 represents the chief contribution made by the 1929 Committee of Jurists. The second part of the fifth reservation offered by the United States was that the Court should not "without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest." The 1926 Conference of Signatories had feared that this provision might lend itself to a possible interpretation which would diminish the value of advisory opinions "in connection with the functioning of the League of Nations." [45] The proposal made by Mr. Root to the 1929 Committee of Jurists was designed to lay down "the manner in which shall be made known whether the United States claims an interest and gives or withholds its consent"; [46] and it was explained as "intended to provide against a very rare and improbable contingency." [47] Root's original draft expressly envisaged a possibility that the United States might be unable "to find the submission of the question so important for the general good as to call upon the United States to forego its objection in that particular instance, leaving the request to be acted upon by the Court without in any

[45] Minutes of the 1926 Conference of Signatories, p. 79.
[46] Minutes of the 1929 Committee of Jurists, p. 9. [47] *Idem*, p. 13.

way binding the United States"; and a provision followed for the exercise of the power of withdrawal.[48] M. Raestad took this to mean that "in case of disagreement, if the Council or the Assembly maintained its request for an advisory opinion, contrary to the wishes of the United States, the United States would not insist on exercising its right of veto and would withdraw from the Permanent Court." [49]

The introduction in the text finally adopted seems to assume the unqualified acceptance of the second part of the fifth reservation of the United States, by which the power of the Court to "entertain any request" would be limited; and it is to be noted that the remaining part of the paragraph relates not to the Court's power but to the procedure before the Council or Assembly. Yet interpretations given to the text by some members of the Committee of Jurists gave another emphasis. M. van Eysinga stated: "There might be a section of public opinion in America which desired to claim the right of veto in cases where a request for an advisory opinion had not been unanimous. The Committee now learned that the United States would be content if it were allowed to withdraw in such circumstances." [50] Sir Cecil Hurst explained to the 1929 Conference of Signatories that the text was "in reality a method of saying: 'For the purpose of giving satisfaction to the fifth condition embodied in the Senate resolution, the Secretary-General shall, through any channel designated for that purpose, inform the United States, etc.'"; he added that if the result of the discussion did not give satisfaction to the United States, "it would be remembered that the United States had the power to withdraw if necessary." [51] If this interpretation were accepted, it would seem that no absolute bar would be created to the Court's entertaining a request touching a dispute or question in which the United States has or claims an interest, without the consent of the United States; perhaps the interpretation finds some support in the reference to a stay of proceedings (Fr., *la procédure sera suspendue*) in the second sentence of the second paragraph of this Article. In the report adopted by the Committee of Jurists, it was emphasized that "the provisions of the Article have purposely been framed so as to afford a measure of elasticity in its application"; and that if the provisions of the Article failed to give it satisfaction, the United States "would be fully justified in withdrawing from the arrangement." [52] It seems clear that the Committee of Jurists was

[48] *Idem*, p. 9. [49] *Idem*, p. 17. [50] *Idem*, p. 20.
[51] Minutes of the 1929 Conference of Signatories, p. 18.
[52] Minutes of the 1929 Committee of Jurists, p. 131.

careful to avoid anticipation of possible but improbable consequences of its drafting, and for this reason it refrained from any complete exposition of the meaning of the text adopted. It was engaged in an effort to reconcile differing views, a process in which it is sometimes less profitable to seek clarity than to arrive at acceptable ambiguity.

It may also be noted that some confusion existed in the United States as to the proper interpretation of the effect of Article 5. The Secretary of State of the United States said in a letter to the President on November 18, 1929:[53] "Whenever a dispute to which we are a party is involved, no opinion on that dispute can be rendered unless we consent. When we claim an interest, although no dispute exists, we can, if we so desire, bring our great influence to bear against the rendering of such an opinion with the same legal standing as if we were a member of the Council or the Assembly of the League of Nations; and, in the extremely unlikely event of our being unable to persuade the majority of the Council or the Assembly that our interest is real and that the request for the opinion should not proceed, we may withdraw from membership in the Court without any imputation of unfriendliness." A different emphasis was given by Mr. Root, when on January 21, 1931, he told a committee of the United States Senate that "so long as we remain in that court, so long the court is barred from passing upon any question as to which we interpose an objection or claim an interest and refuse to consent."[54] This view was later adopted by the Secretary of State of the United States.[55]

The first paragraph of Article 5 provides that an exchange of views between the United States and the Council or Assembly before which a proposal for requesting an advisory opinion may be pending, shall be held, if desired, with a view to their reaching an agreement as to whether any interest of the United States is involved in the dispute or question to which the advisory opinion would relate. When a question was raised in the Committee of Jurists as to the extent of this provision, Sir Cecil Hurst explained that the words "before the Council or the Assembly of the

[53] U. S. Department of State, Publication No. 44, p. 12.

[54] U. S. Senate, Executive Document No. 1, 72d Congress, 1st session, p. 64. Mr. Root was later asked whether "the United States would have an absolute veto power which would take away the jurisdiction of the Court from rendering an advisory opinion"; and he replied, "Absolutely." *Idem*, p. 73.

For a somewhat elaborate discussion of the point, see Proceedings of the American Society of International Law, 1931, pp. 61–91.

[55] In a letter addressed to Senator Borah by Secretary Stimson, on March 22, 1932. See U. S. Senate Report No. 758, 72d Congress, 1st session, p. 59. In a report made on June 1, 1932, by Senators Walsh and Fess, the view was taken that "the difference as a practical matter between the original reservation V and the protocol of accession" was "so slight, even though the Root construction be rejected, as to approach the vanishing point." *Idem*, p. 14.

League" had been inserted to make it "clear that the provisions of the Article would not apply when the request for an advisory opinion came from an outside body and when it was not likely to be seriously entertained by the Council or the Assembly"; he urged "that the question of informing the United States should be left to the good sense and discretion of the Secretary-General and the Council," and he therefore opposed a suggestion that the word "serious" be inserted before the word "proposal." [56] The exchange of views provided for is limited to the question whether an interest of the United States is involved; it can hardly be assumed that if an interest of the United States is found to exist other States would necessarily find the United States' withholding of consent justified, and no doubt the exchange of views would be directed toward persuading the United States to give its consent.

(6) *Article 5, paragraph 2. Whenever a request for an advisory opinion comes to the Court, the Registrar shall notify the United States thereof, among other States mentioned in the now existing Article 73 of the Rules of Court, stating a reasonable time-limit fixed by the President within which a written statement by the United States concerning the request will be received. If for any reason no sufficient opportunity for an exchange of views upon such request should have been afforded and the United States advises the Court that the question upon which the opinion of the Court is asked is one that affects the interests of the United States, proceedings shall be stayed for a period sufficient to enable such an exchange of views between the Council or the Assembly and the United States to take place.*

This paragraph is clearly directed to the Court. The first sentence would require the Court to adopt a special procedure as to the United States, with respect to each request for an advisory opinion; with reference to other States, the Court does not fix "a reasonable time limit" for the filing of written statements unless it considers them "likely to be able to furnish information." The second sentence of this paragraph provides merely for a stay of proceedings in certain cases; it was explained in the report of the Committee of Jurists that "the desirability of obtaining an advisory opinion may only become apparent as the session of the Council is drawing to a close and when it may not be possible to complete the exchange of view [*sic*] before the members of that body separate." [57] The stay of proceedings may possibly be regarded as preliminary to the

[56] Minutes of the 1929 Committee of Jurists, pp. 77–9.

[57] Minutes of the 1929 Committee of Jurists, p. 131. See also the observations of Jonkheer van Eysinga, *idem*, pp. 20–21.

Court's declaration that it cannot entertain the request; consent by the United States or a withdrawal of the request by the Council, as a result of the exchange of views, would obviate the necessity for such a declaration.

(7) *Article 5, paragraph 3. With regard to requesting an advisory opinion of the Court in any case covered by the preceding paragraphs, there shall be attributed to an objection of the United States the same force and effect as attaches to a vote against asking for the opinion given by a Member of the League of Nations in the Council or in the Assembly.*

This paragraph, based upon a provision in Article 4 of the draft protocol of 1926, was retained in the proposal made by Mr. Root in 1929. It relates not to the Court's entertainment of a request for an advisory opinion, but to the power of the United States to prevent the Council or the Assembly from making a request. The provision represents a return to the idea of equality between the United States and the States represented in the Assembly or the Council, with respect to any objection to a request's being made to the Court. It, therefore, raises the question whether a unanimous vote in the Council or the Assembly is needed for a request, which so preoccupied the 1926 Conference of Signatories.[58] The "objection of the United States" to which force is to be given does not seem to be limited to an objection based on a claim of interest, and in this respect, the United States would enjoy equality; yet the introductory words seem to assume that the objection would have been advanced in the course of the "exchange of views" mentioned in the two preceding paragraphs. If the Court had been seized of a request before the exchange of views had taken place, and if the Council or Assembly did not thereafter withdraw the request because of the objection of the United States, it would seem to be for the Court itself to attribute force and effect to the objection. In this event, if the Court should decide that unanimity is required, it might hold itself to be no longer seized of the request.

(8) *Article 5, paragraph 4. If, after the exchange of views provided for in paragraphs 1 and 2 of this Article, it shall appear that no agreement can be reached and the United States is not prepared to forego its objection, the exercise of the powers of withdrawal provided for in Article 8 hereof will follow naturally without any imputation of unfriendliness or unwillingness to co-operate generally for peace and goodwill.*

This paragraph originated in the proposal by Mr. Root. It seems to afford to the United States an option between foregoing its objection and withdrawing, if no agreement can be reached. It applies only "after the

[58] See §469, *infra*.

exchange of views" has taken place, and the exchange referred to is only as to the question "whether an interest of the United States is affected." The text seems to be unduly restricted, for the statement as to "the exercise of the powers of withdrawal" (Fr., *la faculté de retrait*) ought to apply even though an agreement has been reached on the United States' having an interest. This suggests that the "agreement" referred to should not be limited to the subject-matter of the exchange of views provided for, but might relate to the desirability of the request for the opinion. The reservation offered by the United States envisaged a withholding of consent rather than the offering of an objection (Fr., *opposition*); but a withholding of consent by the United States would clearly be an "objection" within the meaning of this paragraph. The whole paragraph is of little substance.

(9) *Article 6. Subject to the provisions of Article 8 below, the provisions of the present Protocol shall have the same force and effect as the provisions of the Statute of the Court and any future signature of the Protocol of December 16, 1920, shall be deemed to be an acceptance of the provisions of the present Protocol.*

The first part of this Article would incorporate the provisions of the Protocol into the Statute of the Court, and would give effect to some of them, particularly to Articles 2 and 4, as amendments to the Statute;[59] yet, as they remain subject to the provisions of Article 8 of the Protocol, these amendments might later be cancelled by a special procedure. The 1929 Committee of Jurists thought it necessary to assure that later signatories of the Protocol of Signature of December 16, 1920, *i.e.*, States which sign that Protocol subsequently to the coming into force of the Accession Protocol of September 14, 1929, would also accept the special terms of the American accession. It would seem that this would have been true if nothing had been said on the point; for an effective modification of the Statute would have to be accepted by any later signatory of the Protocol of Signature of December 16, 1920. The 1929 Committee of Jurists also contemplated ratification subsequent to the Accession Protocol's coming into effect by States on whose behalf the Protocol of 1920 had been signed previously; a proposal to substitute "ratification" for "signature" was not accepted, but it was stated that "the term signature implied acceptance." [60]

[59] It is not accurate to say that the provisions of the Protocol are to "have the same force and effect" as the provisions of the Statute; it is meant that they shall have the force and effect of amendments to the provisions of the Statute.

[60] Minutes of the 1929 Committee of Jurists, p. 81.

(10) *Article 7. The present Protocol shall be ratified. Each State shall forward the instrument of ratification to the Secretary-General of the League of Nations, who shall inform all the other signatory States. The instruments of ratification shall be deposited in the archives of the Secretariat of the League of Nations.*

The present Protocol shall come into force as soon as all States which have ratified the Protocol of December 16, 1920, and also the United States, have deposited their ratifications.

The first paragraph of this Article follows a standard form in multipartite instruments opened to signature at Geneva. The second paragraph requires that the unanimous consent necessary be expressed by formal ratifications; the 1929 Conference of Signatories did not here adopt the innovation as to consent which was included in paragraph 4 of the Revision Protocol of September 14, 1929.[61]

(11) *Article 8. The United States may at any time notify the Secretary-General of the League of Nations that it withdraws its adherence to the Protocol of December 16, 1920. The Secretary-General shall immediately communicate this notification to all the other States signatories of the Protocol.*

In such case, the present Protocol shall cease to be in force as from the receipt by the Secretary-General of the notification by the United States.

On their part, each of the other Contracting States may at any time notify the Secretary-General of the League of Nations that it desires to withdraw its acceptance of the special conditions attached by the United States to its adherence to the Protocol of December 16, 1920. The Secretary-General shall immediately give communication of this notification to each of the States signatories of the present Protocol. The present Protocol shall be considered as ceasing to be in force if and when, within one year from the date of receipt of the said notification, not less than two-thirds of the Contracting States other than the United States shall have notified the Secretary-General of the League of Nations that they desire to withdraw the above-mentioned acceptance.

The fourth reservation offered by the United States had stipulated "that the United States may at any time withdraw its adherence to the said Protocol" of December 16, 1920. The 1926 Conference of Signatories had proposed that the signatory States should possess a "corresponding right" to withdraw their acceptance of the "special conditions" set by the United States in the second part of its fourth reservation and in its fifth reservation, in order that "the *status quo ante* could be reestablished if it were found that the arrangement agreed upon was not yielding satis-

[61] See §131, *supra*.

factory results";[62] it decided, however, "to invest the exercise of such a right with the character of a collective decision taken by a sufficiently large majority to ensure that it is inspired exclusively by objective considerations arising from the discovery of some serious practical difficulty."[63] The text of the 1926 Conference, in Article 7 of the draft protocol, was more limited than that adopted in 1929. Under the latter, however, the privilege of withdrawal is not really reciprocal. The United States alone may withdraw its adherence to the Protocol of 1920; but any withdrawal by another of the Contracting States will apply only to its acceptance of the United States conditions, and it will have to be supported by a total of two-thirds of the Contracting States before it becomes effective in the sense of rendering the Protocol inoperative. The period of one year within which such support must be rallied is so short for action by thirty-three or more States that withdrawal by other Contracting States would be impossible except in case of very serious dissatisfaction. This arraying of the United States on one side and of "the other Contracting States" on the other, lends color to a suggestion that the Protocol is in reality a bilateral arrangement.[64]

§228. Reservations Accepted without Reference. Two of the reservations offered by the United States were accepted without any specific reference to them in the Protocol of September 14, 1929, though the general reference to the five reservations contained in Article 1 of the Protocol may be taken to have covered them.

The first reservation offered was a *caveat* "that such adherence shall not be taken to involve any legal relation on the part of the United States to the League of Nations or the assumption of any obligations by the United States under the Treaty of Versailles." The first part of this reservation was expressly agreed to in the Final Act of the 1926 Conference of Signatories,[65] and it was not later dealt with. Yet it contains a flat contradiction of the basic provisions contained in the Protocol of September 14, 1929; indeed, it contradicts the statement in the second reservation offered by the United States, for participation in the elections of judges by the Assembly and the Council would clearly involve a legal relation to the League of Nations. The reservation was justified by the faulty drafting of the Protocol of Signature of December 16, 1920, which begins with the words "the Members of the League of Nations." The

[62] Minutes of the 1926 Conference of Signatories, p. 77.
[63] *Idem*, p. 53.
[64] See Proceedings of American Society of International Law, 1931, p. 77.
[65] Minutes of the 1926 Conference of Signatories, p. 77.

second part of the reservation was merely superfluous, for by no stretch of imagination could the United States be thought to be assuming any obligation under the Treaty of Versailles as a result of its accession.

The third reservation offered by the United States was "that the United States will pay a fair share of the expenses of the Court as determined and appropriated from time to time by the Congress of the United States." This also was agreed to in the Final Act of the 1926 Conference of Signatories, and it was not later discussed. The President of the 1926 Conference thought that it "could hardly be called a reservation";[66] yet it is to be noted that it assured to the United States a privilege not possessed by States which are members of the League of Nations, the privilege of determining the amount of its own contribution.[67]

§229. Defective Drafting of the 1929 Protocol. The Protocol for the Accession of the United States contemplated an accession to the Protocol of Signature of December 16, 1920, to which the Statute was annexed, but it failed to take account of the revision protocol of September 14, 1929 to which various amendments to the Statute were annexed, and of the possibility that the Revision Protocol might enter into force before the entry into force of the Accession Protocol. According to its terms the Protocol for the Accession of the United States was to have the effect of making the United States a party to the Protocol of Signature of December 16, 1920, with the original Statute annexed, whereas that Statute might already have been amended. For all practical purposes this defect in the Accession Protocol would be cured, however, if the United States should also ratify the Revision Protocol; by its simultaneous ratification of the Protocol of December 16, 1920, the Revision Protocol, and the Protocol for the United States' Accession, the United States would, since the Revision Protocol has been brought into force, become a party to the

[66] *Idem*, p. 12.

[67] Article 33 of the Statute makes no provision for contributions to the Court's expenses by the States not members of the League of Nations to which the Protocol of Signature was opened for signature. Article 22(1) of the League of Nations Financial Regulations provides: "States not Members of the League which have been admitted members of any autonomous organization of the League shall contribute towards the expenses of the autonomous organization concerned in the proportion in which they would contribute to such expenses if they were Members of the League." League of Nations Document, C. 536. M. 373. 1937. X. See §360, *infra*.

In other connections in which the United States has met a part of special expenses incurred by the League of Nations, the amount of its contribution has been computed with reference to the amount paid by the largest contributor to the League's budget, *i.e.*, by Great Britain. In 1933, a typical year, Great Britain's share of the League's budget amounted to 105 units, each unit being 33,016.43 Swiss francs, and 7.95 per cent of each contribution was to be paid over to the Court; on this basis the share of the Court's expenses payable by the United States for 1933 would have been 7.95 per cent of 105 × 33,016.43 Swiss francs, or 275,604.65 Swiss francs (then about $53,205 gold).

amended Statute. It was for the purpose of taking care of the position of the United States in this regard, that provision was made in paragraph 7 of the Revision Protocol that "for the purposes of the present Protocol, the United States of America shall be in the same position as a State which has ratified the Protocol of December 16, 1920"; this afforded the United States an opportunity to object to the coming into force of the amendments to the Statute, but no such objection was made.[68]

§230. Action on the Protocol for the Accession of the United States. The Accession Protocol of September 14, 1929, was to enter into force according to its terms when ratifications had been deposited with the Secretariat of the League of Nations by the United States and by "all States which have ratified the Protocol of December 16, 1920." This means that at any given time when the entering into force of the Accession Protocol might be in question, all the States which had ratified the 1920 Protocol of Signature must have deposited ratifications of the Protocol of September 14, 1929 in order to bring the latter into force. Many such States proceeded promptly to the deposit of their ratifications; on December 31, 1942, forty-two States or Members of the League of Nations which had ratified the 1920 Protocol of Signature had deposited ratifications of the 1929 Protocol—only Bolivia, Brazil, Chile, Haiti, Nicaragua, Paraguay, Peru and El Salvador had not done so.

The real obstacle to the entry into force of the 1929 Protocol was the failure of the United States to ratify it. There was first delay in the formality of signature—it was only on December 9, 1929, that the 1920 Protocol of Signature, the 1929 Revision Protocol, and the 1929 Accession Protocol were signed on behalf of the United States. A year then elapsed before President Hoover sought the advice and consent of the United States Senate; favorable reports were made by the Senate's Committee on Foreign Relations on June 1, 1932 [69] and January 10, 1935,[70] and on January 16, 1935 President Roosevelt urged favorable action by the Senate.[71] On January 29, 1935, the Senate voted 52 to 36 in favor of giving its consent,[72] but as the resolution to that effect failed to receive the necessary two-thirds majority, the question is still pending in the Senate.[73]

[68] See §133, *supra*.
[69] U. S. Senate Report No. 758, 72d Congress, 1st session.
[70] U. S. Senate Executive Report No. 1, 74th Congress, 1st session.
[71] U. S. Senate Document No. 11, 74th Congress, 1st session.
[72] See Hudson, "The United States Senate and the World Court," 29 American Journal of International Law (1935), pp. 301–307.
[73] U. S. Department of States, Publication No. 1751, pp. 4–5.

§231. Importance of the American Participation Proposed. The long and difficult road which was travelled to effectuate the participation of the United States in the maintenance of the Court may be said to have been due to exaggerations, both on the part of the signatory States and on the part of the United States. The importance of American participation was exaggerated in the First Assembly in 1920, in the two Conferences of Signatories, and in the elections of judges. For twenty years, the Court was maintained without aid from the United States, and it would be difficult to say that the value of its functioning was in any important respect diminished by American abstention. At no time did the United States propose to make any large contribution; at no time did it propose to make a declaration accepting compulsory jurisdiction.[74] For a period, agreements were made in exchanges of notes between the United States and other States [75] looking toward a possible insertion of provisions relating to the Court into arbitration treaties; but the requirement that recourse to the Court should be had by the United States "only by agreement thereto through general or special treaties" would have made it impossible for such provisions to go far toward increasing the Court's jurisdiction. If in a few cases during the decades following 1922 the United States might have gone before the Court as a party, this would not have added greatly to the Court's prestige. The desire of the signatory States for American participation was probably based in part upon the hope that it would lead the United States to play a larger rôle in international coöperation.[76]

It is equally true, on the other hand, that the course followed by the United States was largely dictated by exaggerations. In American opinion, mere participation in maintaining the Court was viewed as the assumption of an important rôle in coöperation to maintain the world's peace; a different estimate would doubtless have prevailed if the United States had been a member of the League of Nations. "Membership in the Court" appeared as a substitute for membership in the League, or

[74] By becoming a member of the International Labor Organization in 1934, the United States accepted the Court's jurisdiction provided for in Articles 29–33 and 37 of the constitution of the Organization. U. S. Treaty Series, No. 874.

[75] With Great Britain, June 23, 1923; with France, July 19, 1923; with Japan, August 23, 1923; with Portugal, September 5, 1923; with Norway, November 26, 1923; with the Netherlands, February 13, 1924; with Sweden, June 24, 1924; with Liberia, February 10, 1926. See U. S. Treaty Series, Nos. 674, 679, 683, 735, 680, 682, 708, 747. An exchange of notes between the United States and the Netherlands on August 21, 1924, also envisaged a possible agreement for referring to the Court claims arising under a convention concerning the prevention of smuggling of intoxicating liquors. *Idem*, No. 712. A similar exchange of notes was made by the United States and Cuba, March 4, 1926. *Idem*, No. 738.

[76] See Records of First Assembly, Plenary, p. 441.

as leading necessarily toward the latter; in spite of the American Government's past record in urging the establishment of a court, the step was looked upon in some quarters as one of involvement. This caused the fears expressed in the Senate, and the seeking of a very special position for the United States. The spirit of nationalism prevailing led not only to unfounded criticism of the structure and work of the Court, but also to a distrust of the purposes which it might be made to serve.

PART III

THE ORGANIZATION OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

CHAPTER 12

THE ELECTION OF MEMBERS OF THE COURT

§232. The System of Elections. The provisions of the Statute which deal with the election of members of the Court represent the greatest triumph achieved in 1920. The problem of election had baffled the 1907 Hague Conference in its effort to create a Court of Arbitral Justice, and a very unsatisfactory solution had been given to the problem in this proposal for an International Prize Court. The difficulty had been in reconciling the demands of the more powerful States for certain representation and the insistence of other States on the principle of equality. By 1920, however, a similar difficulty had been surmounted in the creation of the League of Nations; recognition had been given to the claims of the larger States in the provisions for permanent representation on the Council, while all Members of the League had been given equal representation in the Assembly. The 1920 Committee of Jurists took advantage of this fact to propose that the election of judges of the Court should be entrusted to the Assembly and the Council, and the proposal was greeted with general satisfaction. It is the existence of these two bodies which makes possible the maintenance of the Court under the present Statute.

Article 13 of the Statute provides that "the members of the Court shall be elected for nine years," [1] and under Article 15 a member elected to fill a vacancy serves only "for the remainder of his predecessor's term." This means that the membership is completely reconstituted at the end of each nine-year period. Given the difficulties to be overcome when the method of election had to be agreed upon in 1920, perhaps no other plan could have been adopted at that time; yet this feature of the system has been the subject of some criticism on the ground that the continuity of the Court's work would be better safeguarded if the terms of members of

[1] M. Politis proposed to the 1929 Committee of Jurists that the term "should be increased from nine to twelve years, with the hope that, in future, it would be found possible to go even further and to appoint the international judges for life." Minutes of the 1929 Committee of Jurists, p. 44.

the Court did not expire simultaneously.[2] Assuming a Court of fifteen members, the terms might have been so arranged that five members would have been elected every three years; such a system might have produced more continuity, and at the same time it might have reduced the possibility of bargaining in the elections.[3] The provision in Article 13 of the Statute that members may be re-elected has in practice worked to produce the first of these advantages, however.

The original Statute contained no provision fixing the time for holding the elections, and as revised the Statute merely provides that the dates of a by-election shall be fixed by the Council at its next session after the vacancy occurs. The general election of 1930 was held at the session of the Assembly and Council which immediately preceded the expiration of the first nine-year term, and plans were laid in 1939 for a general election at a comparable time; yet constitutionally a general election might be held at any time before or even after the expiration of the incumbents' regular term.

§233. The Nomination of Candidates. Only those persons who have been nominated by a national group in the Permanent Court of Arbitration or by a national group set up under the second paragraph of Article 4 of the Statute may be considered as candidates in an election. Though Article 4 refers to "national groups in the Court of Arbitration" generally, Article 5 restricts the invitations to be issued by the Secretary-General to "members of the Court of Arbitration belonging to the States mentioned in the Annex to the Covenant or to the States which join the League subsequently";[4] in practice, invitations are sent to national groups belonging to States which have joined the League even though such States have withdrawn from membership.[5] As the two categories of States may not include all the States represented in or entitled to representation in the Permanent Court of Arbitration, the privilege of making nominations may not extend to all the members of the latter.[6] Govern-

[2] This question arose before the 1920 Committee of Jurists in a proposal that elections to fill vacancies should be for a full period of nine years. Minutes of the 1920 Committee of Jurists, pp. 194, 465. See §155, *supra*.

[3] It is to be noted that under the scheme adopted in 1926 the terms of Members of the League of Nations non-permanently represented on the Council do not expire simultaneously. Records of Seventh Assembly, Plenary, p. 79.

[4] In the meaning of this phrase in Article 5, members of the Permanent Court of Arbitration "belong to" the States which appointed them, though they may be nationals of other States; Thailand has frequently appointed non-nationals.

[5] League of Nations Official Journal, 1936, p. 557.

[6] In 1940, however, every State actually represented in the Permanent Court of Arbitration was mentioned in the Annex to the Covenant or had joined the League subsequently to 1919. See §2, *supra*.

ments of various Members of the League of Nations not at the time represented in the Permanent Court of Arbitration have appointed national groups for the purpose of making nominations; *e.g.*, the Governments of Albania, Austria, Czechoslovakia, Estonia, Finland, Latvia, Lithuania and Poland, as well as various members of the British Commonwealth of Nations.[7] In practice, the Secretary-General of the League of Nations requests that appointments of national groups under the second paragraph of Article 4 be notified to him, in advance of the despatch of the invitations provided for in Article 5.[8]

The Secretary-General's invitation to the national groups to undertake the nomination of candidates must be sent out "at least three months before the date of the election"; it is usually sent even longer in advance of the election. It is not necessary for the Secretary-General to obtain the authority of the Council for issuing these invitations if the date of the election is known, but such authority is obtained in practice. The invitations are addressed to the members of the national groups individually, but they are sent to the ministry of foreign affairs of each State for transmission to the addressees. Though the invitations are addressed to individuals, the nominations must be made by the national groups; several individual members of a group cannot make nominations, each independently of the others.[9] The invitation is accompanied by reproductions of the relevant texts. The national groups are invited to make the nominations "within a given time," the period being determined by the Secretary-General; in practice the nominations are not required to be in the hands of the Secretary-General by the date set, and later nominations are always received.

The persons nominated by the national groups should be "in a position to accept the duties of a member of the Court" (Fr., *en situation de remplir les fonctions de membre de la Cour*); perhaps this is no more than a statement that the persons nominated should be qualified to serve on the

[7] Czechoslovakia, Finland and Poland were later "represented in the Permanent Court of Arbitration." Several States entitled to representation in the Permanent Court of Arbitration have failed to designate members of that body; under Article 4 of the Statute of the Permanent Court of International Justice, such States may create special national groups to make nominations only if they are members of the League of Nations.

[8] In 1921 the Secretary-General stated that it would not be possible for national groups whose appointments were not notified before June 1 to take part in the nomination of candidates; various Governments sent notification of their appointment of national groups after June 1, however, and such groups were invited to nominate candidates. League of Nations Official Journal, 1921, p. 428.

[9] Some of the national groups communicate to the Secretary-General formal *procès-verbaux* of their meetings.

Court, in accordance with the provision in Article 2 of the Statute.[10] The national groups are under no obligation to make sure that their nominees are willing to accept membership if elected. In 1929, the Committee of Jurists which was considering amendments to the Statute suggested that the Assembly adopt a "recommendation" that the Secretary-General in issuing invitations to national groups should request that they satisfy themselves that their nominees "possess recognised practical experience in international law" and "are at least able to read both the official languages of the Court and to speak one of them," and should recommend that the groups "attach to each nomination a statement of the career of the person nominated showing that he possesses the required qualifications." [11] In the 1929 Conference of Signatories, some opposition was manifested to the qualification of "recognised practical experience in international law," as an addition to Article 2 of the Statute,[12] and the opposition was renewed when the Tenth Assembly voted on September 14, 1929, to associate itself with the following recommendation by the Conference: [13]

> The Conference recommends that, in accordance with the spirit of Articles 2 and 39 of the Statute of the Court, the candidates nominated by the national groups should possess recognised practical experience in international law and that they should be at least able to read both the official languages of the Court and to speak one of them; it also considers it desirable that to the nominations there should be attached a statement of the careers of the candidates justifying their candidature.

Since 1930 the Secretary-General has followed the practice of drawing this recommendation to the attention of national groups when inviting them to make nominations.

Article 7 of the Statute requires the Secretary-General to submit to the Assembly and the Council a list of the persons nominated, "in alphabetical order." This list gives an indication of the source of the nominations in each case.[14] Only candidates whose names appear on the Secretary-General's list may be elected, in the first instance; but if the Assembly and the Council are unable to agree, a joint conference of

[10] See §138, *supra*.

[11] Minutes of the 1929 Committee of Jurists, p. 129.

[12] Minutes of the 1929 Conference of Signatories, pp. 25–28, 52–53. The opposition led by the representative of Norway was motivated by a desire to prevent the election of legal advisers to Foreign Offices, as a regular practice.

[13] Records of Tenth Assembly, Plenary, pp. 119–121; *Idem*, Committees, I, pp. 9–11.

[14] See, *e.g.*, League of Nations Official Journal, 1921, p. 811; League of Nations Document, A. 31. 1930. V.

six members may by unanimous vote select a person for its report to the electoral bodies, even though his name is not included on the Secretary-General's list.

§234. Voting in the Assembly and in the Council. Though this is not required by the Statute, the meetings of the Assembly and Council for the purposes of elections are held simultaneously.[15] Care is taken to prevent either body from knowing in advance the results of the balloting in the other,[16] and in practice the requirement in Article 8 of the Statute that the two bodies "proceed independently" is applied quite strictly. Article 21 of the Assembly's rules of procedure [17] requires that "all decisions relating to individuals shall be taken by a secret ballot," and this is applied in the elections. The voting in the Assembly is conducted in public sessions; the voting in the Council, on the other hand, is conducted at private meetings, Article 10 of the Council's rules of procedure being applied.[18] In both the Assembly and the Council, "an absolute majority of the votes" is required for an election, by Article 10 of the Statute; in practice, this seems to mean an absolute majority of the votes cast. It is the President of the Assembly who makes public declaration of the result of the voting by the Assembly and the Council. The election is definitive only upon the candidate's acceptance, but it then becomes effective as from the time of the announcement by the President of the Assembly.[19]

§235. The General Election, 1921.[20] The hope had been expressed in the First Assembly in 1920 that it would be possible for the first election of members of the Court to be held in 1921.[21] In some quarters it was thought that the election could not be held until the Statute had become operative, and the ratifications of twenty-five States or Members of the League of Nations were required to bring into force the Protocol of Signature to which the Statute was annexed; [22] yet the Council of the

[15] The 1920 Committee of Jurists declined to recommend a text which would have fixed different days for the voting in the Council and the Assembly. Minutes of the 1920 Committee of Jurists, pp. 396–397.

[16] In the beginning, this practice was due to the Assembly's jealousy of the Council.

[17] See League of Nations Document, C. 144. M. 92. 1937.

[18] As codified on May 26, 1933, Article 10 provides: "All decisions concerning persons shall be taken at a private meeting. On the demand of any member of the Council, the voting shall be by secret ballot." League of Nations Document, C. 197. M. 106. 1938.

[19] Series D, No. 2 (3d add.), p. 470.

[20] For a study of various elections, see Hudson, "The Election of Members of the Permanent Court of International Justice," 24 American Journal of International Law (1930), pp. 718–27.

[21] Records of First Assembly, Plenary, p. 467.

[22] The Protocol of Signature entered into force by September 1, 1921. See §119, *supra*.

League of Nations authorized the Secretary-General to take steps to bring about the conditional nomination of candidates on February 25, 1921, at a time when only the Swedish ratification had been deposited.[23] On April 1, 1921, the Secretary-General addressed to the Members of the League of Nations and the States mentioned in the Annex to the Covenant an enquiry as to the composition of their national groups, suggesting also the appointment of members of the Permanent Court of Arbitration by signatories of the Hague Conventions which were not represented in that body.[24] On June 2, 1921, formal invitations were addressed to members of the national groups to nominate candidates by August 15, 1921, subject to the condition that the elections could be held at the forthcoming Assembly; [25] invitations were later sent to members of national groups whose composition was notified to the Secretary-General after the expiration of the time-limit set.[26] On August 15, 1921, only twenty-four national groups had sent in their nominations; to allow for delays in transmission, the list was not closed until September 5, 1921, when eighty-nine candidates had been nominated by thirty-four national groups.[27] One national group expressly declined to nominate on the ground of lack of competence under the 1907 Hague Convention.[28] In the list of nominees submitted to the Assembly and Council by the Secretary-General, under Article 7 of the Statute, indication was given of the nationality of each candidate, and of the groups by which he had been nominated; [29] the actual ballot placed before the Assembly gave only

[23] Minutes of the Council, 12th session (1921), pp. 18, 115–6.

[24] League of Nations Official Journal, 1921, pp. 246–7, 314. On April 25, 1921, 38 States were represented in the Permanent Court of Arbitration by 122 members; but four of these groups were not invited to nominate. Thirty nine national groups, including 126 members, were listed in 1921 as groups referred to in Article 4 of the Statute. *Idem*, pp. 418–424.

[25] *Idem*, pp. 426–7.

[26] *Idem*, p. 428.

[27] League of Nations Document, A. 30. 1921. V. To aid in the appointment of judges *ad hoc* under Article 31 of the Statute, lists of the nominees are published in the Annual Reports of the Court. See Series E, No. 1, pp. 28–45.

[28] This was the group representing the United States of America. As the invitations to members of this group were not promptly transmitted to them by the Secretary of State of the United States, a second invitation was sent to them directly. The American group replied on September 15, 1921, as follows: "Considering that our appointment by the President as members of the Permanent Court of Arbitration was, under the Hague Convention of 1907, to perform the functions contemplated in that Convention and that your invitation to nominate candidates for judges of the new Permanent Court of International Justice is under another treaty, to which the United States is not a party, and in respect of which no authority has been conferred upon us, we reluctantly reached the conclusion that we were not entitled to make official nominations for the new Court." League of Nations Document, A. 92. 1921. V. In 1923, however, the American group composed of the same members made nominations, and nominations were later made by it. In 1930, the Ecuadoran group also expressed doubt as to its competence to make nominations.

[29] League of Nations Official Journal, 1921, p. 811.

the names of the candidates in alphabetical order with an indication of their nationality.[30]

Some nervousness was felt in the Second Assembly as to the procedure to be followed in the election, and on September 13, 1921, the day before the election was to begin, the President of the Assembly gave an elaborate explanation of the proposed procedure.[31] While the Council was to meet in private,[32] it had been decided that the Assembly should meet in public. The voting was to be by secret ballot, the results of each poll being announced to the Assembly. Rule 21 of the Assembly was to be applied to restrict the voting on each later ballot to the unsuccessful candidates who obtained the greatest number of votes on the previous ballots, the number of such candidates to be not more than twice the number of places remaining to be filled. The election was begun in both the Assembly and the Council on September 14, 1921.[33] The two bodies acted simultaneously, care being taken that neither should know the list of the other until the lists were ready for comparison. On the first ballot in the Assembly, nine candidates received an absolute majority of the votes cast: M. Altamira (Spain), M. Alvarez (Chile), M. Anzilotti (Italy), M. Barbosa (Brazil), M. de Bustamante (Cuba), Viscount Finlay (Great Britain), M. Loder (Netherlands), M. Oda (Japan), and M. Weiss (France). Thereafter, the Assembly decided that its Rule 21 should not be applied to exclude any candidate in later ballots.[34] On the second ballot, one candidate, Mr. Moore (U.S.A.), received a majority, but on the third and fourth ballots no candidate had a majority. On the fifth ballot, held after an interval, the Assembly's list of eleven candidates was completed, M. Huber (Switzerland) having received a majority. On comparison with the Council's list, nine candidates whose names appeared on both lists were declared to be elected; MM. Alvarez and Huber, whose names appeared on the Assembly's list, were not on the Council's list, the Council's vote having favored Baron Descamps (Belgium) and M. Nyholm (Denmark). At a later meeting of the Assembly on the same day, a sixth ballot yielded the names of MM. Huber and Nyholm which were also on the Council's second list, and this completed the election of eleven judges. Four ballots were then taken in the Assembly for the election of the deputy-judges; the names of three men on the Assembly's list, MM. Negulesco (Rumania),

[30] League of Nations Document, A. 65. 1921.
[31] Records of Second Assembly, Plenary, pp. 222–3.
[32] No account of the election appears in the published minutes of the Council.
[33] *Idem*, pp. 235–7.
[34] This precedent was followed at the subsequent elections.

Wang (China), and Yovanovitch (Serb-Croat-Slovene State), were also on the Council's third list. A fifth ballot was then taken in which the Assembly again favored M. Alvarez (Chile); but the Council again favored Baron Descamps (Belgium). A sixth ballot in the Assembly and a new ballot in the Council reached the same result. The President of the Assembly then raised the question of applying Article 12 of the Statute to set up a joint conference, and the Assembly requested that a joint conference should be set up; on September 15, the Assembly and Council elected their respective members of the conference.[35] On September 16, the joint conference recommended the election of M. Beichmann (Norway),[36] and soon afterward he was elected by both the Assembly and the Council as the fourth deputy-judge.[37] Thus, the election was completed in three days, after thirteen ballots in the Assembly, its successful termination being made possible by the device of the joint conference. One or more votes were cast for only fifty-five of the eighty candidates whose names were on the Assembly ballot, indicating that some of the nominations were hardly more than a compliment paid to the nominees. All of the successful candidates accepted their election.[38]

§236. **The Election of 1923.** The death of Judge Barbosa on March 1, 1923, created a vacancy, for which an election was authorized by the Council on April 17, 1923. The invitations issued by the Secretary-General requested nominations to be made by August 1, 1923, but the list was not closed until September 3. Thirty-one candidates were nominated by forty national groups;[39] twenty-two of the national groups nominated M. Pessôa (Brazil). The voting took place on September 10, 1923, and M. Pessôa received a majority of the votes cast on the first ballot both in the Assembly and in the Council.[40]

§237. **The Election of 1928.** On April 11, 1928, Judge Moore addressed a letter to the Secretary-General of the League of Nations, presenting his resignation and expressing a desire that it should take effect "as soon as the presence of the statutory full court, without my attend-

[35] Records of Second Assembly, Plenary, pp. 273, 279. When the Assembly was considering the nomination of its representatives in the joint conference, H. A. L. Fisher (Great Britain) laid down three general principles in which the Assembly seems to have acquiesced: (1) the Assembly's representatives should be delegates of States not represented on the Council; (2) the Assembly's representatives should represent different systems of law; and (3) the Assembly's representatives should not be immediately concerned in the issue between the two prominent candidates. *Idem*, p. 258. These principles are not to be found in the Statute, however.

[36] *Idem*, p. 281. [37] *Idem*, p. 291. [38] *Idem*, p. 293.

[39] League of Nations Document, A. 37. 1923. V. Of these thirty-one candidates, sixteen had been nominated in 1921.

[40] Records of Fourth Assembly, Plenary, pp. 22–23.

ance, at the opening of the regular session, on June 15th next, is reasonably assured";[41] on being informed of the letter, the Court asked Judge Moore to reconsider, but he replied that he was unable to alter his decision. As resignation was not provided for, either in the Statute then in force or in the Rules, the resignation was accepted by the Council provisionally, subject to the concurrence of the Assembly; the resignation was not finally accepted until September 4, 1928, when the Assembly concurred in the action of the Council. Meanwhile, however, the Secretary-General had taken the necessary steps to secure the nomination of candidates for an election to fill the vacancy. Twenty-six candidates were nominated by thirty-nine national groups,[42] of which thirty nominated Charles Evans Hughes (U.S.A.). The election took place on September 8, 1928, and Mr. Hughes received a majority of the votes cast on the first ballot in the Assembly and a unanimous vote in the council.[43]

§238. The Election of 1929. The death of Judge Weiss on August 31, 1928, and that of Lord Finlay on March 9, 1929, created two vacancies in the Court; since the vacancies occurred at separate times, the Secretary-General addressed to the national groups separate invitations to nominate in respect of each vacancy, and two lists of candidates were communicated to the Assembly.[44] Twenty-five candidates were nominated by thirty-seven national groups for the vacancy created by the death of Judge Weiss; M. Fromageot (France) was nominated by twenty-five of these groups. Twenty-four candidates were nominated by thirty-five national groups for the vacancy created by the death of Lord Finlay; Sir Cecil Hurst (Great Britain) was nominated by twenty-nine of these groups.[45] In the Tenth Assembly of the League of Nations, the general committee made a special report on the procedure to be followed, recommending that the two vacancies be filled simultaneously and that all candidates nominated for either vacancy should be eligible for both vacancies;[46] the constitutionality of such a procedure is difficult to justify. These recommendations were accepted by the Assembly and followed by the Council, both of which bodies proceeded to the election on September 19, 1929. Fifty-two delegations voted in the Assembly, and on the first

[41] Series E, No. 4, p. 26.
[42] League of Nations Document, A. 32. 1928. V.
[43] Records of Ninth Assembly, Plenary, p. 72.
[44] League of Nations Document, A. 26. 1929. V.
[45] An unusual feature of these nominations was that the British national group consisted of one man who nominated himself. In the House of Commons of the British Parliament, the Secretary of State for Foreign Affairs seems to have accepted responsibility for this nomination, which he attributed to a "previous government." 230 British Parliamentary Debates, p. 399.
[46] Records of Tenth Assembly, Plenary, p. 450.

ballot Sir Cecil Hurst and M. Fromageot received a majority of the votes cast; as their names were also on the Council's list they were declared elected.[47]

§239. The Special Election of 1930. On February 14, 1930, Judge Hughes offered his resignation to take effect immediately; on May 12, 1930, the resignation was accepted by the Council "subject to the concurrence of the Assembly," and the Secretary-General was requested to take steps for the eventual selection of a successor.[48] The list of nominations circulated to the Assembly contained the names of sixteen candidates, eleven of whom were nationals of the United States; these candidates were nominated by thirty-two national groups, of which eight nominated Frank B. Kellogg and seven nominated James Brown Scott, both nationals of the United States.[49] The Assembly did not take any action toward expressly concurring in the Council's acceptance of Judge Hughes' resignation, but on September 17, 1930, both the Assembly and the Council proceeded to the election. Mr. Kellogg received thirty of forty-seven valid votes cast in the Assembly on the first ballot, and as his name was on the Council's list he was declared to be elected.[50]

§240. The General Election of 1930. On March 21, 1930, invitations were despatched by the Secretary-General to national groups to make nominations for the second general election. In a memorandum accompanying the invitation, the national groups were asked to "observe that the candidates whom they nominate on the present occasion may, if elected members of the Court, be called upon to occupy their office either under the conditions laid down by the existing Statute of the Court or under those which would result from the entry into force of the amendments to the Statute" annexed to the Revision Protocol of September 14, 1929;[51] the memorandum also drew attention to the nature of the pending amendments, and to the salaries and pensions to which judges were entitled. In response to the invitation, fifty national groups nominated sixty candidates.[52] Though the Secretary-General had asked that nominations be sent to him by August 1, 1930, nominations were accepted which were received after the opening of the Assembly in September.

[47] *Idem*, pp. 126, 153.

[48] League of Nations Official Journal, 1930, p. 499. Judge Hughes was requested to take part in the session of the Court in June, 1930, but found himself unable to do so. Series C, No. 18–I, p. 9. Even if he was not still a member of the Court, he was eligible to sit under Article 13 of the Statute.

[49] League of Nations Documents, A. 33. 1930. V. and A. 33 (*a*). 1930. V.

[50] Records of Eleventh Assembly, Plenary, p. 128.

[51] League of Nations Document, Annex to M. L. 3 and 3 (*a*). 1930. V.

[52] League of Nations Documents, A. 31. 1930. V, A. 31 (*a*). 1930. V and A. 31 (*c*). 1930. V.

The list presented to the Assembly indicated the nominations received by each candidate, and contained a statement of his career based on information received from the national groups. One candidate received as many as twenty-two nominations, and eight candidates were nominated by six or more groups. Several nominees withdrew from candidacy, including Judge Huber and Judge Pessôa who declined to stand for reelection.[53]

On July 19, 1930, the representatives of twelve Latin-American States addressed a letter to the Secretary-General of the League of Nations, stating that the Governments of these States considered that Latin-American States "should be represented in the Court in the same proportion as on the Council" of the League of Nations, and that "of the fifteen members of the Court, three should be nationals of Latin-American States"; it was stated that "the maintenance of this proportion is particularly necessary in view of the probability of an increase in the near future in the number of American countries which are Members of the League." [54] Of the twelve Governments on behalf of which this demand was made, eight—those of Bolivia, Colombia, Guatemala, Honduras, Nicaragua, Paraguay, Peru and El Salvador—had not at the time ratified the Protocol of Signature of December 16, 1920, and only two of the twelve had become bound by the "optional clause"; nor had any of the twelve States ever been represented in a case before the Court. The Secretary-General of the League of Nations communicated the letter to the Assembly,[55] and it was also brought to the attention of the Council.

In advance of the session of the Eleventh Assembly, the Secretary-General circulated a note concerning the election, drawing attention to the proposed amendments to the Statute, to the financial regulations applicable to members of the Court, and to the procedure to be followed. On September 12, 1930, the Council formulated a proposal that in view of the fact that the Revision Protocol of September 14, 1929, had not been brought into force, the number of judges should be increased from eleven to fifteen; this increase was effected by the Assembly on September 25, 1930, and the action greatly facilitated the general election which followed. The First Committee of the Assembly reported its view that if the Revision Protocol of September 14, 1929, should enter into force

[53] Judge Loder had also declined to stand for reëlection.

[54] League of Nations Official Journal, 1930, p. 1321. It may be recalled that at the First Assembly of the League of Nations in 1920 a Colombian proposal to allot the judgeships to various continents had been rejected. Records of First Assembly, Committees, I, p. 354. See §148, *supra*.

[55] League of Nations Document, A. 31. 1930. V, p. 23.

at some future date, "it would have no effect upon the term of office of judges elected at the present Assembly," [56] and that thereafter the deputy-judges to be elected would "no longer be called upon to exercise their functions"; the election seems to have been conducted with this understanding.

The Assembly and Council proceeded to the election on September 25, 1930.[57] On the first ballot fourteen candidates received an absolute majority of the 52 votes cast in the Assembly: M. Adatci (49 votes), M. Anzilotti (40), M. Fromageot (40), Sir Cecil Hurst (40), M. Altamira (38), Jonkheer van Eysinga (38), M. Guerrero (38), Baron Rolin-Jaequemyns (38), Mr. Kellogg (35), Count Rostworowski (34), M. Schücking (34), M. Wang (32), M. de Bustamante (31), and M. Negulesco (30). On the second, third and fourth ballots, no candidate received a majority; the Cuban delegate then proposed a recess, but the Assembly proceeded to a fifth ballot on which M. Urrutia received 23 of 45 valid votes.[58] On comparison with the Council's list, the latter was found to contain the names of the candidates who had been successful in the first ballot in the Assembly, and these fourteen candidates were declared elected. At a later meeting on the same day, the balloting in the Assembly was resumed. On the sixth to ninth ballots, no candidate received a majority in the Assembly. On the tenth ballot Å. Hammarskjöld received a majority, but the Council's second list contained the name of M. Urrutia. An eleventh ballot was then taken in the Assembly, in which M. Urrutia obtained a majority, and as his name appeared on the Council's third list he was declared to be elected. The election of the deputy-judges then followed. On the first ballot in the Assembly, M. Redlich received a majority of the votes; on the second ballot, MM. Novacovitch and Erich had a majority, and on the fourth ballot M. Octavio de Langgaard Menezes had a majority. The Council's list contained the names of MM. Erich, Novacovitch and Redlich and they were declared to be elected; it also contained the name of M. da Matta. A fifth ballot in the Assembly gave M. da Matta a majority, but the Council had meanwhile shifted to M. de Langgaard Menezes. A sixth ballot in the Assembly gave a majority to M. da Matta, who also received a majority in the Council, and he was declared elected.

[56] Records of Eleventh Assembly, Plenary, p. 131.
[57] *Idem*, pp. 134–140. The published minutes of the 60th session of the Council contain no account of the election.
[58] A blank vote was not counted. *Sed quære.*

The election was thus completed in a single day, without setting up a joint conference, after a total of seventeen ballots in the Assembly and after a comparison of six lists drawn up by each of the electoral bodies. All of the successful candidates accepted the election. A notable feature of this election was that Jonkheer van Eysinga (Netherlands) was elected a judge although he had not been nominated by the national group of the Netherlands.

§241. The Election of 1935. On January 14, 1935, the Council, acting in accordance with the pending amendment to Article 14 of the Statute, proceeded to fix the date for the election of a successor to Judge Adatci who had died on December 28, 1934; in the report submitted to the Council on that occasion, it was stated that "in order to avoid the inconveniences that might arise if too long an interval were allowed to elapse before the vacancy was filled, it appeared desirable that the Council should, on each occasion, consider whether it might not be appropriate to advance the date of the election by summoning a special session of the Assembly," [59] but in this instance it was decided that the election should take place at the ordinary session of the Assembly in 1935. Twenty-seven candidates were nominated by forty-two national groups; twenty-eight of these groups nominated Harukazu Nagaoka (Japan).[60] When the election was held on September 14, 1935, only eight of the candidates nominated were voted for in the Assembly.[61] M. Nagaoka received thirty-five of fifty-one votes on the first ballot in the Assembly, and as he received also a majority of the votes in the Council, he was elected.

§242. The Two Elections of 1936. The death of Judge Schücking on August 25, 1935, and the resignation of Judge Kellogg on September 9, 1935, created two vacancies in the Court. On September 28, 1935, the Council decided that the election to fill these vacancies should be "included in the agenda of the first session of the Assembly which takes place after the end of the period of three months" necessary for the nominations; [62] the invitations to the national groups, therefore, called for nominations to be made by January 20, 1936. Subsequently, however, the Council decided to postpone the election to the ordinary session of the Seventeenth Assembly in 1936,[63] and this decision was confirmed by the

[59] League of Nations Official Journal, 1935, p. 97.
[60] League of Nations Document, A. 14 (1). 1935. V.
[61] Records of Sixteenth Assembly, Plenary, pp. 69–70.
[62] League of Nations Official Journal, 1935, p. 1203.
[63] On June 12, 1936, the Italian Government expressed the view that the election should not be placed on the agenda of the Sixteenth Session of the Assembly when it resumed its proceedings. *Idem*, 1936, p. 783.

Assembly on July 3, 1936.[64] In response to the invitations to nominate, forty-eight national groups nominated thirty-six candidates; thirty-nine groups nominated Manley O. Hudson, twenty-two nominated Åke Hammarskjöld, and ten nominated Viktor Bruns.[65]

A third vacancy was created by the resignation of Judge Wang;[66] when the Council accepted the resignation on January 24, 1936, it foresaw that the filling of the three vacancies at the same time might lead to difficulties with respect to the nomination of candidates, and it was thought to be "necessary to consider how the necessity for the national groups to be able to nominate for the new vacancy is to be reconciled with the fact that they have already been invited to nominate four candidates for the two earlier vacancies."[67] On May 11, 1936, the matter was referred to a Committee of Jurists, and on May 13, the Council approved this Committee's report suggesting that invitations for nominations should be despatched to national groups, including "the groups of States which, although not mentioned in the Annex to the Covenant, have been Members of the League of Nations";[68] the invitations were despatched on May 23, 1936. The Council's Committee proposed a further study of the question whether a single election should be held for the three vacancies, or whether there should be two separate elections; on July 11, 1936, it proposed that two separate elections should be held, one to fill the Kellogg and Schücking vacancies at which only those candidates would be eligible who had been nominated for these vacancies, and one to fill the Wang vacancy at which only those candidates would be eligible who had been nominated for this vacancy.[69] This proposal, later adopted by the Council and by the Assembly, would seem to have been contrary to the precedent set at the time of the 1929 election.[70] Forty national groups nominated nineteen candidates for the Wang vacancy, twenty-nine of them nominating Mr. Cheng Tien-Hsi (China).[71]

The 1936 elections encountered a further complication with respect to the participation of States which though parties to the Protocol and

[64] Records of Sixteenth Assembly, Plenary, II, pp. 52–53.
[65] League of Nations Document, A. 8 (1). 1936. V.
[66] Letters of resignation were addressed by Judge Wang on January 15, 1936, both to the President of the Court and to the Secretary-General of the League of Nations.
[67] League of Nations Official Journal, 1936, p. 126.
[68] *Idem*, p. 557.
[69] *Idem*, p. 1243; Series E, No. 12, p. 425.
[70] In 1929, separate nominations were made for the Weiss and Finlay vacancies, but a single election was held at which any candidate on either of the two lists was declared to be eligible to election to fill either vacancy.
[71] League of Nations Document A. 21 (1). 1936. V.

Statute of 1920, had withdrawn from membership in the League of Nations. After the coming into force of the amendments to the Statute on February 1, 1936, Article 4 provided that

> The conditions under which a State which has accepted the Statute of the Court, but is not a Member of the League of Nations, may participate in electing the members of the Court shall, in the absence of a special agreement, be laid down by the Assembly on the proposal of the Council.

In 1936 this raised a question of the possible participation by Brazil, Germany and Japan. On June 24, 1936, Brazil asked to be admitted "to participate in the election of the judges, not merely in the Assembly, but also in the Council"; in a note of June 29, 1936, Japan sought a position not "inferior either to that which the signatories of the Court's Statute contemplated conferring on a certain non-member state"—the reference being to the Protocol of September 14, 1929, concerning the accession of the United States—"or to the most favorable treatment" accorded to any non-member State.[72] No desire to participate was expressed by the German Government. The Council's Committee of Jurists reporting on July 11, 1936 recommended three rules for adoption by the Council.[73] When these rules came to be considered by the Council, it was easily agreed that each of the States in question might vote in the Assembly, but it was thought that it would "be difficult to secure agreement as to the final settlement of the question of a vote in the Council." The Council's resolution of September 25, 1936, proposed "as a provisional measure and without prejudging any question of principle, that at any election of members of the Court which may take place before January 1, 1940," Germany, Brazil and Japan should if they desired be admitted to vote in the Council as well as in the Assembly.[74] The solution given to the matter by the Assembly's resolution of October 3, 1936 was as follows: [75]

> 1. If a State which is not a Member of the League but is a party to the Statute of the Court notifies the Secretary-General of its desire to participate in the election of members of the Court, such State shall *ipso facto* be admitted to vote in the Assembly;
>
> 2. At any election of members of the Court which may take place before January 1, 1940, Germany, Brazil and Japan, being States which are not Members of the League but are parties to the Statute of the Court, if they notify their desire to do so to the Secretary-General, shall, as a provisional

[72] League of Nations Official Journal, 1936, p. 1244.
[73] *Idem*, p. 1243.
[74] *Idem*, pp. 1155–57.
[75] Records of Seventeenth Assembly, Plenary, pp. 105, 130.

measure and without prejudging any question of principle, also be admitted to vote in the Council;

3. The Secretary-General is instructed to take the necessary measures to allow States which, though parties to the Statute of the Court, are not Members of the League of Nations to participate in the elections.

The two elections were held on October 8, 1936, with representatives of Brazil and Japan participating in both the Council and the Assembly. In the first election to fill the Kellogg and Schücking vacancies, fifty-three valid votes were cast on the first ballot in the Assembly; Manley O. Hudson received forty-eight votes and Å. Hammarskjöld received thirty-eight votes, and as a majority of the Council also favored these candidates, they were declared to be elected.[76] In the second election Mr. Cheng Tien-Hsi received thirty-one votes on the first ballot in the Assembly, but on the first ballot in the Council M. Münir Ertekin (Turkey) received the majority of the votes; on the second ballot in the Assembly, Mr. Cheng Tien-Hsi received thirty of the fifty valid votes cast, and as he had a majority of the votes in the second ballot of the Council, he was declared to be elected.[77]

§243. The Election of 1937. A vacancy having been created by the death of Baron Rolin-Jaequemyns on July 11, 1936, national groups were invited to send in their nominations by October 27, 1936. Forty national groups nominated twenty-one candidates, thirty-three of them naming Charles de Visscher (Belgium).[78] The election was held on May 27, 1937, with Brazil and Japan again participating in the voting in the Council and in the Special Assembly. M. de Visscher was the successful candidate on the first ballot in both the Council and the Assembly, receiving thirty-five of fifty-two votes in the latter body.[79]

§244. The Election of 1938. A vacancy was created by the death of Judge Hammarskjöld on July 7, 1937, and national groups were invited to make nominations for filling it by October 30, 1937; sixteen candidates were nominated by thirty-nine national groups.[80] Twenty-two of the groups nominated Rafael W. Erich (Finland). The election was held on September 26, 1938, with Brazil and Japan participating both in the Assembly and the Council. The first ballot in the Assembly gave no candidate a majority; on the second ballot, M. Erich received thirty-three

[76] *Idem*, p. 110. [77] *Idem*, p. 111.
[78] League of Nations Document, A (Extr.). 3. 1937. V.
[79] Records of Special Assembly (League of Nations Official Journal, 1937, Special Supplement No. 166), p. 35.
[80] League of Nations Document, A. 28. 1938. V.

of fifty-one valid votes cast, but in the Council a majority favored Michael Hansson (Norway); in a third ballot the Assembly maintained its choice, and as M. Erich then received the vote of the Council he was elected.[81]

§245. Preparations for a General Election in 1939. The second nine-year period for which judges were elected expired at the close of the year 1939; hence a third general election of members of the Court was due to be held in 1939. Invitations to nominate candidates in this election were sent out on February 17, 1939, and it was requested that the nominations be made by May 31, 1939. In response to these invitations, forty-six national groups nominated fifty candidates, but only twenty of the candidates received three or more nominations;[82] ten of the sitting judges were among the candidates nominated. The list included nationals of some forty States, but some of the larger States—notably Germany, Italy, and Japan—had no nationals on the list.

In 1937 the Peruvian delegation informed the Eighteenth Assembly of the League of Nations that Peru had proposed to other Latin-American States "that they should take concerted action with a view to obtaining for American jurists a larger number of seats" on the Court, the view of the Peruvian Government being that the American juridical system was entitled to fuller representation in view of its contributions to the progress of international law;[83] all of the Governments approached were said to have expressed their agreement in principle. In announcing Chile's support of this proposal, the Chilean delegation stated to the Eighteenth Assembly that its Government favored an increase "in the number of judges in order to afford Latin America adequate participation," and as an alternative to setting up an American Court of International Justice.[84]

On September 7, 1939, the Egyptian Minister for Foreign Affairs, acting "in agreement with Turkey, Iran, and Iraq," addressed a letter to the Secretary-General of the League of Nations, suggesting that in compliance with Article 9 of its Statute the Court should "include a jurist representing Islamic civilization and Moslem law."[85]

[81] Records of Nineteenth Assembly, Plenary, pp. 92–93.

[82] League of Nations Document, A. 27. 1939. V.

[83] Records of Eighteenth Assembly, Plenary, p. 94. The Peruvian Government seems to have desired that six judgeships be allocated to the American States. See 125 *Boletin de relaciones exteriores* of Peru (1936), pp. 228–30; *Octava Conferencia Internacional Americana, Diario de Sesiones* (1938), p. 201.

[84] Records of Eighteenth Assembly, Plenary, p. 41. In 1936, the Peruvian Government had proposed an amendment to Article 14 of the Covenant, to provide for "proportional representation of continental groups." League of Nations Official Journal, Spec. Supp. No. 154, p. 27.

[85] League of Nations Document, A. 30. 1939. V.

§246. Postponement of the Third General Election. The Assembly was scheduled to meet in its twentieth ordinary session on September 11, 1939, but on a proposal made by the Government of the United Kingdom, meetings of both the Assembly and the Council were adjourned. Subsequently, on an appeal by the Finnish Government, the Council was summoned for December 9, and the Assembly was convoked for December 11, 1939; on this latter date the Assembly, on the proposal of its General Committee, decided "not to proceed during the present session with the renewal of the membership" of the Court, but to regard the election as "postponed to another session." [86]

In these circumstances, the provision in Article 13 of the Court's Statute became operative that the members of the Court "shall continue to discharge their duties until their places have been filled," with the result that the terms of the judges previously elected were automatically extended to cover the period which might elapse until an election could be held;[87] and the Assembly took note to this effect.

§247. Vacancy Created by the Death of Judge Rostworowski. The death of Count Rostworowski on March 24, 1940, left the membership of the Court incomplete; and it raised the question whether the death of a judge who under paragraph 3 of Article 13 of the Statute had continued in office after the expiration of the nine-year term for which he was elected, created a "vacancy" as that term is used in Article 14 of the Statute. "Without prejudice to the action of the Council and Assembly in regard to the election itself," the Secretary-General proceeded on May 10, 1940, to invite national groups to make nominations for filling the vacancy;[88] three national groups responded to this invitation by nominating four candidates, but no further steps were taken toward holding an election.

§248. Vacancies Created by the Resignations of Judges Urrutia and Nagaoka. Two vacancies were created by the resignations of Judges Urrutia and Nagaoka in January 1942, but no immediate steps were taken toward the filling of these vacancies.

[86] Records of Twentieth Assembly, Plenary, p. 6.

[87] On November 30, 1939, the Court had taken a decision that in the event of the operation of Article 13 of the Statute, the principle of that Article would be applicable so that the President and Vice-President of the Court and the members and substitute members of the Court's three Chambers would continue to discharge the duties of their offices until their replacement. League of Nations Document, C. 402. M. 306. 1939. V.

The provisions of Article 9 (2) and 12 (3) of the 1936 Rules were based on the assumption that a general election would take place at the normal time, that is, in the latter part of the last year of the nine-year term; some changes might well have been made to provide for the contingency of the postponement of an election, such as was effected in 1939.

[88] League of Nations Document, C. L. 63. 1940. V.

§249. Members of the Court, 1922–1930. Though the composition of the Court during the first nine-year period was the subject of some criticism, in eminence, in experience, and in geographical representation the roster was probably as satisfactory as that which any possible system of election might have produced. It is notable that of the fifteen members elected to the Court in 1921, ten were members of the Permanent Court of Arbitration. A brief biographical note concerning each of the members may convey some impression of the strength of the Court during this period.[89]

Judge B. C. J. Loder (Netherlands), born in 1849, had long been a judge of the Netherlands Supreme Court. He was one of the founders of the International Maritime Committee, he had taken part in various conferences on maritime law, and had been active in the planning for the creation of a court; he had served as president of the Conference held at The Hague in February 1920, and as vice-president of the 1920 Committee of Jurists. He died on November 4, 1935.

Judge André Weiss (France), born in 1858, was a professor of international law with a wide experience as legal adviser to the French Ministry of Foreign Affairs and in international arbitrations. He had been a delegate to the Paris Peace Conference in 1919. He was the author of a celebrated treatise, *Traité de droit international privé* (6 vols.). He died on August 31, 1928.

Lord Finlay (Great Britain), born in 1842, was for many years a member of the British Parliament, and he had served as Solicitor-General, Attorney-General, and Lord Chancellor in Great Britain. He died on March 9, 1929.

Judge D. G. G. Nyholm (Denmark), born in 1858, had a previous judicial career extending over twenty-eight years, as a member of the Court of Appeal at Copenhagen and as a judge of the Mixed Court at Cairo. He died on August 31, 1931.

Judge John Bassett Moore (United States of America), born in 1860, had been for thirty years a professor of international law at Columbia University; he had had a wide experience in the Department of State at Washington, in international conferences and in international arbitrations. His *History and Digest of International Arbitrations* (6 vols.) and his *Digest of International Law* (8 vols.) are in use throughout the world. He resigned on April 11, 1928.

[89] These biographical notes are based upon the material appearing in the annual reports. Series E, No. 1, pp. 14–27; No. 5, pp. 25–26, 33; No. 6, pp. 20–21; No. 7, pp. 21–41.

Judge Antonio S. de Bustamante (Cuba), born in 1865, for thirty years a professor of international law at Havana, had long been in public life in Cuba. He was a delegate to the Peace Conference at The Hague in 1907, and to the Paris Peace Conference in 1919. His publications on international law are widely known; he drafted the Bustamante Code of Private International Law of 1928. He was reelected as a judge in 1930.

Judge Rafael Altamira (Spain), born in 1866, had been professor at the University of Oviedo and the University of Madrid, actively interested in comparative law, and had had experience in international arbitrations. He had served as a member of the 1920 Committee of Jurists. He was reelected as a judge in 1930.

Judge Yorozu Oda (Japan), born in 1868, had been professor at Kyoto University, interested chiefly in Japanese and Chinese administrative law.

Judge Dionisio Anzilotti (Italy), born in 1869, had long been a professor of international law at Florence, at Palermo, at Bologna and at Rome, and a legal adviser to the Italian Ministry of Foreign Affairs. As Under-Secretary-General of the League of Nations, he had played an important rôle in the launching of plans for the Court. He was the founder of the *Rivista di diritto internazionale*. He was reelected as a judge in 1930.

Judge Max Huber (Switzerland), born in 1874, had been for twenty years a professor at Zurich. He had served as a delegate to the Peace Conference at The Hague in 1907, and as legal adviser to the Political Department of the Swiss Federal Council, and had been active in the early work of the League of Nations.

Judge Ruy Barbosa (Brazil), born in 1849, had served as a delegate to the Peace Conference at The Hague in 1907. He died on March 1, 1923, without having attended any session of the Court.

Judge Epitacio da Silva Pessôa (Brazil), born in 1865, elected to succeed Judge Barbosa in 1923, had been President of Brazil, and had served as Minister of Justice and as *Procureur-Général*. He was a delegate to the Paris Peace Conference in 1919, and had been active in the codification of Brazilian and international law. He died on February 13, 1942.

Judge Charles Evans Hughes (United States of America), born in 1862, elected to succeed Judge Moore in 1928, had been Governor of New York, Justice of the Supreme Court of the United States, and Secretary of State of the United States, and had participated in numerous

international conferences. He resigned on February 14, 1930, after his appointment as Chief Justice of the Supreme Court of the United States.

Judge Henri Fromageot (France), born in 1864, elected to succeed Judge Weiss in 1929, had long been legal adviser to the French Ministry for Foreign Affairs. He had had a wide experience in international conferences and in international arbitrations; from 1913 to 1922, he was president of an Anglo-American Claims Tribunal; from 1920 to 1929 he was closely identified with the work of the League of Nations, and he was a member of the 1929 Committee of Jurists. Prior to his election as judge, he had served on the Court as judge *ad hoc* on two occasions. He was reelected as a judge in 1930.

Sir Cecil Hurst (Great Britain), born in 1870, elected to succeed Lord Finlay in 1929, had been for many years legal adviser to the British Foreign Office. He had had a prominent part in the Peace Conference at Paris in 1919, and in the work of the Council and Assembly of the League of Nations from 1920 to 1929. He was a member of the 1929 Committee of Jurists. In several cases, he had been counsel before the Court. He was reelected as a judge in 1930.

Judge Frank B. Kellogg (United States of America), born in 1856, elected to succeed Judge Hughes in 1930, had been Secretary of State of the United States, and he was widely known as co-author of the Treaty for the Renunciation of War signed at Paris on August 27, 1928. He resigned on September 9, 1935, and died on December 21, 1937.

Deputy-Judge Michailo Yovanovitch (Yugoslavia), born in 1855, had been Minister of Justice, and President of the Court of Appeal and of the Court of Cassation at Belgrade.

Deputy-Judge F. V. N. Beichmann (Norway), born in 1859, had been judge and president of the Court of Appeal at Trondhjem. He had played a prominent rôle in international conferences on the unification of law, and in various international arbitrations. He died on December 29, 1937.

Deputy-Judge Demètre Negulesco (Rumania), born in 1875, had been a judge and a professor at Bucharest, and had served as a delegate to the first and second Assemblies of the League of Nations. He was elected as a judge in 1930.

Deputy-Judge Wang Ch'ung-hui (China), born in 1881, had been Minister of Justice and Minister of Foreign Affairs, judge of the Supreme Court and president of the Codification Commission in China. His translation of the German Civil Code into English was a notable achievement. He was elected as a judge in 1930, but resigned in 1936.

§250. Members of the Court since 1931.[90] At the general election in 1930, Judges Kellogg, Fromageot, de Bustamante, Altamira, Anzilotti and Hurst were reelected, and Deputy-Judges Negulesco and Wang were elected judges. The increase in the number of judges made place for the election of seven new judges, and produced a wider geographical distribution; it is to be noted, however, that no national of a Scandinavian State was included in the new roster of the Court, a fact which did not escape comment at the time.

Judge Minéitcirô Adatci (Japan), born in 1870, had been a professor of diplomatic history and international law in Japan, and had been judge of various prize courts during the Russo-Japanese War. He had served as Minister to Mexico and as Ambassador at Brussels and at Paris. He was a member of the 1920 Committee of Jurists, and a delegate to the Assembly of the League of Nations for many years. He had also been the representative of Japan on the Council and on the Governing Body of the International Labor Organization; in 1923 he was president of the International Labor Conference. He died on December 28, 1934.

Judge J. Gustavo Guerrero (El Salvador), born in 1876, had been Minister of Foreign Affairs, and had served as Minister to Italy, to Spain, to France and to the Vatican. He had played a prominent rôle in the Council and Assembly of the League of Nations, and in numerous international conferences; in 1929 he served as president of the Tenth Assembly of the League of Nations.

Baron Rolin-Jaequemyns (Belgium), born in 1863, had served as a judge in the Congo. He had been a delegate to the Peace Conference at The Hague in 1899, had served as Belgian High Commissioner in the Rhineland, and had been identified with the work of the League of Nations from 1928 to 1930. For some years he was editor of the *Revue de droit international et de législation comparée.* He died on July 11, 1936.

Count Michel Jean César Rostworowski (Poland), born in 1864, had been professor of international and constitutional law at Cracow, and had been prominently identified with the codification of Polish law. During several years he was a member of the Polish delegation at the Assembly of the League of Nations. Prior to his election as judge, he had served on the Court as judge *ad hoc* on four occasions. He died on March 24, 1940.

Judge Francisco José Urrutia (Colombia), born in 1870, had been

[90] These biographical notes are based upon the material appearing in Series E, No. 7, pp. 21–41; No. 12, p. 23; No. 13, pp. 23–26; No. 15, p. 17.

Minister of Foreign Affairs and President of the Senate in Colombia, as well as Minister to Brazil, to Spain and to Switzerland. From 1920 to 1930, he was active in the work of the League of Nations and of numerous international conferences, and he had served as a member of the 1929 Committee of Jurists. He resigned on January 9, 1942.

Judge Walther Schücking (Germany), born in 1875, had been professor of international law at Göttingen, at Breslau, at Marburg, at Berlin and at Kiel, and director of the Institute of International Law at Kiel. He was for some years a member of the Reichstag, and he had served on the Court as judge *ad hoc* on two occasions. His publications on international organization are notable. He died on August 25, 1935.

Jonkheer Willem Jan Mari van Eysinga (Netherlands), born in 1878, had been professor of public and international law at Groningen and at Leyden. He had served for some years in the Ministry of Foreign Affairs and on the International Rhine Commission, and had been a member of the Netherlands delegation to each of the Assemblies of the League of Nations from 1920 to 1930. He had taken a prominent part in the work of the League of Nations Organization for Communications and Transit, and had served as a member of the 1929 Committee of Jurists and as president of the two Conferences of Signatories of the Court Protocol in 1926 and 1929.

Judge Harukazu Nagaoka (Japan), born in 1877, had been Minister at Prague and at The Hague, and ambassador at Berlin and at Paris, and had frequently served in delegations engaged in activities of the League of Nations. He resigned on January 15, 1942.

Judge Manley O. Hudson (U.S.A.), born in 1886, had been professor of international law in Harvard University, and he was the author of numerous publications relating to the Court.

Judge Åke Hammarskjöld (Sweden), born in 1893, had been in the Swedish foreign service, and had served as Registrar of the Court from 1922 to 1936. He died on July 7, 1937.

Judge Cheng Tien-Hsi (China), born in 1884, had been a judge of the Supreme Court of China, and had served as Vice-Minister of Justice.

Judge Charles de Visscher (Belgium), born in 1884, had been professor of international law at Ghent and at Louvain, and Secretary-General of the *Institut de droit international*. He had on several occasions appeared before the Court as counsel, and had also served as judge *ad hoc*. He is editor of the *Révue de droit international et de législation comparée*.

Judge Rafael Waldemar Erich (Finland), born in 1879, had been

Prime Minister in Finland, and a professor of international law at Helsingfors. He had served as Minister to Switzerland, to Sweden and to Italy, and had represented Finland at numerous international conferences. He was a delegate to the Assembly of the League of Nations from 1921 to 1932. Elected a deputy-judge in 1930, he was chosen to succeed M. Hammarskjöld as judge in 1938.

The four deputy-judges elected in 1930 were not called upon for active service in that capacity prior to February 1, 1936 when their posts ceased to exist. Deputy-Judge Joseph Redlich (Austria), born in 1869, had been a professor at Vienna and at Harvard University (U.S.A.), and had served as Minister of Finance of Austria; he died on November 11, 1936. Deputy-Judge José Caeiro da Matta (Portugal), born in 1877, had been professor of international law at Lisbon and a member of Parliament, and he had represented Portugal at numerous international conferences and in several international arbitrations. Deputy-Judge Mileta Novacovitch (Yugoslavia), born in 1878, had been professor of international law at Belgrade, and had been a delegate to several Assemblies of the League of Nations. Deputy-Judge Erich was elected a judge in 1938.

§251. Nationality of Successful Candidates. The Statute clearly excludes the idea of State representation on the Court.[91] Yet the statement in Article 2 of the Statute that the judges should be "elected regardless of their nationality" can hardly be taken seriously, for it might easily wreck an international judicial institution; and provisions in later articles of the Statute indicate that it was not intended to be so taken. Not only should the whole body of judges "represent the main forms of civilization and the principal legal systems of the world" (Article 9), but the general principle seems implicit in Article 10 that a State should have not more than one of its nationals among the elected members of the Court.[92] The second paragraph of Article 10 is awkwardly phrased, providing that "in the event of more than one national of the same Member of the League being elected by the votes of both the Assembly and the Council, the eldest of these only shall be considered as elected." The French version is more accurately drafted,[93] in that it does not purport to nullify

[91] Apart from the provisions in Article 31 for judges *ad hoc*. On the nationality of judges *ad hoc*, see §401, *infra*.

[92] The 1920 Committee of Jurists stated in its report that "the Court can never include more than one judge of the same nationality." Minutes of the 1920 Committee of Jurists, p. 713.

[93] The French version provides: *Au cas où le double scrutin de l'Assemblée et du Conseil se porterait sur plus d'un ressortissant du même Membre de la Société des Nations, le plus âgé est seul élu.*

an election already accomplished; it may be thought to have a different meaning, also, in that it refers to *ressortissant* instead of "national," [94] the French term being of perhaps wider scope.[95] Though the provision in Article 10 relates to nationals (*ressortissants*) "of the same Member of the League," it must apply to nationals of any State whether or not it is a member of the League; in terms it is restricted to the results of a single election, but its application ought to be broadened to cover a case in which the choice at a by-election might fall upon the national of a State of which a national is already on the Court as a result of a previous election. The text affords little guidance in dealing with questions of multiple nationality.[96] While the Statute does not expressly confer on any body the power to determine who has been elected, it would doubtless be for the Assembly and the Council to make this determination, at least in the first instance, if any question arose as to the application of the second paragraph of Article 10.

The results of elections held between 1921 and 1938 were largely determined by the nationality of candidates. In the general elections of 1921 and 1930, each of the States permanently represented on the Council saw one of its nationals elected; and it became an established precedent in the filling of vacancies to elect a person of the same nationality as the previous incumbent, this result having taken place as to nine out of eleven places filled at by-elections. Throughout the twenty years from 1921 to 1941, persons possessing American, British, Chinese, Cuban, Dutch, French, Italian, Japanese, Rumanian and Spanish nationality were among the members of the Court. Regionalism was also a factor in the elections, as evidenced by the demands made by Latin-American States; two nationals of Latin-American States were elected in 1921, and three in 1930.

§252. Appreciation of the System of Nominations. The eleven elections held between 1921 and 1938 enable certain observations to be made both on the system of nominations and on the system of elections provided for in the Statute. The provision for nomination of candidates by national groups instead of by Governments or other agencies served a convenient purpose at the time of its adoption in 1920, in that it provided a useful link between the Permanent Court of International Justice

[94] References in Articles 2, 5, 31 of the Statute are to "nationality" in English and *nationalité* in French; in the original text of the Statute, paragraph 3 of Articles 26 and 27 referred to "national" in English, and to *ressortissants* in French.

[95] See 9 de Lapradelle and Niboyet, *Répertoire de Droit International*, p. 254.

[96] See W. Pollak, "Eligibility of British Subjects as Judges of the Permanent Court," 20 American Journal of International Law (1926), pp. 714–25.

and the Permanent Court of Arbitration. It was also thought to have the advantage of securing an independent selection of competent candidates by men who are not necessarily under Government influence, and to some extent this advantage has been realized; though some of the national groups have clearly conceived it to be their function to express their Governments' will,[97] others of them have acted without consultation of their Governments. The system was also thought to have the advantage of leaving to States' representatives in the electoral bodies a greater freedom in their voting, inasmuch as they were not called upon to choose between Government nominees; perhaps this advantage has materialized also, though Governments have sometimes been active in pushing the candidacy of their nationals. It may also be noted that, as a candidate is not required to be nominated by the national group of his own country, an outstanding person may be elected even though he has failed to receive the support of his own compatriots.[98]

On the other hand, the system of nominations has some disadvantages. It is not easily understood,[99] and the national groups do not always select the strongest nominees. One cannot escape the conclusion that some of the nominations are made simply for the purpose of paying compliments. Only a few of the groups seem to have complied with the recommendation contained in Article 6 of the Statute concerning the consultation of professional bodies, though observation of this recommendation might help to build a strong professional support for the Court.[1] Some of the groups do not consult their nominees in advance; not infrequently the persons nominated have declined the candidacy, though no candidate has declined after his election. Some of the national groups have not shown themselves eager to exercise the privilege of nominating candidates,

[97] In most cases the nomination by the national group is transmitted to the Secretary-General through the Ministry of Foreign Affairs; in some cases, it is the Minister of Foreign Affairs who makes the communication.

[98] This occurred in the election of 1930. See §240, *supra*.

[99] In 1921, nominations were offered by the Government of Paraguay in its own name; owing to the lateness of the communication, the question of listing them did not arise. Apparently some Governments have considered their Assembly delegations competent to make nominations; in 1928, the Canadian representative in the Assembly attempted to withdraw the candidacy of persons nominated by the Canadian national group. League of Nations Document, A. 42. 1928. V.

[1] In some cases the groups state in their communication to the Secretary-General that they have complied with the recommendation in Article 6 of the Statute.

In connection with the reference in Article 6 to "national sections of International Academies devoted to the study of Law," the 1920 Committee of Jurists listed the Institute of International Law, the American Institute of International Law, the *Union Juridique Internationale*, the International Law Association, and the Iberian Institute of Comparative Law; but some of these organizations have no organized national sections.

and the number of national groups making nominations has varied considerably. Thirty-four groups sent in nominations in 1921, while fifty groups acted nine years later; the number has usually been around forty. In many instances, Governments have not kept their quotas in the Permanent Court of Arbitration filled, and have thus deprived the electors of the judgment of four members of a national group.

Consultation among national groups is not provided for in the Statute, but the number of instances in which different groups have nominated the same candidates [2] indicates that informal consultation takes place on a very wide scale.[3] Indeed, in some of the elections, the voting in the electoral bodies has seemed to be little more than a confirmation of a community of opinion existing among the nominating groups,[4] and in consequence problems connected with the elections have been much simplified.

§253. Appreciation of the System of Elections. In view of the long struggle as to the method of electing international judges which preceded 1920, it must be said that the system laid down in the Statute of the Court has worked with surprising ease and with remarkable success. Yet perhaps the chief reason for the system actually devised has disappeared. In 1920, the so-called "Great Powers" held four permanent seats in a Council composed of representatives of eight States, with a possibility that a fifth "Great Power" would also accept a permanent seat; this fact was chiefly responsible for the willingness of the "Great Powers" to create a court in which no States were to be entitled to representation. In later years, however, the Council was enlarged in such a way that the so-called "Great Powers" lost their dominance. At the beginning of 1939, only four of the fifteen seats in the Council were held by "Great Powers," and at the close of 1939, Great Britain and France were the only "Great Powers" which continued to be permanently represented on the Council; of course other "Great Powers," not members of the League of Nations, might be admitted to vote in elections by the Council under paragraph 3 of Article 4 of the Statute. This shift of power led to no suggestion that the method of election should be modified, however.

[2] In the elections held in 1928, 1936 and 1937, candidates received as many as thirty nominations.

[3] It may also indicate Government activity on behalf of candidates.

[4] To some extent, the record to date fulfills the hope expressed by Mr. Root to the 1920 Committee of Jurists, that "so many concordant expressions of opinion would be obtained from the various countries that the election would be thereby virtually decided." Minutes of the 1920 Committee of Jurists, p. 409.

The dual system of elections operates to confer double representation on the States which vote in the Council as well as in the Assembly. Viewing the elections which were held between 1921 and 1938, it may be questioned whether the abolition of this double representation would have greatly changed the results. In the by-elections of 1923, 1928, 1929, 1930, 1935, 1936 (first election), 1937, both the Assembly and the Council favored the same candidates on the first ballot; even in the by-elections of 1936 (second election) and 1938, the candidates who first received a majority vote in the Assembly were later elected by the Assembly and the Council. In only two cases did a candidate who received a majority of votes in the Assembly fail of election because of the Council's disagreement. It may be concluded, therefore, that no great change in result would be effected if the power of election were conferred on the Assembly alone.

So long as the power of election is lodged with two bodies, it is necessary to provide a method for breaking a possible deadlock. The provision in paragraph 1 of Article 12 for a joint conference is a happy one, and it greatly facilitated the first election in 1920 even if a choice might have been completed without it. On the other hand, the ultimate method provided for in the third and fourth paragraphs of Article 12 of the Statute has not been resorted to; it is somewhat artificial, but it might serve a useful purpose in the event of the failure of a joint conference.

The system of elections may be criticized on the ground that the electoral bodies have shown too little disposition to give to the factor of age the importance which it deserves. No age-limit is set by the Statute, either as a qualification of candidates or as a basis for retirement.[5] Three of the judges elected in 1921 had passed the age of seventy at the time—Lord Finlay had attained the age of seventy-nine when he was elected, and Judges Barbosa and Loder were both seventy-two; Judge Kellogg was seventy-four when he was elected in 1930; of these four judges, only Judge Loder survived the end of the term for which he was elected. Only three judges—Hammarskjöld, Huber and Wang—have been elected before they had attained the age of fifty. The average age of the judges elected in 1921 was over sixty, and the average age of the judges elected in 1930 was just under that figure.

[5] In an early draft of the Covenant of the League of Nations in 1918, Colonel House proposed seventy-two as the age for the compulsory retirement of judges. Seymour, Intimate Papers of Colonel House, IV, p. 31. The possibility of an age-limit at the time of election was discussed at the 1929 Conference of Signatories. Minutes of the 1929 Conference of Signatories, pp. 32–33.

On the whole the system of elections must be pronounced to have been a great success. If the results attained did not produce universal satisfaction, the fact that they were attained so easily rebutted many of the anticipations of difficulty on the part of the generation which labored for the establishment of the Court.

CHAPTER 13

THE RULES OF COURT

§254. Rule-making Power of the Court. Throughout the discussions of the 1920 Committee of Jurists, it was recognized that questions of procedure in general should be left to be regulated by the Court itself, and that in framing its rules the Court should have a wide freedom. Article 23 of the original Statute referred to the possibility that the date of the Court's annual session might be fixed by "Rules of Court" (Fr., *règlement de la Cour*). Article 30 provided that "the Court shall frame rules for regulating its procedure;" in particular "rules for summary procedure"; it is more broadly stated in the French version that *la Cour détermine par un règlement le mode suivant lequel elle exerce ses attributions.* Articles 26 and 27 provided for the choice of technical assessors to sit in the special chambers "in accordance with rules of procedure [Fr., *règles de procédure*] under Article 30." Article 51 provided that the conditions for putting questions to witnesses and experts should be "laid down by the Court in the rules of procedure [Fr., *le règlement*] referred to in Article 30."

It would seem that while the rules envisaged in the Statute were to deal chiefly with questions of procedure, they were also to cover questions relating to the internal organization of the Court. In 1922, a suggestion was made that the Court should adopt two sets of rules in order that rules of procedure might be distinguished from rules of Court.[1] This suggestion met with little favor at the time, but in 1931 the Court formulated and in 1936 it revised some rules of "the Court's judicial practice" which were not included in the Rules of Court;[2] however the Court has recognized that it is entirely free to suspend the application of these rules of judicial practice in a given case, if it finds that the circumstances of the case justify that course.[3] In 1934 and 1935 it was suggested that the contents of certain articles of the Rules, dealing with the Registry of the Court, should be transferred to a set of "Internal Regulations for the

[1] Series D, No. 2, pp. 103, 106.

[2] Series D, No. 2 (2d add.), pp. 268, 300; Series D, No. 2 (3d add.), pp. 748–750; Series E, No. 7, p. 297; *idem*, No. 12, p. 196.

[3] Series E, No. 14, p. 158.

Court, separate from the Rules of Court properly so-called," but this suggestion was rejected.[4] The Rules of Court have been regarded as supplementing the provisions concerning procedure contained in the Statute itself,[5] which of course the Court has not power to replace. The principal purpose of the Rules of Court has been said to be "to provide such indications as are indispensable for litigant parties," and "to inform those who are responsible for the conduct of a case before the Court what steps have to be taken, and when and how."[6] From the beginning, it has been the full Court which framed and adopted the Rules of Court; deputy-judges participated in framing the original rules of 1922, but they were not invited to participate in the later revisions.

§255. The Rules Adopted by the Court. The original Rules of Court were adopted on March 24, 1922, a slight addition (to Article 2) being made on January 15, 1925. These Rules contained two chapters in 75 articles; Chapter I (Articles 1–31) dealt with the constitution and working of the Court, and Chapter II (Articles 32–75) with procedure. This arrangement, with the same numbering of the articles, persisted down to 1936. Revised Rules, amending 32 of the 75 articles, were promulgated on July 31, 1926; an amendment (to Article 71) was adopted on September 7, 1927; and under the influence of the pending revision of the Statute amendments to eighteen articles were promulgated on February 21, 1931.

With the entry into force on February 1, 1936 of the amendments to the Statute annexed to the Revision Protocol of September 14, 1929, numerous changes in the Rules became necessary, and on March 11, 1936, the Court promulgated a new set of Rules. Both in arrangement and in substance, the 1936 Rules made many departures, not all of which were necessitated by the amendment of the Statute. Instead of 75 articles in two chapters, the 1936 Rules contain 86 articles, with "headings" devoted to the constitution and working of the Court, to contentious procedure, and to advisory opinions, and with a final provision repealing the Rules previously in force.

All of the Rules adopted have been published in Series D of the Court's publications,[7] and since the beginning the Court has made it a

[4] Series D, No. 2 (3d add.), pp. 403, 842, 864.
[5] Series D, No. 2, p. 106.
[6] Series D, No. 2 (3d add.), pp. 758, 804.
[7] Series D, No. 1 (1926); Series D, No. 1 (2d ed., 1931); Series D, No. 1 (3d ed., 1936); Series D, No. 1 (4th ed., 1940). The 1922 Rules were not published in Series D until 1926, when they had been replaced by the Revised Rules of 1926; from 1922 to 1926 a publication by the *Institut Intermédiaire International*, "The Permanent Court of International Justice Statute and Rules," served in lieu of an official edition. Series E, No. 1, p. 125 note.

practice to publish full minutes of the meetings devoted to preparation of the Rules, together with documents relating thereto.[8]

§256. The Rules of March 24, 1922. The greater part of the Court's preliminary session, January 30 to March 24, 1922, was devoted to the preparation of the original Rules. When the session began, the Court had before it drafts by Judges Loder and Altamira, and by the Court's temporary secretariat which had been supplied to it by the Secretariat of the League of Nations.[9] At the fourth meeting, a committee on procedure was appointed to draw up a "questionnaire embodying the main points to be settled in the Rules," and a discussion of this questionnaire continued from the sixth to the eighteenth meeting of the Court. A drafting committee was then constituted and its draft,[10] based on the Secretariat's draft, was considered by the Court in first reading from the twentieth to the twenty-eighth meetings; its re-draft [11] was considered in second reading from the thirtieth to the thirty-eighth meetings. A special committee set up to harmonize the English and French versions proposed various amendments to the French version which were approved on the second reading.[12] The final English and French versions were adopted unanimously at the fortieth meeting on March 24, 1922. The Rules were signed by the President and Registrar, "in the same manner as a judgment of the Court." [13] A slight addition to Article 2, adopted on January 15, 1925, dealt with the precedence of the retiring President.[14]

§257. The Revision of July 31, 1926. The power of the Court to revise its rules derives from Article 30 of the Statute; a proposal to reserve this power had been rejected in 1922.[15] Soon after the original Rules came into force, suggestions began to be made that they should be revised; particularly, the rules dealing with advisory procedure were said to need amplification. On September 4, 1923, Judge Altamira made a formal suggestion, and in 1923–4 a draft was presented by the President and the Vice-President.[16] On June 17, 1925, the Court decided to under-

[8] In Series D, No. 2 (1922); Series D, Addendum to No. 2 (1926); Series D, Second Addendum to No. 2 (1931); Series D, Third Addendum to No. 2 (1936). See also [B. Schenk von Stauffenberg.] *Statut et Règlement, Eléments d'interprétation* (Berlin, 1934).

[9] Series D, No. 2, pp. 249, 253, 274.

[10] *Idem*, p. 424.

[11] *Idem*, p. 481.

[12] *Idem*, p. 556. The deliberations of the Court had been based upon a French version.

[13] *Idem*, p. 106. For a commentary on the 1922 rules, see Å. Hammarskjöld, "*Le Règlement de la Cour Permanente de Justice Internationale*," 3 *Revue de droit international et de législation comparée* (1922), pp. 125–148.

[14] Series E, No. 1, pp. 13, 127.

[15] Series D, No. 2, pp. 106, 424.

[16] Series D, No. 2 (add.), pp. 254, 281, 293, 294.

take a revision in 1926;[17] the purposes of the revision were later stated by the President to be to supplement the Rules on matters as to which no decision had been reached, and to incorporate interpretations placed on the existing Rules by the Court's jurisprudence.[18] Numerous suggestions were made to this end, and a draft intended to codify existing practice and to fill gaps was prepared by the Registrar.[19] The revision was undertaken at the eleventh session, and occupied the attention of the Court during twenty-seven meetings between June 22 and July 31, 1926. The Revised Rules were adopted on the latter date, and against some opposition they were put into effect immediately.[20]

§258. The Amendments of February 21, 1931. While the revision of 1926 was the result of criticism within the Court itself, the amendments of 1931 resulted from outside pressure. When the amendments to the Statute annexed to the Revision Protocol of September 14, 1929, failed to enter into force in September 1930, as had been contemplated, a committee of jurists reported to the Council of the League of Nations that it would be desirable to call to the Court's attention the possibility of its effecting certain changes, in line with the proposed amendments to the Statute, through the exercise of its power to regulate its procedure; the committee mentioned particularly the "nature of the leave granted" to members of the Court, and "the system of permanent sessions."[21] This report led the Eleventh Assembly of the League of Nations, on September 25, 1930, to adopt the following resolution:[22]

> The Assembly requests the Permanent Court of International Justice to examine the suggestions contained in Part II, paragraphs 1 and 2, of the report of the Committee of Jurists which was submitted to and approved by the Council of the League of Nations on September 12, 1930, and expresses the hope that the Court will give consideration to the possibility of regulating, pending the coming into force of the Protocol of September 14, 1929, concerning the revision of the Statute of the Court, the questions of the sessions of the Court and the attendance of the judges, on the basis of Article 30 of the Statute as annexed to the Protocol of December 16, 1920.

[17] Series D, No. 2 (add.), p. 5. The revision was therefore not due to the proposal of accession made by the United States of America. See §222, *supra*.

[18] Series D, No. 2 (add.), pp. 242–3.

[19] *Idem*, pp. 246–277, 304–316.

[20] Series D, No. 1. The minutes of the Court dealing with the revision are published in Series D, Addendum to No. 2. For a commentary on the 1926 rules, see Å. Hammarskjöld, "*Le Règlement Revisé de la Cour Permanente de Justice Internationale*," 8 *Revue de droit international et de législation comparée* (1927), pp. 322–359.

[21] League of Nations Official Journal, 1930, p. 1466.

[22] Records of Eleventh Assembly, Plenary, p. 132.

When the newly-elected judges met to assume their functions on January 15, 1931, they included several of the men who had been prominently identified with the attempt to revise the Court's Statute; hence the new Court was not reluctant to proceed in accordance with the suggestions in the Assembly's resolution. From January 21 to February 21, 1931, it devoted some thirty meetings to a consideration of modifications of the Rules. While the conclusion was reached that it was inexpedient "at the beginning of the period of office of the judges recently elected, to undertake a fresh general revision," certain questions of an urgent nature were considered in addition to those suggested by the Assembly. The amended Rules were put into effect on February 21, 1931.[23]

§259. The Rules of March 11, 1936. When the examination of the Rules was undertaken in 1931, the Revision Protocol of September 14, 1929, to which were annexed various amendments to the Statute, was pending, and it was quite clear that if the amendments to the Statute were brought into force, a general revision of the Rules would become necessary. In anticipation of that event, on May 12, 1931, the Court set up four committees, each of which was charged with the investigation of certain topics with a view to a general revision of the Rules. The reports of these committees[24] were submitted to a preliminary examination in March, 1934,[25] following which they were studied by a coordinating commission which made its report on May 14, 1934;[26] the four committees and the Coordination Commission were replaced by a drafting committee in February 1935.[27] From May 15 to June 1, 1934, the Court devoted 16 meetings to a consideration of the proposed revision; from February 2 to April 10, 1935, 38 meetings were devoted to the revision, and a text of the revised rules was adopted in first reading;[28] more than thirty meetings were devoted to the second reading between February 1 and March 11, 1936. The work of revision was begun on the basis of the original Statute, but at the second reading it was based on the amended Statute which entered into force on February 1, 1936. Only ten judges were present when the Rules were adopted on March 11, 1936, and two of them voted in opposition.[29]

While the earlier rules were divided into two chapters, each of them containing headings divided into sections, the arrangement of the 1936

[23] Series D, No. 2 (2d add.), p. 5. The text of the 1931 Rules is reproduced in Appendix No. 6, pp. 706–32, *infra*.
[24] Published in Series D, No. 2 (3d add.), pp. 753, 758, 777, 782.
[25] The minutes are published in *idem*, pp. 840–856. [26] *Idem*, pp. 857–895.
[27] *Idem*, pp. 163–166. [28] *Idem*, pp. 464, 944. [29] *Idem*, p. 746.

Rules was somewhat simplified. The order of the 1922 Rules, scrupulously maintained in 1926 and 1931, was replaced in 1936 by a new and somewhat more logical order. In some important particulars terminology was also changed in 1936. In general, it was intended that the 1936 Rules should not include provisions of the Statute, nor references to articles of the Statute.[30] For the most part, they codified the Court's earlier practice, but some substantial changes were made.[31]

§260. 1936 Rules, Article 1.[32] The first part of this Article is designed to fill a *lacuna* in Article 13 of the Statute; the second part, which was added in 1936, completes Article 14 of the Statute. The competence of the Court to regulate this question as to the commencement of the terms of members of the Court might originally have been doubted; for financial and other reasons, however, some rule was necessary and the Court seems to have been the agency best fitted to establish it. The term of office of the judges and deputy-judges elected in 1921 was taken to have commenced on January 1, 1922, "owing to an interpretation given to the Statute by the Secretary-General of the League of Nations."[33] The provision that the term of office shall begin to run on January 1st of the year following an election fails to take account of the possibility that the election may have been postponed beyond the end of the nine-year period;[34] if, for instance, the general election which was postponed in 1939 had been held on March 1, 1940, the newly-elected members of the Court should not have had to wait until January 1, 1941, to take up their duties. With respect to a judge elected to fill a vacancy under Article 14 of the Statute, his term is to begin on the date of his election even though his acceptance may have been given at a later date.[35]

The text of this and other articles of the 1936 Rules employs the term "members of the Court" to refer to the judges elected by the Assembly and the Council; the term "judges" is employed to include such members of the Court and judges *ad hoc*.[36]

§261. 1936 Rules, Article 2. The substance of this Article has been maintained since 1922. Priority of election at the same session of the electoral bodies was early rejected as a basis of precedence.[37] From 1925

[30] *Idem*, pp. 328, 375, 804.
[31] *Idem*, p. 739.
[32] The text of the 1936 Rules is reproduced in Appendix No. 7, pp. 732–55, *infra*.
[33] Series D, No. 2, pp. 107, 168. Salaries of the judges were paid from January 1, 1922.
[34] This point was raised by Judge Anzilotti in 1922. *Idem*, p. 168.
[35] Series D, No. 2 (3d add.), pp. 378–381. Prior to 1936, the term of such a judge began on the first day of the month following that in which his election took place.
[36] *Idem*, pp. 468–470.
[37] Series D, No. 2, pp. 110, 588. In 1922, birth certificates were required for determining seniority. Series D, No. 2 (add.), p. 44.

to 1931, it was provided that a retiring president should sit on the right of the President; this seems to have been intended to apply to an ex-President only during the term of his immediate successor. In spite of the provision in the first sentence in Article 2, the seniority of a member of the Court does not survive a general election at which he is re-elected.[38]

§262. 1936 Rules, Article 3. The first paragraph of this Article, designed to codify the existing practice, deals with a matter not covered by the earlier Rules. Until 1931, it was the Court's practice to take the initiative in proper cases in calling the attention of parties to their rights with respect to the nomination of judges *ad hoc* under Article 31 of the Statute; after 1931 the parties were informed that if they considered themselves entitled to appoint judges *ad hoc* they should proceed on their own initiative without awaiting a communication from the Court.[39] The time-limit fixed by the first sentence was new; prior to 1936, it had been the practice to require designation of judges *ad hoc* before the opening of the oral proceedings. The paragraph seems to envisage a possibility of separate proceedings to determine whether a State is entitled to appoint a judge *ad hoc* and possibly whether the nominee has the necessary qualifications.

The second paragraph is a re-draft of the second and third paragraphs of Article 4 of the 1922 Rules.

§263. 1936 Rules, Article 4. This text was adapted from paragraph 1 of Article 4 of the 1922 Rules. The text of 1922 referred to a judge *ad hoc* of the nationality of a party; the reference in 1936 is to "a judge under Article 31 of the Statute," this phrase being intended to leave open the question whether a State might choose a non-national to be its judge *ad hoc*.[40] The expression "full Court" seems to be taken from Article 25 of the Statute, where it possibly serves the purpose of distinguishing between the Court and its chambers. Article 4 seems to serve little purpose in the Rules, and its omission would effect no change in the Court's conduct.

§264. 1936 Rules, Article 5. In substance, this provision is much the same as that in Article 5 of the 1922 Rules; the text of the declaration has undergone no change. Prior to 1936, the text mentioned both "members of the Court" and "judges summoned to complete the Court, under the terms of Article 31 of the Statute"; following the general usage of the

[38] Series E, No. 7, p. 276.
[39] Series D, No. 2 (3d add.), pp. 384–386.
[40] *Idem*, p. 383. See §401, *infra*.

amended Statute, the term "judge" was used in the 1936 Rules to cover both groups,[41] though Article 20 of the Statute refers to "every member of the Court." The earlier rules provided for the solemn declaration by a member or judge "before entering upon his duties"; this did not correspond with the practice introduced in 1931, under which judges *ad hoc* participated in the preliminary deliberations even before making the solemn declaration, and that practice was codified in 1936.[42] The solemn declaration has always been made at a public sitting. Paragraph 3 of Article 5 seems to be unnecessary as a provision of the Rules, but a proposal for its deletion was rejected in 1936.[43] Judges who are re-elected in a general election must thereafter make a new declaration.[44] A judge nominated under Article 31 of the Statute must repeat the declaration in each case in which he participates; [45] but if a case is treated by the Court in several phases (*e.g.*, jurisdiction and merits), the judge makes the declaration only at the beginning of the first phase.

§265. 1936 Rules, Article 6. No substantial change has been made in this text since its adoption in 1922. The question was raised in 1933 whether Article 18 of the Statute applied to "national judges," [46] but no answer was given; questions connected with the application of Article 18 were recognized to be of a "delicate" nature.[47]

§266. 1936 Rules, Article 7. Paragraphs 1 and 2 of this Article originated in 1922, only slight drafting changes being made thereafter. The second paragraph in the earlier Rules referred to the "special chamber," but the word "special" was dropped in 1936 to take account of the possibility of assessors in the Chamber for Summary Procedure.[48] The request for assessors covered by the third paragraph was dealt with in Article 35 of the earlier Rules.

§267. 1936 Rules, Article 8. The substance of this provision dates from 1922; the earlier rules required the declaration to be made at the first sitting at which the assessor was present, but the 1936 Rules require it "at a public sitting" before the assessor takes up his duties. This may be a public sitting of the full Court or of a Chamber.

§268. 1936 Rules, Article 9. The substance of this Article has undergone little change since 1922. Article 21 of the Statute fixes the duration of the terms for which the President and Vice-President are elected, but fails to fix the time when the terms are to begin and end.

[41] *Idem*, p. 396.
[42] *Idem*, p. 398.
[43] *Idem*, p. 400.
[44] Series D, No. 2, p. 182.
[45] Series D, No. 2 (3d add.), p. 806.
[46] *Idem*, p. 761.
[47] *Idem*, p. 496.
[48] *Idem*, p. 497.

§269. 1936 Rules, Article 10. This precise text was adopted in 1922, and no change has been made since. In 1931, a question as to the meaning of "work and administration" gave rise to a lengthy discussion, but no amendment resulted.[49]

§270. 1936 Rules, Article 11. The substance of this Article dates from 1922, but the text was re-drafted in 1936.[50]

§271. 1936 Rules, Article 12. As adopted in 1922, this Article provided for the President's "main annual vacation," and it required the President to "reside within a radius of ten kilometers from the Peace Palace at The Hague"; this latter requirement was due to an interpretation of the provision in Article 22 of the Statute which required the President to "reside at the seat of the Court." In 1931 no provision on this point was thought to be necessary, but provision was made for assuring the discharge of the duties of the President at all times. Slight drafting changes were made in the Article in 1936. The text prescribes no procedure for determining and announcing who is the oldest judge. The third paragraph may result in imposing the presidential duties on a member of the Court who has had no previous experience on the Court; it might well have been placed in Article 9, in connection with paragraph 2 of that Article.

§272. 1936 Rules, Article 13. The subject of the first paragraph was first covered in Article 13 of the 1926 Rules; President Huber wished to avoid a possibility that a case might be decided by the casting vote of a President who was a national of one of the parties.[51] In 1931 the reference to age and length of service was substituted for the reference to seniority, and in 1936 the paragraph was re-drafted. The second paragraph which was new in 1936 represents an attempt to codify the Court's experience in the *Free Zones Case*.[52] The third paragraph was also added in 1936.

§273. 1936 Rules, Article 14. This subject was previously covered by Article 17 of the Rules. A simpler text was adopted in 1922, and modified in 1926 and 1931; except for slight drafting changes, the 1931 text was retained in 1936. The period of seven years selected for the duration of the Registrar's term of office was said to correspond "to the period of office of Directors of the Secretariat of the League of Nations to whom the Registrar was assimilated." [53] The post of Deputy-Registrar, created in 1925, was first mentioned in the 1926 Rules.

[49] Series D, No. 2 (2d add.), pp. 139–144. *Cf.*, Series D, No. 2 (3d add.), p. 806.
[50] See *idem*, p. 909.
[51] Series D, No. 2 (add.), pp. 33, 248.
[52] Series D, No. 2 (3d add.), p. 402.
[53] Series D, No. 2 (add.), p. 40; Series E, No. 5, p. 247.

§274. 1936 Rules, Article 15. The first paragraph of this Article was adopted as part of Article 18 in 1922. The provision for the Deputy-Registrar's declaration originated in 1926. No change was made in the text in 1931 or in 1936.

§275. 1936 Rules, Article 16. This precise text was Article 19 of the 1931 Rules; the earlier Rules had referred both to the residence of the Registrar and to his "main annual vacation."

§276. 1936 Rules, Article 17. This text has undergone no important change since 1926 when it was adopted as Article 20. The Rules of 1922 referred to "the staff" (Fr., *le personnel*) of the Registry, instead of to "the officials of the Registry, other than the Deputy-Registrar" (Fr., *les fonctionnaires du Greffe autres que le Greffier adjoint*).

§277. 1936 Rules, Article 18. This Article is identical with Article 21 of the 1931 Rules; the text of 1922, maintained in 1926, had been much simpler. In 1922 the approval of the regulations by the Court was thought to be necessary because they "contained certain financial provisions which could not become operative without the express consent of the Court." [54] In 1931, the Registrar explained that the general concordance of the Court's staff regulations and the staff regulations of the Secretariat of the League of Nations was "necessary to enable officials of the Registry to be promoted into the Secretariat and *vice versa*." [55]

§278. 1936 Rules, Article 19. This provision covers the subject-matter of Article 22 of the former Rules, which was re-drafted in 1926 and in 1931. The appointing power, given to the President in 1922, was conferred on "the Court, or if it is not in session, the President" in 1926, and returned to the President in 1936.

§279. 1936 Rules, Article 20. This Article incorporates (in the first paragraph) the first paragraph of Article 28 of the 1931 Rules, and (paragraphs 2 and 3) it takes the place of what was previously Article 23, first adopted in 1922. The session list of cases was dropped in 1936, and the content of the General List was specified in greater detail.

§280. 1936 Rules, Article 21. The first paragraph maintains the form given to it as the first paragraph of Article 25 of the 1922 Rules; the second paragraph is in substance the same as it was drafted in 1922 (second paragraph of Article 25); the third paragraph is substantially as drafted in 1926 and then made part of Article 24; the fourth paragraph,

[54] Series D, No. 2, p. 190.
[55] Series D, No. 2 (2d add.), p. 153. The cases are rare in which former members of the Secretariat of the League of Nations were appointed to the staff of the Registry or *vice versa*.

in slightly different form, was previously Article 43 as adopted in 1922 and maintained in 1926 and 1931. The whole of this Article might have been embodied in the Instructions for the Registry and omitted in the Rules.

§281. 1936 Rules, Article 22. Article 65 of the 1922 Rules provided for the publication of a collection of the judgments of the Court, and Article 74 for the publication of a collection of advisory opinions; Article 65 of the 1931 Rules provided for the publication of a single "collection of the judgments, orders and advisory opinions." While all of the Court's orders are published either in Series A/B or Series C of the Court's publications,[56] the 1936 text of this Article makes it clear that the Court itself should decide as to the inclusion of orders in Series A/B; it was thought that some orders concerning procedure might be omitted.

§282. 1936 Rules, Article 23. Only slight changes were made in this text after its incorporation in Article 26 of the 1922 Rules.[57] It is unnecessarily long in the separate references to the full Court and the various Chambers.

§283. 1936 Rules, Article 24. Paragraphs 1 to 4 of this Article follow quite closely the text of Article 14 as adopted in 1922; originally the text directed that in selecting the members of the Chambers regard should be had for preferences expressed by the judges,[58] and it provided for substitute members of the Chamber for Summary Procedure; this latter provision was included in Article 29 of the revised Statute. Paragraph 5 is a re-draft of what was formerly the first paragraph of Article 15.

§284. 1936 Rules, Article 25. This text deals with topics formerly covered in Article 27 of the Rules. The amended text of Article 23 of the Statute had introduced both permanent sessions and judicial vacations. Paragraph 1 of Article 25 relates to a new conception, the "judicial year"; this seems to have been proposed by M. Hammarskjöld, as a substitute for the "sessions" of the Court.[59] The paragraph does not fix the end of the judicial year, which was intended to synchronize with the calendar year. The "judicial vacation" was intended as a period during which the judges should not be obliged to sit except in cases of

[56] Series D, No. 2 (3d add.), p. 328.
[57] *Idem*, pp. 514–516.
[58] As a result of the omission of this provision, the Court, when electing the members of the Chambers in 1936, decided that it was inconsistent with Article 24 of the Rules to have regard to any preferences expressed by the judges. Series E, No. 14, p. 133.
[59] Series D, No. 2 (3d add.), pp. 525, 808. The expression had been used in the report of the 1929 Committee of Jurists. Minutes of the 1929 Committee of Jurists, p. 121.

urgency.[60] In fixing the dates of the summer vacation, it was thought to be desirable that all of September should not be included, as requests for advisory opinions might come from the Council or Assembly of the League of Nations in September.[61] Power was reserved to the Court either to change the dates of vacations at any time,[62] or to decide to meet in the period set for vacation. The third paragraph reserves to the President power to convene the Court in vacation-time only in case of urgency. The fourth paragraph concerning the observance of holidays, broader than the provisions in Article 27 of the 1922 Rules, seems to be cast to meet the possibility of meetings elsewhere than at The Hague.

§285. 1936 Rules, Article 26. Even before the amendment to Article 23 of the Statute came into force, long leave was instituted under Article 27, paragraph 5, of the 1931 Rules, but it was limited to judges whose homes were situated at more than five days' normal journey from The Hague and who were obliged by their duties at the Court to live away from their own country; this latter limitation was not expressly embodied in Article 23 of the amended Statute.[63]

§286. 1936 Rules, Article 27. Statement of a judge's duty of attendance was first embodied in Article 27 of the 1931 Rules, where it was limited to the Court's ordinary sessions and sessions to which judges were summoned. The 1936 text seems to continue a distinction between sittings to which a judge is summoned and those to which he is not summoned. This reflects an apparent uncertainty as to the validity of a summons which might not give to the judge summoned sufficient time for reaching The Hague; apparently it was thought that if a quorum of the judges could be assembled in time to deal with an urgent matter, it was not necessary to summon judges who were known to be too far distant to be able to be present at the date fixed.[64] The duty of a judge to be present at a series of sittings extends not only to the first sitting but also to the entire series of sittings.[65]

§287. 1936 Rules, Article 28. This text is an adaptation of Article 29 of the former Rules, first adopted in 1922.

[60] Series D, No. 2 (3d add.), p. 528. Cases of urgency were thought to include requests for the indication of interim measures of protection and requests for advisory opinions characterized as urgent.

[61] *Idem*, p. 536.

[62] This power is not to be exercised by the President. Series E, No. 14, p. 129.

[63] Divergent opinions were expressed on this point during the framing of the 1936 Rules. Series D, No. 2 (3d add.), pp. 543–545. See also Series E, No. 14, p. 130.

[64] Series D, No. 2 (3d add.), p. 541.

[65] Series D, No. 2 (2d add.), pp. 99–100.

§288. 1936 Rules, Article 29. This text continues the substance of a provision in Article 30 of the 1922 Rules; the second sentence, added in 1926, was slightly re-drafted in 1936. The article applies only to "the full Court," as no special quorum is provided for the Chambers; the full number of members must be present at a meeting of a Chamber.[66]

§289. 1936 Rules, Article 30. This Article follows quite closely Article 31 of the 1922 Rules and the additions made to it in 1926. It has been questioned whether such provisions concerning its deliberations should be so formalized in the Court's Rules.[67] Paragraph 1 is intended to be broader than paragraph 3 of Article 54 of the Statute, which requires deliberations on judgments to be "in private and remain secret"; the principle is applied to all deliberations connected with contentious and advisory cases before the Court, and by paragraph 8 it is extended to administrative matters. Paragraph 2 covers the possibility of having assessors or experts present at the deliberations.[68] Paragraph 3 seems to be a safeguard against a judge's abstaining from voting on the issues of a case, while paragraph 4 is a protection to a judge against any possible surprises. The provision for inverse order of voting in paragraph 5 dates from 1926, but the Court seems to have adopted the practice even earlier. Paragraph 7 seems to provide a method of procedure to be followed by a judge in setting forth his individual or separate opinion; while the English text of Article 57 of the Statute establishes the privilege of delivering a separate opinion without requiring any particular procedure, the French version of Article 57 requires the *opinion individuelle* to be joined to the judgment of the Court (*"d'y joindre"*).[69]

§290. 1936 Rules, Article 31. This text is a re-draft of Article 32 of the 1922 Rules, the phrase "particular modifications or additions proposed jointly by the parties" being substituted for "such other rules as may be jointly proposed by the parties concerned." The provision was the subject of a lengthy debate in 1922; [70] certain proposals made at that time might have permitted even a varying of provisions contained in the Statute. Judge Schücking referred to the article as containing "a rudiment of arbitral procedure." [71]

§291. 1936 Rules, Article 32. This text represents a departure from the earlier Rules. The general object of the Article is to indicate what should be contained in a special agreement or application. As to the

[66] Series D, No. 2 (3d add.), pp. 15–17.
[67] *Idem*, p. 763.
[68] Series D, No. 2, p. 203.
[69] Series D, No. 2 (3d add.), p. 24.
[70] Series D, No. 2, pp. 52–4, 57–61.
[71] Series D, No. 2 (3d add.), p. 427.

special agreement, paragraph 1 adds nothing to Article 40 of the Statute, and its inclusion in the Rules is only for the sake of symmetry. As to the application, the first sentence of paragraph 2 adds nothing to the imperative requirements of Article 40 of the Statute; the second sentence adds certain safeguards for the respondent party without giving to them the imperative character of the statutory provisions.[72] Paragraph 3 concerning the signature and legalization of applications was added in 1936.

§292. 1936 Rules, Article 33. This text, new in 1936, is in line with paragraph 2 of Article 40 of the Statute.

§293. 1936 Rules, Article 34. This text is a re-draft of Article 36 of the 1926 Rules. Paragraph 1 would seem to serve little purpose, particularly as a provision in the Rules, as it relates to the Court's internal economy; and it seems incongruous to have it placed in the same article with the succeeding paragraph. "Channels indicated in the Statute" covers the reference to the Secretary-General of the League of Nations in paragraph 3 of Article 40 of the Statute; the "special arrangement" refers to the channel of communication which may have been preferred by a State in reply to the Registrar's inquiry.[73] In re-drafting the Article, no analysis was given to the troublesome phrase "States entitled to appear before the Court"; [74] that phrase, in the singular, was first used in Article 38 of the 1922 Rules.[75]

§294. 1936 Rules, Article 35. This Article is a revision of paragraph (1) of Article 35 of the 1926 Rules. The former text contained a provision that "whenever possible, the agents should remain at the seat of the Court pending the trial and determination of the case."

§295. 1936 Rules, Article 36. This Article covers what was formerly paragraph (2) of Article 35 of the 1926 Rules, but it changes the time set for filing the declaration. The previous text referred to the declaration provided for in the Council resolution "when it is required under Article 35 of the Statute"; in 1936 this reference to the Statute was thought to be unnecessary and not justified by the text of Article 35.[76] The text of the Council resolution was made an annex to the Rule in 1926.

§296. 1936 Rules, Article 37. Paragraphs 1, 2 and 3 of this Article were new in 1936; paragraphs 4 and 5 cover the second and third paragraphs of Article 33 of the 1922 Rules. The previous Rules did not provide for personal contact between the President and the agents; the

[72] *Idem*, pp. 68, 135, 155–160. [73] *Idem*, p. 43. See §418, *infra*. [74] See §417, *infra*.
[75] In 1926, M. Anzilotti thought that the phrase included all States. Series D, No. 2 (add.), p. 78.
[76] Series D, No. 2 (3d add.), p. 729.

necessary contact with the parties had in most cases been established by the Registrar without any intervention by the President. Paragraph 1, prescribing the action of the President "in every case submitted to the Court," encountered some opposition; a proposal to make compulsory the meeting between the President and the agents was not adopted, because it was feared that this might, in certain cases, delay the proceedings of the Court.[77] In paragraph 2, the term "documents of the written proceedings" is used, as elsewhere, to exclude applications and special agreements. As to paragraph 5 of this Article, the use of the expression "if the Court is not sitting" gave rise to prolonged debate.[78] The Article seems to apply to written proceedings only.[79]

§297. 1936 Rules, Article 38. This text maintains the substance of a provision in paragraph 1 of Article 33 of the 1922 Rules.[80] The object of the Article is "to indicate the method by which the Court fixed the time-limits, namely by assigning a definite date and not by specifying a certain number of days, weeks or months." [81] In 1922 and again in 1936, proposals were made that rules be adopted for the computation of time; in 1934 a committee expressed the opinion that this question was "not of sufficient importance to require detailed regulation." [82]

§298. 1936 Rules, Article 39. This text effects but a slight re-drafting of the first four paragraphs of Article 37 of the Rules adopted in 1922. Paragraphs 1 and 2 are not intended to exclude a possibility that both of the Court's official languages may be employed in documents of the written proceedings.

§299. 1936 Rules, Article 40. This text elaborates the provisions of Article 34 of the 1926 Rules. The phrase "document of the written proceedings" (Fr., *pièce de la procédure*), in the sense in which it is used in paragraph 1, covers the written memorials, counter-memorials, replies and rejoinders, with annexes, but does not apply to documents instituting proceedings nor to preliminary objections or documents presented during the oral proceedings. In paragraph 1, "fifty printed copies" are required instead of the "ten copies certified as correct" and the "forty printed copies" previously required. In the second sentence of paragraph 3, it is the date of the receipt of the document, and not the date of registration, that is meant by "the material date" (Fr., *la date dont la Cour tiendra*

[77] *Idem*, pp. 59–61.
[78] See especially *idem*, pp. 586–601.
[79] *Idem*, pp. 463–464, 582–586.
[80] For the history of Article 33, see Series D, No. 2 (2d add.), pp. 175–6.
[81] Series D, No. 2 (3d add.), p. 463.
[82] Series D, No. 2, pp. 130–132, 198; Series D, No. 2 (3d add.), pp. 45–50, 63.

compte);[83] paragraph 2 of Article 67 of the 1936 Rules embodies a similar provision. Paragraph 4 is a codification of a practice already established in 1936. Paragraph 6, added in 1936, also represented a prevailing practice;[84] it was intended to apply only to a clerical "slip or error" (Fr., *erreur matérielle*).[85]

§300. 1936 Rules, Article 41. This is a re-draft of Article 39 of the 1922 Rules. The reference to Article 37 in paragraph 1 is intended to safeguard a possibility that even in the absence of an agreement between the parties, alternative presentation of the documents may be ordered.[86] The English version of previous Rules, following the usage in Article 43 of the Statute, had employed the terms *case* and *counter-case;* the reasons given for the substitution of *memorial* and *counter-memorial* in 1936 are hardly convincing.[87]

§301. 1936 Rules, Article 42. This is a re-draft of Article 40 of the 1922 Rules. The object of the Article is to give an indication to agents as to the contents of their memorials and counter-memorials.

§302. 1936 Rules, Article 43. This text deals with matters previously covered in Articles 37 and 40 of the 1922 Rules. "Documents in support" is not a term of exact content; it does not include a treatise which may be cited, but refers rather to documents which constitute evidence (Fr., *pièces justificatives*).[88] The reference in paragraph 3 to paragraph 1 is confused, owing to the employment in the English version of the word "document" in different senses; as the French version indicates, the intention is to apply the substantial provisions of the first and second paragraphs to *documents in support* of the arguments set forth in *documents of the written proceedings* other than the memorial and the counter-memoral.

§303. 1936 Rules, Article 44. This text is a revision of Article 42 of the 1931 Rules. In paragraph 1, "all the documents in the case" does not include, apparently, applications or special agreements, such documents being specially referred to in Articles 33 and 34 of the 1936 Rules; nor does it include documents produced after the termination of the written proceedings (Article 48); on the other hand, this expression comprises not only "the documents of the written proceedings" but also some of the correspondence. The second paragraph was broadened to cover not only memorials and counter-memorials, but also other documents of

[83] *Idem*, p. 54. [84] See, for instance, Series C, No. 67, p. 4115.
[85] Series D, No. 2 (3d add.), pp. 605–608.
[86] *Idem*, p. 870. [87] *Idem*, p. 768. [88] *Idem*, p. 101. See §507, *infra*.

the written proceedings; its object is to serve the needs of Governments which may be contemplating intervention, though the text is not limited to a case in which a request has been made by the interested government.[89]

§304. 1936 Rules, Article 45. This text originated in 1936. It furnishes a definition of the term "ready for hearing" (Fr., *en état*) used in later articles; it was thought that the term, especially in the French version, might otherwise be found obscure.[90]

§305. 1936 Rules, Article 46. This Article deals with topics covered in Article 28 of the earlier Rules. It abandons the idea of a "session list." As re-drafted in 1931 the provision in paragraph 1 of Article 28 concerning the "general list" of cases was designed "to prevent unjustified preference being given to one case over another";[91] that was also a purpose of the "session list." The introductory qualification in paragraph 1 of the 1936 Rules was "intended to indicate that requests for interim measures of protection had priority automatically."[92] Under paragraph 2, the Court reserves power, "in special circumstances," to give priority to a case without regard to the wishes of the parties to that case or of the parties to the other case or cases affected. Paragraph 3 replaces the provision for adjournments (Fr., *remises*) in paragraph 5 of Article 28 of the 1931 Rules which was not clear and was never applied.[93]

§306. 1936 Rules, Article 47. The first paragraph of this Article is a re-draft of Article 41 of the 1922 Rules as amended in 1931, which had given rise to varying interpretations;[94] it is now clear that the fixing of the date for the oral proceedings is to follow the termination of the written proceedings, but it is not necessary that the date be fixed immediately after the case is ready for hearing. For the fixing of the date, an order is not required; but an order was given in 1940 owing to the special circumstances of the case.[95]

§307. 1936 Rules, Article 48. This Article was new in 1936. It refers to documents offered by a party as evidence after the termination of the written proceedings; it does not deal with documents requested by the Court under Article 54 of the Rules.[96] In the *Pâzmány University Case*,[97] the Court construed the words *documents nouveaux*, which are also found in Article 52 of the Statute, to mean *documentary evidence*. A *document*

[89] Series D, No. 2 (3d add.), pp. 120, 611.
[90] *Idem*, p. 613.
[91] Series D, No. 2 (2d add.), p. 92.
[92] Series D, No. 2 (3d add.), p. 561.
[93] *Idem*, pp. 548–9.
[94] *Idem*, p. 117.
[95] *Electricity Company Case*, Series A/B, No. 80.
[96] An explanation of the text is given in Series D, No. 2 (3d add.), pp. 188–190.
[97] Series A/B, No. 61, p. 216.

is to be distinguished from a *pièce justificative, e.g.*, a journal or legal opinion or legal text, as to which it was intended to allow parties the fullest liberty.[98] The third sentence of paragraph 1 provides for a tacit consent, not merely a presumption of consent; this was purposely not made subject to a time-limit. The second paragraph is designed to leave the Court free to see or not to see the document in question before reaching its decision.[99] The second sentence of paragraph 2 follows a practice adopted in the *Eastern Greenland Case*.[1] The Article was said to have been drafted with regard for the "Anglo-American system" of evidence, "as well as the system prevailing on the continent of Europe." [2]

§308. 1936 Rules, Article 49. This is a revision and elaboration of Article 47 of the 1922 Rules. Paragraph 1 covers the testimony of witnesses and experts; paragraph 2 covers "all other evidence," *i.e.*, other than that covered by paragraph 1 and the documentary evidence covered by Article 48. Judge Anzilotti spoke of the witnesses and experts as "living documents." [3] The drafting of the Article occasioned a lengthy debate as to the extent of a party's right to call witnesses and experts, and the extent to which this right is subject to the Court's control. In the end it was decided to omit reference to the effect of a failure to comply with the time-limit set by the Article; the minutes record the view of the Court that Article 49 does not "involve any forfeiture of rights, and that the Court remained free at any time to admit evidence." [4] The provision was "designed as a guide to lawyers responsible" for the conduct of a case.[5] Information is to be given by one party to other parties "through the Registry."

§309. 1936 Rules, Article 50. This text is a re-draft of Article 45 of the 1922 Rules. The principal change is the substitution of the phrase "whether the parties shall address the Court" for the more accurate phrase "whether the representatives of the parties shall address the Court." A proposal to delete the Article as "quite useless" was not adopted; the rule was defended as enabling the Court to refuse to accept evidence not relevant.[6] It was said to have been adopted in 1922 as a combination of Anglo-Saxon and continental procedure.

[98] Series D, No. 2 (3d add.), pp. 197, 206, 209.
[99] *Idem*, p. 198. For this decision of the Court an order is not required. *Idem*, p. 196.
[1] *Idem*, pp. 192–193. [2] *Idem*, pp. 188, 191.
[3] *Idem*, p. 170. [4] *Idem*, p. 623 [5] *Idem*, p. 621.
[6] *Idem*, pp. 251, 770, 776. Judge Anzilotti referred in this connection to the *Chinn Case*, Series A/B, No. 63, where "the enquiry asked for by one party would only have been relevant if the question of law had been decided in a certain way."

§310. 1936 Rules, Article 51. This text retains the substance of Article 46 of the 1922 Rules. The Court's practice was explained to be that "not more than two statements were allowed on the question as a whole; but the presentation of these statements might be sub-divided, at the discretion of the party concerned, among a number of persons." [7] It was proposed in 1935 that the Court should have power to determine also the number of counsel to be heard,[8] but doubt was expressed as to the Court's power to restrict the rights of the parties in this way.

§311. 1936 Rules, Article 52. This Article, new in 1936, codified the practice sanctioned by the Court's resolution of February 20, 1931.[9] In the earlier years, it was thought that embarrassment might result if the judges were free to put questions to agents or counsel, and the discouragement of such questions added to the dullness of the hearings. The resolution of February 20, 1931, provided (in paragraph 2):[10]

> In the course of the arguments and before or after each translation, questions may be put to counsel by the judges individually after notice has been given to the President.
>
> The questions ought to refer exclusively to the actual content of the argument.
>
> The President may either give his assent or he may ask the judge interested to postpone his question.
>
> It shall be pointed out to counsel that he has the privilege of delaying his response if he should deem it necessary.

In 1936, it was thought that this matter should be covered in the Rules for the purpose of better information to States' representatives appearing before the Court. The changes were intended to safeguard the judges' privilege of putting questions; the President was to be apprised not in order that he might give or withhold assent, but in order that he might say when the question should be put. Apparently it was not intended to require that the nature of the question, or its terms, should be made known to the President in advance.[11] The judge's question is no longer required "to refer exclusively to the actual content of the argument," though it would seem that only the President would put questions in regard to the conduct of the hearing.[12] The provision for "questions

[7] Series D, No. 2 (3d add.), pp. 184, 824.
[8] *Idem*, p. 183.
[9] Series D, No. 2 (2d add.), p. 300.
[10] A translation is given here. *Cf.*, Series D, No. 2 (3d add.), p. 167.
[11] *Idem*, pp. 173–175.
[12] *Idem*, pp. 172, 731.

to the parties" means, of course, questions to agents, counsel or advocates. A party is not obligated to reply to a question, but its failure to reply may be at its own risk.[13]

§312. 1936 Rules, Article 53. Paragraph 1 of this Article revises Article 51 of the 1922 Rules; paragraph 2 continues the text of Article 50 of the 1922 Rules; paragraph 3 was new in 1936. The earlier Rules applied only to witnesses, but the 1936 Rules were extended to experts also; this means experts called by the parties, "expert-witnesses."[14] The expression "agents, counsel or advocates" replaces the word "representatives" employed in Article 51 of the 1922 Rules. The previous text provided for questioning by the judges after questioning by the President, but the 1936 text does not prescribe such order. Article 53 as a whole applies only to witnesses and experts appearing in Court; if they appear before a commission of enquiry, "the whole procedure for the hearing of witnesses would have to be prescribed in the order concerning the enquiry."[15]

§313. 1936 Rules, Article 54. This text revises that of Article 48 of the 1922 Rules, extending the provision to experts. The power of the Court has been rested on Article 50 of the Statute,[16] but Article 49 seems to afford a better basis for it.

§314. 1936 Rules, Article 55. This text incorporates that of Article 52 of the 1922 Rules, adding the reference to experts; the French text of the former Article 52 was slightly re-drafted. If witnesses or experts appear at the instance of a party, they are not paid out of the funds of the Court.

§315. 1936 Rules, Article 56. This text effects a slight re-drafting of Article 49 of the 1922 Rules, adding the reference to experts. The previous text had been criticized by the Registrar,[17] as it seemed to empower the President to order the examination of a witness. The Court rejected a proposal that it might instruct one or more of its members to examine witnesses elsewhere than at the seat of the Court, or to carry out an inspection on the spot.[18]

§316. 1936 Rules, Article 57. Paragraph 2 of this Article grew out of Article 53 of the 1922 Rules, the omission of which was proposed in

[13] *Idem*, p. 438.

[14] If the expert is appointed by the Court, Article 57 of the Rules is applicable; the parties have no right to interrogate him without the Court's consent, and the terms of his solemn declaration will be fixed by an order of the Court. *Idem*, pp. 237, 625.

[15] *Idem*, pp. 231, 237.

[16] Series D, No. 2, p. 145.

[17] Series D, No. 2 (3d add.), pp. 825–826. *Cf.*, *idem*, p. 222.

[18] *Idem*, pp. 225–227.

1936. Paragraph 1, due to the Court's experience in the *Chorzów Case*,[19] implements Article 50 of the Statute.

§317. 1936 Rules, Article 58. This text grew out of Article 44 of the 1922 Rules; paragraph 1 was inspired by the resolution adopted by the Court on March 29, 1933 concerning oral translations at the public hearings.[20] Under Article 44 of the previous rules, a party was responsible for the translation of the testimony of its witnesses or experts; the new text makes this translation subject to the Court's supervision (Fr., *contrôle*), *i.e.*, the Court reserves the checking of the translation.[21] The authorization to use a language other than French or English was previously not given in the form of an order; but this form was employed in the *Borchgrave Case* in 1937.[22] The declaration provided for by the new paragraph 3 was required to "augment the solemnity of the procedure," and to remind the interpreters of the importance of their duties.[23]

§318. 1936 Rules, Article 59. This text varies but slightly that of Article 55 of the 1926 Rules.

§319. 1936 Rules, Article 60. The text follows quite closely Article 54 of the 1926 Rules; the second sentence of paragraph 1 was added in 1936.[24] The report of the testimony of a witness provided for in paragraph 2 is read to him at a public sitting of the Court.[25] The detailed execution of the supervision prescribed in paragraph 3 may be entrusted to a committee of the Court.[26]

§320. 1936 Rules, Article 61. This text represents a wide departure from the previous Rules. The two dispositions embodied in Article 57 of the 1922 Rules—concerning the power of the President to indicate interim measures when the Court is not sitting, and the placing on record of a party's refusal to conform to the suggestions of the Court—had completely disappeared in 1931. In 1935, the Coordination Commission wished to revive the first of these ideas, and after a long debate its proposal to this end was rejected by the President's casting vote.[27] What was called an "application" (Fr., *requête*) in Article 57 of the 1931 Rules became a "request" (Fr., *demande*) in the 1936 text; the priority and

[19] In this case the Court, by an order dated September 13, 1928, organized an expert enquiry. Series A, No. 17; Series C, No. 15–II. *Cf.*, Series D, No. 2 (3d add.), pp. 624–625.
[20] Series E, No. 9, p. 163; *idem*, No. 14, p. 138.
[21] Series D, No. 2 (3d add.), p. 643.
[22] Series C, No. 83, p. 175.
[23] Series D, No. 2 (3d add.), p. 642.
[24] Since 1933 the shorthand note of interpretations has as a rule been replaced by a complete written translation of the shorthand note of the original speech. Series D, No. 2 (3d add.), p. 874.
[25] *Idem*, p. 629.
[26] See Series C, No. 80, pp. 1403, 1444.
[27] Series D, No. 2 (3d add.), pp. 279–289.

urgency established in 1931 are continued in paragraph 2 of Article 61. Paragraph 3 provides that even during the judicial vacations the members of the Court may be convened to deal with a request, this being the meaning of "forthwith" (Fr., *sans retard*); paragraph 3 also preserves the precedent established by President Adatci in the *Pless Case* in 1933,[28] by providing that pending a decision by the Court the President may take measures necessary to enable the Court to give an effective decision, *i.e.*, measures to prevent the Court from being confronted with a *fait accompli* due to action by a party.[29] Paragraph 4 seems a logical consequence of the provisions in paragraph 6 that the Court may proceed *proprio motu* to indicate interim measures; the latter provision is in line with the Court's jurisprudence [30] and it preserves the power of preliminary appreciation conferred on the President by the 1931 Rules with respect to the possible desirability of the Court's acting *proprio motu*. Paragraph 5 was said to be due to Judge Anzilotti's dissent from an order made by the Court in the *Polish Agrarian Reform Case;* [31] it may serve as a warning to a party whose request has been denied that a second request should not be made on the basis of the same facts.[32] In the discussion of paragraph 7, it was said that the party which had requested the indication of interim measures could always ask for a revocation of the decision indicating them, and that the revocation would follow; but that if the other party asked for a revocation it would have to show a change of circumstances.[33] Paragraph 8 follows Article 57 of the 1931 Rules in requiring that the parties be given opportunity to present observations. In this connection, the Coordination Commission proposed in 1934 that if an agent had not been appointed by a party, its diplomatic representative at The Hague should be requested temporarily to act as agent; the Court's rejection of this proposal was both prompt and decisive.[34] Paragraph 9 providing for the participation of judges *ad hoc* gave some difficulty because of the possibility that such judges might not yet have been appointed when the Court was called upon to decide on a request for interim measures, or if appointed might yet be in a distant country; as finally adopted, the text seems sufficiently flexible to be practicable, but

[28] Series C, No. 70, p. 429. In this case, the President drew the attention of the Polish Government to the opportunity to consider the possibility of avoiding any measures of coercion pending the Court's decision on the request for an indication of interim measures.

[29] Series D, No. 2 (3d add.), pp. 288–90.

[30] *Southeastern Greenland Case*, Series A/B, No. 48, p. 284; *Polish Agrarian Reform Case*, *idem*, No. 58, pp. 178–9.

[31] *Idem*, p. 182.

[32] Series D, No. 2 (3d add.), p. 300.

[33] *Idem*, p. 299.

[34] *Idem*, pp. 297–298.

it assumes that in some cases the Court may proceed without even summoning judges *ad hoc*.

§321. 1936 Rules, Article 62. This text revises and elaborates the provisions in Article 38 of the 1926 Rules; the 1922 Rules were silent on the subject of preliminary objections. The 1926 Rule envisaged the possibility of a preliminary objection only "when proceedings are begun by means of an application." The omission of this phrase was proposed in 1934, with the thought that the provision should be made applicable to advisory proceedings; this contingency was not discussed at length, however.[35] The possibility of preliminary objections in cases arising under special agreements gave rise to long discussions, and it was decided that the text should cover cases brought either by application or by special agreement.[36] The attempt to define what was meant by preliminary objection was finally abandoned, as agreement could not be achieved. Though Article 62 preserves most of the substance of Article 38 of the 1926 Rules, it omits a provision in the latter assimilating the procedure on preliminary objections to summary procedure. In paragraph 3, the addition was made that "the proceedings on the merits shall be suspended."[37] Paragraph 5 was a new provision in 1936; while the Court's "decision on the objection" is given in the form of a judgment, the joining of an objection to the merits is made by order.

§322. 1936 Rules, Article 63. The earlier rules dealt with counter-claims only incidentally, Article 40 referring to them in listing the contents of counter-cases; as late as 1934 a committee of the judges would have preferred to leave the development of counter-claims to the jurisprudence of the Court.[38] The 1936 text distinguishes between counter-claims advanced by way of defense and counter-claims which are really cross-actions;[39] in the *Chorzów Case*, the Court had referred to counter-claims "juridically connected with the principal claim."[40] Article 63 pre-supposes that counter-claims will be advanced only in cases begun by means of an application. The proviso in the first sentence that the counter-claim must "come within the jurisdiction of the Court," was retained from the earlier text; it would seem to be quite unnecessary as to direct counter-claims, for once established the jurisdiction of the Court would seem to

[35] *Idem*, pp. 86–87.
[36] *Idem*, pp. 149, 645. *Cf.*, the *Borchgrave Case*, Series A/B, No. 72.
[37] Series D, No. 2 (3d add.), pp. 706–707.
[38] *Idem*, p. 781.
[39] *Idem*, p. 111. *Cf.*, the draft on "Competence of Courts," published by the Research in International Law, Harvard Law School, in 26 American Journal of International Law (Supp. 1932), pp. 490–493.
[40] Series A, No. 17, p. 38.

extend to any counter-claim directly connected with the subject of the application.

§323. 1936 Rules, Article 64. This Article is intended to provide for the preliminary proceedings which may be necessary for the Court to decide whether to grant or dismiss a request to intervene based upon Article 62 of the Statute.[41] The text makes no attempt to define the "interest of a legal nature" which would justify intervention under Article 62. It has no application to advisory proceedings; Article 66 of the Statute, added by the 1929 amendments, permits any State to request to be heard in such proceedings.[42] The text combines most of what was originally included in Articles 58 and 59 of the 1922 and 1926 Rules. The earlier text had left some doubt as to the time-limit for presenting an application for permission to intervene; one object of the words "at latest" in paragraph 1 of the new Article 64 is to remind the parties of the desirability of presenting applications as soon as possible.[43]

§324. 1936 Rules, Article 65. The first paragraph of this Article deals with the course to be followed by the intervening State with reference to the proceedings in which it has been admitted to intervene, *i.e.*, in which it is an intervening party; the second paragraph, the substance of which was previously in paragraph 4 of Article 59 of the 1926 Rules, deals with a situation in which the granting of permission to intervene might be considered by the Court as a "pure question of form." [44]

§325. 1936 Rules, Article 66. This Article, which elaborates the previous Article 60 as amended in 1926, deals with intervention as of right under Article 63 of the Statute. Under paragraph 1 the determination whether a State is a party to a convention invoked before the Court is made, in the first instance, by the Registrar; but as the Registrar's determination cannot foreclose the exercise of a right conferred by the Statute, paragraph 2 was added in 1936, on analogy to sub-paragraph 3 of Article 66 of the Statute.[45] No time-limit is set upon the filing of a "declaration of intention to intervene" (Fr., *déclaration d'intervention*). Paragraph 3, also new in 1936, envisages objections to the intended intervention, as well as doubts raised by the Court *proprio motu*. Paragraphs 4 and 5 refer to the intervening State as an intervening party; previously the intervener was not called a party.[46] The right to inspect the documents has been thought to be "a necessary corollary of the right to intervene." [47] The intervening party's rôle in the written and oral pro-

[41] Series D, No. 2 (3d add.), pp. 305, 779.
[42] *Idem*, p. 441.
[43] *Idem*, p. 779.
[44] Series D, No. 2 (3d add.), pp. 734, 780.
[45] *Idem*, p. 876.
[46] *Idem*, p. 312. See §432, *infra*.
[47] Series D, No. 2, p. 216.

ceedings is not clearly set forth; its participation in the written proceedings seems to be limited to the filing of written observations.

§326. 1936 Rules, Article 67. The subject of appeals was not dealt with in the Rules prior to 1936, but it was considered at some length by the 1929 Committee of Jurists and by a special Committee set up by the Council of the League of Nations in 1930.[48] So-called appellate jurisdiction was conferred on the Court by several international instruments; notably by Article 34 of the Danish-Latvian convention of November 3, 1924,[49] and by Article 10 of the Paris Agreement affecting certain States of Southeastern Europe, of April 28, 1930.[50] The Court's experience in the *Pázmány University Case*[51] led to the drafting of Article 67 of the 1936 Rules. The provision is designed to cover "appeals in a wide sense,"[52] but difficulty was foreseen in its application to appeals from national courts.[53] In the English version the term *appeal* is used in a general sense to cover cases in which various remedies may be sought; the French version does not employ the word *appel*, to which a special meaning usually attaches. What is really meant by *appeal* in English and *recours* in French is a dispute concerning a decision given by some other tribunal. It seems odd that it should have been thought necessary to state in paragraph 1 that the proceedings before the Court should be governed by the provisions of the Statute and the Rules. This provision may be thought to serve the purpose of making it clear that the Court is not bound to follow the rules of procedure prevailing in the tribunal whose decision is being appealed against; but in the course of its drafting the original purpose which the provision was to have served completely disappeared.[54] Nor does the text of paragraph 1 seem to take account of Article 31 of the 1936 Rules.

Paragraph 2 of Article 67 is clearly due to the preliminary objection made in the *Czechoslovak Appeals Cases* in 1932;[55] it applies the principle laid down in paragraph 3 of Article 40. Paragraph 5 of Article 67 was adopted instead of a proposal that the tribunal which had rendered the decision impeached should transmit its record to the Court;[56] it does not preclude the presentation of new documents by the parties.[57]

[48] See §435, *infra*.
[49] 33 League of Nations Treaty Series, p. 393.
[50] 121 *idem*, p. 81; 5 Hudson, International Legislation, p. 422. *Cf.*, the Luxemburg-Norwegian Treaty of February 12, 1932. 142 League of Nations Treaty Series, p. 29.
[51] Series A/B, No. 61.
[52] Series D, No. 2 (3d add.), p. 342.
[53] *Idem*, pp. 338–340. See §72, *supra*.
[54] *Idem*, pp. 343, 878.
[55] Series C, No. 68, pp. 187–90, 200–3.
[56] Series D, No. 2 (3d add.), pp. 354–356.
[57] *Idem*, pp. 444–446, 652.

§327. 1936 Rules, Article 68. The subject of settlement and discontinuance was dealt with in Article 61 of the 1922 Rules. Article 68 adds to the 1922 text that the Court's action is to be taken by order, and that the order will prescribe the removal of the case from the list; the first of these additions merely confirmed the practice of the Court.[58] The text was designed to leave it open to the parties to notify the Court of the fact that an agreement had been concluded, without requiring that they communicate to the Court the text of the agreement.[59] It leaves open the question of judgments by consent; in 1922 it was thought that such judgments "might have a detrimental effect upon the development of case-law." [60]

§328. 1936 Rules, Article 69. The possibility of discontinuance by one party only was not explicitly covered by the earlier Rules.[61] In paragraph 2 some doubt may arise as to what amounts to taking a "step in the proceedings"; apparently the appointment of an agent would be such a step.[62] There can be no question of unilateral termination in advisory proceedings.[63]

§329. 1936 Rules, Article 70. This Article embodies a provision first adopted in Article 67 of the 1922 Rules, and extends it to the Chambers for Labor Cases and for Transit and Communications Cases, for which the earlier Rules made no provision. It was recognized in 1936 that provisions as to procedure before the full Court would not always be applicable to procedure in a Chamber;[64] hence the principal provision of the Article was made "subject to the provisions of the Statute and of these Rules."

§330. 1936 Rules, Article 71. Requests that cases be referred to one of the Court's Chambers were dealt with in Article 35 of the former Rules. Under the 1936 text such a request is to be made at the commencement of a proceeding, though not necessarily in the document instituting the proceeding;[65] this seems to exclude a possibility that a proceeding instituted before the full Court might later be transferred to a Chamber. If the parties are agreed, the formality of reference to a Chamber is to be "discharged by the Registry" without any action by the full Court.[66] The first sentence of paragraph 2 re-casts the first sentence of Article 68

[58] See the Order of May 25, 1929, in the *Chorzów Case*, Series A, No. 19, and the Order of January 26, 1933, in the *Castelloriz0 Case*, Series A/B, No. 51.
[59] Series D, No. 2 (3d add.), pp. 315–316.
[60] Series D, No. 2, p. 217.
[61] Series D, No. 2 (3d add.), pp. 318–319, note.
[62] *Idem*, p. 655.
[63] *Idem*, p. 877.
[64] *Idem*, pp. 359–60.
[65] *Idem*, p. 136.
[66] *Idem*, p. 657.

of the 1926 Rules; the second sentence is due to the changes made in Article 31 of the Statute, admitting judges *ad hoc* to the Chambers. Paragraph 3 re-casts the second paragraph of Article 68 of the 1926 Rules; it substitutes the President of the Court for the President of the Chamber [67] as the proper convener of a Chamber, this being justified by the possibility that the President of a Chamber might be absent from the seat of the Court.[68] Paragraph 4 was added in 1936 to clarify the position of the President of a Chamber.[69]

§331. 1936 Rules, Article 72. Article 69 of the 1922 Rules placed emphasis on written proceedings in the Chamber for Summary Procedure, and provided for oral proceedings only when the Chamber found that the documents did not furnish adequate information; it represented a compromise between those who desired all of the summary procedure to be written, and those who desired it to be oral.[70] A proposal that a case begun in the Chamber might be transferred to the full Court was narrowly defeated in 1922.[71] Article 69 was re-drafted in 1926 to distinguish between cases "presented by one party only" and cases presented by all parties simultaneously; the 1936 text omits this distinction. It was for the purpose of encouraging resort to the Chamber for Summary Procedure that the new paragraph 1 was adopted in 1936, providing for both written and oral procedure; [72] paragraph 4 envisages a possibility that the parties may dispense with oral proceedings, but there is no corresponding provision permitting the parties to dispense with written proceedings. Judge Anzilotti expressed the view that "in most, if not all, laws of procedure, the essential characteristic of summary procedure was that it was above all an oral procedure"; [73] Judge Fromageot, on the other hand, thought that in an international court "the desirability of having the parties' contentions, arguments and conclusions in writing amounted to a necessity." [74] General agreement was reached that summary procedure ought to be expeditious.[75] Paragraph 2 safeguards a possibility of a second written statement, to assure opportunity to a party to comment upon the first written statement by an adversary.[76]

[67] But see the expression of doubt on this point by a committee of judges in 1933. *Idem*, p. 772.

[68] *Idem*, p. 833.

[69] *Idem*, p. 772.

[70] Series D, No. 2, p. 158.

[71] *Idem*, pp. 100–102, 159.

[72] Series D, No. 2 (3d add.), pp. 672–676, 772.

[73] *Idem*, p. 659. See also, *idem*, p. 364.

[74] *Idem*, p. 661. Article 90 of the 1907 Hague Convention contemplated proceedings "exclusively in writing."

[75] It is sometimes said that summary procedure is "in principle an urgent procedure." *Idem*, p. 833.

[76] *Idem*, pp. 667–8.

§332. 1936 Rules, Article 73. This is a re-draft of Article 70 of the 1922 Rules, extending it to the special Chambers. The object of the Article is "to make it known that although judgment was rendered by a special Chamber, it was to be regarded as judgment by the Court." [77] The second sentence is an application of the provision in the second sentence of Article 58 of the Statute.

§333. 1936 Rules, Article 74. Paragraph 1 of this Article effects a slight re-drafting of paragraph 1 of Article 62 of the 1922 Rules as amended in 1926. An extended discussion took place in 1935 as to the date on which a judgment should be said to have been pronounced; [78] in the practice of the Court the date when a judgment is read out in open Court is taken to be that date, and only judges present when the judgment is read out in open Court are named as "judges participating." Judge Urrutia wished to draw a distinction "between the final adoption of the judgment and its delivery in open court." [79] A proposal was rejected to have the judgment contain "the names of the judges who have participated in the proceedings until the final vote upon the judgment." [80] The question was raised whether a judge might change his opinion between the final vote and the delivery of the judgment, but no clear answer was given to it.[81] The second paragraph of Article 74 maintains the 1926 drafting. Objection was made to the practice of allowing dissenting judges to attach to the judgment a statement of their dissent without giving reasons, but this practice was justified as enabling the public to know which were the dissenting judges.[82]

§334. 1936 Rules, Article 75. With slight re-drafting this text follows that of Article 63 of the 1926 Rules, adding in the first paragraph that the original of the judgment is to be placed in the archives of the Court. In practice the agents of the parties have the text of the judgment before them while it is being read in open Court.

§335. 1936 Rules, Article 76. This text was drafted in 1922 as part of Article 64; a reference to Article 58 of the Statute was dropped in 1936. A proposal was rejected in 1936 to add a provision that "no plea can be entertained for the setting aside of judgments delivered or orders made under Article 53 of the Statute in cases of default." [83]

[77] *Idem*, p. 449.
[78] *Idem*, pp. 320–323, 326. This question may be thought to be solved by the dating of the judgments.
[79] *Idem*, p. 325.
[80] *Idem*, p. 323.
[81] *Idem*, p. 326.
[82] *Idem*, p. 325.
[83] *Idem*, p. 329.

§336. 1936 Rules, Article 77. This Article maintains the text of Article 56 as drafted in 1926. Doubt was expressed in 1936 as to whether the Court's jurisdiction extended to an award of costs after judgment had been delivered. It had been assumed by the Coordination Commission that a failure to pay costs as ordered might be a violation of Article 13 of the Covenant or of a declaration made in pursuance of the Council's resolution of May 17, 1922;[84] the Commission thought it preferable to return to the 1922 text which provided that "before the oral proceedings are concluded each party may present his bill of costs." It was pointed out in 1936 that no provision had been made concerning the procedure to be followed in the presentation of a bill of costs; but a detailed procedure as to costs proposed by Judge Schücking was not adopted.[85]

§337. 1936 Rules, Article 78. This is a re-draft of paragraph 1 of Article 66 of the 1926 Rules,[86] implementing Article 61 of the Statute. Revision applies only to judgments, and not to decisions "which, normally, would take the form of a judgment" but which are embodied in orders.[87] In paragraph 1 a reference to Article 61 of the Statute was added, without any attempt to say whether the latter required an objectively new fact or a newly discovered fact.[88]

§338. 1936 Rules, Article 79. With slight re-drafting this text follows paragraph 2 of Article 66 of the 1926 Rules. Proceedings for interpretation have been said to be "independent proceedings of an urgent and summary nature." The provision in paragraph 4 that the Court may ask parties for "further written or oral explanations" (Fr., *supplément d'information*) where the interpretation of a judgment is being sought, may be made a basis for oral proceedings.[89]

§339. 1936 Rules, Article 80. This text follows quite closely paragraph 3 of Article 66 of the 1926 Rules; but it omits the provision that "the provisions of [paragraph 3 of] Article 13 of the Statute shall apply in all cases."[90] As to this latter provision, the Court had decided in 1927 that Article 13 of the Statute referred only to judges who ceased to belong to the Court or to one of its Chambers, and that the reference to Article 13 in Article 66 of the Rules did not require the summoning of the judges and deputy judges who had composed the Court when it had

[84] *Idem*, p. 875.
[85] *Idem*, pp. 329–333.
[86] *Idem*, pp. 331–332.
[87] *Idem*, pp. 334–335, 832–833.
[88] *Idem*, pp. 272, 279.
[89] *Idem*, p. 330.
[90] *Idem*, p. 832.

given the judgment being construed.[91] In 1936 the Court was apparently of the same opinion. A request for the interpretation of a judgment may relate to the grounds of a judgment as distinguished from the operative part of the judgment.[92]

§340. 1936 Rules, Article 81. In slightly different form this text was previously paragraph 5 of Article 66 of the 1926 Rules.

§341. 1936 Rules, Article 82. The first sentence of this Article serves only as an introduction.[93] The second sentence is in line with Article 68 of the Statute as amended; its emphasis on the difference between an opinion on a *dispute* and an opinion on a *question* was due to a conception of two distinct procedures for advisory opinions, one for an opinion on a dispute in which contentious procedure generally would be applicable, and the other for an opinion on a question in which the Court would be free to follow a somewhat different course.[94] A proposal was rejected in 1936 to add an article dealing with the procedure where an opinion on a question was requested.[95] The text of the Article does not seem to impose a binding restriction on the Court.

§342. 1936 Rules, Article 83. This text amplifies a provision inserted in 1927 as a second paragraph in Article 71 of the 1926 Rules.

§343. 1936 Rules, Article 84. This text incorporates the first and third paragraphs of Article 71 of the 1926 Rules. The original purpose of the first sentence of the first paragraph was to exclude the giving of advisory opinions by a Chamber, and to indicate that the presence of deputy-judges was not necessary for the giving of advisory opinions. Perhaps the whole of this text is unnecessary, in view of the provision in Article 82.[96]

§344. 1936 Rules, Article 85. The first paragraph of this Article follows very closely the second sentence of the first paragraph of Article 74 of the 1926 Rules; the second paragraph is a re-draft of the second paragraph of that Article. The first paragraph was said to confirm a practice "designed to reconcile the legitimate desire of the Council of the League of Nations to be the first to receive the opinion for which it had asked, and the necessity of ensuring that the Court's opinions should receive full publicity." [97]

[91] Series E, No. 4, p. 295.
[92] But *cf.*, the dissent by Judge Anzilotti in the *Chorzów Case*, Series A, No. 13, p. 24.
[93] Series D, No. 2 (3d add.), pp. 678–684.
[94] *Idem*, pp. 408–415, 684–698.
[95] *Idem*, pp. 700, 701.
[96] *Idem*, pp. 703, 837.
[97] *Idem*, p. 416.

§345. 1936 Rules, Article 86. The 1936 Rules were adopted by eight votes to two, Judges Anzilotti and van Eysinga, dissenting.[98] After considerable discussion,[99] the new Rules were brought into force without any interval following their adoption. The text of Article 86 operates only to emphasize the repeal of the earlier Rules.

[98] The Court had only twelve judges at the time, and Judges Altamira and de Bustamante were absent from the meeting.

[99] Series D, No. 2 (3d add.), pp. 738–744.

CHAPTER 14

THE REGISTRY

§346. The Office of Registrar. The Statute of the Court provides for its appointment of a Registrar, who is to reside at the seat of the Court (Articles 21, 22). Though numerous articles of the Statute refer to the Registrar, it would seem that when the Statute was being drafted there was little appreciation of the importance of the post, and the later developments which have made the office so vital to the functioning of the Court were in no way foreseen. The Registrar has become much more than a clerk of court. He is the "head" of an institution called the Registry,[1] nowhere mentioned in the Statute;[2] as an administrative official he has manifold duties, which include the handling of the Court's finances; he has custody of the seals of the Court; he is the chief representative of the Court *vis-à-vis* Governments, the organs of the League of Nations, and the general public; he conducts important negotiations on behalf of the Court; and he plays a responsible rôle in the actual functioning of the Court as a judicial body.

Article 21 of the Statute provides that the Registrar's duties "shall not be deemed incompatible with those of Secretary-General of the Permanent Court of Arbitration." This provision was partly due to a desire to connect the two institutions, and partly to a desire for economy.[3] At no time have the duties of the two offices been conferred upon a single person,[4] though a combination would possess obvious advantages and it would not in any way militate against the interests of either the Permanent Court of International Justice or the Permanent Court of Arbitration.

[1] Other names were suggested for the Registry, particularly "The Office of the Registrar."
[2] Ten articles of the 1936 Rules (Articles 14–23) are devoted to the Registry.
[3] Minutes of the 1920 Committee of Jurists, p. 455; Series D, No. 2, p. 242.
[4] In 1929, when a vacancy in the post of Secretary-General of the Permanent Court of Arbitration was about to be filled, the Registrar addressed a letter to the President of the Administrative Council of the Permanent Court of Arbitration relative to the provision in Article 21 of the Statute. Series E, No. 5, p. 246.

§347. Dignity of the Office. The Court has wisely invested the office of Registrar with a becoming dignity. Article 15 of the Rules requires him to make a solemn declaration, at a meeting of the full Court. He is present at all sessions of the Court, and a meeting of the judges without the Registrar or his deputy would not be a meeting of the Court; at public meetings the Registrar wears a robe very similar to that worn by the judges. All minutes of meetings of the Court must, under Article 47 of the Statute, be signed by the Registrar, and under Article 58 the Court's judgment must bear his signature. He assists the drafting committees appointed by the Court to prepare the texts of its judgments and opinions. He has large powers which in addition to his administrative responsibilities give him an actual share in the work of the Court.[5] He is protected from embarrassment by the resolution forbidding the acceptance of decorations without the consent of the Court.[6] He enjoys the diplomatic privileges and immunities and special facilities conferred on the members of the Court.[7] At Geneva, also, the post has been dignified; though the Registrar has not been formally assimilated to the higher officials of the Secretariat of the League of Nations,[8] he is given large responsibilities as the Court's "competent official" in connection with the application of the League's Financial Regulations.

§348. Appointment of the Registrar. The appointment of the Registrar is governed by Article 14 of the Rules, which has tended to become more detailed through the various revisions. Only members of the Court may propose candidates, though in 1922 the Court received applications.[9] Since 1931, it is recognized that "experience in connection with the work of the League of Nations" should be considered as a qualification of a candidate; but the Rules place no restriction on the possible choice by the Court, other than nomination by a member of the Court. The appoint-

[5] This is shown by the rôle played by the Registrar in connection with the revision of the Court's Rules.

[6] Series E, No. 3, p. 178.

[7] Series E, No. 4, p. 58. In relation to the Netherlands authorities the Registrar ranks with the Secretary-General of the Permanent Court of Arbitration, considered as an international official. See §373, *infra*.

[8] In 1922, the Court seems to have envisaged assimilation to the post of Director of the Secretariat of the League of Nations. Series D, No. 2, pp. 6–7. In 1930, a League of Nations Committee of Thirteen proposed assimilation to the post of Under-Secretary-General. Series E, No. 6, p. 44. In function, the office of Registrar is more nearly comparable with that of the Secretary-General of the League of Nations, and that of the Director of the International Labor Office.

[9] Series D, No. 2, p. 242. In 1930, it was said that members of the "old" Court might put forward candidates for consideration by the "new" Court. Series E, No. 7, p. 280. In 1936, the President submitted to the Court applications which had been addressed to him. Series E, No. 14, p. 129.

ment or election is by a secret ballot, an absolute majority being required; the casting vote given to the President by the earlier Rules was abolished in 1931, as being inconsistent with the secrecy of the ballot. In the first nine-year period of the Court deputy-judges participated in the nomination of candidates; in 1922 the deputy-judges present participated in the choice of the first Registrar, and two deputy-judges were present when he was reelected in 1929. Every election, even an election to fill a vacancy, is for a term of seven years, which begins to run on January 1 following the election.[10] The Registrar may be reelected, however, and the Court has declared that the only object of the seven-year limit is to enable the Court, if necessary, to terminate the incumbency; the "principle of stability" has been adopted, instead of the system of rotation which prevails for the higher posts in the Secretariat of the League of Nations.[11] The wisdom of this provision is clear; it assures to the Court the immense advantage of its being able to capitalize experience gained.

§349. The Office of Deputy-Registrar. The Statute includes no provision for the post of Deputy-Registrar and the original Rules made no provision for it, though the possibility of creating such a post was mentioned in 1922.[12] The Court created the post in 1925, and since 1926 the Rules have made provision for it. The Deputy-Registrar is selected in the same way as the Registrar; he shares the functions of the Registrar and acts as a substitute for him; when so acting his powers and duties are assimilated to those of the Registrar, but from an administrative point of view the post is not assimilated to that of the Registrar.[13] The Deputy-Registrar is required by his contract to live at the seat of the Court. The instructions for the Registry of 1938 provide (Article 43) that "the Registrar will divide the work between himself and the Deputy-Registrar, ensuring that it is so organized that both of them are at all times fully conversant with all branches of the Court's and of the Registry's work." [14]

§350. The Staff Regulations. The organization of the Registry is determined by the Court upon proposals submitted by the Registrar.[15] The 1922 Rules provided (Article 21) for Regulations for the Staff of the Registry [Fr., *statut du personnel du Greffe*] to be adopted by the President on the proposal of the Registrar, subject to subsequent approval by the

[10] The term of seven years was chosen because Directors in the Secretariat of the League of Nations were appointed for this term, and to assure a continuity over the nine-year periods for which judges are elected. Series D, No. 2, p. 7.

[11] Series E, No. 5, p. 247.

[12] Judge Altamira proposed a candidate for the post in 1922. Series D, No. 2, p. 271.

[13] Series D, No. 2 (3d add.), p. 510.

[14] Series E, No. 14, p. 36.

[15] For the original plan proposed by the Registrar, see Series D, No. 2, p. 310.

Court;[16] in 1931, it was added that the regulations should be drawn up with regard to the organization decided upon by the Court and should conform so far as possible to the Staff Regulations of the Secretariat of the League of Nations. The original Regulations were approved by the Court on March 22, 1922;[17] they applied to the officials of the Registry exclusive of the subordinate administrative personnel, but not to the Registrar himself,[18] and the President explained that they "constituted a contract with the members of the Staff."[19] Several revisions of the Regulations have been made;[20] the latest Regulations came into force on March 12, 1936.[21] Since the revision of January 1, 1926, they have provided that on questions relating to rights and duties of officials of the Registry they are to be supplemented by the Registrar, having regard to the provisions of the Staff Regulations of the Secretariat of the League of Nations and the International Labor Office. Since the beginning, they have been subject to modification by the Registrar with the approval of the President, and have provided that the Registrar shall take into consideration any proposal of modification made by as many as three members of the Staff.[22] The fourteen articles of the 1936 Regulations (issued under Article 18 of the 1936 Rules) deal with appointments, salaries and allowances, hours of work, holidays and leave, pensions, and disciplinary measures.

Article 3 of the Staff Regulations provides that differences between the Registrar and Officials of the Registry may be submitted to the Court or to any of its members to whom the necessary powers may be delegated. It was contemplated that jurisdiction over complaints by officials of the Registry might be given to the League of Nations Administrative Tribunal created in 1927,[23] but no definite action was taken to this end,[24] though in 1930 the Tribunal was given limited jurisdiction over pension claims.[25]

[16] It seems that the President merely satisfies himself that the regulations are in general accordance with the Staff Regulations of the Secretariat of the League of Nations. Series D, No. 2 (2d add.), p. 153.

[17] Series D, No. 2, p. 225. For the text, see *idem*, pp. 530–532.

[18] The term "officials of the Registry" is generally used to exclude the Registrar.

[19] On the contractual nature of the engagement of officials, see the report of a committee of jurists to the First Committee of the Thirteenth Assembly in 1932. Records of Thirteenth Assembly, Fourth Committee, p. 206; Series E, No. 9, p. 194.

[20] Series E, No. 1, p. 81; *idem*, No. 2, p. 36; *idem*, No. 5, p. 54; *idem*, No. 7, pp. 75–81.

[21] Series D, No. 1 (3d ed.), pp. 75–9. The text is reproduced in Appendix No. 8, pp. 756–60, *infra*.

[22] In practice, however, such proposals have never been presented by the members of the Staff.

[23] Records of Eighth Assembly, Plenary, p. 201; 1 Hudson, International Legislation, pp. 212–6.

[24] Series E, No. 3, p. 32; *idem*, No. 4, pp. 52–3; *idem*, No. 9, pp. 33–4.

[25] Records of Eleventh Assembly, Plenary, p. 591.

§351. Instructions for the Registry. The duties of the Registry are set out in the Instructions, which under the third paragraph of Article 23 of the 1936 Rules are approved by the President on the submission of the Registrar. The original Instructions have been several times amended; [26] the latest Instructions entered into force on March 31, 1938.[27] In 75 articles they deal in detail with the position and duties of both the Registrar and the officials of the Registry.

§352. The Personnel of the Registry. On February 3, 1922, Åke Hammarskjöld (Sweden), who had previously acted for a short time as Secretary of the Court, was elected Registrar for a period of seven years,[28] and on August 16, 1929, he was re-elected for a like term; [29] owing partly to his experience in connection with the drafting of the Statute and to the continuity of his service, his work was of inestimable value to the Court in its formative years. M. Hammarskjöld having been elected a judge on October 8, 1936, the Court elected as his successor Julio López Oliván (Spain) who took up his duties on December 9, 1936.[30]

Three persons have held the post of Deputy-Registrar; Paul Ruegger (Switzerland) from 1926 to 1928, Julio López Oliván (Spain) from 1929 to 1931; and L. J. H. Jorstad (Norway) since February 1, 1931.

The Staff of the Registry comprises established, temporary, and auxiliary officials. The appointment of established officials, regulated by the Staff Regulations, is for seven years, but the appointments are automatically renewable until the age-limit is reached.[31] The appointments may be terminated under certain conditions by the Court or by the official concerned.[32] Temporary officials are appointed for periods of more than six months but less than seven years, while auxiliary officials are appointed for periods of less than six months. Under Article 17 of the 1936 Rules all appointments except that of the Deputy-Registrar are made by the Court on the proposal of the Registrar. No attempt is made to follow a strict

[26] Series E, No. 1, p. 86; *idem*, No. 2, p. 40; *idem*, No. 5, p. 58.

[27] *Idem*, No. 14, pp. 27–46. The text is reproduced in Appendix No. 9, pp. 760–75, *infra*.

[28] As a member of the Secretariat M. Hammarskjöld had been placed at the Court's disposal by the Secretary-General of the League of Nations. His candidacy for the post of Registrar was suggested by the President of the Court. Series D, No. 2, p. 7.

[29] Series E, No. 6, p. 41. The Registrar's first term began on February 1, 1922. Series D, No. 2, p. 579. Under the third paragraph of Article 17 of the 1922 Rules, however, the seven-year period was taken to have begun on January 1, 1923, so as to expire at the end of 1929. His second term began on January 1, 1930.

[30] Series E, No. 13, p. 46.

[31] Exceptionally, the election of the Deputy-Registrar is not automatically renewable, but he may be re-elected.

[32] In 1940, most of the officials of the Registry were dismissed, or their contracts were suspended, in accordance with decisions of the Assembly of December 15, 1939. Records of Twentieth Assembly, Plenary, p. 22.

principle of national distribution of the posts in the Registry; knowledge of the official languages of the Court would necessarily restrict any selections on the basis of nationality.[33] Regulations in force down to 1935 fixed certain categories for officials, based upon the salaries paid; after November 1, 1935, newly appointed or promoted officials were divided into categories corresponding to those provided for in the Staff Regulations of the Secretariat of the League of Nations and of the International Labor Office. A list of the established and temporary officials is published each year.[34]

As the possibilities of promotion within the Staff of the Registry are limited, the Registrar has urged "that it should be possible for officials of the Court to be transferred . . . to posts at Geneva, the only means open to them of obtaining promotion within the framework of the League."[35] The 1933 Staff Regulations of the Secretariat of the League of Nations give a preference to officials of the Court when appointments are to be made from outside the Secretariat.[36]

§353. The Work of the Registry. The work of the Registry has been described by the Registrar[37] under four headings: (1) judicial; (2) diplomatic; (3) administrative; and (4) linguistic.

(1) The Instructions for the Registry (Article 3) make the Registrar "responsible for the preparation of cases for consideration by the Court," and direct him to assist the Court's drafting committees in the preparation of the texts of judgments and opinions. They make the Registrar responsible also (Article 15) for seeing that the prescribed forms are followed in documents submitted to the Court, and he is empowered (Article 16) to ask for additional information with regard to requests for advisory opinions. These duties are carried out with a view to saving the Court's time; and to the same end "in all cases of some complexity, the Registry provisionally assembles beforehand—subject to the personal researches which it is the duty of each judge to undertake—judicial and historical precedents, the text of treaty or legislative provisions and the opinions of publicists bearing upon the matter" involved.[38]

[33] Established and temporary officials (excluding locally recruited messengers) from 1922 to 1940 were of the following nationalities: British (12), Netherlands (9), French (4), Belgian (2), Swiss (2), German (1), Irish (1), Italian (1), Norwegian (1), Spanish (1), and Swedish (1).

[34] In Series E, Chapter I. See Series E, No. 15, p. 27, for a list of 27 officials not including the Registrar.

[35] Series E, No. 6, p. 45.

[36] This principle is applied more easily in view of the fact that the Court's personnel is sometimes lent to the Secretariat. See Series E, No. 9, p. 196, note.

[37] Series E, No. 7, pp. 64ff.

[38] *Idem*, pp. 64–5. For an example, see Series C, No. 16—I, pp. 24 ff.

(2) The diplomatic work of the Registry consists of conducting the necessary correspondence with reference to cases before the Court;[39] conducting negotiations and correspondence with Governments as to general questions, particularly with the Netherlands Government, and with the organs of the League of Nations; handling relations with the press, including the preparation of *communiqués;* and the preparation of the publications of the Court with reference to its jurisdiction, and of its annual reports.

(3) The administrative work of the Registry is extensive;[40] in part it is set forth in the Instructions for the Registry. It comprises the internal administration proper, *e.g.*, questions relating to staff, premises, equipment, purchases and accounts; financial administration, including preparation of the budget and seeing it through the Assembly; the routine of preparing and distributing documents, of keeping archives and of maintaining a library;[41] and the preparation and printing of the Court's publications.

(4) The linguistic work of the Court occupies the time of a part of the Staff. Interpretations at meetings of the Court, translations, and the maintenance of a two-language system involve work which is both "administrative and substantial."[42]

§354. The Publications of the Court. An important part of the work of the Registry is connected with the publications of the Court, which appear in both French and English,[43] and which have been organized on a

[39] As between the President and the Registrar, correspondence is divided in accordance with the provisions of Article 21 of the Rules and Article 3 of the Instructions for the Registry. See Series D, No. 2 (2d add.), pp. 153–156.

[40] In 1939 the technical services of the Registry were divided into six departments: (1) Archives and Distribution Service; (2) Indexing Service; (3) Shorthand, Typing and Multigraphing Department; (4) Accounts and Establishment Department (including messengers); (5) Printing Department; (6) Documents Department. Series E, No. 14, pp. 36–46.

[41] Special provision was made in the Secretary-General's agreement with the Carnegie Foundation in 1924 for the Court's use of the Peace Palace Library. Series E, No. 1, p. 115. In addition, the Court built up a small private library during its earlier years. In 1929, it requested additional funds for purchases for this library, in order to add works "authoritative in the various countries and relating to the law of such countries." *Idem*, No 6, p. 52. In 1930, the Assembly voted to increase the budget item for the library from 500 to 10,000 florins. In 1931 a working arrangement was made by the Secretary-General of the League of Nations with the Carnegie Foundation. *Idem*, No. 7, p. 85. Credits voted for the library in later years were greatly reduced. Most of the Court's library, which is the property of the League of Nations, is kept in the premises of the Peace Palace Library; in 1939 it contained 3903 volumes. The Court maintains a Library Committee which decides upon the purchase of books. *Idem*, No. 7, p. 87; *idem*, No. 8, p. 52; *idem*, No. 14, p. 45.

[42] The expenditure for the linguistic work of the Court was partly accounted for in 1932 by the fact that "not all the present judges are sufficiently acquainted with the two official languages of the Court even to understand them." *Idem*, No. 8, p. 329.

[43] Twelve volumes of a German edition of the Court's judgments, orders and opinions, covering the period 1922–1935, have been published by the *Institut für Internationales Recht*

very satisfactory basis. Indeed, it may be said that no public institution in the world is better documented; certainly it is doubtful whether any other judicial institution publishes such a complete record of its activities. The Court's publications have been issued in the following series:[44] Series A was a collection of the judgments of the Court, including some of the orders, and Series B was a collection of advisory opinions; in 1931 these two series were combined into Series A/B, which comprises the texts of judgments, advisory opinions, and "such orders as the Court may decide to include therein" (Article 22 of the 1936 Rules), arranged, paged and indexed so as to form annual volumes. Series C, in which a new consecutive numbering was adopted in 1931, contains acts and documents relating to the judgments and opinions of the Court; in addition to the documents of the written proceedings, these include the orders not published in Series A/B, the essential parts of the correspondence relating to cases before the Court, *procès-verbaux* of the Court's public sittings,[45] records of the oral proceedings, and the texts of relevant treaties or other documents. Series D contains acts and documents concerning the organization of the Court. Series E, inaugurated in 1925, contains the annual reports inaugurated in response to suggestions made in the Fifth Assembly of the League of Nations and to a Council resolution of December 8, 1924.[46] These reports, not addressed to any particular body, are designed to inform the Assembly and a wider public of the Court's activities, and the date of publication is slightly in advance of each ordinary session of the Assembly. They constitute an invaluable source of information. The arrangement is kept more or less uniform from year to year; the contents deal with the structure of the Court and the Registry, the governing instruments, the jurisdiction, the General List of Cases, the judgments, orders and opinions, digests of decisions taken, publications, finances, and bibliographical lists. Series F of the Court's publications contains general indexes.[47]

at Kiel, "with the authorization of the Registrar and subject to his control." Series E, No. 5, p. 126. Translations of the judgments and opinions into other languages, such as those into Spanish by the *Instituto Ibero-Americano de Derecho Comparado*, possess no official character. A collection of the English texts of judgments, orders and opinions is published by the Carnegie Endowment for International Peace, as four volumes of *World Court Reports*. See Appendix No. 14, p. 780, *infra*.

[44] A periodical "confidential bulletin," prepared by the Registry for the use of members of the Court, is not given outside distribution. See Series E, No. 6, p. 294; *idem*, No. 14, p. 36; Å. Hammarskjöld, in 25 Michigan Law Review (1927), p. 343.

[45] Article 59 of the Rules provides that these *procès-verbaux* shall be printed.

[46] League of Nations Official Journal, 1925, p. 124; Series E, No. 1, pp. 7–9.

[47] For a list of the publications, see Appendix No. 13, p. 780, *infra*.

Since 1931, the Court has maintained a Publications Committee to supervise the preparation of its publications.[48] The distribution of the Court's publications is governed by Article 24 of the Instructions for the Registry, and by the contracts for publishing made by the Registrar.[49]

[48] Series E, No. 7, p. 296; *idem*, No. 14, p. 43.

[49] On the publishing contracts concluded by the Registrar with A. W. Sijthoff's Publishing Company of Leyden, see Series E, No. 1, p. 273. The publisher issues from time to time catalogues of the Court's publications; he has agents for the sale of these publications in some thirty-two countries. The system of publication was investigated and approved by the League of Nations Supervisory Commission in 1928. *Idem*, No. 4, p. 315.

CHAPTER 15

THE FINANCES OF THE COURT

§355. Provisions for Meeting the Court's Expenses. There is abundant evidence that when the plans for its establishment were being perfected in 1920, the Court was regarded as an organ of the League of Nations. This partly explains the failure of its founders to envisage any independent method for meeting the Court's expenses. Since agencies had already been created for collecting and disbursing the funds of the League of Nations, it would have meant both duplication and difficulty in 1920 to have created an independent method of financing the Court; and the view that the Court was to be an organ of the League of Nations led quite naturally to the provision in Article 33 of the Statute that "the expenses of the Court shall be borne by the League of Nations, in such a manner as shall be decided by the Assembly upon the proposal of the Council." [1]

The expenses of the International Bureau of the Permanent Court of Arbitration are "borne by the Contracting States in the proportion fixed for the International Bureau of the Universal Postal Union"; [2] as they are not large, no great difficulties have arisen in that system.[3] In line with this precedent, the original text of the Covenant of the League of Nations provided in Article 6 that the expenses of the Secretariat should be "borne by the Members of the League in accordance with the apportionment of the expenses of the International Bureau of the Universal Postal Union." When the First Assembly of the League of Nations came to consider the problems of the budget in 1920, it had already begun to appear that diffi-

[1] A proposal was made in 1917 that an endowment fund of thirty million dollars should be created for a court. In Marburg, Development of the League of Nations Idea (1932), p. 739. In a book on The World Court (1925), §168, Judge de Bustamante also favored the idea of an endowment.

[2] Articles 29 (1899) and 50 (1907) of the Hague Conventions on Pacific Settlement. But Article 31 of the Hague *projet* of 1907 provided in Article 31 that the expenses of the proposed Court of Arbitral Justice should be borne by the Contracting Powers, to which the Administrative Council was to apply for funds.

[3] See §5, *supra*. For a comparison between the expenses of the Permanent Court of International Justice and those of the Permanent Court of Arbitration, see Series E, No. 8, pp. 329–330.

cult questions were involved in the allocation of the burden of expenses, and that the solution given to them by the Covenant was not satisfactory. An amendment to Article 6 of the Covenant, proposed in 1921, was brought into force in 1924; the amended text provides that "the expenses of the League shall be borne by the Members of the League in the proportion decided by the Assembly."[4] Read in connection with the amended Article 6 of the Covenant, therefore, Article 33 of the Statute confers upon the Assembly a broad power to determine how funds are to be obtained for meeting the expenses of the Court.

§356. Obligations of States to Contribute. The Statute itself contains no provision that a State which is a party to the Protocol of Signature of December 16, 1920, must contribute to the support of the Court; and it is under the decisions of the Assembly that the States which are Members of the League of Nations are obligated to contribute to the funds of the League, out of which the funds of the Court are supplied. The obligation to contribute rests on all Members of the League of Nations, whether or not they are parties to the Protocol of Signature.[5] A State which is not a Member of the League of Nations is not expressly bound to contribute to the support of the Court even though it is a party to the Protocol of Signature of December 16, 1920, and it would seem that the Assembly is without power to impose on such a State an obligation to contribute.[6] Yet such States clearly have a moral obligation to share the financial burden of the Court. Contributions by such States, which have been called voluntary,[7] are referred to in the Financial Regulations of the League of Nations,[8] however, and the provision seems to be applicable at

[4] 1 Hudson, International Legislation, p. 20.

[5] A similar question was raised by El Salvador's refusal in 1921 to contribute to the expenses of the International Labor Organization, but no definite solution was given to it. See Records of Third Assembly, Plenary, II, pp. 191–4; League of Nations Official Journal, 1923, pp. 198, 244–5.

[6] Under the amended Article 4 of the Statute, such States may participate in the elections of members of the Court on conditions to be laid down, in the absence of a special agreement, by the Assembly on the proposal of the Council; these conditions might require contributions by such States.

Conditions fixed by the Council in application of paragraph 1 of Article 17 of the Covenant might also provide for a contribution to the League's expenses.

[7] See Series E, No. 11, p. 168. The Protocol of September 14, 1929 concerning the accession of the United States of America did not expressly refer to a contribution to be made by the United States, but it provided for the acceptance of the five reservations offered by the United States, one of which stated "that the United States will pay a fair share of the expenses of the Court as determined and appropriated from time to time by the Congress of the United States." This would have placed the United States in the special position of determining the amount of its own contribution.

[8] As amended on October 5, 1937, Article 22 of the Financial Regulations provides that "States not Members of the League which have been admitted members of any autonomous organisation of the League shall contribute towards the expenses of the autonomous organisa-

least by analogy.[9] In several instances contributions for meeting the expenses of the Court have been made by States not at the time members of the League of Nations.[10]

The Court itself has power, under paragraph 3 of Article 35 of the Statute, to fix the contribution to be made toward the expenses of the Court by a State which is not a member of the League of Nations but which is a party to a dispute before the Court; since 1936 this provision of Article 35 does not apply "if such State is bearing a share of the expenses of the Court." The practice has not developed any clear basis for determining the amount of a party's contribution.[11] At one time the Court was asked to consider whether "legal fees could not be charged to cover certain of its expenses"; but it decided that it was not competent to establish a scale of fees, and that such a course was not expedient.[12] In 1933, however, the Court authorized the Registrar to inform parties in future cases that a decision might be taken by which the expense of printing a party's written or oral statements in Series C of the Court's publications could be charged to that party, but no such decision has been taken.[13]

§357. Court's Control of Expenses. The reference in Article 33 to "the expenses of the Court" is not elsewhere explained in the Statute, and apart from the provisions in Article 32 for the payment of certain salaries, indemnities and allowances, there is little indication as to the nature of the expenses envisaged.[14] No statutory provision is made for

tion in the proportion in which they would contribute to such expenses if they were Members of the League." League of Nations Official Journal, Spec. Supp. No. 168, p. 20. This may apply only where the condition was included in the invitation to participate, however. The Supervisory Commission has established the principle that funds paid to the Court by States not Members of the League of Nations "will be exclusively devoted to the expenditure of the Court." See the Supervisory Commission's report for 1933, in League of Nations Document, A. 5. 1933. X, p. 9; Series E, No. 9, p. 205.

[9] Series E, No. 11, p. 168; *idem*, No. 12, p. 220.

[10] On January 22, 1937, Brazil paid to the Registrar of the Court 82,203.27 Swiss francs for the financial year 1936; and on November 11, 1940, 84,561.10 Swiss francs for the financial year 1940. On July 8, 1937, Japan paid to the Registrar 60,037.52 florins for the financial year 1937.

[11] In the *Wimbledon Case* in 1923, no contribution was demanded from Germany, on the ground that "generally speaking, it was not the intention of the Statute that it should be possible to require a contribution from States summoned to appear before the Court under articles of the Peace Treaties giving the Court compulsory jurisdiction." Series E, No. 3, p. 197. In the *German Interests in Polish Upper Silesia Case* in 1926, Germany was asked to pay the Court 35,000 florins. Series C, No. 11–III, p. 1293. In the *Lotus Case* in 1927, Turkey was asked to pay the Court 5000 florins. Series C, No. 13–II, p. 459. In the *Brazilian Loans Case* in 1929, no contribution was asked from Brazil, which had been a Member of the League of Nations when the case was submitted. Series E, No. 6, p. 287.

[12] *Idem*, No. 3, p. 196.

[13] *Idem*, No. 9, p. 168.

[14] The French version of the Statute distinguishes *frais de la Cour* (Article 33) and *frais de procédure* (Article 64).

the salaries of permanent officials of the Court other than the Registrar, and no specific mention is made of general administrative expenses; hence the Court must have a free hand in this matter, subject of course to the concurrence of the authorities who control the funds of the League of Nations.

§358. The Court and the Budget of the League. The budget of the League of Nations is voted by the Assembly each year, for the following calendar year. Each Member of the League of Nations is asked to contribute a certain number of units, the number being fixed by the Assembly and varying from year to year. Repeated negotiations have been necessary for the allocation of the units among the States, and the scale has been frequently revised. In the allocation made on October 10, 1936 for 1937, 1938 and 1939, the total number of units was 923, of which 108 units were allocated to the United Kingdom of Great Britain and Northern Ireland, 94 units to the Union of Soviet Socialist Republics, 80 units to France, and 60 units to Italy, while only one unit was allocated to each of thirteen States.[15] In 1938 each unit was 24,858.80 gold francs, and the total amount of contributions budgeted was 22,799,327.18 gold francs.

Part III of the League's annual budget is devoted to the Court, and a fixed *per cent* of each contribution paid by a Member of the League of Nations to the Treasurer at Geneva is deposited to the credit of the Court in a bank at The Hague; in 1933, *e.g.*, 7.95 *per cent* was set aside for the Court. Under this system, and with a possibility of drawing on the League's Working Capital Fund and Guarantee Fund,[16] the Court has never been without the funds necessary for meeting its expenses.[17]

§359. Preliminary Budget Arrangements. The first and second budgets of the League of Nations contained items to cover the expense to be incurred in the organization of the Court,[18] and the third budget for 1921, adopted in 1920, included an item of 650,000 francs (later reduced to 500,000 francs) for the Court's expenses.[19] In the fourth budget for 1922, the item was for 1,500,000 francs. As from February 21,

[15] Records of Seventeenth Assembly, Plenary, p. 145.

[16] Article 33 of the Financial Regulations provides that "the Working Capital Fund is primarily applicable to meet temporarily normal requirements of regular organizations of the League which cannot be paid out of income at the time when they are due to be met." The Court has drawn on this fund on several occasions. On the nature of the Guarantee Fund, see Article 33 (*a*) of the Financial Regulations adopted in 1936. League of Nations Official Journal, 1936, p. 1013.

[17] Difficulties were encountered in 1941, however.

[18] Records of First Assembly, Committees, II, pp. 106, 107, 118.

[19] Records of First Assembly, Plenary, p. 707. The Council had previously approved a memorandum by the Secretary-General which proposed an item of 1,500,000 francs for the Court. *Idem*, Committees, II, p. 122.

1922, the Court's services took over from the Secretariat of the League of Nations the accounts and the administration of funds placed to its credit at The Hague.[20] In February 1922, also, by arrangement between the President of the Court and the Secretary-General of the League of Nations,[21] a "permanent imprest" system was established as a temporary expedient, under which at the end of each month the Registrar reported the expenditure of that month and the estimated expenditure for the following month; the Secretariat kept the Court in funds, with the balance not falling below 100,000 florins; and the account was operated by the joint signatures of the President and the Registrar of the Court. During the negotiations in 1922, the President of the Court proposed that the "permanent imprest" system should be replaced by a permanent arrangement, under which the Court itself should propose its budget for adoption by the Assembly, and on March 24, 1922, the Court proceeded to authorize budget estimates for 1923 to be submitted to the "authorities of the League of Nations." [22] The President's proposal was referred by the Council to the Supervisory Commission, which recommended that "the Court should, like the International Labor Office, have its own independent budget," that it should share proportionately in each contribution received by the League of Nations, and that it might be granted advances from the working capital fund of the League. These recommendations were approved by the Third Assembly, and their substance was embodied in the Financial Regulations of the League of Nations.

§360. **Financial Regulations of the League of Nations.** The financial status of the Court was placed on a definite basis by the Financial Regulations first adopted by the Assembly on September 29, 1922, and brought into force on January 1, 1923.[23] Some amendments have been made to the original Regulations, but the provisions relating to the Court have undergone little modification. As revised and in force at the end of 1937,[24] the Regulations deal with the Court as one of several "autonomous organisations," the word *autonomous* signifying a separate financial administration without implying "any wider consequences." Under Article 7 of the Regulations, the financial administration of an autono-

[20] Series E, No. 1, p. 279.
[21] For the exchange of letters, see League of Nations Official Journal, 1922, p. 565.
[22] Series D, No. 2, pp. 233, 581.
[23] For the text of the Financial Regulations of 1922, see Records of Third Assembly, Plenary, II, p. 207. For an analysis of the Regulations as they affect the Court, see Series E, No. 1, pp. 281ff.
[24] For the text, see League of Nations Document, C. 536. M. 373. 1937. X. For the edition of January 1, 1931, see 1 Hudson, International Legislation, p. 149.

mous organization is independent of that of the Secretariat, subject to the provisions of the Regulations. A "competent authority" and a "competent official" are designated for the purpose of the Regulations with respect to each autonomous organization; for the Court, the "competent authority" is the Court itself, or by delegation from the Court its President, and the "competent official" is the Registrar or his duly authorized deputy.[25] Competent officials of autonomous organizations supply data to the Secretary-General, though he seems to have no responsibility for framing the budget of the Court;[26] provision is made in the Regulations for the submission of supplementary estimates also. A Supervisory Commission of five members appointed by the Assembly reports on the budget, which can be adopted by the Assembly only after a report by its Fourth Committee. As the contributions by Members of the League of Nations are received, the Regulations provide (Article 26) that a share is to be distributed to the competent officials of the autonomous organizations, in the proportion of the estimates. The accounts of each organization must be audited, four times annually, the auditor reporting to the Supervisory Commission.[27] Representatives of the Court are entitled to appear before the Supervisory Commission, the Fourth Committee of the Assembly, and even the Assembly itself.[28]

§361. Internal Financial Administration. The Financial Regulations of the League of Nations (Articles 39, 40) require the competent official of each organization to make rules concerning the control of liabilities and payments and to ensure economy, these rules to be communicated to the Supervisory Commission. For the Court these rules are embodied in the 1938 Instructions for the Registry, Articles 27–39 of which deal with financial questions.[29] Under these rules, the Registrar frames the budget estimates and after their approval by the Court or the President, communicates them to the Secretary-General for transmission to the Supervisory Commission. The Registrar represents the Court before the

[25] On the Registrar's activities as "competent official," see Series E, No. 8, pp. 331–336.

[26] In practice the budget estimates are submitted to the Supervisory Commission without modification by the Secretary-General, and it seems that the Secretary-General is not thought to have power to modify them.

[27] The Registrar's office is visited four times each year by the Deputy-Auditor of the League of Nations, and generally once each year by the Auditor. Monthly statements are also made to the Auditor by the Registrar. Series E, No. 8, p. 336.

[28] In 1922, Judge Moore represented the Court in dealing with certain questions considered by the Third Assembly. Beginning in 1922, the Court has been represented at Geneva each year by the Registrar or his deputy. In 1927, certain members of the Court met with certain members of the Supervisory Commission at The Hague, when the latter was considering the emoluments of deputy-judges. Series E, No. 3, p. 195.

[29] Series E, No. 14, pp. 33–35.

Supervisory Commission when the estimates are under consideration,[30] and later before the Fourth Committee of the Assembly. Few changes have been made in the estimates actually submitted. Once the budget is voted by the Assembly, transfers from one item to another may be effected by the Court,[31] subject to limitations set out in Article 29 of the Regulations and Article 34 of the Instructions.[32] Only the Registrar may incur liabilities in the name of the Court; when he deems it necessary, he obtains the previous authorization of the Court or the President. Statements of account are prepared by the Registrar, annually, and after submission to the Court (or the President if the Court is not sitting), they are forwarded to the Supervisory Commission. Records are kept of all appropriations, liabilities, and capital acquisitions. Though the Court's budget is voted in gold francs, the accounts are kept in Dutch florins.

§362. Authorized and Actual Expenditures. The annual budgets of the Court have varied with the activities of the Court, and with the decisions by the Council and Assembly as to the salaries of its members. The following table shows the authorized and actual expenditures of the Court year by year (in Netherlands florins):[33]

	Authorized	*Actual*
1922	900,000.00	711,649.08
1923	935,625.70	745,990.54
1924	921,739.83	580,127.35
1925	915,796.76	847,950.48
1926	915,838.32	791,789.44
1927	1,029,177.83	859,083.55
1928	1,042,296.56	960,812.76
1929	1,082,839.37	819,457.14
1930	1,088,804.81	799,820.69
1931	1,302,288.50	1,159,769.86
1932	1,278,781.00	1,214,854.32
1933	1,277,076.25	1,119,638.66
1934	1,219,332.11	996,960.07
1935	1,217,304.58	995,612.07
1936	1,210,369.58	976,953.13
1937	1,325,651.75	1,170,384.09
1938	1,304,248.33	1,104,838.03
1939	1,329,314.34	1,185,804.98
1940	1,042,810.00	720,719.60
1941	316,426.83	213,692.04
1942	326,068.63	

[30] He may also represent the Court before the Supervisory Commission with respect to other matters. Series E, No. 8, p. 334 note.

[31] Limited transfers of sub-items of the same item may be made by the Registrar.

[32] In 1932, certain transfers by the Registrar were authorized by the Assembly, if the Revision Protocol of September 14, 1929, should come into force. Records of Thirteenth Assembly, Fourth Committee, p. 246.

[33] For the most part these figures are taken from Series E and from the records of the Assembly of the League of Nations. The budgets are now published in the League of Nations Official Journal, where the amounts of Court appropriations are also given in francs. In 1924, the equivalent of the florin was fixed at 2.083 gold francs; in 1939, at 2.40 Swiss francs.

§363. Salaries of Members of the Court. In the original text of Article 32 of the Court's Statute, provision was made that the judges should receive an "annual indemnity," the amount of which was to be fixed by the Assembly of the League of Nations on the proposal of the Council; in addition, the judges (exclusive of the President) and deputy-judges, were to receive "a grant for the actual performance of their duties." Since 1936, the amended text of Article 32 has provided that the members of the Court shall receive an "annual salary," the amount of which is to be fixed by the Assembly on the proposal of the Council. The President was entitled to "a special grant" under the original text of Article 32, but he receives "a special annual allowance" under the text as amended: and the latter provides for the Vice-President "a special allowance for every day on which he acts as President."

When the subject of salaries of members of the Court was first considered by the Council on October 27, 1920, it adopted a report by Léon Bourgeois which called for an "extremely high" salary for the President, and a moderate fixed salary for the judges supplemented by generous *per diem* allowances;[34] when the subject again came before the Council on December 10, 1920, it was decided to request the Third Committee of the Assembly to make a proposal to the Assembly in the name of the Council.[35] Varying proposals were made in the First Assembly: the Secretariat of the League of Nations suggested a basic annual salary for the judges of 30,000 gold francs;[36] a British proposal of December 15, 1920, envisaged a basic salary of 12,000 florins; [37] and a proposal made by M. Hagerup (Norway) on behalf of certain members of the Third Committee would have fixed the basic salary at 40,000 florins.[38] The Third Committee of the First Assembly devoted two meetings to the subject, and its proposal, adopted by the Assembly on December 18, 1920, called for a basic salary for the judges of 15,000 florins, with a *per diem* allowance of 100 florins for a maximum of 200 days; a special allowance was to be paid to the President of 45,000 florins, and a duty-allowance to the Vice-President of 150 florins a day for a maximum of 200 days; an additional allowance of 50 florins a day for each day of actual presence at The Hague was provided for the Vice-President and the judges.[39] This scale of salaries and allowances was continued in force for the first nine-year period of the Court.

[34] Minutes of the Council, 10th session, pp. 171–173. [35] *Idem*, 11th session, pp. 27, 136.
[36] Records of the First Assembly, Committees, I, p. 580.
[37] *Idem*, p. 583. [38] *Idem*, p. 584.
[39] Records of First Assembly, Plenary, pp. 747, 766.

The subject was re-considered by the 1929 Committee of Jurists, which reached the conclusion that in line with its proposals for a more permanent functioning of the Court and for the judges' abandonment of other occupations, some revision was desirable. In submitting a proposed amendment to Article 32 of the Statute, the 1929 Committee of Jurists also proposed a new scale of salaries under which the basic salary of judges was to be 45,000 florins, with no allowances; a special indemnity of 15,000 florins was to be payable to the President, and a *per diem* allowance to the Vice-President of 100 florins for a maximum of 100 days.[40] This scale was adopted by the Tenth Assembly on September 14, 1929, to become effective on January 1, 1931, "subject to the entry into force of the amendments proposed in the Statute of the Court." [41]

When the amendments to the Statute failed to enter into force in 1930, the situation seemed to call for some intermediate solution; on September 25, 1930, the Assembly adopted an interim scale of salaries and allowances as from January 1, 1931, to obtain until the Assembly's resolution of September 14, 1929, should become applicable.[42] This interim scale, in force until January 31, 1936, provided for a basic salary of 35,000 florins, supplemented by a *per diem* allowance to each judge (exclusive of the President) of 50 florins up to a maximum of 200 days, with a special allowance to the President of 25,000 florins and a *per diem* allowance of 50 florins to the Vice-President for each day of his service as President. The Assembly's resolution of September 14, 1929, became operative on February 1, 1936, and it obtained until the close of the second nine-year period on December 31, 1939.

In advance of the general election due to be held in 1939, the Council of the League of Nations requested that the question of the judges' salaries be re-examined by the Supervisory Commission.[43] In a report of June 27, 1939 the latter body suggested that the Council propose to the Assembly a new scale, fixing the basic salary of judges at 36,000 florins, and providing for a special allowance of 10,000 florins to the President, and for a special allowance to the Vice-President of 50 florins for each day of his serving as President up to a maximum of 5000 florins.[44] The new scale was not formally adopted by the Assembly in 1939, in view of the decision to postpone the general election of the judges; but as this decision

[40] Minutes of the 1929 Committee of Jurists, p. 129.
[41] Records of Tenth Assembly, Plenary, pp. 113, 430.
[42] Records of Eleventh Assembly, Plenary, pp. 132–133.
[43] League of Nations Official Journal, 1939, p. 272.
[44] League of Nations Document, C. 204. M. 139. 1939. X.

involved a holding-over by the incumbent judges, the latter offered voluntarily to accept payment of their salaries from January 1, 1940 on the basis of the proposed scale. The budget for 1940 therefore made provision for salaries on the basis proposed.[45]

As a summary of the changes effected, the judges' remuneration may be said to have been from 15,000 florins minimum to 35,000 florins maximum for the period from 1922 to 1930; from 35,000 florins minimum to 45,000 florins maximum for the period from 1931 to 1936; 45,000 florins for the period from 1936 to 1939; and 36,000 florins for the year 1940.[46]

The payment of subsistence and duty allowances was systematized in rules drawn up by the Registry in 1928.[47] Provision was made in Article 32 of the original Statute for the refunding of the judges' "travelling expenses incurred in the performance of their duties," but the amended text of the Article merely empowered the Assembly to fix the conditions for a refunding of travelling expenses; regulations on this subject, adopted by the Assembly on September 14, 1929, became operative in 1936.[48]

The Assembly resolutions of December 18, 1920 and September 25, 1930, provided that salaries and allowances paid to members of the Court should be free of all taxes; it was recognized, however, that "the decisions of the Assembly may be inoperative as against the fiscal laws applied in the different countries," and members of the Court were to be reimbursed by the League of Nations for any taxes which they are obliged to pay on their salaries.[49] The amended text of Article 32 of the Statute provides that the salaries, indemnities and allowances of judges and the Registrar are to be free of all taxes; this applies only to States which have accepted the Statute, however.

§364. Remuneration of Deputy-Judges, Judges *ad hoc*, and Assessors. Under the scale fixed by the Assembly's resolution of December 18, 1920, deputy-judges were to receive a duty allowance of 150 florins a day, up to a maximum of 200 days, and a subsistence allowance of 50 florins a

[45] League of Nations Official Journal, 1939, p. 455. The budgets for 1941 and 1942 did not provide sufficient credits for paying even the reduced salaries.

In its 1940 report the Supervisory Commission invited the Court "to institute a system of remuneration which would consist partly of a fixed annual salary and partly of allowances for each working day." League of Nations Document, C. 152. M. 139. 1940. X. No action was taken by the Court, however.

[46] The payment of the judges' salaries was suspended at the beginning of 1941, only small payments on account being made thereafter.

[47] Series E, No. 6, p. 343.

[48] *Idem*, p. 95.

[49] Records of First Assembly, Plenary, pp. 748, 766; Records of Eleventh Assembly, Plenary, p. 132. Reimbursement does not apply to taxes paid on pensions.

day; but the scale adopted on September 25, 1930 and in force from 1931 to 1936, provided merely for an allowance of 150 florins a day, up to a maximum of 200 days.[50] No provision was made for deputy-judges in the scale adopted on September 14, 1929, which became operative in 1936.

By a resolution of September 23, 1922, the Assembly of the League of Nations decided that judges *ad hoc* selected in accordance with the provisions of Article 31 of the Statute should receive a daily duty allowance and a daily subsistence allowance, "according to the rates and conditions applicable to a deputy-judge taking part in the session of the Court";[51] this meant that the judges *ad hoc* received a daily allowance of 150 florins, plus a daily subsistence allowance of 50 florins.[52] The Assembly's resolution of September 25, 1930, provided that judges *ad hoc* should receive a daily allowance of 150 florins; its resolution of September 14, 1929, which became operative in 1936, provided for a daily allowance of 100 florins and a subsistence allowance of 50 florins.[53]

Assessors serving under Article 26 of the Statute were to receive, under the Assembly's resolution of September 23, 1922,[54] a subsistence allowance of 50 florins for each day spent at the place of session unless they habitually resided there, in which case the subsistence allowance was to be 25 florins. Assessors serving under Article 27 of the Statute were to be similarly remunerated if they were called to serve by the Court; but if they were serving at the request of the parties, their remuneration was to be governed by rules made by the Court, and the rules adopted for this purpose on January 20, 1923, provided for the same allowances.[55]

§365. Pensions of Members of the Court. Article 32 of the original Statute provided that on the proposal of the Council the Assembly should lay down "a special regulation fixing the conditions under which retiring pensions may be given to the personnel of the Court"; the amended Article 32 provides that "regulations made by the Assembly shall fix the conditions under which retiring pensions may be given to members of the Court." Regulations were first adopted by the Assembly

[50] In the earlier years of the Court, the deputy-judges were called upon so frequently that "they received total emoluments amounting to a sum hardly less than that received by regular judges." Series E, No. 3, p. 194.

[51] Records of Third Assembly, Plenary, p. 219.

[52] For purposes of remuneration, judges serving under Article 13 of the Statute to finish cases begun before their replacement are assimilated to deputy-judges and judges *ad hoc*. Series E, No. 8, p. 247.

[53] Records of Tenth Assembly, Plenary, pp. 113, 114, 429, 430.

[54] Records of Third Assembly, Plenary, I, p. 220.

[55] Series E, No. 1, p. 291. These allowances were to be paid by the Court, but the Court was to be reimbursed by the parties.

on September 30, 1924, under which judges were normally entitled to pensions upon retirement after five years of service, at the age of 65 years; power was given to the Court to waive these two conditions in exceptional cases, however.[56] The pension, payable monthly during the life-time of the beneficiary, was fixed at an amount equivalent to one-thirtieth of the "salary in respect of each period of twelve months passed in the service of the Court," but the maximum was 15,000 florins a year. Power was reserved by the Assembly to amend the regulations. On September 25, 1930, revised regulations were adopted to apply to personnel of the Court holding office on January 31, 1931, or thereafter.[57] The regulations adopted by the Assembly on September 14, 1929, which came into force on February 1, 1936,[58] provided no pensions for widows and children of members of the Court, since "judges do not normally enter the service of the Court except at the end of their career"; however, in the case of the death of a judge leaving a widow and children under eighteen years of age a grant corresponding to three months of the deceased judge's salary was made payable to the widow and children.[59] On October 10, 1936, the Assembly adopted regulations concerning the administration of the pension fund for the members of the Court.[60] In 1939 the Supervisory Commission recommended that the maximum pension for the judges should be reduced from 15,000 to 12,000 florins, and that only the actual salaries, excluding indemnities and special allowances, should be taken into account in calculating the amounts payable.[61]

§366. Salary of the Registrar. Article 32 of the original Statute, providing that the salary of the Registrar should be fixed by the Council on the proposal of the Court, was out of line with the general policy of empowering the Assembly to fix salaries to be paid out of the funds of the League of Nations;[62] the revised text of the Article provides that this salary is to be fixed by the Assembly on the proposal of the Court.

On February 3, 1922, the Court proposed a salary of 12,000 florins for the Registrar, supplemented by an allowance of 15,000 florins.[63] On July 17, 1922, the Council fixed the Registrar's salary at 22,000 florins for a period of five years, with a proviso that the amount should be re-

[56] Records of Fifth Assembly, Plenary, p. 191.
[57] Records of Eleventh Assembly, Plenary, p. 133; Series E, No. 7, p. 97.
[58] Records of Tenth Assembly, Plenary, pp. 113, 430; Series E, No. 6, p. 93.
[59] Series D, No. 1 (3d ed.), p. 62 note. [60] Series E, No. 13, p. 175.
[61] League of Nations Document, C. 204. M. 139. 1939. X.
[62] See Series E, No. 8, p. 44. [63] Series D, No. 2, p. 6.

considered at the end of that period;[64] at the insistence of the Court, a decision was taken on August 31, 1922, that the salary should increase by successive annual increments of 1250 florins up to the sum of 27,000 florins.[65] In 1929, the Court proposed that the Registrar's salary for the seven-year period beginning in 1930 should be increased by four annual increments to 32,000 florins.[66] In 1930, a committee set up by the Assembly recommended that the Registrar's salary should be assimilated to that of an Under-Secretary-General of the League of Nations, *i.e.*, 55,000 to 75,000 Swiss francs, with a possible entertainment allowance, if requested by the Court, of 12,500 francs.[67] On May 21, 1931, the Council fixed the Registrar's salary at 27,000 florins with four annual increments to 32,000 florins, the new scale to be operative as from January 1, 1930.[68] In 1936, the Court proposed that the Registrar should receive a salary of 25,000 florins, but it reserved the right to submit fresh proposals in the event of the re-election of a registrar; this proposal was adopted by the Assembly on October 5, 1937.[69]

As one of the "personnel of the Court" the Registrar benefited from the pension regulations adopted by the Assembly on September 30, 1924 and September 25, 1930; a pension of one-fortieth of the salary received for each twelve months of service, with the maximum of 10,000 florins, was to be payable on retirement after seven years service, from the age of sixty-five.[70] The Assembly resolution of September 14, 1929, also provided for the Registrar's pension.[71] In 1936, a new provision was added to the regulations concerning pensions, to the effect that the pension of a future Registrar should be governed by the Staff Regulations of the League of Nations adopted on October 3, 1930.[72]

§367. Salaries of Officials of the Registry. The Staff Regulations make provision for the salaries and allowances of the officials of the Registry. The salary of the Deputy-Registrar is 14,000–17,000 florins;[73] other salaries range from 2350 to 12,000–15,000 florins. In the later contracts, provision was included that a salary of an official could be

[64] League of Nations Official Journal, 1922, p. 787.
[65] *Idem*, p. 1162.
[66] Series E, No. 7, p. 73.
[67] *Idem*, p. 72 note; Series E, No. 9, p. 199 note.
[68] League of Nations Official Journal, 1931, p. 1125.
[69] Records of Eighteenth Assembly, Plenary, p. 147; Series E, No. 13, p. 178; *idem*, No. 14, p. 192.
[70] Records of Eleventh Assembly, Plenary, p. 133.
[71] Records of Tenth Assembly, Plenary, p. 431.
[72] Records of Seventeenth Assembly, Fourth Committee, p. 92; Plenary, p. 144.
[73] For purposes of remuneration, the Deputy-Registrar ranks with a Chief of Section in the Secretariat of the League of Nations. Series E, No. 6, p. 44; *idem*, No. 7, p. 73.

modified by a decision of the Assembly.[74] Officials of the Registry (not including the Registrar) were required to participate in the Provident Fund established by the League of Nations in 1923, the contribution by the official being matched by a contribution by the Court. On October 3, 1930, the Assembly adopted a pension scheme for officials of the Secretariat of the League of Nations, the Staff of the International Labor Office, and the Registry of the Court, and a series of Staff Pensions Regulations came into force on January 1, 1931.[75] Disputes concerning pensions fall within the jurisdiction of the League of Nations Administrative Tribunal.[76]

§368. Remuneration of Witnesses and Experts. Under Article 55 of the 1936 Rules, witnesses or experts who appear at the instance of the Court are to receive indemnities out of the funds of the Court; the expenses of other witnesses and experts are met by the parties which produce them. When a committee of experts was created in the *Chorzów Case* in 1928, the President fixed the fees to be paid to the experts in accordance with their own proposal; each expert was to receive 20,000 florins and traveling expenses, and an additional 2000 florins was to be paid to the chairman of the committee;[77] the parties made deposits in advance to meet these expenses.[78]

§369. The Court's Premises at The Hague. One of the factors which led to the selection of The Hague as the seat of the Court was the existence there of the Peace Palace,[79] due to a gift by Andrew Carnegie to the Carnegie Foundation, a corporation organized under the laws of the Netherlands.[80] Negotiations were begun in 1921 for the Court's occupancy of quarters in the Peace Palace, and on November 15 and 29, 1921, declarations and letters were exchanged by the Secretary-General of the League of Nations and the President of the Board of Directors of the Carnegie Foundation, fixing the details of the arrangement for 1922;[81] the Court was to have exclusive use of certain parts of the Peace Palace

[74] Series E, No. 8, p. 45. In the absence of such a clause, the Assembly does not have power to reduce the salaries of officials of the Registry. See the report of a committee of jurists, in Records of Thirteenth Assembly, Fourth Committee, p. 206.

[75] Records of Eleventh Assembly, Plenary, pp. 585–592.

[76] See §352, *supra*.

[77] Series C, No. 16–II, pp. 23, 40. Because of the early termination of the enquiry these amounts were reduced. *Idem*, pp. 58–64.

[78] By the Court's order of September 13, 1928, each of the parties was invited to advance 25,000 florins on account towards the expense of the expert enquiry. Series A, No. 17, p. 99.

[79] Minutes of the 1920 Committee of Jurists, p. 718.

[80] See A. Lysen, History of the Carnegie Foundation and of the Peace Palace at The Hague (1934).

[81] Series E, No. 1, pp. 105–111.

and non-exclusive use of other parts, for which the League of Nations was to pay an annual sum of 50,000 florins. This arrangement was later extended for the year 1923.

A permanent arrangement was entered into by the Secretary-General and the President of the Board of Directors of the Carnegie Foundation on March 8, 1924,[82] providing for an annual contribution by the League of Nations of 40,000 florins; like the earlier arrangement, it envisaged a possibility that the Court might be dissolved or transferred from the Peace Palace. The space available to the Court under this arrangement proved inadequate and in 1927 and 1929 supplementary arrangements were negotiated which made additional space available, and necessitated a re-modeling of parts of the Peace Palace; for this purpose, the Netherlands Government made a loan to the Foundation of 240,000 florins without interest, and to enable the Foundation to repay the loan, the League of Nations agreed to pay the Foundation an additional sum of 10,000 florins a year from 1929 to 1952.[83] The re-modeling was completed in 1929, but after the increase in the number of judges in 1930 further negotiations were undertaken which led to a rider to the arrangement of 1924, put into effect on December 31, 1932;[84] to provide more space for the Court, the Academy of International Law was removed to a special building for the construction of which the Netherlands Government made a loan to the Foundation of 273,400 florins without interest, and the League of Nations agreed to pay to the Foundation a further sum of 10,000 florins each year until 1960. Beginning in 1933, therefore, the payments made by the League of Nations to the Carnegie Foundation totalled 60,000 florins a year.[85] In the negotiation of the arrangements with the Foundation, the Secretary-General of the League of Nations was usually represented by the Registrar of the Court, but the responsibility for the arrangements was undertaken by the League of Nations itself.[86]

[82] *Idem*, pp. 112–119.

[83] Series E, No. 4, pp. 63–67; *idem*, No. 9, p. 44.

[84] *Idem*, pp. 48–51.

[85] During the same period the Permanent Court of Arbitration made an annual contribution to the Carnegie Foundation of 49,504 florins. The two contributions, totalling 109,504 florins a year, covered more than half of the budgeted *services du Palais* (from 157,000 to 177,000 florins) in the period from 1934 to 1940.

[86] Chattels used by the Court, such as furniture and office equipment, are the property of the League of Nations; the arrangement of 1924 provided that "the furniture and other fittings bought by the League of Nations on behalf of the Court and installed in the Peace Palace are the property of the League." Series E, No. 1, p. 115. Yet the Court doubtless has a juridical personality which would enable it to own and transfer property.

CHAPTER 16

DIPLOMATIC PRIVILEGES AND IMMUNITIES

§370. Provisions in the Statute. Article 19 of the Statute provides that "the members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities." This text is somewhat broader than that in Articles 24 (1899) and 46 (1907) of the Hague Conventions on Pacific Settlement, where the privileges are restricted to the beneficiary's absence from his own country. The subcommittee of the Third Committee of the First Assembly intended that "the question of the situation of the judges in their own country should not be prejudiced" by the final draft of Article 19;[1] yet it seems essential to the independence of the Court, especially in times of emergency, that its members should enjoy some privileges and immunities even within the territory of the States of which they are nationals. Paragraph 4 of Article 7 of the Covenant, which provides that "representatives of the Members of the League and officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities," clearly applies while the beneficiary is in his own country.[2] Members of the Court are not "representatives of Members of the League," but they might possibly be classified as "officials of the League" for the purpose of applying this provision in the Covenant; at any rate the question might arise with reference to a State which is a Member of the League of Nations, but is not a party to the Protocol and Statute of the Court.

Article 19 does not in terms apply to the Registrar of the Court, but the Netherlands Government has agreed to assimilate the Registrar to members of the Court for the purpose of his diplomatic status.[3] The privileges of officials of the Registry derive, not from Article 19 of the Statute, but from Article 7 of the Covenant. Perhaps, also, the

[1] Records of First Assembly, Committees, I, p. 358.

[2] In 1924 the *Institut de Droit International* expressed the view that in the application of this text a Member of the League of Nations was not authorized to make any distinction between its own nationals and those of other States. 31 *Annuaire de l'Institut* (1924), p. 179.

[3] Series E, No. 4, p. 58.

Covenant provision is broad enough to cover agents and counsel representing States before the Court, and even witnesses and experts called to appear before it. It would seem to follow from its consent to the establishment of the seat of the Court at The Hague that the Netherlands Government is bound to permit agents and counsel and witnesses and experts to have access to the Court; this even extends to agents or counsel of a Government which the Netherlands has not recognized. The importance of immunities which would enable agents to have access to the Court was illustrated in the *Electricity Company Case*, in which the Bulgarian Government forbade the departure of its agent from Bulgaria because of the risks involved in crossing belligerent countries.[4]

§371. Rank and Title of Members of the Court. In 1922, the judges took the view that "the question of rank is closely bound up with the question of the dignity of the Court," but they thought that the Court as such could not fix the rank and title that should be accorded to the judges.[5] Hence a memorandum was sent to the Council of the League of Nations, in which alternative solutions were suggested: (1) that the judges of the Court should have the rank of national judges in the various countries; (2) that their rank should be determined on analogy to that of officials of the diplomatic service. The second solution seems to have been preferred, and it was suggested to the Council that the judges might rank after ambassadors but before ministers plenipotentiary. The Council was not disposed to view the matter very seriously; in its reply to the President of the Court,[6] pointing out that no attempt had been made to achieve a general agreement with respect to the rank and title of States' representatives at League of Nations meetings or of permanent officials of the Secretariat, and that questions of precedence had been settled only "in so far as was necessary in each particular case," the Council suggested that the Court might follow the same course, and that "the question of the precedence of the judges of the Court at official ceremonies should, in the first place, be settled by agreement with the authorities at the place where the ceremonies are held." This called, in effect, for an agreement between the Court and the Netherlands Government.

§372. Negotiations with the Netherlands Government. With the seat of the Court established at The Hague, numerous questions arose as to

[4] Series A/B, No. 80, p. 6. *Cf.*, Article 572 of the German-Polish Convention of May 15, 1922, relating to Upper Silesia. 16 Martens, *Nouveau recueil général* (3d ser.), p. 645.
[5] Series D, No. 2, pp. 48–49, 332–333.
[6] League of Nations Official Journal, 1922, pp. 521, 568.

the manner in which Article 19 of the Statute and Article 7 of the Covenant should be applied by the Netherlands Government. Some concessions were made by the Netherlands Government in the course of the earlier years, relating chiefly to tax exemptions,[7] but no formal agreement was arrived at; in the interim, the situation at The Hague seems to have caused some embarrassment to members of the Court, as well as to others concerned. On April 6, 1927, a memorandum was addressed to the Netherlands Minister of Foreign Affairs by the President of the Court, emphasizing the necessity of a definite *protocole*, particularly as to the status of the members of the Court; the reply of the Minister of Foreign Affairs, of November 25, 1927, was thought by the Court to be unsatisfactory, in that it tended "to treat the Court as if it were a Netherlands institution." [8] On December 5, 1927, the Court resolved to request the League of Nations to regulate the matter "from an international point of view," the members of the Court maintaining meanwhile "an absolute reserve with regard to any invitations addressed to them which might in any way influence the ultimate solution of the question"; on December 13, 1927, the Registrar addressed a letter to the Secretary-General of the League of Nations requesting that "the question of the external status of members of the Court" be placed before the Council, and the letter was accompanied by an elaborate memorandum on the subject.[9] Consideration of the matter was postponed by the Council when its *rapporteur* succeeded in arranging for a resumption of negotiations by the President of the Court and the Netherlands Minister of Foreign Affairs. The renewed negotiations, begun on March 28, 1928, resulted in a formal exchange of notes on May 22, 1928, recording an agreement "on some of the points at issue" in the form of four "general principles," supplemented by "rules of application"; this agreement was at once communicated to the Secretary-General of the League of Nations, and on June 5, 1928, the Council took formal note of it.[10]

§373. The "General Principles" of May 22, 1928. While the general principles agreed upon by the President of the Court and the Netherlands Minister of Foreign Affairs are more liberal than the "established custom" set out in the latter's letter of November 25, 1927, they can hardly

[7] Series E, No. 4, p. 59 note. Salaries of members of the Court are exempt from taxation under the Assembly resolution of December 18, 1920, and under the later resolutions; since 1936 such exemption is provided for, also, by Article 32 of the Statute.

[8] League of Nations Official Journal, 1928, pp. 980–982.

[9] *Idem*, p. 982.

[10] *Idem*, pp. 431, 866, 985–987. See also Series E, No. 4, pp. 57–63.

be said to be altogether satisfactory from the point of view of the Court as an international institution. The diplomatic privileges and immunities of members of the Court and of the Registrar are assimilated to those of heads of missions accredited to the Queen of the Netherlands; the Court is given a position analogous to that of the Diplomatic Corps, but the latter takes precedence at official ceremonies to which both are invited; a member of the Court who is not of Netherlands nationality enjoys precedence in relation to the Netherlands authorities as if he were a minister plenipotentiary accredited to the Queen, the Registrar's position in this respect being the same as that of the Secretary-General of the Permanent Court of Arbitration.[11] Implementing the provision in Article 7 of the Covenant, higher officials of the Court are to enjoy "the same position as regards diplomatic privileges and immunities as diplomatic officials attached to legations at The Hague."

§374. **Rules of Application.** The rules or regulations agreed upon for the application of the four general principles, which do not supersede the concessions which had been granted by the Netherlands Government prior to 1927,[12] deal separately with the members of the Court and the Registrar, and with the Deputy-Registrar and the officials of the Court. Members and the Registrar, not of Netherlands nationality, are to enjoy in Netherlands territory the privileges and immunities granted in general to heads of diplomatic missions; a wife and unmarried children share the position of the head of the family if they reside with him and have no profession;[13] the "private establishment," which includes teachers, private secretaries and servants, shares the position of that of a head of a diplomatic mission. A member of the Court or a Registrar of Netherlands nationality enjoys immunity from the jurisdiction of local courts with respect to official acts, and his salary is exempt from direct taxation. As to the Deputy-Registrar and other officials of the Court, a distinction is drawn between "higher officials" and others, and for this purpose the higher officials comprise "at the present time" the Deputy-Registrar and the editing secretaries. The higher officials, not of Netherlands nationality, are accorded the privileges and immunities generally granted to diplomatic officials attached to legations; in determining precedence,

[11] The latter's position is described in the exchange of notes as "that of an international official." Series E, No. 4, pp. 62–3. The Secretary-General of the Permanent Court of Arbitration has the rank of a Minister Resident of the Netherlands Government.

[12] These concessions are contained in thirteen letters, dated from 1922 to 1927, listed in Series E, No. 4, p. 59 note. See, also, *idem*, No. 10, p. 30.

[13] In practice, certain immunities were accorded for a limited time to widows of members of the Court who died at The Hague. *Idem*, No. 12, p. 51.

the Deputy-Registrar ranks as a counsellor of legation and an editing secretary as a secretary of legation. Higher officials of Netherlands nationality enjoy immunity from jurisdiction of local courts with respect to official acts, and their salaries are exempt from direct taxation. With the approval of the President, the Registrar may waive the jurisdictional immunity of an official accused of a violation of law. The Netherlands authorities are to make no objection to the issuance by the competent authorities of the Court of identity cards to officials of the Court.[14] Where any question as to external status of Court officials is in doubt, it is to be decided with regard to the provisions made for corresponding officials of the League of Nations at Geneva.[15]

§375. Provisions by Other Governments. While the agreement of May 22, 1928 constituted a *modus vivendi* for the application of Article 19 of the Statute and Article 7 of the Covenant (in part) by the Netherlands Government, it did not purport to lay down any general interpretation of Article 19; nor did the action taken by the Council of the League of Nations on June 5, 1928, constitute a basis for a more general application of the agreement. Most of the questions arising in connection with the application of Article 19 will probably concern action of the Netherlands Government; yet questions may arise with reference to action taken by other Governments. Though the seat of the Court is fixed at The Hague, it might become necessary for the Court to meet at some other place, and this is not precluded by the Statute. Under Article 28 of the Statute, the special chambers of the Court may sit elsewhere than at The Hague; under Article 50, the Court may direct an enquiry to be undertaken elsewhere, and members of the Court may be charged with conducting it; under Article 44, the Court may undertake "to procure evidence on the spot." Moreover, members of the Court may encounter difficulties with their own Governments, or with Governments whose territories they must traverse to reach The Hague. In any of these cases, the scope of application of Article 19 by States other than the Netherlands may

[14] This question had been the subject of some prior negotiations. League of Nations Official Journal, 1928, p. 984. Identity cards were issued to judges in 1938.

[15] In 1926, a *modus vivendi* was concluded by the Secretary-General of the League of Nations and the Swiss Federal Council. League of Nations Official Journal, 1926, pp. 1407, 1422.

On the general subject, see S. Basdevant, *Les Fonctionnaires Internationaux* (1931); S. Kauffmann, *Die Immunität der Nicht-Diplomaten* (1932); L. Preuss, "Diplomatic Privileges and Immunities of Agents Invested with Functions of an International Interest," 25 American Journal of International Law (1931), p. 694; J. Secretan, *Les Immunités Diplomatiques* (1928); C. van Vollenhoven, "Diplomatic Prerogatives of Non-Diplomats," 19 American Journal of International Law (1925), p. 469.

become important to the functioning of the Court. Yet no attempt has been made to make precise the obligations of a State under Article 19 of the Statute or to secure a uniform application of its provisions, and the Council of the League of Nations has not been disposed to act except as problems have actually arisen. This seems to leave to each State the interpretation to be given to Article 19.[16] As few questions have arisen, there has been no general tendency for States to formalize their attitudes,[17] and the practice is not yet sufficient for a final solution of the problem to be foreseen.

§376. Attitude of Rumania. On August 28, 1929, the Rumanian Minister of Foreign Affairs addressed a letter to the President of the Court, stating that Rumania accepted the interpretation of Article 19 as embodied in the agreement concluded between the Court and the Netherlands Government in 1928, relating to the privileges and immunities of the members of the Court and the Registrar.[18] It was further stated that members of the Court not of Rumanian nationality, "whether in Rumania or abroad," will rank for purposes of precedence in relation to Rumanian authorities as ministers plenipotentiary accredited to the King of Rumania; that members of the Court of Rumanian nationality will rank as Rumanian ministers plenipotentiary; and that under Article 19 of the Statute the members of the Court would enjoy the diplomatic privileges and immunities generally accorded to heads of missions accredited to the King of Rumania. The text of the letter was also communicated to the Secretary-General of the League of Nations; and it was stated in a covering letter that without desiring to prejudge the question so far as other Governments were concerned, the Rumanian Government was of the opinion that "the members of the Court should have the same status as diplomatic representatives of the highest category received or accredited."[19] This action of the Rumanian Government may have been intended to raise the question of a uniform application of Article 19; but

[16] Some States make provisions in their laws for certain privileges and immunities to be given to international officials. Hungary accords certain privileges, for example, to members of international courts. See Feller and Hudson, *Diplomatic and Consular Laws and Regulations* (1933), I, p. 677. Poland accords customs exemptions to representatives of international institutions, among which the Court is mentioned explicitly. *Idem*, II, p. 1018.

[17] A questionnaire circulated by the Committee of Experts for the Progressive Codification of International Law in 1926 dealt with the privileges and immunities of the "judges and staff" of the Court. In reply, the German Government expressed the opinion that the subject should be covered in a separate agreement; the Swiss Government stated that the problem as to the Court was the same as that as to the League of Nations. See League of Nations Document, C. 196. M. 70. 1927, pp. 77, 85, 135, 249.

[18] Series E, No. 6, p. 50.

[19] League of Nations Official Journal, 1929, p. 1863.

the communication was not placed on the agenda of the Council, and it led to no formulation of a common attitude by the parties to the Protocol of Signature of December 16, 1920.

§377. Obligations of States under Article 19. In providing that members of the Court shall enjoy diplomatic privileges and immunities, Article 19 of the Statute imposes on each party to the Protocol of Signature of December 16, 1920, certain obligations which are clear in purpose though indefinite in content. Whether or not the privileges and immunities to be accorded are identical with those given to diplomats, each party to the Protocol of Signature may be taken to have agreed that it will accord to any member of the Court, whether its national or not, the privileges and immunities which may be necessary to enable him to perform his duties on the Court effectively. These privileges and immunities must include, at the least, a freedom to travel to and from the seat of the Court,[20] and a freedom to communicate with the Court or its members. The general principle must be that no State should deny to members of the Court those facilities which are essential to the Court's performance of its functions.[21] In this respect Article 19 is re-enforced by the principle of good faith which must underlie any application of the provisions of the Statute.

Quite apart from the obligations existing, also, it is desirable that privileges and immunities be accorded to members of the Court which will support the Court's dignity and prestige as an international institution. On the whole, it seems that the Court has not been sufficiently exigent in this matter. The judges as a body ought not to be assimilated to a diplomatic corps, and a proper respect for the Court as an institution may be thought to require that its members be given precedence as high international officials over the representatives of any single State.[22] New standards are needed for determining the status of high international officials, and they should be developed without a slavish regard for the past.

[20] In 1935, the Court took a determined attitude on this question. Series E, No. 14, p. 128. In the *Electricity Company Case*, the Bulgarian Government seems to have forbidden the departure of the Bulgarian judge *ad hoc*. Series A/B, No. 80, p. 6.

[21] An Italian law of June 16, 1927, requires Italian nationals who enter the service of another Government or of a public international institution to obtain the authorization of the Ministry of Foreign Affairs or of a competent diplomatic authority, and to abandon such service upon the order of the Government. *Raccolta delle Leggi d'Italia*, 1927, VI, p. 5932. The possible application of such a law to judges of the Court might raise serious difficulties. See also Article 274 of the Italian Penal Code of 1930.

[22] On this point, the suggestion has been made that Article 19 of the Statute should be revised. Genet, "*Un problème de préséances*," 14 *Revue de Droit International et de Législation Comparée* (1933), p. 254. *Cf.*, Warganeus (Å. Hammarskjöld), "*Un problème de préséances*," 4 *Acta scandinavica juris gentium* (1933), pp. 158–165.

CHAPTER 17

PROBLEMS OF THE COURT'S ORGANIZATION

§378. Inauguration of the Court. The Statute of the Court contained no provision for summoning the judges to an inaugural session, nor did it fix a date for the beginning of the nine-year term for which the judges were elected. Following the election in 1921, the Secretary-General of the League of Nations took the initiative of summoning the judges to meet at The Hague for a preliminary session on January 30, 1922, and at the same time, he informed them that their salaries would be paid from January 1, 1922; this latter date came to be regarded as the date on which the judges' nine-year terms began,[1] and by the Rules later adopted, the Court assumed the power to fix January 1 of the year following an election as the date for the beginning of the term of the judges elected at a general election.[2] When some of the judges stated that they could not be present on January 30, 1922, the Secretary-General summoned two deputy-judges to the preliminary session, and both of them attended; the Court later invited the other two deputy-judges, and one of them attended. Nine judges and three deputy-judges thus took part in the Court's first session. Pending the election of a President, Judge Loder was asked to preside; a member of the Secretariat of the League of Nations, Åke Hammarskjöld, had been designated by the Secretary-General as the acting secretary of the Court, and a representative of the Secretary-General was present at three of the earlier meetings. At its second meeting on February 3, 1922, the Court elected Judge Loder as President and M. Hammarskjöld as Registrar. At a public inaugural meeting on February 15, 1922, the members of the Court made their solemn declarations,[3] and speeches were made by M. da Cunha on behalf

[1] Series E, No. 1, p. 12.

[2] The earlier practice of the Court was to regard an election to fill a vacancy "as taking effect on the first day of the month following that in which the election took place." Series D, No. 2 (3d add.), pp. 760, 804. Article 1 of the 1936 Rules provides, however, that the term of office of a judge elected to fill a vacancy shall begin on the date of the election. *Idem*, pp. 378–81, 470. See §260, *supra*.

[3] A similar procedure was followed in 1931. Series E, No. 7, p. 20.

of the Council of the League of Nations, the Secretary-General of the League, the Netherlands Minister of Foreign Affairs, and the Burgomaster of The Hague, as well as by the President of the Court. Forty meetings were held in the preliminary session which continued from January 30 to March 24, 1922.[4]

§379. Seat of the Court. The provision in Article 22 of the Statute that "the seat of the Court shall be established at The Hague," makes no reference to a possible removal of the seat to another place. This silence is the more significant since Article 28 of the Statute expressly permits the special chambers to sit "elsewhere than at The Hague" with the consent of the parties. Clearly the Court has not power to quit The Hague and establish its permanent seat elsewhere; yet there can be little doubt as to its power to hold meetings away from The Hague, or even to establish a temporary seat of the Court elsewhere than at The Hague.[5] Under Article 44 of the Statute, the Court may undertake "to procure evidence on the spot"; under Article 50 it may direct an enquiry to be carried on away from The Hague, and members of the Court might be charged with conducting it.[6] It must be clear, therefore, that the Court is not bound down to The Hague in its activities. This was contemplated in the resolution concerning travelling expenses adopted by the Assembly of the League of Nations on September 14, 1929, Article 2 of which referred to "journeys made necessary by sessions or sittings of the Court held away from the seat of the Court, and by visits to places concerned in proceedings." [7] The Rules have also been drawn up with the idea that the Court may sit in various places,[8] and the Instructions for the Registry of March 31, 1938, provide (Article 10) that "should the Court meet at a place other than that where its seat is established, the Registrar will cause the necessary preparations to be made." [9] In time of crisis, the Court might be forced to meet away from The Hague; in 1940 offices of the President and Registrar were established at Geneva, though no formal announcement was made to that effect.

§380. Sessions of the Court. The original text of Article 23 of the Statute provided that a session of the Court should be held every year,

[4] Minutes of the Court's preliminary session were published in Series D, No. 2.

[5] The 1920 Committee of Jurists purposely refrained from making any proposals as to the power of the Court to remove its seat from The Hague. Minutes of the 1920 Committee of Jurists, pp. 305, 376, 495–6.

[6] See Series D, No. 2, pp. 147, 466; *idem* (3d add.), pp. 216–7, 225–7.

[7] Records of Tenth Assembly, Plenary, pp. 114, 432.

[8] *E.g.*, Article 25 of the 1936 Rules refers to holidays customary "at the place where the Court is sitting." *Cf.*, Series D, No. 2 (3d add.), pp. 631, 634.

[9] Series E, No. 14, p. 30.

and fixed June 15 as the date of the annual or ordinary session, unless it should be otherwise provided by rules of Court; by Article 27 of the 1931 Rules this date was changed to February 1.[10] The President was also authorized to summon an extraordinary session whenever necessary. The distinction between ordinary and extraordinary sessions never had much substantial significance, though for a time the Court seems to have thought that certain of its powers ought not to be exercised at extraordinary sessions.[11] Down to 1936, an ordinary session was held each year, whether or not a case was ready for hearing;[12] and the Court showed itself reluctant to change the date for the opening of the session.[13] No summons was necessary for the ordinary session, the convening of the judges being automatic.

In its first fourteen years, from 1922 to 1935, the Court held thirty-five sessions in addition to the preliminary session; fourteen were ordinary sessions and twenty-one extraordinary. Some confusion resulted from the provision in the original text of Article 23 of the Statute requiring the annual session to continue as long as necessary to finish the cases on the list.[14] Hence the dates of some of the sessions overlap the dates of others; for example, the twenty-sixth session continued from October 14, 1932 to April 5, 1933, but the twenty-seventh session was opened on February 1, 1933 and closed on April 19, 1933.[15] On January 30, 1931, the Court expressed the opinion that it was "desirable that it should not be convened between July 1 and October 1 except for urgent cases."[16] During the first nine-year period the Court was never in session for as much as 200 days in any year, though the budget was framed on that basis; in the busiest years of this period, 1925 and 1927, the sessions lasted for 185 days, and the average for the whole period was 144 days a year.

The amended text of Article 23 of the Statute, in force after February 1, 1936, provided that the Court should "remain permanently in session except during the judicial vacations." Hence Article 25 of the

[10] Article 27 of the Rules of 1922 and 1926 provided that in the year following a new election of the whole Court the ordinary annual session should commence on January 15; hence the ordinary session for 1931 began on January 15.

[11] See Series E, No. 3, p. 183.

[12] The eighth session, which began on June 15, 1925, was adjourned from June 19 to July 15, because a case was not ready for hearing. No case was heard at the twentieth session in 1931. See a list of the sessions in Appendix No. 11, pp. 778–9, *infra*.

[13] Series E, No. 11, p. 147.

[14] See Series D, No. 2 (add.), pp. 19, 94; *idem* (2d add.), pp. 59–72; *idem* (3d add.), pp. 762, 809.

[15] The 17th session also overlapped the 16th session in 1929, and the 24th overlapped the 23d in 1932.

[16] Series D, No. 2 (2d add.), p. 80; Series E, No. 7, p. 285. But the Court was convened in July 1931, and in July 1933.

1936 Rules of Court provides for a judicial year to begin on January 1 of each year; and it fixes the dates of the judicial vacations from December 18 to January 7, from the Sunday before Easter to the second Sunday after Easter, and from July 15 to September 15. In many places, however, the 1936 Rules envisage a possibility that the Court might not be sitting at a particular time; and they leave to the President the power to convene the Court even during the vacation periods in case of urgency.

The change to permanent sessions was one of the chief innovations made in the 1929 revision of the Statute of the Court. Yet it would seem to have accomplished little in the way of assuring a more continuous functioning of the Court. This is indicated by the following statistics as to the duration of the actual sessions year by year:

Year	*Days in Session*	*Year*	*Days in Session*	*Year*	*Days in Session*
1922	113	1929	121	1936	143
1923	149	1930	117	1937	116
1924	81	1931	213	1938	69
1925	185	1932	263	1939	116
1926	160	1933	193	1940	8
1927	185	1934	120	1941	none
1928	182	1935	107	1942	none

§381. "Full Court." Article 25 of the Statute provides that "the full Court shall sit except when it is expressly provided otherwise." [17] The Statute does not say what is to constitute the "full Court," and as the proviso indicates that expression serves its principal function by setting off the whole body of the judges from the chambers of the Court.[18] The original text of Article 25 provided that if eleven judges could not be present that number should be made up by calling on the deputy-judges to sit; the amended text states that the rules may allow one or more of the judges to be dispensed from sitting, but subject to the condition that the number of judges available is not thereby reduced below eleven. It would seem to be in accord with the text of the Statute to say that the "full Court" consists of all the available judges, and during the earlier years of the Court the number of judges who should be available was eleven.[19] After the number of judges was increased to fifteen, the number eleven came to have less importance, and for the later period perhaps it should be taken to indicate a normal minimum of judges to constitute

[17] Express provision "otherwise" may be found in Articles 26, 27, and 29 of the Statute, and under the interpretation given by the Court in Article 18.

[18] The contradistinction is clear in Article 7 of the 1936 Rules. *Cf.*, Series D, No. 2 (3d add.), pp. 498–9.

[19] Article 4 of the 1922 Rules expressly provided for the Court's sitting "with a number of judges exceeding eleven."

the full Court in order to insure the continued existence of the quorum.[20] If the judges *ad hoc* be taken into account, the maximum number for constituting the "full Court" was never limited to eleven. After 1931 it was clear that the maximum would normally exceed eleven, and it was possible for the Court to have fifteen judges on the bench plus two or even more judges *ad hoc*.

The purpose of the amendment to Article 25 of the Statute, envisaging rules allowing one or more of the judges to be dispensed from sitting, was to remove the disadvantage of a large bench and to enable the judges to sit in turn to ensure a prompt dispatch of business.[21] In 1936, the Court decided not to avail itself of this possibility for the time being.[22] Under the original text of Article 25, it would seem that the "full Court" could meet only if all the judges were summoned, but some vacillation is to be noted in the practice on this point;[23] when the amendments to the Statute came into force, the summons lost some of its importance in view of the fact that the permanent session was introduced, but a summons to a meeting during a judicial vacation continued to be possible.

§382. **Quorum.** Both the original and the amended text of Article 25 of the Statute provide that "a quorum of nine judges shall suffice to constitute the Court"; hence it has never been possible for the Court to meet with a smaller number of judges than nine.[24] For the purpose of determining the existence of a quorum a judge *ad hoc* is not to be counted;[25] since 1926, provision to this effect has been included in the Rules. As no provision is made for a special quorum of a chamber, it would seem that a meeting of a chamber requires the presence of the full number of its members.[26] Article 30 of the 1922 Rules provided that "if at any sitting of the full Court it is impossible to obtain the prescribed quorum, the Court shall adjourn until the quorum is obtained"; Article 29 of the 1936 Rules is of somewhat similar import, but it provides for the President's adjourning the sitting.[27] It seems clear that if a quorum is lacking, the Court cannot act, and that a gathering of less than nine judges cannot be a meeting of the Court.[28]

[20] In 1920 the Root-Phillimore plan proposed a quorum of nine judges at the first hearing of a case with a possibility that the number might be later reduced to seven if any of the judges were unable to continue during the hearing. Minutes of the 1920 Committee of Jurists, p. 522.

[21] Minutes of the 1929 Committee of Jurists, p. 121.

[22] Series D, No. 2 (3d add.), pp. 5, 547. [23] *Idem*, pp. 540–1; Series E, No. 14, p. 131.

[24] The presence of the Registrar or his deputy is also required. The order of December 5, 1939 in the *Electricity Company Case* was given by a Court of nine judges. Series A/B, p. 79.

[25] Even a deputy-judge sitting as a judge *ad hoc* was not counted for the requirement of a quorum. Series D, No. 2 (add.), pp. 53–54; Series E, No. 3, p. 188.

[26] Series D, No. 2 (3d add.), p. 15.

[27] The provision seems to serve little purpose. But see Series D, No. 2 (3d add.), p. 16.

[28] Hence, the minutes are not official minutes of the Court. Series E, No. 5, p. 252.

On November 13, 1928, at the opening of its fifteenth session, when six judges, three deputy-judges and one judge *ad hoc* were present,[29] a deputy-judge fell ill; this fact was announced at a public meeting and the hearings were postponed three times; shortly afterward the President declared the session to be closed,[30] with the result that a delay of some six months occurred in the disposition of the *Serbian Loans Case* then before the Court.[31] The Court also lacked a quorum on the date set for the opening of its seventeenth session on June 17, 1929, though the session was stated to have begun on that date.[32] In the *Free Zones Case*, hearings set down for October 14, 1931, had to be adjourned because of the lack of a quorum on that date.[33]

With the requisite number of judges present, a quorum is constituted and it is not affected by the fact that one or more of the judges abstain from voting;[34] but if several judges abstain from voting with the result that the number of recorded votes is less than nine, the voting may be held to have had no effect.[35]

§383. Attendance of the Judges. One of the recurring problems of the Court has been to assure the attendance of the judges at its sessions. One of the judges elected in 1921 failed to attend any of the three sessions held before his death in 1923. In the first nine-year period, some of the judges were absent at most of the sessions held during the winter months,[36] several at about half the sessions, and some of the deputy-judges were present as often as were some of the judges; a marked improvement is noticeable after 1930, though even then the attendance was not wholly satisfactory. The record is given in the following tables:

[29] One of the deputy-judges was a national of a party but apparently he was called upon to sit independently of that fact.

[30] Series C, No. 16–III, pp. 847–52; Series E, No. 5, pp. 251-2

[31] Confronted with the situation existing in November, 1928, the agent of the French Government in the *Serbian Loans Case* proposed either recourse to the Chamber for summary procedure, or recourse to the judges actually available sitting as an arbitral tribunal, or an agreement between the parties to consider the judges actually available as constituting the Court. Series C, No. 16–III, p. 808. The agent of the Serb-Croat-Slovene Government did not accept any of these suggestions.

[32] Series E, No. 6, p. 284.

[33] Series C, No. 58, pp. 331, 698.

[34] Series D, No. 2 (add.), p. 62; Series E, No. 3, p. 188. But see Series D, No 2 (3d add.), p. 810.

[35] The Court's practice is not clear on this point. Series E, No. 9, p. 161; *idem*, No. 14, p. 132. But *cf.*, Series D, No. 2 (3d add.), pp. 549, 552.

[36] M. Fromageot (France) stated to the 1929 Conference of Signatories that "the result was that, in the summer, cases would be heard by a normally constituted Court, whereas in the winter they would be heard by an almost exclusively European Court." Minutes of the 1929 Conference of Signatories, p. 22. President Anzilotti told the 1929 Committee of Jurists that some of the judges had accepted their election in 1921 with the conviction "at that time universally shared, that they would have to come to Europe only once a year to attend the ordinary summer session." Minutes of the 1929 Committee of Jurists, p. 31.

SESSIONS 1922–1930—Attendance of the Judges

Judges	Pre.	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19
Altamira	P	P	PA	P	A	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P
Anzilotti	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P
Barbosa	A	A	A	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
Bustamante	A	P	A	P	A	P	A	A	P	A	A	P	PA	A	P	A	P	P	P	A
Finlay	P	P	P	P	P	P	P	P	P	P	P	P	P	A	P	P	..	..	..	..
Fromageot	.	..	.	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	P	A
Huber	P	A	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P
Hughes	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	P	P	..	..
Hurst	..	..	..	.	.	.	.	.	..	..	..	..	.	..	..	..	.	..	P	P
Kellogg	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	P
Loder	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P
Moore	P	P	P	P	A	P	A	A	A	A	A	P	P	A	..	.	..	..	..	..
Nyholm	P	P	P	P	P	P	P	A	P	P	P	P	P	P	P	P	PA	PA	P	P
Oda	P	P	A	P	P	P	P	P	P	A	A	P	P	PA	P	A	P	P	P	P
Pessôa	..	..	.	.	A	P	A	A	P	A	A	P	PA	A	P	A	P	P	PA	A
Weiss	P	P	P	P	P	P	P	P	P	P	PA	P	PA	P	PA	.	..	..	..	..

P—present; A—absent; PA—present at part of the session only; dots indicate that a person was not a member of the Court at the time.

SESSIONS 1922–1930—Attendance of the Deputy-Judges

Deputy-Judges	Pre.	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19
Beichmann	P	P	P	A	P	A	P	P	A	P	P	A	PA	P	P	P	PA	PA	A	P
Negulesco	P	P	P	A	A	A	P	P	A	P	P	A	PA	P	A	P	P	P	A	P
Wang	A	A	A	P	P	A	A	P	P	A	A	A	A	P	A	A	PA	PA	A	A
Yovanovitch	P	A	A	A	P	A	P	P	A	P	P	A	PA	P	A	P	A	A	P	P

SESSIONS 1931–1935—Attendance of the Judges

Judges	20	21	22 [37]	23	24	25 [38]	26	27	28	29	30	31	32	33	34	35
Adatci	P	P	P	P	P	PA	P	P	P	P	P	P	P	A	..	..
Altamira	P	P	P	P	P	P	A	A	A	A	A	A	A	P	P	P
Anzilotti	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P
Bustamante	A	A	P	A	A	PA	A	A	A	A	PA	A	A	PA	A	P
van Eysinga	P	P	PA	P	P	PA	P	P	P	P	P	P	P	P	P	P
Fromageot	P	P	P	P	P	PA	P	P	P	P	P	P	P	P	P	P
Guerrero	P	P	PA	P	P	PA	P	P	P	P	P	P	P	P	P	P
Hurst	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P
Kellogg	A	P	PA	A	A	PA	A	A	A	A	PA	A	A	A	A	..
Nagaoka	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	P
Negulesco	P	P	P	P	A	P	P	P	P	P	P	P	P	P	P	A
Rolin-Jaequemyns	P	P	P	P	P	PA	P	P	P	P	P	P	P	P	P	P
Rostworowski	P	P	P	P	P	PA	P	P	P	P	P	P	P	P	P	P
Schücking	P	P	P	P	P	PA	P	P	P	P	P	P	P	P	P	..
Urrutia	P	A	P	P	P	PA	P	P	P	P	A	A	P	P	P	P
Wang	A	A	P	P	P	PA	A	P	P	P	P	P	P	A	A	P

[37] The absence of Judge van Eysinga and Judge Guerrero at a part of this session was due to application of Article 24 of the Statute.

[38] Some absences at this session were due to application of Article 13 of the Statute.

This was one of the problems which led to the proposal in 1928 to consider the revision of the Statute. The revised text of Article 23 of the Statute placed on members of the Court the imperative duty "to hold themselves permanently at the disposal of the Court" unless "they are on regular leave or prevented from attending by illness or other serious reason duly explained to the President"; and the substance of this provision was incorporated in Article 27 of the 1931 Rules. Article 27 of the 1936 Rules provides that members of the Court "prevented by illness or other serious reasons from attending a sitting of the Court to which they have been summoned by the President, shall notify the President who will inform the Court." These more imperative provisions may have had some influence, but even after 1936 it was thought in some quarters that the record of attendance was not wholly satisfactory. The real difficulty with reference to the attendance of the judges arose from the advanced age of some of them, and from the fact that during the earlier period some of them had other interests.[39]

§384. Deputy-judges. During the first nine-year period the deputy-judges were frequently summoned to sit upon the Court; one or more deputy-judges were present at the preliminary session and at all but one of the nineteen sessions held thereafter, and in the seventh and thirteenth sessions all four of the deputy-judges sat.[40] It was therefore possible for the 1929 Committee of Jurists to say in its report that the "deputy-judges have in fact been placed on a footing of equality with the ordinary judges in regard to the work performed"; for this reason the Committee proposed the abolition of the post of deputy-judge and an increase in the number of judges.[41] Amendments of the Statute to this end were annexed to the Protocol of September 14, 1929, but when that Protocol failed to enter into force in 1930, the Assembly increased the number of judges and proceeded to elect both judges and deputy-judges. It was recognized, however, that "the practical effect of the increase would be to render superfluous, save in quite exceptional cases, recourse to the deputy-judges." [42] None of the deputy-judges elected in 1930 was ever summoned to sit upon the Court, and deputy-judges were said to have

[39] See Series C, No. 1, p. 3; *idem*, No. 16–III, p. 810; Series E, No. 7, p. 285.
[40] Series E, No. 5, p. 251; *idem*, No. 7, p. 288.
[41] Minutes of 1929 Committee of Jurists, p. 119.
[42] Records of Eleventh Assembly, Plenary, p. 131. In 1931, it was a possible interpretation of Article 25 of the Statute that as the full court then consisted of fifteen judges instead of eleven, the former number should be maintained by summoning the deputy-judges. Series E, No. 7, p. 289.

ceased to take an active part in the Court's work;[43] but the possibility that a deputy-judge might be designated as judge *ad hoc* under Article 31 of the Statute[44] gave some importance to the post down to 1936 when it was abolished altogether.

Article 3 of the 1922 Rules, supplementing Article 15 of the original Statute, provided for the summoning of deputy-judges in rotation in the order laid down in a list in which the names were included in accordance with a precedence based on priority of election and ages; variations in this order were sometimes necessary, however.[45] The extent to which the collaboration of deputy-judges was required by the Statute, apart from their being called to make a quorum, was the subject of prolonged debate in 1922. Deputy-Judge Negulesco (Rumania) proposed that a "general meeting of the Court," *i.e.*, of judges and deputy-judges, should be held for various purposes, and this idea found some favor.[46] At one time it was decided that the deputy-judges should be asked to participate in the elections of President and Vice-President, and in the giving of advisory opinions,[47] but this action was later rescinded.[48] Article 6 of the 1922 Rules provided that the deputy-judges should be convened "for the purpose of applying Article 18 of the Statute," and this provision survived until 1936. Although all of the deputy-judges were invited to participate in the Court's preliminary session largely devoted to framing the 1922 Rules, it was decided in 1926 that "the Statute did not permit the convocation of the deputy-judges for the purpose of the revision of the Rules," except as their presence might be required for a quorum.[49] This view was confirmed in 1931,[50] and again in 1934.[51]

§385. Long Leave for Judges. Article 27 of the 1931 Rules inaugurated a system of long leave for judges "whose homes are situated at more than five days' normal journey from The Hague and who by reason of the fulfilment of their duties in the Court are obliged to live away from their own country." Six months' leave was to be given in each period of three years of duty; not more than two judges were to be on leave at any one time, and the order of leaves was to be laid down in a list based upon seniority in age of the persons entitled. Such a list drawn up in 1931 was not brought into operation until 1933;[52] a new roster was drawn up in

[43] *Idem*, No. 10, p. 153.
[44] This point arose in the *Pajzs Case* in 1935 and in the *Losinger Case* in 1936. Series C, No. 78, p. 390; *idem*, No. 80, p. 1374.
[45] See Series E, No. 4, pp. 273–4.
[46] Series D, No. 2, pp. 476–80.
[47] *Idem*, p. 165.
[48] *Idem*, pp. 172, 174.
[49] Series E, No. 3, pp. 176, 192.
[50] *Idem*, No. 7, pp. 276, 291.
[51] *Idem*, No. 10, p. 153.
[52] Series E, No. 7, p. 285; *idem*, No. 9, p. 161.

1935.[53] In order that Governments might know the composition of the Court during each year, the list of judges who were to take the leave was announced in advance.[54] Some difference of opinion seems to have existed as to the right of a judge to benefit by the system of long leaves if he had not established his residence elsewhere than in his own country;[55] as the Registrar explained it, Article 27 gave to "overseas judges" a choice, either to accept the obligation to hold themselves permanently at the disposal of the Court and be entitled to long leave, or to retain their freedom and renounce the right to any long leave.[56]

The revised text of Article 23 of the Statute provided for leave to be taken by judges "whose homes are situated more than five days' normal journey from The Hague." This must be read with the provision in the following paragraph that judges must "hold themselves permanently at the disposal of the Court"; even so, it can hardly be said that since 1936 an overseas judge's right to long leave is conditioned upon his residence in Europe. Article 26 of the 1936 Rules does not solve this question.

§386. Precedence among the Judges. Precedence among the members of the Court is determined, firstly, by the date of election and, secondly, by age. These criteria were set by Article 2 of the Rules in force from 1922. Members of the Court elected at one session of the Assembly and Council of the League of Nations take precedence over those elected at a subsequent session; while members elected during the same session take precedence according to age.[57] If a member is re-elected at a general election, his precedence is based upon his re-election, not upon his earlier election.[58] While deputy-judges were included among members of the Court, they were subordinated to judges; judges *ad hoc* are subordinated to the judges, also. Apart from these rules, however, the President and Vice-President "naturally occupy the first and second places" in the ranking of the members of the Court,[59] though this is merely adumbrated in the second paragraph of Article 2 of the Rules which relates to seating.[60]

§387. Officials of the Court. The Statute provides for the Court's having a President, a Vice-President and a Registrar, all three of these

[53] Series E, No. 11, p. 147.
[54] See Article 26 of the 1938 Instructions for the Registry, Series E, No. 14, p. 32.
[55] Series D, No. 2 (3d add.), pp. 539, 544; Series E, No. 7, p. 285; *idem*, No. 13, p. 146.
[56] *Idem*, p. 544.
[57] Order of election during a session is not taken into account. Series D, No. 2, pp. 13, 23–4, 110.
[58] Series E, No. 7, p. 276; Series D, No. 2 (3d add.), p. 805.
[59] *Idem*, p. 472.
[60] From 1925 to 1931, the Rules gave to the retiring President the seat on the right of the President. The deletion of this rule in 1931 was due to a suggestion made by the then-retiring President, M. Anzilotti. Series D, No. 2 (2d add.), p. 131.

officials being elected by the Court itself.[61] In addition the Court has made provision for a Deputy-Registrar. The Court also has to elect from time to time members and substitute members of the Chambers provided for in Articles 26, 27 and 29 of the Statute, and it sometimes creates standing committees for dealing with certain subjects. All elections are by secret ballot, and an absolute majority of votes is required in every election.

§388. The Presidency. Article 21 of the Statute fixes the term of the President at three years. Article 9 of the 1936 Rules provides that the election of the President shall take place "in the last quarter of the last year of office of the retiring President," and that the President so elected shall take up his duties on the following January 1st; but that after a new election of the whole Court, the President shall be elected at the commencement of the following year and take up his duties on the date of his election. Article 12 (3) of the 1936 Rules provides that "after a new election of the whole Court, and until the election of the President and Vice-President, the duties of President shall be discharged by the oldest member of the Court"; [62] this provision applies only from January 1 of the year following the election. These provisions of the Rules fail to take account of the possibility of a delay in holding the regular election of judges.

Judge Loder was elected President on February 3, 1922, and served to the end of 1924; Judge Huber, elected on September 4, 1924, served for the years 1925–1927; Judge Anzilotti, elected on December 6, 1927, served for the years of 1928–1930. Following the general election of 1930, Judge Adatci was elected President on January 16, 1931 for the years 1931–1933; Sir Cecil Hurst was elected on December 2, 1933 for the years 1934–1936; and Judge Guerrero was elected on November 25, 1936 for the years 1937–1939. On November 30, 1939, the Court took a general decision that the principle laid down in Article 13 of the Statute should apply to the President, and that he should continue to discharge his functions until his place was filled; as no general election of judges was held in 1939, Judge Guerrero therefore continued to discharge the duties of President during the years following 1939. The practice of the Court does not favor the re-election of a President, though it is expressly authorized by the Statute.

[61] At one time the President, a retired President, and the Vice-President acted as "a sort of permanent 'delegation'" of the Court. Series D, No. 2 (3d add.), p. 805.

[62] No method is prescribed for determining who is the oldest member. See Series D, No. 2 (3 add.), pp. 753, 807.

Even after the expiration of a President's term of office, he may be called upon to assume the functions of President in respect of a case which the Court had begun to examine during the period of his regular incumbency; but if he is unable to fulfil his duties his place will be taken by the newly-elected President.[63] The provision to this effect in Article 13 of the Rules in 1936 represented a previously established practice. The Chamber for Summary Procedure decided on March 3, 1925 that Judge Loder should preside while the Chamber considered a request for the interpretation of a judgment which had been rendered by the Chamber under his presidency.[64] In line with this precedent, the Court decided on December 4, 1930 that the duties of President should continue to be exercised in the *Free Zones Case* by the judge who had been President when previous phases of the case had been dealt with;[65] the new Court took note of this decision on August 6, 1931, and Judge Anzilotti therefore presided over the Court during the third phase of that case in 1932, "in so far as concerned deliberations and proceedings connected with the decision." [66]

The President must not act as such in a case when he possesses the nationality of a party in the case. Provision to this effect was first embodied in Article 13 of the 1926 Rules, and in view of the possibility of the President's casting a deciding vote, it seems an essential provision. In the *Memel Case* in 1932, President Adatci interpreted the rule to apply to the President's function in *chambre du conseil;* he concluded that he might proceed to the signature of an order fixing time-limits,[67] but the hearings were presided over by the Vice-President.[68] Similarly in the *Chinn Case* in 1934, the Vice-President replaced the President.[69] When the Vice-President acts as President he is referred to as "Acting President," [70] or as "Officiating President." [71]

After the expiration of his term as President, a judge of the Court has no special rank as a consequence of the office which he has held. In 1925, however, the retiring President was given a seat at the right of the President and provision to this effect was inserted in Article 2 of the 1926 Rules; this provision was omitted in the 1931 Rules, and the practice was discontinued.

[63] A different solution is given to a somewhat similar problem by the second paragraph of Article 13 (2) of the 1936 Rules.
[64] Series E, No. 3, p. 191.
[65] Series E, No. 7, p. 275.
[66] Series C, No. 58, pp. 328–9, 689; Series E, No. 8, p. 247. *Cf., idem,* No. 5, p. 248.
[67] See his note in Series C, No. 59, p. 606.
[68] *Idem,* p. 157.
[69] Series C, No. 75, p. 208.
[70] Series A/B, No. 47, p. 253; *idem,* No. 49, p. 338.
[71] Series A/B, No. 63, p. 89.

On the whole it must be said that the Presidency of the Court has become a more important office than the draftsmen of the Statute had anticipated. The expectation of the 1920 Committee of Jurists that the President would be *primus inter pares* has hardly been fulfilled, for he exercises such control of the Court's proceedings that his position is clearly one of dominance in the work of the Court. Outside the Court, also, he enjoys a position of prominence, as is indicated by the frequent appeals to the President to make appointments provided for in treaties or contracts.

§389. Casting Vote of the President. Article 55 of the Statute provides that "in the event of an equality of votes, the President or his deputy shall have a casting vote" (Fr., *voix prépondérante*). The English and French versions seem to carry different meanings: a "casting vote" would seem to be a second vote to be cast by the President when an equality prevails, and in this sense it might differ from his original vote; [72] a "preponderant vote" would seem to mean that where equality obtains preponderance is to be assigned to the vote which has been cast by the President, with the result that this vote would become decisive. In practice, the sense of the English version has prevailed, and on numerous occasions the President has given a casting vote which was not in accord with his previous vote.[73] The judgment of the Court in the *Lotus Case* was adopted by the casting vote of the President.[74] The President does not have a casting vote in elections by the Court.[75] He may refrain from using his casting vote, and in such case he will declare lost a motion which fails to obtain a majority vote.[76]

§390. The Vice-Presidency. The election of the Vice-President is governed by rules analogous to those relating to the election of the President. Judge Weiss was elected Vice-President on February 7, 1922, and reëlected on September 4, 1924, and on December 6, 1927; he therefore served as Vice-President from 1922 until his death in 1928, when he

[72] In 1933, the Registrar stated that "the question of the nature of the casting vote has given rise on almost every occasion to lengthy discussions." Series D, No. 2 (3d add.), p. 813.

[73] Series E, No. 3, p. 216; *idem*, No. 4, p. 291; *idem*, No. 6, p. 299; *idem*, No. 7, p. 298; *idem*, No. 9, p. 174. See also Fischer Williams, Chapters on Current International Law and the League of Nations (1929), p. 228.

[74] Series A, No. 10, p. 32. In his dissenting opinion attached to the Court's judgment of June 7, 1932 in the *Free Zones Case*. Series A/B, No. 46, p. 202, Judge *ad hoc* Dreyfus stated that the Court's order of December 6, 1930 had been given by the casting vote of the President; but on the latter date the Court had consisted of twelve judges, of whom all concurred in the operative part of the order and in the recitals relating thereto, but six declared themselves unable to concur in other recitals of the order in so far as their dissent was indicated.

[75] But see Series E, No. 3, p. 216.

[76] *Idem*, No. 14, p. 158.

was succeeded by Judge Huber. Judge Guerrero was elected Vice-President on January 17, 1931, and reëlected on December 2, 1933. On November 25, 1936, Sir Cecil Hurst, then about to retire as President, was elected Vice-President, and in application of the principle laid down in Article 13 of the Statute, he continued to discharge the duties of Vice-President during the years after 1939.

The Vice-President has often replaced the President,[77] but the occasions are rare on which he has presided over the Court during the oral proceedings. In the *Memel Case* in 1932, the Vice-President replaced the President who was a national of one of the parties, and presided over the hearings; for the same reason the Vice-President presided over the hearings in the *Chinn Case* in 1934. The Vice-President presides over any chamber of which he is a member, unless the President is also a member of the chamber.

§391. Chambers. When the Court sits to deliberate upon a case after the oral hearings, it is said to sit in *chambre du conseil.*[78] The Court has three organized Chambers, one for summary procedure, and two for cases arising in special fields.[79] Each of the Chambers may be said to be the Court sitting as a Chamber. A judgment of a Chamber is a judgment of the Court itself, and no appeal lies from a Chamber to the full Court. The members and the substitute members of the Chambers are elected by the full Court by secret ballot. and by an absolute majority of votes.[80] Down to 1936, Article 14 of the Rules provided that in the elections regard should be had "to any preference expressed by the judges, so far as the provisions of Article 9 of the Statute permit." [81] The object of this provision was to give the judges an opportunity of stating the fields of their individual experience, the special Chambers being considered to be Chambers of experts; the provision was applied on numerous occasions,[82] but it was dropped in 1936, and judges

[77] See Series C, No. 71, pp. 148, 166–7; Series A/B, No. 57, pp. 167–70.

[78] This phrase is employed in the French version of Article 54 of the Statute. A precise English equivalent for this term seems to be lacking, but references are sometimes made to "private meetings of the Court." See §395, *infra.*

[79] Proposals have been made also for the creation of a vacation Chamber. Minutes of the 1929 Committee of Jurists (Fr. ed.), p. 113; Series D, No. 2 (3d add.), p. 538. In 1929 the Danish Government proposed a "special chamber for international commercial disputes." Minutes of the 1929 Conference of Signatories, p. 4.

[80] Article 16 of the 1922 Rules, in force until 1936, envisaged a summoning of judges and deputy-judges to complete the membership of the Chambers. Doubts have been expressed as to the propriety of such procedure. Series D, No. 2 (2d add.), p. 145.

[81] Article 9 would seem to have applied only to the election of members of the Court by the Assembly and Council of the League of Nations.

[82] Series D, No. 2 (3d add.), p. 518.

are no longer asked to express their preferences.[83] The President of each Chamber is designated by the Court itself under the conditions set by Article 24 of the 1936 Rules; the organization of the Chambers may therefore be complete without any meeting. Judges *ad hoc* may sit in each of the chambers.[84] The provision in Article 28 of the Statute that the special chambers may with the consent of the parties sit elsewhere than at The Hague seems unnecessary, except for the purpose of suggesting the availability of the Chambers for general use. Since the beginning the Rules have excluded the possibility of a Chamber's giving an advisory opinion.[85]

§392. **Chamber for Summary Procedure.** The Chamber for Summary Procedure was provided for "with a view to the speedy despatch of business." It was intended to have a simplified procedure, and to deal with cases of a secondary importance in the sense that they lend themselves to ready solution.[86] The original Statute provided for a Chamber of three judges and the Court added a provision for two substitutes; the revised Statute provides for a Chamber of five judges and two substitutes. The members are elected for terms of one year. No provision is made for assessors in this Chamber, and this is true even though the Chamber should sit to deal with labor cases or transit and communications cases.[87]

The Chamber for Summary Procedure was regularly constituted each year down to 1940.[88] The President of the Court was always a member of the Chamber, and usually the Vice-President was a member. Yet little use was made of the Chamber. In 1924 it was employed for a case relating to the *Interpretation of the Treaty of Neuilly*, and a judgment was given in that case on September 12, 1924; a later application having been made for an interpretation of this judgment, a second judgment was given by the Chamber on March 26, 1925. Both of these judgments were

[83] Series E, No. 14, p. 133.

[84] In the original Statute, both in Article 26 and in Article 27, the provision for a national judge or a judge *ad hoc* applied "if there is a national of one only of the parties sitting as a judge in the Chamber"; and the national judge or judge *ad hoc* was to replace one of the regular members. Article 31 of the revised Statute covers the situation more adequately.

[85] But see Series D, No. 2 (3d add.), p. 795.

[86] This was put by Judge Fromageot in 1936 as follows: "When governments addressed themselves to the Chamber for Summary Procedure, it was because they considered the case as one of minor importance, not necessarily as regards its consequences, but in the sense that the problems and difficulties to which it gave rise lent themselves to a simple solution." Series D, No. 2 (3d add.), p. 666.

[87] Minutes of the 1929 Committee of Jurists, pp. 48, 122. But *cf.*, Series D, No. 2 (3d add.), p. 497.

[88] On November 30, 1939, the Court decided that if no election was held in that year, the principle of the second paragraph of Article 13 of the Statute should be applied to maintain the then-existing membership of the Chamber.

given as judgments of the "Court sitting as a Chamber of Summary Procedure"; on the two occasions the Chamber was composed of the same judges, and oral proceedings were not called for in either case. The Chamber also held a meeting in 1935 in connection with a request, later withdrawn, that it appoint members of an arbitral tribunal.[89] In the *Serbian Loans Case* in 1928, a reference to the Chamber for Summary Procedure was suggested, but the Serbian Government thought such a course would be unacceptable to its public in view of the importance of the case.[90]

It was thought in 1929 and in subsequent years [91] that one reason for the failure of States to make use of the Chamber for Summary Procedure was the fact that no special provision had been made in the original Statute for the participation of national judges in its work; hence the amended Article 31 of the Statute was made to provide for such participation and for the President's requesting one or if necessary two judges belonging to the Chamber to yield their places to national judges. Yet no disposition to use the Chamber was manifested after these provisions had entered into force.[92]

§393. Chamber for Labor Cases. This Chamber is composed of five members and two substitute members elected for three-year periods. Technical assessors must always sit with the judges in this Chamber, but they have no right to vote. The Chamber has been regularly constituted since 1922, but no case has ever been brought before it,[93] and the Chamber has never held a meeting. The result is the more remarkable in view of the provisions for the Court's jurisdiction contained in the Constitution of the International Labor Organization.

§394. Chamber for Transit and Communications Cases. This Chamber is composed of five members and two substitute members elected for three-year periods. The judges sitting in the Chamber may also be assisted by four technical assessors when desired by the parties or decided

[89] Series E, No. 11, p. 152.

[90] Series C, No. 16–III, pp. 792, 793, 808.

[91] Minutes of 1929 Committee of Jurists, pp. 49–50; Records of Thirteenth Assembly, First Committee, pp. 8, 9; Series D, No. 2 (3d add.), pp. 660–2.

[92] Some treaties provide for the possible use of the Chamber: *e.g.*, Denmark-Netherlands, October 31, 1931; Bolivia-Denmark, November 9, 1931. Series D, No. 6, p. 629.

[93] On several occasions the Court has given advisory opinions in what might be called labor cases: *e.g.*, the opinions of July 31, 1922, on *Nomination of the Netherlands Workers' Delegate;* of August 12, 1922, and July 23, 1926, on *Competence of the International Labor Organization;* of August 26, 1930, on *The Free City of Danzig and the International Labor Organization;* and of November 15, 1932, on the *Interpretation of the 1919 Convention on Employment of Women at Night.*

by the Court, but the assessors will have no right to vote. Though the Chamber has been regularly constituted since 1922, no case has ever been brought before it and the Chamber has never held a meeting.[94]

§395. *Chambre du Conseil.* Article 54 of the Statute provides that after the hearing of a case is closed, the Court "shall withdraw to consider the judgment" (Fr., *se retire en Chambre du Conseil pour delibérer*). Procedure in the *Chambre du Conseil* was to some extent regulated by the Court's resolution of February 20, 1931,[95] revised on March 17, 1936.[96]

§396. Technical Assessors. Article 26 of the Statute provides for technical assessors for labor cases, to sit either with the special chamber for labor cases or with the full Court while it is dealing with such cases; Article 27 provides for technical assessors for transit and communications cases, to sit either with the special chamber for transit and communications cases or with the full Court while it is dealing with such cases, but only if desired by the parties or decided by the Court. Each Member of the League of Nations may nominate two persons as assessors for labor cases and the Governing Body of the International Labor Office may appoint "an equivalent number" from the representatives of workers and of employers who are members of the panels created under Article 26 (412) of the Constitution of the International Labor Organization; each Member of the League of Nations may appoint two persons as assessors for transit and communications cases. Numerous Members of the League of Nations proceeded to appoint assessors in 1921, as did also the Governing Body of the International Labor Office.[97] As no time-limit is set on the period for which assessors may be appointed, many of the persons appointed in 1921 have continued to serve since that date.[98] A list published in 1937 includes the names of 116 assessors for labor cases from thirty-seven countries, two of which (Brazil and Japan) were not then Members of the League of Nations; [99] only twenty-six Governments had participated in the nominations, however, the other assessors for labor

[94] In the *Wimbledon Case* in 1923, the Court considered whether the attention of the parties should be drawn to Article 27 of the Statute, but as no technical questions were involved it decided in the negative. Series E, No. 3, p. 189. The question was apparently not raised in the *Oder Commission Case* in 1929, nor in the *Chinn Case* in 1934.

On several occasions the Court has given advisory opinions in what may be called cases relating to transit and communications questions: *e.g.*, the opinion of December 8, 1927 on the *European Commission of the Danube*, and that of October 15, 1931 on *Railway Traffic between Lithuania and Poland.*

[95] Series D, No. 2 (2d add.), p. 300. [96] Series E, No. 12, p. 196. See §526ff, *infra.*

[97] International Labor Office Official Bulletin (1921), pp. 542–7.

[98] More than half of the assessors named on the general list published in 1937, Series E, No. 13, p. 42, had been appointed in 1921.

[99] Series E, No. 13, p. 36.

cases having been nominated by the Governing Body of the International Labor Office.[1] A list published in 1937 also includes the names of 53 assessors for transit and communications cases appointed by twenty-seven Governments, two of which (Brazil and Japan) were not then Members of the League of Nations.[2]

Articles 26 and 27 of the Statute provide for the assistance of four technical assessors in a case, the method of choosing the assessors "for each particular case" being left to be determined by the Rules. Under Article 7 of the 1936 Rules, assessors are chosen by the Court or by the Chamber, as the case may be, but suggestions may be made by the parties.[3] In labor cases, they must be "chosen with a view to ensuring a just representation of the competing interests," and Article 7 of the Rules provides for a consultation of the Governing Body of the International Labor Office. Persons chosen to sit as assessors may or may not be nationals of one or more of the parties; if a national of one party is chosen as assessor, the other party is entitled to have an assessor appointed.[4] A request for the addition of assessors should be submitted, at latest, when the requesting party files its first document in the written proceedings.[5] Apparently technical assessors are not to sit with the Chamber for Summary Procedure when recourse to summary procedure is had in a labor case or in a case relating to transit and communications under the amended text of Articles 26 and 27.[6] Apparently, also, assessors are not to be called upon in advisory cases.[7] The assessors do not have the right to vote or, as the French version puts it, they have only a *voix consultative;* the extent of their participation in the Court's deliberations seems uncertain.[8]

Assessors have never been called upon to sit in any case, neither with the Court nor with any Chamber.[9]

[1] The Governing Body nominated as assessors certain persons whose States were not at the time Members of the League of Nations.

[2] Series E, No. 13, p. 40.

[3] The conditions governing the selection of assessors to sit in a particular case were much discussed in 1922, Series D, No. 2, pp. 34–8; but Article 7 of the 1922 Rules left the Court or the special chamber concerned a wide freedom, and this was maintained when the Article was revised in 1936.

[4] Series D, No. 2, p. 38; Series E, No. 3, p. 190.

[5] If assessors serve at the request of the parties, their compensation is to be paid by the parties; if they serve at the request of the Court, their compensation is paid by the Court.

[6] Minutes of the 1929 Committee of Jurists, p. 122. But see Series D, No. 2 (3d add.), p. 497.

[7] Series E, No. 3, p. 190; Series D, No. 2 (3d add.), p. 806.

[8] Series D, No. 2, p. 203.

[9] In the *Chorzów Indemnity Case,* the parties appointed assessors to take part in an advisory capacity in the work of the Committee of Experts set up by the Court's order of September 13, 1928. Series A, No. 17, p. 99; Series C, No. 16–II, p. 17.

§397. Composition of the Court for a Particular Case. It may be important to States represented before the Court in a particular case that they should be able to know in advance what will be, or what is likely to be, the composition of the Court for that case; but so much time is usually required for the completion of the written proceedings that this is not always possible. Some members of the Court may be on long leave, yet the roster of judges to whom long leave has been granted is usually announced well in advance.[10] Apart from judges on long leave, it would seem that since 1936 every judge ought to be present at every meeting of the full Court, but no meeting was held at which all the judges were present. Once the hearing of a case has begun, it would seem to be desirable that no unnecessary change should be made in the composition of the Court for continuing the hearing.[11]

The composition of the Court in one stage of the proceedings in a case may differ from that in another stage. In several cases the Court had a different composition in dealing with the merits of the case from that which it had in dealing with a preliminary objection. In the *Mavrommatis Case*, the Court dealt with the merits in 1925 with a different composition from that which it had in considering the preliminary objection in 1924;[12] similarly, in the case relating to *German Interests in Polish Upper Silesia*, the Court had one composition when it dealt with the preliminary objection in 1925, and another when it dealt with the merits in 1926.[13] The composition of the Court which dealt with the request for *Interpretation of Judgments No. 7 and No. 8*, in 1927, differed from that of the Court which had given the judgments of which interpretation was sought.[14] In the *Chorzów Case*, the composition of the Court varied in each of the stages of the case.[15] In the *Pajzs Case* in 1936, two judges who were elected after the Court had dealt with the preliminary objection participated in dealing with the merits of the case, replacing two judges who were present at the earlier but absent at the later stage of the proceedings.[16] Nor is it necessary that the Court's composition for

[10] Series E, No. 9, pp. 160–1.

[11] Series D, No. 2, p. 25; Series E, No. 9, p. 160. Article 26 of the 1938 Instructions for the Registry provides for informing the Secretary-General of the League of Nations of any change in the composition of the Court. Series E, No. 14, p. 32.

[12] Series A, No. 2 and No. 5.

[13] Series A, No. 6 and No. 7.

[14] Series A, No. 13.

[15] Series A, No. 9, No. 12, No. 17, No. 19.

[16] In this case the written record of the arguments in the earlier phase was regarded as having been duly presented to the Court in the later phase, the two newly-elected judges and the agents of the parties concurring in this procedure. Series C, No. 80, p. 415.

dealing with a later phase of a case should be the same as that when it has dealt with a request for interim measures of protection.

Article 13 of the Statute provides that "though replaced," the judges "shall finish any cases which they may have begun" (Fr., *continuent de connaître des affaires dont ils sont déjà saisis*). The precise meaning of this provision is doubtful, for it may be difficult to say whether a judge has "begun" a particular case.[17] Moreover, it is necessary to have rules for saying when a case is finished.[18] Article 66 of the 1922 Rules (paragraph 4) provided that Article 13 of the Statute should apply in cases relating to revision of judgments, and this was extended to cases relating to interpretation of judgments in 1926;[19] but the 1936 Rules contain no analogous provision, as difficulties were foreseen if requests for interpretation should be made many years after the judgment was rendered.[20] The Court has taken the view that the provision in Article 13 of the Statute refers only to judges who have ceased to be members of the Court or members of a Chamber;[21] a more extensive application was given to the underlying principle by the provision in Article 3 of the 1922 Rules that a deputy-judge who has begun a case shall be summoned again, if necessary out of his term, to sit in a case until it is finished; but this provision was omitted in the 1926 Rules.[22]

Difficulties may arise in the application of the provision in Article 13, as was shown by the Court's experience in the *Free Zones Case* between France and Switzerland. After the Court had disposed of the first phase of that case in 1929, its membership was changed by the resignation of Judge Hughes and by the election of Judges Fromageot, Hurst and Kellogg. When the Court met to deal with the second phase of the case in October, 1930, some members of the Court who sat in the first phase were unable to attend; hence the Court was reconstituted by the summoning of two regular judges who were available and of two deputy-judges to complete a full Court of eleven judges. Thus four of the judges who participated in the first phase of the case in 1929 did not participate

[17] This point was raised by M. Raestad in 1929. Minutes of the 1929 Committee of Jurists, p. 42. In the *Serbian Loans Case*, oral argument was heard at a meeting on November 13, 1928, but as the proceedings had to be broken off on account of absence of a quorum, a new beginning was made in the case. Series C, No. 16–III, p. 851.

[18] The provision in paragraph 2 of Article 23 of the original Statute that the annual session should continue as long as necessary to finish the cases on the list, was the subject of protracted discussion in this connection. Series D, No. 2 (add.), pp. 19–22, 246–7, 268.

[19] The provision in the 1922 Rules was applied in 1925 in the case relating to *Interpretation of Judgment No. 3*. Series E, No. 4, p. 294.

[20] Series D, No. 2 (3d add.), p. 334.

[21] Series E, No. 4, p. 295.

[22] Series D, No. 2 (add.), pp. 19–22.

in the second phase in 1930, and four new judges took their places. The parties gave their assent to this course, the declarations of assent being reproduced in the order of December 6, 1930;[23] it was later admitted that the parties had a "right, in view of the reconstitution of the Court, to demand to reargue the whole case.[24] For the third phase of the case in 1932, the Court's composition was the same as for the second phase, except for the absence of Judge Nyholm, then deceased; it included three judges and two deputy-judges whose regular terms as members of the Court had expired.[25] These facts did not escape castigation by M. Dreyfus, the French judge *ad hoc*, in 1932.[26]

§398. List of Participating Judges. Since the beginning the Court's Rules have provided that a judgment shall contain "the names of the judges participating," and the practice of listing the judges participating has also been followed with reference to advisory opinions. The list has sometimes been printed just before the text of the judgment or opinion, but the more recent practice is to include it in the text. The judges included in the list are only those who have taken part in the hearings before the Court and in the deliberations and the voting, and who have been present when the judgment or opinion was read in open Court. Nor infrequently a judge participating in the hearing of a case has been compelled to be absent during a part of the public meetings devoted to the hearings; on most occasions the hearings have been continued in the temporary absence of the judge, the parties making no objection,[27] and the judge has been permitted to resume his participation in the case, but on a few occasions the absent judge has been dropped from further participation.[28] If one of the participating judges is compelled to be absent during a part of the Court's deliberations, the deliberations may be continued if a quorum is present;[29] the continuance of the absent judge to participate in the case has depended upon the circumstances and the

[23] Series A, No. 24, p. 8. See also Series C, No. 19–I, pp. 8–9.
[24] Series A/B, No. 46, p. 107.
[25] Judges Huber, Loder and Oda and Deputy-Judges Yovanovitch and Beichmann.
[26] Series A/B, No. 46, pp. 201–2. In his dissenting opinion, p. 201, M. Dreyfus stated that the "new judges have been invited to state their opinion of the solution given to the question in 1929," and that three out of four of them gave their concurrence. This procedure can hardly be defended.
[27] In the *Serbian Loans Case*, the Serb-Croat-Slovene Government was reluctant to agree to o pening the oral proceedings if one of the sitting judges was temporarily delayed. Series C, No. 16–III, pp. 802, 805.
[28] Series E, No. 2, p. 157; No. 3, p. 187; No. 7, p. 288; No. 9, p. 161; No. 13, p. 147; No. 14, p. 131; No. 15, p. 113.
[29] See Series D, No. 2 (3d add.), p. 810.

length of his absence.[30] If a judge is not present at the voting on a judgment or opinion, his name is not included on the list.

For some years it was the Court's practice to append to its judgments or opinions statements concerning the participation of judges who had ceased to take part in a case after the hearing or deliberations had been begun, and who were not included in the list of participating judges. In some cases the note did not go further,[31] but in a few instances the course was adopted of stating the views of such judges. A note appended to the Court's opinion of September 15, 1923, in the *Polish Nationality Case* stated that Judge Moore took part in the deliberations but left The Hague before the terms of the opinion were finally settled, and that "he declared that he concurred in the conclusions of this opinion." [32] In a note appended to the Court's judgment of October 10, 1927, in the second *Mavrommatis Case*, it was stated that Judge Pessôa was obliged to leave The Hague before the final draft of the judgment was accepted, and that "he declared he was unable to agree to the conclusions of the judgment, the Court having, in his opinion, jurisdiction." [33] In the case on *Interpretation of Judgments Nos. 7 and 8*, a note appended to the judgment of December 16, 1927 stated that Judge Moore took part in the discussion and voted for the adoption of the judgment, but had to leave The Hague before the judgment was delivered.[34] In the *Pázmány University Case*, a note was appended to the judgment of December 15, 1933, stating that Judge Kellogg was compelled to leave The Hague before the terms of the judgment were finally settled and that "he stated that he concurred in the conclusions reached by the Court in its judgment"; [35] the note also stated that Judge de Bustamante had taken part in the deliberations and in the preliminary vote, but was compelled to leave The Hague before the judgment was delivered, and added that "he stated that he concurred both in the operative part of the judgment and in the grounds on which it was based." [36] In a note appended to the judgment of December 12, 1934 in the *Chinn Case*, it was stated that Judge de Bustamante had taken part in the deliberations and in the vote on the judgment, but was compelled to leave The Hague before it was delivered, and it was added that "he stated that he concurred both in the operative part of the judgment and in the grounds on which it was based." [37] No defense can be

[30] Series D, No. 2 (2d add.), pp. 211–2, 227–31, 235.
[31] See Series A, No. 7, p. 83; *idem*, No. 13, p. 22; Series B, No. 2, p. 43; *idem*, No. 4, p. 32.
[32] Series B, No. 7, p. 21.
[33] Series A, No. 11, p. 24.
[34] Series A, No. 13, p. 22.
[35] Series A/B, No. 61, p. 250.
[36] *Ibid.*
[37] Series A/B, No. 63, p. 89.

made of this practice in so far as it would seem to sanction the indication of the views of a judge who did not participate in the final vote on a judgment or opinion; the practice seems undesirable also in so far as it would sanction a statement of the views of a judge not present when the judgment or opinion was delivered, and therefore not named among the participating judges.[38] The practice was definitely condemned and abandoned by the Court on March 17, 1936, when the opinion was formulated that "a judge who was not present at a public sitting held for the delivery of a decision [Fr., *consacrée au prononcé d'un arret ou d'un avis*] could not append to it a statement mentioning, together with the fact that he had taken part in all, or part of, the deliberations, what his opinion on the case was." [39]

§399. Participation of National Judges. Article 31 of the Statute provides that "judges of the nationality of each contesting party shall retain their right to sit in the case before the Court," and it attempts to equalize the positions of the parties by the provisions for judges *ad hoc*. Prior to 1920, the problem had been much discussed whether a judge of the nationality of a party should be permitted to participate in the decision of a case by an international court. What the Court itself has referred to as "the well-known rule that no one can be judge in his own suit," [40] has been advanced as a reason for excluding all participation by national judges.[41] This view was strongly urged at the Hague Peace Conference of 1907,[42] but it was not adopted in the Hague *projet* of 1907. It was included, however, in Article 27 of the draft proposed by the Five-Power conference which met at The Hague in February, 1920.[43] The 1920 Committee of Jurists put its decision to permit participation by judges of the nationality of the parties on the ground that this would protect the character of the Court as a World Court, and would avoid "ruffling national susceptibilities"; it then proceeded to defend the admission of judges *ad hoc* on the ground that this was necessary to "re-establish equality." The Committee emphasized that "States attach

[38] Yet in 1936 Judge Guerrero thought it an anomaly that "a judge who had taken part in the whole proceeding and in the final decision had to be told that his vote would be disregarded" if he was not present at the delivery of the judgment. Series D, No. 2 (3d add.), pp. 322, 571. Judge Bustamante was in this position in the *Chinn Case*, in 1934. Series A/B, No. 63, p. 89.

[39] Series D, No. 2 (3d add.), p. 750; Series E, No. 12, p. 197.

[40] Series B, No. 12, p. 32.

[41] See Wehberg, Problem of an International Court of Justice (trans. by Fenwick), pp. 55ff.

[42] *Actes et Documents*, I, p. 367; *idem*, II, pp. 602ff.

[43] 1920 Committee of Jurists, Preparatory Documents, p. 313. The five states were not unanimous on this point, however.

much importance to having one of their subjects on the bench when they appear at the Court of Justice," though it admitted the result to be that the Court envisaged "more nearly resembles a court of arbitration than a national court of justice." [44]

In the experience of the Court since 1922, it may be said that national judges, *i.e.*, judges or deputy-judges or judges *ad hoc* who have the nationality of a party or are appointed by a party, have usually supported the contentions of the Governments of which they were nationals or by which they were appointed, either by agreeing with the majority in upholding such contentions, or by dissenting when the majority rejected such contentions. It is not strange that a national judge should often find himself convinced by the contentions made by his own Government, and certainly he is under a strong temptation to support views which are widely held in the country in which he lives. Yet one cannot formulate it as a general rule that national judges have regarded themselves as the representatives of their own Governments, for the number of cases is impressive in which national judges have failed to support their Government's contentions. The mere fact that a national judge is in a minority of one does not justify a conclusion that his views are attributable to national bias; such a conclusion could be reached only after a careful analysis of the substance of the views expressed by the majority and by the minority. Hence a statistical presentation of the positions taken by national judges in cases before the Court is almost certain to be misleading,[45] and a conclusion that national judges are or are not disposed to follow the policies of their Governments should not be based upon a mere tabulation of the votes which led to the adoption of the Court's judgments and opinions.

In the *Tunis-Morocco Nationality Case*, Judge Weiss (French) joined in the unanimous opinion of the Court which opposed contentions advanced by the French Government.[46] In the *Wimbledon Case*, in which the applicants were France, Great Britain, Italy and Japan and the respondent was Germany, the judgment adopting the thesis of the

[44] Minutes of 1920 Committee of Jurists, pp. 721–2. M. Adatci urged the representation of parties to assure an understanding by the Court of "the psychology of the various peoples." *Idem*, p. 529.

At the 1929 Conference of Signatories, the Danish representative expressed the view that equality between the parties would be better served by a rule that if one party only had a national on the bench, such national should retire and the party be permitted to select a judge *ad hoc* instead. Minutes of the 1929 Conference, p. 41.

[45] But see the presentation given in Lauterpacht, Function of Law in the International Community (1933), pp. 230–2.

[46] Series B, No. 4, p. 32.

applicants was concurred in by the French, British and Japanese judges on the Court, but the Italian judge was in a minority with the German judge *ad hoc* and the Swiss judge.[47] In the first *Mavrommatis Case*, in which a British preliminary objection was upheld in part and dismissed in part, Lord Finlay (British) dissented with judges of American, Brazilian, Cuban and Japanese nationality;[48] in a later phase of the case the judgment rejected certain contentions both of the British and of the Greek Governments, but both Lord Finlay and M. Caloyanni, Greek judge *ad hoc*, concurred, the only dissenter being Judge Altamira (Spain).[49] In the case relating to *German Interests in Polish Upper Silesia*, Count Rostworowski, Polish judge *ad hoc*, dissented both from the judgment on the preliminary objection and the judgment on merits, forming a minority of one.[50] On the question of jurisdiction in the *Chorzów Case*, the Court's judgment was unanimous except for the dissent of M. Ehrlich, Polish judge *ad hoc*.[51] In the second *Mavrommatis Case*, when the Court upheld a preliminary objection of the British Government to its jurisdiction, Mr. Caloyanni, Greek judge *ad hoc*, dissented along with Judges of Danish and Spanish nationality.[52] In the case relating to the *Interpretation of Judgments Nos. 7 and 8*, the Polish and German judges *ad hoc* were in the majority of the Court, though Judge Anzilotti (Italy) dissented.[53] In the case relating to the *European Commission of the Danube*, only the Rumanian Deputy-Judge dissented from the Court's opinion, but two other judges made individual observations.[54]

The advisory opinion concerning the *Jurisdiction of Danzig Courts* was given by a unanimous Court, with the concurrence of judges *ad hoc* appointed by Danzig and by Poland.[55] In the *Minorities in Upper Silesia Case*, M. Schücking, German judge *ad hoc*, dissented along with judges of Swiss, Danish and Rumanian nationality.[56] In the *Chorzów Case*, the Court's judgment on the merits was adopted by nine votes to three, though two of the judges voting for the judgment did not accept certain parts of it; the three dissenting judges were the Polish judge *ad hoc* and judges of British and Danish nationality.[57] In the *Serbian Loans Case*, the Yugoslav judge *ad hoc* dissented along with Judges de Bustamante (Cuban) and Pessôa (Brazilian).[58] In the *Brazilian Loans Case*,

[47] Series A, No. 1, p. 34.
[48] Series A, No. 2, p. 37.
[49] Series A, No. 5, p. 51.
[50] Series A, No. 6, p. 28; *idem*, No. 7, p. 83.
[51] Series A, No. 9, p. 34.
[52] Series A, No. 11, p. 24.
[53] Series A, No. 13, p. 22.
[54] Series B, No. 14, p. 70.
[55] Series B, No. 15, p. 27.
[56] Series A, No. 15, p. 47.
[57] Series A, No. 17, p. 65.
[58] Series A, No. 20, p. 49.

Judge Pessôa (Brazilian) was in the minority with Judge de Bustamante.[59] In the *Free Zones Case*, the Court's order of August 19, 1929, was adopted unanimously, but together with Judge Nyholm (Danish) and Deputy-Judge Negulesco (Rumanian) the French judge *ad hoc* dissented from certain of the reasons given;[60] the order of December 6, 1930 was also adopted unanimously, but six judges including the French judge *ad hoc* declared that they disagreed with certain recitals of the order;[61] the final judgment was adopted by six votes to five, the minority including a French judge *ad hoc*, and Spanish, British, Yugoslav and Rumanian judges.[62] In the *Oder Commission Case*, the Polish judge *ad hoc* dissented along with Judges de Bustamante and Pessôa.[63]

The Court gave a unanimous opinion in the case relating to *Greco-Bulgarian Communities*, the Greek and Bulgarian judges *ad hoc* both concurring.[64] In the case relating to *German Minority Schools in Upper Silesia*, only the Polish Judge dissented.[65] In the case relating to *Railway Traffic between Lithuania and Poland*, the Court's opinion was given unanimously, and though it did not support the Polish Government's contentions, Count Rostworowski, Polish judge, did not dissent.[66] In the case relating to *Polish War Vessels in Danzig*, the Court's opinion was adopted by eleven votes to three, the minority consisting of Polish, French and Colombian judges.[67] In the *Polish Nationals in Danzig Case*, the Polish judge was in the minority which included also Salvadoran, French, and Colombian judges, but some of the reasons of the Court were not accepted by the British and Belgian judges.[68] In the *Greco-Bulgarian Agreement Case*, the Bulgarian judge *ad hoc* was in a minority which included also Japanese, Polish, Spanish, German and Netherlands judges.[69] In the *Memel Case*, in which the applicants were France, Great Britain, Italy and Japan, and Lithuania was the respondent, the judgment overruling the Lithuanian preliminary objection was adopted by thirteen votes to three, the Lithuanian judge *ad hoc*, and the Belgian, and Polish judges being in the minority;[70] the judgment on the merits was adopted by ten votes to five, but the seven judges who did not concur in certain parts of the judgment included the Cuban, Spanish, German, Netherlands, Italian and Colombian judges as well as the Lithuanian

[59] Series A, No. 21, p. 126.
[60] Series A, No. 22, p. 22.
[61] Series A, No. 24, pp. 18–19.
[62] Series A/B, No. 46, pp. 172–3.
[63] Series A, No. 23, p. 32.
[64] Series B, No. 17, p. 33.
[65] Series A/B, No. 40, p. 21.
[66] Series A/B, No. 42, p. 122.
[67] Series A/B, No. 43, p. 149.
[68] Series A/B, No. 44, p. 44.
[69] Series A/B, No. 45, p. 88.
[70] Series A/B, No. 47, p. 254.

judge *ad hoc*.[71] In the *Southeastern Greenland Case*, the Norwegian judge *ad hoc* concurred in the order by which the Court dismissed the Norwegian request for interim protection.[72] In the *Eastern Greenland Case*, in which the thesis of Denmark was favored, the Norwegian judge *ad hoc* dissented together with Judge Anzilotti (Italian).[73] In the *Polish Agrarian Reform Case*, four judges dissented from the order dismissing the German request for interim measures of protection, the German judge being among the four.[74] In the *Pázmány University Case*, the Czechoslovak judge *ad hoc* alone dissented when the Court by its judgment favored the Hungarian thesis.[75] In the first *Lighthouses Case*, in which the judgment favored the French thesis, M. Séfériadès, Greek judge *ad hoc*, dissented along with Judge Anzilotti.[76] In the *Chinn Case*, the judgment favoring the Belgian thesis was adopted by six votes to five, the British judge being one of the minority of five which included also judges of Spanish, Italian, German and Netherlands nationality.[77]

In the case relating to *Minority Schools in Albania*, the question submitted for advisory opinion did not relate to an existing dispute; the Court's opinion was adopted by eight votes to three, the British, Polish and Rumanian judges being in the minority.[78] In the *Danzig Legislative Decrees Case*, the Polish, Italian and Japanese judges dissented.[79] In the *Losinger Case*, the Swiss and Yugoslav judges *ad hoc* concurred with the majority, while the Spanish and Netherlands judges dissented from the Court's order joining the objection to the merits.[80] When the *Pajzs Case* was heard on the merits, the judgment favoring the Yugoslav thesis was adopted by eight votes to six, the Hungarian judge *ad hoc* being in a minority with judges of Italian, Japanese, Netherlands, Swedish and American nationality.[81] In the *Meuse Case*, the Netherlands judge was in a minority of three opposing the adoption of the judgment which favored the thesis of the Belgian Government; together with British and Italian judges, the Belgian judge dissented from that part of the Court's judgment which overruled a Belgian counter-claim.[82] In the second *Lighthouses Case*, the Court's judgment was adopted by ten votes to three, the Greek judge *ad hoc* being in a minority with judges of British and American nationality.[83] In the *Borchgrave Case*, the Court's judgment

[71] Series A/B, No. 49, p. 338.
[72] Series A/B, No. 48, p. 289.
[73] Series A/B, No. 53, p. 75.
[74] Series A/B, No. 58, p. 179.
[75] Series A/B, No. 61, p. 250.
[76] Series A/B, No. 62, p. 29.
[77] Series A/B, No. 63, pp. 89–90.
[78] Series A/B, No. 64, p. 23.
[79] Series A/B, No. 65, p. 58.
[80] Series A/B, No. 67, p. 25.
[81] Series A/B, No. 68, p. 66.
[82] Series A/B, No. 70, p. 33.
[83] Series A/B, No. 71, p. 106.

overruling the Spanish preliminary objection was adopted unanimously, the Spanish judge concurring but expressing his disagreement with certain of the reasons given by the Court.[84] In the *Phosphates Case*, the Court's judgment refusing to entertain the Italian application was adopted by eleven votes to one, Judge Anzilotti (Italian) being in the majority while Judge van Eysinga (Netherlands) constituted the minority of one.[85] In the *Panevezys-Saldutiskis Case*, the Court's judgment upholding the Lithuanian objection was adopted by ten votes to four; the Estonian judge *ad hoc* was in the majority, but the Lithuanian judge *ad hoc* dissented from some of the reasons given by the Court.[86] In the *Electricity Company Case*, the Court's judgment adopted by nine votes to five overruled in part the preliminary objection advanced by Bulgaria; the minority included the Bulgarian judge *ad hoc* and judges of Italian, Colombian, Netherlands, and American nationality.[87] In the *Société Commerciale Case*, between Belgium and Greece, the two dissenting judges were of American and of Netherlands nationality, but the Belgian judge and the Greek judge *ad hoc* were both in the majority.[88]

This record does not justify a conclusion that national judges have merely registered and sanctioned views held by their own Governments. It is true that as a general rule they have upheld their Governments' contentions, but in relatively few cases has the national judge been alone in his views,[89] and there are striking instances in which national judges went against their Governments' contentions. In spite of the general rule, it may be said that national judges have served a useful purpose in familiarizing other judges with special features of their national laws, and at times with their national psychology as affected by the particular case.

With reference to a few of the cases before the Court, the impression has prevailed in some quarters that judges who were not nationals of parties were disposed to follow the political views of their own Governments. The judgment in the *Lotus Case* [90] was widely criticized on this ground; an attempt was made to say that the judges from maritime

[84] Series A/B, No. 72, p. 171.
[85] Series A/B, No. 74, p. 30.
[86] Series A/B, No. 76, p. 22.
[87] Series A/B, No. 77, p. 85.
[88] Series A/B, No. 78, p. 179.
[89] The following summary seems to present the matter statistically: In six cases the national judge dissenting formed a minority of one; in three cases he was joined by one other judge in dissenting; in ten cases a minority of three included a national judge; in three cases a minority of four included a national judge; in five cases a national judge was one of a minority of five; in four cases the national judge dissenting was one of a minority of six.
[90] Series A, No. 10.

States were all opposed to the Court's conclusions and that only judges from States with lesser maritime interests had favored them, but it is clear that this was not the case for American, Japanese, and Italian judges favored the Court's judgment.[91] In the *Austro-German Customs Régime Case*,[92] in which the opinion was adopted by eight votes to seven, it was widely thought that the judges who constituted the majority were guided by their national sentiments; yet it is difficult to see any political reason why judges of Salvadoran, Cuban, Spanish and Colombian nationality should have favored the French point of view, as did also to some extent the Italian judge.

Aside from the question of their national bias, one may enquire whether the presence of judges *ad hoc* has made any noticeable difference in the results reached by the Court. The extent to which judges may have been persuaded to follow the views of judges *ad hoc* cannot be gauged; but in the *Lotus Case*, as the Court consisting of eleven judges and a judge *ad hoc* nominated by Turkey was evenly divided, and as the Court's judgment favoring the Turkish thesis was adopted by the President's casting vote, one may say that the presence of the Turkish judge *ad hoc* determined the result.[93] In general, however, the judge *ad hoc* is but one of a number of sitting judges, and his influence is probably less than the usual influence of national members of arbitral commissions.

§400. **Judges *ad hoc*.** The term "judge *ad hoc*" is not to be found in the Statute of the Court; it was employed in Article 4 of the 1922 Rules and in Articles 4 and 30 of the 1926 and 1931 Rules, but not in the Rules of 1936. From time to time, the term has been employed in the Court's jurisprudence, however,[94] both before and since 1936, though in the Court's earlier years the term "national judge" was used instead to designate judges chosen under Article 31 of the Statute.[95] In spite of the fact that it has been criticized,[96] it seems to be a convenient and necessary

[91] Judge Moore concurred in the result reached by the Court.

[92] Series A/B, No. 41.

[93] The result would have been the same if the Court had included neither the judge of French nationality nor the Turkish judge *ad hoc*, however.

[94] See especially the order of July 20, 1931, in the *Austro-German Customs Régime Case*, Series A/B, No. 41, p. 88; and the order of October 31, 1935, in the *Danzig Legislative Decrees Case*, Series A/B, No. 65, p. 69.

[95] The term "national judge" was employed in Articles 2 and 3 of the Rules of 1922, 1926, and 1931. In the jurisprudence of the Court this term was abandoned in the judgment in the *Serbian Loans Case* in 1929. Series A, No. 20. But the term "judge *ad hoc*" had appeared in the advisory opinion in the case relating to *Jurisdiction of the Courts of Danzig* in 1928. Series B, No. 15, p. 4.

[96] It has been called "an ugly phrase." Series D, No. 2 (3d add.), p. 763.

term to describe the judges specially appointed by parties in pursuance of the provisions of Article 31 of the Statute, and for that purpose it is more accurate than the broader term "national judge." [97]

If the Court includes upon the Bench, *i.e.*, sitting, or prepared to sit in the case,[98] a judge of the nationality of one of the parties, the other party not having a judge of its nationality on the bench may choose a person to sit as judge *ad hoc;* if the Court includes upon the bench no judge of the nationality of either of the contesting parties, each of the parties may choose a person to sit as judge *ad hoc.*[99] Prior to 1936, a deputy-judge of the nationality of a party, if such existed, was to be selected when that party was entitled to a judge *ad hoc*, and in this case the deputy-judge became a judge *ad hoc;* if the deputy-judge was convoked by the Court to fill a seat left vacant by a regular judge, the State of which he was a national would not, as a party, be entitled to appoint a judge *ad hoc.*[1]

Only a party in a case before the Court may appoint a judge *ad hoc*, and if there are no parties in a case then no interested State may make such an appointment; the denial of Danzig's request to be permitted to name a judge *ad hoc* in the *Danzig Legislative Decrees Case* was put upon this ground, at least in part.[2] Some doubt has been expressed as to the right of an intervening party to appoint a judge *ad hoc*,[3] though it is difficult to see any reason for distinguishing it from other parties in this respect.[4] The necessity of parties would restrict the appointment of judges *ad hoc* to contentious cases, but in 1927, by an amendment to Article 71 of the 1926 Rules,[5] the application of Article 31 of the Statute

[97] Article 2 of the 1922 Rules referred to "national judges chosen from outside the Court, under the terms of Article 31 of the Statute"; in the 1936 Rules this was changed to "judges nominated under Article 31 of the Statute of the Court from outside the Court."

[98] If a judge who is a national of a party cannot sit, that party may select a judge *ad hoc.* Series E, No. 4, p. 274.

[99] Conceivably, only one of the parties might exercise this privilege; and of course both the parties may waive the right to appoint, as in the *Greco-Turkish Agreement Case.* Series B, No. 16, p. 8, Series C, No. 15–I, p. 245. *Cf., Appeals from the Hungaro-Czechoslovak Mixed Arbitral Tribunal*, Series C, No. 68, p. 246.

[1] Series E, No. 6, p. 286 note. In the *Serbian Loans Case*, M. Yovanovitch, the Yugoslav deputy-judge, was on the bench on November 13, 1928, but as he was unable to respond to a summons for the meetings which began on May 15, 1929, his Government was allowed to appoint another person as judge *ad hoc.* Series C, No. 16–III, pp. 10–11, 809–14, 848. *Cf.*, the procedure followed in 1936 in the *Losinger Case* and in the *Pajzs Case.* Series C, No. 78, p. 408; *idem*, No. 80, p. 1374.

[2] Order of October 31, 1935, Series A/B, No. 65, p. 69.

[3] Series D, No. 2, pp. 177, 215. *Cf.*, Series D, No. 2 (3d add.), p. 306.

[4] Series D, No. 2 (3d add.), p. 306. In the *Wimbledon Case*, Poland "renounced" the right of appointing a judge *ad hoc*, but it is to be noted that Poland sought to intervene in that case on the side of the four applicant States. Series C, No. 3, Vol. 1, p. 117.

[5] See the report of a committee of three, of September 2, 1927. Series E, No. 4, pp. 75–7.

was extended to advisory cases in which the question relates to "an existing dispute between two or more States or Members of the League of Nations," and this provision was continued in Article 83 of the 1936 Rules. In several advisory cases, beginning with the case relating to *Jurisdiction of Danzig Courts* in 1928, judges *ad hoc* have been appointed; but in two cases in 1935 the Court held that Article 71 of the 1931 Rules was not applicable as the question submitted for advisory opinion did not relate to an existing dispute.[6] In the *Greco-Bulgarian Agreement Case*, the situation was somewhat complicated owing to the substance of the question submitted, but the Court held that the question related to an existing dispute.[7]

Where there are several parties in the same interest, they are to be counted as one party for the application of Article 31, and any doubt on this point is to be decided by the Court.[8] In the *Austro-German Customs Régime Case*, in 1931, the Court held that for the purposes of that case "all governments which, in the proceedings before the Court, come to the same conclusion, must be held to be in the same interest," and that as Austria and Czechoslovakia were each in the same interest with other parties whose nationals were on the bench these States were not entitled to appoint judges *ad hoc*.[9] In the *Oder Commission Case*, six parties were admittedly in the same interest, Czechoslovakia, Denmark, France, Germany, Great Britain, and Sweden, and as a national of Denmark was on the bench no question arose as to the appointment of a judge *ad hoc* by any of the other five parties.[10] Under Article 3 of the 1936 Rules, where none of several parties in the same interest has a judge of its nationality upon the bench, the Court is to fix a period within which the parties acting in concert may nominate a judge *ad hoc*, and if the parties fail to nominate within the time fixed they are to be taken to have renounced the right conferred by Article 31 of the Statute.[11]

[6] *Minority Schools in Albania Case*, Series A/B, No. 64, p. 6; *Danzig Legislative Decrees Case*, Series A/B, No. 65, p. 71.

[7] Series A/B, No. 45, p. 72; Series E, No. 8, p. 253.

[8] This principle is not applied where each of several parties in the same interest already has a national sitting upon the Court; a proposal by Judge Pessôa in 1926 that in such a situation only one of the judges should take part, was not adopted. Series D, No. 2 (add.), pp. 25–9, 269. In the *Wimbledon Case*, in 1923, a single application was made by four States, each of which had a national sitting upon the bench. Series A, No. 1.

[9] Order of July 20, 1931, in Series A/B, No. 41, p. 88. Five judges dissented when this order was given. In this case, the Court heard observations of representatives of various States concerning the Austrian request to be allowed to appoint a judge *ad hoc*. Series C, No. 53, pp. 189, 201–9. See Mandelsloh, "*Der Antrag Österreichs auf Zulassung eines Richters* ad hoc *im Zollunionsverfahren*," 3 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (I, 1932), p. 523.

[10] Series C, No. 17–II, pp. 8–9.

[11] Article 4 of the earlier Rules was similar in effect.

It is for the Court to decide whether a judge *ad hoc* may be appointed by a party in a particular case, and it will normally await a request by the party before giving such a decision.[12] In its earlier years it was the Court's practice to inform a party of its right to appoint a national judge wherever the existence of the right seemed to be free from doubt, and if the case was not a clear one, to draw the party's attention to the provisions of Article 31 of the Statute; the practice was changed in 1931, however, and after that time a party which had no national upon the bench was informed that if it considered itself to have a right under Article 31 to appoint a national judge it should proceed to make the appointment subject to a subsequent decision by the Court.[13] More recently, the Registrar has merely drawn the party's attention to the first paragraph of Article 3 of the 1936 Rules,[14] which puts the initiative squarely on the party; it provides that any notification of an appointment shall be communicated to other parties who may submit their views to the Court within a fixed period, and in case of any doubt or objection the Court will take a decision "if necessary after hearing the parties."

Article 31 provides that judges *ad hoc* "shall be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5" of the Statute. For this purpose, a cumulative list of nominees is published in the Court's annual reports,[15] and it seems to have been the practice of the Registrar to communicate it to parties when calling Article 31 to their attention.[16] In practice, however, Governments have paid little attention to this list. Of the twenty-three persons who have been selected as judges *ad hoc* since 1922, only seven had at the time of their first selection been nominated as candidates by national groups. Nor is it easy to see any good reason for this "preference." State A should not be in any way bound to choose as a judge *ad hoc* one of its nationals who may have been nominated either by a national group of State A or by a national group of State B in connection with an election of judges of the Court.[17] It is to be noted, also, that as no time-limit is set by the provision in Article 31, it may apply to persons who have been nominated as candidates many years before the judge

[12] See Series C, No. 53, p. 728.

[13] Series D, No. 2 (3d add.), pp. 384–386, 811; Series E, No. 8, p. 252. See also Series C, No. 56, p. 434.

[14] Series C, No. 81, p. 523; *idem*, No. 82, p. 284; *idem*, No. 86, p. 721.

[15] The list published in Series E, No. 15, pp. 18–23, contains the names of some 160 living candidates, nominated prior to June 1939.

[16] Series C, No. 17–II, p. 617; *idem*, No. 67, p. 4077.

[17] See Minutes of the 1920 Committee of Jurists, p. 55.

ad hoc is to be selected, and such persons may have attained an advanced age. The original purpose of the provision seems to have been to assure that persons appointed as judges *ad hoc* "would be of the required standing," [18] but it confers on the nominations an importance which they have not always merited.

It is obviously necessary that the appointment of a judge *ad hoc* be made at an early stage of the proceedings in a case.[19] In the *Eastern Greenland Case*, the Registrar informed the parties that "in accordance with the Court's practice, it was desirable that judges *ad hoc* should be appointed sufficiently early to be able, like their colleagues, to follow step by step the proceedings in the case in which they were to take part." [20] In the *Greco-Bulgarian Agreement Case*, the Registrar informed the Greek agent that the appointment of a judge *ad hoc* should generally be made before the deposit of the first document of the written proceedings, but the Greek appointment made after that deposit was not challenged.[21] Article 3 of the 1936 Rules provides that any State which intends to exercise the right to nominate a judge *ad hoc* should notify the Court "by the date fixed for the filing of the memorial," and its nomination should be made either at the same time or within a period fixed by the President.[22] No case has arisen in which the Court was called upon to decide upon the timeliness of an appointment.

The fifth paragraph of Article 31 in the original Statute provided that judges *ad hoc* should fulfill the conditions required by Articles 2, 16, 17, 20 and 24 of the Statute. It is strange that Article 16 was included in this list, for by its nature it can hardly be applied unless a judge is devoting himself continuously to the duties of the Court; [23] the amended text of Article 31 of the Statute omits the reference to Article 16 and confines the reference to Article 17 to the second paragraph of that article. It seems to have been thought in 1922 that the nomination of a judge *ad hoc* could be invalidated by the Court if the conditions were not met, and that the right to appoint would then lapse; [24] this latter result seems unnecessary.

[18] *Idem*, p. 530.
[19] In the *Pajzs Case*, the covering letter sent with the Hungarian application contained a nomination of a judge *ad hoc*. Series C, No. 79, p. 9.
[20] Series C, No. 67, p. 4083; Series E, No. 9, p. 161.
[21] Series C, No. 57, pp. 426, 430. See also Series C, No. 17–II, p. 615; *idem*, No. 67, p. 4083; *idem*, No. 78, p. 393.
[22] *Cf.*, Series C, No. 78, p. 403.
[23] *Cf.*, the correspondence in the *Eastern Greenland Case*, Series C, No. 67, pp. 4083–4, 4085–6.
[24] Series D, No. 2, p. 119.

The caliber of the persons who have been appointed judges *ad hoc* has been such as to inspire confidence in their impartiality. In several instances a State has chosen the same person to act as judge *ad hoc* on repeated occasions.[25] In a number of cases persons who have served as judges *ad hoc* have later been elected to membership in the Court: thus Judge Schücking, Count Rostworowski, Judge Fromageot, Judge de Visscher, and Deputy-Judge Novacovitch. In a few cases, it may be thought that the appointments were somewhat questionable. In the *Serbian Loans Case*, the President of the Court made a reservation when he was notified of the designation by the Serb-Croat-Slovene State of a diplomat in active service as judge *ad hoc*, and a different person was then designated;[26] in the *Eastern Greenland Case*, however, diplomats in active service sat as judges *ad hoc*.[27] In the *Société Commerciale Case* the Greek Government appointed as a judge *ad hoc* the legal adviser of its Foreign Office.[28] Under Article 3 of the 1936 Rules the nominations of persons to serve as judges *ad hoc* are notified to the opposing parties and opportunity is given to such parties to submit their views; but apparently no objection has ever been made to such an appointment.

Once a party has designated a judge *ad hoc*, its freedom of choice is ended, and it cannot later choose another person to replace the person designated;[29] if the person designated should become incapacitated or die, however, it would seem that in the normal case the party should be allowed to choose a successor.[30] In the *Serbian Loans Case*, the Serb-Croat-Slovene Government first named M. Georges Diouritch as judge *ad hoc*, but when President Anzilotti expressed a doubt about this appointment on the ground that M. Diouritch was a diplomat in active service at The Hague, M. Novacovitch was designated to replace him.[31] In the second phase of the *Free Zones Case*, President Anzilotti expressed the view that if the Court was to be reconstituted under Article 25 of the Statute, the normal course would be for the French judge elected in the interim between the first and second phases of the case to be convoked instead of the French judge *ad hoc* who had participated in the first

[25] Count Rostworowski served as judge *ad hoc* in four cases, M. Ehrlich in four cases, M. Caloyanni in five cases, M. Rabel in five cases, M. Bruns in three cases, and M. Römer'is in three cases.

[26] Series C, No. 16–III, p. 811.

[27] Series C, No. 67, p. 4087. The Court seems to have taken the view that a diplomat accredited at The Hague may not act as a judge *ad hoc*. Series D, No. 2 (3d add.), p. 30. *Cf.*, Series C, No. 16–III, p. 811.

[28] Series C, No. 87, p. 296.

[29] Series D, No. 2 (3d add.), p. 293.

[30] Series C, No. 14–I, pp. 549–54.

[31] Series C, No. 16–III, pp. 802–11.

phase.[32] If a person is elected judge while serving on the Court as judge *ad hoc*, his continued service will be in the capacity of judge and not of judge *ad hoc*.[33] In the *Southeastern Greenland Case*, the Norwegian Government named a judge *ad hoc* provisionally, as it foresaw that the nominee would later be needed for "other important affairs." [34]

§401. Nationality of Judges *ad hoc*. It seems clear that a party may select as judge *ad hoc* a person who does not possess its nationality. This is not excluded by Article 31 of the Statute, neither by the original nor by the amended text of that Article. The original text, providing for a party's selecting "from among the deputy-judges a judge of its nationality, if there be one" (Fr., *un juge suppléant s'il s'en trouve un de sa nationalité*), put an emphasis on nationality which is not maintained in the amended text. In the contemplation of the draftsmen of the Statute, the text was intended to assure the representation of parties by their own nationals; [35] this view was also taken by the Court in drafting Article 4 of the 1922 Rules which referred to cases "in which one or more parties are entitled to choose a judge *ad hoc* of their nationality." Yet the suggestion that judges *ad hoc* be chosen from among those persons nominated as candidates in the elections seems to indicate that the States making the appointments would not be limited to their own nationals. On three occasions a party before the Court named as judge *ad hoc* a person who did not possess its nationality; in the cases relating to *Jurisdiction of Danzig Courts*, to *Polish War Vessels in Danzig*, and to *Polish Nationals in Danzig*, Viktor Bruns, a German national, was appointed by Danzig to serve as judge *ad hoc*.[36] Some States might feel themselves too restricted if they could not choose non-nationals as judges *ad hoc*, and that course must be open to them under the amended Statute.

It is a somewhat different but related question whether a party may name as judge *ad hoc* a national of another State of which one of the regular judges already upon the bench is a national. Article 10 of the Statute precludes the election by the Assembly and the Council of two nationals of the same State, and perhaps one may find in the Statute as a whole a general conception that the Court is to be "composed of a certain number

[32] Series C, No. 19–I, pp. 2234–5. Between the first and second phases of the *Free Zones Case*, M. Fromageot (France) was elected a judge, but as he was disqualified under Articles 17 and 24 of the Statute M. Dreyfus continued to sit as the French judge *ad hoc*. *Idem*, p. 10.

[33] Series A/B, No. 70, p. 6; *idem*, No. 72, p. 160; Series C, No. 83, p. 164.

[34] Series C, No. 69, p. 57.

[35] See generally the report of the 1920 Committee of Jurists. Minutes of the 1920 Committee of Jurists, p. 693.

[36] Series B, No. 15; Series A/B, Nos. 43, 44.

of judges of different nationalities." [37] In line with this principle, it has been said that in its appointment of a judge *ad hoc*, a party "must not disturb the equilibrium which should exist in the Court in regard to nationality." [38] The question was discussed by the Court at some length in 1932 and 1934, but various proposals for dealing with it in the Rules were not adopted.[39] The conclusion seems to have been reached, however, that "it was desirable that there should not be two judges of the same nationality in the Court; that the Court would be disposed, if necessary, to convey this to a State; but that, having regard to the terms of the Statute, it could go no further." [40] It is to be noted, however, that in 1931 and 1932 when Viktor Bruns, a German national, sat as judge *ad hoc* in the cases relating to *Polish War Vessels in Danzig* and to *Polish Nationals in Danzig*, the Court also included upon the bench Judge Schücking who possessed German nationality.[41]

A question was raised in 1929 as to the interpretation of the word "nationality" in Article 31 of the Statute, in its application to members of the British Commonwealth of Nations. Sir Cecil Hurst proposed that Article 31 "should be interpreted to mean that it did not exclude the right of a Dominion to appoint to the Court a judge *ad hoc* even though an English judge should also be a member"; [42] but the discussion revealed opposition to such an interpretation and the proposal was not adopted. It seems possible that the meaning of the term "nationality" (Fr., *nationalité*) in Article 31 should be determined with some reference to the meaning of the term "national" (Fr., *ressortissant*) in Article 10; if Article 10 does not preclude the possibility that two British subjects, one from the United Kingdom and another from a Dominion, or from two Dominions, may be elected judges of the Court, then it would seem to be easier to arrive at the proposed interpretation of Article 31. Apart from Article 10, however, it would seem to be possible for a Dominion to appoint a judge *ad hoc* in a case in which it is a party, even though a British judge is sitting on the bench, if the British judge does not possess the nationality of that Dominion.

§402. Functions of Judges *ad hoc*. Article 20 of the Statute is applied to judges *ad hoc* by analogy, and under Article 5 of the Rules a judge *ad hoc* makes the same solemn declaration as a member of the Court. Judges *ad hoc* normally take part in the preliminary discussion which

[37] Series D, No. 2 (3d add.), p. 22.
[38] *Idem*, p. 26.
[39] *Idem*, pp. 17–23, 26–31.
[40] *Idem*, p. 31.
[41] Series A/B, No. 43, p. 128; *idem*, No. 44, p. 4.
[42] Minutes of the 1929 Committee of Jurists, pp. 70–1, 84–7. See §§150, 251, *supra*.

precedes the hearings in a case even before they have made the solemn declaration,[43] however, and it is the practice to communicate documents to them in advance.[44] It is provided in Article 31 of the Statute that judges *ad hoc* "shall take part in the decision on terms of complete equality with their colleagues." In the very nature of things, it is not possible for the equal participation of judges *ad hoc* to be assured at every stage of the proceedings in a case. According to a provision in the Rules since 1926,[45] they are not to be "taken into account for the calculation of the quorum." Their presence is not necessary for orders relating to the conduct as distinguished from the decision of a case,[46] *e.g.*, orders relating to fixing the dates for proceedings; [47] or for decisions relating to the composition of the Court; [48] or for orders relating to the termination of proceedings; [49] or for decisions in regard to the language to be used by a party.[50] The Court may consider a request for the indication of measures of interim protection in their absence. In the *Chorzów Case* it was said that "the Court is entitled as normally composed, to indicate, should occasion arise, provisional measures of interim protection, without specially obtaining the assistance of national judges"; [51] but in the *Southeastern Greenland Case* the Court decided to admit the participation of the judges *ad hoc* when it considered the Norwegian requests for the indication of interim measures of protection, on the special ground that "in this case the presence of judges *ad hoc* is not inconsistent with the urgent nature of interim measures of protection." [52] Article 61(9) of the 1936 Rules provides for the convening of judges *ad hoc* whenever the Court is to consider the indication of interim measures, if their presence can be assured. In principle, the presence of a judge *ad hoc* is necessary for a decision concerning the minutes of a meeting at which he has participated.[53]

[43] Series D, No. 2 (3d add.), pp. 805–806. In the Court's earlier years a judge *ad hoc* was not allowed to be present until he had made the solemn declaration. Series E, No. 1, p. 248; *idem*, No. 3, p. 193.

[44] Series C, No. 78, p. 411. At times, it seems that the communication of the documents was postponed until it had become clear that no objection would be made to the selection of the judge *ad hoc*. Series C, No. 81, p. 531; *idem*, No. 82, p. 286. But see *idem*, No. 78, p. 409.

[45] Article 30 of the Rules of 1926 and 1931, Article 29 of the Rules of 1936.

[46] Series E, No. 15, p. 115.

[47] Series E, No. 1, p. 248; *idem*, No. 2, p. 162.

[48] Series E, No. 5, p. 252; *idem*, No. 7, p. 291.

[49] *Southeastern Greenland Case*, Series A/B, No. 55; *Losinger & Co. Case*, Series A/B, No. 69; Series E, No. 9, p. 162; *idem*, No. 14, pp. 133–40. See also Series C, No. 68, p. 283.

[50] Series E, No. 14, p. 138.

[51] Order of November 21, 1927, Series A, No. 12, p. 10.

[52] Series A/B, No. 48, p. 280.

[53] Series E, No. 14, p. 133.

A judge *ad hoc* who takes part in one phase of the proceedings in a case should, in accordance with the principle underlying Article 13(3) of the Statute, finish the case in any later phases; and in a later phase of the proceedings in the same case his solemn declaration does not have to be repeated.[54] In connection with the request for an interpretation of Judgments Nos. 7 and 8, the Court decided in 1929 that as this did not involve a continuation of the original suit, the persons to be named as judges *ad hoc* might be different from those who had sat when the judgments were delivered.[55]

Until 1936, the tendency was noticeable to assimilate judges *ad hoc* to deputy-judges. Such assimilation was made, for example, in certain provisions relating to their remuneration.

§403. Disqualification of Judges. The second paragraph of Article 17 of the Statute provides that no member of the Court may participate in the decision of a case in which he has previously taken an active part either as agent, counsel or advocate, or as a member of a national or international Court or as a member of a commission of enquiry or in any other capacity; any doubt on this point is to be settled by the decision of the Court. On several occasions members of the Court have submitted their doubts to the Court. In 1928, when Judge Huber raised a question concerning his participation in the *Free Zones Case*, the Court decided that he was not disqualified from sitting by the fact that from 1918 to 1921, before the dispute had arisen, he was legal adviser to the Swiss Political Department; this was formally confirmed in 1929.[56] In 1931, the Court held that a judge was not disqualified in a particular case because he had participated in the drafting of a convention the interpretation of which was at issue.[57] Judge Fromageot sat in the *Phosphates Case* when the Court was considering the preliminary objection advanced by the French Government, although he had served in 1920 as a member of an arbitral commission which had passed upon certain claims which, after their transfer to Italian nationals, were made the basis of the application by the Italian Government.[58] In the *Société Commerciale Case* in 1939, M. Ténékidès sat as judge *ad hoc* although he had been legal adviser to the Greek Ministry of Foreign Affairs during the period when negotiations

[54] Series C, No. 15–II, p. 11; *idem*, No. 19–I, p. 10; *idem*, No. 58, pp. 331–2.
[55] Series E, No. 4, p. 295.
[56] Series E, No. 4, p. 270; *idem*, No. 6, p. 282.
[57] Series E, No. 8, p. 251. Judge Weiss sat in the *Wimbledon Case* though he had been a member at the Paris Peace Conference of the committee which drafted Articles 380–386 of the Treaty of Versailles.
[58] Series C, No. 84, p. 535.

concerning the subject of the dispute were being carried on by the Belgian and Greek Governments.[59] In the *Electricity Company Case* in 1939, M. Papazoff, nominated by Bulgaria as judge *ad hoc*, was permitted to participate although he had been a member of an arbitral tribunal whose awards had been invoked in the application.[60] In several cases of requests for advisory opinions, judges have informed the Court of their previous activities in connection with the deliberations of the Council of the League of Nations on the same or similar questions, and the attitude of the Court has been dictated by its appreciation of the facts in each case.[61]

A question may be raised whether a party may challenge a judge on the ground that he is disqualified under Article 17. Though the subject of challenges was much discussed by the 1920 Committee of Jurists,[62] the Statute contains no provision which would allow a party to challenge a judge's qualifications, nor is such a challenge foreseen in the Rules.[63] In spite of these *lacunae*, however, it must be open to a party to take advantage of the peremptory provision in Article 17 and to raise a question for the Court's decision.

A further disqualification is created by the provisions in Article 24 of the Statute that if the President considers that for some special reason one of the members of the Court should not sit on a particular case, he shall give notice to the member accordingly, and that if the President and the member disagree, the matter is to be settled by the decision of the Court. It would seem that a party cannot raise before the Court the question of applying these provisions,[64] though it might inform the President of facts which would lead to his initiative in the premises. In the *Free Zones Case* in 1930, President Anzilotti seems to have been of the opinion that Article 17, paragraph 2 of the Statute, as well as Article 24, paragraph 2, was applicable; he expressed the view that Judge Fromageot, who had been elected in 1929 after the order of August 19, 1929 had been handed down, should not sit in the second phase of the case because he had represented the French Government in the negotiations which led to the signing of the special agreement of October 30, 1924.[65] In addition,

[59] Series C, No. 87, p. 296.
[60] Series E, No. 15, p. 112. No proceedings on the merits were held in this case, however.
[61] Series C, No. 52, pp. 105–6; *idem*, No. 54, pp. 304–5; Series E, No. 7, p. 277; *idem*, No. 8, p. 251.
[62] Minutes of the 1920 Committee of Jurists, pp. 171–175, 185–6, 472–3.
[63] In 1922, the Court rejected a proposal to include in the Rules a provision that a party might suggest that a certain judge should not sit. Series D, No. 2, p. 72.
[64] But see Series E, No. 6, p. 282.
[65] Series C, No. 19–I, pp. 10, 2234–5. Judge Fromageot shared the views of the President in this case.

what may be termed a subjective disqualification is provided by Article 24 in the privilege of withdrawal conferred on a judge if for some special reason he considers that he should not take part in the decision of a particular case; in this situation, the judge is to inform the President, and if the President and the judge should disagree the decision would be taken by the Court.[66] The "special reason" must cover reasons of a personal nature, such for example as having a financial interest in the matter in issue or being related to an individual interested in a particular case.[67] It would seem that a withdrawal should take place before the beginning of the oral hearings, for it might jeopardize the existence of a quorum or necessitate the appointment of a judge *ad hoc;* yet it is possible that the progress of the hearings would reveal facts which would produce scruples in the mind of a judge, and a hard and fast rule on this point should be avoided.[68]

§404. Disabilities of Members of the Court. Article 17 of the original Statute provided that "no member of the Court can act as agent, counsel or advocate in any case of an international nature." This text is traceable, at least in part, to the provision in Article 62 of the 1907 Hague Convention on Pacific Settlement, that a member of the Permanent Court of Arbitration should not act as agent, counsel or advocate except on behalf of the State by which he was appointed. It is clear that a judge of the Permanent Court of International Justice cannot act as agent or counsel before any international tribunal; and Article 17 served the additional office of forbidding such action by a deputy-judge. The original text did not preclude private law-practice before national courts by a member of the Court,[69] and some of the judges actively engaged in private practice; but in the revision of the Statute the last four words were dropped, so that after February 1, 1936, it was forbidden for a judge to act as agent or counsel in any case whatever, national or international.[70]

Further disabilities are imposed on members of the Court by Article 16 of the Statute. The original text of this Article provided that they should

[66] The third paragraph of Article 24 may be thought to cover the contingencies outlined in both the first and second paragraphs. Minutes of the 1920 Committee of Jurists, p. 472.
Article 31 of the Statute provides that judges *ad hoc* must fulfil the conditions set by Article 24.

[67] Series D, No. 2 (3d add.), pp. 29, 30. It seems that the "special reason" does not cover questions relating to nationality. Series D, No. 2 (add.), p. 248; *idem*, No. 2 (3d add.), pp. 28, 30.

[68] But see Series E, No. 7, p. 287.

[69] Series D, No. 2, p. 12.

[70] The Australian representative at the 1929 Conference of Signatories accepted this change as a substitute for the deletion of the first paragraph of Article 17 which he had proposed. Minutes of the 1929 Conference of Signatories, p. 34.

not "exercise any political or administrative function," the deputy-judges being under this disability only when performing their duties on the Court; the amended text of Article 16 added that they should not "engage in any other occupation of a professional nature," and the 1929 Conference of Signatories intended that this phrase should be "interpreted in the widest sense." [71] "Any doubt on this point is settled by the decision of the Court." In 1936 the Court rejected a proposed addition to the Rules requiring each judge to communicate to the Court a list of all his "other occupations," [72] as well as a proposed outline of the procedure to be followed in the application of Article 16.[73] A member of the Court may raise the question of applying the provisions of Article 16, either with reference to himself or with reference to another member of the Court; possibly the question might be raised, also, by an outside authority such as the Council or Assembly of the League of Nations.[74] It seems questionable whether Article 18 of the Statute should be interpreted to provide a sanction for a violation of the provisions of Article 16.[75]

What is an "occupation of a professional nature"? Judge Negulesco defined the term to mean "a remunerative occupation which provided the person concerned with a livelihood and in which he was continually engaged." [76] The Court has not formulated a definition of the term.

§405. Incompatibilities. Even when a member of the Court is not strictly under a disability, it has been recognized that he should refrain from certain activities on the ground that they are incompatible with his duties as a judge of the Court. Incompatibilities are not to be so rigidly defined as disabilities and disqualifications, and they may call for appreciation from the broad view-point of the completely satisfactory discharge of a judge's responsibilities. In general, any activity which might even in remote possibility affect a judge's independence or impartiality, or might even be thought to do so, should be avoided as incompatible. Of course any activity which would interfere with a judge's discharge of his duties to the Court would be incompatible. Even when the Statute contained no prohibition on a member's engaging "in any other occupation of a professional nature," certain occupations were clearly excluded

[71] *Idem*, p. 78.
[72] Series D, No. 2 (3d add.), pp. 678, 716–23.
[73] *Idem*, pp. 710–13, 715–16.
[74] *Idem*, p. 717.
[75] *Idem*, pp. 718, 721. President Hurst observed in 1936 that "it was a far cry from the uniformity of application aimed at by Article 16 . . . to the penal provisions of Article 18." *Idem*, p. 713.
[76] Series D, No. 2 (3d add.), p. 712. See also Minutes of the 1929 Conference of Signatories, pp. 31–3.

as incompatible; and independently of that provision in the revised Statute, the question of compatibility may be raised at any time.

At the Court's preliminary session in 1922, the following opinions were expressed: [77]

(*a*) that there was incompatibility between the functions of judge of the Court and the functions of a member of an institution such as the *Conseil du Contentieux* of the Italian Foreign Office;

(*b*) that there was no incompatibility between the functions of a judge and the functions of a member of a Government commission for preparing copyright legislation;

(*c*) that there was no incompatibility between the functions of a judge and the functions of a member of a Government commission for testing candidates for the diplomatic service;

(*d*) that the judges, or in case of doubt the Court, should decide in each instance whether there is incompatibility between their functions as judges and participation in cases of private international law;

(*e*) that, except in special cases upon which the Court might be called upon to decide, participation in negotiations even of a non-political character was inadmissible;

(*f*) that the judges might take part in international conferences which were connected with the development of law.

The question of incompatibility has frequently arisen, and on occasion the Court has approved the exercise of various international and national functions by its members. It approved a judge's acting as a member of a Mixed Arbitral Tribunal set up under the Peace Treaties of 1919–20, as *rapporteur* in an Anglo-Spanish dispute concerning Morocco, as member of an international commission on rules of warfare, as a member of the Spanish Senate.[78] Judge Schücking stated that when he was elected a member of the Court he withdrew from all political activities, and ceased to take part in the work of the Executive Committee of the Interparliamentary Union.[79]

The subject of incompatibilities was studied at length by the 1929 Committee of Jurists, and it expressed the view that no incompatibility resulted if a member of the Court was also a member of the Permanent Court of Arbitration.[80] On numerous occasions the question has arisen whether the President or a judge of the Court should accept membership in a conciliation commission. When the question arose in 1926, in connection with the proposed appointment of a judge as president of a

[77] Series D, No. 2, pp. 12–3; Series E, No. 1, p. 247.
[78] Series D, No. 2, pp. 10–12; Series E, No. 3, p. 177.
[79] Series D, No. 2 (2d add.), p. 255.
[80] Minutes of the 1929 Committee of Jurists, p. 120. In 1939, ten of the fifteen judges were also members of the Permanent Court of Arbitration.

conciliation commission under one of the Locarno agreements, the principle was formulated that an effective incompatibility exists if the conciliation commission is set up by an agreement which confers jurisdiction on the Court in the event of a failure of the conciliation commission to reach a settlement.[81] This view was confirmed in 1930,[82] but in 1931 it was thought that the distinction was not justified, and no impropriety was seen in service by a member of the Court as a member of a commission of conciliation.[83] In general, it would seem that a judge of the Court ought to be available for international judicial service not connected with the Court when such service will not interfere with the discharge of his duties in connection with work of the Court, and this rule might be applied to conciliation commissions whose function it may be to smooth out international differences, even though the differences be "political" in their origin.[84]

Political activities, either in the national or the international sphere, are certainly incompatible with the position of a judge of the Court. In 1931 the view seems to have been accepted that "any function which compelled a person to follow the instructions of his government, regardless of his personal views, was 'political.'" This would preclude a member of the Court from representing his Government at an international conference, even at a conference for the development of international law; it was thought at the time to preclude a judge from representing his Government at a session of the International Labor Conference, or from making "an official pronouncement at a banquet regarding his government's international policy, in a certain limited respect." [85]

§406. Discipline. Article 18 of the Statute provides that "a member of the Court cannot be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfil the required conditions" (Fr., *cessé de répondre aux conditions requises*). This is equivalent to a positive provision for dismissal. The power has not been exercised by the Court, and the published records reveal no case in which its exercise has been under consideration. Since 1922, however, Article 6 of the Rules has laid down a procedure to be followed for applying Article 18 of the Statute:

[81] Series E, No. 3, pp. 177–8.
[82] Series E, No. 7, p. 276. See also Minutes of the 1929 Committee of Jurists, p. 120.
[83] Series E, No. 7, pp. 276–7.
[84] The discussion of this question in 1931 was very illuminating. Series D, No. 2 (2d add.), pp. 254–267. In 1936 the Court's President declined an invitation to become president of a permanent conciliation commission on the ground that a later reference to the Court was possible. Series E, No. 14, p. 127.
[85] Series E, No. 7, p. 278.

all members of the Court are to be convened, the member affected is to be allowed to furnish explanations, and the question is to be discussed and the vote taken in the absence of such member. This procedure seems to amount to a sort of trial. The initiative for applying Article 18 may be taken by any member of the Court, or possibly by the Council or Assembly of the League of Nations.[86] No attempt has been made to define "the required conditions" to which Article 18 refers, and the provision can hardly be confined to conditions of physical incapacity.[87] In 1922, the Court thought that Article 18 might be invoked in extreme cases of unexcused absences.[88]

Apart from the provision for dismissal, the Court may be thought to have some power to discipline its members; yet it is difficult to see what sanction could be imposed other than a mere reprimand. In one case action was taken which could be called disciplinary. In 1929, a deputy-judge who was a national of a party failed to respond to a summons to attend a session under circumstances which seemed to indicate an intention thereby to modify the composition of the Court in the case before it; the failure seems to have been explained, but the Court addressed a letter to the deputy-judge drawing his attention to the "danger" to the "Court's authority" involved in any purpose to change the Court's composition in a particular case.[89] In at least one instance, also, the Court has reminded a member of his duty to be present at sessions of the Court.

§407. Acceptance of Decorations. Account must be taken by the Court of the common practice of Governments throughout the world to confer decorations on persons whom they wish to compliment or whose services they wish to acknowledge, and a definite rule seems to be needed forbidding the acceptance of decorations from any source by any member of the Court, or by the Registrar or any official of the Registry, during his term of office. Cases might arise in which the acceptance of a decoration would excite no unfavorable comment, yet this seems to be a point on which the Court should not take any risks. On July 30, 1926, the Court adopted a resolution stating "that neither its members nor the Registrar nor officials of the Registry should accept decorations without the consent of the Court," and it was decided that as a general rule any vote on applying this resolution should be by secret ballot; [90] a proposal to adopt a stricter rule on this point was made in 1931, but was not

[86] Series D, No. 2, p. 51.
[87] But see the report of the 1920 Committee of Jurists, Minutes, p. 717.
[88] Series D, No. 2, p. 50.
[89] Series E, No. 6, p. 283.
[90] Series E, No. 3, p. 178.

adopted.[91] The Court's consent has been refused on some occasions and granted on others; in general a willingness has been shown to allow acceptance of decorations conferred by the State of which the recipient is a national.[92] The Court's position in this respect would seem to be somewhat different from that of the Secretariat of the League of Nations,[93] because the necessity of its avoiding any appearance of favoritism is so patent.

§408. Resignation of Judges. The original Statute contained no provision relating to the resignation of judges.[94] Judge Moore addressed his letter of resignation of April 11, 1928, to the Secretary-General of the League of Nations, and the resignation was provisionally accepted by the Council subject to the concurrence of the Assembly, which did not take place until September 4, 1928.[95] On February 14, 1930, Judge Hughes addressed telegrams of resignation both to the Secretary-General of the League of Nations and to the President of the Court; the resignation was accepted by the Council on May 12, 1930, but subject to the concurrence of the Assembly, and it seems that the Assembly never acted.[96] On September 9, 1935, Judge Kellogg addressed a letter of resignation to the President of the Court, and on September 23, 1935 the latter forwarded the letter to the Secretary-General of the League of Nations; the resignation was accepted by the Assembly on September 27, and by the Council on the following day.[97] On January 15, 1936, Judge Wang addressed letters of resignation both to the Secretary-General of the League of Nations and to the President of the Court, and the resignation was accepted by the Council on January 24, 1936.[98]

The amended text of Article 13 of the Statute provides that "in the case of the resignation of a member of the Court, the resignation will be addressed to the President of the Court for transmission to the Secretary-General of the League of Nations," and that "this last notification makes the place vacant." Judge Urrutia resigned "as of January 1, 1942," by

[91] Series E, No. 7, p. 278.

[92] Series E, No. 3, p. 178; *idem*, No. 4, p. 270; *idem*, No. 5, p. 246; *idem*, No. 7, p. 276.

[93] Yet Article 1 of the Staff Regulations of the Secretariat of the League of Nations (edition of 1933) provides that "no official of the Secretariat may, during the term of his appointment, accept from any Government any honor or decoration except for services rendered before appointment."

[94] When the question was raised before the 1920 Committee of Jurists, it was said that the judges had a "natural right" to resign. Minutes of the 1920 Committee of Jurists, p. 612.

[95] Series E, No. 4, pp. 26–7; *idem*, No. 5, p. 17.

[96] Series E, No. 6, pp. 17–18. In May, 1930, Judge Hughes was asked to sit in the *Free Zones Case*, as he had sat in an earlier phase of that case in 1929, but he declined. Series C, No. 19–I, pp. 2191–5, 2201–2, 2205.

[97] Series E, No. 12, p. 16.

[98] Series E, No. 12, pp. 16–17.

a letter addressed to the President of the Court under date of November 17, 1941, but the letter was not transmitted to the Secretary-General of the League of Nations until January 9, 1942; Judge Nagaoka resigned by an undated letter addressed to the President, which was transmitted to the Secretary-General on January 15, 1942.[99]

§409. Enquiries and Experts. Article 50 of the Statute provides that the Court may at any time entrust any individual, body, bureau, commission or other organization with the task of carrying out an enquiry or giving an expert opinion. This would seem to contemplate either the use of an existing organization, or the creation of an organization *ad hoc*, and the Court may act on its own initiative or at the request of a party. Such action may doubtless be taken, also, by a special chamber.[1] Article 57 of the 1936 Rules provides that if the Court decides to arrange for an enquiry or an expert report, an order shall be issued, after hearing the parties, setting forth the procedure to be followed; and the resulting report must be communicated to the parties.[2]

The Court has instituted an expert enquiry in only one case.[3] An order of September 13, 1928 provided for an expert enquiry with a view to enabling the Court to fix, in conformity with the principles laid down in a judgment of that date, the amount of the indemnity to be paid by the Polish Government in the *Chorzów Case*.[4] The enquiry was to relate to specified points, and it was to be entrusted to a committee of three experts appointed by the President, each of the parties having the right to appoint an assessor to act with the committee in an advisory capacity. The experts and assessors were to make a solemn declaration, the text of which was set forth in the order.[5] The President appointed the experts by order of October 16, 1928,[6] and the German and Polish

[99] League of Nations Document, C. 17. M. 17. 1942. V.

[1] Series D, No. 2 (3d add.), p. 366.

[2] Article 52 of the earlier Rules was less complete.

No clear distinction is to be drawn between an enquiry and an expert report. But see Series D, No. 2, p. 147.

[3] Expert enquiries have been suggested in various other cases, however: in the *Free Zones Case*, Series A, No. 24, p. 8 and Series A/B, No. 46, pp. 169–170; in the *Chinn Case*, Series A/B, No. 63, pp. 69, 88; in the *Phosphates Case*, Series C, No. 84, pp. 406, 784–5 and *idem*, No. 85, p. 1173. In the *Société Commerciale Case*, a dissenting judge favored the ordering of an expert enquiry. Series A/B, No. 78, p. 182.

[4] Series A, No. 17, pp. 99–103.

[5] No provision for such a declaration had been included in the Rules because of the possibility of entrusting an enquiry to an organization. Series D, No. 2 (3d add.), p. 625. The text of the declaration set forth in the order of September 13, 1928 is of special interest; *e.g.*, the experts and assessors agreed not to turn to their own use any business secrets which they might learn in the course of the work.

[6] Series C, No. 16–II, pp. 12–13. The appointees were technical men, two of Norwegian and one of Swiss nationality.

Governments named assessors. After five meetings of the Committee,[7] the expert enquiry was terminated and the Committee was dissolved by the President's order of December 15, 1928, in consequence of the termination of the case before the Court. The expenses were borne by the parties equally, deposits being made with the Registrar for this purpose.[8]

The final paragraph of Article 26 of the Statute confers on the International Labor Office a special privilege of furnishing the Court with relevant information in labor cases,[9] and the Council's resolutions asking for advisory opinions in labor cases have usually requested the International Labor Office "to afford the Court all assistance which it may require" in considering the question submitted. Even in such cases, however, the Court must remain at liberty to seek information elsewhere. In the case concerning *Railway Traffic Between Lithuania and Poland*, the Council's resolution of January 24, 1931 requesting the advisory opinion provided that "the Advisory and Technical Committee for Communications and Transit [of the League of Nations] is requested to provide the Court with any assistance it may need for the examination of the question submitted to it." This provision was probably not intended to limit the power of the Court to go elsewhere for its information; [10] the Court did not apply to the Committee for an expert opinion, but it decided that information might be received from the Committee in accordance with the usual practice in advisory proceedings,[11] and an oral statement was made on behalf of the Committee.[12]

§410. The Court's Public Relations. In one sense the Court's public may be said to consist of the States of the world which are eligible to appear before it as parties; in a larger sense its public consists of all the peoples whose interests may be affected by its judgments and opinions. Aside from its effort to avoid any appearance of partiality and its issuance of most useful publications,[13] the Court has made little attempt to cultivate relations with its public. It has been content to let its work speak for itself, confident that in the long run the public's estimate would

[7] For the *procès-verbaux*, see *idem*, pp. 17–24. At its fifth meeting on November 12, 1928, the Committee envisaged a visit to certain factories, but the visit did not take place.

[8] Series C, No. 16–II, pp. 58–64. The honorarium of each expert was fixed at 13,335 florins, an additional allocation of 1,335 florins being made for the president.

[9] In 1922 the Court expressed the opinion that this provision did not refer to advisory opinions. Series D, No. 2, p. 98. But see Series E, No. 3, p. 189.

[10] See the correspondence between the Registrar and the Secretary-General of the Advisory and Technical Committee, Series C, No. 54, pp. 447–50.

[11] This decision was embodied in a formal resolution. *Idem*, p. 455.

[12] *Idem*, pp. 305, 310–16.

[13] See §354, *supra*.

depend upon the results achieved. Hence no machinery has been established for bringing its work to the attention of the public. Though they are usually attended by only a small local audience, the public sittings of the Court have great value; in at least one case, a public meeting was held for the sole purpose of informing the public concerning the progress of the Court's work.[14] Under Article 21 of the 1936 Rules,[15] the Registrar replies to enquiries concerning the work of the Court, including enquiries from the press, and publishes all necessary information concerning the time fixed for public sittings of the Court. *Communiqués* marked "unofficial" are usually issued in connection with the public sittings. At one time the establishment of a post of press official was contemplated, but the post was never filled,[16] and in 1931 the Court declined an offer of the Secretariat of the League of Nations to take charge of the press service during a series of its public sittings.[17]

[14] On June 18, 1927. Series C, No. 13–I, pp. 6–9.

[15] Article 24 of the earlier Rules. See also Articles 13 and 23 of the Instructions for the Registry of 1938. Series E, No. 14, p. 28.

[16] Series E, No. 7, p. 282. In certain cases of wide public interest, special facilities were arranged for the press. *Idem*, No. 10, p. 33.

[17] Series E, No. 7, p. 283; No. 8, p. 248.

PART IV

THE JURISDICTION OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

CHAPTER 18

ACCESS TO THE COURT

§411. Categories of Possible Parties before the Court. Article 34 of the Statute provides that "only States or Members of the League of Nations can be parties in cases before the Court." [1] This limitation has been thought to have had its origin in Article 14 of the Covenant of the League of Nations,[2] which envisaged a Court "competent to hear and determine any dispute of an international character which the parties thereto submit to it." While a "dispute of an international character" might not be an inter-State dispute, the Court has said that the phrase refers to "disputes between the actual Parties who submit them to the Court." [3] Two categories of parties—"States" and "Members of the League of Nations"—are mentioned in Article 34 because of the possibility that some of the Members of the League of Nations may not be included in the category of States; for example, certain Members of the League of Nations which are members of the British Commonwealth of Nations are not generally referred to as States.[4] Article 34 does not seem to exclude the possibility that a number of States may present themselves as joint parties or may combine as a single party before the Court,[5] and if this is true, it ought to be possible for an association of States such as the League of Nations to become a party. The term "only" which introduces Article 34 does not militate against this conclusion, for its purpose was to distinguish States and Members of the League of Nations from individuals and private organizations. Opinion on the point has not

[1] The French version reads: *Seuls les États ou les Membres de la Société des Nations ont qualité pour se présenter devant la Cour.*

[2] This statement was made by the Court in the *Serbian Loans Case.* Series A, No. 20, p. 17.

[3] *Ibid.*

[4] A new practice may be growing up on this point, however. The preamble of the treaty of April 2, 1940, between the United States of America and the Union of South Africa, refers to the latter as "an independent State." U. S. Treaty Series, No. 966.

[5] In the *Wimbledon Case*, Series A, No. 1, a single application was presented by four applicants, acting jointly; the *Memel Case* was similar. Series C, No. 59, p. 12. *Quaere* whether one State may appear before the Court as a representative of a group of States. *Cf.*, Series C, No. 68, p. 272.

been clear, however,[6] and after a lengthy discussion the 1929 Committee of Jurists, acting partly for political reasons, decided not to attempt to make the text of the Statute more explicit.[7]

In advisory proceedings there are no parties in a strict sense of the term, and under Article 66 of the Statute as well as under the Court's practice before that Article became operative in 1936, the Court may receive information from any Member of the League of Nations, from any State "entitled to appear before the Court," or from any "international organization." [8]

Article 34 of the Statute having laid down the principle that parties in cases before the Court must be States or Members of the League of Nations, Article 35 proceeds to apply the principle. It describes three categories of possible parties; in other words, it opens the Court to certain States or Members of the League and provides for its being opened to others. The first category is the Members of the League of Nations: the Court is open to all Members, regardless of their position as signatories or non-signatories of the Protocol of Signature of December 16, 1920. This is a logical result of the fact that all Members of the League are obligated to contribute to the funds of the League out of which the Court's expenses are met.[9] The second category is the States mentioned in the Annex to the Covenant but not members of the League of Nations; [10] the Protocol of Signature of December 16, 1920, was opened to signature by such States, the object being to enable the United States of America to "adhere to the Statute," [11] and it seemed to follow that since any such State might become a party to the Protocol of Signature it should be

[6] In 1920, a question was raised as to a special *locus standi* for the League of Nations and its organizations. Minutes of the 1920 Committee of Jurists, p. 579. Wishing to safeguard the independence of the Court and its own independence, the Council showed no desire that such a *locus standi* be given to the League of Nations. Records of First Assembly, Committees, I, pp. 475–6. In 1924, Judge Huber expressed the opinion that the Council or Assembly might be heard in advisory proceedings. Series D, No. 2 (add.), p. 255.

Conceivably, an international organization may be a party to an instrument conferring jurisdiction on the Court. *Cf.*, the Agreement of June 28, 1932, to which Rumania, Yugoslavia and the International Commission of the Danube are parties. 140 League of Nations Treaty Series, p. 191.

[7] Minutes of the 1929 Committee of Jurists, pp. 57–61.

[8] The term *informateur* has been employed to describe a State or an organization furnishing information to the Court. Series D, No. 2 (3d add.), p. 792.

[9] See §356, *supra*.

[10] The Annex to the Covenant named certain States as "original Members" of the League of Nations, and others as "invited to accede to the Covenant." All of the States mentioned in the Annex eventually became Members of the League of Nations, except the United States of America and Hedjaz (later Saudi Arabia); on December 16, 1920, however, several additional States were not yet Members of the League.

[11] Records of First Assembly, Plenary, p. 441.

accorded access to the Court.[12] The second category includes two groups of States mentioned in the Annex to the Covenant; those which never became Members of the League of Nations, *e.g.*, the United States of America, and those which became Members of the League of Nations but ceased to be Members, *e.g.*, Brazil.[13] A third category consists of "other States," *i.e.*, of States not members of the League of Nations and not mentioned in the Annex to the Covenant. The Statute did not attempt to list these States, nor to fix the conditions on which the Court should be open to them; "subject to the special provisions contained in treaties in force," it left that task to the Council of the League of Nations, but stipulated that the conditions to be laid down by the Council should in no case "place the parties in a position of inequality before the Court."[14]

It seems strange that no provision is made in the Statute that the Court shall be open to States which are parties to the Protocol of Signature of December 16, 1920, to which the Statute is annexed. That Protocol was open for signature only by Members of the League of Nations and by the States mentioned in the Annex to the Covenant, and as provision was made for access to the Court by both of these categories, it seemed unnecessary to provide for the access of States in their capacity as parties to the Protocol of Signature. In consequence of the omission, a problem arises with regard to States which are not mentioned in the Annex to the Covenant and which have been and have ceased to be Members of the League of Nations, which are however parties to the Protocol of Signature. Should compliance with the conditions set by the Council's resolution of May 17, 1922 be required of such a State before the Court would be open to it? No case has arisen to call for a solution of this problem.[15] It seems strange also that no provision is made in the Statute that the Court shall be open to States not mentioned in the

[12] At one time, however, the sub-committee of the Third Committee of the First Assembly seems to have held the view that only Members of the League of Nations which had "signed and ratified the Statute" would be "justiciable by the Court." Records of First Assembly, Committees, I, p. 408.

[13] Brazil was a Member of the League of Nations when the Court was seized of the *Brazilian Loans Case* in 1928, but ceased to be a member while the case was pending. See Series E, No. 6, p. 287.

[14] From the beginning, States not Members of the League of Nations and not named in the Annex to the Covenant were not excluded from participation in advisory proceedings. Series C, No. 1, p. 8.

[15] Germany and Hungary are the only parties to the Protocol of Signature which were not mentioned in the Annex to the Covenant and which have ceased to be Members of the League of Nations. On Germany, see Series E, No. 12, p. 111. Viktor Bruns has expressed the view that a State which became a party to the Protocol of Signature while a Member of the League of Nations continues to be entitled to appear before the Court after its withdrawal from the League. 62 *Receuil des Cours* (1937), p. 620. *Cf.*, §219, *supra*.

Annex to the Covenant and not parties to the Protocol of Signature of December 16, 1920, but which have been and have ceased to be Members of the League of Nations.[16] It seems to have been assumed that such States are entitled to access to the Court as of right, but there has been no decision on the point.[17]

§412. The Council's Resolution of May 17, 1922. At its preliminary session in 1922, the Court decided to address a letter to the Council of the League of Nations concerning action to be taken by the Council under the second paragraph of Article 35 of the Statute.[18] The President's letter of February 21, 1922, suggested that the powers of the Council should be considered as subordinate to the main principles that (*a*) any State should have a right of recourse to the Court, and (*b*) all parties admitted before the Court should have a right "to be placed in a position of absolute legal equality."[19] It was concluded, therefore, that the conditions fixed by the Council could "hardly involve more" than a duty to carry out the Court's decisions in good faith in accordance with the last paragraph of Article 13 of the Covenant, and a duty to contribute to the funds for meeting the Court's expenses.[20] This letter led to the Council's resolution of May 17, 1922.[21]

(1) The first paragraph of the Council's resolution sets a single condition for access to the Court by a State not a member of the League of Nations and not mentioned in the Annex to the Covenant: *viz.*, that it shall previously have deposited with the Registrar a declaration "by which it accepts the jurisdiction of the Court, in accordance with the Covenant of the League of Nations and with the terms and subject to the conditions of the Statute and Rules of the Court, and undertakes to carry out in full good faith the decision or decisions of the Court and not to resort to war against a State complying therewith." The reference to the Covenant was doubtless due to the mention of Article 13 of the

[16] Costa Rica and the Union of Soviet Socialist Republics are in this position; the former signed but did not ratify the Protocol of Signature.

[17] The 1920 Committee of Jurists proposed that "the Court shall be open of right to the States mentioned in the Annex to the Covenant and to such others as shall subsequently enter the League of Nations." *Cf.*, Article 5 of the Statute where the sense of the latter phrase was retained.

[18] This decision was due to a suggestion made by the Secretary-General of the League of Nations. Series D, No. 2, p. 63.

[19] *Idem*, pp. 69–72, 76, 345–7.

[20] The report of the Third Committee to the First Assembly had suggested that the Council's resolution might "lay down conditions of access in conformity with Article 17 of the Covenant." Records of First Assembly, Plenary, p. 462. This suggestion had previously been made by the 1920 Committee of Jurists. Minutes of the 1920 Committee of Jurists, p. 725.

[21] League of Nations Official Journal, 1922, pp. 526, 545, 609. For the text of the Council's resolution, see p. 755, *infra*.

Covenant in the President's letter of February 21, 1922; the phrasing of the concluding part of the condition is based on the first sentence of paragraph 4 of Article 13. It seems extremely doubtful whether any jurisdiction is conferred on the Court by the Covenant; nor do the Statute and Rules confer more than incidental jurisdiction. An acceptance referring to the Covenant, the Statute and the Rules, can therefore involve nothing in the way of an obligation to submit to the Court's jurisdiction. The undertaking required to be contained in the declaration does not tend to produce "inequality before the Court," but it may produce inequality in the position of parties after the Court has rendered a judgment. Even if Members of the League of Nations have an obligation under paragraph 4 of Article 13 of the Covenant "to carry out in full good faith the decision or decisions of the Court and not to resort to war against a State complying therewith," no such obligation rests on States not Members but mentioned in the Annex to the Covenant.

(2) The second paragraph of the Council's resolution provides that the declarations required by the first paragraph may be either particular or general, and both of these terms are defined. A *caveat* is stated, however, that even though in making a general declaration a State accepts the Court's compulsory jurisdiction "in conformity with Article 36 of the Statute," such acceptance may not, without special convention, be relied upon *vis-à-vis* States which have signed the "optional clause." [22]

(3) The third paragraph of the Council's resolution merely provides for the custody of the declarations and their communication to Members of the League of Nations, to States mentioned in the Annex to the Covenant, "to such other States as the Court may determine," and to the Secretary-General of the League of Nations.

(4) The fourth paragraph of the Council's resolution reserves the power of the Council to modify the resolution, even so as to affect "existing declarations." No modification has ever been considered, however.

(5) The fifth paragraph of the Council's resolution provides that "all questions as to the validity or the effect" of a declaration shall be decided by the Court. This would seem to open a door to the Court's determination of the effect of an undertaking analogous to that in Article 13 of the Covenant, a duty which the Court might be reluctant to assume.

[22] But see the application made by Liechtenstein in the *Gerliczy Case* in 1939. 4 Hudson, World Court Reports, p. 496.

§413. Action on the Council's Resolution by the Court. The Council's *rapporteur* suggested that the Council's resolution should be communicated to the Court, and that the Court should be requested "to give effect to the resolution." [23] After the text had been communicated to all Members of the League of Nations by the Secretary-General, the Secretariat stated to the Registrar that it was presumed that if the Court thought it desirable to communicate the resolution to non-Members, it would take the necessary steps. On June 23, 1922, the Court decided that the text of the Council's resolution should be communicated "to all States recognized *de jure*," and on June 28, 1922, it decided that the text should be communicated to States not Members of the League but mentioned in the Annex to the Covenant,[24] and to the following list of States: Danzig (through the intermediary of Poland), Dominican Republic, Georgia, Germany, Hungary, Iceland, Liechtenstein, San Marino, Mexico, Monaco, and Turkey.[25] Thereafter, in connection with its consideration of the Geneva Protocol of 1924, the Fifth Assembly of the League of Nations adopted a resolution recommending that States accede to the optional clause drawn up under paragraph 2 of Article 36 of the Statute, and in pursuance of this resolution, the Secretariat of the League of Nations communicated the Council's resolution of May 17, 1922, to a list of States which included all the States on the Court's list with the exception of Danzig, as well as Afghanistan, Egypt and "Russia"; thereafter, on June 16, 1925, the Court decided to add these three States to its list.[26] Some of the States to which the Council's resolution was communicated subsequently changed their position *vis-à-vis* the League of Nations.

The effect of this communication of the Council's resolution to certain States by the Court is not clear; it seems to have been interpreted to mean that these States are "entitled to appear before the Court," as that expression is used in the Rules,[27] though this was not expressly stated in the communication.[28] For some years the annual reports of the

[23] League of Nations Official Journal, 1922, p. 609.

[24] The Court later ceased to communicate with the Hedjaz. Series E, No. 1, p. 261.

[25] *Idem*, pp. 144, 260. Georgia continued to be included in the list published in the Court's annual reports, though it seems that in fact no communication was made to Georgia for some years.

[26] Series E, No. 1, pp. 142–44.

[27] Series E, No. 2, p. 87; No. 3, p. 98; No. 4, p. 128; No. 5, p. 150; No. 6, p. 172; No. 7, p. 180; No. 8, p. 143.

[28] In Series E, No. 2, p. 87, it is said that the States to which the Council's resolution was communicated were "notified by the Court that they are entitled to appear before it." *Cf.*, Series E, No. 11, p. 60; No. 12, p. 111. According to information supplied by the Registry, the actual communication did not go so far.

Court referred to the States to which the Court had directed that the Council's resolution be communicated as "States entitled to appear before the Court"; but this reference was dropped in 1937.[29] It would doubtless be within the power of the Council, under Article 35 of the Statute, to exclude any State not a member of the League of Nations and not mentioned in the Annex to the Covenant from appearing before the Court; but the Council does not seem expressly to have authorized the exercise of any power of selection or exclusion by the Court,[30] and some danger might be involved in the Court's exercising the political function of selecting the States to which it should be open.

The text of the Council's resolution was annexed to Article 35 (2) of the 1926 Rules and to Article 36 of the 1936 Rules, though apparently only for information in connection with the application of the rule; such reproduction of the text has not changed its legal effect, though it clearly facilitates the framing of declarations under the resolution.

§414. Declarations under the Council's Resolution. Two general declarations have been made in pursuance of the Council's resolution. On April 26, 1937, the Principality of Monaco filed with the Registry a declaration, dated April 22, 1937 and ratified by the Prince of Monaco on that date, by which the Principality accepted the Court's jurisdiction "in respect of all disputes which have already arisen or which may arise in the future."[31] The declaration followed almost verbatim the first paragraph of the Council's resolution; it then proceeded, with somewhat doubtful consistency, to put forth an acceptance of the Court's compulsory jurisdiction "in conformity with Article 36, paragraph 2, of the Statute of the Court and No. 2, paragraph 4, of the Resolution of the Council of May 17, 1922, for a period of five years, in any disputes arising after the present Declaration with regard to situations or facts subsequent to this Declaration, except in cases where the Parties have agreed or shall agree to have recourse to another method of pacific settlement." In very similar terms except for the omission of the exclusion of prior disputes relating to previous situations or facts, the Principality of Liechtenstein made a declaration on March 22, 1939, filed with the Registry on March 29, 1939;[32] on the basis of this declaration Liechtenstein instituted a proceeding against Hungary in the *Gerliczy Case* on June 17, 1939.

[29] Series E, No. 13, p. 71. See §417, *infra*.

[30] The reference in paragraph 3 of the resolution "to such other States as the Court may determine" applies only to the communication of declarations by the Court.

[31] Series E, No. 13, pp. 71–3, 273–4.

[32] Series E, No. 15, pp. 49–50, 213–4.

Two particular declarations have also been made in pursuance of the Council's resolution, both of them by Turkey. In the *Lotus Case*, the special agreement filed with the Registry on January 4, 1927, made no reference to a possible declaration, but the following declaration was made on behalf of the Turkish Government on January 24, 1927:[33]

> The undersigned, being duly empowered by the Government of the Turkish Republic, hereby declares, in accordance with the terms of paragraph 2 of Article 35 of the Rules of the Permanent Court of International Justice, that he accepts, on behalf of that Government, the aforesaid Court's jurisdiction for the dispute which has arisen between the Government of the Turkish Republic and the Government of the French Republic as a result of the collision which occurred on August 2nd, 1926, between the steamships *Boz-Kourt* and *Lotus*, which dispute has formed the subject of the Special Agreement signed by the delegates of the two Governments on October 12th, 1926, and filed on behalf of those Governments with the Registry of the Court on January 4th, 1927.

On November 18, 1931, a similar declaration was given on behalf of the Turkish Government, in the *Castellorizo Case;*[34] but in this case the Turkish Government had undertaken in the special agreement to make the declaration. It might have been questioned whether either of these Turkish declarations complied with the requirements of paragraph (1) of the Council's resolution, for Turkey did not purport to agree "not to resort to war against a State complying" with the decision of the Court. No such question was raised, however, and in the second case the Court's order of November 30, 1931 recited that the Turkish Government had filed "a declaration whereby it accepts the jurisdiction of the Court in accordance with the terms of No. 1" of the Council's resolution.[35]

§415. "Special Provisions of Treaties in Force." Article 35 of the Statute provides that the Council's power to lay down the conditions under which the Court should be open to other States is to be "subject to the special provisions in treaties in force" (Fr., *sous reserve des dispositions particulières des traités en vigueur*). The object of the subcommittee of the Third Committee of the First Assembly in drafting this text was to take account of "parties who may present themselves before the Court by virtue of the Treaties of Peace,"[36] for example, provisions "concerning

[33] Series C, No. 13–II, pp. 9, 28. Meanwhile, time-limits for the written proceedings had been fixed, and a judge *ad hoc* had been appointed by Turkey.
[34] Series C, No. 61, p. 9; Series E, No. 8, p. 255. This case was later withdrawn. Series A/B, No. 51.
[35] Series C, No. 61, p. 33.
[36] Records of First Assembly, Committees, I, p. 379.

the right of minorities, labor, etc." [37] The Council was thus obligated to avoid any conflict with the provisions of such treaties in force, and perhaps it may be said that the conditions set by the Council are not to be applied in cases covered by "special provisions contained in treaties in force." Some difficulty arises, however, in determining the scope of this expression. As of what time must the treaty have been in force? Does the expression refer to future treaties? [38] The question was considered by the Court in 1926, but no definite solution was reached.[39]

In the *Wimbledon Case*, the Court's jurisdiction derived from a special provision in a treaty in force, *viz.*, Article 386 of the Treaty of Versailles of June 28, 1919; Germany, the respondent, was then not a Member of the League of Nations, and not mentioned in the Annex to the Covenant, yet apparently no question was raised as to the necessity of Germany's giving a declaration accepting the Court's jurisdiction.[40] In other words, the Council's resolution was not applied in the *Wimbledon Case*. In the case relating to *German Interests in Polish Upper Silesia*, in which Germany was applicant, the Court's jurisdiction was derived from an instrument concluded after the date of the Council's resolution, *i.e.*, the Convention of May 15, 1922, brought into force on June 3, 1922. The parties seem to have been agreed that Article 23 of the 1922 Convention was a "matter specially provided for in treaties and conventions in force," as that expression is used in Article 36 of the Statute, and Poland did not dispute that the suit had been duly submitted in accordance with Articles 35 and 40 of the Statute; [41] the Court seems to have decided, also, that Germany was not obligated to made the declaration provided for in the Council's resolution as a condition precedent to the Court's entertaining the application.[42] If the implications of this decision were carried out, it would be possible for two States to escape the Council's conditions by entering into a treaty; indeed, if special agreements were included among treaties in force, the Council's resolution might never be applicable. It is clearly necessary for some restrictive meaning to be given to this provision in Article 35; it ought to be confined to treaties relating

[37] *Idem*, p. 532.

[38] The expression "treaties and conventions in force" in paragraph 1 of Article 36 clearly refers to future instruments, but it is doubtful whether the same scope is to be given to the expression "a treaty or convention in force" in Article 37.

[39] Series D, No. 2 (add.), pp. 76, 104ff.

[40] Article 386 provided only for appeal to the jurisdiction instituted for the purpose by the League of Nations; Article 37 of the Statute provides that the Court will be such tribunal. Though Germany was not a party to the Statute at that time, it did not object to the Court's exercise of jurisdiction in the *Wimbledon Case*.

[41] Series A, No. 6, p. 11.

[42] Series E, No. 1, p. 261.

to the liquidation of the war of 1914–18,[43] and the action taken in the case of *German Interests in Polish Upper Silesia* ought not to serve as a general precedent.

§416. Access Possible to All "States." The Council's resolution of May 17, 1922 makes it possible for any State to have access to the Court. A question may arise, however, whether the political organization offering itself as a party is a State within the meaning of that term as it is used in Articles 34 and 35 of the Statute; this question would have to be decided by the Court, and little indication has been given as to the criteria to be applied in determining statehood for this purpose.[44] On several occasions the Court has been approached by political groups which were clearly not States. When inquiry was made as to the conditions on which the "Confederacy of Six Nations of the Grand River" could submit certain disputes to the Court, the Registrar replied by referring to Articles 34 and 35 of the Statute, and his action was later approved by the Court.[45] When the Court was addressed on behalf of a group of Armenians, the same course was followed.[46] When on May 4, 1939, an advocate of Middleburg (Netherlands) transmitted to the Registry an "application" signed by the President of the "Government of Euzkadi" (in Spain), the Registrar acting on the instruction of the Court referred to Article 34 of the Statute and stated that the Court was not competent to entertain the request formulated.

§417. "States Entitled to Appear Before the Court." Article 38 of the 1922 Rules provided that cases and counter-cases in each suit might be held at the disposal of the Government of "any State which is entitled to appear before the Court";[47] and various articles of the 1926 Rules provided for certain communications to be made to "States entitled to appear before the Court."[48] The adoption of this phrase was due to the

[43] See Series D, No. 2 (add.), p. 105.

[44] In 1932, the Court referred to Danzig as having a legal status which was *sui generis*. Series A/B, No. 44, p. 23. [45] Series E, No. 8, p. 158. [46] *Ibid.*

[47] In contrast with this provision is the text of Article 73 of the 1922 Rules providing for the communication of requests for advisory opinions only to Members of the League and to the States mentioned in the Annex to the Covenant. Nevertheless, in 1922 several requests were communicated to Germany and to Hungary "for information." See Series C, No. 1, pp. 4, 586. When the request in the *German Settlers Case* was communicated to Germany in 1923, a protest was made by the Polish Government; in reply it was said that the enumeration in Article 73 was not limitative. Series C, No. 3, Vol. III, pp. 1051, 1055.

[48] Article 36 of the 1926 Rules mentioned "States not Members of the League entitled to appear before the Court" (Fr., *États, non-Membres de la Société, admis à ester devant la Cour*); Article 42 mentioned "any State which is entitled to appear before the Court" (Fr., *tout État admis à ester en justice devant la Cour*); Article 63 mentioned "States entitled to appear before the Court" (Fr., *États admis à ester en justice devant la Cour*); Article 73, paragraph 1, referred to "States entitled to appear before the Court" (Fr., *États admis à ester en justice devant la Cour*), and in paragraph 2 it referred to "State admitted to appear before the Court" (Fr., *tout État admis à ester devant la Cour*).

necessity of having a convenient term for referring to the States to which the Court is open, and to the convenience of having a list of States to which various communications should be sent. From Article 73 of the 1926 Rules the phrase was transposed to the new Article 66 of the revised Statute, which requires communications both to "States entitled to appear before the Court" and to a "State admitted to appear before the Court"; Article 40 of the revised Statute also provides for notifications to be made to "any States entitled to appear before the Court," when proceedings are instituted. The 1936 Rules employ a similar expression in directing the despatch of various communications.[49] These expressions attempt an over-simplification, and they do not adequately serve the purposes for which they are used in the Statute and the Rules. Under paragraph 1 of Article 35 of the Statute all Members of the League and all States mentioned in the Annex to the Covenant are clearly "entitled to appear before the Court"; but the expression is almost invariably used in connection with, and in contra-distinction to, the expression "Members of the League of Nations." So far as concerns States not Members of the League of Nations and not mentioned in the Annex to the Covenant, the Court is open to them only on the conditions laid down by the Council acting under paragraph 2 of Article 35 of the Statute.[50] The mere fact that the Council's resolution of May 17, 1922 was communicated to a State is not a sufficient reason for saying that it is "entitled to appear before the Court"; and at any given time there may be political communities which could be found to be States and which should not be excluded from appearing before the Court even though the Council's resolution had not been communicated to them.

Some confusion has been produced in this connection by statements made in the annual reports of the Court. In 1926 a list was given of "States neither Members of the League of Nations nor mentioned in the Annex to the Covenant which have been notified by the Court that they

[49] Paragraph 2 of Article 34 of the 1936 Rules provides that copies of special agreements or applications are to be sent "to Members of the League of Nations and to States entitled to appear before the Court" (Fr., *aux Membres de la Société des Nations et aux États admis à ester devant la Cour*). Article 44 provides that documents of the written proceedings may be held "at the disposal of the government of any Member of the League of Nations or State which is entitled to appear before the Court" (Fr., *à la disposition du gouvernement de tout Membre de la Société des Nations ou État admis à ester en justice devant la Cour*). Article 75 provides that a copy of the judgment shall be sent "to Members of the League of Nations and to States entitled to appear before the Court" (Fr., *aux Membres de la Société des Nations ainsi qu'aux États admis à ester en justice devant la Cour*).

[50] Under Article 63 of the Statute the Registrar has a duty to send notice to every State which is a party to a convention the construction of which is in question before the Court; every State so notified has a right to intervene, and is to this extent "entitled to appear before the Court."

are entitled to appear before it." [51] It would seem, however, that this was only a list of States to which the Court had communicated the Council's Resolution of May 17, 1922, for a year later the States were described as those "which have been notified by the Court of the Resolution of the Council to the effect that they are entitled to appear before it." [52] In 1934, the statement was made to read, "which have been notified by the Court of the Resolution of the Council and which are therefore entitled to appear before it." [53] In 1935, a fuller statement was made concerning the communication of the Council's Resolution of May 17, 1922, and a list was given of States which were "accordingly . . . entitled to appear before the Court." [54] In 1937, such statements were discontinued in the annual reports.[55] In fact, though the Court may have given a general approval of the annual reports it seems never to have addressed itself to the problem of saying what are the States in the world "entitled to appear before the Court," and as no final closed list of such States is possible, the Court would doubtless follow the wiser procedure of awaiting the necessity of a decision with respect to any claiming State.[56] Moreover, a State may be entitled to appear before the Court in some, and not in other, proceedings; if it is a party to a convention the construction of which is in question before the Court, it might be admitted to intervene under Article 63 of the Statute, even though it would not be entitled as a matter of right to file an application.[57] Conceivably, also, a State excluded from contentious proceedings might furnish information in an advisory proceeding.[58]

§418. Channels for Communication with Governments. It was thought at the Court's preliminary session that in determining the channels through which it would communicate with Governments, the Court would have "to conform to the varying wishes and usages of the several Governments"; and that the Governments should be approached to ascertain these "wishes and usages." [59] On March 27, 1922, the Registrar

[51] Series E, No. 2, p. 87. See §413, *supra*.
[52] Series E, No. 3, p. 98.
[53] Series E, No. 10, p. 57. The conclusion in the statement in the Annual Report states a *nonsequitur*.
[54] Series E, No. 11, p. 60.
[55] Series E, No. 13, p. 71.
[56] But see the statements as to Danzig in Series E, No. 4, p. 128, note, and as to Costa Rica in *idem*, No. 6, p. 287.
[57] This seems implicit in paragraph 2 of Article 66 of the 1936 Rules. See also Series D, No. 2 (3d add.), pp. 790, 794–5.
[58] See Series C, No. 1, p. 8, as to the position of Hungary in 1922; and Series C, No. 3, Vol. I, p. 65, as to the position of Soviet Russia in 1923.
[59] Series D, No. 2, pp. 197, 451.

requested the Secretary-General of the League of Nations to ask Members of the League of Nations to state their desires in this respect; the Governments of certain States not members of the League of Nations were approached directly by the Registrar.[60] All the Governments approached did not reply promptly, and a reminder was sent to them in 1928.[61] The annual reports of the Court list the results of the inquiries; fifty-nine States indicated channels to be used for direct communications emanating from the Court.[62] In most cases, the Court was asked to address the Ministry of Foreign Affairs or a corresponding department of the Government, though in some instances this was to be done through the legation at The Hague. Where no desire has been expressed, the Court communicates either with the legation at The Hague or with the Ministry of Foreign Affairs. With regard to a particular case before the Court, a party will usually be addressed through its agent, who under Article 35 of the 1936 Rules should have a permanent address at the seat of the Court for this purpose.[63]

No limitation exists on the agency through which a Government may address a communication to the Court, but the Court may require a communication to be confirmed by the Minister of Foreign Affairs or by the diplomatic representative at The Hague.[64] Communications by Governments are normally addressed to the Registrar, though in some instances they are addressed to the President and sent to the Registrar; Article 40 of the Statute requires applications and notifications of special agreements to be addressed to the Registrar.

§419. Exclusion of Individuals. Article 34 of the Statute of the Court clearly excludes the possibility of an individual's being a party before the Court. Nor can an association of individuals, or a corporation, or a society be a party, and this is true even though it be invested with a public character. The exclusion of individuals from the category of possible parties has frequently been criticized in doctrinal writings.[65] A tendency

[60] Series E, No. 1, pp. 144–5.

[61] Series E, No. 4, p. 129.

[62] Series E, No. 15, pp. 50–3. On the channel for the Court's communication with Danzig, see Series C, No. 8, p. 501; *idem*, No. 14–I, p. 518.

Communications emanating from the Court may be in English or in French; English is commonly employed in communications addressed to English-speaking countries.

[63] On the purpose of this rule, see Series C, No. 18–I, p. 1041. See also §482, *infra*.

[64] In 1932, when applications were addressed to the Court by the Czechoslovak Government's agent-general before the Mixed Arbitral Tribunals, the Court directed the Registrar to obtain the confirmation by the Czechoslovak Government of the appointment of its agent before the Court. Series E, No. 9, p. 164. *Cf.*, Series C, No. 68, pp. 240–1.

[65] On this topic see, generally, E. M. Borchard, "Access of Individuals to International Courts," 24 American Journal of International Law (1930), pp. 359–365; B. de Geöcze, "*Les*

has prevailed in some circles to say that progress in international law requires its extension to include individuals among its subjects, and upon this premise it has been contended that access to the Court should be accorded to individuals. Historical support for this contention is usually found in the provisions relating to the International Prize Court proposed in 1907, in the jurisdiction exercised by the Central American Court of Justice from 1908 to 1918, and in the work of the Mixed Arbitral Tribunals set up by the Peace Treaties of 1919–20.[66] A philosophical justification of the contention, also, is found in the modern revolt against dualism. A practical approach to the problem reveals no imperative need for a permanent international tribunal to which individuals may bring their claims against States. Claims tribunals are frequently inter-State tribunals; even where they are directly open to individuals, they usually have a special character which would seem to indicate that they cannot easily be generalized. Moreover, many States would probably be reluctant to confer jurisdiction upon any international tribunal which would permit them to be sued by individuals; and at any rate until a strictly inter-State tribunal has been established on firm and lasting foundations, the attempt to overcome such reluctance might be postponed.

In spite of the exclusion effected by Article 34, individuals have on numerous occasions sought to approach the Court with claims against Governments;[67] in the earlier years, these claims were usually based upon provisions of the Peace Treaties of 1919–20, and they were frequently made by persons who possessed no nationality. In response, it is the practice of the Registrar to refer to the provision in Article 34 of the Statute.[68]

personnes privées sont-elles sujets de droit international," 12 *Revue de Droit International* (1934), pp. 119–134; Denis Schulé, *Le droit d'accès des particuliers aux juridictions internationales* (1934); S. Séfériadès, *Le problème de l'accès des particuliers à des juridictions internationales*, in 51 *Recueil des Cours* (1935), pp. 5–117; S. Segal, *L'individu en droit international positif* (1932); T. Sobolewski, "*La Cour permanente de Justice internationale et les droits et intérêts des particuliers*," 38 *Revue de Droit International Public* (1931), pp. 420–437; Jean Spiropulos, *L'individu en droit international* (1928); Georges Ténékidès, *L'individu dans l'ordre juridique international* (1933).

[66] Reference might also be made to the Mixed Tribunals created by conventions interdicting the slave trade which functioned in the first half of the nineteenth century, and to the arbitral tribunal created by the German-Polish Upper Silesia Convention of May 15, 1922.

[67] Series E, No. 1, p. 155; No. 3, p. 109; No. 5, p. 163; No. 7, p. 191; No. 8, p. 158; No. 9, p. 86; No. 11, p. 72; No. 13, p. 85; No. 15, p. 59.

[68] The Kunter petition which came before the Court in 1922 was transmitted to the Secretary-General of the League of Nations "with an official request that it should be circulated to the members of the Council." Series D, No. 2, pp. 225, 533–5. This procedure was indefensible.

§420. Espousal of Nationals' Claims. Although the Court is not open to individuals, claims by individuals espoused by the States of which they are nationals may be presented to the Court as the claims of such States.[69] When a State espouses a claim of its national against another State, it makes that claim its own, and when it advances the claim in an international tribunal it appears as claimant and it proceeds primarily on the basis of its own rights. In the first *Mavrommatis Case* in 1924, the Court declared that "once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter, the State is sole claimant," and it appears "asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law." [70] In the *Panevezys Case*, the Court recalled a rule of law that "in taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law." [71] The conduct of the case, so far as the Court is concerned, is entirely in the hands of the claimant State itself; hence, no question can arise as to the representation before the Court of the individual whose claim is espoused.[72] Yet it is not uncommon for States presenting the claims of their nationals before international tribunals to be represented by counsel or even by agents who had previously been employed by the individuals concerned.[73]

In the *Serbian Loans Case* the Court was confronted with the necessity of determining whether claims made by French bond-holders against the Serb-Croat-Slovene Government had been espoused by the French Government. The special agreement in that case[74] referred to a dispute between the former Government and the French bond-holders, and set forth their opposing views; according to its strict terms, the controversy submitted to the Court did not appear to be a dispute between the two

[69] In the *Pázmány University Case*, the Court said that "the fact that a judgment was given in a litigation to which one of the parties is a private individual does not prevent this judgment from forming the subject of a dispute between two States capable of being submitted to the Court, in virtue of a special or general agreement between them." Series A/B, No. 61, p. 221. See §67, *supra*.

[70] Series A, No. 2, p. 12. *Cf.*, *idem*, p. 63.

[71] Series A/B, No. 76, p. 16. See also the discussion in the *Losinger Case*, Series C, No. 78, pp. 25, 122, 129, 146–8, 286, 292, 331.

[72] In the 1920 Committee of Jurists it seems to have been agreed that "the right of a private individual, associated with his Government in a suit, to have an agent of his own, is a domestic question concerning the individual and the Government." Minutes of the 1920 Committee of Jurists, p. 340.

[73] In the *Electricity Company Case*, the Belgian agent was assisted by counsel who had represented the Company through its long contest with the Bulgarian Government.

[74] See Series C, No. 16–III, p. 292. *Cf.*, §421, *infra*.

Governments, and the Court found that it was "exclusively concerned with relations between the borrowing State and private persons." Yet the French Government had intervened with the Serb-Croat-Slovene Government, and a "difference of opinion" had arisen between the two Governments "which, though fundamentally identical with the controversy already existing between the Serb-Croat-Slovene Government and its creditors, is distinct therefrom." It was held that this "difference of opinion" between the two States had been submitted to the Court.[75]

In cases in which a State is espousing a claim of its national, difficult questions may arise as to the reparation found to be due. The claimant State must seek reparation for the injury caused by the infringement of its own rights. The act for which responsibility is attributable to the respondent State may have caused both injury to the applicant State and injury to the latter's national, but the injury to the applicant State is not the same as the injury which its national may have suffered. Rights of States and rights of individuals are on different planes; reparation for a violation of the rights of a State will be governed by the rules of international law applicable to inter-State relations, while reparation for the violation of the rights of an individual may be governed by national law. In calculating the indemnity payable as reparation for an injury done to a State, however, international tribunals frequently take account of the injuries suffered by the State's national, and in many cases the indemnity awarded is made to correspond with the extent of the national's injury.[76] The Court has summarized the whole matter in a striking paragraph in its judgment in the *Chorzów Case*.[77] The possibility is also to be noted

[75] Series A, No. 20, pp. 17–8. In a dissenting opinion Judge Pessôa stressed the fact that the French Government was proceeding on behalf of unidentified French nationals. *Idem*, pp. 64–5.

[76] A definite money indemnity was awarded by the Court only in the *Wimbledon Case*, Series A, No. 1, in which France, Great Britain, Italy and Japan were applicants, and in which it was held that Germany should "compensate the French Government" for the loss sustained by a French company.

[77] "It is a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured State have suffered as a result of the act which is contrary to international law. This is even the most usual form of reparation; it is the form selected by Germany in this case and the admissibility of it has not been disputed. The reparation due by one State to another does not however change its character by reason of the fact that it takes the form of an indemnity for the calculation of which the damage suffered by a private person is taken as the measure. The rules of law governing the reparation are the rules of international law in force between the two States concerned, and not the law governing relations between the State which has committed a wrongful act and the individual who has suffered damage. Rights or interests of an individual the violation of which rights causes damage are always in a different plane to rights belonging to a State, which rights may also be infringed by the same act. The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the reparation due to the State." Series A, No. 17, pp. 27–28.

that a State may have agreed with another State to make a payment to the latter's national and, in such cases, jurisdiction may have been conferred upon an international tribunal to order the specific performance of the obligation. This was recognized by the Court when it said, in the *Chorzów Case*, that "international law does not prevent one State from granting to another the right to have recourse to international arbitral tribunals in order to obtain the direct award to nationals of the latter State of compensation for damage suffered by them as a result of infractions of international law by the first State." [78] Where a respondent State has been ordered to pay damages to an applicant State which had espoused the claim of its national, no attempt has been made by the Court to deal with the question of any payment over by the applicant State to its national. In the *Chorzów Case*, the Court reserved for a future judgment "the conditions and methods for the payment of the compensation." [79]

§421. Espousal of Claims of Non-Nationals. Various proposals were made to the 1920 Committee of Jurists that a State should be permitted to bring before the Court claims made on behalf of nationals of another State in cases in which "it is entitled by treaty to appear," and provisions in the Minorities Treaties were referred to in this connection; [80] but the Statute is silent on the point. As a general rule a State may not espouse the claims of non-nationals in the absence of special treaty provision.[81] In the *Wimbledon Case*, the four applicant States, desiring an interpretation of a provision in the Treaty of Versailles, sought reparation for a loss sustained by a French company; the Court ordered a payment to be made by Germany to the French Government.[82] In the *Pless Case*, the German Government relied upon Article 72 of the German-Polish Convention of May 15, 1922, in espousing against Poland a claim of a "Polish national of German race and language"; [83] the Court raised the question *proprio motu*, but gave no decision on it.[84]

[78] *Idem*, p. 28. [79] Series A, No. 17, p. 64. *Cf.*, *idem*, p. 96.

[80] Minutes of the 1920 Committee of Jurists, pp. 327, 566, 578–80, 723. Article 12, paragraph 3, of the Polish Minorities Treaty of June 28, 1919, goes very far in this connection. *Cf.*, Article 44, paragraph 3, of the Peace Treaty of Lausanne of July 24, 1923. See Judge Huber's comment in the case relating to *Minorities in Upper Silesia*, Series A, No. 15, p. 50.

[81] See the judgment in the *Panevezys Case*, Series A/B, No. 76, p. 16. The special agreement in the *Serbian Loans Case* submitted to the Court a dispute which had to do with the interests of bondholders of various nationalities, and the Court's judgment dealt with the rights of bondholders "whatever their nationality may be." Series A, No. 20, p. 48. Judge Pessôa characterized the case as one "on behalf of persons unknown and anonymous." *Idem*, p. 65.

[82] Series A, No. 1, pp. 8, 33. [83] Series C, No. 70, p. 10.

[84] Series A/B, No. 52, p. 15.

§422. International Organizations before the Court in Advisory Proceedings. In a draft of Rules of Court proposed in 1922,[85] it was suggested that notice of requests for advisory opinions should be sent "to such States and international organizations as are likely to be able to furnish material for the investigation of the question." At an early stage in the drafting of the Rules, also, Judge Anzilotti "drew attention to the question whether the views of the organizations of the League of Nations should be had when the Court was giving an advisory opinion upon a point of interest to them." [86] Article 73 of the 1922 Rules provided for notice of requests to be given "to any international organizations which are likely to be able to furnish information on the question." [87] In 1926, this was changed to a provision for notice "by special and direct communication" to any international organization considered by the Court (or its President) "as likely to be able to furnish information on the question, that the Court will be prepared to receive within a time limit to be fixed by the President written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question." This latter text was incorporated in Article 66 of the revised Statute. Article 67 of the revised Statute also refers to notice to be given to the representatives of "international organizations immediately concerned" (Fr., *organisations internationales directement intéressés*), this expression having been previously employed in Article 74 of the 1926 Rules. It would seem that an international organization not notified by the Court might ask to be heard.[88] The term "international organization" was never precisely defined in this connection; in 1924 Judge Anzilotti referred to it as an "unhappy expression" which had been adopted to avoid mention of the International Labor Office,[89] and he sought to have the term defined, but he refrained from pressing this proposal in 1926 because he thought difficulties could be avoided so long as the initiative rested with the Court.[90] Some disposition existed to embrace only official organizations in the term, but this limit cannot be said to have been established;

[85] This draft was framed by the provisional secretariat furnished to the Court by the Secretariat of the League of Nations. Series D, No. 2, p. 269.

[86] *Idem*, p. 98.

[87] This text left open the question as to who should select the organizations. But see Series D, No. 2 (add.), p. 282.

[88] Series E, No. 3, p. 225 An international organization may ask to be heard even before the Court's notices have been despatched. See Series C, No. 12, p. 263.

[89] Series D, No. 2 (add.), p. 290. The concluding paragraph of Article 26 of the Statute, providing that the International Labor Office shall be at liberty to furnish the Court with all relevant information, is primarily applicable to contentious cases. See §409, *supra*.

[90] Series D, No. 2 (add.), pp. 224–5.

in later years there was a tendency to give the term a broad interpretation, but it was thought not to cover a national political organization.[91]

The practice of the Court took its directions from experience in connection with the earlier advisory opinions relating to labor questions, and the Court seems to have been influenced by the tripartite character of the International Labor Organization to admit participation by unofficial international organizations. In 1922, in its first case, the Court decided to hear the representative of any international organization which within a fixed period of time expressed the desire to be heard; but it was later explained that this decision did not cover organizations purely national in character.[92] Notice of the request which led to the Court's first advisory opinion was communicated to three trade-union organizations, two of which participated in the oral proceedings. Notice of the request which led to the Court's second advisory opinion was sent to international organizations dealing both with labor and with agriculture; oral statements were made on behalf of the International Labor Office, the International Agricultural Commission, and the International Federation of Trades Unions, and information was supplied by the International Institute of Agriculture.[93] In connection with the request for an advisory opinion concerning the *Competence of the International Labor Organization* to propose legislation affecting the employer, notice was sent to the International Labor Organization. the International Organization of Industrial Employers, the International Federation of Trades Unions, and the International Confederation of Christian Trades Unions,[94] all of which participated in the hearings before the Court.[95] In the case relating to the *Exchange of Greek and Turkish Populations*, notice was sent to the Mixed Commission at Constantinople.[96] In the *Danube Commission Case* it seems that no notice was given to the European Commission of the Danube. In the *Greco-Turkish Agreement Case*, notice was sent to the Mixed Commission for the Exchange of Greek and Turkish Populations

[91] Series D, No. 2 (3d add.), p. 702.

[92] Series C, No. 1, pp. 5, 449. Yet the Court seems to have received a written statement emanating from a national organization.

[93] The second advisory opinion referred to a letter addressed to Vice-President Weiss on behalf of a national French organization, the text of which is reproduced in Series C, No. 1, p. 481.

[94] On the selection of these organizations, see Series C, No. 12, pp. 259–62.

[95] The International Federation of Trades Unions suggested that the Court hear experts whom it would produce, but after the Court had agreed to hear them the Federation decided not to produce them. Series C, No. 12, pp. 269, 287.

[96] In this case the Registrar suggested to the Secretary-General of the League of Nations that the President of the Mixed Commission should be warned that he might be requested to appear before the Court, but no such request was made. Series C, No. 7–I, pp. 233–4, 245.

through the Secretary-General of the League of Nations; the Commission informed the Registrar that it would be represented before the Court by its president if the Court saw fit to hear its views, but the Court did not consider it necessary to summon the Commission's representative.[97] In the *Greco-Bulgarian Communities Case*, the Council included in its resolution an invitation to the Greco-Bulgarian Mixed Commission to hold itself at the disposal of the Court for the purpose of furnishing information; the President of the Greco-Bulgarian Mixed Emigration Commission went to The Hague, and placed himself at the disposal of the Court, and some questions were addressed to him.[98] The request for an opinion in the case concerning *Danzig and the International Labor Organization* was communicated to the International Labor Office, which was represented in the oral proceedings before the Court. In the case concerning *Railway Traffic between Lithuania and Poland*, notice was sent to the Advisory Committee for Communications and Transit of the League of Nations, and its president appeared before the Court.[99] Notice of the request for an advisory opinion relating to the *Employment of Women during the Night*, was sent to the International Labor Organization, the International Federation of Trade Unions, the International Confederation of Christian Trade Unions and the International Organization of Industrial Employers, and the first three of these organizations participated in the written and oral proceedings.[1] In several cases documents have been sought by the Court directly or indirectly from such international bodies as the Conference of Ambassadors at Paris.[2] This practice would seem to leave the Court a free hand in deciding as to its admitting official or unofficial international organizations to appear before it.

§423. Individuals in Advisory Proceedings. The question may be raised whether the Court might not in some cases permit individuals to furnish it with information concerning questions submitted to it for advisory opinions. Down to 1936, its Rules provided that international organizations considered by the Court as likely to be able to furnish information on such questions might present written or oral statements relating to the questions, though no basis for that provision was to be

[97] Series B, No. 16, p. 7.
[98] Series B, No. 17, p. 10. *Cf.*, Series C, No. 18–I, pp. 1044–50. The questions addressed to the President of the Mixed Commission were embodied in an Order. *Idem*, p. 1077.
[99] Series A/B, No. 42, pp. 110–1. *Cf.*, Series C, No. 54, pp. 424–5, 447–9.
[1] Series A/B, No. 50, p. 367.
[2] Series B, No. 8, p. 15; No. 9, p. 8.

found in the Statute. If Article 34 of the Statute was no barrier to such appearance by international organizations in advisory proceedings, it would seem possible for the Court to have said, down to 1936 at any rate, that national organizations and even individuals might likewise appear to furnish information in advisory proceedings.[3] After 1936, the point is more doubtful, for the new Article 66 of the Statute regulates advisory proceedings in such detail that the Court would probably be more reluctant to accord the privilege of furnishing information to individuals. This was appreciated in the drafting of the resolution of December 14, 1939, by which the Council of the League of Nations authorized a request to the Court for an advisory opinion concerning questions relating to certain claims advanced by ex-officials of the Governing Commission of the Territory of the Saar Basin; a paragraph was included in the resolution by which the League of Nations renounced the right to present to the Court the written and oral statements provided for by Article 66 of the Statute, if the same possibility could not be given to the individual ex-officials who were the claimants, and the resolution provided for an exchange of statements between the claimants and the Secretary-General to precede the submission of the request to the Court.[4] This may be thought to have been an excess of caution, however, in view of the actual precedent of 1935 in the case relating to the *Danzig Legislative Decrees;* when the request for an advisory opinion was being formulated in that case, the Council's *rapporteur* had raised the question whether the Court's procedure excluded the possibility of its receiving information from the persons who had petitioned against the Danzig decrees, and the Secretariat of the League of Nations had given the assurance that "the Court could seek information from any quarter it chose and could, therefore, call for evidence from the petitioners."[5] When the request had been submitted to the Court, the Registrar wrote to the Secretary-General of the League of Nations, in accordance with the instructions of the President of the Court, requesting that the authors of the petition be informed through the appropriate channel that if they desired to supplement the statement contained in the petition, the Court would be prepared to

[3] Under Article 50 of the Statute individuals could be called upon as experts, in advisory as in contentious cases.

[4] League of Nations Official Journal, 1939, pp. 502–3.

[5] Series C, No. 77, p. 249. The Court has not heard witnesses or experts in any advisory proceeding; but in 1926 it was willing to hear experts in the *Personal Work of the Employer Case.* Series C, No. 12, p. 287.

receive an explanatory note from them.[6] The petitioners acting as representatives of political parties in Danzig presented two documents to the Court,[7] but they did not ask to be represented in the oral proceedings.[8]

[6] It is so put in the Registrar's telegram of October 14, 1935, but the letter of the same date to which the telegram refers is to a somewhat different effect. Series A/B, No. 65, p. 43; Series C, No. 77, p. 262.

[7] *Idem*, pp. 120–144, 270, 271.

[8] In a dissenting opinion, Judge Anzilotti found an inequality resulting from the fact that "the three minority parties were only allowed to send explanatory notes without taking any part in the oral procedure." Series A/B, No. 65, p. 65. In Series E, No. 14, p. 161, it is said that the Court "decided that the terms of the Statute and Rules precluded it from hearing the petitioners." See also Series D, No. 2 (3d add.), pp. 701–2.

CHAPTER 19

THE JURISDICTION OF THE COURT

§424. Provisions in the Covenant. The Statute of the Court is the primary instrument determining the sources and the scope of the Court's jurisdiction. While it is entirely independent of the Covenant of the League of Nations, account must be taken of the fact that the Statute opens with the provision in Article 1 that "a Permanent Court of International Justice is hereby established, in accordance with Article 14 of the Covenant of the League of Nations." This indicates the intent of the framers of the Statute to follow the indications of Article 14 of the Covenant, at any rate to the extent that contrary indications were not included in the Statute itself. Article 14 envisaged a Court (1) which should be "competent to hear and determine any dispute of an international character which the parties thereto submit to it"; and (2) which might "also give an advisory opinion upon a dispute or question referred to it by the Council or by the Assembly." These provisions must be said to have been incorporated by reference into Article 1 of the Statute; but the question arises whether their effect is modified by other provisions to be found in the Statute. The provision in Article 36 of the Statute that "the jurisdiction of the Court comprises all cases which the parties refer to it" is broader than the provision in Article 14 of the Covenant that the Court "shall hear and determine any dispute of an international character which the parties thereto submit to it." It would seem that the limitation of "international character" which prevailed in the Covenant is negatived by Article 36 of the Statute, for the general should prevail over the more restrictive provision. However, "international character," as the term is used in Article 14 of the Covenant, may involve no more than the necessity of an inter-State dispute; if so, the same limitation is embodied in Article 34 of the Statute.[1] The text of the original Statute contained no express reference to advisory opinions, however, and the Court's advisory jurisdiction originally depended on

[1] *Serbian Loans Case* (1929), Series A, No. 20, p. 17.

the incorporation in Article 1 of the Statute of the provision in Article 14 of the Covenant that the Court might "also give an advisory opinion upon any dispute or question referred to it by the Council or Assembly." When Articles 65–68 were added to the Statute in 1936, their effect was merely to lay down the procedure to be followed in the Court's exercise of a power which it had previously possessed under Article 14 of the Covenant as incorporated in Article 1 of the Statute.

Articles in the Covenant other than Article 14 can hardly be said to serve directly as bases of the Court's jurisdiction. The reference in Article 1 of the Statute is not broad enough to cover them, nor does the general relation of the Court to the League of Nations effect their incorporation in the Statute. The texts of the Articles do not bring them within the category of "matters specially provided for in treaties and conventions in force." By the original text of Article 12 of the Covenant, the Members of the League agreed that if there should arise between them any dispute likely to lead to a rupture they would submit the matter either to arbitration or to inquiry by the Council; in 1924, the alternative of judicial settlement was added. By the original text of Article 13, the Members agreed that whenever any dispute should arise which they recognized to be suitable for submission to arbitration and which could not be satisfactorily settled by diplomacy, they would submit the whole subject-matter to arbitration; certain disputes were declared to be "generally suitable" for such submission, but the Members remained free to make their own appreciation. Nor was this freedom curtailed in 1924 when the alternative of judicial settlement was added and a new paragraph was inserted in Article 13 providing that "for the consideration of any such dispute" the submission should be to the Permanent Court of International Justice or "any tribunal agreed on by the parties to the dispute or stipulated in any convention existing between them." Neither in their original nor in their amended form [2] did Article 12 and Article 13 contain any definite engagement conferring jurisdiction on the Court, therefore.[3] In line with the obligations assumed in Articles 12 and 13, many Members of the League took part in a subsequent extension of the law of pacific settlement, but the Articles do not operate automatically to confer any jurisdiction on the Court.

[2] The amendments were said to be "merely drafting amendments" at the time they were proposed. Records of Second Assembly, Plenary, pp. 698, 827; *idem*, Committees, I, pp. 33–4.

[3] Yet in 1920 the Council of the League of Nations proposed as Article 33 of the Court's Statute a provision that "the competence of the Court shall be regulated by Articles 12, 13 and 14 of the Covenant." Minutes of the Council, 10th session, p. 161.

§425. The Protocol of Signature. The Protocol of Signature of December 16, 1920, provides that the signatories declare their acceptance (Fr., *déclarent reconnaître*) of the Statute of the Court, and that "consequently," they "declare that they accept the jurisdiction of the Court in accordance with the terms and subject to the conditions" of the Statute.[4] At first glance this language creates an impression that a party to the Protocol of Signature necessarily accepts, *i.e.*, confers on the Court, some measure of jurisdiction, but an analysis of the provisions of the Statute tends to dissipate the impression. Article 36 of the Statute provides that "the jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force"; it then proceeds to make provision for declarations recognizing the Court's compulsory jurisdiction. If a State has not made such a declaration, and if it is not a party to a "treaty or convention in force" which provides a matter for the Court's cognizance, it is not obligated by the Statute to refer any case to the Court; hence its acceptance of the "jurisdiction of the court in accordance with the terms and subject to the conditions" of the Statute does not operate to subject it to the Court's power. Indeed that acceptance 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, including of course the advisory jurisdiction. A party to the Protocol of Signature is not bound by its acceptance of the Statute to make any use of the Court, or to submit to the Court's exercise of contentious jurisdiction in any dispute in which it may be involved. By becoming a party to the Protocol of Signature, therefore, a State merely consents to the Court's functioning under the Statute.

The language used in the Protocol of Signature may have a meaning, however, in connection with the powers which are incidental to the Court's exercise of the jurisdiction which may be conferred upon it. Thus, if two States are before the Court by reason of a special agreement, they will have to submit to the Court's exercise, incidentally to its exercise of the jurisdiction conferred by the special agreement, of any of the powers for which the Statute provides; "in accordance with the terms

[4] This provision may have been due to a provision in the resolution adopted by the Assembly of the League of Nations on December 13, 1920, that upon the coming into force of the Statute "the Court shall be called upon to sit in conformity with the said Statute in all disputes between the Members or States which have ratified, as well as between the other States to which the Court is open under Article 35, paragraph 2, of the said Statute." Records of First Assembly, Plenary, p. 500.

of the Statute," the Court may allow intervention by a State not a party to the special agreement, it may indicate provisional measures of interim protection, and it may entertain a request to construe the judgment which it has previously given. In this limited sense a party to the Protocol of Signature may be said to have conferred jurisdiction upon the Court. Perhaps it should be added that under the last paragraph of Article 36 of the Statute signatories of the Protocol of Signature have conferred upon the Court power to decide disputes as to whether it has jurisdiction.

§426. Provisions in the Statute. Article 36 of the Statute provides three ways in which jurisdiction may be conferred on the Court: (1) by the reference of a case (Fr., *affaire*) by the parties, *i.e.*, by the parties to the dispute; (2) by a special provision in a treaty or convention in force; and (3) by a declaration recognizing the Court's jurisdiction "as compulsory *ipso facto* and without special agreement." These are merely ways in which States may proceed to confer jurisdiction on the Court. The last paragraph of Article 36 goes further, however, in providing directly for the Court's possessing a sort of obligatory jurisdiction to decide any dispute (Fr., *contestation*) as to whether it has jurisdiction; indeed it goes so far that some limits must be set upon the jurisdiction which it confers. Article 37, providing a special implementing of certain treaties or conventions in force, must be separately considered. Articles 62 and 63 confer jurisdiction on the Court, obligatory so far as parties before it are concerned, to allow intervention in proceedings which have been instituted.

Various other articles in the Statute relate to the Court's exercise of jurisdiction conferred upon it, and give it powers which are incidental to such exercise. Thus Article 41 gives the Court power to indicate provisional measures of interim protection; Article 48 gives it power to make orders for the conduct of a case; Article 53 empowers the Court to give a decision even in the absence of a party; Articles 60 and 61 give it power to construe or revise its previous judgments.[5] Judge Anzilotti has referred to Article 60 as containing "a clause establishing the compulsory jurisdiction of the Court for a certain category of disputes." [6]

§427. Article 37 of the Statute. Article 37 of the Statute provides that "when a treaty or convention in force provides for the reference of a matter to a tribunal (Fr., *juridiction*) to be instituted by the League of

[5] Article 63 of the 1936 Rules also provides for the Court's entertaining direct counterclaims in proceedings instituted by means of an application.

[6] Series A, No. 13, p. 23.

Nations, the Court will be such tribunal." This text raises some difficult questions, as well in its application to treaties and conventions in force when the Statute became operative in 1921 as in its application to treaties and conventions brought into force subsequently.[7] In both cases it has the appearance of an attempt by the parties to one international instrument to give a definite meaning to provisions in other international instruments the parties to which may be different. The subcommittee of the Third Committee of the First Assembly intended the provision to take "into account all the cases which under the Peace Treaties, were to be referred to the 'jurisdiction instituted by the League of Nations.'" [8] With respect to such cases, however, the parties to the Protocol of Signature and Statute were not competent to lay down an obligatory method of carrying out provisions in the peace treaties,[9] for certain States were parties to the latter which did not immediately become parties to the Protocol of Signature. Perhaps there is less difficulty in saying that the League of Nations itself was bound to carry out provisions in the peace treaties as Article 37 directed, for the Assembly's approval of the draft Statute and the Council's adoption of it may have constituted Article 37 as the established method for their carrying out the provisions of the peace treaties; [10] yet doubtless these bodies could at a later time have set up a tribunal or a jurisdiction other than the Court. No case arose under the provisions in the peace treaties to test the application of the provision in Article 37 of the Statute; in the *Wimbledon Case* in 1923 the applicant States relied on Article 386 of the Treaty of Versailles and Article 37 of the Statute as the foundations of the Court's jurisdiction, but the jurisdiction was not contested by Germany.[11] So far as future treaties or conventions are concerned it seems improbable that provision will frequently be made for reference of matters "to a tribunal to be instituted by the League of Nations." [12] The conclusion would seem to

[7] It was apparently intended to be applicable to future treaties and conventions. Records of First Assembly, Committees, I, p. 384.

[8] *Idem*, pp. 382, 533–4.

[9] In the Treaty of Versailles, Article 336 referred to "the tribunal instituted for this purpose by the League of Nations;" Article 337 to "the tribunal of the League of Nations"; Article 376 prescribed the settlement of certain disputes "as provided by the League of Nations"; Article 386 referred to "the jurisdiction instituted for the purpose by the League of Nations." Reference may also be made to Articles 297, 298 and 328 of the Treaty of St. Germain, to Articles 281, 282, 293, 311 of the Treaty of Trianon, and to Articles 225, 226, 245 of the Treaty of Neuilly.

[10] *Cf.*, Records of First Assembly, Committees, I, p. 317.

[11] On January 28, 1922, the German Government had suggested that the dispute be brought before the Court as the jurisdiction envisaged in Article 386 of the Treaty of Versailles. Series C, No. 3 (additional volume), p. 38. See also, *idem*, pp. 29–30, 139–40.

[12] But see Article 38 of the Convention on the Statute of the Danube of July 23, 1921, 1 Hudson, International Legislation, p. 681; and Article 66 of the Agreement on Special Services at the Iron Gates of June 28, 1932, 6 *idem*, p. 47.

follow, therefore, that Article 37 is not an important source of the Court's jurisdiction.[13]

§428. General Limits on the Court's Jurisdiction. The jurisdiction of the Court is subject to certain general limitations, and the Court may proceed either *proprio motu* or upon a party's suggestion to require their observance.

(1) *Assumption of Jurisdiction.* The Court has taken the view that it should assume jurisdiction only when "the force of the arguments militating in favour of it is preponderant"; but that the mere "fact that weighty arguments can be advanced to support the contention that it has no jurisdiction cannot of itself create a doubt calculated to upset its jurisdiction." [14] Even where some doubt exists, it is not clear that jurisdiction must be declined.

(2) *Consent of the Parties.* The Court has repeatedly declared that its jurisdiction "depends on the will of the parties," [15] or "on the consent of the respondent," [16] and that jurisdiction exists "only in so far as States have accepted it." [17] No particular form is required for the manifestation of a State's consent. The previous conclusion of a formal special agreement (*compromis*) is not necessary, and a party's agreement in the course of the proceedings that the Court should decide the case is sufficient. Nor is any express declaration required. Consent may be established by proof of acts, even by acts performed after the proceeding in question has been instituted; [18] the act of asking "for a decision on the merits, without making reservations as to the question of jurisdiction," or the act of submitting arguments on the merits without such a reservation may be sufficient to indicate a State's consent so as to establish the Court's jurisdiction.[19] Opinion has been divided, however, on the question whether the mere absence of objection on the part of a respondent is sufficient to indicate its consent to the assumption of jurisdiction. In the first *Mavrommatis Case*, the Court was willing to exercise jurisdiction on the basis of a protocol ratified after the proceeding had been insti-

[13] See Å. Hammarskjöld's comment on the Article, in 42 *Revue générale de droit international public* (1935), pp. 653–8.

[14] In the *Chorzów Case*, Series A, No. 9, p. 32.

[15] Series A, No. 15, p. 22; *idem*, No. 17, p. 37.

[16] Series A, No. 2, p. 16.

[17] Series A, No. 9, p. 32.

[18] *Minorities in Upper Silesia Case*, Series A, No. 15, p. 24.

[19] The Court's judgment No. 4, interpreting its judgment No. 3, was based on jurisdiction derived from an "agreement between the parties," which was found to result from the request for interpretation by the Greek agent and the submission of a memorandum which did not contest the jurisdiction by the Bulgarian agent. Series A, No. 4, p. 6.

See the discussion under the rubric *forum prorogatum* in Series D, No. 2 (3d add.), pp. 69–72, 155–60.

tuted;[20] and as to certain questions it asserted jurisdiction "in consequence of an agreement between the parties resulting from the written proceedings."[21] In the *Société Commerciale Case*, the Court acted *proprio motu* when it inquired into its jurisdiction to adjudicate on the Belgian submissions; no objection had been made by Greece to the changed submission of the Belgian Government, but as the Greek agent had asked for a decision on the merits, the Court found that the parties had agreed upon its jurisdiction.[22] It is to be noted that in most of the cases which have arisen there had been an agreement and its effect was merely extended by consent. Yet where without any previous agreement whatever a respondent proceeds to defend on the merits and asks judgment in its favor, its action might be regarded by the Court as "an unequivocal indication" of a willingness that the Court take jurisdiction.[23] Once consent has been given, it cannot be withdrawn during the Court's exercise of the jurisdiction consented to; possibly it could be withdrawn, however, "if the applicant had, in the subsequent proceedings, essentially modified the aspect of the case."[24]

(3) *Subject-Matter of the Dispute.* The Court envisaged in Article 14 of the Covenant was to be competent "to hear and determine any dispute of an international character"; paragraph 1 of Article 36 of the Statute extends the Court's competence to "all cases" (Fr., *toutes affaires*) referred to it by the parties and to "all matters" (Fr., *tous les cas*) specially provided for in treaties or conventions in force. "International character," as the term is used in the Covenant, would seem to involve the necessity of an inter-State dispute. If this is all it involves, the expression has no more limiting effect than Article 34 of the Statute, and under Articles 34 and 36, the subject-matter of a dispute which may be brought before the Court is not limited if the States which are parties to the dispute have agreed to the submission.[25] Is there a limitation, however, in that the dispute must be one to which international law

[20] Series A, No. 2, p. 34.

[21] Series A, No. 5, p. 27. The Court would doubtless be reluctant to allow "an understanding between the representatives of the interested Governments reached in the course of the [advisory] proceedings to serve, as a kind of special agreement, initiating a contentious proceeding." Series A/B, No. 45, p. 87.

[22] Series A/B, No. 78, p. 174. *Cf.*, *idem*, p. 183.

[23] Series A, No. 12, p. 24. See, however, the dissent of Judge Huber in Series A, No. 15, pp. 52, 53, insisting that "the absence of a plea to the jurisdiction does not create jurisdiction." See also Series D, No. 2 (3d add.), pp. 69–72, 155–60.

[24] *Minorities in Upper Silesia*, Series A, No. 15, p. 25. In this case it was held that consent evidenced by the filing of a counter-case dealing with the merits was not invalidated by an objection contained in a rejoinder.

[25] See Judge Pessôa's dissent in Series A, No. 20, p. 62.

applies? In the *Serbian Loans Case*, the Court's "true function" was declared to be "to decide disputes between States or Members of the League of Nations on the basis of international law," [26] but it was said that "Article 38 of the Statute cannot be regarded as excluding the possibility of the Court's dealing with disputes which do not require the application of international law." [27] The Court has also described itself as the "organ" of international law,[28] and as "a tribunal of international law." [29] Yet it is "bound to apply municipal law when circumstances so require," [30] and there would seem to be "no dispute which States entitled to appear before the Court cannot refer to it." [31] In the *Free Zones Case*, it was thought that a settlement of such matters as tariff exemptions was "not a question of law," but depended upon "the interplay of economic interests"; and that "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 two States." [32] Article 32 of the Constitution of the International Labor Organization seems to present a difficult problem in this connection; it would confer on the Court a competence to "indicate the measures, if any, of an economic character which it considers to be appropriate, and which other Governments would be justified in adopting against a defaulting Government." This provision antedates the drafting of the Court's Statute, and possibly Article 26 of the Statute may be taken to incorporate it by reference; yet express authority for such an "indication" is not to be found in the Statute, and if the case should arise, the Court might hesitate to embark upon an exercise of competence under Article 32.

Questions involved in a dispute may be "abstract" questions; [33] in some cases at any rate, *e.g.*, where the Court is asked to decide *ex aequo et bono*, they may be "political" questions, though that category is one of changing content. A dispute concerning "pure matters of fact" may be brought before the Court, and "the facts the existence of which the Court has to establish may be of any kind." [34]

[26] *Idem*, p. 19.
[27] *Idem*, p. 20.
[28] Series A, No. 7, p. 19.
[29] Series A, No. 21, p. 124.
[30] *Ibid.* See §555, *infra*. It may also give an advisory opinion which would involve its examination of municipal legislation. *Danzig Legislative Decrees Case*, Series A/B, No. 65, p. 50.
[31] Series A, No. 15, p. 22. See, however, the observations of Judge Kellogg, Series A, No. 24, pp. 37, 41, 43.
[32] Series A/B, No. 46, p. 162.
[33] Series A, No. 7, p. 18. In the *Memel Case*, the Court drew attention to the "inconvenience resulting from" the formulation of questions "purely *in abstracto*," though it seems to have admitted the propriety of the parties' seeking an interpretation of the Statute of Memel merely "as a guide for the future." Series A/B, No. 49, pp. 311, 337.
[34] *Serbian Loans Case*, Series A, No. 20, p. 19.

(4) *Other Constitutional Limits.* Even where the parties have given their consent and have presented to the Court a proper subject-matter, jurisdiction can be exercised by the Court only within the framework of its Statute. The Court would not be justified, even at the request of the parties, in attempting to go outside of the limits set by its own constitution. For instance, a judgment of the Court could not be given by less than the required number of judges;[35] nor could a judgment be given which was not to be binding on the parties. In the *Free Zones Case* the Court declared that "special agreements whereby international disputes are submitted to the Court should henceforth be formulated with due regard to the forms in which the Court is to express its opinion according to the precise terms of the constitutional provisions governing its activity"; and on the ground that it could not "on the proposal of the parties, depart from the terms of the Statute," it refused to communicate to the parties "unofficially" indications as to the results of its deliberations.[36] It also refused to give a judgment "which either of the parties may render inoperative";[37] later it was said "after mature consideration" that "it would be incompatible with the Statute, and with its position as a Court of Justice," for the Court "to give a judgment which would be dependent for its validity on the subsequent approval of the parties."[38] Nor is it possible for the parties to place before the Court alternatives from which it will be limited to a selection. The Court "cannot be bound by formulas chosen by the parties concerned, but must be able to take an unhampered decision";[39] it cannot be "compelled to choose between constructions determined beforehand none of which may correspond to the opinion at which it may arrive."[40]

(5) *Previous Negotiations.* It cannot be laid down as a general condition of the jurisdiction of the Court that prior to their coming before the Court the parties must have conducted negotiations with a view to the settlement of their differences and that such negotiations must have failed to produce an agreement between them. Where a proceeding is

[35] In the *Serbian Loans Case*, the French agent seems to have proposed an agreement between the parties to consider the available judges, of a number less than nine, as constituting the Court. Series C, No. 16–III, p. 808.

[36] Series A, No. 22, p. 12.

[37] Series A, No 24, p. 14.

[38] Series A/B, No. 46, p. 161. The special agreement in the *Serbian Loans Case* provided that after the Court's judgment had been given the Serb-Croat-Slovene Government would enter into negotiations with the bondholders. Series C, No. 16–III, p. 294. The special agreement in the first *Lighthouses Case* also provided for later negotiations which might be followed by an arbitration. Series C, No. 74, p. 12.

[39] Series A, No. 13, pp. 15–6.

[40] Series A, No. 22, p. 15. See also Series A/B, No. 46, p. 138.

begun under a special agreement, it is improbable that occasion would arise for applying such a principle; nor can it be formulated with reference to proceedings begun by application. Article 13 of the Covenant provides for the settlement of disputes "which cannot be satisfactorily settled by diplomacy," and the 1920 Committee of Jurists proposed to confer on the Court jurisdiction over disputes which "it has been found impossible to settle . . . by diplomatic means" (Fr., *par la voie diplomatique*);[41] but no such provision was retained in the Statute. Article 36, paragraph 2, envisages a compulsory jurisdiction over certain classes of "legal disputes" (Fr., *differends d'ordre juridique*), and where this provision is relied upon as the basis of the Court's jurisdiction it may be necessary to show that a dispute had arisen before the proceeding was instituted; but in its earlier years at any rate the Court was not disposed to require any specific manifestation of disagreement, and it did not in all cases require proof of previous diplomatic negotiations. Of course treaty provisions may restrict the Court's jurisdiction to disputes "which it may not have been possible to settle by diplomacy."[42]

In the *Mavrommatis Case*, the Court's jurisdiction rested on Article 26 of the Palestine mandate which applied only if the dispute "cannot be settled by negotiation" (Fr., *ne serait pas susceptible d'être réglé par des negociations*). On this point it was said: "The Court realises to the full the importance of the rule laying down that only disputes which cannot be settled by negotiations should be brought before it. It recognizes, in fact, that before a dispute can be made the subject of an action at law, its subject-matter should have been clearly defined by means of diplomatic negotiations. Nevertheless, in applying this rule, the Court cannot disregard, amongst other considerations, the views of the States concerned, who are in the best position to judge as to political reasons which may prevent the settlement of a given dispute by diplomatic negotiation."[43] A *dispute* was said to be "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons," and the Court refused to lay down any rule as to the extent of the exchanges required between the parties.[44] In the *German Interests in Upper Silesia*

[41] Minutes of the 1920 Committee of Jurists, pp. 725–6. The Committee thought that "it would be inadmissible for a State to bring a direct action against another State before the Court without having previously attempted to settle the case by friendly means."

[42] This language was employed in the Belgian-Bulgarian Treaty of June 23, 1931. See Series A/B, No. 77. See also the treaty of December 14, 1935 between Denmark and Yugoslavia, Series E, No. 14, p. 306; the treaty of July 24, 1937 between Iran and Iraq, Series E, No. 15, p. 248.

[43] Series A, No. 2, p. 15.

[44] *Idem*, pp. 11, 13. Judge Moore thought that a dispute involved "a pre-existent difference," and "that the government which professes to have been aggrieved should have

Case, the Court's jurisdiction rested on Article 23 of the Geneva Convention of May 15, 1922, which provided for the submission of "differences of opinion" (Fr., *des divergences d'opinion*); the Court thought that "even if, under Article 23, the existence of a definite dispute were necessary, this condition could at any time be fulfilled by means of unilateral action on the part of the applicant party," and a "difference of opinion" was said to exist "as soon as one of the Governments concerned points out that the attitude adopted by the other conflicts with its own views." [45] Hence it was thought that "the absence of diplomatic negotiations" did not "prevent the bringing of the action," and was "of no practical importance." [46] In the *Chorzów Case*, the Court construed the term "dispute" (Fr., *contestation*) in Article 60 of the Statute, holding that "the manifestation of the existence of the dispute in a special manner, as for instance by diplomatic negotiations, is not required"; [47] it added, however, that "it would no doubt be desirable that a State should not proceed to take as serious a step as summoning another State to appear before the Court without having previously, within reasonable limits, endeavoured to make it quite clear that a difference of views is in question which has not been capable of being otherwise overcome." In the *Phosphates Case* jurisdiction depended on declarations made under paragraph 2 of Article 36 of the Statute, and the Italian declaration of September 7, 1931 applied only "if a solution through the diplomatic channel . . . should not be reached" (Fr., *où une solution par la voie diplomatique . . . n'interviendrait pas*); in its preliminary objection the French Government contended that certain questions had not been investigated through diplomatic channels, but the Court found it unnecessary to deal with the point.[48] In the *Electricity Company Case*, two bases existed for the Court's jurisdiction—the Belgian-Bulgarian Treaty of June 23, 1931, and declarations made by Belgium and Bulgaria under paragraph 2 of Article 36 of the Statute: the Treaty provided for the Court's jurisdiction only over a dispute "which it may not have been possible to settle by

stated its claims and the grounds on which they rest, and that the other government should have had an opportunity to reply, and if it rejects the demands, to give its reasons for so doing." *Idem*, p. 61. *Cf.*, Series A/B, No. 77, p. 132.

[45] Series A, No. 6, p. 14.

[46] *Idem*, p. 22. Count Rostworowski thought that a difference of opinion should "take the form of an official controversy," which "far from being a mechanical juxtaposition of two individual opinions, constitutes the mutual confronting of these opinions in the form of diplomatic steps taken by the two Governments." *Idem*, p. 36.

[47] Series A, No. 13, p. 10.

[48] Series A/B, No. 74, pp. 17, 29. Judge Cheng thought that the condition set by the Italian declaration had not been fulfilled.

diplomacy"; the Bulgarian declaration of July 29, 1921 accepted the Court's compulsory jurisdiction "unconditionally," while the Belgian declaration of September 25, 1925 accepted the jurisdiction for certain "disputes" without express mention of diplomatic negotiations. The Bulgarian Government argued that one of the Belgian contentions was inadmissible because it related to a claim which had not formed the subject of a dispute prior to the filing of the Belgian application; in upholding this position, the Court said that under either the Treaty of 1931 or the declarations made by the two States, it was necessary to prove that a dispute had arisen before the filing of the application, and in the absence of such proof the Court refused to entertain the Belgian application insofar as it related to that contention.[49] If this view had been taken by the Court in 1925, a different result might have been reached in the case relating to *German Interests in Upper Silesia.*

§429. Disputes as to the Court's Jurisdiction. The Statute provides in Article 36, paragraph 4, that "in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court" (Fr., *en cas de contestation sur le point de savoir si la Cour est compétente, la Cour décide*). The provision is not limited to disputes arising with reference to the Court's jurisdiction under paragraph 2 of Article 36, though the history of its drafting indicates that such a limit was originally intended;[50] the Court is competent to decide a question as to its jurisdiction under (1) a special agreement (*compromis*), (2) a treaty or convention in force, or (3) a declaration made under paragraph 2 of Article 36. The English and French versions might be thought to point to somewhat different results, for *dispute* and *contestation* are not precise equivalents. Conceivably the dispute may have no relation to a case before the Court for a decision on the merits. The principal office to be served by paragraph 4 of Article 36 may be to foreclose any possible contention that the Court is incompetent to go on with a proceeding because one party contests its jurisdiction; it is in itself a provision for obligatory jurisdiction, limited to disputes as to jurisdiction.[51] It

[49] Series A/B, No. 77, p. 83. Some of the dissenting judges agreed on this point.

[50] In Article 34 of the draft-scheme of the 1920 Committee of Jurists, the final paragraph applied to "a dispute as to whether a certain case comes within any of the categories abovementioned."

[51] The question may be raised as to the possibility of varying the effect of paragraph 4 by a bipartite treaty. The Greek-Rumanian treaty of March 21, 1928, which conferred on the Court jurisdiction over legal disputes, provided (Article 5) that any question as to whether a particular dispute was a legal dispute should be submitted to the Council of the League of Nations. 108 League of Nations Treaty Series, p. 187.

does not in any way restrain the Court's acting *proprio motu* to raise and decide questions as to its jurisdiction.

§430. Objections to the Court's Jurisdiction. The Statute makes no procedural provision for a party's objecting to the Court's jurisdiction. The matter was discussed in 1922,[52] but no such provision was included in the 1922 Rules. When the British Government advanced a preliminary objection to the jurisdiction in the *Mavrommatis Case* in 1924, the Court found itself "at liberty to adopt the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with the fundamental principles of international law."[53] Article 38 of the 1926 Rules made provision for preliminary objections, generally,[54] in proceedings begun by means of an application;[55] this provision was modified in Article 62 of the 1936 Rules. The chief question to be regulated related to the time for advancing a preliminary objection. Article 38 of the 1926 Rules required it to be "filed after the filing of the case by the applicant and within the time fixed for the filing of the counter-case";[56] Article 62 of the 1936 Rules requires it to "be filed at the latest before the expiry of the time-limit fixed for the filing by the party submitting the objection of the first document of the written proceedings to be filed by that party." In the earlier years there was some disposition within the Court to say that an objection to the jurisdiction might also be submitted not as a preliminary objection but as an objection made in the course of the proceedings on the merits;[57] but a party which thus postpones its objection incurs a risk of being found to have consented to the jurisdiction by participating in the proceedings on the merits. In the *Minorities in Upper Silesia Case*, after having filed a counter-case in which no objection or reservation was made as to the jurisdiction,

[52] Series D, No. 2, pp. 201–3, 213–4, 489–90, 494.

[53] Series A, No. 2, p. 16.

[54] The discussion of Article 38 was chiefly concerned with objections to jurisdiction, however. Series D, No. 2 (add.), pp. 78–94.

[55] Article 38 did not apply to the rare case of an objection to the jurisdiction advanced in a proceeding under a special agreement. Series D, No. 2 (3d add.), p. 820. Such an objection was made in the *Borchgrave Case*, Series A/B, No. 72.

[56] In the case relating to *German Interests in Upper Silesia*, in 1925, a preliminary objection was filed before any "document of procedure upon the merits had been filed." Series A, No. 6, p. 15.

[57] In 1926 Judge Moore thought it possible that "a State, being unable to foresee all the facts and arguments put forward by the other side, might find itself confronted, in the middle of the proceedings, with the necessity of raising an objection to the jurisdiction." Series D, No. 2 (add.), p. 88. In 1928 Judge Huber said that "the disputes as to the jurisdiction provided for under the last paragraph of Article 36 of the Statute are not necessarily, except in particular circumstances, preliminary pleas." Series A, No. 15, p. 50.

Poland advanced such an objection in its rejoinder; but the Court held that the jurisdiction had been implicitly accepted by the filing of the counter-case, and that the acceptance was not invalidated by the objection made in the rejoinder.[58]

In passing upon an objection to its jurisdiction, the Court may find it necessary to separate different questions presented to it; this was done in the *Mavrommatis Case*,[59] in the case relating to *German Interests in Upper Silesia*,[60] and in the case relating to the *Electricity Company of Sofia*.[61] The Court may also find it necessary to consider questions relating to the merits before objections to jurisdiction can be disposed of. In the earlier years, the Court sometimes continued to deal with objections even though it was necessary to deal with questions relating to merits.[62] In the *Pless Case*, the objection was joined to the merits; [63] Article 62(5) of the 1936 Rules expressly envisaging this course was relied upon in the *Pajzs Case*,[64] in the *Losinger Case*,[65] and in the *Panevezys-Saldutiskis Railway Case*.[66]

§431. Jurisdictional Questions Raised by the Court. Even in the absence of an objection by a party, the Court would seem to have a duty to assure itself that jurisdiction exists. Its jurisdiction is not necessarily determined by the parties' contentions,[67] and it must guard against stepping outside the bounds of its statutory competence even though the danger is not pointed out by a party. As it was put by Judge Urrutia, "it is not only the right but the duty of the Court *ex officio* to make sure of its jurisdiction, that is of its power to take cognizance of a case in accordance with the texts governing the said jurisdiction." [68] The duty is expressly imposed on the Court, in cases in which a party fails to appear or defend, by Article 53 of the Statute. In the *Serbian Loans Case*, the special agreement seemed "at first sight" to ask for a departure from principles laid down by the Court, and for this reason special attention was given by the Court to its jurisdiction and functions in that case.[69] In the *Pless Case*, a question as to its jurisdiction was raised by the Court *proprio motu*.[70] In the *Appeals from the Hungaro-Czechoslovak Mixed*

[58] Series A, No. 15, p. 26.
[59] Series A, No. 2, p. 29.
[60] Series A, No. 6, pp. 25–6.
[61] Series A/B, No. 77, p. 84.
[62] See Series A, No. 6, p. 15.
[63] Series A/B, No. 52, p. 16.
[64] Series A/B, No. 66, p. 9.
[65] Series A/B, No. 67, p. 23.
[66] Series A/B, No. 75, pp. 55–6.
[67] Series A, No. 15, pp. 53–4.
[68] Series A/B, No. 77, pp. 102–3.
[69] Series A, No. 20, p. 16. See also Series A, No. 21, p. 101. In the *Wimbledon Case*, no objection was made, but the respondent left certain questions of jurisdiction to the appreciation of the Court. Series A, No. 1, p. 20.
[70] Series A/B, No. 52, pp. 15–6.

Arbitral Tribunal, the Court asked for the views of the parties on a question of jurisdiction.[71]

Under Article 32 of the 1936 Rules an application must "as far as possible, specify the provision on which the applicant founds the jurisdiction of the Court." If this requirement should not be met, it would seem that the Court should at once raise the question of its jurisdiction; [72] even if the requirement be met, it ought to be possible for the Court acting *proprio motu* to examine the sufficiency of the basis of jurisdiction set out before the application is transmitted to the intended respondent.[73] However, Article 33 of the 1936 Rules requires the Registrar to "transmit forthwith to the party against whom the claim is brought a copy of the application"; [74] the fact that the State against which the application is brought might be willing to accept the Court's jurisdiction may be a justification of this provision.[75] The Registrar's transmission of a copy of the application to the intended respondent does not necessarily commit the Court, but in a doubtful case the transmission ought to be delayed until the Court has had opportunity to instruct the Registrar. The intended respondent may proceed to defend on the merits, in which case it may be held to have consented to the jurisdiction; or it may file a preliminary objection and thus require the Court to consider the question of jurisdiction; or it may do nothing, in which case it risks a decision in favor of the applicant under Article 53 of the Statute provided that the Court can satisfy itself that it has jurisdiction under Articles 36 and 37 of the Statute and that the claim is well founded in fact and law. When the application by Liechtenstein in the *Gerliczy Case* was filed in 1939, it was forthwith transmitted to Hungary though the application disclosed the possibility of a question as to the Court's jurisdiction.

§432. Intervention.[76] Apart from the sources of jurisdiction set out in Articles 36 and 37 of the Statute, the Court may acquire jurisdiction

[71] Series C, No. 68, pp. 262, 292.

[72] Series D, No. 2 (3d add.), pp. 156, 869.

[73] In the Supreme Court of the United States certain proceedings may be instituted against states of the United States only after leave to file the initial pleading has been granted. In *Monaco* v. *Mississippi* (1934) 292 U. S. 313, a rule for Mississippi to show cause why the leave should not be granted was issued; this rule was discharged after Mississippi made its return, and the leave was not granted See also Article 19 of the draft on *Competence of Courts* by the Harvard Research in International Law, in 26 American Journal of International Law (Supp., 1932), pp. 676–684.

[74] *Cf.*, Article 15 of the 1938 Instructions for the Registry. Series E, No. 14, p. 30.

[75] See Series D, No. 2 (3d add.), pp. 67–9, 845.

[76] On this subject, see Wadie M. Farag, *L'Intervention devant la Cour Permanente de Justice Internationale* (Paris, 1927); Wilhelm Friede, "*Die Intervention im Verfahren vor dem Ständigen Internationalen Gerichtshof*," 3 *Zeitschrift fur ausländisches öffentliches Recht und Völkerrecht* (1932), pp. 1–67.

as a result of a State's intervention under Article 62 or under Article 63 of the Statute, or possibly under both articles.[77] Article 62 provides that a State which considers that "it has an interest of a legal nature which may be affected by the decision in the case" (Fr., *estime que dans un différend un intérêt d'ordre juridique est pour lui en cause*), may request "to be permitted to intervene as a third party," [78] and that "it will be for the Court to decide upon this request." The Court's decision will depend in the first instance upon the establishment of the "interest of a legal nature which may be affected by the decision in the case," [79] but permission might be denied even though such an interest be shown.[80] Article 62 was drafted at a time when it was proposed to confer on the Court a general obligatory jurisdiction, and the text was not modified when that proposal was later rejected. If two States are before the Court by reason of declarations made under paragraph 2 of Article 36 of the Statute, it would seem to be a derogation from the condition of reciprocity in their declarations to allow intervention by a third State which has made no similar declaration; the situation is not essentially different, however, when two States are before the Court under a special agreement and it allows intervention by a third State which is not a party to the agreement.[81]

The precise character of the "interest of a legal nature" to be established for intervention under Article 62 is uncertain; it would seem to require a special interest, in addition to a State's general interest in the development of international law.[82] Article 64 of the 1936 Rules, like Article 58 of the 1922 Rules, provides that a request for permission to intervene under Article 62 of the Statute must take the form of an application (Fr., *requête*); as the parties must have opportunity to present their observations with reference to it, the application introduces a preliminary and independent proceeding, in which the Court's decision is to be given in the form of a judgment. The application must be filed "at latest before the commencement of the oral proceedings" in the

[77] Series D, No. 2, p. 151.

[78] The French version includes no equivalent of the phrase "as a third party."

[79] The restriction in Article 59 of the Statute must be borne in mind in this connection.

[80] See Series D, No. 2, p. 349.

[81] Series D, No. 2, pp. 86–97, 381–2. The General Act for the Pacific Settlement of International Disputes of September 26, 1928, expressly provides (Articles 36 and 37) for intervention in terms analogous to Articles 62 and 63 of the Statute; similar provision was included in the models of bipartite conventions proposed by the Ninth Assembly of the League of Nations. Records of Ninth Assembly, Plenary, pp. 496, 502, 506. See also Article 34 of the Belgian-Czechoslovak Convention of April 23, 1929. 110 League of Nations Treaty Series, p. 113.

[82] But see Series D, No. 2, pp. 86–91.

principal case.[83] If the request is granted, the intervenor becomes a party to the pending case, on a footing with the other parties;[84] it will be permitted to take part in the pending proceedings, and it may take an independent role without siding with any original party. If the application to intervene is not opposed, Article 65 of the 1936 Rules provides for the possibility of the intended intervenor's taking part in the written proceedings even before the intervention has been allowed. Under Article 59 of the Statute the Court's decision will have "binding force" for the intervenor.

Under Article 63 of the Statute, whenever a case involves the construction of a convention[85] to which States other than those concerned in the case are parties (Fr., *ont participé*),[86] the Registrar should notify all such States, and every State so notified has the right to intervene in the proceedings. By Article 66 of the 1936 Rules,[87] the notification is to be sent to each "party to a convention invoked in the special agreement or in the application as governing the case referred to the Court."[88] In identifying the parties to a convention, the Registrar is guided by information which he may be able to obtain from the Government or from the institution with which the convention was deposited[89] or from other sources;[90] in case of doubt, the notification is not made. If a party to the convention is not notified, however, it may file with the Registry a declaration of intention to intervene, and the Court will decide after giving the parties before it opportunity to state their observations. For a time, the Registrar's practice was to say in the notification that the State was entitled to intervene, but the later practice calls

[83] Prior to 1936, the Rules provided that the Court might "in exceptional circumstances, consider an application submitted at a later stage."

[84] No limitation has resulted from the phrase "as a third party," employed in the English version of Article 62 of the Statute.

[85] The term *convention* seems here to imply that there are more than two parties to the instrument.

[86] It would seem to be not enough for a State merely to have participated in the conference which drew up the convention. Series E, No. 12, p. 198. Such a State may have a legal interest in the question before the Court, however. *Cf.*, Series C, No. 60, p. 277. Nor is it enough for a State to be a signatory if ratification was necessary to bring the convention into force. Series D, No. 2 (add.), p. 160.

[87] Article 60 of the 1926 Rules was similar in effect.

[88] The convention may also be invoked in a preliminary objection. Series C, No. 68, pp. 264–5; Series E, No. 9, p. 176. In the *Chinn Case*, the *compromis* referred to "international obligations" generally, without invoking any specific convention, but in contemporary letters the Registrar was apprised of the invocation of provisions in the Convention of St. Germain of December 10, 1919, and Article 63 of the Statute was applied on this basis. Series C, No. 75, pp. 8, 345–6, 349.

[89] Series D, No. 2 (3d add.), pp. 309–10.

[90] In the *Phosphates Case*, the Registrar compiled from "British and Foreign State Papers" a list of the parties to the Act of Algeciras of April 7, 1906. Series C, No. 85, p. 1350.

merely for a notification that the convention is "in question," with a reference to Article 63 of the Statute.[91] The action by the Registrar does not necessarily commit the Court, either to allowing or to excluding the intervention.[92] Perhaps Article 63 may be considered as a special application of the general principle laid down in Article 62, and the fact that a State is a party to a convention to be construed may be regarded as establishing that State's legal interest so that a judgment by the Court will not ordinarily be required.[93]

The Rules have not expressly set a time-limit for filing a declaration of intention to intervene under Article 63, but in practice a limit might have to be set. By exercising the right conferred by Article 63, a State becomes a party before the Court in the pending case insofar as the proceeding relates to the construction of the convention, and the construction given by the judgment will be binding upon it; but apparently it does not become a party generally for all purposes. It is not a case of "true intervention," therefore.[94] The intervening party is entitled to inspect the documents only "in so far as they relate to the interpretation of the convention in question," and under Article 66 of the 1936 Rules it may take but a limited role in both the written and the oral proceedings.

States may agree, in advance, that they will exercise the right of intervention conferred upon them by the Statute.[95] No procedure exists, however, for compelling a State to become a party when it has not agreed to the Court's having jurisdiction. On the other hand, the parties to a special agreement cannot exclude the possibility of intervention by States which are not parties to it.

The Court's experience with intervention has been very limited. On May 22, 1923, Poland presented an application for permission to intervene on the side of the applicant States in the *Wimbledon Case;*

[91] See Series C, No. 85, p. 1350.

[92] Series E, No. 12, p. 198. In the *Free Zones Case*, "States Parties to the Treaty of Versailles were not specially notified under Article 63 of the Statute, which was considered as inapplicable." Series A/B, No. 46, p. 100. In this case, the Registrar sent notice to various States, including most of the parties to the Treaty of Versailles and a few States not parties, to the effect that his communication to them of a copy of the Franco-Swiss special agreement was not to be considered a notification under the terms of Article 63 of the Statute; he added, however, that it was open to each of these States "to inform the Court of its desire to intervene under Article 63 of the Statute, in which case the Court will have to take a decision upon the point." Series C, No. 17–I, p. 2400. The Polish Government protested against the position taken, but without expressing a desire to intervene. *Idem*, pp. 2423, 2429. See also Series E, No. 7, pp. 299–300.

[93] Series D, No. 2 (3d add.), pp. 779–80.

[94] Series D, No. 2 (add.), pp. 159–60; Series D, No. 2 (3d add.), p. 780.

[95] Such a provision was proposed at the sixth session of the Conference on Private International Law in 1928. *Actes de la Sixième Session*, p. 233.

reference was made to Article 62 of the Statute, it being stated that the cargo of the *Wimbledon* had been destined to the Polish Government, and that the action taken by Germany had violated rights and material interests assured to Poland by Article 380 of the Treaty of Versailles, to which Poland was a party.[96] In observations on the Polish application, the British agent contended that as a special notification had been addressed to Poland as provided for by Article 63 of the Statute, the Polish intervention should be based on Article 63 and not on Article 62.[97] In reply, the Polish Agent contended that Poland had a legal interest as the owner of the cargo; in the oral proceedings, he stated that while Poland did not withdraw its application it would not insist on placing its intervention under Article 62 but would avail itself of its right under Article 63, and would not ask for special damages.[98] None of the parties to the case objected to the intervention, and by a judgment of June 28, 1923, the Court "recorded" that the Polish Government intended to avail itself of its right to intervene under Article 63 and "accepted" the intervention; in the *desiderata* of the judgment, the Court took note of the facts (1) that the interpretation of certain clauses of the Treaty of Versailles was involved in the suit, and (2) that Poland was a party to that Treaty.[99]

In 1931 the Government of Iceland notified the Court that Iceland had an interest of a legal nature which might be affected by the decision in the *Eastern Greenland Case;* but the Court was later informed that after inquiry the Government of Iceland had found that there was not sufficient reason to proceed to an intervention in the case.[1]

In advisory proceedings there is less need for intervention in the strict sense of the term because of the provisions, first included in the Rules and later incorporated in the Statute, with reference to the Court's receiving information from States which are willing to furnish it. Articles 62 and 63 of the Statute were in force when the Court formulated Article 73 of the 1926 Rules, which later served as the model for Article 66 of the revised Statute. Moreover, under the new Article 68 of the revised Statute, the Court may apply Article 62 and 63 by analogy if it "recognizes them to be applicable."[2] In 1923, before the amendment of the Statute, Rumania sought to be permitted to be heard by the Court in the *Polish Nationality Case*, relying upon Articles 62 and 63 of the Statute;

[96] Series C, No. 3, Vol. I, p. 102.
[97] *Idem*, p. 106.
[98] *Idem*, pp. 9, 109, 116.
[99] Series A, No. 1, pp. 11–13. *Quaere*, whether a judgment was necessary for this purpose?
[1] Series C, No. 67, pp. 4081–2, 4118–9.
[2] See Series D, No. 2 (3d add.), p. 794.

the President replied that Articles 62 and 63 were not applicable, but that under Article 73 of the 1922 Rules Rumania would be permitted to furnish information.[3] In 1930, in the case relating to *Danzig and the International Labor Organization*, on analogy to Article 63 all of the parties to the Constitution of the International Labor Organization were sent the special and direct communication provided for in paragraph 1 of Article 73 of the 1926 Rules.[4] A similar procedure was followed in the *Austro-German Customs Régime Case* in 1931 [5] and in later cases.[6]

§433. Interim Protection. Article 41 of the Statute confers on the Court power "if it considers that circumstances so require," to indicate "any provisional measures which ought to be taken to reserve [preserve] the respective rights of either party"; and it provides that "pending the final decision, notice of the measures suggested shall forthwith be given to the parties and the Council." Article 61 of the 1936 Rules refers to the indication of "interim measures of protection." [7] This power may be exercised by the Court *proprio motu* or at the request of one or more of the parties; and even in the latter case the Court may proceed independently of the request made and may go beyond the proposal of any party. In the *Southeastern Greenland Case*, after deciding to dismiss the Norwegian request for an indication, the Court considered whether it should make an indication *proprio motu*.[8] As Article 41 refers to "party" and "parties," and employs the expression "pending the final decision" (Fr., *en attendant l'arrêt définitif*), it would seem that the power exists only in respect of a dispute already submitted to the Court. This point was raised but not decided in the *Southeastern Greenland Case* in 1932.[9] In the *Polish Agrarian Reform Case*, the Court said that the essential condition of interim measures was that they "should have the effect of protecting the rights forming the subject of the dispute submitted to the Court." [10] In other words, only rights in issue are to be protected by an indication, and there can be no indication in advance of the institu-

[3] Series C, No. 3, Vol. III, pp. 1089–90. See also Series B, No. 7, p. 9.
[4] Series C, No. 18–II, pp. 239–40.
[5] Series C, No. 53, pp. 756–7.
[6] Series C, No. 54, p. 436; Series C, No. 55, p. 419; Series C, No. 56, p. 427. In 1932 in the case relating to *Employment of Women during the Night*, special and direct communication was made to parties to the Convention of 1919; Germany was not a party but was permitted to file a statement at its own request, on the ground that it had a legal interest in the question before the Court by reason of its having participated in the negotiation of the Convention and by reason of the fact that its ratification of the Convention was still in contemplation. Series C, No. 60, pp. 253, 264–5, 277–8.
[7] For an explanation of this phrase, see Series D, No. 2 (2d add.), pp. 253–4.
[8] Series A/B, No. 48, pp. 287–9.
[9] *Idem*, pp. 283–4.
[10] Series A/B, No. 58, p. 177.

tion of a proceeding.[11] Nor is jurisdiction to indicate provisional measures dependent upon a previous determination of the Court's jurisdiction to deal with the case on the merits.[12]

The purpose to be served by an indication of provisional measures is "to preserve the respective rights of the parties pending the decision of the Court." [13] They are designed to afford protection to the parties in the interim until a final disposition of the case; hence the 1936 Rules refer to "interim protection" and to "interim measures" (Fr., *mesures conservatoires*). In the *Electricity Company Case*, the Court declared that Article 41 of the Statute "applies the principle universally accepted by international tribunals . . . that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute." [14] In the *Southeastern Greenland Case*, it was contended that the Court might indicate interim measures "for the sole purpose of preventing regrettable events and unfortunate incidents"; but the Court found it unnecessary to go so far, as in both countries the state of mind and intentions were found to be "eminently reassuring," and it thought that even action calculated to change the legal status of the territory would not in fact have irreparable consequences, for which no legal remedy would be available.[15]

The power conferred on the Court by Article 41 is to "indicate" [Fr., *indiquer*] measures which ought to be taken. The term *indicate*, borrowed from treaties concluded by the United States with China and France on September 15, 1914, and with Sweden on October 13, 1914,[16] possesses a diplomatic flavor, being designed to avoid offense to "the susceptibilities of States." [17] It may have been due to a certain timidity of the draftsmen. Yet it is not less definite than the term *order* would have been, and it would seem to have as much effect.[18] The use of the term does not attenuate the obligation of a party within whose power

[11] On May 26, 1933, the German Government notified the Registrar that a proceeding would be instituted relating to the Polish Agrarian reform, and on June 30, 1933, the Registrar was notified that interim protection would be requested; but the request was filed with the application only on July 3, 1933. Series C, No. 71, pp. 136–7.

[12] See Series A/B, No. 54, p. 153; *idem*, No. 58, p. 179.

[13] Series A, No. 8, p. 6.

[14] Series A/B, No. 79, p. 199.

[15] Series A/B, No. 48, pp. 284, 288. *Cf.*, Series A, No. 8, p. 7.

[16] So-called "Bryan Treaties."

[17] Series D, No. 2 (3d add.), p. 282.

[18] Little significance is to be attached to the phrase "measures suggested" in paragraph 2 of Article 41, no equivalent of which appears in the French version.

the matter lies to carry out the measures "which ought to be taken." An indication by the Court under Article 41 is equivalent to a declaration of obligation contained in a judgment, and it ought to be regarded as carrying the same force and effect.

The judicial process which is entrusted to the Court includes as one of its features, indeed as one of its essential features, this power to indicate provisional measures which ought to be taken. If a State has accepted the general office of the Court, if it has joined with other States in maintaining the Court, or if it is a party to a treaty which provides for the Court's exercise of its functions, it has admitted the powers which are included in the judicial process entrusted to the Court. It would seem to follow that such a State is under an obligation to respect the Court's indication of provisional measures; in other words, as a party before the Court such a State has an obligation, to the extent that the matter lies within its power, to take the measures indicated. This obligation exists apart from and prior to a determination of the jurisdiction of the Court to deal with the merits of the pending case, but it ceases to be operative when a determination is made that the Court lacks such jurisdiction.[19] If State A institutes a proceeding against State B and requests the indication of provisional measures, the Court may exercise its power to indicate though State B may later advance a preliminary objection that the Court lacks jurisdiction to deal with the merits of the case, or may fail to defend its case and thereby incur the risk that the Court, having satisfied itself that it has jurisdiction and that A's claim is well founded in fact and law, will give a decision in favor of A's claim under Article 53 of the Statute.[20]

The obligation to take measures indicated by the Court clearly devolves upon any State which is a party to the Protocol of Signature of December 16, 1920, for the signatories of that Protocol "declare that they accept the jurisdiction of the Court in accordance with the terms and subject to the conditions" of the Statute. It devolves upon any State which has made a declaration accepting the jurisdiction of the Court "in conformity with Article 36 of the Statute." It devolves, also, upon any State which by becoming a party to a treaty conferring jurisdiction on the Court has recognized in a general way the nature and incidents

[19] This seems to have been taken into account in the President's order of January 8, 1927 in the Belgian-Chinese Case. Series A, No. 8, p. 7.

[20] This question has been considered by Å. Hammarskjöld, in 5 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1935), pp. 5–33; and by H. Rolin, in 2 *Mélanges Mahaim* (1935), pp 280–98.

of the Court's judicial powers, in so far as the indication may be connected with an application calling for the Court's exercise of jurisdiction under such a treaty. Moreover, numerous instruments provide for the Court's exercise of the power to indicate provisional measures and affirm the obligation of the parties to take the measures indicated; Article 33(1) of the General Act of 1928 contains such a provision,[21] as does also Article 19 of the Locarno treaties of 1925.[22]

It was suggested to the 1920 Committee of Jurists that an indication of provisional measures should "be supported by effective penalties."[23] Article 57 of the 1922 Rules provided that "any refusal by the parties to conform to the suggestions" [Fr., *indications*] should be "placed on record";[24] when the deletion of this provision was decided upon in 1931, the Court rejected a proposal that members of the Council of the League of Nations should be informed of such a refusal.[25] The provision in Article 41 of the Statute that notice of the measures suggested shall be given to the Council seems to be for the purpose of enabling the Council, if it should become necessary, to appreciate the situation created by any refusal.[26]

Article 41 confers the power to indicate upon the Court, and in view of its importance, one may doubt whether the Court should delegate the power to its President. Such delegation was effected by Article 57 of the Rules of 1922 and 1926,[27] however, and the deletion of this provision decided upon in 1931 was confirmed in 1935 only by the casting vote of the President.[28] Article 61(3) of the 1936 Rules provides, however, that pending a meeting of the Court and its decision, "the President shall, if need be, take such measures as may appear to him necessary in order to enable the Court to give an effective decision." The power thus conferred falls far short of an indication of provisional measures under

[21] Article 33(3) of the General Act also provides for parties' abstaining from any action which might aggravate the dispute; this was cited in the order of August 3, 1932 in the *South-eastern Greenland Case*, Series A/B, No. 48, p. 288.

In the *Free Zones Case*, the parties agreed to maintain an existing *de facto* situation pending the Court's decision. Series C, No. 17–I, p. 494.

[22] 54 League of Nations Treaty Series, pp. 313, 325, 337, 351.

[23] Minutes of 1920 Committee of Jurists, p. 588. See also Records of First Assembly, Plenary, pp. 455–7.

[24] Judge Nyholm had proposed a more elaborate provision. Series D, No. 2, p. 377.

[25] Series D, No. 2 (2d add.), pp. 198–200, 289, 297.

[26] The suggestion has been made that under paragraph 4 of Article 13 of the Covenant as amended a competence is conferred on the Council. Minutes of the 1929 Committee of Jurists, p. 64.

[27] Judge Rostworowski sharply criticized this delegation. Series D, No. 2 (3d add.), pp. 910–3.

[28] *Idem*, p. 289.

Article 41 of the Statute; but the provision constitutes an approval of the action taken by President Adatci in the *Pless Case* in 1933.[29]

Though the indication of interim measures has been requested in six cases, indications have been made in only two cases.

(1) In the *Belgian-Chinese Case*, the Belgian application of November 25, 1926 contained a request for an indication of provisional measures;[30] by a letter of December 20, 1926, the Registrar informed the Belgian agents of the President's decision that the circumstances did not require an indication.[31] In the Belgian memorial of January 3, 1927, the request was renewed,[32] and on January 8, 1927, President Huber issued an order indicating provisionally certain measures, pending a decision by the Court that it had no jurisdiction or a judgment on the merits.[33] When the parties later concluded an agreement on a provisional regime, the Belgian agents requested a revocation of the order of January 8, 1927, and the President effected the revocation by an order of February 15, 1927.

(2) In the *Chorzów Case*, after the Court had given a judgment dismissing Poland's preliminary objection to its jurisdiction, the German Government made a request for a provisional measure of interim protection; in its order of November 21, 1927, the Court declined to give effect to this request, regarding it as relating not to interim protection but to an interim judgment in favor of a part of the claim formulated in the German application.[34] This action was taken without inviting the Polish Government to submit observations.

(3) In the *Southeastern Greenland Case*, the Norwegian application requested an indication of provisional measures,[35] and the Danish application stated that the Danish Government reserved the right to make a similar request. After hearing the parties' agents,[36] on August 3, 1932 the Court issued an order dismissing the Norwegian request, but reserving the power to re-consider the matter *proprio motu* at a later time.[37]

(4) In the *Pless Case*, after Poland's preliminary objection that the German application was inadmissible had been joined to the merits, the German agent on May 3, 1933 requested the Court to indicate to the Polish Government that it should abstain from any measure of constraint

[29] Series C, No. 70, pp. 429–30. See Series D, No. 2 (3d add.), pp. 288–90, 778, 875–6.
[30] Series A, No. 8, p. 5.
[31] Series C, No. 16–I, pp. 305–6.
[32] *Idem*, pp. 23–4.
[33] Series A, No. 8, p. 6.
[34] Series A, No. 12.
[35] The request employed the term *order* instead of the term *indicate*.
[36] Series C, No. 69, pp. 15–49.
[37] Series A/B, No. 48.

in respect of the property of the Prince of Pless on account of income tax, contending that certain measures taken by Polish officials would irremediably prejudice the interests which formed the subject of the dispute. On May 5, 1933, President Adatci convoked the Court, and despatched a telegram to the Polish Minister of Foreign Affairs suggesting the opportunity of the Polish Government's considering the possibility of desisting from any coercive measures until a meeting and decision of the Court.[38] On May 8, 1933, the Polish Government informed the Court that certain of the measures complained of had been due to error and had been annulled, and that it would suspend other measures of constraint in respect of the income tax of the Prince of Pless until a final decision of the Court; the German Government declared this solution of the matter to be satisfactory. On May 11, 1933, the Court issued an order taking note of the declarations made by the two Governments and declaring, without pronouncing upon the question of competence, that the German request had ceased to have object.[39]

(5) In the *Polish Agrarian Reform Case*, the German agent filed with the German application a request for the indication of provisional measures "to preserve the *status quo*" until the final judgment of the Court. After hearing the representatives of the parties, the Court issued an order on July 29, 1933, dismissing the request on the ground that it was not in conformity with Article 41 of the Statute, as the pending suit related only to what had happened in the past and the request had to do with the future.[40] The question of competence was raised but not decided.

(6) In the *Electricity Company Case*, the Belgian Government requested an indication of a preliminary measure on July 2, 1938; when it later withdrew this request, the withdrawal was recorded in an order by the President. Later the Bulgarian Government presented a preliminary objection to the jurisdiction of the Court, which was upheld in part and dismissed in part.[41] On October 17, 1939, a second request was made by the Belgian Government, the Court being asked to indicate that a certain proceeding in the Bulgarian courts should be suspended until a final decision by the Court. At a meeting held for hearing the parties, the Bulgarian Government was not represented. On December 5, 1939, the Court issued an order indicating as an interim measure that while the case was pending "Bulgaria should ensure that no step of any kind is taken capable of prejudicing the rights claimed by the Belgian Gov-

[38] Series C, No. 70, p. 429.
[39] Series A/B, No. 54.
[40] Series A/B, No. 58.
[41] Series A/B, No. 77.

ernment or of aggravating or extending the dispute submitted to the Court." [42]

§434. Counter-claims.[43] The Statute makes no reference to counter-claims, but it would seem that where the Court has jurisdiction over the subject-matter of a pending proceeding it should also have jurisdiction over any counter-claim directly connected with it.[44] Article 63 of the 1936 Rules leaves this point open, however; it seems to envisage counter-claims only in cases begun by application, [45] requiring a separate application for an indirect counter-claim. In the *Chorzów Case*, a submission made by the respondent was found to be a counter-claim "juridically connected with the principal claim"; jurisdiction was rested on the agreement of the parties, but the submission was dismissed.[46] In the *Meuse Case*, a counter-claim put forward by the Belgian Government was found to be "directly connected with the principal claim"; jurisdiction was not challenged by the Netherlands Government, but the counter-claim was rejected on the merits.[47] A counter-claim presented by the Lithuanian Government in the *Panevezys Case* was not passed upon, as it was alternative to a preliminary objection which was upheld.[48]

§435. Appellate Jurisdiction. The Court is not a part of a hierarchical system which includes other inferior courts. Its jurisdiction is envisaged in the Statute only as original jurisdiction.[49] Numerous provisions have been made, however, for its dealing with disputes which concern the functioning of other tribunals.[50] In a few instances, States have agreed that the work of other tribunals will be interrupted until certain questions of substantive law may be dealt with by the Court.[51] More frequent is the

[42] Series A/B, No. 79.

[43] See, generally, Anzilotti, *La riconvenzione nella procedura internazionale*, 21 *Rivista di diritto internazionale* (1929), pp. 309–27.

[44] On the distinction between direct and indirect counter-claims, see the report of the Harvard Research in International Law, in 26 American Journal of International Law (Supp., 1932), pp. 490–3.

[45] On the impossibility of counter-claims in proceedings begun by special agreement, see Series D, No. 2, p. 139; Series D, No. 2 (3d add.), pp. 781, 848, 871.

[46] Series A, No. 17, pp. 37–8, 63–4. The Court refused to consider a submission by the applicant designed to prevent or limit a set-off by the respondent. *Idem*, pp. 60–63, 64.

[47] Series A/B, No. 70, pp. 28, 32.

[48] Series A/B, No. 76, pp. 7–9. On the procedure with respect to this counter-claim, see Series E, No. 15, pp. 114–5.

[49] In 1919 Lord Cecil (Great Britain) had envisaged an extensive appellate jurisdiction for the Court to be created. 1 Miller, Drafting of the Covenant, p. 63.

[50] Such jurisdiction was exercised under a special agreement in the *Treaty of Neuilly Case* in 1924. Series A, No. 3. The advisory opinion in the *Greco-Turkish Agreement Case* in 1928 was similar in character. Series B, No. 16.

[51] Article 36 of the International Railways Statute and Article 22 of the Maritime Ports Statute, both of December 9, 1923, provide that during the course of certain arbitrations "any question of international law or question as to the legal meaning of this Statute the solution of which the arbitral tribunal . . . pronounces to be a necessary preliminary to the

provision that disputes as to the competence of other tribunals shall be referred to it. Such disputes may arise either before or after the other tribunals have acted; [52] or the Court may be called upon to construe, or revise, or annul an award already given by another tribunal. Such other tribunal may be a national or an international tribunal.[53] No general provision exists, however, giving the Court appellate jurisdiction in the sense of enabling it to control action by inferior tribunals.

The 1929 Committee of Jurists was seized of a proposal by Simon Rundstein which was designed to draw "attention to the possibility of widening the competence of the Permanent Court as a court of appeal"; [54] the Committee drew the proposal to the attention of the Council of the League of Nations, which directed a study to be made of the subject.[55] Both the Rundstein proposal and a somewhat similar Finnish proposal [56] were considered in the Tenth Assembly of the League of Nations, and on September 25, 1929, the Tenth Assembly requested the Council to submit to examination the question: "What would be the most appropriate procedure to be followed by States desiring to enable the Permanent Court of International Justice to assume in a general manner, as between them, the functions of a tribunal of appeal from international arbitral tribunals in all cases where it is contended that the arbitral tribunal was without jurisdiction or exceeded its jurisdiction." [57] A special committee set up by the Council outlined three alternative procedures which might be followed by the Assembly for this purpose: [58] (1) a recommendation

settlement of the dispute," shall be referred to the Court. 2 Hudson, International Legislation pp. 1138, 1162.

[52] Several treaties provide for reference to the Court of questions of competence arising during the course of proceedings before an arbitral tribunal. Series D, No. 6, pp. 616, 624, 628; Series E, No. 9, p. 334. Article 21 of the Agreement relating to the European Commission of the Danube, of August 18, 1938, conferred on the Court power to deal with questions of competence and to evoke a case pending before an arbitral tribunal, in certain contingencies. 196 League of Nations Treaty Series, p. 113.

[53] Series D, No. 2, pp. 338–44.

[54] Minutes of the 1929 Committee of Jurists, pp. 75, 105. M. Rundstein referred to the precedent in Article 5 of the unratified American-British arbitration treaty of January 11, 1897. 28 Martens, *Nouveau recueil général* (2d ser.), p. 90.

[55] League of Nations Official Journal, 1929, p. 997.

[56] Records of Tenth Assembly, First Committee, pp. 82–3. In 1928, the Finnish delegation to the Ninth Assembly of the League of Nations had proposed that in arbitration conventions States should agree upon the possibility of appealing to the Court as "the highest international tribunal," when difficulties should arise in the functioning of arbitral tribunals. Records of Ninth Assembly, Plenary, p. 76. *Cf.*, the proposal by M. Undén (Sweden), *idem*, p. 38.

[57] Records of Tenth Assembly, Plenary, p. 174; *idem*, First Committee, pp. 12–9, 47–50.

[58] League of Nations Official Journal, 1930, pp. 1359–65. See also Caballero de Bedoya, "*État actuel de la Question de la Cour . . . considérée comme instance de recours*," 10 *Revue de Droit International* (1932), pp. 142–67; Erich, "*Le Projet de conférer à la Cour . . . des fonctions d'une instance de recours*," 12 *Revue de Droit International et de Législation Comparée* (1931), p. 268; Raestad, "*Le recours à la Cour . . . contre les sentences des tribunaux d'arbitrage . . .*," 13 *idem* (1932), p. 302; Rundstein, "*La Cour Permanente . . . comme instance de recours*," 43 *Recueil des Cours* (1933), pp. 1–113.

that provisions for the Court's appellate jurisdiction be inserted in arbitration treaties; (2) an invitation to States to sign a protocol giving the Court jurisdiction to annul arbitral awards vitiated because the tribunal lacked or exceeded its jurisdiction or followed an improper procedure; (3) a resolution declaring that any State contesting an award should propose the submission of the question to the Court. The Assembly showed a reluctance to act on this report, and decision was repeatedly postponed; in 1931, an interesting protocol on disputes as to the validity of arbitral awards was drawn up as a basis for discussion,[59] but the Twelfth Assembly concluded that the question "presents many aspects on which sufficient light has not yet been thrown." [60] Opinion at the time was not unanimous as to the effect of the various declarations under paragraph 2 of Article 36 of the Statute, with reference to "contests of the validity of arbitral awards."

The consideration of the proposal may have contributed to one result, however. In an agreement signed at Paris on April 28, 1930, Czechoslovakia, Hungary, Rumania and Yugoslavia recognized a "right of appeal" (Fr., *droit d'appel*) to the Court without special agreement, from all judgments on questions of jurisdiction or merits thereafter given by Mixed Arbitral Tribunals in proceedings other than those referred to in Article 1 of the Agreement.[61] An application based upon this agreement is clearly not an appeal in the strict sense of the term; the parties will be different, and the proceeding before the Court will be instituted *de novo*. When two "appeals" under the Paris Agreement were instituted by Czechoslovakia against Hungary in 1932, the Court invited the parties to submit their observations with reference to the question whether the provision in the Agreement was consistent with the constitutional provisions relating to the Court's jurisdiction;[62] such observations were submitted,[63] but the appeals were withdrawn before the Court took any decision. The question again arose when Hungary instituted an appeal against Czechoslovakia in the *Pâzmány University Case*, and the Court invited the parties to deal with it preliminarily in the oral proceedings; [64] but in its judgment the Court found it "unnecessary to go into the various problems connected with the question of the nature of the juris-

[59] Records of Twelfth Assembly, First Committee, p. 142. In the drafting of this protocol, an effort was made to "avoid any appearance of placing arbitral tribunals in a position of subordination" to the Court. *Idem*, p. 140.

[60] *Idem*, Plenary, p. 137.

[61] 121 League of Nations Treaty Series, p. 80; 5 Hudson, International Legislation, p. 436.

[62] Series C, No. 68, pp. 262, 292.

[63] *Idem*, 209–26.

[64] Series C, No. 73, pp. 763–5, 776–7, 1374–5.

diction thus conferred upon it." [65] In the *Pajzs Case*, the Court refused to entertain an "appeal" by Hungary against Yugoslavia under the provision in the Paris Agreement, on the ground that the judgments appealed against had been given in proceedings referred to in Article 1 of the Agreement.[66]

In a few isolated instances, treaties have envisaged the possibility of resort to the Court for revision of arbitral awards: thus, Article 38 of the Convention of July 23, 1921 on the Statute of the Danube,[67] Article 34 of the treaty of November 3, 1924 between Denmark and Latvia,[68] Article 19 of the treaty of February 12, 1932 between Luxemburg and Norway,[69] and Article 6 of the protocol of May 24, 1934 between Colombia and Peru.[70]

§436. Extra-Judicial Activities. The constitutional instruments relating to the Court clearly confine its activities to the discharge of judicial functions only. Hence the Court is at all times subject to the limits within which judicial action must be effected. In numerous instances, however, international instruments have provided for requests to the Court or its President [71] to assume extra-judicial functions such as the appointment of umpires or arbitrators or members of conciliation commissions.[72] On several occasions, the Court has complied with such requests.[73] In 1925, the Court prepared and submitted to the Turkish Government a list of European legal counsellors who might be selected by Turkey as judicial advisers under the Declaration of July 24, 1923; [74] in 1931, the Court appointed members of the Hungarian-Czechoslovak, Hungarian-Rumanian and Hungarian-Yugoslav Mixed Arbitral Tribunals, in accordance with an agreement signed at Paris on April 28, 1930; [75] and it later filled a vacancy in the Hungarian-Yugoslav tribunal.[76] On several occasions, also, the President of the Court has made appointments of a similar nature; on one occasion when he was consulted in

[65] Series A/B, No. 61, p. 221. [66] Series A/B, No. 68.
[67] 1 Hudson, International Legislation, p. 681.
[68] 33 League of Nations Treaty Series, p. 393.
[69] 142 *idem*, p. 29. [70] 164 *idem*, p. 21.
[71] In some cases, to the Vice-President or the oldest or ranking judge. Provision may also be made for a substitution in case the official referred to is a national of a party. *Cf.*, Article 23 of the Geneva General Act of 1928. In some cases it seems that the President may have been mistakenly referred to as the President of the Permanent Court of Arbitration. Series D, No. 6, pp. 660n, 661n.
[72] See the texts of such instruments in Series D, No. 6 (4th ed.), pp. 634–679, and in Chapter 10 of later volumes of Series E.
[73] Similar requests have also been made by individuals and non-official organizations.
[74] Series E, No. 1, pp. 151ff. [75] Series E, No. 7, p. 188.
[76] Series E, No. 8, p. 153.

advance of the conclusion of the instrument, he gave assurance that he would accept the duties envisaged if occasion should arise.[77] In a few instances, missions have been entrusted to the Court or its President by private contracts, but more hesitance may be felt about undertaking to discharge such missions.[78] Such action by the Court or its President is not in any sense an exercise of jurisdiction; it is extra-judicial action, justified by the general interest which it serves, and it involves no departure from the restrictions imposed on the Court by its judicial character.[79]

[77] Series E, No. 11, p. 70.

[78] Series E, No. 10, p. 164. Such a mission was accepted in 1934, however. Series E, No. 11, pp. 70–1.

[79] In the *Free Zones Case*, the Court recognized as binding a Swiss declaration which envisaged the possible appointment of experts by the President of the Court. Series A/B, No. 46, p. 170. *Cf.*, Series C, No. 58, p. 706.

CHAPTER 20

JURISDICTION UNDER SPECIAL AGREEMENTS AND UNDER TREATIES IN FORCE

§437. Special Agreements. Article 36 of the Statute provides that "the jurisdiction of the Court comprises all cases (Fr., *toutes affaires*) which the parties refer to it and all matters (Fr., *tous les cas*) especially provided for in treaties and conventions in force;" Article 40 mentions as the two ways in which cases are brought before the Court (1) the notification of a special agreement (Fr., *compromis*),[1] and (2) a written [2] application (Fr., *requête*).[3] *Special agreement* (*compromis*) is the term employed to describe an agreement by two or more States to submit to the Court a dispute which has already arisen relating to a defined question or questions. It may or may not be entered into in pursuance of provisions in a previous agreement relating to the jurisdiction of the Court.[4] It constitutes an "international engagement," though in practice special agreements have seldom been registered under Article 18 of the Covenant.[5] Article 40 of the Statute provides that "the subject of the dispute and the contesting parties must be indicated," but no special form seems to be required for a special agreement and the will of the parties may doubtless be expressed informally. The special agreement may be brought into force between the parties upon signature, or its entry into force may be

[1] The *compromis* mentioned in Article 40 is commonly referred to as *compromis d'arbitrage*. See, generally, H. Thévenaz, *Les compromis d'arbitrage devant la Cour Permanente de Justice Internationale* (1938).

[2] The French version contains no equivalent of the term "written."

[3] Conceivably an application might be made in reliance upon a special agreement. While the *Chorzów Case*, instituted by application, was pending before the Court, the applicant proposed to the respondent that they enter into a special agreement. Series A., No. 9, pp. 7–8; Series C, No. 13–I, pp. 159–70.

[4] A special agreement was made by Belgium and Spain in the *Borchgrave Case*, though these States had a treaty of July 19, 1927 concerning the Court's jurisdiction, though both States were bound by declarations under paragraph 2 of Article 36 of the Statute, and though both States had adhered to the Geneva General Act of 1928.

[5] The special agreements were registered with the Secretariat of the League of Nations under Article 18 of the Covenant in the *Brazilian Loans Case*, 75 League of Nations Treaty Series, p. 91; in the *Oder Commission Case*, 87 *idem*, p. 103; and in the *Chinn Case*, 154 *idem*, p. 361. An agreement for asking the Council to request an advisory opinion in the *Danube Commission Case* was also registered, 59 *idem*, p. 237.

made to depend upon later ratifications; in the latter case, proof of the ratifications, or of the exchange of ratifications, may be required.[6]

The special agreement must be notified to the Registrar of the Court. If the text authorizes one or either party to make such notification, then a notification by one party is sufficient to bring the case before the Court, provided a proper showing is made that any requirement of ratification has been fulfilled; Article 33 of the 1936 Rules requires the Registrar to inform the other party immediately that the notification has been made. If the special agreement does not provide for a notification by one party, then it would seem that the notification ought to be effected by all the parties to the special agreement;[7] possibly the Court would not be so exigent, however. Conceivably a special agreement may provide for notification to be made by some one other than the parties.[8]

The notification of the special agreement is almost invariably effected by a transmission of a copy of the text of the special agreement,[9] though Article 35 of the Rules in force down to 1936 referred to "the document notifying the Court of the agreement." Whether it is effected by one party or by all the parties, the notification of a special agreement results in placing the parties to the agreement before the Court on the same basis. Normally, neither party will be complainant and neither respondent; hence they "must have an equal opportunity reciprocally to discuss their respective contentions."[10] This may be changed, however, by the text of the agreement or by the nature of the case submitted.[11] The scope and extent of the questions upon which the Court is to decide will

[6] If all of the parties join in the notification of the special agreement, no proof of the ratification may be necessary; but in the event of a notification by one party only, evidence of ratification is required. Series C, No. 5–I, pp. 10–1; *idem*, No. 6, pp. 113–5; *idem*, No. 74, p. 404; Series E, No. 10, pp. 156–7.

[7] This statement has been made in Chapter 3 of the annual reports since 1928, *e.g.*, Series E, No. 15, p. 33.

[8] This seems to have been the purpose of a clause in the report on the Chaco dispute between Bolivia and Paraguay adopted by a Special Assembly of the League of Nations on November 24, 1934, providing that the Secretary-General of the League of Nations should "forward the present report to the Court on behalf of the Parties." League of Nations Official Journal (Supp. No. 132), pp. 43–51. See the author's discussion of this point in 29 American Journal of International Law (1935), pp. 636–40.

The Buenos Aires Protocol of June 12, 1935 having envisaged the Court's jurisdiction over certain phases of the Chaco dispute, Article 8 of the resolution embodied in the *procès-verbal* of October 2, 1935 provided that in certain eventualities the *dossier* in the case would be handed over to the Court by the President of an International Commission. League of Nations Official Journal, 1935, pp. 901, 1648.

[9] The copy is usually certified as a true copy by an official of the notifying State. In the *Treaty of Neuilly Case*, an original of the special agreement was transmitted. Series C, No. 6, p. 113.

[10] Series A, No. 23, p. 45.

[11] As in the *Chinn Case*, Series A/B, No. 63, p. 76.

depend upon the text of the special agreement, rather than upon the submissions (Fr., *conclusions*) of the parties. In the *Lotus Case* it was said that "the Court having obtained cognizance of the present case by notification of a special agreement . . . it is rather to the terms of this agreement than to the submissions of the parties that the Court must have recourse in establishing the precise points which it has to decide." [12]

§438. Contents of Special Agreements. Eleven special agreements were notified to the Court in twenty years: (1) Greece-Bulgaria, *Treaty of Neuilly Case*, March 18, 1924; [13] (2) France–Switzerland, *Free Zones Case*, October 30, 1924; [14] (3) France–Turkey, *Lotus Case*, October 12, 1926; [15] (4) Brazil–France, *Brazilian Loans Case*, August 27, 1927; [16] (5) France–Serb-Croat-Slovene State, *Serbian Loans Case*, April 19, 1928; [17] (6) Czechoslovakia, Denmark, France, Germany, Great Britain, and Sweden–Poland, *Oder Commission Case*, October 30, 1928; [18] (7) Italy–Turkey, *Castellorizo Case*, May 30, 1929; [19] (8) France–Greece, *Lighthouses Case*, July 15, 1931; [20] (9) Belgium–Great Britain, *Chinn Case;* [21] (10) France–Greece, *Lighthouses in Crete and Samos Case*, October 27, 1936; [22] (11) Belgium–Spain, *Borchgrave Case*, March 5, 1937.[23] Their terms are not uniform, but some standards can be traced in their contents. Definite questions are formulated upon which the Court is asked to give its decision. The agreement is usually subject to ratification. Notification of the agreement to the Court is provided for in most cases, and several of the agreements provide that it may be made by either party. Several of the agreements set out proposals to the Court as to the time-limits for the filing of cases and counter-cases; in the Franco-Swiss agreement, the parties assumed to fix the time-limits as to cases, counter-cases and replies. Some of the agreements provide that from one month after the expiration of the time-limits, the parties will hold themselves at the disposition of the Court. In the Italian-Turkish agreement, the Turkish Government undertook to make the declaration provided for in paragraph 2 of Article 35 of the Rules. In several instances

[12] Series A, No. 10, p. 12. *Cf.*, the *Oder Commission Case*, Series A, No. 23, pp. 17–8. But see the criticism of the Court's judgment in the *Treaty of Neuilly Case*, in 53 *Journal du Droit International* (1926), pp. 879–89.

[13] Series C, No. 6, p. 9.

[14] *Idem*, No. 17–I (vol. 2), p. 490.

[15] *Idem*, No. 13–II, p. 25.

[16] *Idem*, No. 16–IV, p. 145.

[17] *Idem*, No. 16–III, p. 292.

[18] *Idem*, No. 17–II, p. 244.

[19] *Idem*, No. 61, p. 10.

[20] *Idem*, No. 74, p. 11.

[21] *Idem*, No. 75, p. 9.

[22] *Idem*, No. 82, p. 10. It is notable that France was a party to seven of the eleven special agreements.

[23] *Idem*, No. 83, p. 10.

French was agreed upon as the language of the proceedings and judgment. Some of the agreements specially envisaged the application of the provisions of the Statute in regard to points not covered by their terms; the Italian-Turkish agreement restricts this to questions concerning procedure. The Brazilian-French agreement provided that the Court should not be bound by national jurisprudence in its appreciation of the applicable national law of either party.

In the *Free Zones Case*, the Court felt called upon to declare that special agreements should be "formulated with due regard to the forms in which the Court is to express its opinion according to the precise terms of the constitutional provisions governing its activity." [24] In that case, also, it was said that "every special agreement, like every clause conferring jurisdiction upon the Court, must be interpreted strictly"; [25] but it may be doubted whether this would be followed as a general rule, for that interpretation should be preferred which will enable the Court to accomplish the task conferred upon it.[26]

§439. Treaties and Conventions in Force. From the early stages in the drafting of the Court's Statute, it was anticipated that States would wish to make agreements concerning the Court's jurisdiction, and even before the 1920 Committee of Jurists began its work provisions for the reference of certain questions to the Court had been included in instruments of the peace settlement negotiated at Paris. The draft-scheme of the 1920 Committee of Jurists provided that the Court should "take cognizance of all disputes of any kind which may be submitted to it by a general or particular convention between the parties." [27] As amended by the Council the draft referred (Article 34) to "treaties in force" providing for the reference of disputes to the Court.[28] In the First Assembly of the League of Nations the subcommittee of the Third Committee contrasted a special agreement and a "treaty or general convention embracing a group of matters of a certain nature," [29] and its proposal became the provision in paragraph 1 of Article 36 of the Statute that "the jurisdiction of the Court comprises . . . all matters specially provided for in treaties and conventions in force." It was made clear at the time that "treaties in force" included "not only the treaties in force

[24] Series A, No. 22, p. 13.
[25] Series A/B, No. 46, pp. 138–139.
[26] Series A, No. 22, p. 13; *idem*, No. 24, p. 14. *Cf.*, *idem*, No. 21, pp. 123–4; Series A/B, No. 71, p. 120.
[27] Minutes of the 1920 Committee of Jurists, pp. 583, 680.
[28] Records of First Assembly, Committees, I, p. 488.
[29] *Idem*, p. 533.

now but at any given moment in future." [30] Adopted as a substitute for compulsory jurisdiction, the provision served to open the way for a wide extension of the Court's jurisdiction.

"Treaties and conventions" is a global expression which may apply to an international instrument of any form. No general rule is to be formulated which would require the observance of a particular formality for bringing a treaty or convention into force; neither signature nor ratification is required for all instruments.[31] It may be thought, however, that where the parties to an instrument are Members of the League of Nations, the Court would be justified in saying that the instrument is not in force until it is registered in accordance with the provision in Article 18 of the Covenant.[32] In practice, however, the Court has paid little attention to the requirements of Article 18, and it has not hesitated to assume jurisdiction under instruments not yet registered.[33]

§440. Treaties Connected with the Peace Settlement of 1919. Of the numerous treaties and conventions providing "matters" for the Court's jurisdiction,[34] the first category to be mentioned is that of the Peace Treaties of 1919–20 and the instruments connected with their execution.

(*a*) *Labor.*[35] Article 423 of Part XIII of the Treaty of Versailles and the corresponding article in other treaties of peace conferred a potentially important jurisdiction on the Court. It provided that "any question or dispute (Fr., *toutes questions ou difficultés*) relating to the interpretation" of Part XIII "or of any subsequent convention concluded by the Members in pursuance of the provisions" of Part XIII "shall be referred for decision" (Fr., *soumises à l'appreciation*) of the Court; as sixty-seven draft conventions were adopted by the International Labor Conference between 1919 and 1939, a large number of instruments was covered by

[30] *Idem*, p. 384. [31] See 1 Hudson, International Legislation, pp. xlii–lv.

[32] Article 18 has sometimes been construed to require registration as a condition to the application of the provisions of a treaty by an international organ. See Anzilotti, *Corso di Diritto Internazionale* (3d ed., 1928), pp. 340–1.

[33] In the *Mavrommatis Case*, the jurisdiction exercised by the Court was based in part upon the Lausanne Protocol on Concessions of July 24, 1923; ratifications of this instrument were deposited on August 6, 1924, but the registration was effected only on September 5, 1924, after the Court's judgment of August 30, 1924. In this case, however, not all of the parties to the Protocol were members of the League of Nations at the time. See 28 American Journal of International Law (1934), p. 552.

[34] The Court's "Collection of Texts Governing the Jurisdiction of the Court" lists 564 international instruments, but not all of them were brought into force and not all of them conferred jurisdiction on the Court. See Series D, No. 6 (1932), and addenda to the same in Series E, Nos. 8–15.

[35] See Å. Hammarskjöld, "*L'Organisation Internationale du Travail et la Cour*," 2 *Mélanges Mahaim* (1935), pp. 545–60.

this provision. The English version referred to a "decision" by the Court, and the Article may be thought to have envisaged only the contentious jurisdiction of the Court; but the International Labor Office took the view that the Article applied both to contentious and to advisory proceedings, reference being made to the "regrettable absence of coordination between Articles 14 and 423 of the Treaty of Versailles." [36]

No case has arisen calling for an interpretation of Article 423 by the Court, and it is impossible to say that any of the six advisory proceedings in labor cases was instituted under that Article; each of the cases was explainable as an exercise of the Council's power to request advisory opinions,[37] and the Court did not regard them as "labour . . . cases referred to in Part XIII" for which Article 26 of the Statute prescribes the participation of technical assessors.

By Articles 415–20 of Part XIII of the Treaty of Versailles, the Court is also given obligatory jurisdiction over disputes relating to the execution of labor conventions, or relating to the performance of the obligations imposed by Article 405; Article 418 gives the Court power to affirm, vary or reverse certain findings of a commission of enquiry, and to "indicate the measures, if any, of an economic character which it considers to be appropriate, and which other Governments would be justified in adopting against a defaulting Government." No case has arisen under these Articles.

(*b*) *Protection of Minorities.*[38] The Treaty of June 28, 1919, relating to the protection of minorities in Poland,[39] provided (in Article 12) for the Court's obligatory jurisdiction over certain disputes as to questions of law or fact between Poland and a State represented on the Council of the League of Nations. Analogous provision was included in treaties for the protection of minorities in Czechoslovakia, Yugoslavia, Rumania, and Greece; [40] in the Austrian,[41] Bulgarian,[42] Hungarian,[43] and Turkish [44]

[36] Minutes of the 1929 Committee of Jurists, pp. 102–4.

[37] In the letter by which the Director of the International Labor Office informed the Secretary-General of the decision by the Governing Body to seek an advisory opinion concerning *Danzig and the International Labor Organization*, reference was made to Article 423 of the Treaty of Versailles. Series B, No. 18, p. 9; Series C, No. 18–II, p. 148. In the Case relating to the *Convention on Employment of Women at Night*, the International Labor Office urged the view that the request for an advisory opinion had been made "in pursuance of Article 423 of the Treaty of Versailles." Series C, No. 60, p. 207.

[38] See, generally, Nathan Feinberg, "*La juridiction et la jurisprudence de la Cour . . . en matière de mandats et de minorités*," 59 *Recueil des Cours* (1937), pp. 596–607.

[39] 1 Hudson, International Legislation, p. 283.

[40] 1 *idem*, pp. 298, 312, 426, 489.

[41] Treaty of St. Germain, September 10, 1919, Article 69.

[42] Treaty of Neuilly, November 27, 1919, Article 57.

[43] Treaty of Trianon, June 4, 1920, Article 60.

[44] Treaty of Lausanne, July 24, 1923, Article 44; this text presents a slight variation from the standard.

peace treaties; in declarations concerning minorities made by Albania, Lithuania and Iraq:[45] in Article 72 of the German-Polish Upper Silesia Convention of May 15, 1922,[46] and in Article 17 of the Memel Convention of May 8, 1924.[47] The declaration made by Latvia on July 7, 1923, provides for possible requests for advisory opinions on such disputes.[48]

The provision in the Polish Minorities Treaty was relied upon by Germany in its application in the *Polish Agrarian Reform Case* in 1933;[49] that in the German-Polish Upper Silesia Convention was relied upon by Germany in its applications in the *Minorities in Upper Silesia Case* in 1928,[50] and in the *Pless Case* in 1932.[51] The provision in the Memel Convention was relied upon by the applicants in the *Memel Case* in 1932.[52]

(*c*) *Mandates*.[53] The various mandates approved by the Council of the League of Nations in pursuance of the provisions in Article 22 of the Covenant contain a standard article, as follows:[54]

> The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations.

An additional provision was included in the British mandate for East Africa, that:

> States Members of the League of Nations may likewise bring any claims on behalf of their nationals for infractions of their rights under this mandate before the said Court for decision.

[45] 1 Hudson, International Legislation, p. 733; 2 *idem*, p. 868; 6 *idem*, p. 39.

[46] Series D, No. 6, p. 559.

[47] 2 Hudson, International Legislation, p. 1265. Article 33 of the Danzig-Polish Convention of November 9, 1920 provides in Danzig a system of minority protection analogous to that in the Polish Minorities Treaty; *sed quaere*, whether the article confers jurisdiction on the Court. See 6 League of Nations Treaty Series, p. 189.

[48] League of Nations Official Journal, 1923, p. 933. See also the Estonian declaration of September 17, 1923. *Idem*, p. 1311. *Cf.*, the Åland Islands Agreement between Finland and Sweden, of June 24, 1921. League of Nations Official Journal, Special Supp. No. 5 (1921), pp. 24–6.

[49] Series A/B, No. 58, p. 175; Series C, No. 71, p. 7.

[50] Series A, No. 15, pp. 17–9; Series C, No. 14–II, p. 87.

[51] Series A/B, No. 52, p. 13; Series C, No. 70, pp. 19–20.

[52] Series C, No. 59, p. 12. Provisions in the Minorities Treaties were also before the Court in several advisory proceedings.

[53] See Feinberg, *op. cit.*, pp. 596–607.

[54] The texts of the mandates are collected in 1 Hudson, International Legislation, pp. 44–126.

The provision in the British mandate for Palestine (Article 26) was relied upon by Greece in its applications in the *Mavrommatis Cases* in 1924 and 1927. In the first of these cases the parties agreed that Article 26 of the mandate fell within the category of "matters specially provided for in treaties and conventions in force" under the terms of Article 36 of the Statute,[55] and the Court exercised the jurisdiction conferred by Article 26 with respect to certain claims made by Greece; [56] in the second case the Court upheld a preliminary objection denying the Court's jurisdiction.[57]

(*d*) *Transit and Communications.* Article 37 of the Convention on Aerial Navigation, of October 13, 1919, provided that questions in dispute as to the interpretation of the Convention should be determined by the Court.[58] In addition various articles in Part XII of the Treaty of Versailles and in corresponding parts of other treaties of peace of 1919–1920 fall under Article 37 of the Statute; provision was also made in Article 379 of the Treaty of Versailles for "general conventions regarding the international regime of transit, waterways, ports or railways," and some of the conventions later drawn up made provision for the Court's jurisdiction.[59] Article 13 of the Statute on Freedom of Transit and Article 22 of the Statute on Navigable Waterways, annexed to the Barcelona Conventions of April 20, 1921, provide for the Court's jurisdiction over disputes as to their interpretation or application; [60] and provision for possible jurisdiction of the Court was made by Articles 35 and 36 of the Statute on International Regime of Railways and by Articles 21 and 22 of the Statute on the International Regime of Maritime Ports, annexed to the Geneva Conventions of December 9, 1923.[61] Provisions as to the Court's jurisdiction are also to be found in Article 15 of the Rhine Protocol of December 18, 1929,[62] and in Article 21 of the Sinaia Agreement concerning the European Commission of the Danube of August 18, 1938.[63]

[55] Series A, No. 2, p. 11.

[56] Dissenting judges stressed the difference between the British mandate for Palestine and the British mandate for East Africa, however. Series A, No. 2, pp. 82–3, 86–7. This led to a proposal in 1925 that the Permanent Mandates Commission recommend that the jurisdictional article in the British mandate for East Africa be amended to conform to that in the other mandates. Minutes of the Permanent Mandates Commission, 6th session, pp. 55–6, 158–62.

[57] Series A, No. 11.

[58] 1 Hudson, International Legislation, p. 359.

[59] See also Article 38 of the Convention on the Statute of the Danube, of July 23, 1921.

[60] 1 Hudson, International Legislation, pp. 631, 645.

[61] 2 *idem*, pp. 1138, 1162.

[62] 5 *idem*, p. 125.

[63] 196 League of Nations Treaty Series, p. 113.

No proceeding was instituted before the Court in reliance on these jurisdictional provisions, though transit and communications questions were involved in a number of cases.[64]

§441. Instruments Concerning Pacific Settlement of Disputes Due to Activities of the League of Nations. The Geneva Protocol on Pacific Settlement of Disputes of October 2, 1924, providing for the reference of certain disputes and questions to the Court, was not brought into force;[65] it was replaced by the General Act on Pacific Settlement of Disputes of September 26, 1928, which goes further in providing for the possible jurisdiction of the Court. The General Act was acceded to by twenty-three States, mostly European States;[66] all of these States, with the exception of Turkey, also made effective declarations recognizing the Court's jurisdiction under paragraph 2 of Article 36 of the Statute. Under Article 17 of the General Act, "all disputes with regard to which the parties are in conflict as to their respective rights,"[67] and "in particular those mentioned in Article 36" of the Court's Statute, were to be submitted for decision to the Court unless the dispute was referred to an arbitral tribunal. Article 39 of the Act gives an exhaustive list of possible reservations which any State may make in acceding to the Act, and some of the acceding States availed themselves of one or more of the possibilities. States were permitted to exclude "disputes falling within clearly defined categories," and in renewing their accessions in 1939 certain States excluded disputes arising out of events occurring during a war in which they might be involved.[68]

When it drew up the General Act of 1928, the Ninth Assembly of the League of Nations also drafted three models of bilateral conventions which States were invited to consider along with the General Act;[69] two of these models contained provisions for the Court's jurisdiction identical with those in the General Act. Numerous conventions concluded during the decade following 1928 were influenced by the model conventions, and in a number of them one or the other of the models was followed

[64] See J. Hostie, "*Les affaires de communication devant la Cour*," 12 *Revue de droit international* (1933), pp. 58–129; 18 *idem* (1936), pp. 481–537; 22 *idem* (1938), pp. 105–56.

[65] 2 Hudson, International Legislation, p. 1378.

[66] 4 *idem*, p. 2529. In addition to European States, the list includes Australia, Canada, Ethiopia, India, New Zealand, and Peru.

[67] This formula was borrowed from the Locarno arbitration conventions of October 16, 1925.

[68] This exclusion was made by France, Great Britain, India and New Zealand. Series E, No. 15, pp. 231–4. Australia and Canada also gave tardive notices of a similar exclusion. League of Nations Official Journal, 1939, p. 412, 1940, p. 47.

[69] Records of Ninth Assembly, Plenary, pp. 182, 498, 503, 507.

almost verbatim; a Belgian-Czechoslovak convention of April 23, 1929,[70] and a General Act of May 21, 1929 between States of the Little Entente,[71] led a procession of twenty-two instruments,[72] which greatly extended the Court's jurisdiction.

No case arose before the Court in which the provisions of the General Act were relied upon as founding the jurisdiction. In its application in the *Electricity Company Case* in 1938, the Belgian Government relied upon its treaty with Bulgaria of June 23, 1931; [73] and in its application in the *Société Commerciale Case* in 1938, the same Government relied upon its treaty with Greece of June 25, 1929: [74] in both cases, the treaties followed one of the 1928 models.

§442. Other Instruments Concerning Pacific Settlement of Disputes. The establishment of the Court gave impetus to the conclusion of various treaties concerning arbitration and judicial settlement. The first of these treaties to be principally concerned with the Court's jurisdiction was the Brazilian-Swiss treaty of June 23, 1924, under which the parties agreed to submit to the Court all disputes not relating to constitutional questions which could not be settled by diplomacy or conciliation, and the Court could be seized by an application if the conclusion of a *compromis* was delayed.[75] An Italian-Swiss treaty of September 20, 1924, made provision for the Court's adjudication of any dispute after failure of a conciliation procedure, and for the Court's being seized by application if agreement on a *compromis* should be delayed.[76] On October 16, 1925 conventions of arbitration were concluded at Locarno between Belgium and Germany, Czechoslovakia and Germany, France and Germany, and Germany and Poland, under which all disputes as to the parties' respective rights were to be referred by *compromis* to the Court or to arbitral tribunals created under the 1907 Hague Convention, and if the parties could not agree on the *compromis* either of them could bring the dispute

[70] 110 League of Nations Treaty Series, p. 113.
[71] 116 *idem*, p. 311.
[72] The lead was taken by Belgium in conventions with Greece (June 25, 1929), Yugoslavia (March 25, 1930), Lithuania (September 24, 1930), Turkey (April 18, 1931), and Bulgaria (June 23, 1931); and by Czechoslovakia in conventions with Greece (June 8, 1929), Estonia (July 9, 1929), Norway (September 9, 1929), Luxemburg (September 18, 1929), Finland (October 2, 1929), and Lithuania (March 8, 1930). Norway also concluded conventions with Poland (December 9, 1929), Austria (October 1, 1930), and Bulgaria (November 20, 1931); and Greece concluded conventions with Austria (June 26, 1930), Poland (July 2, 1932), and Denmark (April 13, 1933). The list also includes conventions between Luxemburg and Rumania (January 22, 1930), Bulgaria and Denmark (December 7, 1935), and Denmark and Yugoslavia (December 14, 1935).
[73] Series A/B, No. 77.
[74] Series A/B, No. 78.
[75] 33 League of Nations Treaty Series, p. 415.
[76] 33 *idem*, p. 91.

before the Court after one month's notice.[77] Thereafter numerous treaties were concluded providing for obligatory adjudication by the Court (*a*) of all disputes, or (*b*) of all legal disputes, or (*c*) of all disputes as to the parties' respective rights; in some cases such adjudication was to be preceded by attempted conciliation, and in some it was to take place only if arbitration could not be arranged.

§443. Compromissory Clauses in Treaties and Conventions. The establishment of a permanent judicial agency greatly facilitated the inclusion in international instruments of clauses concerning the settlement of disputes which might arise with reference to the interpretation or application of their provisions,[78] and it became a general practice to include such clauses in multipartite instruments drawn up at conferences held under the auspices of the League of Nations. They were frequently included in bipartite instruments also, and even in instruments concerning arbitration and judicial settlement. In the course of time standard clauses were developed. They usually applied to disputes as to (*a*) interpretation, or (*b*) application, or (*c*) interpretation and application, or (*d*) interpretation or application of the provisions of the particular treaties. Resort to various agencies for the settlement of such disputes was provided for, the Court being the agency most frequently mentioned: in some cases, the Court was named only as one of several alternative agencies. Most of the clauses provided only generally for the reference of the dispute, but in some cases it was expressly stated that reference was to be possible by the unilateral application of any party.

Several interesting examples of such compromissory clauses may be mentioned. Article 41 of the Geneva General Act of September 26, 1928, provided for submission to the Court of "disputes relating to the interpretation or application of the present General Act, including those concerning the classification of disputes and the scope of reservations." [79] On March 27, 1931, a Protocol was opened for signature at The Hague, by which the signatories recognized the competence of the Court to deal with (Fr., *pour connaître*) all disputes concerning the interpretation of the conventions on private international law drawn up by the Hague

[77] 54 *idem*, pp. 303, 341, 315, 327.

[78] In the *Chorzów Case*, the Court referred to "the so-called *clause compromissoire* (arbitration clause) introduced into commercial and other treaties during the last twenty-five years of the XIXth century and subsequently, by which the contracting Parties agreed to submit to arbitration any differences as to the interpretation or application of the particular treaties." Series A, No. 9, p. 21.

[79] 4 Hudson, International Legislation, p. 2529.

Conferences on Private International Law.[80] The standard compromissory clauses inserted in later multipartite instruments tended to follow the form used in Article 25 of the Geneva Convention on the Manufacture and Distribution of Narcotic Drugs of July 13, 1931, which provided: [81]

> If there should arise between the High Contracting Parties a dispute of any kind relating to the interpretation or application of the present Convention and if such dispute cannot be satisfactorily settled by diplomacy, it shall be settled in accordance with any applicable agreements in force between the Parties providing for the settlement of international disputes.
>
> In case there is no such agreement in force between the Parties, the dispute shall be referred to arbitration or judicial settlement. In the absence of agreement on the choice of another tribunal the dispute shall, at the request of any one of the Parties, be referred to the Permanent Court of International Justice, if all the Parties to the dispute are Parties to the Protocol of December 16th, 1920, relating to the Statute of that Court, and, if any of the Parties to the dispute is not a Party to the Protocol of December 16th, 1920, to an arbitral tribunal constituted in accordance with the Hague Convention of October 18th, 1907, for the Pacific Settlement of International Disputes.

The compromissory clause in Article 23 of the Geneva Upper Silesia Convention of May 15, 1922, was relied upon by Germany in its two applications in the case relating to *German Interests in Upper Silesia* in 1925; [82] Article 23 provided that "should differences of opinion respecting the construction and application of Articles 6 to 22 arise between the German and Polish Governments, they shall be submitted" to the Court. Poland advanced a preliminary objection contending that the Court lacked jurisdiction on the grounds that no difference of opinion had arisen between the parties before the application was filed, and that the dispute did not fall under Article 23; the Court dismissed the objection, holding that under Article 23 recourse could be had to the Court as soon as one of the parties considered that a difference of opinion arising out

[80] 5 Hudson, International Legislation, p. 933.

[81] 5 Hudson, International Legislation, p. 1048. The same text *mutatis mutandis* constitutes Article 4 of the Convention on Traffic in Women of Full Age, of October 11, 1933; Article 9 of the Convention on Contagious Diseases of Animals of February 20, 1935; Article 16 of the Convention on Transit of Animals of February 20, 1935; and Article 17 of the Convention on Traffic in Dangerous Drugs of June 26, 1936. See also Article 21 of the Convention on Conflict of Nationality Laws of April 12, 1930, and Article 7 of the Convention on Broadcasting in the Cause of Peace, of September 23, 1936.

The mention in such clauses of a forum other than the Court was originally due to insistence by representatives of the United States of America.

[82] Series A, No. 6; Series C, No. 9–I, p. 24; *idem*, No. 11, p. 340.

of the construction and application of Articles 6 to 22 exists. Article 23 of the Geneva Convention was also relied upon by Germany in its application in the *Chorzów Case* in 1927,[83] where it was held to confer on the Court jurisdiction to deal with a claim for reparation for a violation of the treaty provisions covered.

§444. Invocation of the Court's Jurisdiction under a Treaty in Force. Jurisdiction over "matters specially provided for in treaties and conventions in force," referred to in Article 36 of the Statute, will be exercised by the Court only when a case is brought before it by the methods provided for in Article 40. The parties to a dispute covered by a treaty or convention in force may join in submitting it to the Court, *i.e.*, they may conclude a special agreement for this purpose. On the other hand, in many cases either of the parties to the dispute may bring it before the Court by filing an application with the Registry.[84] The treaty or convention in force may expressly provide for such unilateral action by a single party; *e.g.*, the Protocol of March 27, 1931 concerning the conventions on private international law provides that a dispute may be brought before the Court by the application of the "most diligent State." [85] Even in the absence of such a provision, unilateral application by one party may be possible. In some cases it may be excluded, either because of express requirement of an agreement between the parties or because alternative courses are provided for; thus Article 6 of the Czechoslovak-French Treaty of Alliance of January 25, 1924 provided for a reference of disputes either to the Court or to one or more arbitrators to be chosen by the parties.[86]

§445. Contents of Applications under Treaties in Force.[87] The applications in which the Court was asked to exercise jurisdiction over "matters specially provided for in treaties and conventions in force" have tended to follow more or less standard lines. They set out or refer to the provision in the treaty or convention relied upon; Article 32 of the 1936 Rules requires that "as far as possible" the "provision on which the

[83] Series C, No. 13–I, p. 107.

[84] Two or more parties may file applications simultaneously. *Cf.*, the *Southeastern Greenland Case*, Series A/B, No. 48.

Two sources of jurisdiction may be relied upon simultaneously, as in the *Electricity Company Case*, Series A/B, No. 77. On the other hand, in the *Chorzów Case*, where the application referred only to the Geneva Convention of May 15, 1922, the Court refused to look to the German-Polish Locarno Treaty of October 16, 1925, as a possible source of jurisdiction. Series A, No. 9, p. 19; Series C, No. 13–I, p. 75.

[85] 5 Hudson, International Legislation, p. 933.

[86] 23 League of Nations Treaty Series, p. 163.

[87] See also §492, *infra*.

applicant founds the jurisdiction of the Court" shall be "specified." [88] Article 36, paragraph 1, and Article 40 of the Statute are usually referred to, as well as articles of the Rules. The statements of the subject of the dispute, some of which are very long, are followed by formal submissions on which the Court is asked to give judgment; in some of the earlier cases, judgment was requested whether the respondent was "present or absent." In some cases, the Court is requested to give notice of the application to the respondent. Most of the applications refer to the fixing of time-limits for stages of the written procedure, to the appointment of an agent by the applicant and to the address of such agent. Some of them purport to reserve to the applicant a right to present new submissions.

[88] On the origins of this provision, see Series D, No. 2 (3d add.), pp. 65–74, 154–60, 869.

CHAPTER 21

COMPULSORY JURISDICTION UNDER ARTICLE 36

§446. The Compromise in Article 36. The provision for the Court's compulsory jurisdiction contained in paragraph 2 of Article 36 of the Statute represented a compromise between the views of the 1920 Committee of Jurists and those of the Council of the League of Nations. The draft-scheme of the Committee of Jurists provided for extensive compulsory jurisdiction, applicable to all Members of the League of Nations; the Council thought that this would be inconsistent with the freedom of choice given to Members of the League of Nations by Article 12 of the Covenant, and it wished to make no modification in that Article. A struggle between these opposing views in the First Assembly of the League of Nations resulted in a rejection of the views both of the Committee of Jurists and of the Council, and led to the inclusion of a provision for a system of compulsory jurisdiction which Members of the League of Nations and States mentioned in the Annex to the Covenant were to be free to adopt as they might wish.[1]

§447. Declarations Accepting Compulsory Jurisdiction. Various methods of accepting the Court's compulsory jurisdiction remained open to Members of the League of Nations and States mentioned in the Annex to the Covenant after the rejection of the proposal of the 1920 Committee of Jurists. Two or more Members or States could by treaty or convention confer jurisdiction on the Court with reference to themselves, within or outside the limits set by Article 36. Or any Member or State could by unilateral declaration submit itself to the Court's

[1] Article 36, paragraph 2, therefore provides: The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or ratifying the Protocol to which the present Statute is adjoined, or at a later moment, declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning: (*a*) the interpretation of a treaty; (*b*) any question of international law; (*c*) the existence of any fact which, if established, would constitute a breach of an international obligation; (*d*) the nature or extent of the reparation to be made for the breach of an international obligation.

On the drafting of this provision see §185, *supra*.

jurisdiction; the Statute was not intended to limit this privilege, and a declaration made by a Member or State may fall outside the framework of paragraph 2 of Article 36. In 1929 Finland made a declaration accepting the Court's jurisdiction over disputes concerning the interpretation or application of the Convention on Abolition of Import and Export Prohibitions and Restrictions of November 8, 1927, *vis-à-vis* any party accepting the same obligation, "whether or not the dispute be of a legal character." [2]

The provision in paragraph 2 of Article 36 was designed to encourage and facilitate the making of declarations by providing a framework within which a Member or State might cast the limitations which it desired. It applies only to Members of the League of Nations and States mentioned in the Annex to the Covenant; declarations made by other States do not fall within the framework of the paragraph, even though they should be cast in the terms which it employs and even though Article 36, paragraph 2, may be referred to. This is important because a Member or State making a declaration under paragraph 2 of Article 36 may wish to know which are the other States to which it is to be or may become bound; going further, paragraph 3 of Article 36 expressly authorizes a declarant to stipulate for "reciprocity on the part of several or certain Members or States." Moreover, as the declaration is to be made "either when signing or ratifying the Protocol to which the present Statute is adjoined, or at a later moment," declarations within the framework of paragraph 2 of Article 36 can be made only by Members of the League or States mentioned in the Annex to the Covenant which are or become signatories to the Protocol of Signature. This clearly excludes declarations made by States to which the Protocol of Signature was not opened for signature, as was recognized in the Council's resolution of May 17, 1922.

By the declaration, described by the Court as "a unilateral act," [3] a Member or State declares that it recognizes [4] "as compulsory [5] *ipso facto* and without special agreement,[6] in relation to any other Member

[2] 97 League of Nations Treaty Series, p. 395.

[3] *Phosphates Case*, Series A/B, No. 74, p. 23.

[4] The French version contains the additional words "dès à present," for which no equivalent is to be found in the English version.

[5] The English version of Article 36 employs the term *compulsory* (Fr., *obligatoire*). Perhaps the English term *obligatory* would be more exact, for it would indicate that the jurisdiction is to be exercised, not as a result of external compulsion, but as a result of the assumption of an obligation by the States concerned.

[6] The corresponding French term is not *compromis*, as one would expect, but *convention spéciale*.

or State accepting the same obligation, the jurisdiction of the Court in all or any" of certain "classes of legal disputes." The declaration may be made "for a certain time." No particular form is prescribed for it, but any Member or State so desiring may avail itself of the form set out in a special additional protocol, the so-called "Optional Clause," which was opened to signature at the same time and together with the Protocol of Signature of December 16, 1920.

§448. The Optional Clause. The additional protocol of December 16, 1920,[7] entitled "Optional Clause" (Fr., *Disposition Facultative*), is a subsidiary, not an independent, instrument. It was designed to serve only as a text for the declarations referred to in paragraph 2 of Article 36 of the Statute, and as such declarations may be made by Members or States only "when signing or ratifying the Protocol" of Signature "or at a later moment," the signature and ratification of the Optional Clause are dependent upon the signature and ratification of the Protocol of Signature. A State cannot become a party to the Optional Clause unless it becomes or has become a party also to the Protocol of Signature.

The form given to the Optional Clause is far from satisfactory, and it has resulted in much confusion in references to the Clause.[8] The Member or State on behalf of which the Optional Clause is signed "accepts [9] the jurisdiction of the Court in conformity with Article 36, paragraph 2 of the Statute"; this reference is lacking in precision, for paragraph 2 of Article 36 seems to require a choice by the declarant. The English version adds "under the following conditions," a phrase different in meaning from the French *dans les terms suivants;* thus neither the English nor the French version gives a complete form of declaration, for each of them envisages a declaration to follow, in addition to a signature. The English version of the Optional Clause contains the phrase "from this date," for which no equivalent is to be found in the English version of paragraph 2 of Article 36 of the Statute, but which corresponds to the phrase *dès à présent* in the French version of both the Optional Clause

[7] The history of the Optional Clause has been traced in § 118, *supra*.

The resolution of the Council of the League of Nations of May 17, 1922 referred to "the 'Optional Clause' provided for by the additional protocol of December 16th, 1920"; a resolution adopted by the Assembly of the League of Nations on October 2, 1924, referred to "the special Protocol opened for signature in virtue of Article 36, paragraph 2, of the Statute."

[8] Even the Court has not escaped the confusion: thus it has referred to "accession to the Optional Clause of Article 36, paragraph 2 of the Statute," Series A/B, No. 48, p. 270; and to "declarations of adherence to the Optional Clause of the Court's Statute," Series A/B, No. 77, p. 80.

[9] Article 36, paragraph 2, employs the term *recognize*. In the French version of the Optional Clause, as in the French version of paragraph 2 of Article 36, the term *reconnaître* is employed.

and the Statute; the phrase may or may not coincide with the desire of a Member or State making a declaration.

At most, therefore, the Optional Clause is only a suggested form for beginning a declaration. It may serve as a peg upon which a declaration may be hung; but any Member or State is free to ignore the Optional Clause in making its declaration.

§449. Entry into Force of Declarations. Article 36, paragraph 2, does not require that a declaration be ratified; on the contrary, as the French version of the paragraph and both the English and French versions of the Optional Clause refer to the recognition or acceptance of jurisdiction "from this date" (Fr., *dès à présent*), *i.e.*, from the date of the declaration, it would seem that the declaration was intended to take effect at the time of signature. The text of the declaration may indicate that it is not intended to enter into force immediately, however, and conditions may be set by the declarant to postpone that event. A declaration which does not expressly require ratification may enter into force at the time of signature [10] if the declarant simultaneously deposits or has previously deposited a ratification of the Protocol of Signature; otherwise such a declaration will not enter into force until a ratification of the Protocol of Signature is deposited. A declaration which expressly requires ratification may enter into force upon the deposit of the ratification if the declarant simultaneously deposits or has previously deposited a ratification of the Protocol of Signature; otherwise even though a ratification of the declaration is deposited, it will not enter into force until a ratification of the Protocol of Signature is deposited.[11]

§450. The Assembly's Construction of Article 36, Paragraph 2. On several occasions efforts were made by the Assembly of the League of Nations to encourage the Members of the League to make the declarations envisaged in paragraph 2 of Article 36, and to this end liberal interpretations were given to the text of that paragraph. In the Fifth Assembly which drafted the Protocol for Pacific Settlement of International Disputes of October 2, 1924, the view was taken that the terms were sufficiently wide to permit States to "adhere" to the Optional Clause "with the reservations which they regard as indispensable," and various

[10] In some cases declarations not expressly subject to ratification have been ratified; *e.g.*, the Bulgarian declaration made in 1921, the Ethiopian declaration of July 12, 1926, and the Lithuanian declaration of October 5, 1921.

[11] A ratification of the Protocol of Signature does not necessarily effect a ratification of an earlier declaration. Thus a ratification of Iran's declaration of October 2, 1930 was not deposited until September 19, 1932, though Iran's ratification of the Protocol of Signature was deposited on April 25, 1931.

possible reservations were listed.[12] Article 36 was also subjected to a detailed study by the Ninth Assembly which drafted the General Act for Pacific Settlement of Disputes of September 26, 1928; wishing to "diminish the obstacles which prevent States from committing themselves," it was pointed out that States might accede to the Optional Clause with "appropriate reservations limiting the extent of their commitments, both as regards duration and as regards scope"; and it was said that "the reservations conceivable may relate, either generally to certain aspects of any kind of dispute, or specifically to certain classes or lists of disputes, and that these different kinds of reservation can be legitimately combined." [13]

§451. Forms of Declarations. In practice, declarations under paragraph 2 of Article 36 have usually been made by or in connection with signatures of the Optional Clause. Though the declarants in most cases have availed themselves of the additional protocol for making their declarations, they have not always paid attention to its actual text. The Optional Clause was drafted with the idea that declarants would add merely the terms or conditions of the jurisdiction recognized or accepted; in a few instances, it has been signed with no terms or conditions added; in many cases its text has been ignored and the signature has been preceded by a complete text of the declaration. In some cases the text of the declaration repeats in part the text of the Optional Clause, or the text of paragraph 2 of Article 36. Some States purported to "adhere to the Optional Clause." Several States have embodied declarations in their ratifications of the Protocol of Signature; [14] the Netherlands' declaration of August 6, 1921 was inserted in a *procès-verbal* of the deposit of its ratification of the Protocol of Signature. In some instances the declaration has been made in a separate instrument communicated to the Secretary-General,[15] and in a few instances merely in a letter addressed to the Secretary-General.[16] Any of these forms seems to satisfy the requirements for a declaration under paragraph 2 of Article 36.

[12] Records of Fifth Assembly, Plenary, p. 225; *idem*, Third Committee, pp. 198–200. Article 3 of the abortive Protocol of October 2, 1924, referred to the possibility that States acceding to the Optional Clause might make "reservations compatible with the said clause." *Idem*, Plenary, p. 499. In a message of the Swiss Federal Council of March 1, 1921, the view had been taken that no reservations other than those expressly referred to in paragraph 2 of Article 36, could be included in a declaration. Swiss Bundesblatt, 1921, I, p. 321.

[13] Records of Ninth Assembly, Plenary, p. 183.

[14] Thus, the declarations by Brazil (November 1, 1921), Estonia (May 2, 1923), Paraguay (May 11, 1933), and El Salvador (August 29, 1930).

[15] Thus, the declarations by France (April 7, 1936), Great Britain (February 28, 1940), Lithuania (March 8, 1935), Norway (May 19, 1936), and Panama (October 25, 1921).

[16] Thus, the Estonian declarations (June 25, 1928, May 6, 1938).

On the other hand, an acceptance of the Court's jurisdiction with respect to the classes of legal disputes enumerated in paragraph 2 of Article 36 may be in such form that it cannot be regarded as a declaration under that paragraph. Thus, a State's accession to the Geneva General Act of 1928 is not such a declaration, though Article 17 states specifically that it covers disputes "mentioned in Article 36 of the Statute." A bipartite instrument by which the parties accept the Court's jurisdiction over legal disputes falling within the classes enumerated in paragraph 2 of Article 36 is clearly not such a declaration.[17]

A declaration may be made in any language, at the choice of the declarant. Most of the declarations have been cast in French, but some have been in English; Spanish and Portuguese have also been employed on a few occasions.

§452. Legal Disputes. Paragraph 2 of Article 36 provides for recognition of the Court's jurisdiction "in all or any of the classes of legal disputes concerning" (Fr., *ayant pour objet*) four general classes. The enumeration and description of these classes was taken from paragraph 2 of Article 13 of the Covenant of the League of Nations,[18] where it was declared that such disputes are "generally suitable for submission to arbitration." This provision in the Covenant was a development of Articles 16 (1899) and 38 (1907) of the Hague Conventions on Pacific Settlement, which provided that "in questions of a legal nature, and especially in the interpretation or application of international conventions," arbitration was recognized as the most effective and equitable method of settlement. The provision in Article 36 of the Statute, differing from that in Article 13 of the Covenant, describes the disputes referred to as *legal* disputes, and the question arises whether this introduces a limitation on the Court's jurisdiction in addition to the limitations contained in other terms of Article 36. Must a dispute which falls into one or more of the four categories be examined to see whether it is also a "legal" dispute, before the Court will have jurisdiction under a declaration?[19]

The 1920 Committee of Jurists proposed that as to Members of the League of Nations the Court be given obligatory jurisdiction over "cases

[17] By the 1930 conventions between Iceland and Denmark, Iceland and Norway, and Iceland and Sweden, disputes covered by paragraph 2 of Article 36 are to be referred to the Court; but these conventions do not constitute declarations under Article 36. For the texts see 118 League of Nations Treaty Series, p. 121; 126 *idem*, p. 417; 127 *idem*, p. 67. *Cf.*, the Netherlands-Siamese treaty of October 27, 1928. 93 *idem*, p. 131.

[18] The borrowing from Article 13 of the Covenant had been suggested in Article 21 of the Five-Power Plan of February 27, 1920.

[19] A State's declaration may expressly limit the jurisdiction accepted to *legal* disputes.

of a legal nature, concerning" the four categories of disputes as enumerated in Article 13 of the Covenant. A text before the Committee for some time would have applied to "disputes concerning cases of a legal nature, that is to say, those dealing with" the four classes; the deletion of the words "that is to say" in this phrase changed its meaning materially. Some dissatisfaction with the reference to *legal* disputes was voiced in the 1920 Committee of Jurists;[20] the provision in Articles 16 (1899) and 38 (1907) of the Hague Convention on Pacific Settlement was cited as a precedent for the use of the term,[21] but the precise role to be served by it was not explained. Nor does the First Assembly seem to have appreciated the significance of the phrase.[22]

The term *legal* seems to be used as the opposite of *non-legal;*[23] in popular speech it is often used as an antonym of *political.* A dispute is *legal* if it relates to a claim of a right conferred by law; in this connection, possibly to a claim of a right conferred by international law. Numerous arbitration treaties of recent years have applied to disputes with regard to which "the parties are in conflict as to their respective rights,"[24] such disputes being said to include the disputes mentioned in Article 13 of the Covenant,[25] or in Article 36 of the Statute of the Court.[26] Each of the four categories which are set out in Article 36 embraces disputes which are *legal* in this sense;[27] even a dispute as to the existence of a "fact which, if established, would constitute a breach of an international obligation," would be "legal" in the sense that the ascertainment of fact would be solely for the purpose of applying a legal obligation.

Two views seem to be possible as to the effect of the use of the term *legal* in paragraph 2 of Article 36. On the one hand, it may be thought that the compulsory jurisdiction accepted is confined to disputes which concern, or have *pour objet,* one or more of the four categories enumerated provided that they are at the same time *legal* disputes. This would make

[20] Particularly by Mr. Ricci-Busatti. Minutes of the 1920 Committee of Jurists, pp. 260, 274.

[21] *Idem,* pp. 264, 283.

[22] Records of First Assembly, Committees, I, pp. 312–3, 408.

[23] Minutes of the 1920 Committee of Jurists, pp. 242–4, 254–6.

[24] Article 1 of the Inter-American Arbitration Treaty of January 5, 1929 provides for arbitration of differences "by virtue of a claim of right" and "juridical in their nature by reason of being susceptible of decision by the application of the principles of law." 4 Hudson, International Legislation, p. 2627.

[25] Thus, Article 1 of the Locarno Treaties of October 16, 1925.

[26] Thus, Article 17 of the Geneva General Act of September 26, 1928.

[27] It is to be noted, however, that many bipartite treaties have followed the British-French agreement of October 14, 1903 in providing for the arbitration of "differences of a legal nature or relating to the interpretation of treaties."

the text of the Statute equivalent to—"the jurisdiction of the Court in legal disputes in all or any of the following classes: (*a*) disputes concerning" *etc.* On this view, for the Court to have jurisdiction, it would be necessary to inquire whether a dispute is *legal*, even though it falls within one of the four categories. The Court has said that where a treaty provision is not clear, the interpretation "which involves a minimum of obligations for the parties should be adopted";[28] the rule would lead to this first interpretation, which would also have the advantage of emphasizing the juridical character of the problems with which the Court deals.

On the other hand, it may be thought that the Court's jurisdiction extends to all disputes which fall within one or more of the four classes enumerated, these classes of disputes being by definition "classes of legal disputes." This would make the text of the Statute equivalent to—"the jurisdiction of the Court in all or any of the following classes of legal disputes: (*a*) disputes concerning," *etc.* On this view, for the Court to have jurisdiction it would not be necessary to inquire whether a dispute is *legal* if it falls within one of the four categories; *legal* would be merely a descriptive word, employed with reference to disputes which satisfy the requirements of one of the four categories. This interpretation would carry out the purpose for which the text of paragraph 2 of Article 13 of the Covenant was borrowed in paragraph 2 of Article 36 of the Statute; as a provision for compulsory jurisdiction, the latter would then implement the former, which operates only as a declaration that certain disputes are "*generally suitable* for submission to arbitration or judicial settlement." Moreover, definiteness is desirable with reference to the jurisdiction which States may accept, and this interpretation would avoid controversy about the vague and uncertain term *legal*.[29]

§453. Classification of Disputes. The approaches to compulsory arbitration which were made in the latter part of the nineteenth century led to the classification of disputes for the purposes of arbitration agreements, and during the generation which preceded the drafting of the Statute of the Court certain classifications came to be quite generally employed. The way was led by the Conference of American States at

[28] In the *Treaty of Lausanne Case* (1925), Series B, No. 12, p. 25.

[29] The second view outlined above seems to have dominated the drafting of Article 1 of the Inter-American Arbitration Treaty of January 5, 1929. 4 Hudson, International Legislation, p. 2625. This view was taken also by Å. Hammarskjöld in a communication to the *Institut de droit international* in 1927, *Annuaire*, 1927, II, pp. 819–20. See also H. Lauterpacht in 10 Economica (1930), pp. 160–2.

The vagueness of the term *legal* was emphasized in the drafting of the Geneva General Act in 1928. Records of Ninth Assembly, First Committee, p. 61.

Washington in 1890, which in its "plan of arbitration" called for obligatory arbitration of "all controversies concerning diplomatic and consular privileges, boundaries, territories, indemnities, the right of navigation, and the validity, construction and enforcement of treaties." [30] In 1899, the Russian delegation at the Peace Conference at The Hague proposed a plan for compulsory arbitration in two classes of cases, in so far as they did not concern vital interests or national honor: (1) disputes relating to pecuniary damages due to illegal acts, and (2) disputes relating to the interpretation or application of certain types of treaties. Though this proposal was not adopted, it greatly influenced subsequent developments.[31] A further step was taken by the Second Conference of American States at Mexico in 1902, which drew up a treaty providing for arbitration of all disputes except those relating to independence or national honor, stipulating expressly that this exception did not apply to disputes as to diplomatic privileges, boundaries, rights of navigation, or validity, construction and enforcement of treaties.[32] At the Second Peace Conference at The Hague in 1907, the Portuguese delegation proposed that exceptions relating to vital interests and independence in engagements to arbitrate should not include (1) disputes concerning the interpretation or application of conventions relating to any of sixteen subjects; (2) boundary disputes; (3) disputes concerning claims for damages when the principle of an indemnity was recognized by the parties; (4) disputes relating to debts.[33] Numerous bipartite treaties of this period adopted classifications along these lines. An interesting series of treaties provided for compulsory arbitration of (1) disputes concerning the interpretation or application of treaties, and (2) disputes concerning the interpretation or application of a principle of international law.[34]

In the period from 1890 to 1919, three classes of disputes stand out among those which were widely recognized as suitable for compulsory

[30] Scott, International Conferences of American States (1931), p. 40. This classification was embodied in Guatemala's treaties with El Salvador (November 15, 1890) and Honduras (March 2, 1895). Manning, Arbitration Treaties Among the American Nations (1924), pp. 192, 222.

[31] Various bipartite treaties adopted this classification: *e.g.*, Denmark–Russia (July 29, 1899); Belgium–Russia (October 17/30, 1904).

[32] Scott, *op. cit.*, p. 100. This formula was also embodied in bipartite treaties: *e.g.*, Mexico–Spain (January 11, 1902); Guatemala–Spain (February 28, 1902).

[33] 2 *Actes et Documents*, p. 882. This proposal followed a model recommended by the Inter-Parliamentary Union at its Conference in London in 1906. Official Report of the Conference, pp. 117, 234.

[34] This classification was made in the Argentine-Italy treaty of September 18, 1907, in the Argentine-Venezuela treaty of July 22, 1911, in the Brazil-Italy treaty of September 22, 1911, in the Peru-Venezuela treaty of January 25, 1912, in the Argentine-France treaty of July 3, 1914, and in the Argentine-Spain treaty of July 9, 1916.

arbitration agreements: (1) disputes relating to the interpretation and application of treaties dealing with various subjects; (2) disputes relating to principles of international law, and (3) disputes relating to the indemnity which should be paid for an admitted breach of an international obligation. The treaties of the period do not seem to have made express provision for disputes as to the existence of facts which, if established, would constitute the breach of an international obligation, but the provisions concerning commissions of enquiry in the Hague Conventions on Pacific Settlement lent themselves to extension in this direction.[35]

The four classes of disputes described in Article 13 of the Covenant were, therefore, not innovations. They were "not conceived in the inner consciousness" of the draftsmen of the Covenant.[36] They represented a culmination of almost thirty years of history. Yet the terminology was adopted without much enquiry into its precise significance. The draftsmen of the Covenant seem merely to have availed themselves of a ready-made formula which they found at hand and which had acquired respectability from continued repetition.[37] They could safely do so since the classes were mentioned only as disputes "declared to be among those which are generally suitable for submission to arbitration." When the classification was taken over by the draftsmen of the Statute, however, it was made to serve a very different purpose. In the 1920 Committee of Jurists, Lord Phillimore proposed that the four classes in Article 13 of the Covenant be utilized as the basis of the Court's compulsory juris-

[35] See the Russian proposal at the Second Peace Conference at The Hague in 1907. 2 *Actes et Documents*, pp. 382, 862.

[36] Root, Men and Policies (1924), p. 348.

[37] The enumeration and descriptions of the four classes seem to have originated as a definition of justiciable disputes in certain "Proposals for the Avoidance of War" which were privately circulated by a British group headed by Lord Bryce on February 24, 1915, and which were published in 1917. See 2 Marburg, Development of the League of Nations Idea (1932), p. 869. The text later appeared in the so-called "Phillimore Plan" for a League of Nations of March 20, 1918, where it was used with reference to disputes the arbitration of which was proposed to be recognized as "the most effective and at the same time the most equitable means" of settlement. 2 Miller, Drafting of the Covenant (1928), p. 4; 3 Baker, Woodrow Wilson and World Settlement (1922), p. 75. It was repeated by Smuts in his "suggestion" of December 16, 1918, in connection with a very general proposal that the peace treaty should bind States to submit such disputes to arbitration. 2 Miller, *op. cit.*, p. 57. In the same connection, it was included in Wilson's drafts of the Covenant of January 10 and 20, and February 2, 1919, *idem*, pp. 75, 100, 147. It was not to be found in the earlier drafts considered by the Commission on the League of Nations, but on March 24, 1919 the British delegation proposed its adoption to describe disputes for which members of the League should recognize arbitration to be the most effective and equitable solution, and which they should agree to submit to arbitration; Lord Robert Cecil explained that the proposal was intended to draw a distinction between justiciable and non-justiciable disputes, and President Wilson suggested that it be made clear that the cases enumerated were only mentioned as examples. *Idem*, pp. 348, 352, 515, 523. About the same time, Elihu Root proposed that the Bryce Committee's formula be employed in the Covenant as a definition of justiciable disputes. 1 Miller, *op. cit.*, 378n; 13 American Journal of International Law (1919), p. 584.

diction.[38] Defending this proposal Elihu Root urged adherence to the language of the Covenant, insisting on "the authority of a text agreed on by the States," [39] and declaring that it was the result of "long discussion and conference among the international jurists of many countries." [40] M. de Lapradelle found the terminology of Article 13 of the Covenant "extremely defective"; he thought the French version to be less clear than the English, and on his proposal the Committee of Jurists seems to have taken the English version as the basis of its work.[41] The result was that the Committee of Jurists borrowed the language of Article 13 of the Covenant and made it serve a much larger function, that of delimiting the compulsory jurisdiction proposed for the Court. Though the Council and Assembly of the League of Nations dropped the proposal for general compulsory jurisdiction, the Assembly retained the language of the Covenant in the provision for optional compulsory jurisdiction. Thus, language invented for the purpose of defining justiciable disputes, and employed to indicate the disputes which are "generally suitable for submission to arbitration," was made to serve the purpose of distinguishing the different kinds of disputes which may be selected by States in conferring compulsory jurisdiction on the Court.

Taking into account the history of the classification of disputes, it would seem that the four categories set out in paragraph 2 of Article 36 of the Statute should be regarded as a schematic compendium of legal disputes, perhaps of all legal disputes. They describe, first of all, disputes with reference to the nature and extent of legal obligations; (*a*) deals with disputes concerning obligations under treaties, and (*b*) with disputes concerning obligations under international law apart from treaties.[42] Secondly, they describe disputes with reference to the performance of legal obligations; (*c*) deals with disputes concerning the bases of fact for the operation of legal obligations, and (*d*) with disputes concerning the reparation due when legal obligations have been violated.[43] This view

[38] Minutes of the 1920 Committee of Jurists, p. 252.

[39] *Idem*, pp. 283, 287. Mr. Root urged the generalization of the principle contained in various arbitration treaties. Root, Men and Policies (1924), p. 348. [40] *Ibid.*

[41] Minutes of the 1920 Committee of Jurists, pp. 285, 287.

[42] The Court has asserted its power to give a declaratory judgment "to ensure recognition of a situation at law, once and for all and with binding force as between the parties." Series A, No. 11, p. 20.

[43] A somewhat similar explanation of the categories was made by M. de Lapradelle in 1920. Minutes of the 1920 Committee of Jurists, p. 285. In his memorandum of December 16, 1918, General Smuts had explained his proposal of the four categories by saying that justiciable disputes "involve mostly the interpretation of treaties or some other question of international law; or questions of fact, such as the situation of boundaries, or the amount of damage done by any breach of the law." 2 Miller, Drafting of the Covenant, p. 56.

takes account of the order in which the categories are enumerated, and it assigns to each of them a distinct function which avoids a confusion with other categories.[44] Each of the categories thus deals with disputes not covered by other categories, and each of them deals with disputes properly described as "legal." Moreover, no difficulty is presented by the separation of the categories, if a State desires to recognize the Court's jurisdiction as to some but not as to all of them.

It seems clear that a State's declaration may operate under paragraph 2 of Article 36, only if it is responsive to the classification set out in that paragraph.

§454. The Classes of Disputes. (*a*) *The interpretation of a treaty.* The term *treaty* is here used in a generic sense to refer to any international instrument. In Articles 16 (1899) and 38 (1907) of the Hague Conventions on Pacific Settlement, as in many arbitration treaties of the period, interpretation was linked with application. The 1920 Committee of Jurists rejected a proposal that both terms should be used in the Statute, but it seems to have intended to abide by the "traditional" phraseology.[45] Application will usually involve interpretation, but interpretation will not always include application.[46] To some extent, however, the application of treaties may be covered by classes (*c*) and (*d*).[47] In the *German Interests in Upper Silesia Case*, the Court referred to category (*a*) in paragraph 2 of Article 36 as an example of a clause relating "solely to the interpretation of a treaty"; it spoke of "interpretations unconnected with concrete cases of application," and found "no reason why States should not be able to ask the Court to give an abstract interpretation of a treaty." [48] In the *Exchange of Populations Case*, the Court said that a difference of opinion regarding the meaning and scope of the word "established" in Article 2 of the Convention of Lausanne was "a dispute regarding the interpretation of a treaty and as such involves a question of international law." [49]

[44] *Cf.*, the dissenting opinion of M. Ehrlich, Judge *ad hoc*, in Series A, No. 9, p. 37.

[45] Minutes of the 1920 Committee of Jurists, pp. 264, 274, 283. The German-Swiss arbitration treaty of December 3, 1921, which followed the classification of Article 36 of the Statute, changed (*a*) to include disputes regarding "the contents, interpretation and application of any treaty." 12 League of Nations Treaty Series, p. 271. This formula is to be found in numerous later treaties concluded by Germany.

[46] See §565, *infra*. The Persian declaration of October 2, 1930, referred to disputes with regard to situations or facts relating directly or indirectly to the application of treaties. Series D, No. 6, p. 53.

[47] In the *Treaty of Neuilly Case*, the interpretation sought related to the basis and extent of the obligations resulting from a treaty provision, the applicability of which was taken for granted. Series A, No. 4, p. 6.

[48] Series A, No. 7, p. 18.

[49] Series B, No. 10, p. 17.

If a party to a dispute claims that it concerns the interpretation of a treaty the existence of which is denied by the other party, the Court may have to decide the question of the existence of the treaty as a jurisdictional question before it can deal with the question of interpretation; competence to decide the jurisdictional question is conferred by paragraph 4 of Article 36.[50]

(*b*) *Any question of international law.* It is a possible view that this category serves as a catch-all with reference to legal disputes, and that (*b*) covers the disputes described under (*a*), (*c*) and (*d*). A schematic interpretation will give it a narrower meaning, however. In the 1920 Committee of Jurists, (*b*) was referred to as dealing with customary law, in contrast with (*a*) which deals with conventional law; Baron Descamps explained that the two classes were necessary to distinguish between the "two kinds of international law, the law founded on special conventions and general international law." [51] On this view, categories (*a*) and (*b*) may be said to have developed from the two categories first employed in the Argentine-Italian treaty of September 18, 1907, viz., (1) differences concerning interpretation and application of conventions, and (2) differences concerning interpretation and application of a principle of international law.[52] A "question of international law" may relate either to the existence [53] or to the interpretation of a principle of international law. Categories (*c*) and (*d*), rather than category (*b*), refer to the application, as distinguished from the interpretation, of a principle. The term *international law* must mean public international law, though it is possible that States will be engaged in a dispute which concerns private international law, even apart from a treaty.[54]

(*c*) *The existence of any fact which, if established, would constitute a breach of an international obligation.* This category covers disputes as to the application of a principle or rule of law to particular situations of fact. The example frequently given is that of a dispute concerning the delimitation of a boundary where legal rights are not contested. In the

[50] Numerous treaties of arbitration have dealt with disputes as to the validity of treaties; *e.g.*, Italy–Peru, April 18, 1905. 34 Martens, *Nouveau recueil général* (2d ser.), p. 320. The German-Persian treaty of February 17, 1929, and the Belgian-Persian treaty of May 23, 1929, applying to disputes relating to the application or interpretation of treaties, include the "prior question" whether a dispute is of that character.

[51] Minutes of the 1920 Committee of Jurists, pp. 264, 284–5.

[52] 4 Martens, *Nouveau recueil général* (3d ser.), p. 84. These categories were later employed in other treaties.

[53] See Series C, No. 13–I, p. 153. A Belgian-Swiss treaty of February 13, 1925, referred to disputes concerning "a point of universally accepted international law." Series E, No. 1, p. 423.

[54] See §554, *infra*.

Serbian Loans Case, the Court said that paragraph 2 of Article 36 clearly includes "disputes concerning pure matters of fact," and that the facts to be established "may be of any kind." [55] Such disputes may be "legal" in the sense that the facts when ascertained will constitute a foundation for the application of law.[56]

In a communication to the Locarno Conference in 1925, the Belgian Government expressed the view that category (*c*) as contained in Article 13 of the Covenant did not cover (1) disputes as to facts which would constitute a mere failure to observe, as distinguished from a breach of, an engagement; (2) disputes as to facts which would constitute a breach of an international obligation under customary as distinguished from conventional law; (3) disputes as to facts which would constitute not a breach of an obligation, but the exercise of a right entailing a duty to make compensation (Fr., *obligation synallagmatique*).[57] This insistence seems to have influenced the drafting of the Locarno arbitration treaties.[58] Yet it may well be doubted whether the alleged exclusions are to be made from category (*c*) in paragraph 2 of Article 36 of the Statute. Resting upon the French version of the text, they neglect the English version. Though the term *violation* is employed in the French version, the English version employs the wider term "breach," and no distinction should be drawn between violation and non-performance; the French version also employs the term *engagement*, but as the English version employs the wider term *obligation*, it does not seem possible to confine category (*c*) to an obligation (Fr., *engagement*) which rests on conventional as distinguished from customary law.[59]

If a State relies upon (*c*) in filing an application with the Court, the

[55] Series A, No. 20, p. 19.

[56] The special agreement in the *Borchgrave Case* requested the Court "to say whether having regard to the circumstances of fact and of law" the responsibility of the Spanish Government was involved; this was held to cover a Belgian submission as to the "alleged lack of diligence on the part of the Spanish Government in apprehending and prosecuting the guilty." Series A/B, No. 72, p. 168.

[57] Sénat de Belgique, *Rapport par le Baron Descamps*, 23 février 1926, p. 17; H. Rolin, "*L'Arbitrage et le Comité de Securité de la Société des Nations*," 8 *Revue de Droit International et de Législation Comparée* (1927), pp. 583, 600.

[58] The Locarno arbitration treaties applied to disputes in which the parties were in conflict as to their respective rights, and stipulated that such disputes included those mentioned in Article 13 of the Covenant.

[59] When this point was discussed in the 1920 Committee of Jurists, the members of the Committee were not agreed that the term *engagement* applied only to an "obligation freely undertaken." Minutes of the 1920 Committee of Jurists, p. 285. Moreover, the Committee seems to have taken the English rather than the French version of Article 13 of the Covenant as the basis of its proposals. *Idem*, p. 287.

In the *Railway Traffic Case*, a question concerning "international engagements in force" was held to refer to contractual engagements. Series A/B, No. 42, p. 114. *Cf.*, the Yugoslav contention in the *Losinger Case*, Series C, No. 78, pp. 123–8.

respondent may of course contend that the facts in dispute would not, if established, "constitute a breach of an international obligation"; this contention would raise a preliminary question as to the Court's jurisdiction over the dispute as to the facts, and under paragraph 4 of Article 36 this matter would be "settled by the decision of the Court" before the exercise of jurisdiction under (*c*). To this extent, the Court might have to decide "a question of international law" under (*c*), even though the parties had not recognized its jurisdiction under (*b*).

(*d*) *The nature or extent of the reparation to be made for the breach of an international obligation.* This category of disputes developed from a classification which was quite common in the earlier years of the twentieth century. The Russian delegation to the Peace Conference at The Hague in 1899 proposed that States agree to obligatory arbitration, subject to the exception of vital interest and national honor, for disputes relating to pecuniary claims for damages suffered by a State or its nationals as a consequence of illegal actions or negligence on the part of another State or its nationals.[60] On January 11, 1902, Mexico and Spain concluded an arbitration treaty which excluded from the exception of independence and national honor disputes relating to damages and pecuniary injuries suffered by a party or its nationals by reason of the illegal acts or omissions of the other party or its nationals;[61] the same or a similar formula was embodied in treaties concluded by Italy, as well as by Spain, with other American States.[62] Beginning with the Belgian-Russian treaty of October 17/30, 1904,[63] numerous treaties provided for the obligatory arbitration of disputes as to pecuniary claims for damages when the principle of the indemnity was recognized by the parties;[64] a Belgian-Danish treaty of April 26, 1905, varied this formula by adding a specific statement that the disputes covered relate solely to the question

[60] *Actes et Documents*, p. 120.

[61] 1 *Traités Généraux d'Arbitrage*, p. 7.

[62] Guatemala–Spain, February 28, 1902; Italy–Mexico, October 16, 1907; Italy–Costa Rica, January 8, 1910; Italy–Ecuador, February 25, 1911; Italy–Paraguay, May 11, 1911; Italy–Bolivia, May 17, 1911; Italy–Guatemala, May 31, 1913; Italy–Honduras, December 8, 1913.

[63] 1 *Traités Généraux d'Arbitrage*, p. 84.

[64] Belgium–Switzerland, November 15, 1904; Belgium–Norway and Sweden, November 30, 1904; Norway and Sweden–Russia, November 26/December 9, 1904; Norway and Sweden–Switzerland, December 17, 1904; Belgium–Spain, January 23, 1905; Norway and Sweden–Spain, January 23, 1905; Denmark–Russia, February 16/March 1, 1905; Belgium–Greece, April 19/May 2, 1905; Denmark–Spain, December 1, 1905; Belgium–Nicaragua, March 6, 1906; Brazil–Sweden, December 14, 1909; Greece–Spain, December 3/16, 1909; Russia–Spain, August 2/15, 1910; Russia–Brazil, August 13/26, 1910; Italy–Russia, October 14/27, 1910; Italy–Norway, December 4, 1910; Denmark–France, August 9, 1911; Spain–Switzerland, June 19, 1913.

of the amount of the sum to be paid. This formula was included also in various classifications proposed at the Second Peace Conference at The Hague in 1907, and it persisted in bipartite treaties down to 1923.[65] When the formula in (*d*) came before the 1920 Committee of Jurists, M. de Lapradelle explained it as covering disputes "concerning the *quantum* in cases in which an obligation is admitted." [66]

In the light of this history, it may be thought that category (*d*) covers only disputes as to the nature and extent of the reparation to be made when the parties are agreed that there has been a breach of an international obligation. Yet in case of a dispute as to the nature and extent of the reparation claimed when the parties are not agreed that there has been a breach of an international obligation, the Court may have jurisdiction to decide the latter question under paragraph 4 of Article 36; but its decision as to the existence of a breach of an obligation would be a preliminary decision, taken for the purpose of determining its jurisdiction under (*d*) as a whole.

§455. Disputes as to the Compulsory Jurisdiction Conferred. Paragraph 4 of Article 36 follows a precedent found in numerous arbitration treaties in connection with the classification of disputes. Several treaties to which Italy was a party and which included a classification, provided that any question concerning the inclusion of a controversy in one of the enumerated classes should also be referred to arbitration.[67] This precedent was followed by the 1920 Committee of Jurists in its proposal that "in the event of a dispute (Fr., *contestation*) as to whether a certain case comes within any of the categories above mentioned, the matter shall be settled by the decision of the Court." [68] In the course of the Assembly's deliberations, this was given a wider scope,[69] and the text adopted is not confined to jurisdictional questions relating to the classification.[70]

[65] *E.g.*, the Austrian-Polish treaty of November 13, 1923.

[66] Minutes of 1920 Committee of Jurists, p. 285.

[67] Italy's treaties with the Argentine Republic (September 18, 1907), with Mexico (October 16, 1907), with Norway (December 4, 1910), with Ecuador (February 25, 1911), and with Bolivia (May 17, 1911), all provided for the arbitration of questions as to the classification of a dispute. The Danish-French treaty of August 9, 1911, was similar. *Cf.*, the Italian-Peruvian treaty of April 18, 1905, the Norwegian-Swedish treaty of October 26, 1905, and the Italian-Paraguayan treaty of May 11, 1911. But see Article 53 of the 1907 Hague Convention on Pacific Settlement.

[68] An earlier proposal by Baron Descamps that "when the legal nature of a case is disputed" the Court should "decide the point as an interlocutory question," was amended on the suggestion of Mr. Ricci-Busatti and Mr. Hagerup. Minutes of the 1920 Committee of Jurists, pp. 255, 260–1, 272, 275, 277.

[69] Records of First Assembly, Committees, I, pp. 317, 571, 576.

[70] See Message of the Swiss Federal Council (March 1, 1921), *Bundesblatt*, 1921, I, p. 322. In the Colombian-Swiss treaty of August 20, 1927, a provision relating to jurisdictional disputes (Article 13) is limited to questions concerning classification.

Paragraph 4 may be binding on a party to the Protocol of Signature of December 16, 1920, even though it has made no declaration under paragraph 2 of Article 36. The dispute (Fr., *contestation*) as to the Court's jurisdiction will usually arise in the course of a proceeding initiated before the Court, as a result of a preliminary objection by a party; and perhaps a decision would be given by the Court under paragraph 4 only where the dispute concerned jurisdiction to deal with a pending proceeding.[71]

§456. Reciprocity. Paragraph 2 of Article 36 provides for a State's recognition of the Court's jurisdiction "in relation to any other Member or State accepting the same obligation." Every declaration made under paragraph 2 of Article 36, whether it is made by signature of the optional clause or otherwise, has this characteristic impressed upon it. It is not a reservation made by the declarant; it is a limitation in the very nature of the declaration which operates under or is made "in conformity with" paragraph 2 of Article 36. Most of the declarations made, following the example set by Portugal, repeat the limitation *verbatim;* many of them, following the formula set by Switzerland, add to the repeated limitation the phrase "that is to say, on the condition of reciprocity." In some cases, the declaration repeats the limitation *verbatim* but states that it is made "on condition of reciprocity." Almost all of the declarations include one or the other of these three formulae, exactly or with but slight variation. In a few cases, however, the declaration is made without the use of any such formula, or expressly "without condition." From a legal point of view, the formulae seem to serve no purpose; all of the declarations contain the limitation *ipso facto*, and this is true even though they are said to be "without condition." [72]

It may not always be a simple matter to say when two States have "accepted the same obligation." When a similar idea appeared in the deliberations at the Second Peace Conference at The Hague in 1907, it was clearly indicated that precise identity of the obligations accepted was not required.[73] Two States may be bound *inter se* even though their obligations are not in all respects co-extensive, but they will be bound

[71] Paragraph 4 is expressly mentioned in the French-Swiss treaty of April 6, 1925.

[72] See T. Perassi, in 24 *Rivista di Diritto Internazionale* (1932), pp. 129–131. But see G. Enriques, in 13 *Revue de Droit International et de Législation Comparée* (1932), pp. 834–860.

[73] The Swiss proposal at the 1907 Conference was that each State should give notice of those of the subjects listed as to which it would accept obligatory arbitration, and that each State should be committed to obligatory arbitration with respect to another State when and to the extent that the two States had given such notice as to the same subjects in the list. 2 *Actes et Documents*, p. 888.

only to the extent that they have accepted the same jurisdiction. An applicant State may therefore rely upon a respondent State's declaration,[74] but only within the limitations set by the applicant's own declaration.[75] The Court's jurisdiction applies only to the common ground covered by the applicant's and respondent's declarations. In the *Phosphates Case*, the declaration of the applicant (Italy) did not contain a limitation included in the declaration of the respondent (France); but the Court said that "as a consequence of the condition of reciprocity stipulated in paragraph 2 of Article 36" the limitation held good as between the parties.[76] In the *Electricity Company Case*, a limitation in the declaration of the applicant (Belgium) was relied upon by the respondent (Bulgaria), though the same limitation had not been included in the respondent's declaration; here, also, the Court said that "in consequence of the condition of reciprocity laid down in paragraph 2 of Article 36" and "repeated in the Bulgarian declaration" the limitation was "applicable as between the parties." [77]

Paragraph 3 of Article 36 states expressly that a declaration "may be made unconditionally (Fr., *purement et simplement*) or on condition of reciprocity on the part of several or certain Members or States." This seems to contemplate not a limitation of the jurisdiction accepted but a condition as to the operation of the declaration itself; its effect is illustrated in Brazil's declaration of November 1, 1921, the operation of which was to begin only when compulsory jurisdiction had been recognized by at least two of the States permanently represented on the Council of the League of Nations. Yet paragraph 3 raises a question as to the possibility of a declarant's excluding disputes with a particular State or States. Though paragraph 2 envisages a recognition of jurisdiction "in relation to *any other Member or State*," [78] each of the members of the British

[74] Article 39 (3) of the Geneva General Act of 1928 provides that "if one of the parties to a dispute has made a reservation, the other parties may enforce the same reservation in regard to that party." 4 Hudson, International Legislation, p. 2529. See also Article 8 of the Inter-American Arbitration Treaty of January 5, 1929. *Idem*, p. 2625.

[75] Article 38 of the Geneva General Act of 1928 provides that "parties may benefit by the accessions of other parties only in so far as they have themselves assumed the same obligations."

[76] Series A/B, No. 74, p. 22. In this case, the French declaration was limited to disputes with regard to situations or facts subsequent to the date of the deposit of its ratification, *i.e.*, April 25, 1931; the Italian declaration, containing no similar limitation, entered into force only on September 7, 1931. The French Government therefore contended that September 7, 1931 was the crucial date for the dispute, but the Italian Government placed the crucial date as April 25, 1931; the Court found it unnecessary to decide the point. *Idem*, p. 25. This question is explicitly covered by one of the possible reservations set out in Article 39(2)(*a*) of the Geneva General Act of 1928.

[77] Series A/B, No. 77, p. 81.

[78] See Records of Ninth Assembly, First Committee, p. 59.

Commonwealth of Nations except Ireland excluded "disputes with the government of any other Member of the League which is a Member of the British Commonwealth of Nations, all of which disputes shall be settled in such manner as the parties may have agreed or shall agree." [79] Iraq excluded from its declaration "disputes with the Government of any other Arab State, all of which disputes shall be settled in such a manner as the parties have agreed or shall agree." Rumania recognized the Court's jurisdiction "in respect of the Governments recognized by Rumania," and Yugoslavia made a somewhat similar declaration. Poland's declaration excluded disputes with States which refuse to establish or to maintain normal diplomatic relations with Poland. Such action by so many States may be taken to have established the possibility of a State's making its declaration to apply only to certain other States.

§457. Exclusions in the Declarations. Paragraph 2 of Article 36 provides for recognition of the Court's jurisdiction in "all or any" of the four enumerated "classes of legal disputes." States have shown little disposition to avail themselves of the possibility of confining their declarations to certain of the classes, and with one or two exceptions all of the declarations apply in some measure to all of the classes.[80] Some of the early declarations were couched in simple forms, the jurisdiction being recognized *unconditionally* (Fr., *purement et simplement*); but many of the declarations exclude certain kinds of disputes described in terms other than those used in the Statute to describe the classes. In 1924, a committee of the Fifth Assembly of the League of Nations gave countenance to such exclusions, by suggesting the possibility of "reservations either in connection with a certain class of dispute or, generally speaking, in regard to the precise stage at which the dispute may be laid before the Court." [81] Thereafter, a tendency was noticeable to give the declarations a more complicated form, and to multiply the limitations on the jurisdiction recognized. In 1928, this tendency was encouraged by the Assembly resolution to the effect that "the reservations conceivable may relate, either generally to certain aspects of any kind of dispute, or

[79] In making the declaration of Canada, however, Mr. Dandurand admitted that "a doubt may exist as to such reservation being consistent with Article 36 of the Statute." Journal of the Tenth Assembly, p. 315. See, also, the Irish Minister's statement to the same effect, as reported in 11 Journal of the Parliaments of the Empire (1930), pp. 474, 836.

[80] El Salvador's declaration of August 29, 1930, excludes pecuniary claims from the jurisdiction recognized. The Persian declaration of October 2, 1930, applies only to situations or facts having to do directly or indirectly with the application of a treaty to which Persia is a party. Series D, No. 6 (4th ed.), pp. 51, 53.

[81] Records of Fifth Assembly, Third Committee, p. 199. But see Message of the Swiss Federal Council, March 1, 1921. *Bundesblatt*, 1921, I, p. 321.

specifically to certain classes or lists of disputes, and that these different kinds of reservation can be legitimately combined," [82] and by Article 39 of the Geneva General Act of 1928 which enumerated three classes of disputes which might be excluded from its operation by reservation.[83]

Certain types of exclusions were frequently employed, and the forms of stating them became more or less standardized.[84]

(1) *Future disputes.* As a general rule, the declarations are made to apply only to disputes subsequently arising.[85] The Netherlands declaration of August 6, 1921, expressly limited the jurisdiction recognized to "any future dispute," and the limitation is to be found in several later declarations.[86] A more common form refers to disputes which arise after the ratification of the declaration; in some cases, renewals of declarations refer to disputes arising after the effective date of an earlier declaration.

(2) *Subsequent situations and facts.* A formula employed in the Belgian declaration of September 25, 1925,[87] limiting the jurisdiction recognized to disputes arising with regard to situations or facts subsequent to the ratification of the declaration, has been widely copied.[88]

The Court has been called upon to apply this limitation in two cases. In the *Phosphates Case*, the respondent French Government contended that the Court lacked jurisdiction because the dispute related to situations and facts which were not subsequent to the ratification of the French

[82] Records of Ninth Assembly, Plenary, p. 183.

[83] Article 41 of the General Act expressly provides for the Court's jurisdiction over disputes as to the scope of reservations; this provision is to be found in a number of bipartite treaties also.

[84] Such exclusions do not preclude agreement between two or more States to confer a larger jurisdiction on the Court. Thus, Article 7 of the Colombian-Peruvian Protocol of May 24, 1934, provides for the Court's having jurisdiction not limited "by any reservations that either party may have made when subscribing to the optional clause." League of Nations Official Journal, 1934, p. 933.

[85] If no express limitation be made, a declaration would apply to disputes arising before the date of the declaration. *Cf.*, the *Mavrommatis Case*, Series A, No. 2, p. 35.

[86] The Liechtenstein declaration of March 22, 1939 applied to disputes "which have already arisen or which may arise in the future."

[87] An arbitration convention between Belgium and Russia, of October 17/30, 1904, provided that it should be applied even in disputes having their origin *dans des faits antérieurs à sa conclusion;* this became a popular formula in the succeeding years, and it persisted even after 1921. See the protocols to the German-Netherlands treaty of May 20, 1926, and the German-Lithuanian treaty of January 29, 1928. On the other hand, the Belgian-Greek convention of April 19/May 2, 1905, excluded from the arbitration provided for matters relating to facts anterior to the convention; this exclusion was also made by the Chilean-Italian convention of August 8, 1913. The Locarno conventions of October 16, 1925, excluded from the provision for arbitration "disputes arising out of events prior to the present convention and belonging to the past." 54 League of Nations Treaty Series, pp. 303, 315, 327.

[88] In a protocol to the Belgian-Danish treaty of March 3, 1927, it was stipulated that the limitation did not exclude from the Court's jurisdiction disputes as to the interpretation of previous treaties. 67 League of Nations Treaty Series, p. 129. *Cf.*, the protocols to the Belgian-Spanish treaty of July 19, 1927, 80 *idem*, p. 27, and the Luxemburg-Spanish treaty of June 21, 1928, 109 *idem*, p. 151.

declaration, and this contention was upheld. The Court explained that the limitation in the French declaration had been "inserted with the object of depriving the acceptance of the compulsory jurisdiction of any retroactive effects, in order both to avoid, in general, a revival of old disputes, and to preclude the possibility of the submission to the Court by means of an application of situations or facts dating from a period when the State whose action was impugned was not in a position to foresee the legal proceedings to which these facts and situations might give rise." [89] The Court looked for the situations and facts which were to "be considered as being the source of the dispute," declaring that the use of the two terms evidenced the declarant's intention "to embrace, in the most comprehensive expression possible, all the different factors capable of giving rise to a dispute." In the *Electricity Company Case*, the Bulgarian Government relied upon the limitation as contained in the Belgian declaration of September 25, 1925; rejecting the Bulgarian contention, the Court said that "a situation or fact in regard to which a dispute is said to have arisen must be the real cause of the dispute." [90]

(3) *Disputes for which a solution is not reached through the diplomatic channel.* Arbitration treaties have frequently provided for the settlement of disputes "which may not have been settled by diplomacy," or "which it may not have been possible to settle by diplomacy." The Geneva General Act of 1928 applied only to disputes "which it has not been possible to settle by diplomacy"; this would seem to require more evidence of effort to settle a dispute than would be necessary for proving merely that a dispute exists.[91] The Italian declaration of September 9, 1929 applied only in cases where a solution was not arrived at through the diplomatic channel; and in the *Phosphates Case*, one judge thought that the condition of diplomatic negotiations had not been fulfilled.[92]

(4) *Disputes for which the parties have agreed to have recourse to another method of pacific settlement.* The Netherlands' declaration of August 6, 1921 applied only to disputes for which the parties have not agreed to have recourse to some other method of pacific settlement; [93] the Belgian declaration of September 25, 1925 made the exclusion apply more clearly

[89] Series A/B, No. 74, p. 24. *Cf.*, the *Mavrommatis Case*, Series A, No. 2, p. 35.

[90] Series A/B, No. 77, p. 82.

[91] See Judge Moore's opinion in the *Mavrommatis Case*, Series A, No. 2, p. 62; and Judge Hudson's opinion in the *Electricity Company Case*, Series A/B, No. 77, p. 132.

[92] Series A/B, No. 74, p. 40. The French agent argued in this case that the provision in the Italian declaration was meaningless unless it required a fruitless attempt to achieve a settlement by the diplomatic channel. Series C, No. 84, p. 205.

[93] In later declarations by the Netherlands, this was limited to agreements made after the entry into force of the Statute of the Court.

to agreements made subsequently to the date of the declaration.[94] Such exclusions were widely copied. The Greek declaration of September 12, 1929, excluded "disputes relating directly or indirectly to the application of treaties or conventions accepted by Greece and providing for another procedure."[95] In applying provisions of this character, difficulty may arise in determining what are "other methods of pacific settlement";[96] if two States have agreed upon the settlement of disputes "through the diplomatic channel,"[97] *quaere* whether the exception applies.

(5) *Recourse to the Council of the League of Nations.* Inspired by the deliberations of the Assembly of the League of Nations,[98] the abortive French declaration of October 2, 1924, reserved a possibility of appeal to the Council of the League under paragraph 3 of Article 15 of the Covenant. The Italian declaration of September 9, 1929, and the French declaration of September 19, 1929, both excepted cases in which a solution was arrived at by the Council.[99] The British declaration of September 19, 1929, set a condition that Great Britain might within ten days after a dispute is brought before the Court require the Court's proceedings to be suspended if the dispute was under consideration by the Council, the suspension to be limited in point of time. Somewhat similar exclusions or reservations were made by other States, also.

(6) *Domestic questions.* In line with paragraph 8 of Article 15 of the Covenant,[1] Article 39 of the Geneva General Act of 1928 provided for a possible reservation excluding from the procedure laid down in the Act disputes concerning questions which by international law are solely within the domestic jurisdiction of States. This seems to have led to a provision in the British declaration of September 19, 1929, excepting "disputes with regard to questions which by international law fall

[94] The origin of such exclusions is to be traced to provisions in bipartite treaties safeguarding earlier agreements which prescribe a special procedure.

[95] This was followed in the Albanian declaration of September 17, 1930, and in the Turkish declaration of March 12, 1936.

[96] See the *Electricity Company Case*, Series A/B, No. 77, pp. 123–4.

[97] Various conventions on the enforcement of judgments to which Great Britain is a party so provide; *e.g.*, Article 9 of the British-French convention of January 18, 1934. 171 League of Nations Treaty Series, p. 183.

[98] A Committee of the Fifth Assembly of the League of Nations stated that in recognizing the Court's compulsory jurisdiction a State might "reserve the right of laying disputes before the Council of the League with a view to conciliation in accordance with paragraphs 1–3 of Article 15 of the Covenant, with the proviso that neither party might, during the proceedings before the Council, take proceedings against the other in the Court." Records of Fifth Assembly, Third Committee, p. 199. *Cf.*, Records of First Assembly, Committees I, p. 383.

[99] The French declaration applied only to disputes which could not be settled by a procedure of conciliation.

[1] In the *Nationality Decrees Case*, Series B, No. 4, the dispute was held not to be "solely a matter of domestic jurisdiction."

exclusively within the jurisdiction of the United Kingdom,"[2] and the precedent was followed in declarations by the British Dominions (not including Ireland), and by Yugoslavia, Albania, Iran, Rumania, Poland, Argentina, Brazil, Iraq, and Egypt. It is difficult to see what is accomplished by this exclusion; if a dispute relates to questions which fall within exclusively national jurisdiction, it does not fall within one of the classes enumerated in paragraph 2 of Article 36. The British Government's comment on its declaration[3] stated that questions of prize were not excluded from the Court's jurisdiction by the British declaration, for although "jurisdiction in matters of prize belongs to the courts of the States concerned, the law which prize courts administer in such matters is international law."[4] No State can set itself up as the final judge of what international law leaves to its own jurisdiction.

(7) *Constitutions.* Beginning with the Argentine-Uruguayan treaty of June 8, 1899, disputes affecting "constitutional principles of a State" were frequently excluded from provisions for arbitration. The declaration made by El Salvador on August 29, 1930, excluded disputes "concerning points or questions which cannot be submitted to arbitration in accordance with the political Constitution of this Republic."[5] Exclusions of constitutional questions were also made in declarations by the Argentine Republic and Brazil.

(8) *Territorial status.* Article 39 of the Geneva General Act of 1928 provided for a possible reservation excluding from the procedure laid down in the Act "disputes concerning particular cases or clearly specified subject-matters, such as territorial status." The Greek declaration of September 12, 1929 excluded "disputes relating to the territorial status of Greece including disputes relating to its rights of sovereignty over its ports and lines of communication."[6] The declaration by Persia on October 2, 1930, and that by Iraq on September 22, 1938, followed similar lines. Albania's declarations of September 17, 1930 and November 7, 1935, excluded "disputes relating to the territorial status of Albania." The Egyptian declaration of May 30, 1939 excluded "disputes relating

[2] Special concern on this point had been voiced by Canada and New Zealand in 1925, in connection with the abortive Protocol of October 2, 1924. See British Parliamentary Papers, Cmd. 2458 (1925).

[3] British Parliamentary Papers, Cmd. 3452 (1929), p. 12.

[4] See Pearce Higgins, British Acceptance of Compulsory Arbitration under the "Optional Clause" and Its Implications (1929); H. Lauterpacht, in Economica (June, 1930).

[5] Articles 49 and 68 (29) of the 1886 Constitution place certain limits on treaties which may be concluded by El Salvador.

[6] The exclusion was repeated in the Greek declarations of September 12, 1934, and September 8, 1939.

to the rights of sovereignty of Egypt." The Rumanian declaration of October 8, 1930, has a more complicated form, as it excludes "any question of substance or of procedure which might directly or indirectly involve discussion of the existing territorial integrity and the sovereign rights of Rumania, including her rights over ports and lines of communication."

(9) *Particular treaties.* The Polish declaration of January 24, 1931, excludes disputes relating to the Treaty of Riga of March 18, 1921. The Greek declaration of September 12, 1929,[7] excludes disputes relating directly or indirectly to the application of treaties or conventions accepted by Greece and providing for another procedure. The Argentine declaration of December 28, 1935, excludes disputes relating to "questions already settled." [8]

(10) *Disputes in time of war.* The British declaration of February 28, 1940, excepted "disputes arising out of events occurring at a time when His Majesty's Government in the United Kingdom were involved in hostilities"; similar exceptions were included also in the 1940 declarations of Australia, South Africa, New Zealand and India.

§458. Time-Limits in the Declarations. Paragraph 3 of Article 36 provides that the declaration may be made "for a certain time." Some thirteen States—Bulgaria, Colombia, Costa Rica, Dominican Republic, Guatemala, Haiti, Liberia, Nicaragua, Panama, Paraguay, Portugal, El Salvador and Uruguay—set no time-limits in their declarations recognizing the Court's jurisdiction; [9] but most of the declarations have been limited to definite periods of time. The period generally set in the earlier declarations was five years, but many of the later declarations were made for longer periods, usually ten years. In some instances, the declaration has been made for a definite period of years, with provision for its continuance after the expiration of the period until notice of termination or abrogation is given; [10] Luxemburg's declaration of September 15, 1930, was made for five years, and unless denounced six months before the

[7] Also the Greek declarations of September 12, 1934, and September 8, 1939. The example of Greece was followed in the Albanian declarations of September 17, 1930 and November 7, 1935, and in the Turkish declaration of March 12, 1936.

[8] Many arbitration treaties concluded by the Argentine Republic contain a similar provision; *e.g.*, the treaty of June 8, 1899 with Uruguay.

[9] Some of these States failed to bring their declarations into force, however.

[10] Thus the declarations of Australia (September 20, 1929 and August 21, 1940), Canada (September 20, 1929), Great Britain (September 19, 1929 and February 28, 1940), India (September 19, 1929 and February 28, 1940), Iran (October 2, 1930), Iraq (September 22, 1938), Latvia (January 31, 1935), New Zealand (September 19, 1929 and April 1, 1940), and South Africa (September 19, 1929).

expiration of a five-year period it was to be renewed automatically for further five-year periods.[11] South Africa's declaration of April 7, 1940, was unusual in that it set no definite period for its duration, but was to continue in force "until such time as notice may be given to terminate the acceptance." Upon the expiration of the time-limitation, many States have renewed their declarations, and in some cases the renewals were for longer periods of time than the original declarations.

§459. Extent of Recognition of Compulsory Jurisdiction. In the twelve months which followed the opening to signature of the Protocol of Signature of December 16, 1920, the Optional Clause was signed by few States; by the end of 1921, effective declarations had been made by only eight States. The number was increased to eleven in 1922, but for several years thereafter little progress was made. By 1929, Germany was the only State permanently represented on the Council of the League of Nations which had made an effective declaration; but with the impetus given by the signing of the Treaty for the Renunciation of War of August 27, 1928, and by the Assembly resolution of September 26, 1928, the Optional Clause was signed by fifteen States during the Tenth Assembly of the League of Nations in 1929. By the end of 1934, declarations were in force by which forty-two Members of the League of Nations had recognized the Court's compulsory jurisdiction.[12] In succeeding years, the number of States bound by declarations did not increase; on the contrary, though several new declarations were made, some of the expiring declarations were not renewed and the number of States bound progressively decreased.

§460. Relation of Separate Agreements to Declarations under Article 36, paragraph 2. It would seem to be possible for two States by a bipartite instrument to modify the effect of their earlier declarations, as between themselves, if this is clearly intended.[13] In the *Electricity Company Case*,[14] the Court held that a later treaty between Belgium and Bulgaria did not prevent their earlier declarations from having effect, as the parties had not intended to weaken their obligations under the declarations; but it is to be noted that in this case both of the parties

[11] Similar provision was contained in Article 45 of the Geneva General Act of 1928.

[12] The 42 effective declarations were equivalent to 861 bipartite agreements.

[13] Message of Swiss Federal Council, March 1, 1921. *Bundesblatt*, 1921, I, p. 321. But *cf.*, Judge van Eysinga's dissent in the *Chinn Case*, Series A/B, No. 63, pp. 133–6.

The Colombian-Peruvian Protocol of May 24, 1934, conferred on the Court a jurisdiction which was not to be "excluded or limited by any reservations" made by either party "when subscribing to the Optional Clause." 164 League of Nations Treaty Series, p. 21.

[14] Series A/B, No. 77, p. 76.

had taken the position that both the declarations and the later treaty were operative.

Certainly the point is one which negotiators ought to have in mind, and some instruments indicate that it has not been neglected. The Portuguese-Swedish arbitration convention of November 15, 1913 was formally abrogated by an exchange of notes of December 29, 1926, because of the declarations made by Portugal and Sweden under paragraph 2 of Article 36; but this seems to be the only instance, apart from the fact of nonrenewal of earlier agreements, in which the effect of the declarations on such agreements has been expressly recognized.[15] On the other hand, the effect of later agreements on earlier declarations has been referred to in numerous instances. In a protocol to the Austrian-Swiss treaty of October 11, 1924, it was provided that so long as the treaty remained in force, the parties would continue to be bound by Article 36 of the Statute of the Court, even though the declaration previously made by one or both of them should cease to be in force.[16] An additional protocol to the Baltic States' Convention of January 17, 1925, provided that the convention did not modify in any way the declarations previously made by Estonia and Finland.[17] By a protocol of August 29, 1928, modifications were introduced into the German-Swiss treaty of April 3, 1921 to take account of declarations made by the two States under Article 36, paragraph 2;[18] the Finnish-German protocol of December 3, 1928[19] and the German-Swedish protocol of April 25, 1929,[20] had similar effect with reference to earlier conventions. The treaty between Denmark and Iran of February 20, 1934, made special provision that since the parties had acceded to the Optional Clause of the Statute of the Court, they should "apply it to the settlement of all disputes to which it is suitable, notwithstanding the foregoing provisions" of the treaty.[21] The treaty between Iran and Switzerland of April 25, 1934, provided that the dispositions covering arbitration did not in any way preclude the application of the declarations made by the two States under Article 36, paragraph 2, of the Statute.[22]

[15] In a few instances, reference has been made, at the time of concluding a bipartite treaty, to the possibility of a later declaration under paragraph 2 of Article 36 by one or both of the parties. Series D, No. 6, pp. 139, 414. The Rumanian-Turkish arbitration treaty of October 17, 1933, stated that the parties maintained the reserves made at the time of their adhesion to the Optional Clause of Article 36 of the Statute of the Court, though a declaration was not made by Turkey until March 12, 1936 and it was never ratified.

[16] Series D, No. 6, p. 97.

[17] *Idem*, p. 105.

[18] *Idem*, p. 296.

[19] *Idem*, p. 323.

[20] *Idem*, p. 362.

[21] Series E, No. 13, p. 333.

[22] *Idem*, p. 335.

The Geneva General Act of September 26, 1928 provided (Article 29) that it should not affect any agreements in force by which the parties are bound to resort to arbitration or judicial settlement assuring the settlement of the dispute; the effect of this provision is doubtful, so that the relation of the act both to prior and to later declarations is somewhat uncertain.[23] In adhering to the Act, Italy stipulated that its adhesion did not in any way affect its declaration under paragraph 2 of Article 36.[24]

The confusion of jurisdictional instruments may be illustrated by a reference to the situation of Belgium and Spain in 1937 when the *Borchgrave Case* was under discussion. From March 10, 1926, Belgium had been bound by a declaration under paragraph 2 of Article 36 of the Statute, conferring on the Court jurisdiction over disputes with regard to subsequent situations or facts, except in cases where the parties might have agreed to have recourse to another method of pacific settlement. On May 23, 1928, Belgium and Spain brought into force a Treaty of Conciliation, Judicial Settlement and Arbitration of July 19, 1927, providing for the Court's jurisdiction over disputes in which the parties were in conflict as to their respective rights, but resort to the Court by one party was subject to certain preliminary conditions, and disputes for the settlement of which a special procedure was laid down in other conventions in force between the parties were excepted. On May 18, 1929, Belgium adhered to the Geneva General Act of 1928, conferring on the Court a jurisdiction over disputes arising out of subsequent facts, including the disputes mentioned in Article 36 of the Statute, but excluding disputes for which a special procedure had been provided by other conventions. On April 7, 1930, a ratification was deposited of the Spanish declaration of September 21, 1928, recognizing the Court's jurisdiction in subsequent disputes relating to subsequent situations or facts for which the parties had not agreed to have recourse to another method of pacific settlement. On September 16, 1930, Spain adhered to the Geneva General Act with certain reservations. With regard to any particular dispute, it therefore became difficult to say whether the General Act, or the Treaty of 1927, or the declarations made by Belgium and Spain were to be applied. The multiplicity of instruments can hardly have facilitated the negotiations

[23] See Gallus, "*L'Acte général d'arbitrage*," 11 *Revue de droit international et de législation comparée* (1930), p. 878; C. G. Ténékidès, "*Les actes compromissoires concurrents*," 17 *diem* (1936), p. 719. *Cf.*, G. Bosco, *Rapporti e conflitti fra giurisdizioni internazionali* (1932), pp. 131–42.

[24] 111 League of Nations Treaty Series, p. 415.

which led to the signing of the special agreement of February 20, 1937 in the *Borchgrave Case;* no mention of the Geneva General Act was made in the diplomatic correspondence, but before the Court the Spanish Government relied on the 1927 Treaty in advancing one of its exceptions, while the Belgian Government contended that the special agreement was based not upon the 1927 Treaty but upon the declarations under paragraph 2 of Article 36.[25]

§461. Denunciation or Modification of Declarations. In 1933, Paraguay recognized the Court's jurisdiction "purely and simply" without any time-limit; in 1938, after Paraguay's withdrawal from membership in the League of Nations, the President of Paraguay by decree duly legalized in Paraguay withdrew the previous acceptance of the Court's jurisdiction, the decree stating that Paraguay's acceptance had not been accompanied "by an undertaking to maintain such acceptance or adherence for any stated period."[26] The text of the decree was communicated to the Secretary-General of the League of Nations *pour toutes fins utiles;* when it was later transmitted to States and Members of the League of Nations, reservations were made by Belgium, Bolivia, Brazil, Czechoslovakia, Netherlands and Sweden.[27]

The outbreak of war in Europe in 1939 led several States to declare that they would not regard their previous declarations under paragraph 2 of Article 36 as covering disputes arising out of events occurring during the war; this position was taken by Australia, Canada, France, Great Britain, India, New Zealand and South Africa.[28] Reservations as to the legal effect of such action were made by Belgium, Brazil, Denmark, Estonia, Haiti, Netherlands, Norway, Peru, Sweden, Switzerland, and Thailand.[29]

§462. Exercise of Compulsory Jurisdiction. Even where the States engaged in a dispute are bound by declarations recognizing the Court's compulsory jurisdiction, the jurisdiction will not be exercised by the Court in the absence of an application which fulfills the conditions laid down by the Statute and the Rules; any one of the parties to the dispute may make the application, but the Court will not act *proprio motu.* In connection with the Letitia dispute between Colombia and Peru in 1933, the Peruvian

[25] Series C, No. 83, pp. 67, 83, 116, 129.
[26] League of Nations Official Journal, 1938, pp. 650–2.
[27] *Idem,* pp. 686–7, 1180–2; *idem,* 1939, p. 235. *Cf.,* A. P. Fachiri, in 20 British Year Book of International Law (1939), pp. 52–7.
[28] League of Nations Official Journal, 1939, pp. 407–10; *idem,* 1940, p. 44.
[29] *Idem,* 1939, p. 410; *idem,* 1940, pp. 45–7.

delegate to the League of Nations addressed a letter to the President of the Court stating:

> "Pursuant to the instructions of my Government, I have the honour to submit to the jurisdiction of the Court, under Article 36 of the Statute, the Salomon-Lozano Treaty concluded between the Governments of Peru and Colombia, this Treaty not having been executed in the latter country, as will be established by evidence provided by my Government in due course."

Though Colombia and Peru had made declarations under paragraph 2 of Article 36, this letter was not treated as an application, and the case was not entered on the Court's list.[30]

§463. Recourse to Compulsory Jurisdiction under Article 36, paragraph 2. Declarations made under paragraph 2 of Article 36 of the Statute have been relied upon as founding the jurisdiction of the Court in eleven cases:

(1) *Denunciation of the Belgian-Chinese Treaty.* The Belgian application of November 25, 1926, asking for judgment that the Chinese Republic was not entitled unilaterally to denounce the Belgian-Chinese Treaty of November 2, 1865, referred to the declarations made by Belgium and China under paragraph 2 of Article 36, and in communicating a copy of the application to the Chinese Minister at The Hague, the Registrar set out the texts of the declarations. Time-limits were fixed and extended from time to time for the filing of documents of the written procedure,[31] but at no time did the Chinese Government take any step in the proceeding; the Chinese Minister at The Hague confined himself to acknowledgments of communications sent to him.[32] The case was finally terminated at the request of the Belgian Agent, following the signature of the Belgian-Chinese treaty of November 22, 1928.

(2) *Eastern Greenland Case.* The Danish application of July 12, 1931, referred to the Danish and Norwegian declarations under paragraph 2 of Article 36; the Court was asked to give judgment that the promulgation of a Norwegian decree of July 10, 1931, relating to the occupation of certain territories in Eastern Greenland, constituted a violation of the existing legal situation and was accordingly illegal and null and void.

[30] Series E, No. 9, p. 76, note.

[31] On January 8, 1927, the President gave an order indicating measures of interim protection; this order was revoked on February 15, 1927. Series A, No. 8.

[32] However, the Chinese Minister at The Hague and the Chinese Legation at Brussels did despatch to the Registrar, apparently *à titre purement privé*, certain documents published by the Chinese Government. Series C, No. 16–I, pp. 296–301.

The judgment given by the Court on April 5, 1933, was to this effect.[33] Norway did not at any time contest the Court's jurisdiction.

(3) (4) *Southeastern Greenland Case.*[34] The Norwegian and Danish applications of July 18, 1932 both referred to the two States' declarations under paragraph 2 of Article 36. Finding the two applications to be "directed to the same object," *viz.*, the validity of a Norwegian decree placing the territory of Southeastern Greenland under the sovereignty of Norway, the Court held that the situation "closely approximated, so far as concerns the procedure, to that which would arise if a special agreement had been submitted," and the two suits were joined. The two Governments were treated as being "simultaneously in the position of applicant and respondent." No question as to the Court's jurisdiction arose, the proceedings being terminated because of the withdrawal of the applications.

(5) *Losinger Case.* In its application of November 23, 1935, seeking judgment that Yugoslavia could not claim release from the terms of a contract with a Swiss company by advancing a subsequent Yugoslav law on the conduct of State litigation, the Swiss Government invoked the declarations of Switzerland and Yugoslavia under paragraph 2 of Article 36, and the Swiss memorial relied upon the classes of disputes under (*b*) and (*c*). The Yugoslav Government put forward a preliminary objection, contending that the dispute concerned neither a question of international law nor the existence of a fact which would constitute a breach of an international obligation by Yugoslavia; that the application concerned relations of private law between the Yugoslav Government and a Swiss company; that as to class (*b*), the Court could not give a judgment on an abstract question; that as to class (*c*), "the existence of the international obligation referred to in this provision must be beyond dispute," and the international obligation must be an obligation between States, and contractual in origin.[35] By an order of June 26, 1936 the Court joined the objection to the merits; thereafter, the parties discontinued the proceedings, the Court taking note of their action in its order of December 14, 1936.[36]

(6) *Pajzs, Csáky, Esterházy Case.* In its application of December 1, 1935, filed with the Registry on December 6, 1935, the Hungarian Government adduced "as a clause bestowing jurisdiction, but only as a second alternative and purely by way of precaution," the declarations made by

[33] Series A/B, No. 53.
[34] Series A/B, Nos. 48 and 55.
[35] Series C, No. 78, pp. 25, 123–8, 179.
[36] Series A/B, Nos. 67 and 69.

Hungary and Yugoslavia under paragraph 2 of Article 36. The Yugoslav declaration of May 16, 1930, recognizing the Court's jurisdiction for a period of five years from November 24, 1930, expired on November 24, 1935; hence Yugoslavia was not bound by the declaration on December 6, 1935.[37] The Hungarian agent later withdrew the contention as to the declarations, explaining that the reference to them had been made in anticipation of renewal of the declaration by Yugoslavia.[38]

(7) *Diversion of Water from the Meuse.* The Netherlands' application of August 1, 1936 relied upon declarations made by the Netherlands and Belgium under paragraph 2 of Article 36. Though the case related to the interpretation of a treaty of May 12, 1863, no point was made as to the limitation in the Belgian declaration of September 25, 1925, confining the Court's jurisdiction to disputes relating to situations or facts subsequent to the ratification of the declaration. No question was raised as to the jurisdiction, and the Court's judgment of June 28, 1937 rejected both the submissions relating to the Netherlands' claim and the submissions relating to a Belgian counter-claim.[39]

(8) *Phosphates in Morocco.* The Italian application of March 30, 1936, relied upon declarations made by Italy and France under paragraph 2 of Article 36. The French Government put forward preliminary exceptions, contending that the Italian Government had not explained how the various parts of its case were covered by paragraph 2 of Article 36 of the Statute; that the condition of attempted settlement by diplomatic negotiations required by the Italian declaration of September 9, 1929 had not been fulfilled; that the Italian application related to situations and facts which, being prior to the date of the ratification of the Italian declaration, did not fall within the jurisdiction which it conferred. For this last reason, in its judgment of June 14, 1938, the Court held that it had no jurisdiction. After the expiration of the Italian declaration on September 7, 1936, new submissions were presented in this case by the Italian Government; but the French Agent's contention that no jurisdiction existed to decide upon these new submissions was not dealt with by the Court.[40]

(9) *Panevezys-Saldutiskis Railway.* In its application of November 2, 1937, the Estonian Government relied upon declarations made by Estonia and Lithuania under paragraph 2 of Article 36. The Lithuanian

[37] Series A/B, No. 66, pp. 5–6.
[38] Series C, No. 79, p. 188; Series C, No. 80, pp. 490–2, 684, 903.
[39] Series A/B, No. 70.
[40] Series C, No. 85, p. 1058; Series A/B, No. 74.

Government submitted two preliminary objections based not upon the texts of the declarations but on rules of general international law, to the effect that the private claim espoused by Estonia was not national in character, and that local remedies had not been exhausted. The Court joined these objections to the merits, and in its judgment of February 28, 1939, it declared the latter objection to be well-founded.[41]

(10) *Electricity Company of Sofia and Bulgaria.* In its application of January 28, 1938, the Belgian Government relied upon declarations made by Belgium and Bulgaria under paragraph 2 of Article 36, and upon the Belgian-Bulgarian Treaty of June 23, 1931. The Court held that both the declarations and the Treaty were in force on January 28, 1938, and that as the later Treaty had not been intended to weaken the parties' obligations, it did not prevent the exercise of the more extensive jurisdiction conferred by the declarations.[42] One of Belgium's claims was found not to have been the subject of a dispute between the two Governments prior to the filing of the Belgian application, as was necessary under either the Treaty or the declarations.[43] The Belgian declaration, effective from March 10, 1926, conferred jurisdiction over disputes arising after that date with regard to subsequent situations or facts. Claims were made by Belgium relating to the application, after March 10, 1926, of a formula established by arbitral awards given in 1923 and 1925. In its preliminary objection, the Bulgarian Government contended that if these claims related to *facts* subsequent to March 10, 1926, they related to *situations* anterior to that date, and hence that they were not covered by the Belgian declaration. The Court was of the opinion that the dispute did not arise with regard to the awards, nor with regard to the situation created by them; "a dispute may presuppose the existence of some prior situation or fact, but it does not follow that the dispute arises in regard to that situation or fact." The "real cause of the dispute" in this case was found in "subsequent acts with which the Belgian Government reproaches the Bulgarian authorities with regard to a particular application of the formula."[44] The Bulgarian Government further contended that the dispute did not fall "within any of the categories of Article 36"; the Court found that as this contention was closely linked to the merits of the case it lacked the character of a preliminary objection.

(11) *Gerliczy Case.* In its application of June 17, 1939, Liechtenstein relied upon its own declaration of March 22, 1939 "accepting the juris-

[41] Series A/B, Nos. 75, 76.
[42] Series A/B, No. 77, p. 76.
[43] *Idem*, p. 83.
[44] *Idem*, p. 82.

diction of the Court and recognizing the jurisdiction of the Court as compulsory, *ipso facto* and without special convention, in conformity with Article 36, paragraph 2, of the Statute," [45] and upon the Hungarian declaration of May 30, 1934, made under paragraph 2 of Article 36. The application was communicated to the Hungarian Government which proceeded to appoint an agent; time-limits were fixed for the written proceedings but no documents of the written proceedings were filed. The Hungarian Government stated that it intended to file a preliminary objection based *inter alia* upon the text of the Council's resolution of May 17, 1922; as Liechtenstein was not mentioned in the Annex to the Covenant and was never a member of the League of Nations, its declaration was made under the Council's resolution, which provides that such a declaration "may not, without special convention, be relied upon *vis-à-vis* Members of the League or States mentioned in the Annex to the Covenant which have signed or may hereafter sign the 'Optional Clause.'" [46]

During the Court's first nine-year period, ten cases were begun by applications, but in only one case did the applicant invoke declarations made under paragraph 2 of Article 36. In the second nine-year period, there were seventeen cases in which proceedings were instituted by applications, and in ten of them the applicant relied upon declarations under paragraph 2 of Article 36. It is also to be noted that in four of the five cases arising under special agreements during the second nine-year period, the parties to the agreements were bound by declarations under paragraph 2 of Article 36. In two of the eleven cases in which declarations under paragraph 2 of Article 36 were invoked during eighteen years—the *Eastern Greenland Case* and the *Meuse Case*—jurisdiction was exercised by the Court without objection. In five of the eleven cases the jurisdiction was challenged, and the Court upheld the objection in the *Phosphates Case* and in the *Panevezys Case*, and upheld it in part in the *Electricity Company Case;* in the *Pajzs Case* the reliance was withdrawn. In five of the eleven cases, also—the *Belgian-Chinese Treaty Case*, the two cases relating to *Southeastern Greenland*, the *Losinger Case*, and the *Gerliczy Case*—the proceedings did not advance to a point where the Court was called upon to consider the basis of jurisdiction invoked.

[45] Series E, No. 15, p. 213; 196 League of Nations Treaty Series, p. 403.

[46] Though not named in the Annex to the Covenant, Hungary was a member of the League of Nations from September 18, 1922 to April 11, 1941.

§464. Appraisal of Compulsory Jurisdiction. In view of the actual developments with respect to the Court's compulsory jurisdiction, it may be thought that some of the framers of the Statute were too timid. The proposal of the 1920 Committee of Jurists may have been too broad, and it was not well explained; yet it can hardly be said to have been premature, and those who so stoutly opposed compulsory jurisdiction in 1920 have not been vindicated. The willingness of so many States to confer compulsory jurisdiction on the Court in the subsequent years marks a substantial advance in the history of the law of pacific settlement of disputes.

CHAPTER 22

ADVISORY JURISDICTION

§465. Legal Basis of Advisory Jurisdiction. The general nature and powers of the Court depend upon a single international instrument, *viz.*, the Protocol of Signature of December 16, 1920 and the annexed Statute. Historically this instrument is due to the provisions in Article 14 of the Covenant of the League of Nations; but it is not to be thought that for this reason the Court derives character directly from the Covenant. Indeed the Protocol of Signature of December 16, 1920 was open to signature by States not parties to the Covenant of the League of Nations, and, therefore, not bound by the provisions in Article 14 of the Covenant; if any such State had become a party to the Protocol of Signature, it would not thereby have agreed to provisions in the Covenant except to the extent that such provisions had been incorporated into the Statute.

The original Statute made no express reference to advisory opinions. The 1920 Committee of Jurists had proposed an article concerning advisory opinions,[1] but its proposal was rejected in the First Assembly of the League of Nations. The opinion was expressed at that time that as "the Covenant, in Article 14, contained a provision in accordance with which the Court could not refuse to give advisory opinions," it "was therefore unnecessary to include a rule to the same effect in the Constitution of the Court";[2] but no explanation was offered as to the way in which Article 14 of the Covenant was to be made applicable.

Article 1 of the Statute states that the Court was established "in accordance with Article 14 of the Covenant of the League of Nations";

[1] Article 36 of the draft-scheme of the 1920 Committee of Jurists provided:

"The Court shall give an advisory opinion upon any question or dispute of an international nature referred to it by the Council or Assembly.

"When the Court shall give an opinion on a question of an international nature which does not refer to any dispute that may have arisen, it shall appoint a special Commission of from three to five members.

"When it shall give an opinion upon a question which forms the subject of an existing dispute, it shall do so under the same conditions as if the case had been actually submitted to it for decision."

[2] Records of First Assembly, Committees, I, p. 401. This opinion was expressed at a meeting of a subcommittee held on December 4, 1920, before a decision had been taken as to the way in which the Statute of the Court should be launched.

this had the effect of incorporating into the Statute the third sentence in Article 14 of the Covenant, which provided that "the Court may also give an advisory opinion upon any dispute or question referred to it by the Council or the Assembly." Hence in spite of the absence of an express provision, the original Statute did provide for the Court's giving advisory opinions.[3] This conclusion is reinforced by the reference to Article 14 of the Covenant in the title given to the Statute, though the reference in the title might not by itself be a sufficient basis for saying that the Court has the powers envisaged for it in Article 14 of the Covenant. A contention has also been made that the provision in Article 14 of the Covenant is a matter specially provided for in a treaty or convention in force, within the meaning of that phrase in paragraph 1 of Article 36 of the Statute;[4] but it would seem unnecessary to place this strained construction on the text of Article 36.

From the beginning the Court entertained no doubt as to its power to give advisory opinions; this is evidenced by the procedural provisions in Articles 71–74 of the Rules of 1922, 1926, and of 1931. The legal situation was clarified when the amendments to the Statute entered into force on February 1, 1936, for they added four articles concerning advisory opinions (Articles 65–68), consisting chiefly of the procedural provisions formerly included in the Rules.

§466. Advisory Jurisdiction of Other International Bodies. Prior to 1920 several international bodies possessed a competence to give opinions which were advisory in nature. Article 15 of the Universal Postal Convention of October 9, 1874 provided that the International Bureau of the Universal Postal Union should give opinions on questions in dispute at the request of the parties concerned, and this provision had been maintained in the later conventions of the Union.[5] To similar effect, with reference to the International South American Postal Bureau, was Article 12 of the Montevideo Convention of February 2, 1911.[6] The International Commission for Air Navigation was empowered by Article 34 of the Aerial Navigation Convention of October 13, 1919 to give opinions on questions which the States might submit for examination.[7]

[3] In 1922 President Loder stated that by virtue of Article 1 of the Statute, Article 14 of the Covenant "forms an integral part" of the Statute. Series D, No. 2, p. 502. To the same effect, see Judge de Visscher in 26 *Recueil des Cours* (1929), p. 20. See also the statements by Judge Negulesco in Minutes of the 1926 Conference of Signatories, pp. 43–4, and in Series D, No. 2 (3d add.), p. 679.

[4] A. P. Fachiri, Permanent Court of International Justice (2d ed., 1932), p. 78.

[5] 1 *Résumé alphabétique et méthodique des Documents de l'Union Postale* (1932), p. 40.

[6] Mera, *Convenios Diplomaticos* (2d ser.), p. 567.

[7] 1 Hudson, International Legislation, p. 371.

Since 1920, numerous provisions have been adopted for advisory jurisdiction to be exercised by international agencies. Article 13 of the Barcelona Statute on Freedom of Transit and Article 22 of the Barcelona Statute on Navigable Waterways, both of April 20, 1921, provide for the exercise of an advisory function by the League of Nations Advisory and Technical Committee for Communications and Transit, as a condition precedent to resort to the Court; [8] similar provision was made in the Geneva Statute on Railways, the Geneva Statute on Maritime Ports, and the Convention on Transmission in Transit of Electric Power, all of December 9, 1923.[9] Provision for advisory jurisdiction was also made in Article 22 of the Convention on Simplification of Customs Formalities of November 3, 1923, to be exercised by a technical body to be appointed by the Council of the League of Nations; [10] and a similar provision was included in Article 32 of the Opium Convention of February 19, 1925.[11]

§467. Advisory Jurisdiction of National Courts. In view of the history of Article 14 of the Covenant,[12] it cannot be said that the provision relating to advisory opinions was due to the experience of national courts. Yet the courts of various States had long had experience with advisory opinions,[13] and this experience may have been in the minds of the draftsmen of the Covenant in 1919. In the United States of America,[14] the constitutions of several of the states provide for advisory opinions to be given by state courts or by the judges which compose them,[15] and in some of the states such competence is conferred by statute.[16] In Great Britain, the Judicial Committee of the Privy Council has had power to give advisory opinions since 1833.[17] In Canada, the Supreme Court of the Dominion [18] and the highest courts of eight of the provinces have such power. The Irish Constitution of 1937 (Article 26) confers such power on the Supreme Court of Ireland.[19] In several European States, courts

[8] *Idem*, pp. 637, 658. [9] 2 *idem*, pp. 1152, 1169, 1177. [10] *Idem*, p. 1116.

[11] 3 *idem*, p. 1609. Such jurisdiction is also possessed by the International Office of the Postal Union of the Americas and Spain under the Conventions of 1931 and 1936. 5 *idem*, p. 1113; 7 *idem*, p. 515.

[12] See §102, *supra*.

[13] See generally, Hudson, "Advisory Opinions of National and International Courts," 37 Harvard Law Review (1924), pp. 970–1001; 15 *Bulletin de l'Institut Intermédiaire International* (1926), pp. 11–22, 330–2.

[14] In 1793, the Justices of the Supreme Court of the United States declined to give an advisory opinion which had been requested by the President. Warren, The Supreme Court in United States History, I, p. 108ff. *Cf.*, Muskrat *v.* U. S. (1911), 219 U. S. 346.

[15] Such provisions are to be found in the constitutions of Colorado (1876), Florida (1887), Maine (1820), Massachusetts (1780), New Hampshire (1784), Rhode Island (1842), South Dakota (1889).

[16] Alabama (Act of February 13, 1923), and Delaware (Act of January 17, 1832).

[17] Judicial Committee Act of 1833. [18] Act of 1875, §§52–3.

[19] *Cf.*, Article 213 of the British Government of India Act, 1935.

have long exercised advisory jurisdiction,[20] and some European States have recently adopted the practice.[21] The courts of several Central and South American States have power to give advisory opinions.[22] Hence it cannot be said that the provision in Article 14 of the Covenant constituted a great innovation in judicial history.

468. Power to Request an Advisory Opinion. The Court has no power to give or to offer to give an advisory opinion *proprio motu;* it can act only when it is seized of a request, and a request can emanate only from the Council or the Assembly of the League of Nations. As the Court said in the case relating to *German Interests in Upper Silesia* in 1925, a request "directly submitted by a State will not be considered." [23] Nor may two States interested in an advisory proceeding secure an extension of the advisory procedure beyond the limits of the request by the Council or Assembly by entering into an agreement to that effect.[24]

In 1920, the Director of the International Labor Office sought power to make a request for both the Governing Body of the International Labor Office and the International Labor Conference; in the same year, the Argentine delegation to the First Assembly proposed that the Statute be made to provide for requests "by the Governments of the States composing the League of Nations." These proposals were rejected in the First Assembly, on the ground that they "might lead to consequences difficult to calculate in advance." [25] In 1936, the Chilean Government proposed that competence to request advisory opinions be conferred on conciliation commissions.[26]

It seems very doubtful whether the Council or the Assembly of the League of Nations may delegate its power to request an advisory opinion. The object of the requirement that the request emanate from one of these two bodies would be defeated if neither of them had passed upon the opportunity of a request or upon the statement of the question to

[20] *E.g.*, Bulgaria (Law on organization of Courts, 1898, Art. 47); Norway (Constitution of 1814, Art. 83); and Sweden (Constitution of 1809, Art. 88).

[21] *E.g.*, Austria (Constitution of 1920, Arts. 139–40); Finland (Constitution of 1919, Arts. 18–9); and Poland (Law on organization of Courts, 1928, Art. 41).

[22] *E.g.*, Colombia (Constitution of 1886, Art. 90; of 1937, Art. 83); Ecuador (Constitution of 1929, Art. 67); Honduras (Constitution of 1924, Art. 102; of 1936, Arts. 108, 111); Nicaragua (Constitution of 1911, Art. 99); Panama (Constitution of 1904, Art. 105); and El Salvador (Constitution of 1886, Art. 79).

[23] Series A, No. 6, p. 21.

[24] *Caphandaris-Molloff Agreement Case*, Series A/B, No. 45, p. 87.

[25] Records of First Assembly, Committees, I, pp. 519, 534, 563. But see Records of Sixth Assembly, Plenary, p. 73; League of Nations Official Journal, 1935, p. 142.

[26] Proceedings of Inter-American Conference for the Maintenance of Peace (1937), p. 240; League of Nations Official Journal, 1937, p. 664.

which it relates. The evil of delegation is the substitution of one judgment for another. When the Assembly of the League of Nations set up a Committee to follow the Manchurian situation in 1932, it empowered the Committee to propose to the Assembly, if necessary, that it make a request for an advisory opinion;[27] this clearly involved no delegation. A different course was taken in 1934 when the Special Assembly of the League of Nations dealing with the Chaco dispute authorized the Secretary-General to submit to the Court "on behalf of the Assembly" a request for an advisory opinion if an Advisory Committee charged with following the dispute should "consider such a consultation to be justifiable and opportune," and provided that "the terms of the question and the date of the request" should be determined by the Advisory Committee;[28] this was quite clearly an attempt to delegate.[29] In the Council's resolution of December 14, 1939 authorizing the Secretary-General to lay before the Court a request for an advisory opinion concerning specific questions relating to claims made by ex-officials of the Saar, a preliminary procedure was required, but as no discretion was left to the Secretary-General there was clearly no attempted delegation.[30]

In deciding to make a request, the Council or the Assembly may act upon a suggestion by another international body or by one or more States engaged in a dispute. In each case, however, the responsibility must be assumed by the Council or the Assembly.[31] Neither of these bodies is under any duty to request an advisory opinion, even when a legal question is before it;[32] but in 1929 and 1936, the International Labor Office contended that under a proper interpretation of Article 14 of the Covenant and Article 37 of the Constitution of the International

[27] Records of 1932 Special Assembly, p. 88.

[28] Records of 1934 Special Assembly, p. 51. When the Council voted to request an opinion in the *Polish Nationality Case*, the formulation of the precise questions was left to the President. League of Nations Official Journal, 1923, p. 935.

[29] See the author's discussion of this case in 29 American Journal of International Law (1935), pp. 640–3.

[30] League of Nations Official Journal, 1939, p. 502.

[31] In the *Danube Commission Case* in 1927, the Council's request was made in response to the desire of four States expressed in an agreement of September 18, 1926. 59 League of Nations Treaty Series, p. 237. The Registrar later referred to this agreement as *res inter alios acta*. Series C, No. 13–IV, p. 2108.

[32] Articles 4 and 5 of the abortive Geneva Protocol of October 2, 1924, were designed to place a duty on the Council. *Cf.*, the Finnish-Swedish Aaland Island Agreement, in Minutes of the Council, 13th session, June 27, 1921, p. 53; Latvian Minorities Declaration of July 7, 1923, League of Nations Official Journal, 1923, p. 933; Resolution on Minorities in Estonia, *idem*, p. 1311. In the Committee set up in 1930 to consider amendments "to bring the Covenant into harmony with the Pact of Paris," there was some disposition to say that the Council should be bound to request an opinion desired by a party to a dispute. Records of Eleventh Assembly, First Committee, p. 109.

Labor Organization, the Council or Assembly would be obliged to transmit to the Court any request for an advisory opinion concerning the interpretation of the Organization's Constitution or of a labor convention, made under Article 37.[33]

No distinction is to be drawn between the competence of the Council and that of the Assembly with respect to requests for advisory opinions. In connection with the Vilna dispute between Lithuania and Poland in 1923, the Lithuanian Government asked the Assembly to request an advisory opinion after the Council had refused to request an opinion on the same questions; the matter was discussed by the First and Sixth Committees of the Fourth Assembly, and apparently the view was taken that a request by the Assembly was not excluded after a refusal by the Council, provided the matter had not been expressly committed to the Council.[34] In the case relating to *Danzig and the International Labor Organization*, Judge Anzilotti expressed the view that as the admission of members of the League of Nations "is a matter falling within the exclusive jurisdiction of the Assembly," it would seem to follow that "the Assembly alone could ask the Court for an advisory opinion" relating to such admission.[35]

In practice, no requests have been made by the Assembly of the League of Nations, though on several occasions it was proposed that the Assembly take such action.

§469. The Vote in the Council and the Assembly. The question has been much discussed whether in voting to make a request for an advisory opinion the Council or the Assembly of the League of Nations must be unanimous, or whether a majority vote would be sufficient. The two bodies would seem to be on the same basis in this respect.[36] Article 5, paragraph 1, of the Covenant provides that "except where otherwise expressly provided in this Covenant or by the terms of the present treaty,[37] decisions at any meeting of the Assembly or of the Council shall require the agreement of all the Members of the League represented at

[33] Minutes of the 1929 Committee of Jurists, pp. 103–4; League of Nations Official Journal, 1937, pp. 184–5. It had been contended in 1922 that the Council had a duty to consult the Governing Body before requesting an opinion relating to the International Labor Organization. League of Nations Official Journal, 1922, pp. 527–8.

[34] Records of Fourth Assembly, Plenary, p. 367.

[35] Series B, No. 18.

[36] In 1929, however, the *rapporteur* of the First Committee of the Assembly (M. Politis, Greece) expressed the view that a majority vote was sufficient for the Assembly's decision to request an advisory opinion. Records of Tenth Assembly, Plenary, p. 116.

[37] The term *present treaty* must include all of the four peace treaties in which the text of the Covenant was embodied.

the meeting"; paragraph 2 of the same Article provides, however, that "all matters of procedure at meetings of the Assembly or of the Council,[38] including the appointment of Committees to investigate particular matters, . . . may be decided by a majority of the Members of the League represented at the meeting." The substance of these provisions is incorporated in Article 19 of the Rules of Procedure of the Assembly,[39] and in Article 9 of the Rules of Procedure of the Council.[40]

Is the adoption of a resolution to request an advisory opinion a "decision" within the meaning of that term as it is used in paragraph 1 of Article 5 of the Covenant? Or is it a "matter of procedure" as that term is used in paragraph 2 of Article 5? The unanimity referred to in paragraph 1 of Article 5 seems to be absolute, requiring the agreement of all the Members of the League represented at the meeting; a more limited unanimity is referred to in paragraph 6 of Article 15 of the Covenant requiring only agreement by Members of the Council "other than the representative of one or more of the parties to the dispute." In its reply to the Council in the *Eastern Carelia Case*, the Court stated that "there has been some discussion as to whether questions for an advisory opinion, if they relate to matters which form the subject of a pending dispute between nations, should be put to the Court without the consent of the parties"; but it was found to be unnecessary in that case to deal with the matter.[41] In the opinion given in the *Greco-Turkish Agreement Case* in 1928, the Court noted the fact that the Council's resolution to request the opinion had been "adopted in the presence of the representatives of the two Governments."[42]

The question has arisen in the Council of the League of Nations on several occasions when proposals for requesting advisory opinions were under consideration. The fact that such proposals were rejected does not

[38] The French version is clearer: *toutes questions de procédure qui se posent aux réunions de l'Assemblée ou du Conseil.*

[39] Article 19 of the Assembly's Rules of Procedure provides:

"1. Except where otherwise expressly provided in the Covenant or by the terms of a treaty, decisions of the Assembly shall be taken by a unanimous vote of the Members of the League represented at the meeting.

"2. All matters of procedure at a meeting of the Assembly, including the appointment of committees to investigate particular matters, shall be decided by a majority of the Members of the League represented at the meeting."

[40] Article 9 of the Council's Rules of Procedure provides:

"1. Except where otherwise expressly provided by the Covenant, or by the terms of any other instrument which is to be applied, decisions at any meeting of the Council shall require the agreement of all the Members of the League represented at the meeting.

"2. All matters of procedure at meetings of the Council, including the appointment of committees to investigate particular matters, shall be regulated by the Council and may be decided by a majority of the Members of the League represented at the meeting."

[41] Series B, No. 5, p. 27.

[42] Series B, No. 16, p. 12.

necessarily indicate any view as to the nature of the vote required, but it seems possible to say that the Council has shown some reluctance to adopt a request for an advisory opinion by majority vote. On several occasions when it appeared that unanimity could not be achieved for requesting an advisory opinion the Council has decided to consult *ad hoc* committees of jurists.[43] In 1932, when the Council was considering a question relating to the Memel Convention, its *rapporteur* stated that he hesitated to propose that the Council ask for an advisory opinion on a majority vote, and that if unanimity could not be secured he would prefer that another course be taken.[44]

The published minutes do not always reveal the precise character of the voting in the Council, but the following cases are instructive:

(1) On April 21, 1923, the Council voted to request an advisory opinion concerning questions relating to the merits of a dispute between Finland and the Soviet Union concerning the autonomy of Eastern Carelia. The vote was unanimous, but the Soviet Union was not represented and had not been invited to be represented.[45]

(2) On July 7, 1923, the Council voted to request an advisory opinion concerning the competence of the League of Nations to deal with the question of Article 4 of the Polish Minorities Treaty, and if the League of Nations were found to be competent with the precise interpretation of that Article. The Polish representative opposed this decision, contending that Czechoslovakia, Rumania and the Serb-Croat-Slovene State should first be consulted; when the decision was taken, however, he declared he would bring it to the notice of his Government.[46] The Polish Government was later represented before the Court and offered no objection to the Court's giving the opinion.

(3) On March 14, 1925 the Council adopted a proposal to request an advisory opinion concerning objections raised by the Turkish Government to the competence of the Council to deal with questions relating to the expulsion of the Oecumenical Patriarch. The Turkish Government had contended that this question was within its domestic jurisdiction, and it had refused to be represented in the Council. The vote of the

[43] For instance, in 1923 in connection with the aftermath of the Corfu dispute. League of Nations Official Journal, 1923, pp. 1320–5, 1328–32, 1338–52. In 1935 the Council's *rapporteur* on the Finnish ships question proposed a request for an advisory opinion, but in the face of opposition the suggestion was withdrawn. League of Nations Official Journal, 1935, pp. 163–180.

[44] League of Nations Official Journal, 1932, p. 541.

[45] League of Nations Official Journal, 1923, p. 578. See §480 (5), *infra*.

[46] *Idem*, p. 935.

Council was unanimous.[47] On May 16, 1925 the Turkish Minister for Foreign Affairs addressed a letter to the Registrar of the Court informing him that the Turkish Government maintained its point of view, denied any competence in the League of Nations with respect to the question, and declined to be represented before the Court.[48] The request for an advisory opinion was later withdrawn.

(4) On September 19, 1925, the Council adopted a proposal to request an advisory opinion concerning the character of the decision to be taken by the Council in virtue of paragraph 2 of Article 3 of the Treaty of Lausanne, and concerning the character of the vote required for reaching such a decision. A representative of the Turkish Government who was present in the Council declared that his Government saw no necessity for a reference to the Court in view of the fact that the questions put were "essentially extremely political questions"; but the record does not indicate the character of the vote in the Council.[49] On October 8, 1925, the Turkish Minister for Foreign Affairs informed the Registrar of the Court by telegram that in the view of his government the questions presented were of a political character and were not susceptible of a juridical interpretation, and the Turkish Government saw no need to be represented before the Court. Later, however, the Turkish *chargé d'affaires* at The Hague replied to certain questions put by the Court, for "information only" and subject to the reservations previously formulated by his Government.[50] The case seems to have been regarded by the Court as presenting some analogy to the *Eastern Carelia Case*, but it was distinguished from the latter on the ground that the questions presented related to the competence of the Council.[51] When the Court's opinion came before the Council on December 8, 1925, the representative of the Turkish Government declared that the advisory opinion had not been asked for by a unanimous vote, and that the Turkish representative had voted against the request; and he stated that "as long as this decision is not obtained by unanimous vote in conformity with the provisions of Article 5, such a vote to include the British and Turkish representatives, the opinion in question will have only the character of a legal consultation of a theoretical character without any practical bearing on the issue." [52]

[47] League of Nations Official Journal, 1925, p. 488.
[48] Series C, No. 9–II, p. 107.
[49] League of Nations Official Journal, 1925, pp. 1381–2.
[50] Series C, No. 10, p. 287. *Cf.*, *idem*, pp. 325–7.
[51] Series E, No. 2, p. 164.
[52] League of Nations Official Journal, 1926, p. 122.

The question as to the nature of the vote required arose at the 1926 Conference of Signatories in connection with its consideration of the proposed accession by the United States to the Protocol of December 16, 1920. That Conference took the fifth reservation offered by the United States "to rest upon the presumption that the adoption of a request for an advisory opinion by the Council or Assembly requires a unanimous vote," and in its Final Act it made the reply that "no such presumption has so far been established," and that "it is therefore impossible to say with certainty whether in some cases, or possibly in all cases, a decision by a majority is not sufficient." [53] The 1929 Committee of Jurists expressed the same view, and declared its unwillingness to say "that in all cases a decision on the part of the Council or of the Assembly to ask for an advisory opinion from the Court must be unanimous." [54]

The question was also raised by several delegations in the Ninth Assembly of the League of Nations in 1928. M. Undén (Sweden) referred to the "prevailing uncertainty" as to whether unanimity was required; M. Mowinckel (Norway) suggested that the question as to the nature of the vote required be referred to the Court itself; M. Motta (Switzerland) stated that "the view appears already to be fairly generally held that the votes of the States parties to the dispute should not be counted" in a decision to request an advisory opinion, and he thought "the Covenant could easily be interpreted" to require only a majority vote, a result which would be "wise and sound" and would ensure "considerable progress in international jurisprudence." The Swiss delegation to the Ninth Assembly proposed that the Council be asked to consider "whether it would not be desirable" to submit to the Court for an advisory opinion "the question whether the Council or the Assembly can, by a simple majority, request an advisory opinion." [55] This proposal evoked the expression of a variety of views by members of the Assembly's First Committee: [56] "Some held that an advisory opinion might be requested by a majority vote in all cases connected with conciliation procedure; others maintained that it should only be permitted when the question submitted to the Court was itself a question of procedure and not of substance; others, again, considered that the answer must depend on the procedure adopted by the Court when giving its opinion; lastly, it was asked what was the connection between this question and the question

[53] Minutes of the 1926 Conference of Signatories, p. 79. See also *idem*, pp. 21–45.
[54] Minutes of the 1929 Committee of Jurists, pp. 130–1.
[55] Records of Ninth Assembly, Plenary, pp. 38, 43, 64–5.
[56] Records of Ninth Assembly, First Committee, pp. 40–57.

whether and in what cases the votes of the States concerned should be included."[57] The discussion indicated a confused understanding of the role of advisory opinions, M. Politis (Greece) declaring that advisory opinions were in reality no longer advisory. The resolution voted by the Assembly on September 24, 1928 noted "the divergencies of opinion which exist as regards the requirements for voting in the Council or Assembly a resolution requesting an advisory opinion," and expressed the Assembly's desire that "when circumstances permit, the Council may have a study made of the question whether the Council or the Assembly may, by simple majority, ask for an advisory opinion." In taking note of this resolution the Council resolved that each of its members should "study the subject individually" in preparation for a later exchange of views;[58] but such an exchange of views did not take place.

A special committee set up in 1930 to consider amendments to the Covenant "to bring it into harmony with the Pact of Paris" recommended that a new paragraph 7 *bis* be added to the Article 15 of the Covenant, as follows:[59]

> At any stage of the examination the Council may, either at the request of one of the parties or on its own initiative, ask the Permanent Court of International Justice for an advisory opinion on points of law relating to the dispute. Such application shall not require a unanimous vote by the Council.

The special committee stated in its report, however, that it did not intend to deal with the general question as to the nature of the vote required for a request for an advisory opinion. Its proposal was not favored by the Eleventh Assembly in 1930, and no amendment to this effect was proposed by the Assembly.

The question again arose in the Sixteenth Assembly of the League of Nations in 1935, when a proposal was made by the delegations of Belgium, Netherlands, Norway, Sweden and Switzerland.[60] On September 28, 1935 the Assembly adopted a resolution stating that "uncertainty on the matter still exists and may have contributed to diminish the activity" of the Court, and expressing a desire that the Council should examine the

[57] *Idem*, Plenary, p. 139.
[58] League of Nations Official Journal, 1929, p. 10.
[59] Records of Eleventh Assembly, First Committee, p. 109. *Cf.*, the Minutes of the special committee in League of Nations Document, C. 160. M. 69. 1930. V.
[60] Records of Sixteenth Assembly, Plenary, p. 76. The reasons for this proposal were explained by M. Rolin (Belgium). *Idem*, First Committee, pp. 44–6.

question.[61] Thereafter the Council instructed the Secretary-General to invite the Members of the League of Nations to express their views on the question, and some seventeen Governments responded to this invitation.[62] A number of governments—those of Belgium, Chile, China, Denmark, Ecuador, Portugal, and Sweden—expressed the opinion that a majority vote in the Council or Assembly is sufficient for requesting an advisory opinion; on the other hand, some governments—those of Poland and Turkey—expressed the view that unanimity is required in all cases. Several governments—those of Australia, United Kingdom, Estonia, Finland, and Netherlands—expressed the view that a majority vote would suffice for certain cases, and not for others, but these governments were not agreed as to the bases for distinguishing the two classes of cases. Some of the replies expressed no clear choice between the opposing solutions. The Estonian Government proposed that a special protocol similar to the Optional Clause be opened to signature, by which States might consent in advance to the Council's reference of disputes to the Court for advisory opinions. On January 26, 1937, the Council communicated the Governments' observations to a committee set up to study the application of the principles of the Covenant, and asked that committee to study the question;[63] the action taken by the Council led to no result, however.

§470. Subject-Matter of Advisory Opinions. The provision in Article 14 of the Covenant refers "to an advisory opinion upon any dispute or question" (Fr., *sur tout différend ou tout point*). In this connection the term *dispute* seems to mean a dispute between States or Members of the League of Nations;[64] and the term *question* seems to require an "international element."[65] The 1920 Committee of Jurists proposed to distinguish between "a question of an international nature which does not refer to any dispute that may have arisen" and "a question which forms the subject of an existing dispute"; this proposal was rejected because the Third Committee of the First Assembly thought that the distinction was "lacking in clearness and likely to give rise to practical difficulties."[66] Since 1936, Article 65 of the Statute provides

[61] *Idem*, Plenary, p. 127. See also the report of the First Committee of the Assembly. *Idem*, First Committee, pp. 100–101.

[62] League of Nations Official Journal, 1937, pp. 170–83, 186, 664.

[63] *Idem*, p. 108.

[64] *Cf.*, the dissenting opinion of Judge Anzilotti in the *Danzig Decrees Case*. Series A/B, No. 65, p. 60. Judge Anzilotti thought it only "a matter of words" to say that a *question* and not a *dispute* was involved. *Idem*, p. 64.

[65] *Idem*, p. 50.

[66] Records of First Assembly, Committees, I, p. 534. See Series D, No. 2 (3d add.), p. 838.

that "the request shall contain an exact statement of the question (Fr., *la question*) upon which a statement is required." Since 1927, the Rules have distinguished, for the purpose of applying Article 31 of the Statute, between "a question relating to an existing dispute between two or more States or Members of the League of Nations" and other questions;[67] and Article 82 of the 1936 Rules envisages a possible difference between the procedure when the opinion requested relates to a *dispute*, and the procedure when the opinion requested relates to a *question*.[68]

In a broad sense of the term, it may be said that each of the requests for an advisory opinion which have been made by the Council has related to a *dispute;*[69] in every case the Council acted because important questions as to which varying opinions were held had presented themselves for solution, either to the Council or some other international body, or to a State or a group of States.[70] In a number of instances the questions had arisen as differences between States, so that there was a *dispute* in the narrower sense of the term as it is used in Article 83 of the 1936 Rules. For the purpose of enabling the Court to say whether a dispute in this latter sense exists, it might be convenient to require that the difference should have been clearly manifested before the request was made for an advisory opinion.[71] In some of the cases which have arisen, the Council of the League of Nations had been seized of the difference either under provisions of the Covenant or under provisions of other instruments, and in other cases the difference had become clearly manifest in proceedings before other international bodies. It seems doubtful, however, whether the reference in Article 83 of the 1936 Rules to "an existing dispute" (Fr., *un différend actuellement né*) requires such a prior formalization of the difference.[72]

[67] Article 71 of the Rules as amended in 1927, and Article 83 of the 1936 Rules.

[68] In the course of the 1936 revision of the Rules, however, proposals that a special procedure be adopted for a proceeding relating to a *question* were rejected. Series D, No. 2 (3d add.), pp. 408–15, 700–1.

[69] With the possible exception of the case relating to the *Competence of the International Labor Organization* with respect to agricultural production. Series B, No. 3.

[70] In the *Personal Work of Employers Case* in 1926, the difference seems to have existed only between employers' representatives and other representatives in the Governing Body of the International Labor Organization, and no State participated in the proceedings before the Court. Series B, No. 13.

[71] In 1935, the Court considered a preliminary procedure to determine whether a dispute existed. Series D, No. 2 (3d add.), p. 413. Such a preliminary procedure, in connection with the designation of judges *ad hoc*, was conducted in the *Austro-German Customs Régime Case* and in the *Danzig Decrees Case*. Series C, No. 53, pp. 188–9; *idem*, No. 77, p. 166.

[72] See, however, the proposal made by President Huber in 1925, which provided for the application of Article 31 of the Statute when the question concerned proceedings pending before the Council or some arbitration or conciliation tribunal in which there were parties. Series D, No. 2 (add.), pp. 185, 254. *Cf.*, Series C, No. 76, p. 205.

In a number of cases, usually in connection with the proposed appointment of judges *ad hoc*, the Court held that the question on which an opinion was requested related to an existing dispute.[73] In the cases relating to *Minority Schools in Albania* [74] and *Danzig Legislative Decrees*,[75] the Court refused to permit the appointment of judges *ad hoc* on the ground that the questions before it did not relate to an existing dispute between States or Members of the League of Nations.[76] In several cases, the opinion requested may be said to have related to a "question" (Fr., *point*) as distinguished from a "dispute." [77] States represented before the Court took this view in the case relating to *Danzig and the International Labor Organization*,[78] and in the *Danzig Decrees Case*.[79] In some cases, no necessity existed for saying whether the opinion requested was to relate to a "dispute" or a "question," and the Court made no enquiry along this line.

No case has arisen in which the Court has been requested to give an opinion on a purely hypothetical question.[80] The Council's first request for an advisory opinion in 1922, related to the nomination of the Netherlands Workers' delegate at the Third Session of the International Labor Conference, the Court being asked whether this nomination was in accordance with the provision in paragraph 3 of Article 389 of the Treaty of Versailles. The Third Session of the Conference had been held in 1921, and the Netherlands Workers' delegate had been admitted to participate in it; the object of the question was "to obtain an interpretation of the provision of paragraph 3 of Article 389," the form of the question being due to a desire "to fix clearly the state of facts to which the interpretation has application." [81] Hence the Court was asked to pronounce

[73] In the *Danzig Courts Case* (1928), Series B, No. 15; the *Greco-Turkish Agreement Case* (1928), Series B, No. 16, but in this case no judges *ad hoc* were appointed; the *Greco-Bulgarian Communities Case* (1930), Series B, No. 17; the *Lithuanian-Polish Railway Traffic Case* (1931), Series A/B, No. 42; the *War Vessels in Danzig Case* (1931), Series A/B, No. 43; the *Polish Nationals Case* (1932), Series A/B, No. 44; the *Bulgarian-Greek Agreement Case* (1932), Series A/B, No. 45. The Court held that there was an existing dispute in the *Austro-German Customs Régime Case*, but for other reasons Austria and Czechoslovakia were not permitted to appoint judges *ad hoc*. (1931) Series A/B, No. 41.

[74] (1935) Series A/B, No. 64, p. 6.

[75] (1935) Series A/B, No. 65, p. 69.

[76] The question was not raised in the case relating to *Danzig and the International Labor Organization* (1930), Series B, No. 18.

[77] This is the result of the Court's holding in the *Minority Schools in Albania Case*.

[78] Series C, No. 18–II, pp. 18, 67, 178.

[79] Series C, No. 77, p. 177.

[80] The case relating to *Competence of the International Labor Organization* with respect to agricultural production is not an exception to this statement; but the Court's opinion fails to set forth the preliminary history of the question presented. *Cf.*, Series C, No. 1, pp. 572–84.

[81] The resolution adopted by the Labor Conference on November 18, 1921, had envisaged a request for an opinion in very general terms. International Labor Conference, 3d session (1921), pp. 522, 616, 863.

upon a question which had actually arisen but to which a solution had already been given, for purposes of future guidance.[82]

The question has frequently been discussed whether the Council might properly request an opinion on an "abstract" question; it would seem that the Court should not decline to entertain such a request, even though it should later have to refrain from giving the opinion. In 1923, following the action taken by the Council in the Corfu dispute between Greece and Italy, certain questions of a general nature were formulated upon which it was proposed that an advisory opinion be requested; the Italian representative expressed doubt as to the competence of the Court to deal with such questions,[83] and no advisory opinion was requested. A question relating to a dispute existing at the time of the request may later become moot or "abstract" in consequence of the settlement of the dispute; but this would not necessarily call for the Court's refusing to answer the question.[84] When in 1934 the Swiss Government brought before the Council a question of reparation for war damages and asked that the Council request an advisory opinion, the British representative stated that giving effect to the Swiss request would "be circumventing the voluntary character of Article 13 [of the Covenant] and the reservations made in connection with the [British] acceptance of the optional clause by means of the application of the second paragraph of Article 11" of the Covenant; [85] the Council's *rapporteur* stated that the Court could not be asked "what should be the law in the future," because "it would be a case of legislating rather than exercising a judicial function," [86] and M. Motta (Switzerland) agreed that no advisory opinion could be requested with regard to the law of the future, or even upon a question of equity.[87]

In the cases which have arisen, the matter placed before the Court has usually related to some point of law; in the *Danzig Decrees Case* it related chiefly to a point of the internal law of Danzig.[88] In the *Iraq-Turkey*

[82] This was affirmed by the Director of the International Labor Office before the request was voted by the Council. League of Nations Official Journal, 1922, p. 529.

[83] League of Nations Official Journal, 1923, p. 1321.

[84] In the *Austro-German Customs Régime Case* the Court's opinion was given on September 5, 1931; two days before that date, representatives of Austria and Germany had made declarations to the Committee of Enquiry for European Union that the two Governments did not intend to proceed with the establishment of the proposed regime, but these declarations were not communicated to the Court. *Idem*, 1931, pp. 2185–90. On September 7, 1931, the Council took note of the declarations and dropped the question from its agenda. *Ibid.*, pp. 2069–70.

[85] League of Nations Official Journal, 1934, p. 1439.

[86] *Idem*, 1935, p. 128. [87] *Idem*, p. 129.

[88] Judge Anzilotti, dissenting, thought that the question was one "purely of Danzig constitutional law," and that "international law does not come into it at all." Series A/B, No. 65, p. 61.

Frontier Case, the questions were thought by the Turkish Government to be "of a distinctly political character" and not susceptible of a "legal interpretation," [89] but the Court seems to have thought that its opinion was requested on points of law.[90] If the opinion requested relates to a dispute between two or more States or Members of the League of Nations, the Court will be limited in a general way to dealing with the legal questions involved, but it may have to ascertain facts as a preliminary basis for the application of the law. In its reply in the *Eastern Carelia Case*, it was stated that "the Court does not say that there is an absolute rule that the request for an advisory opinion may not involve some enquiry as to facts, but, under ordinary circumstances, it is certainly expedient that the facts upon which the opinion of the Court is desired should not be in controversy, and it should not be left to the Court itself to ascertain what they are." [91] In the *Danube Commission Case*, the Court stated that since the facts had been investigated by the League of Nations it was not "proper to make new investigations and enquiries"; the Rumanian Government had refused to accept the facts found by a League committee, but the Court thought that it should "accept the findings of the Committee on issues of fact unless in the records submitted to the Court there is evidence to refute them." [92]

In 1923 the Lithuanian Government asked the Council to request an advisory opinion on "two points relating to the interpretation of the Covenant," dealing specially with a decision previously taken by the Council; this course was opposed in the Council on the ground that competence to interpret the Covenant had been denied to the Court when Article 14 was being drafted,[93] and on the ground that the questions proposed by the Lithuanian representative were theoretical and of no practical interest.[94]

§471. Compliance with Requests for Opinions. It would seem that the Court is bound to entertain any request for an advisory opinion which is duly communicated to it by the Council or by the Assembly. Article 14 of the Covenant merely states that the Court "may give" (Fr., *donnera*) an advisory opinion, but even under the original Statute the Court could

[89] Series B, No. 12, p. 8. [90] Series E, No. 2, p. 164.

[91] Series B, No. 5, p. 28. *Cf.*, the observations of Deputy-Judge Yovanovitch in 1924 and 1925, to the effect that the Court could deal only with legal questions on the basis of facts furnished to it by the Council or Assembly. Series D, No. 2 (add.), pp. 274, 291.

[92] Series B, No. 14, p. 46.

[93] See 1 Miller, Drafting of the Covenant, pp. 329–30. *Cf.*, Records of Second Assembly, First Committee, pp. 96–8; Records of Fourth Assembly, First Committee, p. 20.

[94] League of Nations Official Journal, 1923, pp. 585–6, 667–70.

not have said that it would decline altogether to entertain requests for advisory opinions, and Articles 65 and 66 of the revised Statute outline a routine procedure to be followed with respect to all requests. Yet the nature of the Court and the process by which its action must be consummated make it impossible to say in advance that the Court must give any particular opinion requested. Many circumstances might arise in which the Court should refrain from answering the question put to it. If a majority of the judges were unable to reach any agreement among themselves, no opinion could be given as the opinion of the Court; for this reason the Court found it impossible in 1931 to answer part of the question put to it in the case relating to the *Austro-German Customs Régime*.[95] The question may on examination be found to be of such a nature that no answer can be given to it.[96] In 1922, it was proposed to provide in the Rules that "the Court reserves the right to refrain from replying to questions put to it which require an advisory opinion on a theoretical case"; [97] this proposal was not adopted and perhaps no such general rule can be stated, yet a "theoretical case" might be put in such a way that the Court could give no opinion.[98] If a question of fact were involved, the Court might find that its powers of investigation as conferred by Articles 44 and 50 of the Statute would not be sufficient to permit any answer to be given. Nor can the Court go outside its constitutional limitations to arrive at an opinion; "being a Court of Justice," it "cannot, even in giving advisory opinions, depart from the essential rules guiding" its "activity as a Court." [99] Hence, if the Council requested the Court to give an opinion on a dispute without hearing the States involved,[1] the Court might refuse to answer the questions put. Clearly, the Court cannot always be bound to give the opinion requested.

Varying conclusions have been drawn from the *reply* made by the Court in 1923 when it was asked to give an advisory opinion concerning the legal effect of certain articles in the Treaty of Dorpat of October 14, 1920, and an annexed Declaration regarding the autonomy of Eastern

[95] In this case, Judge Anzilotti insisted that the Court should either "refuse to give the opinion asked for" or "give it on the question as a whole." Series A/B, No. 41, pp. 68–9.

[96] In the case concerning *Danzig and the International Labor Organization* in 1930, Judge Anzilotti said that it is "inadmissible for the Court to comply with a request based on a hypothesis which is legally unsound." Series B, No. 18, p. 20.

[97] Series D, No. 2, pp. 161, 308.

[98] "It may turn out to be practically impossible to define a principle adequately and safely without previous ascertainment of the exact facts to which it is to be applied." Lord Haldane, in *Attorney-General for British Columbia* v. *Attorney-General for Canada* [1914] A. C. 153, 162.

[99] Series B, No. 5, p. 29.

[1] See the Beichmann memorandum of July 6, 1922. Series D, No. 2 (add.), pp. 298–9.

Carelia.[2] The Court did not refuse to entertain the request in this case, but it declined to give the opinion requested. The Soviet Government had refused to participate in the Council's consideration of the Eastern Carelia dispute, and it had refused to take any part in the Court's examination of the question on which an opinion was requested. The Court found that insofar as the question before it related to the Declaration, it was "really one of fact," and that an answer to it would require the taking of evidence from both Finland and Russia; owing to Russia's refusal to take part, the Court would "be at a very great disadvantage in such an enquiry." Indeed the Court was "unable to pursue the investigation which, as the terms of the Council's Resolution had foreshadowed, would require the consent and cooperation of both parties." Under these circumstances, it is clear that the Court was bound to refuse to give any opinion. Yet this ground was stated only as one of "other cogent reasons" for the refusal, which was based principally on a consideration of Article 17 of the Covenant; as the question presented referred to "an actual dispute between Finland and Russia," and as Russia was not then a Member of the League of Nations and had not consented to the solution of its disputes "according to the methods provided for in the Covenant," the Court found it "impossible to give its opinion on a dispute of this kind." In other words, the Court seems to have made its competence to give the opinion depend upon its view of the competence of the Council to deal with the dispute.[3] An additional reason was given that "answering the question" put "would be substantially equivalent to deciding the dispute between the parties"; but this was an over-statement of the effect of an advisory opinion. In taking note of the Court's reply, the Council entered a *caveat* by which it refused to be committed to the views expressed by the Court;[4] but the reply may have exercised some influence on the Council in subsequent years.[5] The Court itself may have narrowed the application of its reply in the *Eastern Carelia Case* when it gave an opinion in the case relating to the *Frontier between Iraq and Turkey* in 1925; while the latter case was like the former in some respects, the Court thought that as the Council had been duly seized of

[2] Series B, No. 5. The publication of this reply in the series devoted to advisory opinions has tended to encourage references to the *reply* as an *advisory opinion*. Series E, No. 1, p. 200; Minutes of the 1926 Conference of Signatories, p. 79; League of Nations Official Journal, 1928, p. 404.

[3] See Series D, No. 2 (3d add.), p. 837.

[4] League of Nations Official Journal, 1923, p. 1502.

[5] See *idem*, 1928, p. 404.

the dispute and had asked for an opinion on its own competence, the opinion could be given.[6]

§472. Form of Requests. By Article 72 of the 1922 Rules, the Court stipulated that "questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request, signed either by the President of the Assembly or the President of the Council of the League of Nations, or by the Secretary-General of the League under instructions from the Assembly or the Council"; the request was to "contain an exact statement of the question," and it was to "be accompanied by all documents likely to throw light upon the question." These provisions were incorporated in Article 65 of the amended Statute. The form of the "written request" came to be more or less stereotyped, as follows: the Secretary-General of the League of Nations, referring to the Council's resolution and the authorization contained therein, submits an "application" (Fr., *requête*) addressed to the Court "requesting the Court in accordance with Article 14 of the Covenant, to give an advisory opinion to the Council on the question" referred to in the resolution of which a copy is attached; it is added that the Secretary-General would "be prepared to furnish any assistance which the Court may require in the examination of the question," and would "if necessary, arrange to be represented before the Court." The request is transmitted to the Court with a covering letter addressed to the Registrar,[7] and the relevant documents, usually including the Council's minutes, are transmitted at the same time or promptly thereafter.

The Council's resolutions authorizing requests for advisory opinions have also tended to become standardized. In the later practice, the resolution usually states that the Council requests the Court to give (Fr., *prie la Cour de vouloir bien donner*) an opinion on a definite question or questions; it frequently refers to Article 14 of the Covenant; it invariably authorizes the Secretary-General to submit the request to the Court together with all documents concerning the question, to afford the necessary assistance in the examination of the question, and to arrange to be represented before the Court if necessary.[8] The resolution sometimes invites particular interested Governments or international bodies to hold themselves at the disposal of the Court for the purpose of furnishing

[6] Series E, No. 2, p. 164. *Cf.*, Series B, No. 12, p. 18.

[7] This letter is usually preceded by a telegraphic communication, made for the information of the Court.

[8] The Secretary-General was not represented before the Court in any case, however.

any relevant documents or explanations; [9] in labor cases, the International Labor Office is requested to afford the Court all the assistance which it may require,[10] and in the case relating to *Lithuanian-Polish Railway Traffic* a similar request was made to the League of Nations Advisory and Technical Committee for Communications and Transit.[11] The resolution may also ask the Court to treat the request "as a matter of urgency," or to give its opinion in time to enable the Council to take a decision on the matter at a particular session, or to examine the questions submitted "if possible, in extraordinary session." [12]

The Council's resolution concerning an advisory opinion in the *Tunis and Morocco Nationality Case* stated that "the Council decides to refer" the question to the Court for an opinion; that "it requests the two Governments" of France and Great Britain "to bring this matter before" the Court and "to arrange with the Court with regard to the date on which the question can be heard and with regard to the procedure to be followed"; and that the Secretary-General should communicate parts of the resolution to the Court.[13] On October 4, 1922, a copy of this resolution was transmitted by the Secretary-General to the Registrar "for the information" of the Court, but the Registrar did not treat the communication as an official request under Article 72 of the 1922 Rules; on November 7, 1922, the Secretary-General transmitted a formal request.[14] In the *German Settlers Case*, after the Court had been seized of the request the Council adopted a report interpreting the question which had been presented to the Court, and a copy of the report was communicated to the Court.[15] In the *Jaworzina Case*, the "cases" of the Czechoslovak and Polish Governments were incorporated in the Council's resolution. In the *Greco-Bulgarian Communities Case*, an opinion was requested on questions formulated in three annexes to the resolution, containing four questions drawn up by a Mixed Commission, three questions drawn up by the Bulgarian Government, and five questions drawn up by the Greek Government; the Court answered all of the twelve

[9] This provision in a request does not require the Court to permit participation by the Government or body invited; nor is the Government or body under an obligation to accept the invitation. The question arose in 1930 in correspondence in the *Greco-Bulgarian Communities Case*. Series C, No. 18–I, pp. 1050, 1055–6.

[10] Paragraph 5 of Article 26 of the Statute is applied by analogy. Series D, No. 2, p. 98; Series E, No. 3, p. 189.

[11] See Series C, No. 54, pp. 424–5, 447–50, 454–5; Series E, No. 8, pp. 273–4.

[12] A request may be urgent because of the nature of the question presented, also. Series C, No. 9–II, p. 9.

[13] League of Nations Official Journal, 1922, pp. 1206–7, 1209.

[14] Series C, No. 2, pp. 248ff.

[15] Series B, No. 6, pp. 8–9.

questions. In its resolution of December 14, 1939, concerning a request for an advisory opinion in the *Ex-Officials of the Saar Case*, the Council outlined a procedure to be followed by the disputants for the development of their contentions before its request should be communicated to the Court.[16]

The drafting of the request has given rise to difficulties on several occasions.[17] In the case relating to the *Competence of the International Labor Organization* as to agricultural production, the Court felt it necessary to re-state and to limit the question submitted; [18] on the other hand, in the *Jaworzina Case* [19] and in the case relating to *Danzig and the International Labor Organization*,[20] the portent of the question was somewhat amplified by the Court. In the *Greco-Turkish Agreement Case*, the Court was asked for an opinion "upon the question raised" in a certain letter, relating to the interpretation of a provision in a protocol; the Court thought that "the letter referred to does not exactly state the question upon which its opinion is sought," and it therefore undertook to "formulate an exact statement" of the question, declaring at the same time that this course might not always be possible.[21] In the *War Vessels in Danzig Case*, the Court accepted the interpretation placed on the question before it by the representatives of the Governments concerned.[22] In the *Caphandaris-Molloff Agreement Case*, the Court declined to deal with a phase of the question which had "not been discussed either before the Council or before the Court." [23]

§473. Composition of the Court for Advisory Proceedings. The 1920 Committee of Jurists proposed that "when the Court shall give an opinion on a question of an international nature which does not refer to any dispute that may have arisen, it shall appoint a special Commission of from three to five members." No such provision was included in the Statute, and in 1922 the Court took the view that advisory opinions should always be given by the full Court composed as provided in Article 25 of the Statute, and could not be given by a chamber.[24] Since the

[16] League of Nations Official Journal, 1939, p. 502.
[17] See Series D, No. 2 (3d add.), p. 838.
[18] Series B, No. 3, p. 59. See also *idem*, No. 16, p. 15. [19] *Idem*, No. 8, p. 50.
[20] *Idem*, No. 18, p. 9. Judge Anzilotti thought that the question in this case was "based on a hypothesis which is legally unsound," and that it could not be modified to bring it into harmony with the law in force. *Ibid.*, p. 20. *Cf.*, Judge Anzilotti's opinion in the *Austro-German Customs Regime Case*, Series A/B, No. 41, pp. 68–9.
[21] Series B, No. 16, p. 14. [22] Series A/B, No. 43, p. 140. [23] *Idem*, No. 45, p. 86.
[24] The Court refused to accept M. Negulesco's proposal that advisory opinions should be given at "general meetings" of the judges and deputy-judges. Series D, No. 2, pp. 476–80. It also held that the presence of technical assessors in advisory proceedings was inadmissible. Series E, No. 1, p. 250.

beginning, the Rules have provided that "advisory opinions shall be given after deliberation by the full Court"; but in 1924, and again in 1933, proposals were made that opinions might be given by a chamber upon the request of the Council or Assembly.[25]

In fifteen of the twenty-seven cases in which advisory opinions were given, the Court was unanimous. From the beginning the Rules have provided that the individual opinions of judges may be attached to the Court's opinion; [26] since 1926 mere statements of dissent may be attached, and the opinion must in every case mention the number of judges constituting the majority.

The 1920 Committee of Jurists proposed that judges *ad hoc* be admitted to participate in advisory cases relating to existing disputes.[27] The Statute was not explicit on the point, and for some years States interested in questions submitted for advisory opinions were not permitted to appoint judges *ad hoc* to participate in the proceedings.[28] In 1926 the Court rejected a proposal by President Huber that the provisions of Article 31 of the Statute should apply when the question before the Court for advisory opinion directly concerned proceedings "pending before the Council of the League of Nations or before some arbitration or conciliation tribunal, and in which States or Members of the League of Nations appear as Parties." [29] In 1927, the *Danube Commission Case* presented a complication in this connection, for it related to a dispute in which at one time there were three Governments on one side, each having a judge of its nationality on the Court, and one Government on the other side without a judge of its nationality on the Court.[30] On September 7, 1927, the Court, reversing its previous decision, added a provision in Article 71 of the Rules for the application of Article 31 where the question related to an existing dispute; the provision was continued in Article 83 of the 1936 Rules, and it may be thought to be covered by

[25] Series D, No. 2 (add.), pp. 256–8; Series D, No. 2 (3d add.), pp. 795, 881.

[26] In 1926 a proposal to abolish dissenting opinions in advisory cases led to a protracted discussion. Series D, No. 2 (add.), pp. 184–198, 200–23.

[27] Minutes of the 1920 Committee of Jurists, p. 731. The history of the whole question is summarized in the argument of the Danzig agent in the *Danzig Decrees Case*, Series C, No. 77, pp. 171–179.

[28] Series E, No. 3, p. 223; Series C, No. 7–I, pp. 238–9.

[29] Series D, No. 2 (add.), pp. 185–193, 253–4. The rejection of this proposal led to a suggestion that to ensure equality Article 24 of the Statute might be applied to require the withdrawal of judges in certain cases. *Idem*, pp. 193–4. See also Records of Fifth Assembly, Plenary, p. 486.

[30] Series E, No. 4, p. 77. The problem in the *Danube Commission Case* was solved when Deputy-Judge Negulesco was summoned to sit.

Article 68 of the revised Statute.[31] It is for the Court to decide in each case whether the question concerns an existing dispute,[32] and if so who are the parties to that dispute; [33] the latter question gave some difficulty in the *Austro-German Customs Régime Case.*[34]

Judges *ad hoc* were appointed in six cases arising after 1927, but in several cases permission to appoint a judge *ad hoc* was denied. In the case relating to *Minority Schools in Albania* it was held that the question did not relate to an existing dispute; [35] and in the *Danzig Decrees Case* a special order was given denying a request by Danzig for permission to appoint a judge *ad hoc* on the ground that the question did not relate to a dispute "between two or more States or Members of the League of Nations." [36] The parties to the dispute may renounce the privilege of appointing judges *ad hoc.*[37]

§474. Procedure on the Request. From the beginning, the Court refused to consider its rôle in giving advisory opinions as merely that of a legal adviser to the Council or the Assembly, and the 1922 Rules laid down limitations to safeguard the judicial character of advisory proceedings. In line with the provision for notice in paragraph 3 of Article 40 of the Statute,[38] Article 73 of the 1922 Rules provided for notice of each request to be given to the Members of the League of Nations [39] and to States mentioned in the Annex to the Covenant; actually, however, notice was also given to States not in those two categories when there was reason for thinking that they might be specially interested in the question before the Court. For instance, when the Court was asked for three opinions in 1922, notice was given to Germany and Hungary "for information," [40] though neither Germany nor Hungary was mentioned in the Annex to the Covenant and neither was at the time a Member of the League of Nations, and the Hungarian Government took part in the

[31] Minutes of the 1929 Committee of Jurists, p. 125; Series D, No. 2 (3d add.), pp. 698–9.

[32] See the *Caphandaris-Molloff Agreement Case*, Series A/B, No. 45, p. 72; Series E, No. 8, p. 253. The Greek Government was reluctant to appoint a judge *ad hoc* in this case.

[33] One factor in this decision may be whether the States concerned had been invited to be represented in the Council when it had the matter under consideration. Series E, No. 7, p. 303.

[34] See the Court's order of July 20, 1931, and the dissenting opinion of five judges. Series A/B, No. 41, pp. 88, 91.

[35] Series A/B, No. 64, p. 6.

[36] Series A/B, No. 65, pp. 69–71.

[37] In the *Exchange of Populations Case*, the Court was informed that Greece and Turkey had renounced the privilege when the matter was before the Council, but it refused to take cognizance of such renunciations; the renunciations were then repeated before the Court. Series C, No. 15–I, pp. 229, 231; Series E, No. 5, p. 262.

[38] Series D, No. 2, p. 219; Series D, No. 2 (add.), p. 224; Series D, No. 2 (3d add.), p. 839.

[39] Though presumably, after 1920, the Members of the League of Nations had knowledge of the minutes of both the Council and the Assembly.

[40] Series C, No. 1, pp. 4, 420.

proceedings relating to the second advisory opinion. In fact, the Court did not consider its rule as limitative,[41] and in addition to the notice for which the rule provided it developed a practice of giving special notice to interested States. A tendency was manifest in the early years, also, to apply the underlying principle of Article 63 of the Statute in advisory proceedings;[42] in the *Iraq-Turkey Frontier Case*, Members of the League were informed that as the questions before the Court had a possible bearing on the interpretation of the Covenant, the Court would be prepared to receive favorably an application by any Member to be allowed to furnish information.[43] Clearly the object of the notice to States required by Article 73 of the 1922 Rules was to enable them to ask to be heard and to enable the Court to be as completely informed as possible;[44] for as stated in an order by the President in 1932, "in advisory procedure, it is both the duty of the Court and in its interest to obtain all information which may be likely to facilitate its task."[45] Yet it does not necessarily follow from the fact that notice of a request was sent to a State that this State is entitled to participate in the proceedings with reference to the request. In the *St. Naoum Case* in 1924, the Court permitted the participation of Greece, a State "not directly concerned."[46] In its reply in the *Eastern Carelia Case*, the Court referred to communications received from the Estonian and Polish Governments, though these Governments did not otherwise participate in the proceedings.[47]

Article 73 of the 1922 Rules also provided that notice should "be given to any international organizations which are likely to be able to furnish information on the question."[48] Notice of the three requests made by the Council in 1922 was sent to various organizations, and a number of them participated in the proceedings which led to the opinions given by the Court.

In 1926, the practice which had developed led to an expansion of Article 73 to provide: (1) for notice of a request for an advisory opinion "to any States entitled to appear before the Court"; (2) for notice "by means of a special and direct communication" to any State "admitted

[41] See the Court's reply to Poland's protest concerning the notice given to Germany in the *German Settlers Case*. Series C, No. 3–III, p. 1055.
[42] Series D, No. 2 (3d add.), p. 836.
[43] Series B, No. 12, pp. 7–8; Series C, No. 10, pp. 299, 304.
[44] See Series D, No. 2, pp. 220, 269, 307.
[45] Series C, No. 60, p. 278.
[46] Series C, No. 5–II, pp. 9–10.
[47] Series B, No. 5, p. 12; Series C, No. 3–II, pp. 204–6.
[48] See §422, *supra*.

to appear before the Court" or international organization considered by the Court (or the President) as likely to be able to furnish information, that the Court would be prepared to receive written statements, or to hear at a public sitting oral statements relating to the question; and (3) for the expression of a desire to submit written or oral statements on the part of any Member of the League or State entitled to appear before the Court, even if it had failed to receive the regular notice.[49] Provision was also added in Article 73 that States and organizations which had presented statements should be permitted to comment on statements made by other States or organizations, and that for this purpose the statements of others should be communicated to them.[50] These provisions of the 1926 Rules were incorporated almost verbatim in Article 66 of the amended Statute, in force after February 1, 1936.

The result has been that in every case before the Court for advisory opinion, statements have been submitted to the Court either by Governments or by organizations; in every case save one,[51] Governments have submitted statements to the Court; and in every case save one,[52] oral as well as written proceedings have been conducted. Questions relating to written proceedings were sometimes decided after consultation with interested States. In some cases States were permitted to present second written statements;[53] in some cases, successive statements took the form of replies.[54] Written statements were sometimes called "memorials" and "counter-memorials," or "cases" and "counter-cases." Interested States have usually been represented before the Court by "agents." Such States are invited to make proposals as to time-limits for the written proceedings and as to the time for oral hearings; in later years, orders were issued fixing such time-limits.[55]

An alphabetical order is usually followed for hearing the representatives of States in advisory proceedings,[56] though there was at one time

[49] After 1930, the attention of certain States not considered likely to be able to furnish information was specially drawn to this provision in Article 73 of the 1926 Rules. Series D, No. 2 (3d add.), p. 839; Series C, No. 53, p. 689.

[50] In the *Tunis-Morocco Nationality Case*, the memoranda of the interested States were directly exchanged between them. Series C, No. 2, pp. 265, 267.

[51] The *Personal Work of Employers Case*, Series B, No. 13.

[52] The *Postal Service in Danzig Case*, Series B, No. 11. No request for a hearing was made in this case.

[53] See the President's order of September 6, 1932, in the *Employment of Women at Night Case*. Series C, No. 60, p. 276.

[54] In general, "the Court has not allowed the documents of the written procedure to be presented alternately" in advisory proceedings. Series D, No. 2 (3d add.), p. 839.

[55] On various occasions the Court seems to have shown a reluctance to postpone advisory proceedings, because of possible opposition by the Council. Series C, No. 13–IV, p. 2134; Series D, No. 2 (2d add.), p. 110; Series E, No. 4, p. 297.

[56] Series C, No. 7–I, p. 9.

a disposition to say that "the representatives of countries not directly concerned" should be heard last.[57] In several cases the Court followed joint suggestions made by interested States as to the order in which their oral statements should be presented.[58] On one occasion, the Court expressed a willingness to hear experts called by an international organization interested in an advisory proceeding.[59] In the *Greco-Bulgarian Communities Case* in 1930, the Court issued an order inviting the President of the Mixed Emigration Commission and the agents of the Bulgarian and Greek Governments to answer certain questions; the order referred to the Council's previous invitation to the two Governments and to the Commission to hold themselves at the disposal of the Court for furnishing information.[60] A year later, in the *Minority Schools in Upper Silesia Case*, questions by the Court were put to the agent of a State by letter.[61]

§475. Assimilation of Advisory to Contentious Procedure. The 1920 Committee of Jurists foresaw a need for assimilating advisory to contentious procedure, and in Article 36 of its draft-scheme it proposed that opinions on questions relating to existing disputes should be given "under the same conditions as if the case had been actually submitted to it for decision."[62] In the drafting of its 1922 Rules, the Court showed a disposition to confine its exercise of advisory jurisdiction within the limits of judicial action, but it was not yet prepared to say how far the procedure was to be assimilated to procedure in contentious cases. In the course of later experience, however, it became increasingly apparent that a large measure of assimilation was desirable. In 1926, the Registrar proposed that various articles of the Statute and Rules should be applicable by analogy in advisory proceedings;[63] and when in 1927 the Court reversed its attitude on the admission of judges *ad hoc* in certain advisory proceedings, a long step was taken toward a close assimilation when the question submitted for advisory opinion related to an existing dispute.[64] In line with the Court's practice, the amendments to the Statute which were proposed in 1929 and which entered into force in 1936, included a

[57] Series C, No. 5–II, p. 10. In several cases the Director of the International Labor Office seems to have asked to be heard last. Series C, No. 12, p. 280.
[58] Series C, No. 56, p. 227; Series C, No. 60, p. 203.
[59] In the *Personal Work of Employers Case*, Series C, No. 12, pp. 10–12, 287.
[60] Series C, No. 18–I, pp. 24, 1077.
[61] Series C, No. 52, pp. 250–1. See also Series C, No. 55, pp. 439, 443.
[62] Minutes of the 1920 Committee of Jurists, p. 732.
[63] Series D, No. 2 (add.), pp. 226–7, 315.
[64] See Series C, No. 15–I, p. 250

new Article 68 providing that "in the exercise of its advisory functions the Court shall further be guided by the provisions of the Statute which apply in contentious cases to the extent to which it recognizes them to be applicable." This text leaves the Court free to appreciate the need for assimilation. Implementing Article 68 of the Statute, Article 82 of the 1936 Rules states that the Court will "be guided by the provisions of the present Rules which apply in contentious cases to the extent to which it recognizes them to be applicable, according as the advisory opinion for which the Court is asked relates, in the terms of Article 14 of the Covenant of the League of Nations, to a 'dispute' or to a 'question'." Article 30 of the 1936 Rules provides the same procedure for the Court's deliberations in advisory and in contentious cases. Yet certain provisions of the Statute cannot be applied in advisory proceedings even by analogy, as their application would require jurisdiction over "parties" in the strict sense of the term; thus, the provisions in Article 41 relating to the indication of measures of interim protection, in Article 53 relating to the Court's action in the absence of a party,[65] and in Articles 59–61 concerning the effect of judgments.

The policy of assimilation is undoubtedly sound; the judicial character of the Court should be safeguarded in the rendering of advisory opinions, and the opinions themselves will be more authoritative, the prestige of the Court will be better protected, if they are preceded by the thorough explorations which contentious procedure is designed to facilitate. Yet the policy could easily be carried too far. The result of a too complete assimilation might be to encourage a view that an advisory opinion is a species of judgment, that because of the procedure followed before the Court it attains an obligatory character; advisory jurisdiction might then come to be looked upon as an alternative to obligatory jurisdiction, and this might result in diminishing the frequency of requests for advisory opinions.[66]

§476. Withdrawal of a Request. The Council or Assembly may withdraw a request for an advisory opinion; the withdrawal may certainly be made at any time prior to the opening of oral proceedings, and it would seem that it might be made at any time prior to the actual delivery of the opinion in open court. Only one request has been withdrawn: on March 14, 1925, the Council adopted a resolution requesting an opinion on its

[65] But see the proposal of a committee of the Court in 1933. Series D, No. 2 (3d add.), p. 801.

[66] See the declaration by Judge Altamira in *idem*, p. 925.

competence to deal with a dispute growing out of Turkey's expulsion of the Oecumenical Patriarch;[67] when as a consequence of an agreement reached by Greece and Turkey the matter was withdrawn from the Council's agenda, the Court was informed on June 8, 1925, that "the Council no longer finds it necessary to ask the Court to give the opinion," and the question was thereafter removed from the list of cases before the Court.[68] The removal, effected without an order by the Court, was viewed as an administrative matter to be dealt with by the President, but it was announced at a public sitting of the Court.[69]

§477. Publication of Advisory Opinions. From the beginning, the advisory opinions of the Court have been read "in open court" (Fr., *lu en audience publique*); provision to this effect was contained in the 1926 Rules, and Article 67 of the revised Statute requires that "the Court shall deliver its opinions in open Court." Advance notice is given to States and organizations interested,[70] as well as to the Secretary-General of the League of Nations, and an "advance copy" is in the hands of the Secretary-General by the time of the delivery.[71] "Original copies" are deposited in the archives of the Court and of the Secretariat, and certified copies are sent to interested States and organizations.[72] Article 74 of the 1922 Rules provides that opinions should be printed and published in a special collection, and Series B of the Court's publications, of which eighteen numbers were issued, was the result; in 1931, Series B was combined with Series A into a new Series A/B.[73]

§478. Nature of Advisory Jurisdiction. In some quarters there has been a disposition to say that the Court does not perform a judicial function when it exercises advisory jurisdiction. In 1922 Judge Moore expressed the view that "the giving of advisory opinions, in the sense of opinions having no obligatory character, either on actual disputes or on theoretical questions, is not an appropriate function of a Court of

[67] See League of Nations Official Journal, 1925, pp. 579, 637.

[68] Series C, No. 9-II, pp. 10, 97. The Turkish Government had contested the validity of the Council's resolution of March 14, 1925, and had refused to take any part in the Court's proceedings. *Idem*, p. 107. See §469, *supra*.

[69] Series C, No. 9-II, pp. 9-10, 111-2; Series E, No. 3, p. 184.

[70] Article 58 of the Statute was applied by analogy prior to 1936. Series C, No. 52, p. 111; Series C, No. 53, p. 199.

[71] The advance copy is enclosed in a sealed envelope, and permission to break the seal is given by telegraph at the time of the delivery. See Series D, No. 2 (3d add.), pp. 416, 704. There seems to have been some delay in the arrival of the advance copy at Geneva in the *Austro-German Customs Regime Case*. Series C, No. 53, pp. 752, 754-5.

[72] But *cf.*, Series C, No. 18-I, pp. 1073-4. Printed copies are also sent to all States entitled to appear before the Court. Series D, No. 2 (3d add.), p. 705.

[73] The advisory opinions were numbered down to 1931.

Justice," and that "the exercise of such a function is at variance with the fundamental design of the Permanent Court of International Justice." [74] It is not possible to say in the abstract what is a judicial function. That term should be defined only in the light of the history of action taken by courts. Clearly no such uniformity prevails in the action of judicial bodies throughout the world as to indicate that the judicial function must always have precisely the same attributes.

In general, it may be true that the giving of legal advice is not to be considered a discharge of the judicial function, but much depends upon the circumstances under which it is given and the way in which the result is arrived at. The Court might have developed its procedure with regard to advisory opinions in such a way that it would have lacked the usual safeguards of judicial action; the actual developments have been in the contrary direction. The Rules adopted in 1922 excluded the possibility of the Court's giving opinions which would remain secret, as well as the possibility that the giving of the opinion should remain secret; [75] they also provided, though not too clearly, for a possible hearing of interested States or international organizations. In the later revisions of the Rules, there has been a progressive tendency to assimilate advisory to contentious procedure, the tendency culminating in Article 68 of the revised Statute and Article 82 of the 1936 Rules. Other courses might have been taken, but on the actual record one may say that the Court itself has conceived of its advisory jurisdiction as a judicial function, and in its exercise of this jurisdiction it has kept within the limits which characterize judicial action. It has acted not as an "academy of jurists," but as a responsible "magistrature." [76]

§479. Legal Force of Advisory Opinions.[77] An advisory opinion given by the Court is what it purports to be. It is advisory. It is not in any sense a judgment under Article 60 of the Statute, nor is it a decision under Article 59. Hence it is not in any way binding upon any State, even upon a State which is especially interested in the dispute or question to which the opinion relates.[78] Though such a State may have submitted

[74] Series D, No. 2, p. 397. See also the opinion expressed by Elihu Root, in Minutes of the 1920 Committee of Jurists, p. 584. *Cf.*, Judge Anzilotti, in Series A/B, No. 65, pp. 61–2;

[75] This course was not adopted without opposition, however. See Series D, No. 2, p. 160. Series D, No. 2 (add.), pp. 293–4.

[76] See League of Nations Official Journal, 1923, p. 1339.

[77] See *Annuaire de l'Institut de Droit International*, 1928, pp. 409–477; *idem*, 1937, pp. 164–82, 272–3.

[78] This was insisted upon by Rumania in connection with the agreement that an advisory opinion should be sought with reference to the jurisdiction of the European Commission of the Danube. Series B, No. 14, p. 21.

written or oral statements to the Court in the course of the proceedings leading up to the opinion, such statements possessed only the character of information; the State presenting them did not appear before the Court as a party to a suit, and it did not thereby subject itself to an exercise of jurisdiction by the Court. The Court is therefore without power to impose obligations on any State by the conclusions stated in an advisory opinion,[79] and the conclusions are not binding as formulations of a State's obligations.[80] Nor is the body which had requested the opinion legally bound to accept those conclusions; the Council or the Assembly will not proceed illegally if it opposes the opinion given, or if in a report under paragraph 4 of Article 15 of the Covenant it adopts contrary conclusions on a question of law to which the Court has given an answer. Though the authority of the Court is not to be lightly disregarded, it gives to the Court's opinion only a moral value. The fact that none of the opinions given by the Court has been ignored by the Council, and the fact that many of them have been the bases of decisions taken by the Council, do not serve to give legal force to the opinion itself. Nor is the Court itself bound to adhere to conclusions reached in an advisory opinion. If the question upon which an opinion is given is later submitted to the Court for judgment, the matter is not *res judicata;* [81] and though an opinion may be cited as a precedent,[82] the Court is not bound to abide by the conclusions stated in the opinion. Resort to Article 59 of the Statute by analogy is not necessary for this result; it flows from the nature of the opinion itself, and that nature is not changed by the provision in Article 68 of the Statute for assimilating advisory to contentious procedure.

It must be admitted, however, that this view of the nature of advisory opinions has not always been taken. In its reply to the request for an opinion in the *Eastern Carelia Case*, the Court stated that "answering the question would be substantially equivalent to deciding the dispute between the parties." [83] Reference must also be made to views expressed in the Assembly of the League of Nations in connection with the Swiss

[79] "Nobody would dream of applying to an opinion the rule of Article 13, paragraph 4, of the Covenant, with respect to the execution of an award." M. Erich (Finland), in Records of Ninth Assembly, First Committee, p. 54.

[80] In 1927, a committee of the Court stated that "the view that advisory opinions are not binding is more theoretical than real." Series E, No. 4, p. 76. This must be understood as applying to the problem before the Committee, *i.e.*, a proposed amendment to Article 71 of the Rules.

[81] *Cf.*, De la Grotte, in 10 *Revue de droit international et de législation comparée* (1929), p. 401; Lauterpacht, Function of Law in the International Community (1933), p. 335 note.

[82] See Series B, No. 16, pp. 15, 18. *Cf.*, Series E, No. 6, p. 300; *idem*, No. 8, p. 271.

[83] Series B, No. 5, p. 29.

proposal in 1928,[84] when some of the delegates looked upon the advisory opinion as a species of judgment; M. Politis (Greece) stated that "advisory opinions, being in reality no longer such, were accordingly equivalent in the eyes of the Council, of public opinion and of the interested parties to a judgment." [85] Something of this conception seems to have been behind the fifth reservation offered by the United States in its proposal to accede to the Protocol of Signature of 1920, and it may also be found in the observations made by various Governments in 1936.[86] The history of the opinions given by the Court lends no support to the view that the character of advisory opinions has been changed by the reception accorded to them. Of course it is possible that the parties to a dispute may have agreed in advance that an advisory opinion requested by the Council and given by the Court will be binding upon them; [87] in such case, however, the binding force of the opinion is derived from the agreement itself.

§480. Reception of the Court's Opinions. As each of the opinions given by the Court had been requested by the Council, all of them were communicated to it. In eight cases the Council formally "adopted" the opinion; in nine cases it took note of the opinion; in eight cases it merely transmitted the opinion to the body from which the request emanated; in a few cases the Council took no direct action with reference to the opinion. Some of the opinions were formally accepted by interested States; but as such States are "always free to dispose of their rights," [88] their later negotiations are not required to be along the lines indicated by the opinion of the Court.

(1) *Nomination of Netherlands Delegate to the International Labor Conference.* In its opinion of July 31, 1922, the Court answered affirmatively the question whether the Netherlands workers' delegate to the Third International Labor Conference had been nominated in accordance with the provisions of Article 389 of the Treaty of Versailles. The Council transmitted the opinion to the Director of the International Labor

[84] Records of Ninth Assembly, First Committee, pp. 40–57.

[85] Records of Ninth Assembly, First Committee, p. 47. See also *idem*, p. 61. This view has appeared also in doctrinal writings. See S. Engel, "*La force obligatoire des avis consultatifs . . .*," 17 *Revue de droit international et de législation comparée* (1936), pp. 768–800; Leland M. Goodrich, "The Nature of the Advisory Opinions of the Permanent Court of International Justice," 32 American Journal of International Law (1938), pp. 738–58.

[86] League of Nations Official Journal, 1937, pp. 171–83.

[87] In Article 5 of the abortive Geneva Protocol of October 2, 1924, it was provided that an advisory opinion of the Court on the question whether a matter is by international law solely within the domestic jurisdiction of a State, should be binding on arbitrators. Records of Fifth Assembly, First Committee, p. 137.

[88] Series A, No. 24, p. 11; Series A/B, No. 46, p. 153.

Office for communication to the competent authorities of the International Labor Organization.[89]

(2) (3) *Competence of the International Labor Organization.* The two opinions given by the Court on August 12, 1922, were similarly transmitted by the Council to the Director of the International Labor Office. The Court's conclusions met with approval in the subsequent International Labor Conference, and several draft conventions relating to agriculture were later adopted by the Conference.[90]

(4) *Nationality Decrees in Tunis and Morocco.* On February 7, 1923, the Court gave its opinion that this dispute was not by international law solely a matter of domestic jurisdiction. The two parties to the dispute had agreed that if this answer should be given, the whole dispute would be referred to arbitration or judicial settlement under conditions to be agreed upon; immediately after the reading of the opinion, the French agent asked the Court to place on record that the French Government proposed to the British Government that the case should be submitted to the Court on its merits.[91] The Council took no action on the opinion, but on May 24, 1923, the dispute was settled by an exchange of notes between France and Great Britain. The Court took note of the settlement on June 18, 1923,[92] though it is difficult to say that this action served any purpose.

(5) *Eastern Carelia Case.* The reply given by the Court on July 23, 1923, by which it refused to answer the questions put concerning provisions for the autonomy of Eastern Carelia, was noted by the Council on September 27, 1923, and the Council adopted a report containing the following *caveat:* "Whilst noting the view of the Court that an advisory opinion concerning this question would have involved an investigation into facts for which certain conditions were lacking, the Council feels sure that the opinion expressed by the Court in connection with the procedure described in Article 17 of the Covenant cannot exclude the possibility of resort by the Council to any action, including a request for an advisory opinion from the Court, on a matter in which a State non-member of the League and unwilling to give information is involved, if the circumstances should make such action necessary to enable the

[89] League of Nations Official Journal, 1922, p. 1173. See the Director's Report in 1922, International Labor Conference, Fourth Session, pp. 643–6.

[90] International Labor Conference, Fourth Session, pp. 704–5. The French Government acquiesced in the Court's conclusions, *idem*, p. 97, and later ratified several draft conventions dealing with agricultural labor.

[91] Series C, No. 2, p. 13.

[92] Series C, No. 3, Vol. I, pp. 3, 55–62.

Council to fulfil its functions under the Covenant of the League in the interests of peace." [93]

(6) *German Settlers in Poland.* In its opinion of September 10, 1923, the Court stated that matters covered by a resolution of the Council involved international obligations of the kind referred to in the Polish Minorities Treaty and therefore came within the competence of the League of Nations, and that the position adopted by the Polish Government "was not in conformity with its international obligations." This opinion was noted by the Council on September 26, 1923, and the Polish Government was invited to inform the Council as to the measures which it proposed to take to settle the question of the German settlers; on December 17, 1923, the Council adopted a resolution stating that the question could be settled only on the basis of the Court's opinion "with which the Council is in agreement." Negotiations ensued under the guidance of the Council, and on June 17, 1924, the Council took note of a settlement of the question.[94]

(7) *Acquisition of Polish Nationality.* On September 15, 1923, the Court gave an opinion interpreting Article 4 of the Polish Minorities Treaty and stating that consideration of the position of certain persons, arising out of its application, fell within the competence of the League of Nations.[95] On September 27, 1923, the Council "adopted" the opinion,[96] the Polish representative abstaining from voting, and offered its good offices for continuing negotiations with reference to the matter.[97] Difficulties having been encountered, on March 14, 1924, the Council suggested the choice of a mediator to preside over negotiations which covered *inter alia* the interpretation and application of Article 4 of the Polish Minorities Treaty. On September 19, 1924, the Council noted the success of these negotiations,[98] which after a fresh arbitral award had led to a convention setting forth the basis for the acquisition of Polish nationality; [99] Article 7 of this convention adopts a rule consistent with

[93] League of Nations Official Journal, 1923, p. 1336. The *caveat* was formally adopted by the Council, not as part of its resolution but as included in a report. See also the memorandum submitted to the Council by the Government of Finland. *Idem*, p. 1497.

[94] League of Nations Official Journal, 1923, p. 1333; *idem*, 1924, pp. 359–61, 927.

[95] Prior to its request for this opinion, the Council had taken advice from a committee of jurists whose interpretation of the treaty the Polish Government had declined to accept.

[96] The "adoption" of the opinion in this case may have had consequences under Article 12 of the Polish Minorities Treaty; in some cases, however, it is difficult to say what is the effect of the Council's "adoption" of the opinion of the Court.

[97] League of Nations Official Journal, 1923, p. 1334.

[98] *Idem*, 1924, p. 1309. See also *idem*, 1925, p. 855.

[99] 32 League of Nations Treaty Series, p. 331.

the Court's interpretation of Article 4 of the Polish Minorities Treaty, but makes certain exceptions in its application.

(8) *Jaworzina Boundary.* On December 6, 1923, the Court gave the opinion that a question as to the delimitation of the Polish-Czechoslovak frontier had been settled by a decision of the Conference of Ambassadors in 1920, and that this definitive decision "must be" (Fr., *doit être*) applied in its entirety. When it came before the Council on December 13, 1923, the opinion was accepted by Poland and Czechoslovakia "in its entirety." The Council "adopted" the opinion,[1] on the basis of which it continued to deal with the dispute, and on March 12, 1924, it adopted a recommendation [2] which led to the fixing of the frontier.[3]

(9) *Monastery of Saint-Naoum.* On September 4, 1924, the Court gave an opinion to the effect that by a decision of the Conference of Ambassadors in 1922 the Principal Allied Powers had exhausted, in regard to the Albanian-Yugoslav frontier, the mission recognized by the interested States and contemplated in a resolution of the Assembly of the League of Nations in 1921. The questions put to the Court by the Council, in substance, had previously been submitted to the Council by the Conference of Ambassadors; on October 3, 1924, the Council considered that the Court's opinion "gives the answer" to the questions submitted by the Conference of Ambassadors, and it therefore communicated the opinion to that body.[4]

(10) *Exchange of Greek and Turkish Populations.* On February 21, 1925, the Court gave an opinion interpreting Article 2 of the Lausanne Convention of January 30, 1923, concerning the exchange of Greek and Turkish populations. The Council's request for the opinion had been in response to a desire expressed by the Greco-Turkish Mixed Commission. On March 11, 1925, the Council took note of the opinion and directed that it be communicated to the President of the Mixed Commission; its *rapporteur's* observation was added to the communication, that "he had no doubt that the Mixed Commission would attribute to this opinion the same high value and authority which the Council always gave to the opinions" of the Court.[5]

[1] League of Nations Official Journal, 1924, pp. 347, 356, 364.
[2] *Idem*, p. 520.
[3] See League of Nations Official Journal, 1924, p. 828; Polish *Dziennik Ustaw*, 1925, No. 133 (supplement).
[4] League of Nations Official Journal, 1924, pp. 1369–72. New facts were later discovered which led to an agreement by which the Monastery of Saint-Naoum was attributed to Yugoslavia. Survey of International Affairs, 1925, Vol. II, p. 287. See also Series E, No. 2, p. 137.
[5] League of Nations Official Journal, 1925, p. 441. Later negotiations between Greece and Turkey resulted in an agreement of June 21, 1925, adopted by the Mixed Commission

(11) *Polish Postal Service in Danzig.* On May 16, 1925, the Court expressed the opinion that points at issue regarding the Polish postal service at Danzig had not been covered by a decision by the League of Nations High Commissioner; that the Polish postal service within the port of Danzig was entitled to set up letter boxes and collect and deliver postal matter outside its premises in the Heveliusplatz; and that the use of such service might be opened to the public and was not confined to Polish authorities and officials. On June 11, 1925, the opinion was "adopted" by the Council, and it was decided that the boundaries of the port of Danzig should be traced for the purposes of the Polish postal service with due regard to the considerations put forward in the opinion.[6] A final decision on the dispute was taken by the Council on September 19, 1925, following a report by a committee of experts.[7]

(12) *Article 3, paragraph 2 of the Treaty of Lausanne.* On November 21, 1925, the Court gave its opinion that the "decision to be taken" by the Council under Article 3, paragraph 2, of the Treaty of Lausanne would be binding on the parties and would constitute a definitive determination of the frontier between Turkey and Iraq, and that it should be taken by a unanimous vote, the votes of representatives of the parties not being counted in ascertaining whether there is unanimity. When the opinion came before the Council on December 8, 1925, the Turkish representative stated that as Turkey had voted against the request for the opinion, his Government could not be considered to be bound by the opinion, to which he attributed "only the character of a legal consultation of a theoretical character without any practical bearing." He also drew the Council's attention to an "advisory opinion" by Gilbert Gidel,[8] which he compared with that of the Court. On the question of accepting the Court's opinion, the President of the Council first said that as this was a "question of procedure," the Council might apply the rule in the Covenant relating to a question of procedure; later, the vote was taken on the basis of a stricter rule that unanimity would be required for accepting the opinion, without counting the votes of the parties to the dispute, Great Britain and Turkey. The report "in favor of accepting the

on March 19, 1927. See Series C, No. 15–I, pp. 78, 82, 101–2. The question was also dealt with in Article 10 of the Convention of June 10, 1930. 108 League of Nations Treaty Series, p. 233. See also the Convention signed at Ankara, December 9, 1933. League of Nations Official Journal, 1934, p. 389.

[6] League of Nations Official Journal, 1925, pp. 882–7.

[7] *Idem*, pp. 1371–7.

[8] Professor Gidel's opinion had been placed in the hands of members of the Court before the Court's opinion was given. Series C, No. 10, p. 325.

advisory opinion . . . was unanimously adopted, the representative of Turkey voting against the report." [9] Thereafter, on December 16, 1925, the Council took a decision under Article 3, paragraph 2, of the Treaty of Lausanne, in the absence of a Turkish representative, the vote being unanimous; [10] this decision was later made definitive.[11]

(13) *Competence of the International Labor Organization.* On July 23, 1926, the Court gave an opinion that it is within the competence of the International Labor Organization to draw up and to propose labor legislation which, in order to protect certain classes of workers, regulates incidentally the same work when performed by the employer himself. The Council had been asked by the Governing Body of the International Labor Organization to request this opinion. On June 7, 1926, before the opinion was given, the Council, being informed of the desire of the International Labor Office to have the opinion at the earliest possible date, decided that when it was handed down the opinion should first be communicated to the members of the Council individually and then communicated without further delay to the Director of the International Labor Office.[12]

(14) *Jurisdiction of the European Commission of the Danube.* On December 8, 1927, the Court gave an opinion that under the law in force the European Commission of the Danube has the same powers on the maritime sector of the Danube from Galatz to Braila including the port of Braila as on the sector below Galatz, and the opinion defined the extent of these powers. In asking for this opinion, the Council had acted upon a formal request made by the French, British, Italian and Rumanian Governments,[13] transmitted to it by the Chairman of the Advisory and Technical Committee for Communications and Transit. On March 7, 1928, the Council decided to forward the opinion to the Chairman of that Committee, for transmission to those Governments.[14]

[9] League of Nations Official Journal, 1926, p. 128.

[10] League of Nations Official Journal, 1926, pp. 187–193.

[11] *Idem*, p. 503. The Mosul dispute was finally settled by the Treaty of June 5, 1926, between Great Britain, Iraq and Turkey. For the text, see 64 League of Nations Treaty Series, p. 379.

[12] League of Nations Official Journal, 1926, p. 857.

[13] When the agreement for making this request was concluded on September 18, 1926, the parties also agreed in a protocol that if within six months after the Court's opinion had been given the procedure of conciliation had led to no result, the procedure should be considered as closed. Series B, No. 14, p. 20; Series C, No. 13–IV, p. 812; 59 League of Nations Treaty Series, p. 237.

[14] League of Nations Official Journal, 1928, p. 400. Subsequent negotiations led to the preparation of a draft convention initialled on March 20, 1929, and to the signature of a Declaration on December 5, 1930. For the texts, see *idem*, 1931, pp. 736, 738. Difficulties in completing the draft convention led to the negotiation of a *modus vivendi* and declaration

(15) *Jurisdiction of the Courts of Danzig.* On March 3, 1928, the Court gave an opinion to the effect that a decision given by the League of Nations High Commissioner at Danzig on April 8, 1927, as a result of certain requests by Danzig, was not legally well founded, in so far as it did not comply with those requests. On March 2, 1928, Danzig and Poland had reached an agreement [15] by which they undertook to accept the Court's opinion as an authentic interpretation of their previous agreement of October 2, 1921. On March 9, 1928, the Council took note of the opinion and of the agreement.[16]

(16) *Interpretation of the Greco-Turkish Agreement of 1926.* In an opinion given on August 28, 1928, the Court interpreted Article 4 of the final protocol annexed to the Greco-Turkish agreement of December 1, 1926. On September 8, 1928, the Council took note of the opinion, and directed that it be communicated to the President of the Mixed Commission for the Exchange of Greek and Turkish Populations, on whose suggestion the Council had requested the opinion.[17]

(17) *The Greco-Bulgarian Communities.* On July 31, 1930, the Court gave an opinion answering three series of questions formulated respectively by the Greco-Bulgarian Mixed Emigration Commission, the Bulgarian Government and the Greek Government. As the opinion was requested at the Mixed Commission's suggestion and for its use, the Council took note of the opinion on September 8, 1930, and directed that it be communicated to the President of the Mixed Commission. This opinion served as the basis of later procedure before the Commission.[18]

(18) *Danzig and the International Labor Organization.* On August 26, 1930, the Court gave an opinion to the effect that the special legal status of Danzig was not such as to enable it to become a Member of the International Labor Organization. As the opinion had been requested at the suggestion of the Governing Body of the International Labor Office and

adopted on May 17, 1933 at a meeting of the European Commission of the Danube; Rumania agreed to refrain from contesting the jurisdiction of the Commission from the sea to Braila, on the understanding that the Commission was not to exercise a judicial competence between Galatz and Braila under certain conditions. Series E, No. 9, p. 115. The formal instruments were signed on June 25, 1933. 6 Hudson, International Legislation, pp. 364, 367. A further arrangement was made at Sinaia, on August 18, 1938. 196 League of Nations Treaty Series, p. 113.

[15] This agreement was signed on March 6, 1928. Series C, No. 14–I, p. 572.

[16] League of Nations Official Journal, 1928, p. 433.

[17] League of Nations Official Journal, 1928, p. 1487. The question was finally settled by the Greco-Turkish Convention of June 10, 1930. 108 League of Nations Treaty Series, p. 233.

[18] Series E, No. 8, p. 213. The Mixed Commission was dissolved as of January 31, 1932. League of Nations Official Journal, 1932, pp. 469–72, 605–6. See S. P. Ladas, The Exchange of Minorities, Bulgaria, Greece and Turkey (1932), *passim.*

for its use, the Council took note of the opinion on September 9, 1930, and directed that it be communicated to the Director of the International Labor Office for transmission to the Governing Body.[19]

(19) *Access to German Minority Schools in Upper Silesia.* On May 15, 1931, the Court gave an opinion to the effect that children who had been excluded from German minority schools in Upper Silesia on the basis of the language tests provided for by a Council resolution of 1927 could not by reason of that circumstance be refused access to those schools. On September 19, 1931, the Council adopted a report made at an earlier session, deciding that the children in question should be transferred immediately to the minority schools to which their admission had been requested; the Polish representative informed the Council that his Government had complied with the Court's opinion and had already informed the children's parents that the admission would be granted.[20]

(20) *Customs Régime between Germany and Austria.* On September 5, 1931, the Court gave an opinion to the effect that a customs regime established between Germany and Austria in accordance with a Protocol of March 19, 1931, would not be compatible with Protocol No. 1 signed at Geneva on October 4, 1922. Two days before the opinion was handed down, the representatives of Germany and Austria had declared to the Committee of Enquiry for European Union that it was not their intention to proceed with the establishment of the proposed customs regime.[21] On September 7, 1931, the Council took note of the opinion. The 1922 protocol was "reproduced" in a protocol of July 15, 1932.[22]

(21) *Railway Traffic between Lithuania and Poland.* On October 15, 1931, the Court gave an opinion to the effect that the international engagements in force did not oblige Lithuania in the existing circumstances to take the necessary steps to open for traffic or for certain categories of traffic the Landwarów-Kaisiadorys railway sector. On January 28, 1932, the Council took note of this opinion,[23] but some years elapsed before the final settlement of the dispute.[24]

[19] League of Nations Official Journal, 1930, p. 1308. For the resolution adopted by the Governing Body on October 11, 1930, see Minutes of the Governing Body, 50th session, p. 112.

[20] League of Nations Official Journal, 1931, pp. 1151, 2263.

[21] *Idem*, pp. 2185–2190. It may be contended that this declaration made the question a moot one, and that the Court should thereupon have refused to give the opinion; but as the declaration had not been communicated to the Court, it could not properly have been taken into account by that body, though the Council could have withdrawn the request.

[22] *Idem*, 1932, p. 1461.

[23] *Idem*, 1932, p. 481.

[24] Lithuania and Poland concluded a convention on railway traffic on May 25, 1938. 191 League of Nations Treaty Series, p. 391.

(22) *Polish War Vessels in Danzig.* On December 11, 1931, the Court gave an opinion to the effect that the Treaty of Versailles, the Danzig-Polish Convention of November 9, 1920, and the relevant decisions of the Council and the League of Nations High Commissioner did not confer upon Poland rights or attributions as regards the access to, or anchorage in, the port and waterways of Danzig of Polish war vessels. On January 29, 1932, the Council "adopted" the opinion and, noting that the legal points of divergence had "been elucidated," directed that it be communicated to the High Commissioner.[25] A protocol signed by representatives of Poland and Danzig on August 13, 1932, established a series of rules to govern the access of Polish warships to Danzig waters.[26]

(23) *Treatment of Polish Nationals in Danzig.* On February 4, 1932, the Court gave an opinion construing Article 104 (5) of the Treaty of Versailles and Article 33 (1) of the Danzig-Polish Convention of November 9, 1920, as regards the position of Polish nationals and other persons (including Danzig nationals) of Polish origin and speech in Danzig territory. On February 6, 1932, the Council directed that the opinion be communicated to the League of Nations High Commissioner at Danzig.[27] On November 26, 1932, representatives of Danzig and Poland signed an agreement accepting the conclusions of the Court's opinion.[28]

(24) *Interpretation of the Caphandaris-Molloff Agreement.* On March 8, 1932, the Court gave an opinion to the effect that in the case at issue there was no dispute between Greece and Bulgaria within the meaning of Article 8 of the Caphandaris-Molloff Agreement of December 9, 1927. Previously, on November 11, 1931, Greek and Bulgarian representatives had signed an arrangement concerning the execution of the Caphandaris-Molloff Agreement, but it was not to affect their legal position as it stood when the Council requested the opinion.[29] On May 10, 1932, the Council took note of the Court's opinion and congratulated the two Governments on the conclusion of the arrangement of November 11, 1931;[30] it appeared, however, that the Greek and Bulgarian representatives were not agreed as to the effect of the Court's opinion.

[25] League of Nations Official Journal, 1932, p. 489.

[26] *Idem*, 1933, p. 142. Annexed to the protocol was a series of general rules relating to access of foreign warships to the port of Danzig.

[27] *Idem*, 1932, p. 523.

[28] *Idem*, p. 2282. See also the agreement initialled on August 5, 1933, and signed on September 18, 1933, implementing the agreement of November 26, 1932. *Idem*, 1933, pp. 1157, 1541–2.

[29] *Idem*, 1932, p. 270.

[30] *Idem*, 1932, p. 1187.

(25) *Interpretation of the Convention on Employment of Women at Night.* On November 15, 1932, the Court gave an opinion interpreting the convention concerning employment of women during the night, adopted by the International Labor Conference in 1919, and holding that it applied to women holding positions of supervision or management. On January 24, 1933, the Council directed that the opinion be transmitted to the Director of the International Labor Office for communication to the Governing Body.[31]

(26) *Minority Schools in Albania.* On April 6, 1935, the Court gave an opinion to the effect that the Albanian Government was not justified in its contention that the abolition of private schools in Albania, as it constituted a general measure applicable to the majority as well as to the minority, was in conformity with the letter and spirit of the stipulations laid down in Article 5, paragraph 1, of the Albanian Declaration of October 2, 1921. In line with the Court's interpretation of the Declaration, the Albanian Government proposed a special regulation on private schools for minorities, which with some modifications was accepted by the Council of the League of Nations as a "reasonable solution" of the question by resolutions of September 23, 1935, January 23, 1936, and May 13, 1936.[32]

(27) *Consistency of Certain Decrees with the Danzig Constitution.* On December 4, 1935, the Court gave an opinion that two decrees adopted by the Senate of the Free City of Danzig on August 29, 1935, were not consistent with the guarantees which Part II of the Danzig Constitution provides for fundamental rights, and not consistent in particular with Articles 74, 75 and 79 of the Constitution, and constituted therefore violations of the principles on which Part II of the Constitution was founded. The two Danzig decrees had followed *verbatim* decrees adopted by the German Reich on June 28, 1935, and published on July 5, 1935.[33] The Court's opinion was "adopted" by the Council of the League of Nations on January 24, 1936,[34] and on February 20, 1936, the Senate of the Free City amended the decrees of August 29, 1935 in line with it.[35]

[31] *Idem*, 1933, p. 184. The 1919 Convention was revised by a Convention of June 19, 1934, Article 8 of which provides that it does not apply to women holding responsible positions of management and not ordinarily engaged in manual work. 6 Hudson, International Legislation, p. 907.

[32] League of Nations Official Journal, 1935, pp. 1185, 1290; *idem*, 1936, pp. 115–6, 264–5, 560–1, 742–3.

[33] *Reichsgesetzblatt*, 1935, I, pp. 839, 844.

[34] League of Nations Official Journal, 1936, pp. 124–5.

[35] *Idem*, pp. 515–6.

§481. Purposes Served by Advisory Jurisdiction. The 1926 Conference of Signatories stated in its Final Act that "great importance is attached by the Members of the League of Nations to the value of the advisory opinions which the Court may give as provided for in the Covenant." [36] This was doubtless because of the purposes which had been served by advisory opinions even in the short period of the Court's experience up to that time. On the record to date, it may be said that three distinct advantages have been derived from the Court's exercise of its advisory jurisdiction.

(1) In several instances, advisory opinions greatly facilitated the work of the Council of the League of Nations. This is not merely because a request for an advisory opinion may be a means of gaining time or of shifting the theater of discussion in an acute situation; the Court's opinion may clarify difficult questions as to the Council's competence, or it may dispose of legal questions which condition progress in the settlement of political issues. The opinion concerning *German Settlers in Poland,* and that concerning the *Acquisition of Polish Nationality,* both dealt with the competence of the Council; the opinion concerning the *Iraq-Turkey Frontier* gave guidance to the Council as to the nature of the "decision to be taken" and the method by which that decision should be arrived at; the various opinions concerning the relations of Poland with Germany and Danzig and of Greece with Bulgaria and Turkey, enabled the Council to push forward settlements of political issues. Indeed, it may be said that the Court's chief contribution to the maintenance of peace has been this assistance given to the Council.

(2) Advisory opinions also facilitated the efficient functioning of international institutions other than the Council. International bodies do not operate automatically, and many legal questions may arise to impede their action. In numerous instances authoritative answers to such questions were obtained from the Court through the mediation of the Council. Six opinions dealt with the functioning of the International Labor Organization; the Greco-Turkish Mixed Commission for the Exchange of Greek and Turkish Populations was twice given such assistance; and other opinions dealt with the attributions of the Greco-Bulgarian Emigration Commission and the European Commission of the Danube.

(3) The Court's advisory jurisdiction also proved useful to States engaged in disputes, when they were unable to agree upon the submission

[36] Minutes of the 1926 Conference of Signatories, p. 79.

of questions to arbitration or adjudication. When Great Britain and France were negotiating concerning the nationality decrees in Tunis and Morocco, no agreement for arbitration could be reached, though such a course was proposed; the two States were able, however, to agree upon asking the Council to request an advisory opinion, and even to agree that if the Court answered a preliminary question by saying that the issue was not "solely a matter of domestic jurisdiction," the "whole dispute" should be "referred to arbitration or to judicial settlement"; and when the Court's opinion was given, a settlement resulted promptly. In the *Jaworzina Case*, also, Czechoslovakia and Poland seem to have besought the Council to request an opinion because it was the most expeditious way open to them of meeting the demands of public opinion of the two countries, though a "calming effect" had already been produced by the submission of the dispute to the Council.[37] Even though agreements in force may provide for the compulsory jurisdiction of the Court, the States interested in a dispute may prefer to have an advisory opinion which by a clarification of legal questions will aid them in reaching a settlement on broader grounds and which will not have the binding effect of a judgment. In 1931, when the British representative on the Council proposed a request for an advisory opinion relating to the dispute concerning railway traffic between Lithuania and Poland, he stated that under the Memel Convention of 1924 Great Britain and the other parties to the convention had "the opportunity of referring the dispute" to the Court "for final decision";[38] but a resort to the Court's advisory jurisdiction was preferred as a more efficacious way of handling that dispute.

[37] League of Nations Official Journal, 1923, pp. 1317, 1474.
[38] *Idem*, 1931, p. 214.

PART V

PROCEDURE AND PRACTICE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

CHAPTER 23

REPRESENTATIVES OF STATES BEFORE THE COURT

§482. Agents in Contentious Proceedings. Article 42 of the Statute of the Court provides that "the parties shall be represented by agents." [1] Though it is cast in obligatory form, this is to be applied as a procedural provision. As a matter of cooperation with the Court in the discharge of its functions, every State which becomes a party should appoint an agent for the purpose of facilitating communications between the Court and itself.[2] If a State is an applicant, or if it is a party to a special agreement, the Court is in a position to require the appointment of an agent as a condition precedent to the exercise, or to the continued exercise, of its jurisdiction.[3] If a State is a respondent, on the other hand, if in other words it is made a party against its will, it may or may not "appear before the Court" or "defend its case," within the sense of those terms in Article 53 of the Statute; and if it refrains from taking any action, the Court will not be in a position to require the appointment of an agent. The provision in Article 42 is therefore exhortatory, rather than peremptory.[4] Each of the parties appointed an agent in every case before the Court, except that in the *Belgian-Chinese Treaty Case* no agent was appointed by China, and in the *Castellorizo Case* no agent was appointed by Italy. The agent of a party is always designated with respect to a particular case, *i.e.*, he is an agent *ad hoc;* yet it is conceivable that a State might designate a general agent to represent it before the Court

[1] Agents charged with the conduct of arbitral proceedings have been regularly appointed since the eighteenth century. Judge Fromageot explained in 1935 that the appointment of agents "had its origin in the early days of arbitration" because it was thought that their interposition would tend "to diminish tension between the parties." Series D, No. 2 (3d add.), p. 235.

[2] In an interlocutory judgment of October 19, 1901, in the American-Russian arbitration relating to Whaling and Sealing claims, M. Asser held that even in the absence of a provision authorizing it a party may appoint an agent. 3 *Revue de droit international et de législation comparée* (1901), pp. 655–8.

[3] See Series E, No. 14, p. 140.

[4] Articles 37 (1899) and 62 (1907) of the Hague Conventions on Pacific Settlement provided that parties have the right to appoint delegates or special agents. *Cf.*, Series D, No. 2 (3d add.), p. 260.

in any case which might arise. Two or more parties may be represented by the same agent.[5]

Prior to notification of the appointment of a party's agent, it is frequently necessary for the Court to have contact with the party. For this purpose, the designated channel for communication may be employed by the Registry.[6] In the first *Lighthouses Case*, the parties' diplomatic representatives at The Hague were considered to be provisional agents for the purpose of the necessary preliminary contacts;[7] in some cases, however, the Court has been notified of the appointment of provisional agents by the parties.[8]

The 1922 Rules failed to refer to the appointment of agents, but in the drafting of its later Rules the Court has given special attention to the time when agents should be appointed, distinguishing between cases instituted by special agreement and those instituted by application.[9] Article 35 of the 1936 Rules indicates the Court's desire that agents should be appointed as early in the proceedings as possible, as delay in the appointment may "paralyze the action of the Court."[10] In a case instituted by a special agreement, the Court should be informed of the appointment of the agents or agents of the party or parties filing the special agreement at the time it is filed; if a special agreement is filed by one only of the parties, the other party should inform the Court of the name of its agent when it acknowledges the announcement of the filing or "as soon as possible."[11] An applicant should state the name of its agent in the application or the covering letter; in several cases, States intending to file applications notified the Court of the appointment of their agents before the applications were filed.[12] A respondent should inform the Court of the name of its agent when it acknowledges the communication of the application or "as soon as possible." Delay in the appointment of a respondent's agent will not necessarily hold up the

[5] See Article 8 of the *compromis* of July 31, 1913, in the case relating to *Religious Properties in Portugal*. Scott, Hague Court Reports (2d ser.), p. 30. In the *Japanese House Tax Case* in 1904, three parties collectively designated three agents to constitute a common delegation. Not uncommonly one agent acts on behalf of several agents of parties in the same interest.

[6] Series D, No. 2 (3d add.), p. 58. See §418, *supra*.

[7] Series C, No. 74, p. 404; Series E, No. 12, p. 191. If an applicant selects its legation at The Hague as its address, it may be taken to have conferred upon its *chef de mission* the powers of a provisional agent. Series C, No. 59, p. 602.

[8] *E.g.*, in the *Memel Case*, Series C, No. 59, pp. 9–11; and in the *Eastern Greenland Case*, Series C, No. 67, pp. 4079, 4083. Provisional agents are sometimes appointed in the concluding stages of a proceeding, also.

[9] See Series D, No. 2 (3d add.), p. 763.

[10] Series C, No. 16–I, p. 295. But *cf.*, Series E, No. 12, p. 191.

[11] The Italian Government failed to do this in the *Castelloriso Case*. Series C, No. 61, p. 22.

[12] Series C, No. 13–III, p. 102; *idem*, No. 81, p. 9.

proceedings. In the first *Lighthouses Case*, in which the special agreement was filed by both parties on May 23, 1933, the appointment of the French agent was notified only on July 27, 1933, and during the interim the Court refrained from fixing the time-limits for the written proceedings; [13] on the other hand, in the case relating to *Phosphates in Morocco*, begun by an Italian application filed on March 30, 1936, the Court issued an order fixing time-limits on June 18, 1936, though the appointment of the French agent was not notified until July 6, 1936.[14]

The appointment of an agent should be made "by an authority generally known to be qualified to speak on behalf" of the appointing government.[15] It should be notified to the Court by a person known to be a duly authorized representative of that government.

From the point of view of the Court it is important that "information emanating from the Court should be concentrated in the hands of a single person." [16] Hence it would seem that a party should be represented by a single agent. Article 35 of the Rules seems to envisage the appointment of one agent; yet assistant agents or deputy-agents are sometimes appointed,[17] and on several occasions a party has been represented by several agents.[18] A party is free to select any person as its agent, and it may select a person who does not have its own nationality.[19] In some cases, their diplomatic representatives at The Hague have acted as agents of parties, and the practice does not seem to have given inconvenience. An agent may be replaced in the course of proceedings in a case.[20]

[13] *Idem*, No. 74, pp. 9–10.

[14] *Idem*, No. 85, pp. 1346, 1351. The order of June 18, 1936 recited that the appointment of a French agent had been delayed. *Idem*, pp. 1370–1. See also Series E, No. 12, p. 191. *Cf.*, the Court's order of July 29, 1933 in the *Polish Agrarian Reform Case*, Series A/B, No. 58, pp. 175–7.

In the *Pless Case* and in the *Czechoslovak Appeals Cases*, orders fixing and extending time-limits were issued before the appointment of the respondents' agents.

[15] Series D, No. 2 (3d add.), p. 817. In a few cases agents have presented *pleins pouvoirs* to the Court. See Series C, No. 14–I, p. 525; Series C, No. 16–III, p. 767; Series C, No. 77, p. 256. In the *Wimbledon Case*, so-called *lettres de créance* were read in Court, Series C, No. 3–I, pp. 9, 110–6; in the *Eastern Carelia Case*, so-called *pleins pouvoirs* were read in Court. *Idem*, pp. 6, 73–4.

In several cases, the appointment of a State's agent was effected by executive decree. Series C, No. 69, p. 63; Series C, No. 74, p. 10.

[16] Series C, No. 18–I, p. 1041; Minutes of the 1920 Committee of Jurists, p. 340.

[17] See *e.g.*, Series C, No. 59, p. 621; Series C, No. 82, p. 287.

[18] In the *Chorzów Case*, a tardively appointed second agent was recognized only as counsel. Series C, No. 13–I, pp. 11, 205. Belgium seems to have had several agents in the case against China. Series C, No. 16–I, p. 300. In the *Free Zones Case*, Switzerland appointed two agents. Series C, No. 17–I, Vol. 1, p. 10. In the *Memel Case*, the Italian Government appointed a "second agent." Series C, No. 59, p. 622. In the *Eastern Greenland Case*, the Norwegian Government appointed an agent and two agents and counsel. Series C, No. 66, p. 2593.

[19] See Series C, No. 13–I, p. 204.

[20] Series C, No. 17–II, pp. 9, 648. An acting agent was appointed in the *Chorzów Case*, to replace the agent while the latter was ill. Series C, No. 15–II, p. 546.

An agent should have an address at which he can easily and quickly be reached by the Registry of the Court, perhaps for telephonic and telegraphic as well as for postal communications.[21] Simultaneous communication with the agents of all parties should be possible, also, and for this reason the agents should have addresses at the seat of the Court.[22] Article 35 of the 1922 Rules envisaged "addresses selected [Fr., *les domiciles élus*] at the seat of the Court to which notices and communications intended for the respective parties are to be sent";[23] Article 35 of the 1936 Rules made it clear that this referred to the agent's "permanent address [Fr., *domicile élu*] at the seat of the Court,"[24] and provided that the appointment of the agent should be accompanied by mention of the address. A legation or the office of an advocate at The Hague[25] is usually chosen as such address.[26] In the *Panevezys-Saldutiskis Case*, the application stated that the Estonian agent had selected as his permanent address "the Registry of the Court of The Hague," but as this seemed to be a doubtful compliance with the Rules the Estonian agent was prompted to select another address.[27]

The compensation of an agent, as of counsel, is in all cases a matter between him and the Government which he represents; it is in no sense a concern of the Court. As the law with reference to the costs which the Court may award under Article 64 of the Statute is as yet undeveloped, no indication has been given that costs awarded may reimburse a State for compensation paid to an agent or counsel.

§483. Agents in Advisory Proceedings. In the Court's earlier years, States and organizations participating in advisory proceedings usually appointed "representatives" for this purpose; this practice was followed down to 1927 in all cases except the *Nationality Decrees Case*, in which the British and French Governments agreed upon the appointment of "agents."[28] Beginning with the *Danube Commission Case*,[29] however,

[21] See Series D, No. 2 (add.), p. 74.

[22] Series C, No. 18–II, pp. 1040–1; Series E, No. 7, pp. 293–4. At one time the Court voted to include in the Rules a provision that "whenever possible persons permanently resident at the seat of the Court shall be selected as agents." Series D, No. 2 (add.), pp. 73–5, 309; Series E, No. 3, pp. 204–5.

[23] The English expression *address selected* was taken as the equivalent of the French *domicile élu*. Series D, No. 2 (add.), pp. 71–2.

[24] Yet the address selected is frequently referred to as that of the Government, and the selection may precede the appointment of the agent.

[25] In two cases the Yugoslav agent selected the Yugoslav Legation in London as his "permanent address at the seat of the Court," explaining that the Yugoslav Minister in London was also accredited at The Hague. Series C, No. 78, p. 412; *idem*, No. 80, p. 1383.

[26] Agents frequently request that documents be sent also to the hotels in which they are lodged at The Hague. Series E, No. 4, p. 279.

[27] Series C, No. 86, pp. 10, 719, 721.

[28] Series C, No. 2, pp. 265–7, 270–2.

[29] Series C, No. 13–IV, Vol. 1, p. 10.

States participating in advisory proceedings have commonly been represented by "agents"; Article 35 of the Rules has been said to be applicable in advisory proceedings,[30] though its specific provisions were drafted without reference to the character of such proceedings.[31] The representatives of international organizations have not been called "agents," however.[32] In several cases preliminary conversations were held by the Registrar with representatives of Governments before agents were appointed. In the *Austro-German Customs Régime Case*, the Registrar convoked representatives of seven States at Geneva on May 21, 1931, shortly after the voting of the Council's request for an opinion; [33] a somewhat similar procedure was followed in the *Polish Nationals Case* and the *Caphandaris-Molloff Agreement Case*.[34]

§484. Counsel and Advocates in Contentious Proceedings. Article 42 of the Statute provides that parties "may have the assistance of counsel or advocates before the Court." The conduct of proceedings may require that a party appoint an agent, but it does not require the appointment of counsel or advocates. In other words, the Statute leaves a party free to entrust to its agent all phases of the presentation of its case.[35] No distinction is to be made between counsel and advocates.[36] The term *counsel* is employed more frequently than the term *advocates;* [37] indeed

[30] Series C, No. 18–I, p. 1041; Series C, No. 56, p. 423; Series D, No. 2 (3d), p. 836. In some cases, the representative of a State has been a non-national. Series C, No. 14–I, pp. 524–5, 528; Series C, No. 53, p. 698.

[31] But see the proposals considered in 1933 and 1934. Series D, No. 2 (3d add.), pp. 764, 866.

[32] The appointment of organizations' representatives is usually very informal. On several occasions the Director of the International Labor Organizations has appeared before the Court, as such.

[33] Series C, No. 53, pp. 687–91.

[34] *Idem*, No. 56, pp. 419–20; *idem*, No. 57, pp. 402–3.

[35] Records of First Assembly, Committees, I, pp. 369–70, 535.

Article 43, paragraph 5, of the Statute provides that "the oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel and advocates." In the first *Lighthouses Case*, the President spoke of the agent's acting also as counsel. Series C, No. 74, p. 216.

In the *Fur Seal Arbitration* between the United States and Great Britain in 1893, the tribunal seems to have required that argument be presented by counsel and not by agents, though the arbitration convention referred to the agents as representing the parties "generally in all matters connected with the arbitration." 1 Moore, International Arbitrations, p. 910. The Court was seized of a proposal in the same sense in 1922. Series D, No. 2, p. 277.

[36] *Cf.*, Series D, No. 2 (3d add.), pp. 437, 897.

[37] In the *Austro-German Customs Régime Case*, four persons in addition to the agent were designated as forming part of the Czechoslovak agency. Series C, No. 53, p. 727. In the *Eastern Greenland Case*, the Danish Government designated an agent, an agent and advocate, an advocate and counsel, and an advocate, and *à coté de ces messieurs* a delegation composed of a chief, a counsel, an assistant advocate, nine experts and three secretaries; the Norwegian Government designated an agent, two persons called agents and counsel, a counsel and advocate, as well as five experts and three secretaries. Series C, No. 67, pp. 4120–1, 4123.

the addition of the second term seems superfluous.[38] The appointment of a counsel or advocate is not governed by any provisions in the Rules. It is usually notified to the Court by an informal letter addressed to the Registrar, and frequently this letter emanates from the agent.[39] In many cases it is stated that the counsel will assist the agent;[40] in other cases it is stated that the counsel will assist the party.[41] So far as the Court is concerned, counsel is always subordinate to the agent. Counsel are frequently not nationals of the States for which they appear.[42] It is not necessary that they be trained lawyers, and technical experts may act in this capacity.[43] The number of counsel or advocates which a party may have is not limited;[44] but it may be limited by agreement between the parties, and the Court might limit the number of oral statements to be made in the same interest in any case.[45] In numerous cases[46] parties have presented to the Court opinions by eminent jurists who though not named as agents or counsel were sometimes referred to as counsel. These opinions, usually annexed to an application or to one of the documents of the written proceedings, depend for their persuasive force on the names of the authors, and they are rarely referred to by the Court. In no case did counsel for any individual or for any private interest attempt to appear before the Court; in this respect the Court is not in the same position as an international claims tribunal.[47]

§485. Counsel and Advocates in Advisory Proceedings. So long as States participating in advisory proceedings refrained from designating their representatives as "agents," they refrained also from designating

[38] Both terms were borrowed from Articles 37 (1899) and 62 (1907) of the Hague Conventions on Pacific Settlement.

[39] See Series C, No. 87, p. 299. In the *Serbian Loans Case*, a formal appointment was made by the agent. Series C, No. 16–III, p. 790.

[40] Series C, No. 17–II, p. 628; Series C, No. 87, pp. 299, 300. In the *Serbian Loans Case*, an agent was also assisted by a "technical legal adviser." Series C, No. 16–III, p. 11.

[41] Series C, No. 83, p. 166; Series C, No. 87, p. 299. In the *Greco-Turkish Agreement Case*, the Turkish agent was assisted by counsel privately. Series C, No. 15–I, pp. 258–60.

[42] In the *Eastern Greenland Case*, Denmark and Norway seem to have considered making an agreement that neither State would appoint counsel not possessing its nationality. Series C, No. 67, pp. 4104–5. Where a claim is made by one State against another, it is not unusual for the former to choose nationals of the latter as its counsel; *e.g.*, in the *Mavrommatis Case*, Series A, No. 2.

[43] In the *Meuse Case*, M. Delmer addressed the Court as "technical counsel" of Belgium. Series C, No. 81, pp. 218, 331.

[44] Proposals to limit the number were made in 1922 and 1934. Series D, No. 2, p. 263; Series D, No. 2 (3d add.), pp. 183–5, 872.

[45] See Series C, No. 69, pp. 17–8; Series E, No. 3, p. 204.

[46] See the lists of these cases in Series F, No. 1, pp. 61–2; No. 2, p. 68; No. 3, p. 63.

[47] *Cf.*, Minutes of the 1920 Committee of Jurists, p. 340. See A. H. Feller, Mexican Claims Commissions (1935), p. 289. Yet persons who have previously acted for private groups may appear as the counsel of a party espousing the claims of those groups. See Series C, No. 78, p. 411.

them as counsel or advocates; but the later frequent appointment of "agents" in advisory cases led, also, to the appointment of counsel and advocates in such cases.[48] In the *Tunis and Morocco Nationality Case* the British and French Governments appointed both agents and counsel, and agreed that the number of counsel should not exceed two on each side.[49]

§486. The Rôle of the Agent. An agent is the representative of the Government which appointed him *vis-à-vis* the Court.[50] He serves as intermediary between the State which he represents and the Court.[51] His primary function is to maintain the party's contact with the Court. The whole conduct of the party's rôle in the proceedings is in his hands. He may take decisions on behalf of the party as to all steps in the proceedings; indeed he ought to be able to take such decisions without seeking further instruction from the Government which appointed him.[52] He acts and speaks in the name of the party, and what he does and says is binding upon the party in so far as that case is concerned.[53] Vested with such powers, it may not be improper to speak of him as a "political officer."[54]

All correspondence should be centered in the hands of the agent.[55] Parties seldom ignore their own agents by communicating with the Court

[48] Series C, No. 53, pp. 725; Series C, No. 57, p. 265; Series C, No. 76, p. 107.

[49] Series C, No. 2, pp. 5–7, 266, 271.

[50] In Article 51 of the 1922 Rules, the term "representatives of the parties" was used in a global sense to include agents, counsel and advocates, but the term was dropped in 1936. See Series D, No. 2 (3d add.), pp. 233–7, 874.

[51] Articles 37 (1899) and 62 (1907) of the Hague Conventions on Pacific Settlement refer to agents as intermediaries between the parties and the tribunal.

One of the most complete statements of the functions of an agent is to be found in conventions made by Chile with France, Great Britain and Italy in 1882 and 1883; Article 5 of the Convention with Great Britain of January 4, 1883, provided: "Each Government may appoint an Agent to act on its behalf, present petitions, documents, interrogatories, bring forward or demand evidence, support charges or refute contrary statements, produce proofs, and adduce before the Commission, personally or through an advocate, verbally or in writing in accordance with the rules of procedure which the Commission shall lay down on commencing its functions, the doctrines, legal principles, or antecedents which he may deem convenient for the furtherance of his cause." 74 British and Foreign State Papers, p. 322.

[52] The need for the agent's having ample powers was demonstrated in the *Serbian Loans Case*. See Series C, No. 16–III, p. 817; Series E, No. 5, p. 250.

[53] See Series A, No. 7, p. 13; Series A/B, No. 46, p. 170. Acts of an agent may even effect a party's submission to the Court's jurisdiction. Series A, No. 5, pp. 27–8; Series A, No. 15, p. 24.

It was formerly not uncommon to state in the *compromis* that the acts of an agent would bind his Government. 2 Lapradelle et Politis, *Recueil des Arbitrages*, pp. 627, 626.

[54] Root, North Atlantic Coast Fisheries Arbitration at The Hague, Foreword by Scott and Bacon, p. xxxi (1917). The political quality of agents' functions was safeguarded in the *Croft* and *Yuille* arbitrations between Great Britain and Portugal in 1855 and 1861, by indirect stipulations that the agents should not be lawyers. See 2 Lapradelle et Politis, *Recueil des Arbitrages*, pp. 13, 90.

[55] The provision in paragraph 3 of Article 32 of the 1936 Rules relating to the legalization of the signature of a previously designated agent seems foreign to basic ideas as to agents; once an agent is duly appointed his signature should need no legalization.

directly.[56] Once it is notified of the appointment of an agent, the Court should communicate with a party with reference to the case only through the agent;[57] and it should receive communications from the party only through the agent.[58] This has not always been insisted upon, however. In the absence of the British agent in the *Mavrommatis Case*, the Court took note of an oral request made by the British Minister at The Hague;[59] and in 1933 it was the German Minister at The Hague who gave notice that the German Government intended not to proceed with two pending cases,[60] but the Registry continued to send communications to the German agents until the cases were removed from the list. Applications are frequently signed by agents, but the 1936 Rules permit the signature by any duly authorized person. Since 1926, the Rules have required that the originals of all documents of the written proceedings shall be signed by the agent;[61] and agents must be at the disposal of the President for consultation with reference to steps in the written proceedings and the fixing of time-limits therefor. In the oral proceedings, agents may address the Court,[62] but this function may be delegated to counsel or advocates.[63] At all stages of the proceedings, the Court looks to the agent as the person responsible for the presentation of the case on behalf of the party which appointed him. The judgment must contain the name of the agent;[64] Article 58 of the Statute provides that agents must be notified in advance of the reading of judgments in open Court, and they are usually, but not invariably, present on that occasion.

Article 37 of the 1936 Rules provides that the President should summon the agents of the parties to a meeting to ascertain their views as to questions connected with the procedure;[65] particularly, questions

[56] But see the Swiss communication in the *Free Zones Case*, Series C, No. 19–I, pp. 2188, 2191; and the Yugoslav communication in the *Pajzs Case*, Series C, No. 80, p. 1376.

[57] Article 21 of the 1936 Rules provides that "communications addressed to the agents of the parties shall be considered as having been addressed to the parties themselves."

[58] See Series D, No. 2 (3d add.), pp. 42, 58. The appointment of judges *ad hoc* is usually notified to the Court by persons other than the agents. Series C, No. 67, p. 4087; Series C, No. 87, pp. 295–6.

[59] Series C, No. 5–I, p. 17.

[60] Series C, No. 70, p. 426; Series C, No. 71, p. 426; Series E, No. 10, p. 155.

[61] In the second *Lighthouses Case*, documents of the written proceedings were signed by an assistant agent of Greece. Series C, No. 82, pp. 90, 188.

Cf., as to copies, Series C, No. 18–I, pp. 1037–8; Series C, No. 56, p. 452; Series E, No. 8, p. 259.

[62] But *cf.*, 1 Moore, International Arbitrations, p. 910.

[63] In the second *Mavrommatis Case* the agents took little part in the oral proceedings, if indeed they were present at all.

[64] The agents are named in the statement of parties; the historical parts of the judgments also name both agents and counsel who participated in oral proceedings.

[65] Series D, No. 2 (3d add.), pp. 59–61, 431–3, 759, 814. Previously the Registrar had conferred with agents informally.

The rules of some of the Mixed Arbitral Tribunals set up under the Peace Treaties of 1919 and 1920 provided for a preliminary hearing which was in the nature of a pre-trial procedure. 1 *Recueil des Décisions*, pp. 50, 622, 648, 655.

as to the number and order of the documents of the written proceedings and the time-limits within which they should be presented are discussed with agents. These meetings usually take place at a very early stage of a proceeding, but they are sometimes held after a proceeding is well advanced. After the first phase of the *Free Zones Case*, the President called a meeting of the French and Swiss agents in Geneva;[66] several meetings were held at The Hague after the second phase of the case.[67] Press notices of such meetings were sometimes issued.

Article 35 of the Rules of 1926 and 1931 provided that "whenever possible, the agents should remain at the seat of the Court pending the trial and determination of the case."[68] This provision was omitted from the 1936 Rules, though they require (Article 59) that the minutes of each hearing shall include the names of agents present. It is clearly the duty of the agent to hold himself at the disposal of the Court, but his presence in Court is not a condition to the validity of the proceedings.[69] In practice, the agent is usually present at every stage of the proceedings in open Court, and if he finds it necessary to leave The Hague he sometimes asks the Court's permission to depart.[70]

The Statute does not expressly envisage direct communications between agents of opposing or different parties,[71] though frequent reference is made to agreement between the parties; Article 43 seems to require that communications be made through the Registrar, and in 1933 the Registrar thought that under this Article the Registry was to serve as a "buffer between the parties."[72] Though as a general rule an agent communicates with the Registrar only, Article 47 of the 1922 Rules provided for each party's informing other parties of evidence which it intended to produce;[73] Article 49 of the 1936 Rules stipulates that this should be done through the Registry, however.[74] In the *Tunis and Morocco Nationality Case*, the British and French Governments agreed upon certain direct communications of memoranda (cases) and counter-memoranda (counter-

[66] Series C, No. 19–I, pp. 2197–9.
[67] Series C, No. 58, pp. 674, 683, 694.
[68] The Registrar was disposed to say that an agent should be on hand at The Hague shortly before the opening of oral proceedings and until their termination, and that thereafter he should be sufficiently near The Hague to return on call. Series C, No. 18–I, p. 1032.
[69] Series D, No. 2 (3d add.), p. 260.
[70] Series E, No. 14, p. 144.
[71] Article 63 of the 1907 Hague Convention on Pacific Settlement provided for communications between the agents directly or by the intermediary of the International Bureau. A special agreement might contain provisions for direct communication between agents.
[72] Series D, No. 2 (3d add.), p. 825.
[73] This was done in the *Pázmány University Case*, Series C, No. 73, p. 1395.
[74] Series D, No. 2 (3d add.), pp. 131, 189, 207–8, 873.

cases).[75] In several instances agents have entered into correspondence directly,[76] and on a few occasions they have submitted joint written proposals to the Court.[77]

§487. The Rôle of Counsel. As compared with agents, counsel or advocates play only a secondary rôle. No special competence is conferred upon them by the Statute.[78] Their participation in the proceedings is entirely subject to direction by the agent, and on any doubtful point the Court will look to the agent and not the counsel or advocate. The principal function of counsel is to address the Court on behalf of a party in the oral proceedings, but it is for the agent to say when and to what extent this function is to be discharged by counsel. Rarely does counsel take any part in correspondence relating to a case. If an important procedural step is suggested by counsel, the Court may ask that the suggestion be confirmed by the agent.[79] Questions may be addressed to counsel with reference to their presentations, but in most cases questions put by the Court will be addressed to agents and not to counsel.

The Court has shown some vacillation as to the binding force of declarations made on behalf of a party by its counsel. At a public sitting in 1932, a clear distinction was drawn between declarations made by agents and those made by counsel; President Adatci declared it to be "the doctrine of the Court" that while statements made by agents engaged the responsibility of the Governments they represented, observations by counsel engaged only their own responsibility.[80] This statement was discussed at a private meeting of the Court held on the following day,[81] and it seems doubtful whether the Court consistently maintained this view. The rank and position of a counsel within his own country seem to be without significance in this connection; but President Adatci attached special significance to a statement which had been made in the

[75] Series C, No. 2, pp. 265, 270. The President of the Court referred to this agreement as "a derogation from the rule laid down in Article 43" of the Statute. *Idem*, p. 267.

[76] In the *Eastern Greenland Case*, Series C, No. 67, pp. 4134–5, 4136–9, 4140–1; and in the *Chinn Case*, Series C, No. 75, pp. 356–7, 368–74.

[77] In the *Eastern Greenland Case*, Series C, No. 67, p. 4080; and in the *Borchgrave Case*, Series C, No. 83, p. 161. See also the *Meuse Case*, Series C, No. 81, pp. 543, 554.

[78] Article 62 of the 1907 Hague Convention on Pacific Settlement states the function of counsel and advocates to be the defense of the parties' rights and interests before the tribunal. *Cf.*, Minutes of the 1920 Committee of Jurists, p. 340.

[79] Series C, No. 7–II, pp. 16, 355–7; Series D, No. 2 (3d add.), p. 235 note.

[80] Series C, No. 70, p. 207. See also Judge Fromageot's statement in 1935 that an advocate's statement would commit his Government if made in the presence of the agent and if the agent tacitly associated himself with it. Series D, No. 2 (3d add.), p. 236; Series A, No. 13, p. 13. An agent may expressly authorize counsel to make a declaration. See Series C, No. 87, p. 270.

[81] Series D, No. 2 (3d add.), pp. 234–6 note.

Mavrommatis Case by Sir Douglas Hogg as counsel, because he was at the time a member of the British Government.[82]

§488. The Bar of the Court. As the Statute places no restriction upon the choice of agents and counsel,[83] each party is free to make that choice as it may please. Yet it would seem to be within the power of the Court, acting within its general competence to ordain rules assuring the efficient conduct of proceedings, to set some limitations upon the parties' choice of counsel. With a view to assuring the proper and adequate presentation of cases before it, the Court may have power to prescribe that counsel admitted to appear before it shall comply with standards which may be laid down for its bar.

In 1922, the Court was seized of a proposal that advocates should be either (1) persons admitted to practice as advocates before the highest Court of their own country, or (2) university professors of international law, or (3) members of the great international academies of international law; but due to the "almost insurmountable" difficulty of laying down any rules on the subject, a decision was taken that no provision "limiting the right of pleading before the Court should be introduced into the Rules." [84] Unofficial suggestions which have been made in this connection [85] give little indication that the establishment of excluding standards would meet with general approval. In view of the quasi-political functions of agents, it seems most doubtful that States would be willing to accept excluding standards for them; while an attempt to establish such standards as to counsel might result in the elimination of counsel altogether, and in the discharge of all the functions of representation by agents.

[82] *Idem*, p. 235 note. Sir Douglas Hogg had purported to speak as the "authorized representative" of the British Government and "as a member of it," Series A, No. 5, p. 37, but his appearance before the Court could not have been in any rôle other than that of counsel.

[83] However, Article 17 of the Statute provides that "no member of the Court may act as agent, counsel or advocate in any case." The disability imposed on members of the Permanent Court of Arbitration by Article 62 of the 1907 Hague Convention on Pacific Settlement does not prevent them from being agents or counsel before the Permanent Court of International Justice.

[84] Series D, No. 2, pp. 78–9, 263. *Cf.*, Series D, No. 2 (add.), p. 260.

Article 26 of the Prize Court Convention of October 18, 1907, provided that a private person might be represented before the Prize Court by an advocate who should be either an advocate qualified to plead before a court of appeal or a high court in one of the contracting States, or a lawyer practising before a similar court, or a professor of law at a higher teaching center in one of those States; yet Article 25 of the Convention did not place similar limitations on representatives of States before the Prize Court.

Elaborate provisions concerning agents, counsel and mandatories of private interests were contained in the rules of the Mixed Arbitral Tribunals set up under the Peace Treaties of 1919–20. See 1 *Recueil des Décisions*, pp. 33, 55, 71, 172, 687, 699, 947.

[85] See M. A. Caloyanni, in 38 *Recueil des Cours* (1931), pp. 768–776; 17 Transactions of the Grotius Society (1932), pp. 90, 97.

In practice, while diplomats or legal advisers of Governments are frequently chosen as agents, counsel are usually practicing lawyers or professors.[86] The choice of counsel and advocates is limited in some degree by the official languages of the Court. Statements by the most eminent counsel are likely to lose force if they must be translated, and rarely if ever have parties chosen counsel who could not speak in English or in French. To some extent this may explain the frequency with which States have chosen non-nationals to act in this capacity, and the frequency with which the same persons have been chosen as counsel by the same Governments, or by different Governments.[87] The result has been that in many cases the Court has had the advantage of participation by experienced counsel versed in its procedure and its law.

[86] In addressing the Court at public meetings, agents and counsel frequently wear the robes which are worn in courts of their own countries.

[87] Professor Jules Basdevant appeared as agent of France in eleven cases; Mr. Alexander Fachiri and M. Nicolas Politis appeared as agent or counsel in eight cases; Professor Gilbert Gidel and Professor Erich Kaufmann appeared as agent or counsel in seven cases; M. Jean Mrozowski and Professor Charles de Visscher appeared as agent or counsel in five cases.

CHAPTER 24

INSTITUTION OF PROCEEDINGS

§489. Methods of Instituting a Proceeding. Under Article 40 of the Statute, a case may be brought before the Court, *i.e.*, a contentious proceeding may be instituted, either (1) by the notification of a special agreement, or (2) by a written application addressed to the Registrar. Where a proceeding is pending, however, there are several possibilities of separate but subsidiary proceedings which may be instituted: by a preliminary objection, or by an application for permission to intervene under Article 62 of the Statute. A proceeding instituted by a preliminary objection stands apart from other subsidiary proceedings; it is given a somewhat independent position, being entered separately in the Court's general list of cases.[1] A request for the indication of interim measures of protection does not institute a separate proceeding.[2] A proceeding for the revision of a judgment is in no sense subsidiary. A proceeding relating to the interpretation of a judgment is also wholly independent. A respondent's counterclaim directly connected with the subject of the application institutes no separate proceeding; but if a respondent puts forward a claim not directly connected with the subject of the original application, under Article 63 of the 1936 Rules it "may form the subject of distinct proceedings or may be joined by the Court to the original proceedings." An advisory proceeding is instituted, under the new Article 65 of the Statute, by a written request. No special method is to be followed in the institution of a proceeding before one of the Chambers of the Court.

§490. Documents Instituting Proceedings. The document instituting a proceeding is not included among the "documents of the written

[1] Special proceedings relating to preliminary objections in fourteen cases are listed in Series E, No. 15, pp. 45–6.

In the *Losinger Case*, the Court said that for some purposes documents submitting a preliminary objection were to be "assimilated to documents instituting proceedings." Series A/B, No. 67, p. 23.

[2] Series D, No. 2 (3d add.), p. 559. But see Series E, No. 9, p. 165.

proceedings" as that phrase is used in Article 39 and other articles of the 1936 Rules.[3] The former document is promptly printed in French and English at the expense of the Court and brought to the attention of all States, while documents of the written proceedings are printed at the expense of the parties and are not transmitted as a matter of course to States not parties.[4] In the earlier years, documents instituting proceedings were read out in open Court before or at the opening of the hearings.[5]

§491. Notification of Special Agreements. Where there is a special agreement,[6] Article 40 of the Statute requires that it be notified to the Registrar.[7] This notification may be effected by a mere filing of a certified copy of the text of the special agreement by one or both of the parties; [8] or it may be made by a separate letter addressed to the Registrar by one of the parties, or by separate letters addressed to the Registrar by each of the parties, such letter or letters being accompanied by a certified copy of the text of the agreement. The letter usually emanates from a diplomatic representative at The Hague, though it may emanate from any person known to be duly authorized. Copies of the special agreement are transmitted forthwith to the members of the Court, and they are sent also to Members of the League of Nations and States entitled to appear before the Court. If the special agreement is transmitted by only one of the parties, notice is sent by the Registrar to the other party, and unless notification by one party is expressly provided for, confirmation by the other party will be required. If the special agreement required ratification, the exchange of ratifications will be presumed to have taken place if both parties file a copy of the agreement with the Registry; but if the copy is filed by only one party, proof of the exchange of ratifications must be supplied.[9] The party or parties filing the special agreement should at the same time notify the appointment of their agents; if the special agreement is filed by only one party, the other party should notify the appointment of its agent when it acknowledges notice of the filing or as soon as possible thereafter. Notification of an agent's appointment

[3] See the order of June 27, 1936, in the *Losinger Case*. Series A/B, No. 67, p. 23.

[4] Series D, No. 2 (3d add.), pp. 765, 815. Only an original of a document instituting proceedings need be filed with the Registry, while fifty copies of a document of the written proceedings must be filed with the original.

[5] *E.g.*, Series C, No. 3, pp. 8–9; *idem*, No. 13–I, p. 8.

[6] On the content of special agreements, see §438, *supra*.

[7] The English and French versions vary slightly.

[8] In the first *Lighthouses Case*, the parties' diplomatic representatives at The Hague handed a certified copy of the special agreement to the Registrar. Series C, No. 74, p. 404.

[9] Series C, No. 74, p. 404; Series E, No. 14, pp. 139–40. But see Series E, No. 3, p. 191.

should be accompanied by mention of his permanent address at the seat of the Court to which communications are to be sent.

It can hardly be required that a special agreement be drawn in the French or English language;[10] but if the text of the special agreement includes no version in either of the official languages of the Court, the parties may have the duty of presenting to the Court an agreed translation in one of the official languages.

§492. Applications.[11] An application instituting a proceeding must state the name of the applicant, the name of the State or States against which the application is directed,[12] and the subject of the dispute between these States. If an application should fail to meet these requirements, the Court might hold that its filing did not institute a proceeding, but Article 33 of the 1936 Rules calls for the Registrar's transmission of a copy of the application to "the party against whom the claim is brought" without awaiting any decision by the Court; the Instructions for the Registry[13] seem to indicate, however, that the Registrar should make a preliminary examination of the application and should inform the applicant of any insufficiency. Article 32 of the 1936 Rules requires also that "as far as possible" the application "specify the provision on which the applicant founds the jurisdiction of the Court"; as "the party against whom the claim is brought" may acquiesce in the Court's exercise of jurisdiction, a proceeding is instituted by the filing of the application without any inquiry on the point of jurisdiction.[14] The application should also "as far as possible . . . state the precise nature of the claim and give a succint statement of the facts and grounds on which the claim is based."[15]

Article 40 of the Statute envisages "a written application" to be addressed to the Registrar.[16] In practice, applications have generally

[10] In the *Brazilian Loans Case* the text of the special agreement consisted of versions in the French and Portuguese languages; the copies transmitted by the Registrar included both versions and an English translation.

[11] See §445, *supra*.

[12] The State against which the application was directed was not clearly specified in the applications of the Czechoslovak Government filed with the Court *à toutes fins utiles* on July 11 and July 25, 1932, but as the Court was asked to notify the Hungarian Government, proceedings were regarded as instituted against Hungary. Series C, No. 68, pp. 286, 288.

[13] Instructions of December 20, 1928, Article 16, Series E, No. 5, p. 6; Instructions of March 31, 1938, Article 15, Series E, No. 14, p. 30. The latter article refers also to documents of the written proceedings.

[14] Series D, No. 2 (3d add.), pp. 54–55, 65–74, 153–60.

[15] The German application of May 18, 1932 in the *Pless Case* included fifteen annexes, which made a volume of 120 pages; it is for the purpose of forestalling such procedure that paragraph 2 of Article 32 of the 1936 Rules states that the "facts and grounds" should be "developed in the memorial, to which the evidence will be annexed." Series D, No. 2 (3d add.), p. 766.

[16] The term *requête* in the French version may have the same meaning.

As to the possibility of a telegraphic application, see Series D, No. 2 (3d add.), pp. 349–50. Article 28 of the 1907 Prize Court Convention provided that the written declaration necessary for instituting a proceeding before the proposed Prize Court could be made by telegram,

been addressed "to the President and Judges of the Permanent Court of International Justice";[17] but in such cases a covering letter is usually addressed to the Registrar. In a few cases the application seems to have carried no salutation. Copies are sometimes filed with the original application, but this is unnecessary as the application itself is duplicated by the Court.[18] The application is invariably drawn in French or English, and perhaps the statutory provision as to languages makes this necessary. The application must be signed by a duly authorized person, and if such person is not a diplomatic representative at The Hague, the signature should be properly legalized by a competent authority. The application or the accompanying letter should state the name of the applicant's agent; the "party against whom the application is directed" should notify the appointment of its agent when it acknowledges the communication from the Registry or as soon as possible thereafter. It is usually stated in the first order in a case after the filing of the application, whether by the Court or by the President, that the application "fulfills the formal conditions laid down in the Statute and the Rules."[19] The Registrar transmits a copy of the application to the "party against whom the claim is brought,"[20] to each Member of the League of Nations through the Secretary General, and to each State entitled to appear before the Court.

§493. Preliminary Objections. A preliminary objection (Fr., *exception préliminaire*) may be filed as a separate document;[21] it is frequently included in a "document of the written proceedings," so as to necessitate a decision by the Court or by the President establishing its character as a preliminary objection.[22] Article 62 of the 1936 Rules requires that the document containing the objection set out the facts and the law on which the objection is based, the submissions and a list of the documents in support, and mention any evidence to be produced. The document must be filed before the expiry of the time-limit[23] fixed for the filing by the

[17] Series D, No. 2 (3d add.), p. 817.

[18] *Idem*, p. 765.

[19] This usual statement was not included in the Court's order of June 3, 1938 in the *Société Commercial Case*, nor in the President's order of October 18, 1939 in the *Gerliczy Case*.

In the orders of July 18 and 28, 1932, in the *Czechoslovak Appeals Cases*, it was said that the question of the admissibility of the applications was not prejudged by the fixing of time-limits for the written proceedings. Series C, No. 68, pp. 287, 289.

[20] It is the practice of the Registrar to transmit to the intended respondent two certified copies of the application, as well as five uncertified copies. Series C, No. 86, p. 718; No. 87, p. 293.

[21] See Series C, No. 86, p. 127.

[22] See the decision embodied in the Court's order of March 10, 1936 in the *Pajzs Case*, Series C, No. 80, pp. 1451–3.

[23] Including any extension. Series A/B, No. 67, pp. 22–3.

party submitting the objection of the first document of the written proceedings to be filed by that party. For a time Article 34 of the Rules was applied by analogy, and the Registrar communicated the document containing the preliminary objection as if it were an application;[24] but this practice seems to have been abandoned in 1938.[25]

§494. Intervention. A "request" for permission to intervene under Article 62 of the Statute [26] takes the form of an application. It should contain a specification of the case, a statement of law and of fact justifying intervention, and a list of the supporting documents which should be attached. It must be filed with the Registry before the commencement of the oral proceedings. Article 64 of the 1936 Rules requires the application to be communicated only to the parties, but it would seem that Article 34 might also be applied by analogy.

§495. Revision and Interpretation of Judgments. A request for the revision of a judgment,[27] made by an application,[28] must specify the judgment of which revision is sought; it must indicate that it is based upon the discovery of some fact of such a nature as to be a decisive factor, that when the judgment was given this new fact was unknown to the Court without any negligence of the applicant for revision, that the new fact was discovered not more than six months prior to the date of the application, and that on this date not more than ten years have elapsed since the date of the judgment sought to be revised. The application should list the supporting documents which should be attached. The application is communicated to the other parties by the Registrar. The proceeding thus instituted by the filing of the application for revision is preliminary to the judgment which may open the "proceedings for revision" referred to in Article 61 of the Statute.[29]

A proceeding for the interpretation of a judgment may be instituted by the filing of an application by any one or more of the parties, or by

[24] See Series C, No. 86, p. 724.

[25] Series E, No. 15, p. 142.

[26] Intervention under Article 63 is effected by a "declaration of intention to intervene" (Fr. *déclaration d'intervention*); a decision as to its admissibility may be necessary, however, and in the *Wimbledon Case* this decision was given in the form of a judgment. Series A, No. 1, p. 11. See §432, *supra*.

[27] Article 61 of the Statute does not envisage the revision of orders. Series D, No. 2 (3d, add.), p. 330. As orders do not have the finality of judgments under Article 60 of the Statute, perhaps they can be revised by a less formal procedure.

[28] Conceivably all the parties might by a special agreement make a joint request for revision; opposing parties might agree upon the existence of new facts and upon the need for revision, without being able to agree upon the nature or extent of the revision to be made. Yet Article 61 in the English version of the Statute and Article 78 of the 1936 Rules refer to an application only.

[29] Series D, No. 2, pp. 558–9.

the notification of a special agreement between all the parties; the judgment must be specified, and the precise point or points in dispute must be mentioned, though in its interpretation the Court will not "be bound by formulae chosen by the parties concerned." [30] If the request is made by an application, the Registrar communicates the application to the other parties.

§496. Advisory Proceedings. An advisory proceeding is instituted by the communication to the Court of a written request, signed either by the President of the Assembly or the President of the Council of the League of Nations, or by the Secretary General of the League under instructions from the Assembly or the Council; in practice, the request is signed by the Secretary General.[31] It must contain an exact statement of the question upon which an opinion is required, and should be accompanied by relevant documents.[32]

§497. Appeals. An appeal (Fr., *un recours*) to the Court against a decision by some other tribunal may be instituted by the filing of an application or by the notification of a special agreement; [33] in either case, Article 67 of the 1936 Rules requires that the document instituting the appeal (Fr., *acte introductif d'une instance en recours*) "contain a precise statement of the grounds of the objections to the decision complained of, and these constitute the subject of the dispute referred to the Court." An authenticated copy of that decision must be attached.

§498. Joinder of Proceedings. Two or more proceedings may be joined, or consolidated, though they have been instituted by separate documents. By a decision of February 5, 1926, the Court gave effect to an agreement between Germany and Poland by joining causes of actions (Fr., *les cas*) mentioned in a German application to those mentioned in one of the conclusions in an earlier German application.[34] By an order of August 2, 1932, two suits concerning Southeastern Greenland, instituted on the same date by applications by the Danish and Norwegian Governments respectively, were joined by the Court acting *proprio motu;* it was noted that the applications were "directed to the same object," and that the situation approximated that which would arise under a

[30] Series A, No. 13, pp. 15–6.
[31] See §472, *supra.*
[32] The Rules do not provide for the communication of the accompanying documents to interested States and organizations.
[33] Series D, No. 2 (3d add.), pp. 336–9.
[34] Series A, No. 7, p. 94. Before this joinder was effected the Polish agent had filed a single counter-memorial to both applications. Series C, No. 11, pp. 1219–20.

special agreement.[35] By an order of October 26, 1932, the Court joined two preliminary objections presented by the Hungarian Government to two applications filed by the Czechoslovak Government, the objections being couched in identical terms and the conclusions being the same.[36] Article 63 of the 1936 Rules also envisages the joinder to the original proceeding of an application presenting an indirect counterclaim.

In several cases preliminary objections have been joined to the merits, *i.e.*, proceedings instituted by the filing of preliminary objections have been consolidated with the principal proceedings previously instituted. The practice originated[37] with the order given in the *Pless Case* on February 4, 1933, where the Court thought it could not "pass upon the question of jurisdiction until the case has been argued upon the merits"; the joinder was effected "in order to pass upon the objection and, if the latter is overruled, upon the merits, by means of a single judgment."[38] Article 62(5) of the 1936 Rules confirmed this precedent, and it was followed in the *Pajzs Case*[39] and the *Losinger Case*[40] in 1936, and in the *Panevezys Case*[41] in 1938; in the last-named case, it was said that a joinder may be ordered "whenever the interests of the good administration of justice require it." The joinder does not necessarily foreclose an enquiry into the preliminary character of the objection.[42]

§499. Discontinuance of Proceedings. At any time prior to judgment all of the parties may inform the Court that they are not going on with the proceedings, or give notice that they have concluded an agreement as to the settlement of the dispute; Article 68 of the 1936 Rules provides that in such a situation the Court will record the discontinuance or settlement in an order, and prescribe the removal of the case from the list. In the *Chorzów Case*, the Court placed on record an agreement for a settlement of the dispute, by its order of May 25, 1929.[43] In the *Castellorizo Case*, an agreement as to discontinuance was recorded in the Court's order of January 26, 1933,[44] and similar agreements were recorded in the order of December 14, 1936 in the *Losinger Case*,[45] and in the order of April 30, 1938 in the *Borchgrave Case*.[46]

[35] Series A/B, No. 48, p. 268.
[36] Series C, No. 68, p. 290.
[37] The possibility of such joinder had been discussed in 1926. Series D, No. 2 (add.), pp. 79–94.
[38] Series A/B, No. 52, p. 16.
[39] Series A/B, No. 66, p. 10. See also Series E, No. 14, p. 151.
[40] Series A/B, No. 67, p. 25.
[41] Series A/B, No. 75, p. 56.
[42] Series A/B, No. 76, pp. 22, 42.
[43] Series A, No. 19, p. 13.
[44] Series A/B, No. 51, p. 6.
[45] Series A/B, No. 69, p. 101.
[46] Series A/B, No. 73, p. 5. The written proceedings had previously been suspended in this case by order of the President. Series C, No. 83, p. 178; Series E, No. 14, p. 152.

Where a proceeding is begun by the notification of a special agreement, it cannot be discontinued by a single party. Where a proceeding has been begun by application, the applicant may inform the Court in writing that it is not going on with the proceeding: if at the time the respondent has not yet taken any step in the proceedings, the discontinuance will be recorded in an order and the case will be removed from the list, a copy of the order being sent to the respondent; if the respondent has already taken some step in the proceedings, under Article 69 of the 1936 Rules a time-limit is fixed within which the respondent may state its objections to discontinuance, and the discontinuance is ordered only if no objection is made. In the *Belgian-Chinese Case*, the unilateral termination of the suit by the Belgian Government was allowed, as the Chinese Government had taken no step in the proceeding.[47] In the *Southeastern Greenland Case*, the Court took note that Norway and Denmark had withdrawn their respective applications.[48] In the *Czechoslovak Appeals Cases*, the Hungarian Government having acquiesced in the withdrawal of the appeals by the Czechoslovak Government, the Court issued an order declaring the proceedings terminated.[49] A similar procedure was followed in the *Pless Case*[50] and the *Polish Agrarian Reform Case*.[51]

A request for the indication of provisional measures of interim protection may be withdrawn, as in the *Electricity Company Case*.[52] A request for an advisory opinion was withdrawn in the *Oecumenical Patriarch Case*.[53]

The filing of a preliminary objection has the effect of suspending the proceeding on the merits,[54] and if the objection is upheld the proceeding on the merits is terminated.

[47] Series A, No. 18, p. 7.
[48] Series A/B, No. 55, p. 159.
[49] Series A/B, No. 56, p. 164.
[50] *Idem*, No. 59, pp. 195–6.
[51] *Idem*, No. 60, pp. 202–3.
[52] Series A/B, No. 77, p. 67. In the *Pless Case*, action taken by the Polish Government led the Court to declare that the German request for an indication had "ceased to have any object." Series A/B, No. 54, p. 154.
[53] Series C, No. 9–11, pp. 10, 111–2. No order was issued in this case. See Series D, No. 2 (3d add.), p. 809.
[54] Article 62 of the 1936 Rules, containing provision to this effect, confirmed a previously established practice.

CHAPTER 25

WRITTEN PROCEEDINGS

§500. The Terms "Procedure" and "Proceedings." In the English version of the Statute, the terms "procedure" and "proceedings" are employed in a somewhat confusing manner. "Procedure" (Fr., *procédure*) is used as the global term. It is employed as the title of Chapter III of the Statute, and a Chamber is created to hear cases by "summary procedure." Article 30 refers to the rules for regulating the Court's "procedure," but the French version is broader in its reference to the manner in which the Court will exercise its attributions. Articles 26 and 27 refer to the "rules of procedure under Article 30" (Fr., *règles de procédure visées à l'article 30*). Though the term *procédure* is used quite consistently in the French version of the Statute, Article 43 in the English version shifts from "procedure" to "proceedings"; it refers to two parts of the "procedure," the written and the oral, and then deals with "written proceedings" (Fr., *procédure écrite*) and "oral proceedings" (Fr., *procédure orale*). Article 61 deals with the "proceedings" for revision (Fr., *procédure de revision*), and Article 63 provides for intervention in the "proceedings" (Fr., *au procès*).

The Rules show a confusion even more baffling. Chapter II of the 1922 Rules was entitled "Procedure" (Fr., *De la Procédure*); but subdivisional headings then became "written proceedings" (Fr., *procédure écrite*) and "oral proceedings" (Fr., *procédure orale*). Article 33 referred to "acts of procedure," but Article 34 referred to "documents of the written proceedings." Article 35 referred to "cases" brought by means of a special agreement, and to "proceedings" instituted by means of an application. The confusion is continued in the subsequently promulgated Rules. In the 1936 Rules, Article 35 refers to a "case" brought by means of a special agreement, but Article 41 refers to "proceedings" instituted (Fr., *l'instance introduite*) by means of a special agreement; in other articles the term "proceedings" is used as the equivalent of the French *procédure*. Article 38 refers to "acts of procedure" (Fr., *actes de pro-*

cédure), but Article 37 refers to a "proceeding" (Fr., *acte de procédure*) taken after expiration of a time limit.

It is unfortunate that the English version of both the Statute and the Rules did not consistently employ the term *procedure* as the equivalent of the French *procédure*. If it was necessary to employ the English term *proceeding*, it should have been made the equivalent of the French *instance* or *affaire*.

§501. Sources of the Court's Law of Procedure. No attempt was ever made by the Assembly or the Council of the League of Nations to control or to influence the Court's law of procedure.[1] The framers of the Statute wished the Court to have a wide latitude in developing its procedural law, and therefore confined themselves to "fundamental points."[2] Chapter III of the Statute, bearing the title "Procedure" (Fr., *Procédure*) and containing twenty-six articles, outlines only the bare rudiments of the Court's procedure. Article 30 confers on the Court power to "frame rules for regulating its procedure," in particular for regulating summary procedure; this was apparently intended to include power to make good omissions in the Statute.[3] Article 48 refers to the Court's power to make orders for the conduct of a particular case. Under these texts the Court has appreciated its responsibility for working out a satisfactory law of procedure. Early in its work it declared itself free "to adopt the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with the fundamental principles of international law."[4] It is not restricted to building a law of procedure based upon municipal codes and practices,[5] and it has declared that it is not bound to "have regard to the various codes of procedure and the various terminologies in use in different countries."[6]

The successive texts of the Court's Rules indicate the development of its procedural law. To some extent this law has been worked out *de*

[1] Early drafts of the Court's Rules referred to resolutions of the Assembly in order to take account of certain provisions relating to organization. Series D, No. 2, pp. 253, 293, 399.

[2] Minutes of the 1920 Committee of Jurists, p. 248. The Hague *projet* of 1907 would have permitted the proposed Court of Arbitral Justice to propose modifications in the Convention's provisions relating to procedure.

[3] Minutes of the 1920 Committee of Jurists, p. 647.

[4] Series A, No. 2, p. 16.

[5] In 1922, Judge Altamira offered draft Rules "mainly based on Spanish law." Series D, No. 2, p. 275.

[6] Series A, No. 6, p. 19. This principle was not applied in the case relating to *German Minorities in Upper Silesia*, when the Court stated that "the word *débouter* (dismiss) in the Polish Government's main submission must be taken as possessing the meaning ordinarily attaching to it in French law." Series A, No. 15, p. 20. It seems difficult to justify this statement. *Cf.*, Series D, No. 2, pp. 64, 78.

novo, but numerous references to the experience of other tribunals are to be encountered in the record of the discussions of proposed rules. For the most part, however, changes in the Rules once adopted have merely incorporated the precedents established by the Court in its own practice. The Court has not committed itself to a source to be drawn upon in cases not foreseen by its Rules, though in 1934 it was pressed to say that on analogy to Article 38 of the Statute it should have resort in such cases to "the general principles of procedure recognized by civilized nations." [7]

The Rules of Court are subject to change by the Court at any time, even during the conduct of proceedings in a particular case; advance notice of impending changes does not have to be given to the parties in cases already begun.[8] Yet until they are changed, the Court is bound to abide by its Rules as they are. To this extent, the representatives of the parties are "entitled to have a reliable guarantee of the stability of the rules of procedure." [9] Article 31 of the 1936 Rules seems to indicate that any departure from the existing rules made in a particular case should be the result of a joint proposal by the parties. The consequences of a party's failure to observe a provision of the Rules will depend on the nature of the provision; the question may be "one that concerns the organization and internal administration of the Court, rather than the rights of the parties." [10]

§502. Rôle of the Parties in the Control of Procedure. From the beginning, the Court has sought to safeguard the parties' freedom to shape the procedure to be followed in a particular case. Article 32 of the 1922 Rules provided that "the rules contained under this heading shall in no way preclude the adoption by the Court of such other rules as may be jointly proposed by the parties concerned, due regard being paid to the particular circumstances of each case." [11] This text persisted until 1936, and the modification effected in Article 31 of the 1936 Rules left its substance intact. The parties' proposals are subject to the Court's final decision, and they cannot justify a departure from the provisions of the Statute; [12] yet the freedom of the parties to make proposals is

[7] Series D, No. 2 (3d add.), pp. 78, 844–5, 866. *Cf.*, Series D, No. 2, p. 379.

[8] Two cases were pending when the 1936 Rules were promulgated; the parties were notified and the new provisions were applied in these cases. See Series C, No. 78, p. 403; No. 80, p. 1386.

[9] Series D, No. 2 (3d add.), p. 38.

[10] Series A/B, No. 67, p. 22.

[11] The inclusion of such a provision in the Statute had been proposed in 1920. Records of First Assembly, Committees, I, pp. 489, 534–5.

[12] In the Court's order of August 19, 1929, in the *Free Zones Case*, it was said that "in contradistinction to that which is permitted by the Rules (Article 32), the Court cannot, on the proposal of the parties, depart from the terms of the Statute." Series A, No. 22, p. 12.

important in shaping the attitude of the Court toward provisions in special agreements. In advisory proceedings, the provision in the Rules may be applied by way of analogy.[13]

Various articles in the Statute, as well as in the Rules, provide explicitly for the parties' participation in the decision of procedural questions The parties decide whether a case is to be referred to a chamber, and their consent is necessary for a chamber's sitting elsewhere than The Hague; they may also decide upon the language in which a case is to be conducted, and whether the hearing shall be public. Article 37 of the 1936 Rules provides that in every case the President shall "ascertain the views of the parties with regard to questions connected with the procedure," and that in the making of any order as to the documents of the written proceedings or as to time-limits "any agreement between the parties is to be taken into account so far as possible." [14] Under Article 68 of the 1936 Rules, the parties may agree to discontinue a case at any time before judgment. At various stages of the procedure, also, steps proposed by one party may be permitted by the Court if the other party offers no objection.

In several cases, the special agreement has contained provisions relating to procedure. The special agreement in the *Lotus Case* proposed time-limits for the filing of memorials and counter-memorials.[15] The special agreements in the *Free Zones Case* and the *Chinn Case* set out the documents to be presented, and the time-limits for presenting them. In several cases, the special agreement stated what language was to be employed before the Court. In the special agreement in the *Oder Commission Case*, the parties asked that the Court's judgment be given "in its ordinary session of 1928." [16] The special agreement in the *Free Zones Case* provided that either party might request an investigation on the spot, but it was not interpreted as meaning that the Court was bound to comply with such a request.[17]

It is clear, therefore, that the system of the Court's procedure is not

[13] Series D, No. 2 (3d add.), p. 36.

[14] See Series D, No. 2, p. 130; Series D, No. 2 (2d add.), pp. 165–71, 175–6. In the *Oder Commission Case*, the President's order of December 24, 1928 fixing time-limits was subject to any modification which might be made at the parties' request; it was later modified by an order of February 25, 1929, as requested by the parties. Series C, No. 17–II, pp. 667, 668.

[15] Where a special agreement specifies certain documents and fails to mention replies, it may be presumed that the parties have waived the right to present replies; but the Court may direct the presentation of replies *proprio motu*. *Cf.*, the Court's order of July 28, 1933, Series C, No. 72, pp. 434–5.

[16] The ordinary session of 1928 was already terminated.

[17] Series A/B, No. 46, pp. 162–3.

a rigid one into which the parties must unwillingly fit themselves, that on the other hand the parties can exercise a large influence on the procedure before the Court. Even in advisory proceedings, in application of Article 68 of the amended Statute, the influence of participating States may be extensive.[18]

§503. Pre-Reference Procedure. In recent years some tendency is noticeable to provide for a preliminary conduct of written proceedings by direct exchanges between the parties, and to have the final submission of the case to a tribunal await or depend upon the outcome of such proceedings. Such a procedure was adopted by the United States of America and Mexico in a protocol of April 24, 1934, relating to claims presented to an existing Commission.[19] A convention between the United States of America and Canada of April 15, 1935, also provided for exchanges between the parties of statements and supporting evidence, and for later exchanges of answers and arguments, before the communication of these documents of the "record" to the special tribunal which was to decide the *Trail Smelter Case*.[20] In an arbitral convention of March 18, 1938, the United States of America and the Netherlands provided for direct exchanges between their agents of a memorial, an answer and briefs, and "in the event that the two Governments shall be unable to agree upon a disposition of the claim and the counter-claim or upon any portions thereof" within the following six months, the pleadings thus exchanged were to be referred to an arbitral tribunal to be constituted for the decision of any unsettled questions, all further proceedings in the case being oral.[21] Similarly, an unratified convention of March 28, 1940, between the United States of America and Norway, provided for an exchange of pleadings and evidence relating to two claims, and if one of the claims could not then be settled by agreement the pleadings were to be referred to a sole arbitrator for an adjudication of that claim.[22]

The resolution adopted by the Council of the League of Nations on December 14, 1939, relating to complaints by ex-officials of the Governing Commission of the Saar Territory, provided for a similar procedure to precede a request to the Court for an advisory opinion; within fixed successive periods memoranda and additional memoranda were to be exchanged by the complainants and the Secretary General of the League

[18] *Cf.*, the *Tunis and Morocco Nationality Case*, Series C, No. 2, pp. 261–272.
[19] U. S. Executive Agreement Series, No. 57.
[20] U. S. Treaty Series, No. 892.
[21] U. S. Treaty Series, No. 935.
[22] 2 Department of State Bulletin (1940), p. 351.

of Nations.[23] The adoption of such procedure in this case seems to have been due, in part, to a doubt as to the possibility of the complainants' being given direct access to the Court.

Pre-reference procedure of this character possesses little advantage over the procedure laid down in the Statute of the Court and conducted under the Court's direction through the intermediary of the Registry. Its value lies, chiefly, in keeping open until the latest moment the possibility of an agreement between the parties which will narrow the issues to be adjudicated.

§504. Necessity of Written Proceedings. Article 43 of the Statute envisages a procedure "of two parts: written and oral." [24] In contentious cases there will normally be written proceedings, though perhaps the parties might agree to dispense with them, contenting themselves with the statement of their contentions which appears in the special agreement; but under Article 49 of the Statute the Court may always call upon the agents to produce any document or to supply any explanations. Whatever be the nature of the proceeding, a party in the position of a respondent must have an opportunity to present a written statement in opposition to the document by which the proceeding was instituted.[25]

With respect to requests for advisory opinions, written proceedings have invariably been conducted, but reasons might exist for dispensing with them.[26] The Court might be unable to consider any State or international organization "as likely to be able to furnish information on the questions" before it; or no State or organization might express a desire to submit a written statement. In such a case the Court might find the documentation submitted with the request sufficient to enable it to give an opinion, or it might decline to give the opinion for want of sufficient information.

§505. Documents of the Written Proceedings.[27] Dealing with the ordinary contentious case, Article 43 of the Statute provides that "the

[23] League of Nations Official Journal, 1939, pp. 502–3.

[24] Article 63 of the 1907 Hague Convention on Pacific Settlement provides that arbitral procedure comprises as a general rule two distinct phases; written pleadings (*l'instruction écrite*) and oral argument (*les débats*). It was said in 1899 that the first of these phases is "always indispensable." *Actes de la Conférence* (1899), p. 134.

[25] In the *Løsinger Case*, the Court said that in a proceeding begun by application it could not enter upon the merits before the parties have had "an opportunity of exercising the right . . . of each submitting two written pleadings, and of making oral statements on the merits." Series A/B, No. 67, pp. 23–4.

[26] "Originally, no written proceedings had been contemplated in the case of advisory opinions." Series E, No. 7, p. 286.

[27] Prior to 1936, the English version of the Rules employed also the expression "documents constituting the written procedure."

written proceedings shall consist of the communication to the judges and to the parties of Cases, Counter-Cases, and if necessary Replies; also all papers and documents in support." Article 37 of the 1936 Rules provides that after hearing the views of the parties, the Court or the President will make the necessary orders to determine "the number and order of the documents of the written proceedings," taking into account as far as possible any agreement between the parties.[28] Subject to that provision, where the proceeding is instituted by the notification of a special agreement, each of the parties may present, within the same time-limits, a memorial, a counter-memorial and a reply; [29] where the proceeding is instituted by the filing of an application, the documents (Fr., *pièces de procédure*) to be presented are a memorial by the applicant, a counter-memorial by the respondent, a reply by the applicant and a rejoinder by the respondent. Article 42 of the 1936 Rules provides that a memorial shall contain a statement of the facts on which the claim is based, a statement of law, and the submissions (Fr., *conclusions*), and that a counter-memorial shall contain the admission or denial of the facts stated in the memorial to which it is opposed, observations on the statement of law in the memorial, and the submissions; but this serves only as a guide to the agents.[30] In a case brought by application, a direct counter-claim may be presented in the submissions in the counter-memorial. The Rules contain no indication as to the contents of replies and rejoinders. The "papers and documents in support," mentioned in Article 43 of the Statute as included in the written proceedings, should be listed in the memorial or counter-memorial, and copies should be annexed.

In the Chamber for Summary Procedure, the written proceedings include a single written statement by each party; but at the request of the parties or *proprio motu* the Chamber may call for further written statements.[31]

In a special proceeding begun by the filing of a preliminary objection, the written statement of the observations and submissions of the party

[28] A party is privileged to present the documents to which the order refers, but it has no duty to do so. In the *Electricity Company Case*, however, the Court referred to an effort to "justify" Bulgaria's failure to present a rejoinder. Series A/B, No. 80, p. 8. Of course the Court may specially request a presentation of a document of the written proceedings.

[29] The 1936 Rules substituted the English terms "memorial" and "counter-memorial" for the English terms "case" and "counter-case" which, following Article 43 of the Statute, had been employed in the earlier Rules. See Series D, No. 2 (3d add.), p. 768.

[30] Series D, No. 2 (3d add.), p. 100.

[31] In the *Treaty of Neuilly Case*, each party presented a case and a reply. Series A, No. 3, p. 5.

against whom the objection is directed may be the only document of the written proceedings; but the Court may decide to permit the filing of other documents.[32] In a subsidiary proceeding relating to a request for permission to intervene under Article 62 of the Statute, the parties in the principal proceeding may present written observations.[33] In a preliminary proceeding relating to a request for the revision of a judgment, observations may be submitted by parties other than the applicant; the Statute and Rules make no provision as to documents to be presented after the judgment opening the proceedings for revision. In a proceeding for interpretation of a judgment begun by application, observations may be submitted by parties other than the applicant; whether the proceeding is begun by application or special agreement, the Court may ask for further written or oral explanations.

If written proceedings are conducted in an advisory case, States or organizations which present written statements may comment on the statements presented by others, but the form of this comment will depend upon the decision of the Court or of the President.[34] In the *War Vessels in Danzig Case*, a "second statement" was presented by Danzig and a *contremémoire* by Poland.[35]

As a request for an indication of interim measures may be filed at any time during the proceedings in the case, it may be included in an application or in any document of the written proceedings. It must specify the case to which it relates, the rights to be protected, and the interim measures sought. Unless the Court decides to dismiss the request forthwith,[36] the parties must be given opportunity to present observations. Such observations are usually presented at oral hearings; in the *South-eastern Greenland Case*, the Court expressed a desire that at the close of the hearings the parties should hand in a brief summary of their respective oral observations.[37]

Unless the use of another language is authorized, all documents of the written proceedings must be in English or French. If the parties

[32] See the orders of September 20 and December 8, 1937 in the *Phosphates Case*. Series C, No. 85, pp. 1373, 1374.

[33] In the *Wimbledon Case*, a Polish reply to the parties' observations was made by informal letter. Series C, No. 3, vol. I, p. 109.

[34] On one occasion the Registrar said that the Court generally preferred to have two written statements. Series C, No. 53, p. 690.

[35] Series C, No. 55, pp. 182, 200.

[36] As in the *Chorzów Case*, Series A, No. 12, p. 10.

[37] Series C, No. 69, pp. 16, 50, 51. Apparently copies of all of the documents relating to a request for interim measures are sent to the Secretary-General for communication to the Council. Series E, No. 6, p. 290.

have agreed to use one of these languages in the conduct of the proceedings, then the document must be in that language.[38] Where the use of a language other than English or French is authorized, a translation into English or French must be attached to the original of each document of the written proceedings, and it would probably be treated as the original. In the *Borchgrave Case*, the Court showed itself reluctant to authorize the use of Spanish for the documents of the written proceedings, on the ground that it "might involve difficulties." [39] The Registrar is not bound to make translations of the documents of the written proceedings.[40]

§506. Form of Documents of the Written Proceedings. The original of each document of the written proceedings must be dated, and signed by the agent.[41] Fifty printed copies must be filed with the original, and each should bear "the signature of the agent in print"; the President may require additional copies to be supplied. After a document has been filed, the correction of slips or errors may be permitted with the consent of the other party or by leave of the President.[42] At the request of an agent the Registrar may arrange for the printing of the documents at the expense of the Government represented by the agent; such arrangements have been made in numerous cases.[43] The expense of reproducing the documents in Series C of the Court's publications is borne by the budget of the Court.[44]

§507. Documents in Support. Article 43 of the Statute refers to "papers and documents in support," and Article 43 of the 1936 Rules provides that copies of such documents must be attached to a document of the written proceedings, a list of them being given after the submissions. Ordinarily it is not necessary to present the original of a document.[45] If a document is lengthy extracts may be annexed, but in such case the document or a complete copy, unless it has been published and is of a public character, should be communicated to the Registrar for

[38] A party is not entitled to a translation from one official language into the other. Series E, No. 4, p. 277.

[39] Series C, No. 83, pp. 175–6. However, a Spanish translation was presented with the French text of the Spanish memorial. *Idem*, pp. 55, 163.

[40] Series D, No. 2 (3d add.), pp. 82–3.

[41] Series C, No. 82, p. 286.

[42] In the *Lotus Case*, the Turkish agent was permitted to substitute a new text of the Turkish counter-memorial on account of printing errors in the text originally filed. Series C, No. 13–II, pp. 447–51. See also *idem*, No. 13–III, p. 503; Series E, No. 4, p. 279.

[43] See Series E, No. 9, p. 168; *idem*, No. 14, p. 146.

[44] In the *Eastern Greenland Cases*, in which this expense was very heavy, the Registrar conducted negotiations with the parties for their sharing the expense, but apparently without results. Series C, No. 67, pp. 4132–3, 4151–3.

[45] Series C, No. 80, pp. 1417–8.

the use of the Court as well as of the other party. If the document is in a language other than English or French, it must be accompanied by a translation into one of those languages. The term "document in support" is not to be applied to a legal treatise which is merely cited.[46] Copies of documents in support presented by one party are usually transmitted to the other party, but in some cases the other party is notified that the document may be inspected at the Registry.[47] As a general rule, documents in support are reproduced in Series C.[48]

§508. Documents in the Case. Articles 44(1) and 66(4) of the 1936 Rules employ the term "documents in the case" in an inclusive sense.[49] Included in this category are not only the documents of the written proceedings and documents in support but also parts of the relevant correspondence and documents filed during the hearings; but the term does not include applications or special agreements.[50] Nor does it include documents collected by the Registry for the use of the judges.[51]

In several cases, unauthorized private persons have sent supposedly relevant documents to the Registry, but such documents do not properly form part of the *dossier*.[52] When the *Belgian-Chinese Case* was pending, a letter was addressed to the Court by the United Chambers of Commerce of China; the Chinese Legation having stated in reply to an enquiry that this body had no connection with the Chinese Government, the Registrar informed the Chinese Minister that the letter was considered *comme nulle et non avenue*, but the text was reproduced in Series C.[53] Numerous documents emanating from private sources were received and acknowledged by the Registrar while the *Free Zones Case* was pending, and were later published in Series C; some such documents, at any rate, were communicated to agents of the parties and brought to the attention of the Court.[54] This practice is hardly to be commended.

§509. Time-Limits. The time-limits within which documents of the written proceedings must be filed are fixed by the Court or by the Presi-

[46] Series D, No. 2 (3d add.), p. 101.
[47] Series C, No. 80, p. 1388.
[48] In a few instances secret documents have been presented to the Court. Series C, No. 16–I, pp. 310, 312; *idem*, No. 71, p. 150. *Cf.*, the proposal made by Judge Huber in 1925, Series D, No. 2 (add.), pp. 125–32, 250.
[49] In the French version of the 1936 Rules, Article 44 (1) refers to *pièces de l'affaire*, and Article 66 (4) to *documents de l'affaire*. Article 42 of the earlier Rules referred in the French version to *les pièces formant le dossier complet de l'affaire*.
[50] Series D, No. 2 (3d add.), pp. 821–2.
[51] See, for example, Series C, No. 16–I, pp. 240–82; Series C, No. 86, pp. 714–5.
[52] See Series E, No. 3, p. 226.
[53] Series C, No. 16–I, pp. 283, 301–2, 304.
[54] Series C, No. 19–I, pp. 2169–86, 2202–4, 2245, 2252–3.

dent, after the views of the parties have been heard. Article 37 of the 1936 Rules provides that "any agreement between the parties is to be taken into account so far as possible." Proposals relative to time-limits are frequently embodied in special agreements; even where such is not the case, the parties' agents may make joint suggestions. The Court may be guided, also, by the nature of a case,[55] by the history of a dispute,[56] by "the exigencies of the Court's work as a whole," [57] or by the state of its calendar.[58] The Court sometimes fixes the time-limits for some of the documents in a case, leaving open the time-limits for other documents. The Rules have always provided that "time-limits shall be fixed by assigning a definite date for the completion of the various acts of procedure"; but proposals in special agreements sometimes prescribe a number of weeks or months within which a step is to be taken.[59] Article 40 of the 1936 Rules provides that "when a document has to be filed by a certain date, it is the date of the receipt of the document by the Registry which will be regarded by the Court as the material date." [60]

In the Court's earlier years, time-limits were fixed by a simple decision of the Court or the President, communicated to the parties by letter of the Registrar; beginning in 1928, greater formality is observed and the fixing is invariably done by order by the Court or the President. Copies of the order are transmitted to each of the parties, and the Secretary-General of the League of Nations is informed of the order and of the date intended for the close of the written proceedings.

Extensions of time-limits are frequently made. A party's request for extension is notified to other parties, and an extension may be made "in the interests of a sound administration of justice," even though objection is made.[61] Article 37 of the 1936 Rules provides that the Court "may also, in special circumstances and after giving the agent of the opposing party an opportunity of submitting his views, decide that a proceeding taken after the expiration of a time-limit shall be considered

[55] Series C, No. 85, p. 1371.
[56] Series A/B, No. 44, p. 7.
[57] *Idem*, No. 46, p. 215.
[58] Series C, No. 17–I, p. 2475. Holidays customary at the place where the Court is sitting may also be taken into account.
[59] The Court has not adopted any general rules concerning the computation of time, though drafts of such rules were placed before it in 1922. Series D, No. 2, pp. 131, 258, 378. See also Series D, No. 2 (3d add.), pp. 45–52. In two cases the Court "calculated times indicated in months in the arbitration agreement as though months of twenty-eight days were meant and not calendar months." Series C, No. 17–I, p. 2475.
[60] Articles 67 (2) of the 1936 Rules is similar.
[61] See the Court's order of June 18, 1932, in the *Eastern Greenland Case*. Series C, No. 67, p. 4156.

as valid."[62] A preliminary objection, which must be presented within a time-limit fixed for the filing of a counter-memorial, may be presented within any extension of that limit.[63] An extension of time-limits may have the effect of destroying the urgency of a case.[64]

§510. Communication of Documents of the Written Proceedings. Article 43 of the Statute provides that "a certified copy of every document produced by one party shall be communicated to the other party." Article 44 of the 1936 Rules requires the Registrar to "forward to the judges and to the parties copies of all the documents in the case,[65] as and when he receives them";[66] and in practice each party receives at least seven copies of documents of the written proceedings presented by each other party. The system of the Court does not call for direct exchanges between the parties; a direct exchange of cases and counter-cases, agreed upon by the British and French Governments in the *Nationality Decrees Case* in 1922, was referred to by the President as "a derogation from the rule laid down in Article 43, paragraph 4, of the Court's Statute."[67]

Documents of the written proceedings are not communicated as a matter of course to States not parties.[68] Yet it may be important for a State which contemplates the possibility of intervening in a case to be informed of the documents of the written proceedings as they are presented by the parties; for this reason, the Rules have always provided that the Court or the President may decide that the Registrar shall hold such documents at the disposal of the Government of any State entitled to appear before the Court. Such Government must make a request in writing,[69] and while the consent of the parties is not required the decision will be taken only after obtaining their views.[70] In several cases in which requests made have been opposed by a party, the Court has declined

[62] See the President's decision of May 31, 1932, in the *Memel Case*. Series C, No. 59, p. 638. See also *idem*, No. 60, p. 267.

[63] Order of June 27, 1936, in the *Losinger Case*. Series A/B, No. 67, pp. 22–23.

[64] Series E, No. 3, p. 206.

[65] In this connection the Registrar gave a wide meaning to the expression "documents in the case." Series D, No. 2 (3d add.), pp. 821–2.

[66] Where the same time-limit is fixed for the presentation of documents by opposing parties, a document submitted by one party before the expiry of the time-limit is not distributed until the other party's document is at hand for distribution. Series D, No. 2 (3d add.), p. 99.

[67] Series C, No. 2, pp. 265, 267. See also the direct exchange agreed upon in the *Eastern Greenland Case*, Series C, No. 67, p. 4114.

[68] A proposal in the contrary sense was made in 1922. Series D, No. 2, pp. 304–5.

[69] Series E, No. 14, p. 147.

[70] *Idem*, No. 9, p. 169. Since 1937 it is the practice to inform the parties of the source of the request.

to take this decision;[71] in a number of cases, however, the decision has been taken and the Registrar has sent copies of the documents to the requesting State.[72]

In an advisory proceeding, under Article 66 of the Statute, States and organizations which are considered "as likely to be able to furnish information" and which have submitted written statements to the Court are entitled to have communicated to them the written statements made by other States or organizations. Article 44 of the 1936 Rules may also be applied by analogy in such a way that the written statements will be held at the disposition of other States, also.[73] In one case in 1922, the written statements were communicated to the members of the Council of the League of Nations.[74]

It has been thought that the publication of the documents of the written proceedings while a case is *sub judice* might give "food for polemics."[75] Hence the documents of the written proceedings are not ordinarily made accessible to the public prior to the termination of the case; since 1931, however, the Rules have provided that with the consent of the parties the Court may authorize them to be made accessible to the public.[76] As a corollary, the parties should not take such a step without the consent of the Court, though in a few cases this has not been observed.[77] In this sense, the documents of the written proceedings are "confidential" until the termination of a case. On a few occasions the Court has sought in advance of any request to learn what the parties thought of making the documents accessible.[78] The provision in the Rules is applied by analogy to the written statements in advisory proceedings, though in some cases the consent of the Council or Assembly of the League of Nations might be sought before the Court would authorize premature publication.[79] Once a case is terminated, all documents of the written

[71] *Idem*, No. 14, p. 147.

[72] In one case in which a request was based on the ground that the documents might be useful in connection with another dispute to which the requesting State was a party, the other party to that dispute was notified of the granting of the request. Series C, No. 70, pp. 412–7.

[73] Series E, No. 11, p. 149.

[74] Series C, No. 2, p. 276.

[75] Series D, No. 2 (2d add.), pp. 173–4.

[76] The provision confirmed the previous practice. Series C, No. 16–III, pp. 776–7. In the *Meuse Case*, the Court expressed the view that the provision did not apply to the Netherlands Government's submitting its own documents to the Netherlands parliament for confidential use. Series C, No. 81, pp. 531–2. The documents in that case seem to have been available to the writer of an article which appeared prior to the opening of the oral proceedings, in 19 *Revue de droit international* (1937), pp. 177–263.

[77] Series C, No. 59, p. 634; Series E, No. 6, p. 284; *idem*, No. 7, p. 280.

[78] Series C, No. 53, pp. 717–8; *idem*, No. 67, p. 4122.

[79] Series D, No. 2 (3d add.), p. 872.

proceedings are published *in extenso* in Series C of the Court's publications, and thus made available to the general public.[80] Such publication affords protection against a partial and misleading reproduction, and it facilitates the study of the Court's jurisprudence by the legal profession.

§511. Termination of Written Proceedings. The Rules refer to the "termination of the written proceedings" as marking the time when "the case is ready for hearing," *i.e.*, when the date is to be fixed for the commencement of the oral proceedings. Ordinarily, no formal pronouncement is made of the termination; even after all the documents of the written proceedings are presented, supporting documents are not infrequently received. In the *Electricity Company Case*, in which the Bulgarian agent had advanced various reasons for filing no rejoinder by the date fixed, the Court issued an order which after declaring the written proceedings to be terminated fixed a date for the commencement of the oral proceedings.[81]

[80] In 1938, the Spanish agent proposed that the documents of the written proceedings in the *Borchgrave Case* should not be published, but the Court declined to give effect to this proposal.

In 1924, the Registrar stated that "documents placed at the Court's disposal for the purpose of an advisory opinion need not necessarily be published." Series E, No. 6, pp. 296–7.

[81] Order of February 26, 1940, Series A/B, No. 80.

CHAPTER 26

ORAL PROCEEDINGS

§512. Priority and Urgency. Article 61 of the 1936 Rules provides that "a request for the indication of interim measures shall have priority over all other cases." Subject to that provision, cases are taken up in the order in which they become ready for hearing, and when several cases are ready for hearing the order is determined by their position in the General List of Cases provided for in Article 20 of the 1936 Rules;[1] but this order may be varied "in special circumstances."[2] A case may be postponed at the request of the parties, but in this connection the interests of parties to other cases which might have to be advanced are to be taken into consideration.[3]

Urgency is one of the factors which determine priority. Whether a case is urgent depends upon its nature and the circumstances in which it has arisen. Article 61 of the 1936 Rules provides that the decision on a request for interim protection "shall be treated as a matter of urgency."[4] As the Chamber for Summary Procedure is established "with a view to the speedy despatch of business," cases before it are in some degree urgent. In the *Chorzów Case*, "relative urgency" was ascribed to proceedings in regard to a preliminary objection because they were said to be "in the nature of summary proceedings";[5] and the President's order of October 10, 1932 in the *Pless Case* recited that such proceedings "are of an urgent character."[6] In 1927, a proceeding relating to the interpretation of a judgment was said to be urgent.[7] A request for an advisory

[1] The session list provided for by the earlier Rules was abolished in 1936.
[2] Article 28 of the 1931 Rules referred to "exceptional circumstances."
[3] Series D, No. 2 (3d add.), p. 555.
[4] See Series C, No. 13–I, p. 8. In 1933, the Court was twice convened in extraordinary session to deal with requests for the indication of measures of interim protection; the interval between the date of the filing of the request and the date set for the hearing was in each case eight days; in the second case, however, the hearing was adjourned for eight days at the request of one of the parties.
[5] Series C, No. 13–I, p. 8.
[6] Series C, No. 70, p. 443. But see Series D, No. 2 (3d add.), p. 820.
[7] Series C, No. 13–V, p. 78; Series E, No. 4, p. 294.

opinion may be characterized by the Council as urgent,[8] and one advisory proceeding was so characterized by the Court though the Council had been silent on the point.[9] If a party has sought an extension of time-limits fixed, it may not thereafter insist upon the urgency of the case.[10] Except for its bearing on priority, the urgent character of a case would seem to have lost much of its significance since the amendment of Article 23 of the Statute providing that the Court shall remain permanently in session.[11]

§513. Necessity of Oral Proceedings.[12] Though Article 43 of the Statute envisages a procedure in "two parts: written and oral," oral proceedings cannot be said to be necessary in every case before the Court. On the proposal of the parties[13] under Article 31 of the Statute, the Court may decide to dispense with oral proceedings;[14] but in no case has a judgment been given by the full Court without oral proceedings. In the *Belgian-Chinese Case*, the President indicated provisional measures of interim protection without any oral proceedings; and in the *Chorzów Case*, a request for an indication of such measures was dismissed without any hearing.[15] Article 64 of the 1936 Rules provides that where the parties' observations do not oppose a proposed intervention under Article 62 of the Statute, the Court may decide that there shall be no oral argument. A judgment opening proceedings for the revision of a judgment, under Article 61 of the Statute, might be given without oral proceedings; and in proceedings relating to the interpretation of a judgment the Court is free to dispense with hearing the parties orally.[16]

The earlier Rules placed emphasis on written proceedings in the Chamber for Summary Procedure, but provided that in the absence of an agreement to the contrary between the parties the Court might institute oral proceedings if the documents did not furnish adequate information; Article 72 of the 1936 Rules provides for oral proceedings in the

[8] Series C, No. 53, p. 9. In the *Postal Service in Danzig Case* and in the *Treaty of Lausanne Case*, the Council asked the Court to deal with the request at an extraordinary session. Series C, No. 8, p. 17; *idem*, No. 10, p. 57.

[9] *Exchange of Populations Case*, Series B, No. 10, p. 8.

[10] Series E, No. 3, p. 191.

[11] See Series D, No. 2 (3d add.), p. 528.

[12] See generally Guynat, "*La procédure orale devant la Cour Permanente*," 37 *Revue générale de droit international public* (1930), pp. 312–23.

[13] Special arbitration agreements sometimes provide for written procedure only.

[14] See Series D, No. 2, p. 140. In 1920 it seems to have been thought that "both parts of the procedure are equally necessary." Minutes of the 1920 Committee of Jurists, p. 727.

[15] In the *Pless Case*, also, no oral proceedings were held on the German request for interim protection.

[16] Series E, No. 5, p. 260.

Chamber for Summary Procedure as a normal course unless the parties agree to dispense with them, and reserves the power of the Chamber to call upon the parties to supply verbal explanations even if there are no oral proceedings. No oral proceedings were held in the two cases before the Chamber for Summary Procedure in 1924 and 1925.[17]

In advisory proceedings a provision in Article 73 of the earlier Rules, which became a provision of Article 66 of the revised Statute, requires the Registrar to notify States and organizations concerned that the Court will be prepared to hear oral statements at a public sitting; oral proceedings in advisory cases thus depend upon States and organizations concerned and not upon the Court. In the *Polish Postal Service Case*, in 1925, no oral proceedings were held.[18] In the *Jurisdiction of Danzig Courts Case*, the interested States expressed no desire for oral proceedings; but in view of their failure to present counter-memorials they were informed that the Court wished to hear their oral statements.[19]

§514. Conduct of Oral Proceedings. Article 43 of the Statute provides that "the oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel and advocates." Witnesses and experts are heard but rarely, so that the hearings usually consist merely of the hearing of arguments made by agents, counsel and advocates. The date for the commencement of oral proceedings is fixed when the case is ready for hearing, *i.e.*, upon the termination of the written proceedings; in the *Electricity Company Case* the date was fixed by order.[20] Parties should not attempt to fix the date in a special agreement,[21] for the ultimate control must rest with the Court.[22] The hearing is under the control of the President or his substitute; if the President is a national of one of the parties, Article 13 of the Rules provides that "he will hand over his functions as President in respect of that case." The hearing is invariably held in public [23] though Article 46 of the Statute empowers the Court to

[17] Series A, No. 3, p. 5; Series A, No. 4, p. 5. [18] Series B, No. 11, p. 10.

[19] Series B, No. 15, p. 7; Series C, No. 14–I, p. 548.

[20] Series A/B, No. 80. An order in the *Free Zones Case* fixed "a day in October" for a public hearing. Series A/B, No. 46, p. 216. If the Court is unable to fix the definite date, it may request the agents to be at its disposal from a certain date. Series E, No. 8, p. 264; Series D, No. 2 (3d add.), p. 821.

[21] Series E, No. 7, p. 295. In the *Tunis-Morocco Nationality Case*, a date was set by the parties, and the Court met on the following day. Series C, No. 2, p. 265. In the *Castelloriso Case*, the parties agreed to hold themselves at the disposal of the Court one month after the filing of the replies. Series C, No. 61, p. 11.

[22] This question has been debated at length. Series D, No. 2, p. 130; Series D, No. 2 (2d add.), pp. 165–71, 175–6.

[23] Under the 1899 and 1907 Hague Conventions on Pacific Settlement, non-publicity was the rule and publicity the exception. See Records of First Assembly, Committees, I, pp. 370, 372–3, 535–6.

decide otherwise and permits the parties to demand that "the public be not admitted";[24] but oral statements in advisory proceedings must be made at public sittings. Advance notice of the hearings is published in the press, special notification being sent to legations at The Hague.[25]

Hearings are conducted in French or in English, but the use of another language may be authorized. Speeches and statements in one official language are translated[26] into the other official language at the public sitting unless the Court decides otherwise;[27] if the use of a language other than French or English has been authorized, the party employing such language must arrange for a translation into one of the official languages, and that translation becomes the official version.[28] Shorthand notes (Fr., *un compte rendue sténographique*) are made of the oral proceedings, including the interpretations, and a transcript is appended to the minutes;[29] corrections by agents or counsel may be made under the Court's supervision.[30] Minutes of the hearings held in public, which under Article 47 of the Statute constitute the "only authentic record," are published in Series C; the contents of the minutes are prescribed by Article 59 of the 1936 Rules.

§515. Evidence.[31] In the usage of the Statute, the term *evidence* has not an exact meaning: Article 44 refers to procuring "evidence on the spot" (Fr., *moyens de preuve*); Article 48 refers to arrangements for "the taking of evidence" (Fr., *l'administration des preuves*); Article 52 refers to "proofs and evidence" (Fr., *les preuves et témoignages*) and to "oral or written evidence" (Fr., *dépositions ou documents*). The 1936 Rules are also somewhat indefinite: Article 49 refers to "evidence" generally (Fr., *déposition* and *moyens de preuve*); Article 50 refers to the production

[24] A sitting may be closed at the request of a single party. Series E, No. 3, p. 209.

[25] Series D, No. 2 (3d add.), p. 822.

Admission to the hearings is usually by card, which is readily obtainable at The Hague; this limitation seems essential to the assurance of order, but it has been criticized. See John H. Wigmore, in 10 American Bar Association Journal (1924), pp. 471–5; but see *idem*, pp. 711–2.

[26] Article 58 of the 1936 Rules employs in the English version "translation," but Article 60 employs the more accurate term "interpretation"; in the French version Article 58 employs *traduction* and Article 60 employs *traduction orale*.

[27] Decisions otherwise, taken in a number of cases, usually state as reasons the composition of the Court, or the language or languages employed by the parties. Series E, No. 11, p. 148; Series E, No. 14, pp. 138–9. On March 29, 1933, the Court resolved that the decision should be taken in advance of the opening of the oral proceedings. Series E, No. 9, p. 163.

[28] Series E, No. 3, p. 201. See also Series E, No. 14, pp. 138–9.

[29] Apparently an actual translation is sometimes appended to the minutes instead of a transcript of the notes of the interpretations. Series D, No. 2 (3d add.), p. 874.

[30] Series E, No. 14, pp. 148, 149. On the importance of restricting corrections, see Series C, No. 80, pp. 1442–3.

[31] See, generally, D. V. Sandifer, Evidence before International Tribunals (Chicago, 1939).

of and comment on the "evidence" (Fr., *moyens des preuves*); Article 54 refers to "evidence on points of fact" (Fr., *moyens de preuves sur des points de fait*); Article 58(2) refers to the "evidence of witnesses" (Fr., *dépositions des témoins*); Article 59(1) refers to the "evidence produced at the hearing" (Fr., *preuves produites à l'audience*); Article 60 refers to notes of "the evidence taken" (Fr., *dépositions*); Articles 62 and 72 refer to "evidence" to be produced (Fr., *moyens de preuve*). In general it may be said that the term *evidence* covers real evidence, documentary proofs, and the testimony of witnesses and experts, advanced by a party either on its own motion or at the invitation of the Court.

Issues of fact are seldom tried before the Court, and where a question of fact arises the Court must usually base its finding on statements made on behalf of the parties either in the documents of the written proceedings or in the course of oral proceedings.[32] On several occasions the Court has referred to the burden of proof as falling upon a particular party, but without distinguishing it from the burden of going forward with proof.[33] In the *Eastern Greenland Case*, Norway was said to have the burden of proof that the term *Greenland* in certain Danish legislation and in certain treaties was used, as Norway contended, in a special rather than a geographical sense.[34]

The Court is always free to estimate the value of any evidence presented to it, likewise "to estimate the value of statements made by the parties." [35] In 1922, it decided not to include in the Rules a statement to the effect that this appreciation should be made "in accordance with its conscience and with the principles of equity." [36] In general, the Court has refrained from requiring specific types of proof for particular matters; thus in the *German Interests in Upper Silesia Case* it rejected a contention that the acquisition of Czechoslovak nationality could be established only by a certificate from the Czechoslovak Government.[37]

§516. Real Evidence. Certain types of demonstrative or real evidence may be presented to the Court. Maps, which are frequently presented to the Court, may be viewed as historical documents or as demon-

[32] As in the *Chinn Case*. Series A/B, No. 63, p. 78. On an issue of fact in the *Danube Commission Case*, the Court accepted the findings of a special committee of the League of Nations. Series B, No. 14, p. 46.

[33] See Series A, No. 5, p. 29; *idem*, No. 7, p. 30; Series A/B, No. 62, p. 18. See also Series B, No. 14, p. 124; Series A, No. 22, p. 24; Series A/B, No. 49, p. 355.

[34] Series A/B, No. 53, pp. 49, 52.

[35] Series A, No. 7, p. 73.

[36] Series D, No. 2, pp. 148, 264, 303, 467.

[37] Series A, No. 7, p. 73.

strative evidence;[38] this may be true of photographs also.[39] In presenting geographical data in the *Eastern Greenland Case*, a Danish advocate introduced an assistant who illustrated on a wall-map,[40] and numerous maps were transmitted to the Court either with documents of the written proceedings or during the oral procedure.[41] In the *Meuse Case*, the Netherlands agent was permitted, no objection being offered by the Belgian agent, to make certain demonstrations with the aid of a map, a topographical bas-relief and models of canal-locks constructed for the purpose and brought before the Court, the demonstrations being considered as "part of the agent's pleadings."[42]

Article 44 of the Statute refers to the procuring of "evidence on the spot," but the Statute and Rules do not expressly envisage a visit by the Court to the scene to which a case relates (*descente sur les lieux*). When such a rule was proposed in 1922,[43] it was thought to be unnecessary because of Articles 44 and 50 of the Statute,[44] nor was a rule proposed in 1934 adopted.[45] Numerous precedents for such visits exist in international jurisprudence.[46] The special agreement in the *Free Zones Case* provided that either party might request the Court to delegate one or more of its members to conduct investigations on the spot (Fr., *enquêtes sur les lieux*),[47] but when the French Government requested such an investigation the Court thought that it was not bound to grant the request, and it did not do so.[48] In the *Meuse Case*, after the Netherlands agent had completed his first oral argument, the Belgian agent suggested that the Court should make a *descente sur les lieux* to enable the judges to see the canals, waterways and installations involved in the proceedings; the suggestion was viewed not as an offer to present evidence, but as an invitation to the

[38] In the *Jaworzina Case*, the Court said that "the maps and their tables of explanatory signs cannot be regarded as conclusive proof, independently of the text of the treaties and decisions." Series B, No. 8, p. 33. In the *St. Naoum Case*, it noted that a map presented was "unsigned," and its "authentic character" not established. *Idem*, No. 9, p. 21.

[39] See Series C, No. 85, p. 875.

[40] *Idem*, No. 66, p. 2594.

[41] *Idem*, Annex to Nos. 62–67, p. III, in which more than twenty maps were published. Several maps were also presented to the Court in the *Meuse Case*. Series C, No. 81, p. 561.

[42] *Idem*, No. 81, p. 215; Series E, No. 14, p. 157. The models were also employed for demonstration by the Belgian agent.

[43] Series D, No. 2, pp. 264, 278, 303, 372, 466.

[44] *Ibid.*, p. 147. The resolution adopted by the Assembly of the League of Nations on September 14, 1929, concerning judges' traveling expenses, refers to journeys "made necessary . . . by visits to places concerned in proceedings." Records of Tenth Assembly, Plenary, pp. 114, 432.

[45] Series D, No. 2 (3d add.), pp. 216–27, 873.

[46] See Hudson, in 31 American Journal of International Law (1937), pp. 696–7.

[47] Series C, No. 17–I, p. 493.

[48] Series A/B, No. 46, pp. 162–3. The program of the experts in the *Chorzów Case* called for an inspection of certain factories, but it was not made. Series C, No. 16–II, p. 24.

Court to procure its own information for a better understanding of the case. No opposition was offered by the Netherlands agent, and at the Court's request the two agents proposed an itinerary. By order of May 13, 1937,[49] the Court decided to carry out an inspection on the spot (Fr., *une descente sur les lieux*) and to follow the itinerary proposed by the parties. This was done on May 14 and 15, 1937; each party named representatives to accompany the judges, to furnish explanations, and to make practical demonstrations. Minutes of the visit were made,[50] and the expense of the visit was borne by the Court.[51]

§517. Documentary Proofs. Documentary proofs are ordinarily submitted with documents of the written proceedings as documents in support. Article 48 of the 1936 Rules provides that once the written proceedings are terminated new documents may be submitted only with the consent of the opposing party,[52] or with the sanction of the Court given after hearing the parties.[53] In the course of oral proceedings documents are frequently offered, sometimes read *in extenso*, but the Court has shown a general reluctance to allow them to be presented over the objection of a party, and numerous incidents have occurred in consequence.[54] During the oral proceedings, or even before the hearing begins, the Court is empowered by Article 44 of the Statute to call upon the agents to produce any document; [55] a single judge may also request the production of a document.[56]

In several cases a party has sought the submission of a document or evidence by an opposing party. In the *War Vessels in Danzig Case*, where the agent of Danzig asked that documents cited by the Polish Government might be communicated, the Polish counsel acceded to the demand.[57] In the *Free Zones Case*, the French agent having asked for a document, the Swiss agent complied with a request by the President to produce it.[58] In the *Eastern Greenland Case*, the Danish counsel declined a request

[49] Series C, No. 81, pp. 553–4.

[50] *Ibid.*, pp. 222–3.

[51] Series E, No. 14, p. 154.

[52] Consent has been presumed unless the opposing party objects after the document has been communicated to it. Series A/B, No. 61, p. 215.

[53] Series E, No. 14, pp. 155–7.

[54] See for example Series A/B, No. 53, pp. 25–6; Series C, No. 81, p. 228. In the *Mavrommatis Case*, the Court permitted counsel for the Greek Government, in spite of objection, to cite as evidence a statement appearing in Hansard's Parliamentary Debates. *Idem*, No. 7–II, p. 33. In the *Pázmány University Case*, documents read by an agent during the oral proceedings were regarded as arguments and not as evidence. Series A/B, No. 61, pp. 214, 216.

[55] Such a request was made in the *German Interests in Upper Silesia Case*, Series C, No. 11, pp. 1268–9. See also *idem*, No. 74, pp. 421–2.

[56] See Series C, No. 73, p. 774; *idem*, No. 77, p. 169; *idem*, No. 81, p. 224.

[57] Series C, No. 55, p. 212.

[58] *Idem*, No. 58, pp. 338, 707.

made to him directly by the Norwegian agent for the production of certain documents.[59]

§518. Testimony of Witnesses and Experts. The Court may invite the parties to call witnesses or experts,[60] or this action may be taken by a party on its own initiative. Since the beginning the Rules have provided that in advance of the opening of the oral proceedings each party shall inform the Court as to the witnesses and experts it intends to produce, and shall give a general indication of the points to be covered by their testimony. Article 51 of the Statute provides that "during the hearing any relevant questions are to be put to the witnesses and experts under the conditions laid down by the Court" in its Rules. A witness or an expert must make a solemn declaration as provided in Article 53 of the 1936 Rules of Court. They may be examined by agents, counsel or advocates of the parties under control of the President, and questions may be put to them by the President or by the judges. This examination may take place before or after the hearing of agents and counsel, as may be determined by the Court.[61] Shorthand notes of the testimony are taken, to be appended to the minutes, and in addition to a statement of the evidence the minutes must state the names, Christian names, description, and residence of witnesses and experts heard. The record of the evidence of each witness or expert must be read to him in order that, under the supervision of the Court, any mistakes may be corrected.[62] When approved the record is signed by the witness. If the testimony is not in English or French, the party presenting the witness must provide the Court with a translation into one of those languages; where a witness or expert appears at the instance of the Court the arrangement for the translation is made by the Registrar. The indemnities of witnesses or experts who appear at the instance of the Court are paid out of the funds of the Court;[63] the indemnities of other witnesses or experts are paid by the party who produces them.

Article 56 of the 1936 Rules provides that at the request of a party or on its own initiative the Court, or the President, shall take the necessary steps for the examination of witnesses or experts "otherwise than

[59] *Idem*, No. 67, p. 4135. See also Series A/B, No. 61, pp. 214–5.

[60] The Court may ask a party to call a particular person as a witness or expert. See Series D, No. 2 (3d add.), pp. 242–3.

[61] See Series D, No. 2 (add.), pp. 115–7.

[62] "Only slips may be corrected." Series E, No. 3, p. 208.

[63] An item to cover such expense appears in the budget of the Court since 1926. Series E, No. 3, p. 211. See Series D, No. 2, pp. 82, 146–7.

before the Court itself";[64] this has been interpreted to include commissions rogatory.[65] Various proposals have been made concerning the taking of evidence on commission. In 1922 it was proposed that the Court should apply the rules laid down in the Hague Convention on Civil Procedure of July 17, 1905;[66] a proposal was made in 1934 that the Court should select one or more of its members to hear witnesses, but the constitutionality of such a delegation of power was questioned.[67] The special agreement in the *Free Zones Case* provided that either party might request the Court to delegate one or three of its members to hear the evidence of any interested persons.[68]

Article 44 of the Statute provides that for the service of all notices upon persons other than agents, counsel and advocates the Court shall apply direct to the Government of the State upon whose territory the notice has to be served, and this provision applies whenever steps are to be taken to procure evidence on the spot. Thus the Court has no power directly to summon witnesses or experts to appear; it might request a national court to take the testimony of a witness or expert, but compliance with such a request would depend upon the local law.[69] The affidavit of a person may be presented without producing him as a witness.[70]

The Court's experience as to witnesses and experts has been limited to a single case.[71] After the hearing of agents and counsel in the *German Interests in Upper Silesia Case*, the Court by an order of March 22, 1926, invited the parties to furnish information on certain points "at a public

[64] See the criticisms of this provision in Series D, No. 2 (3d add.), pp. 770, 825.

[65] Series D, No. 2, pp. 145–6; Series D, No. 2 (3d add.), pp. 216–27.

[66] Series D, No. 2, p. 264. Articles 8–16 of the 1905 Hague Convention deal with *commissions rogatoires*. 2 Martens, *Nouveau recueil général* (3d ser.), p. 243.

[67] Series D, No. 2 (3d add.), pp. 216–27, 873.

[68] Series C, No. 17–I, p. 493. *Cf.*, Series A/B, No. 46, p. 162.

[69] Few States seem to have legislation which would enable them to produce witnesses to testify before the Court, and perhaps an international convention concerning the subpoena of witnesses to appear before international tribunals would serve a useful purpose. A suggestion along this line was made in Article 49 of the Five-Power Plan in 1920. Instruments creating international tribunals have but rarely dealt with the production of witnesses. Such a provision in Article 12 of the Boundary Waters Treaty between the United States and Canada, of January 11, 1909, has been implemented by legislation in the United States, and recent legislation of the United States is designed to facilitate the summoning of witnesses in international cases to which the United States is a party. Law of July 3, 1930, 46 Stat. 1005, as amended by Law of June 7, 1933, 48 Stat. 117. See Chandler P. Anderson, "Production of Evidence by Subpoena before International Tribunals," 27 American Journal of International Law (1933), p. 498; Philip C. Jessup, "National Sanctions for International Tribunals," 20 American Bar Association Journal (1934), p. 55.

[70] Two affidavits were presented in the *Mavrommatis Case*. Series C, No. 13–III, pp. 488, 490, 524–6.

[71] In the *Eastern Greenland Case*, the Norwegian agent reserved the right to call named expert witnesses, but they were not called. Series C, No. 67, pp. 4123, 4126.

meeting, by whatever means they may think fit," but this was done "subject to the Court's right, should the evidence thus furnished be regarded by it as insufficient, to make good such insufficiency by the means provided for in the Statute." [72] In application by analogy of Article 47 of the 1922 Rules, the parties were later asked to inform the Registrar of the evidence which they intended to produce; the German Government replied that it would call four named expert-witnesses, and the Polish Government replied that it would call one expert-witness. These witnesses appeared before the Court on April 13–15, 1926; [73] the President stated that the witnesses should confine themselves to matters of fact without entering upon considerations of law. Questions were put to the witnesses by the two agents and by some of the judges. After the witnesses had testified, the agents were given opportunity to comment on the testimony. The witnesses spoke in the German and Polish languages, but a record of the French translation made in Court was sent to the agents for transmission to the witnesses. On April 16, 1926, four of the five witnesses were present in Court when the record was read to them for their approval and signature; the German agent approved the record of the testimony of the absent witness and signed it by proxy, but the Court reserved its appreciation [74] and subsequently the testimony of this witness was set aside.[75]

In the *Personal Work of Employers Case*, in 1926, the Court gave permission to the International Federation of Trades Unions to produce experts who were to reply to questions but not to be regarded as witnesses; but the experts were not produced.[76]

§519. Solemn Declarations by Witnesses and Experts. The Statute includes no provision for the taking of oaths by witnesses and experts,[77] but Article 53 of the 1936 Rules provides for solemn declarations by both, to be made upon their honor and conscience. A witness declares that he "will speak the truth, the whole truth and nothing but the truth"; an expert declares that his statement will be in accordance with his sincere belief. Such a declaration does not compel the declarant to violate professional secrecy.[78] It may be made in a language other than English or French.[79] Though the Court has no power to punish for perjury, false

[72] Series A, No. 7, pp. 96–7.
[73] Series C, No. 11, pp. 25–34.
[74] *Idem*, pp. 35–6.
[75] Series E, No. 3, p. 211. *Cf.*, Series D, No. 2 (3d add.), p. 826.
[76] Series E, No. 3, p. 213.
[77] In 1922, the Court rejected a proposal concerning the administration of oaths. Series D, No. 2, pp. 82–3.
[78] *Ibid.*, p. 211; Series D, No. 2 (add.), p. 132.
[79] Series C, No. 11, p. 28.

testimony or a false statement might be punishable under some national laws. In any case, the solemn declaration would seem to serve a useful purpose.

Article 58 of the 1936 Rules requires that where certain translations are being made in Court, the translator must make a solemn declaration that his translation will be "a complete and faithful rendering." [80]

§520. Exclusion of Evidence. The occasions have been rare in which the Court has excluded evidence proffered, and no general rules for exclusion have been formulated. In the *Chorzów Case*, the Court refused to take into account declarations, admissions or proposals made in the course of direct negotiations between the parties which had proved abortive.[81] In the oral proceedings in the *Danube Commission Case*, a Rumanian representative read from a document which was part of the preparatory work of Part 12 of the Treaty of Versailles; a British representative stated in reply that there had been an express agreement that the preliminary negotiations should be kept secret. In its opinion the Court declined to consider such *travaux préparatoires* on the ground that they had not "been placed before the Court by, or with the consent of, the competent authority." [82] In the *Oder Commission Case*, references were made in the Polish memorial to preparatory work in connection with certain parts of the Treaty of Versailles; the opposing Governments requested that the Court give a ruling at the hearing of the oral arguments to the effect that such references and the arguments based upon them should be disregarded because they were *travaux préparatoires*, because they were confidential, and because some of the parties concerned in the case had not taken part in the work of the Conference which prepared the Treaty of Versailles.[83] By an order of August 15, 1929, the Court invited the agents to submit observations on this question, and by an order of August 20, 1929, it ruled that the minutes of the Commission on Ports, Waterways and Railways of the Paris Peace Conference should be excluded as evidence

[80] This was applied in the *Borchgrave Case*. Series C, No. 83, p. 97.

[81] Series A, No. 9, p. 19.

[82] Series B, No. 14, p. 32. Following a procedure adopted in 1922 (Series C, No. 1, pp. 496, 501, 503, 533), the Registrar had previously requested the French Government to supply records of these preliminary negotiations for the use of the Court; the reply was that these records were held for the use of governments only, but that the Secretariat of the Conference of Ambassadors would be willing to verify and certify any citations. Series C, No. 13–IV, pp. 2078–9, 2084. Thereafter the Registrar sought the good offices of the British agent to this end, but the British agent declined. *Idem*, pp. 2087–8, 2098–2099. After the reference made by the Rumanian representative in the oral proceedings, the Registrar again addressed the French Minister for Foreign Affairs; the ultimate reply by the President of the Conference of Ambassadors arrived after the Court's opinion was given. Series E, No. 4, p. 288.

[83] Series C, No. 17–II, pp. 25–35.

from the proceedings.[84] In the *Chinn Case*, however, Judge van Eysinga expressed "regret that the Court should frequently be called upon to give decisions in regard to collective conventions concluded after the Great War, without having at its disposal the records of the meetings at which these conventions were elaborated, these records being kept secret." [85] In the *Meuse Case*, the Belgian agent offered to produce a draft of a treaty which had been under consideration in abortive negotiations between the parties, but on objection by the Netherlands agent the President refused to permit the draft to be added to the record.[86]

In several cases exclusion has been due to lateness of presentation. In the *St. Naoum Case*, after the close of the proceedings, the Serb-Croat-Slovene representative informed the Court of the arrival at The Hague of an ex-functionary of the Russian Ministry of Foreign Affairs, and requested that the Court should hear his information, but the Court refused to re-open the proceedings for this purpose; likewise, letters sent by States' representatives were returned to them.[87] In the *Free Zones Case*, a document presented by the Swiss agent in the course of the oral proceedings was, by order of August 19, 1929, excluded "as evidence at the present stage of the case; [88] this seems to have been due to an application of Article 52 of the Statute.

§521. Hearing of Agents and Counsel. The most important part of the oral proceedings is the hearing of agents or counsel, or of agents and counsel, which may precede or follow the examination of witnesses and experts. In the absence of an agreement between the parties,[89] the Court determines the order in which agents, counsel or advocates shall be called upon to speak. If a proceeding is instituted by application, the applicant's agent or counsel is heard first; and if by special agreement, agents are heard in the alphabetical [90] order of the names of the parties.[91] If the Court is considering a preliminary objection, argument for the party offering the objection will be heard before argument for the opposing party,[92] and representatives of a State requesting the indication of interim

[84] Series A, No. 23, pp. 38, 41. [85] Series A/B, No. 63, p. 136.
[86] Series C, No. 81, pp. 220, 224.
[87] Series C, No. 5–II, p. 381; Series E, No. 3, p. 214.
[88] Series A, No. 22, pp. 14, 21; Series C, No. 17–I, pp. 168, 368, 2458. The document was against presented and admitted in 1930. Series C, No. 19–I, pp. 1245, 1252.
[89] For instances of such agreements, see Series C, No. 53, p. 193; *idem*, No. 56, pp. 227–8; *idem*, No. 60, p. 203; *idem*, No. 75, p. 209.
[90] The French names of States are employed for this purpose, but in a case in which all proceedings are in English it would seem that the English names should be employed.
[91] For exceptions to this rule, see Series D, No. 2 (3d add.), p. 824. In the *Oder Commission Case*, agents of the six Governments in the same interest were invited to speak before the agent of the Polish Government. Series C, No. 17–III, p. 10. [92] Series C, No. 78, p. 213.

measures will usually be heard first. In advisory proceedings also, the alphabetical order is usually applied to the hearing of representatives of interested States and organizations.[93] Several persons may be permitted to speak in behalf of the same party in the same case and in the same phase of the oral proceedings, dividing the subject-matter between them.[94] After oral presentations on behalf of each party, replies and rejoinders are allowed.[95]

Agents and counsel have a free rein in presenting their arguments. The Court has frequently said that they should come before it "fully prepared to argue the case," but postponements are sometimes granted to enable preparation to be made.[96] No attempt is made to confine speakers to relevant statements,[97] though frequent admonition is given that in preliminary proceedings the merits of a case should not be gone into. It has been said that "the reading of prepared written statements is contrary to the principle underlying oral proceedings," [98] but this practice is not infrequent and it may be necessary where an agent or counsel must speak in an unfamiliar language. No time-limits are placed on the statements by agents or counsel, and in some cases they have been very lengthy; [99] the reference in the French version of Article 54 of the Statute to *tous les moyens qu'ils jugent utiles* may be thought to preclude a time-limitation, and the importance of giving the parties what they consider to be adequate opportunity to present their views makes any limitation undesirable.

§522. Questions to Agents and Counsel. Prior to 1936, the Rules contained no provision concerning questions to agents and counsel. The practice during the Court's earlier years did not encourage the judges to ask questions; questions were frequently put by the Court itself, as expressly authorized by Article 49 of the Statute, but it seems to have been felt that embarrassment might result from questions put by the individual

[93] A distinction has been drawn between States directly concerned and other States. Series C, No. 5–II, p. 10. On the order of hearing representatives of interested organizations, see Series E, No. 3, p. 207; Series C, No. 54, p. 304.

[94] Series C, No. 69, p. 18. But see Series E, No. 3, p. 204. An oral reply or rejoinder should be made by a single person.

[95] In a few cases, an applicant's agent has been permitted to speak after the respondent's rejoinder. Series C, No. 81, pp. 228–9. See also *idem*, no. 69, p. 18; *idem*, No. 80, pp. 410–2.

[96] Series E, No. 6, p. 296.

[97] In 1934, Judge Schücking made a severe criticism of the Court's oral procedure in this connection, but the Court decided not to include in the Rules a provision that the President should see that the arguments do not stray into irrelevancies. Series D, No. 2 (3d add.), pp. 172, 916–7.

[98] Series E, No. 6, p. 296.

[99] Fifty-seven half-day sittings were devoted to the hearings in the *Eastern Greenland Case*. Series C, No. 66, pp. 2592–2618.

judges. Hence for some years all questions were put by the President in the name of the Court.[1] In the *Bulgarian Communities Case*, in 1930, questions were communicated unofficially beforehand to the representatives of interested States, and embodied in an order by the Court.[2] The attitude of the Court was changed in 1931. Its resolution of February 20, 1931 provided that after notifying the President a judge might put his own question; but the question was to relate exclusively to the subject to which the argument was devoted at the moment, and the President might ask the judge to postpone his question; in any event the agent or counsel was to be free to postpone his answer.[3] A new practice was thus inaugurated,[4] and in consequence the dullness of the hearings was somewhat alleviated. Article 52 of the 1936 Rules provides that the President, or any judge after apprising the President, may "put questions to the parties," and that "the parties shall be free to answer at once or at a later date."[5] Even since 1936, however, questions are but rarely put by the judges.

§523. Rôle of Experts. The Statute of the Court gives no clear definition of the role of experts in the working of the Court: Article 43 refers to the hearing of experts, and Article 51 refers to questions put to experts during the hearing. These provisions seem to assimilate experts to witnesses, and Articles 49, 53–56 and 59 of the 1936 Rules also have that effect. On the other hand, Article 50 of the Statute provides that the task of carrying out an enquiry or giving an expert opinion may be entrusted to any individual, body, bureau, commission or other organization; and this is implemented by Article 57 of the 1936 Rules. When an expert enquiry was ordered by the Court in the *Chorzów Case* in 1928 with reference to the amount of an indemnity to be paid under a judgment of the Court, the questions were carefully defined, the procedure to be followed was laid down in detail, and the report was to "contain the reasoned opinion in regard to each question put of each member of the committee."[6] A public sitting of the Court was envisaged, to be attended by the experts, for the agents' discussion of their report; but when the enquiry was prematurely terminated the experts had merely submitted questions to assessors appointed by the parties, and no report had been drawn up.[7]

[1] Series E, No. 8, pp. 262–3. [2] Series C, No. 18–I, p. 1077.
[3] Series D, No. 2 (2d add.), pp. 212–7, 300. [4] Series E, No. 8, p. 263.
[5] See Series D, No. 2 (3d add.), pp. 167–75. [6] Series A, No. 17, pp. 99–103.
[7] Series A, No. 19, pp. 14–5. For the *procès-verbaux* of the experts' committee, see Series C, No. 16–II, pp. 17–24.

Though the practice is not covered by any provision in the Statute, agents or counsel are sometimes assisted by "experts." [8]

§524. Conclusions and Submissions. Article 48 of the Statute provides that the Court "shall decide the form and time in which each party must conclude its arguments." This was an adaptation of the provision in Article 49 of the 1899 Hague Convention on Pacific Settlement as to *des formes et délais dans lesquels chaque Partie devra prendre ses conclusions*.[9] The Court's earlier Rules employed the terms "conclusions" in English and *conclusions* in French; in the 1936 Rules, "submissions" was substituted for "conclusions" in the English version.[10] In addition to the necessity of a clear indication of the nature of the dispute before the Court, each party should state what it desires the Court to decide; submissions or conclusions should be, therefore, a synthesis of the arguments advanced and an indication of the action which the party desires the Court to take.[11] Alternative [12] and subsidiary [13] submissions are frequently presented.[14]

The task of formulating the parties' submissions must not be imposed upon the Court, for the Court cannot "substitute itself for the parties" by formulating their submissions "simply on the basis of argument and facts advanced." [15] Yet submissions may be interpreted by the Court,[16] or an agent may be asked to explain them.[17] If the presentation fails to develop the various points of a case the Court may ask that submissions be presented.[18] Submissions may be stated in the document by which proceedings are instituted, but Article 42 of the 1936 Rules contemplates

[8] As in the *Eastern Greenland Case*, Series C, No. 67, pp. 4121, 4123; and in the *Borchgrave Case*, Series C, No. 83, p. 96.

[9] Article 74 of the 1907 Convention was slightly different. See 2 *Actes et Documents de la Deuxième Conference*, p. 730; Series D, No. 2, p. 64.

[10] Series D, No. 2 (3d add.), p. 768.

[11] Series D, No. 2 (2d add.), p. 171.

"Draft decisions" were presented by the parties in the *Free Zones Case*. Series A/B, No. 46, pp. 103, 150–1.

[12] On the choice between alternative submissions, see *idem*, No. 61, p. 212.

[13] On subsidiary submissions, see Series A, No. 7, p. 45.

[14] In the *German Interests in Upper Silesia Case*, the Court refused to give judgment on a submission in interrogative form. Series A, No. 6, p. 22; *idem*, No. 7, pp. 34–5. *Cf.*, the *Memel Case*, Series A/B, No. 49, pp. 311–3, 350–1.

[15] Series A, No. 7, p. 35.

[16] *Ibid.*, p. 19; *idem*, No. 17, pp. 16–7; Series A/B, No. 78, p. 174. On several occasions, parties' submissions have been re-stated.

[17] Series C, No. 13–V, pp. 10, 78–9.

[18] As in the *Oder Commission Case*, Series A, No. 23, pp. 44–6, where submissions were asked for by noon of a particular day. See also Series C, No. 84, p. 18.

In the *Southeastern Greenland Case*, the Court asked for a written summary of oral observations on the request for interim protection. Series C, No. 69, p. 16.

that they will be set out in the memorial and the counter-memorial; [19] Article 62 also provides that the document presenting a preliminary objection and the written statement in reply shall contain the parties' submissions, but no express provision is made for submissions in proceedings relating to intervention, or to the revision or interpretation of a judgment.[20] As a general rule, the Court has not exercised the power conferred upon it by Article 48 of the Statute to fix a definite stage of the proceedings by which submissions must be presented, and though reference has been made to that power on several occasions [21] submissions have been entertained regardless of the time when they were presented. A special agreement may set a time for the presentation of submissions.[22] Once presented submissions may be abandoned,[23] or they may be superseded or modified by later submissions; indeed, modification has frequently been permitted down to the close of the oral proceedings,[24] the one limitation being that "the other party must always have an opportunity of commenting on the amended submissions." [25] This practice does not seem to depend upon whether the proceeding was instituted by an application or under a special agreement, though the Court has sometimes shown a disposition to draw this distinction. On several occasions the Court has intimated that some limits may be imposed upon the extent to which submissions may be modified.[26] In the *Oder Commission Case* it stated that the questions contained in a special agreement "could not be changed or amplified by one of the parties." [27] In the *Pless Case* it was said that while a case (memorial) might elucidate the terms of the application, it "must not go beyond the limits of the claim as set out

[19] Article 63 of the 1936 Rules requires any counterclaim to be presented in the submissions in the counter-memorial.

[20] See Series A, No. 13, pp. 15–16, 23.

[21] Series E, No. 5, pp. 257–8; *idem*, No. 6, pp. 294–5. *Cf.*, Series A, No. 17, p. 7.

[22] As in the *Free Zones Case*, Series A/B, No. 46, p. 100, but in this case conclusions were allowed to be presented after the time set. *Idem*, pp. 155–6.

[23] Series A, No. 2, p. 24; *idem*, No. 17, p. 14. Abandonment may result from the withdrawal of a claim by an opposing party. Series A/B, No. 78, p. 173. Failure to repeat a submission in the course of the oral proceedings should not necessarily involve its abandonment. Series A, No. 10, p. 10. But see *idem*, No. 2, p. 24. The other party's assent to the abandonment can hardly be necessary. But see *idem*, No. 7, p. 10; Series A/B, No. 78, p. 172.

[24] In the *Pajzs Case*, a submission was allowed to be presented after the close of the oral proceedings. Series C, No. 80, p. 430.

[25] Series A, No. 17, p. 7. In the Court's earlier years, a tendency was noticeable to be more strict on this point. In the *Chorzów Case*, in 1927, it noted that a modification had been made when it was still possible for the respondent to file a preliminary objection. *Idem*, No. 9, p. 18. In the second *Mavrommatis Case*, it was noted that amended submissions had been presented when the opposite party could still offer objection. *Idem*, No. 11, p. 11. See also *idem*, No. 8, p. 10; Series E, No. 9, p. 173.

[26] See Series A, No. 17, p. 17.

[27] *Idem*, No. 23, p. 18.

therein." [28] In the *Société Commerciale Case*, it was observed "that the liberty accorded to the parties to amend their submissions up to the end of the oral proceedings must be construed reasonably and without infringing the terms of Article 40 of the Statute and Article 32, paragraph 2 of the Rules which provide that the application must indicate the subject of the dispute"; and it was said that the Court could not "in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character," for such a change might affect the Court's jurisdiction and might prejudice the interests of possible intervenors.[29]

As a general rule the decision of the Court will be based upon the submissions of the parties, and it will confine itself to dealing with the issues which they formulate.[30] In the *Lotus Case*, however, it was said that the points to be decided were those stated in the special agreement rather than in the submissions of the parties.[31] A question of law may have to be decided by the Court though it is not expressly covered in the submissions.[32] Incidental submissions will be passed upon in so far as they fall within the ambit of the case.[33]

Conclusions or submissions play a less important role in advisory proceedings, where States or organizations appear before the Court to furnish information and not to present claims.[34] Where a dispute is involved, advisory proceedings are to be assimilated to contentious proceedings, however, and submissions may be presented.[35] In the *Caphandaris-Molloff Agreement Case*, the agents of Bulgaria and Greece were asked to formulate their Governments' points of view "in the form of conclusions." [36]

§525. Closing of Oral Proceedings. Article 54 of the Statute provides for the President's declaring the hearing closed when the agents, advocates and counsel have completed their presentation of the case

[28] Series A/B, No. 52, p. 14. *Cf.*, Series A, No. 17, p. 29.
[29] Series A/B, No. 78, p. 173.
[30] Series A, No. 17, p. 17. *Cf.*, *idem*, No. 2, p. 30.
[31] *Idem*, No. 10, p. 12. *Cf.*, Series A/B, No. 46, pp. 155–6. A similar position seems to have been taken as to an application in Series A, No. 7, p. 45.
[32] *Idem*, No. 23, p. 19.
[33] Series A/B, No. 46, pp. 114, 155–6.
[34] In a case relating to the competence of the International Labor Organization, the President informed representatives of organizations concerned that as a question of law had been submitted for the Court's opinion, "it was not for them to indicate the conclusions at which the Court should, in their opinion, arrive." Series C, No. 12, p. 10.
[35] See, for example, Series B, No. 4, pp. 11–6; *idem*, No. 16, pp. 13–4.
[36] Series C, No. 57, p. 433.

(Fr., *ont fait valoir . . . tous les moyens qu'ils jugent utiles*). Formerly the President frequently refrained from making such a declaration after the oral presentations, to enable the Court to put the questions to the parties if it should desire to do so; in such case, the declaration might be made at a later stage, the parties being informed by letter.[37] In the recent practice, the President declares the closing subject to the right of the Court to call upon the parties to furnish any additional information which may be required.[38] After a closure has been declared, the oral proceedings may be reopened by the Court,[39] but on several occasions it has refused to take this step.[40]

[37] Series E, No. 4, pp. 289–90; Series C, No. 60, p. 271.

[38] *Idem*, No. 85, p. 880; *idem*, No. 86, p. 428; *idem*, No. 87, p. 165. When it becomes clear that no additional information is required, *i.e.*, after the adoption of a draft judgment or opinion in first reading, the agents are so informed. Series E, No. 14, p. 157; Series D, No. 2 (3d add.), p. 438.

[39] Series E, No. 7, p. 301; Series D, No. 2 (3d add.), p. 825.

[40] Series E, No. 3, p. 214; *idem*, No. 14, p. 157.

CHAPTER 27

PRACTICE OF THE COURT

§526. Regulation of the Court's Practice. The term "practice" is used to denote the formal methods by which the Court exercises its judicial functions.[1] To some extent it is regulated by the Statute and the Rules. From the beginning it has been recognized that a distinction is to be drawn between provisions relating to the parties' conduct of proceedings before the Court and the Court's handling of the questions and issues presented to it. In 1922, the Court rejected a suggestion that it should draw up two separate sets of rules, distinguishing rules of procedure from rules of Court.[2] Again in 1935 it rejected a proposal to create a set of internal regulations separate from the Rules of Court.[3] Article 31 of the earlier Rules, and Article 30 of the 1936 Rules contain regulations concerning deliberations and decisions, and they have undergone but slight revision since 1922. A resolution concerning *la pratique en matière judiciare* was adopted as an experiment in 1931,[4] and it was revised in 1936;[5] but this resolution is by no means a complete guide to the practice followed, and in a given case its application may even be suspended.[6]

§527. Preliminary Exchange of Views before Hearings. After the close of the written proceedings and before the beginning of the hearing, a private meeting of the Court is held for an exchange of views among the judges with reference to the written proceedings and lacunae in the presentation of the case.[7] Emphasis has been placed on the duty of judges "to make a complete study of the written proceedings before the hearing," and the preliminary examination after such study has been

[1] See Series D, No. 2 (3d add.), p. 812.
[2] Series D, No. 2, p. 106.
[3] Series D, No. 2 (3d add.), pp. 403–4, 864.
[4] Series D, No. 2, pp. 218–226, 268, 300. This resolution was not regarded as confidential, but it was published only in Series D. See Series E, No. 7, p. 297.
[5] Series D, No. 1 (4th ed.), pp. 62–3; Series D, No. 2 (3d add.), pp. 748–50; Series E, No. 12, p. 196.
[6] Series E, No. 14, p. 158.
[7] Judges *ad hoc* participate in these meetings.

made is designed to draw attention to "gaps in the documentation"; [8] it also gives opportunity for the Court's raising questions relating to its jurisdiction.[9] The occasions have been rare in which it has led to questions to agents at the beginning of the hearing.[10] On the whole, the preliminary exchange of views seems to have served little purpose in most cases.[11] It might be more useful if the President assumed a more active direction in the development of the oral proceedings.[12]

§528. Deliberations after Hearings. Questions frequently arise during the hearings which call for immediate answer, and the hearings are sometimes interrupted to permit the Court to dispose of them; [13] but the deliberations on the case as a whole are postponed until the close of the hearings, a short interval being allowed thereafter.[14] Article 54 of the Statute requires that they "take place in private" (Fr., *en Chambre du Conseil*) and "remain secret"; Article 30 of the 1936 Rules provides that only the judges, the Registrar or his substitute, and "authorized persons" [15] may be present.

The deliberations are begun with a collective examination of "the case as it presents itself after the hearing," in which the judges in turn, in the inverse order of seniority, indicate their preliminary views as to the salient points and questions involved.[16] The President endeavors to ensure that all questions raised are discussed and that each judge makes known his impressions in regard to them. Time is then allowed for the preparation, translation, circulation,[17] and study of individual written notes in which each of the judges expresses his personal views.[18] Each judge must prepare such a note,[19] but care is taken to emphasize that he is not definitely committed to the provisional views expressed. On the

[8] Series C, No. 55, pp. 437–8; *idem*, No. 56, pp. 460–1; *idem*, No. 74, pp. 421–2; Series D, No. 2 (2d add.), p. 216.

[9] As in the *Pázmány University Case*, Series C, No. 73, p. 764. See also, *idem*, No. 68, p. 262.

[10] But see Series C, No. 81, p. 213.

[11] See Judge Anzilotti's statement in Series D, No. 2 (3d add.), p. 915.

[12] As suggested by Judge Schücking, in Series D, No. 2 (3d add.), p. 916.

[13] In the *Pázmány University Case*, the Court declined to pass upon the nature of its jurisdiction before the hearings were closed. Series C, No. 74, pp. 776–7.

[14] In 1929, the hearings in the *Brazilian Loans Case* were begun immediately after the close of the hearings in the *Serbian Loans Case*, and apparently draft judgments in the two cases were laid before the Court simultaneously. Series E, No. 6, p. 298. See also *idem*, No. 8, p. 271.

[15] These may include assessors and possibly experts. Series D, No. 2, pp. 188–9, 203–4. The official interpreters are invariably included. Series D, No. 2 (add.), p. 232; Series E, No. 3, p. 215.

[16] There has been some disposition to say that the preliminary discussion is not a part of the deliberations properly so-called. Series E, No. 6, p. 298.

[17] All the notes are circulated among the judges simultaneously.

[18] Two series of notes were presented in the *Chorzów Case*. *Idem*, No. 5, p. 259.

[19] But see Series D, No. 2 (2d add.), p. 238–9.

basis of these notes, the President prepares a plan of discussion, a *schema*, for the next phase of the deliberations, listing the points and stating the questions which were raised in the notes; [20] but this plan may be modified by the Court, and any judge may propose additional points or questions to be considered. In the general discussion which follows, votes are recorded on each of the questions involved in a case. Article 30 (4) of the 1936 Rules provides that "any judge may request that a question which is to be voted upon shall be drawn up in precise terms in both the official languages and distributed to the Court." On the basis of these votes two judges are elected by the Court by secret ballot to serve with the President as a drafting committee.[21] When the draft judgment or opinion [22] prepared by the drafting committee is circulated, any judge may propose amendments in writing for the consideration of the drafting committee. After a discussion of the draft, a text is adopted on first reading; individual opinions are circulated before the second reading of the text is begun. The adoption of the text on second reading is the "culminating act of the deliberations," and the text is then final,[23] though the power to modify the text of a judgment or opinion rests with the Court until it is read in open Court. Where there are two versions of a text in different languages, both are adopted by the Court.

The method of conducting the Court's deliberations has been evolved after much discussion and considerable experimentation.[24] The system of written notes was "a stage in a progressive development"; [25] on a few occasions such notes have been dispensed with. In the beginning a *rapporteur* was appointed instead of a drafting committee.[26] Frequent criticism of the details of the procedure is made by the judges themselves, and it must be admitted that the procedure as a whole is time-consuming. Yet it gains in thoroughness precisely because it is not expeditious, though changes might have to be made if the cases before the Court should become more numerous. It has the merit of producing in most cases a fair consensus of views among men of widely differing training and traditions.

[20] See Series D, No. 2 (2d add.), p. 249.

[21] Service on the drafting committee is obligatory for the judges elected; judges of the nationality of the parties are in practice excluded from election to the drafting committee. Series D, No. 2 (3d add.), p. 812; Series E, No. 8, p. 269. Under Article 3 (1) of the Instructions of 1938, the Registrar assists in the work of the drafting committee.

[22] The general procedure may also be applied to orders. Series E, No. 14, p. 158.

[23] Up to this time, a judge may change his opinion on any point, despite his previous voting. Series E, No. 2, p. 172; Series E, No. 14, p. 158.

[24] Series E, No. 2, pp. 170–2; *idem*, No. 4, p. 290.

[25] Series D, No. 2 (2d add.), p. 223. [26] Series E, No. 2, p. 170.

In the *Free Zones Case*, the French-Swiss special agreement provided that upon the conclusion of the deliberations on the question submitted the Court should, before pronouncing any decision, accord to the parties a reasonable time to settle between themselves the new regime to be applied in districts to which the question related; and annexed notes provided that no objection would be raised on either side to the communication by the Court to the agents, unofficially and in each other's presence, of any indications which might appear desirable as to the result of the deliberations.[27] While this was thought to call for a "strictly exceptional" course of action, the Court gave effect to the desire expressed by the parties by embodying the results of its deliberations in the grounds of an order by which it accorded to the parties a period of time for reaching an agreement on certain questions; but relying on Article 54 of the Statute it refused to give an "unofficial" character to that part of the order.[28]

§529. Voting during the Deliberations. Article 55 of the Statute provides that "all questions shall be decided by a majority of the judges present"; the English version adds "at the hearing," but no equivalent for this phrase appears in the French version and this limitation is not respected in practice. Article 30 (5) of the 1936 Rules provides that "the decision of the Court shall be based upon the conclusions adopted after final discussion by a majority of the judges voting in an order inverse to the order" of precedence. A judge may not abstain from participating in the final vote on a judgment or opinion, and he must vote on the text as a whole.[29] A judge who was in the minority in a particular vote is not compelled to subordinate his personal view to that of the majority in the later voting, though the practice may have varied on this point.[30] In the event of an equality of votes, the President has a casting vote; only in the *Lotus Case* has a judgment been adopted as a result of such a vote,[31] but the President's casting vote has frequently been given in the course of the deliberations.[32]

[27] Series C, No. 17–I, pp. 492, 494–5.
[28] Series A, No. 22, pp. 12–3. See also Series E, No. 6, p. 295.
[29] Series D, No. 2 (3d add.), p. 813; Series E, No. 9, p. 174. See also Minutes of the 1929 Committee of Jurists, p. 65.
[30] At one time it was proposed that the Court should adopt the principle of a Polish law of October 27, 1932, which provides (Article 82) that a judge whose opinion on a given point has been rejected by a previous vote is bound to take part in the deliberations and votes on other points, subordinating his opinion to the decisions previously taken. *Dziennik Ustaw*, 1932, *Poz.* 806.
[31] Series A, No. 10, p. 32.
[32] Series E, No. 7, p. 298.

§530. Minutes of Private Sessions. The Statute does not deal with the minutes to be taken of the Court's deliberations, but since 1926 the Rules have provided that minutes shall record only the subject of the debates, the votes taken, the names of judges voting for and against a motion, and statements expressly made for insertions in the minutes.[33] This practice has persisted in spite of some experimentation.[34] The minutes are submitted for the approval of the Court, page by page, any judge being permitted to propose corrections;[35] they are signed by the President and Registrar, and are kept confidential.

§531. Forms Employed in Action Taken by the Court. The English version of the Statute employs five terms with reference to the forms in which the Court may cast the exercise of its judicial powers:[36] (1) judgment, (2) sentence, (3) decision, (4) order and (5) opinion. Article 39 (1) refers to "judgment" in English and *jugement* in French; Articles 56 (1), 57, 58, 60 and 61 refer to "judgment" in English and *arrêt* in French; Article 63 refers to "judgment" with *sentence* as the French equivalent; in Article 54 (2) "judgment" has no equivalent in the French version. The English term "sentence" is employed in Article 61 (5) with the French equivalent *arrêt*. "Decision" in Article 17 (2) is apposed to the French term *règlement*, but it is employed in Article 24 (1) with the French equivalent *jugement;* Articles 31 (6) and 59 employ "decision" and *décision;* Article 38 refers to "judicial decisions" and *les décisions judiciaires;* in Articles 39 (2) and 41 (2) the equivalent of "decision" is *arrêt;* the term "decision" in English has no French noun-equivalent in Articles 16, 17 (3), 24 (3), 31 (5), 36 (4), 56 (2) and 62 (1). The term "order," in French *ordonnance*, appears only in Article 48. The term "advisory opinion," in French *avis consultatif*, is employed in Articles 65 (1), 66 (1) and 67. The 1936 Rules are more systematic, consistently employing "judgment" and *arrêt;*[37] they refer also to "decisions" and *décisions*, and to "orders" and *ordonnances*, but they do not employ the English term "sentence." The process of judging or deciding is variously referred to, both in the Statute and the 1936 Rules.

The most puzzling shift in the Statute is in the use of the term "decision" (Fr., *décision*) in Article 59. The history of the drafting of this

[33] Summary minutes relating to the drafting of the Rules are regularly published in Series D.

[34] Series D, No. 2 (add.), pp. 63–5, 232; Series E, No. 8, pp. 269–70.

[35] Series D, No. 2 (3d add.), p. 813; Series E, No. 14, p. 158.

[36] The amended text of Article 13 of the Covenant of the League of Nations employs "decision" in English and *sentence* in French.

[37] This usage was established in 1922. Series D, No. 2, p. 79.

provision reveals no special reason for this usage,[38] and as Articles 56, 57 and 58, and Articles 60 and 61 refer to "judgment" (Fr., *arrêt*), the "decision" envisaged in Article 59 may be the same as judgment.[39] In the *Free Zones Case*, the Court expressed the view that Article 59 did not apply to orders.[40]

In practice the Court formulates judgments, decisions, orders and opinions, and it sometimes employs the term "resolution"; but it has not given any "sentence," *eo nomine*.

§532. Decisions and Resolutions. A decision taken by the Court may be embodied in a judgment or an order;[41] the operative part of the judgment is frequently introduced by the expression "the Court decides," and in this sense the term "decision" (Fr., *décision*) is employed in Article 30 (5) of the 1936 Rules. On a number of occasions, however, the Court has taken formal decisions *eo nomine*, and indeed it is a usual practice for it to deal with questions arising incidentally in the course of oral proceedings by formal or informal decisions; such decisions are sometimes announced in Court, and later embodied in orders.[42] In the *Eastern Greenland Case*, two formal decisions on points of procedure were read in Court;[43] in the *Czechoslovak Appeals Cases* an informal decision was announced by the President.[44] In the *German Interests in Upper Silesia Case*, a decision effecting the joinder of two proceedings was read out in Court and later annexed to the judgment;[45] but in the *Southeastern Greenland Case*, a somewhat similar joinder was effected by an order.[46] A "decision" was announced by the Court in 1939 with reference to its officers' continuing in office in the event of no general election in that year.[47] Formal and informal decisions are frequently given by the President, also.[48] Decisions by the Court or by the President relating to procedural or administrative matters are not regularly published.

[38] The provision originated in the Brussels draft by the Council. Minutes of the Council, 10th session, p. 161. See §208, *supra*.

[39] The suggestion has been made that the "decision" referred to in Article 59 is the operative part of the judgment (*le dispositif*). W. E. Beckett, in 39 *Recueil des Cours* (1932), p. 141. *Sed quaere.*

[40] Series A, No. 22, p. 13.

[41] In the *Free Zones Case*, Judge Pessôa expressed the view that a decision could be given only in an order, judgment or advisory opinion. Series A, No. 22, p. 49.

[42] Series C, No. 53, p. 189; *idem*, No. 77, p. 167.

[43] *Idem*, No. 66, pp. 2606, 2615.

[44] *Idem*, No. 73, p. 769.

[45] Series C, No. 11, pp. 9, 42; Series A, No. 7, pp. 6, 94.

[46] Series A/B, No. 48, p. 268.

[47] League of Nations Document, C. 402. M. 306. 1939. V.

[48] As in the *Memel Case*, Series C, No. 59, p. 638. See also *idem*, No. 73, p. 1417; *idem*, No. 74, p. 436; *idem*, No. 80, p. 1453.

Resolutions are more rarely adopted by the Court. By a resolution of June 16, 1925, the Court decided to inform parties as to the probable time of a hearing;[49] by a resolution of November 9, 1927, later read at a hearing, the Court invited agents to present certain explanations;[50] a resolution of July 17, 1931, embodied a decision to address a special communication to an international commission;[51] a resolution adopted on March 29, 1933, as to dispensing with oral translations at public hearings, is frequently cited;[52] a resolution of June 25, 1936 dealt with the publication of records of the hearings.[53] Some resolutions have served for the guidance of the Court itself: a resolution of February 17, 1928 dealt with the presentation of dissenting opinions,[54] and a resolution of January 30, 1931 with the convening of the Court during summer months;[55] the resolutions of February 20, 1931 and March 17, 1936 outlining the Court's practice are of great importance.[56]

§533. Orders.[57] Article 48 of the Statute empowers the Court to make orders "for the conduct of the case" (Fr., *rend des ordonnances pour la direction du procès*). A wider use for the order has been found by the Court, however; indeed, it has become the omnibus form employed for action preliminary to a final judgment or advisory opinion.[58] Articles 37, 57, 68, and 69 of the 1936 Rules provide for the employment of orders for various purposes.[59] They are more frequently employed for fixing or extending time-limits, for joinder of applications or preliminary objections, for requests for the production of evidence, for termination of proceedings, for decisions on appointment of judges *ad hoc*, and for decisions on interim protection. An order which relates to the conduct of a case may be given without the participation of judges *ad hoc*.[60] The text of the order usually states that the Court has acted "after deliberation."[61] Dissenting opinions or statements of dissent may be attached to orders.[62] In many cases orders have been issued by the President;

[49] Series C, No. 9-I, p. 30.
[50] *Idem*, No. 13-V, p. 10.
[51] *Idem*, No. 54, p. 455.
[52] *Idem*, No. 71, p 148; *idem*, No. 75, p 383.
[53] *Idem*, No. 80, p. 1402.
[54] Series E, No. 4, p. 291.
[55] *Idem*, No. 7, p. 285.
[56] Series D, No. 2 (2d add.), p. 300, Series E, No. 12, p. 196.
[57] See generally, Walter Rothholz, "*La nature juridique des ordonnances de la Cour*," 43 *Revue générale de droit international public* (1936), pp. 643–86.
[58] The practice is indicated in lists of the published orders. Series E, No. 11, pp. 95–100; No. 12, pp. 149–50; No 13, pp. 108–9; No. 14, pp. 99; No. 15, p. 83. Indexes are annexed to these lists.
[59] See Series D, No. 2 (3d add.), pp. 830–1.
[60] Series E, No. 15, p. 115.
[61] On the significance of this term, see Series E, No. 14, p. 149.
[62] Series E, No. 6, p. 295; *idem*, No. 14, pp. 150, 152. Five judges dissented from the order concerning judges *ad hoc* in the *Austro-German Customs Régime Case*. Series A/B, No. 41, p. 91. See also *idem*, No. 58, p. 179; *idem*, No. 67, p. 25.

though the terms of such orders may be varied by later action by the Court, a party has no right to appeal from the President to the Court.[63] No consistent practice has prevailed with respect to the reading of orders in open Court,[64] or with respect to their publication in Series A/B.[65] It has been said that orders "have no 'binding force' (Article 59 of the Statute) or 'final' effect (Article 60 of the Statute) in deciding the dispute";[66] yet in many cases compliance with their terms will be imperative for parties desiring to continue proceedings before the court.[67]

The employment of orders in the *Free Zones Case* in 1929 and 1930 was a "strictly exceptional" procedure of considerable significance;[68] while the operative part of these orders was chiefly devoted to the time accorded to the parties for settling certain matters by direct negotiations, the Court found it possible to give effect to a desire expressed by the parties by including in the reasons given indications as to the result of its deliberations on the principal question before it for judgment. Judge Nyholm thought the first order was "rather an interlocutory judgment," and Judge Pessôa thought that the parties were really asking for an advisory opinion.[69]

§534. Judgments.[70] The judgment is the usual form employed by the Court in adjudicating in a contentious proceeding; but Article 61 of the Statute provides that the judgment will also be employed to open proceedings for revision of a judgment, and Articles 64 and 81 of the 1936 Rules provide that the Court's decisions on requests to intervene and on requests for revision or interpretation of judgments shall take the form of judgments. All judgments are given in the name of the Court.[71] Under Article 73 of the 1936 Rules judgments given by a special Chamber or by the Chamber for Summary Procedure are "judgments rendered by the Court"; but such judgments are read at a public sitting of the Chamber and not of the Court itself. The general form and character of the judgment is fixed by Articles 56–60 of the Statute, supplemented by Articles 74–76 of the 1936 Rules. A judgment must indicate the date on

[63] Series D, No. 2, p. 67.

[64] In the *Free Zones Case*, the Court said that orders are "as a general rule read in open Court." Series A, No. 22, p. 13. Yet this was not true at the time or later. See Series D, No. 2 (3d add.), p. 831; Series E, No. 9, pp. 171–2; *idem*, No. 14, pp. 149–52.

[65] The texts of orders relating to procedure are usually published in Series C. As to the date to be given to an order, see Series D, No. 2 (3d add.), p. 571; Series E, No. 14, p. 150.

[66] Series A, No. 22, p. 13.

[67] See Series D, No. 2 (3d add.), p. 831.

[68] Series A, No. 22 and No. 24.

[69] *Idem*, No. 22, pp. 23, 48.

[70] See, generally, G. Morelli, *La Sentenza Internazionale* (1931).

[71] It was proposed in 1922 that the judgment should be given "in the name of the community of civilized nations." Series D, No. 2, pp. 266, 374. Various theories of the source of the Court's authority are discussed in Morelli, *op. cit.*, pp. 1–81.

which it is pronounced and the number of judges constituting the majority. It must contain the names of the participating judges, as well as the names of the parties and their agents. Numerous questions arise in connection with the names of the participating judges. To be included as such, a judge must "have taken part in the decision," *i.e.*, he must have been counted present at the hearings, at the deliberations and the voting, and at the public session at which the judgment is read.[72]

The judgment must be signed by the President and by the Registrar; but these signatures constitute only a form of authentication and legalization. The signature by the President does not indicate his approval of the judgment; he must sign a judgment though he votes against its adoption,[73] and though he expresses a dissenting opinion.[74] When the President is replaced, the judgment is signed by the acting or officiating President.[75] The judgment must be read in open court, after due notice has been given to the parties' agents, and it is regarded as taking effect on the day of the reading. One signed and sealed "original copy" of the judgment is communicated to the parties on the occasion of its being read in open court,[76] and one such copy is kept in the archives of the court. Copies are also sent to each State entitled to appear before the Court.

The judgment consists of several parts, a summary of the proceedings and the submissions of the parties, a statement of the facts,[77] the reasons in point of law (Fr., *les motifs de droit*), and lastly the operative provisions (Fr., *le dispositif*). The "reasons" given in the judgment have not the "binding force" of the operative part; every reason does not constitute a decision, but as the Court said of judgments generally in the *Polish Postal Service Case*, all parts of a judgment which concern the points in dispute must be taken into account in construing the operative part.[78] The terms of the operative part (*le dispositif*) are always carefully chosen. It is usually a declaration as to the legal obligations of the parties, a "formulation of what the law is in the case in question," rather than a command addressed to the parties; yet in several cases a definite time

[72] See §398, *supra*.

[73] Series D, No. 2 (add.), p. 205.

[74] See Series B, No. 18, p. 17; Series A/B, No. 41, pp. 53–4; *idem*, No. 45, p. 88; *idem*, No. 64, p. 23.

[75] *Idem*, No. 47, p. 253; *idem*, No. 49, p. 338; *idem*, No. 63, p. 89.

[76] Series D, No. 2 (3d add.), p. 831. In addition to the authenticated text, fifteen printed copies are sent to each party. Series C, No. 85, p. 1367; *idem*, No. 86, p. 731

[77] The omission of the usual statement of facts in the judgment in the *Phosphates Case* did not pass without criticism. Series A/B, No. 74, p. 35.

[78] Series B, No. 11, pp. 29–30. In the *Chorzów Case*, Judge Anzilotti expressed the view that "it is the operative part [of the judgment] which contains the Court's binding decision." Series A, No. 13, p. 24.

has been set for a party's compliance with the terms of a judgment.[79] In most cases, the Court does not direct the parties to act or to refrain from acting; instead it declares what they are by law bound to do or to refrain from doing, or pronounces upon submissions which have been presented. If a case is under a special agreement, the Court endeavors in drafting the *dispositif* to "keep as closely as possible to the terms used by the parties themselves in the special agreement." [80] The Court has power to give a declaratory judgment properly so-called,[81] and conceivably, it might also give a judgment by consent; [82] but it will not "give a judgment which would be dependent for its validity on the subsequent approval of the parties," [83] or "which either of the parties may render inoperative." [84] Yet after a judgment has been given the parties are "free to dispose of their legal rights," and by such disposition they may cancel the obligations which the judgment declares to exist.

§535. Dissenting and Concurring Opinions.[85] Article 57 of the Statute provides that "dissenting judges are entitled to deliver a separate opinion" (Fr., *les dissidents ont le droit d'y joindre l'exposé de leur opinion individuelle*). Article 74 of the 1936 Rules provides that dissenting judges may attach to the judgment "either an exposition of their individual opinion or a statement of their dissent." [86] There is no requirement that the name of a dissenting judge be disclosed,[87] but the fact of the dissent will be indicated by the number of the judges constituting the majority as contained in the judgment.[88] Dissenting opinions may be entitled "individual" or "separate" opinions, or "declarations" or "observations." Article 84 of the 1936 Rules provides that dissenting opinions

[79] In the *Wimbledon Case*, Series A, No. 1, p. 33; and in the *Free Zones Case*, Series A/B, No. 46, p. 172.

[80] Series A, No. 20, p. 47.

[81] *Idem*, No. 7, p. 19; *idem*, No. 13, p. 20.

[82] *Idem*, No. 24, p. 14; Series D, No. 2, p. 154; Series D, No. 2 (add.), pp. 168–71; Series E, No. 3, p. 200.

[83] Series A/B, No. 46, p. 161.

[84] Series A, No. 24, p. 14. The special agreement in the *Chinn Case* provided that before fixing the amount of any reparation which might be payable, the Court was requested "to indicate the principles upon which such reparation shall be calculated," and "to determine the procedure whereby the said amount shall be ascertained" if within a time-limit to be fixed the parties had not agreed on the sum to be paid. Series C, No. 75, p. 10.

[85] See, generally, Toffin, *La Dissidence à la Cour* (1937).

[86] In the earlier years, dissenting opinions were sometimes attached to the minutes of the private meeting at which the final vote was taken, no public record of the dissent being made. Series E, No. 3, p. 217. Article 31 of the 1926 Rules put an end to this practice.

[87] Four judges voted against the adoption of the opinion in the *Danzig and International Labor Organization Case*, but only three of the dissenting judges were named. Series B, No. 18, pp. 16–7.

[88] The opinion has sometimes been expressed that secrecy of the deliberations is violated by publishing this number. See Series D, No. 2 (add.), p. 223.

or statements of dissent may be attached to advisory opinions; in practice they may also be attached to orders.[89] Several judges may join in a dissenting opinion.

A dissenting opinion should be "an exposition of the views of the writer" with reference to the issues presented to the Court, rather than a criticism of the judgment or opinion of the Court.[90] Yet it cannot be said that this conception has been consistently followed in practice. All the judges should be "acquainted with dissenting opinions" before the final vote on the text of a proposed judgment or opinion at the close of the second reading; for this reason, the requirement was laid down in the Court's resolutions of February 17, 1928 and March 17, 1936, that dissenting opinions should be circulated among the judges before the second reading of the draft judgment or opinion is begun.[91]

The Statute does not seem to envisage concurring opinions, though Article 57 refers to dissents from a whole or a part of the judgment. Separate concurring opinions are frequently given, however, sometimes under the title "observations," [92] and the practice is confirmed by the Court's resolution of March 17, 1936.

Separate opinions were usually read in Court during the earlier years; the President continues to ask the authors if they desire to follow that course, but in the later years the opinions have not been read out.

§536. Award of Costs. Article 64 of the Statute provides that "unless otherwise decided by the Court, each party shall bear its own costs." [93] Article 77 of the 1936 Rules adds that "the party in whose favor an order for the payment of the costs has been made may present his bill of costs after judgment has been delivered." [94] As no decision has been taken by the Court to deviate from the general rule laid down in Article 64 of the Statute, these texts have not been supplemented by practice.[95] In several cases, a party asked that the opposing party be ordered to pay its costs, but the Court declined to do so; [96] indeed, it has shown a general reluc-

[89] As in the *Austro-German Customs Régime Case* Series A/B, No 41, p 91. In an earlier period this practice was deemed "exceptional" Series E, No 7, p 297. See also *idem*, No 14, p. 152.

[90] Series E, No. 4, p. 291; Series B, No. 18, p. 18.

[91] Series E, No. 4, p. 291; *idem*, No. 12, p. 197.

[92] As in Series B, No. 14, pp. 71, 80; Series A/B, No. 53, p. 96.

[93] "Costs," in this sense, are to be distinguished from the contributions towards the expenses of the Court which may be held to be payable under Article 35 (3) of the Statute.

[94] This text dates from 1926. Article 56 of the 1922 Rules provided that "before the oral proceedings are concluded, each party may present his bill of costs."

[95] See the discussion in Series D, No. 2 (add.), pp. 146–8; Series D, No. 2 (3d add.), pp. 272–9.

[96] *Eastern Greenland Case*, Series A/B, No. 53, p. 74; *Pajzs Case*, Series A/B, No. 68, p. 65.

tance in this matter. Article 64 of the Statute may be inapplicable in advisory proceedings.[97]

In the *Wimbledon Case* in 1923, the operative part of the judgment included, quite unnecessarily, the statement that "each party shall bear its own costs." [98] In the *Chorzów Case* in 1928, the order instituting an expert enquiry provided that each party should pay the fees (Fr., *honoraires*) and expenses of the assessor appointed by it, and that "all other fees, costs and expenses, including secretariat and establishment expenses, as also expenses for the services of technical staff . . . shall be advanced by the Court and refunded by the parties in the proportion to be fixed by the Court in accordance with Article 64 of the Statute"; each of the parties was invited to deposit with the Registrar 25,000 florins on account towards the expenses.[99]

§537. Interpretation of Judgments. The interpretation of a judgment will be made by the full Court if it gave the judgment to be interpreted,[1] or by the Chamber which gave such judgment. A request for interpretation may be made by any party by application, or by all the parties by special agreement; and it may be made at any time.[2] Under Article 81 of the 1936 Rules, the interpretation is to be given in the form of a judgment.

Two requests have been made for the interpretation of judgments.[3] In 1924, the Greek Government requested an interpretation of a judgment given by the Chamber for Summary Procedure in the *Treaty of Neuilly Case;* the letter embodying the request [4] was communicated to the other party, and as the latter made no objection, the Chamber rested its jurisdiction on the agreement between the parties. No oral proceedings were instituted. The Chamber "declared" that the interpretation could not be granted, however, on the ground that an interpretation of a judgment "cannot go beyond the limits of that judgment itself." [5] In 1927,

[97] In 1923 the Court approved the reimbursement to Germany of certain expenses incurred for interpretation and verbatim reports in connection with two advisory opinions. Series E, No. 3, p. 221.

[98] Series A, No. 1, p. 33.

[99] Series A, No. 17, pp. 102–3. Such deposits were made, and after the expenses were paid the balance was refunded to the parties equally. Series C, No. 16–II, pp. 58–64. *Quaere*, as to the applicability of Article 64 in this case.

[1] A provision in the earlier Rules for applying Article 13 (3) of the Statute was omitted in 1936. Series D, No. 2 (3d add.), pp. 334, 780.

[2] *Ibid.*, p. 334.

[3] The second *Lighthouses Case*, in 1937, dealt with the application, rather than the interpretation, of a *décision de principe* given in 1934.

[4] The original letter making the request was considered to be insufficient, and at the request of the Court it was supplemented by a second letter. Series C, No. 6 (additional), pp. 13–5, 21.

[5] Series A, No. 4, p. 7.

the German Government filed an application asking for an interpretation of two judgments, Nos. 7 and 8, given by the Court in 1926 and 1927. The Polish Government filed observations, in which it contended that a basis for applying Article 60 of the Statute did not exist. After some further proceedings, written and oral, the Court gave an interpretation of its judgment No. 7;[6] in reply to the Polish contention, it stated that before an interpretation can be given, a dispute must exist as to the meaning and scope of a judgment, but that the manifestation of the dispute in a specific manner is not required. The object of the provision in Article 60 as to interpretation was "to enable the Court to make quite clear the points which had been settled with binding force in a judgment," and it includes the question "whether a particular point has or has not been decided with binding force."[7] In giving the interpretation the Court is not "bound by formulae chosen by the parties," but will take an "unhampered decision." It was stated that "the interpretation adds nothing to the decision," and only has "binding force within the limits of what was decided in the judgment construed."[8] In giving an interpretation, the Court considers no facts other than those considered in the judgment under interpretation.

§538. Revision of Judgments. Article 61 of the Statute provides that the Court may require compliance with a judgment as a condition precedent to opening a proceeding for its revision.[9] After a judgment opening a proceeding for revision, the further procedure should follow the usual course in contentious proceedings,[10] but Article 78 of the 1936 Rules is not explicit to this effect. A revision will be effected by a second judgment. No request for revision has been made.[11]

§539. Effect of Judgments.[12] Under Article 59 of the Statute, the judgment of the Court, or the "decision" embodied in it, "has no binding force except between the parties and in respect of that particular case"

[6] *Idem*, No. 13.

[7] In 1935, the Registrar deduced that "an interpretation might relate not only to the operative part of the judgment, but also to those portions of the grounds which constituted the essential basis of the operative provisions." Series D, No. 2 (3d add.), p. 335. But see Judge Anzilotti's dissent, Series A, No. 13, p. 24.

[8] See Series A/B, No. 68, p. 88.

[9] The French version of Article 61 of the Statute is clearer than the English version on this point.

[10] On the possibility of a preliminary objection in such a case, see Series D, No. 2 (3d add.), p. 335.

[11] In dealing with a decision by a Conference of Ambassadors in the *St. Naoum Case*, the Court seems to have been guided by an analogy to Article 61 of the Statute. Series B, No. 9, pp. 21–2.

[12] See, generally, Limbourg, "*L'autorité de chose jugée des décisions des judictions internationales*," 30 *Recueil des Cours* (1929), pp. 523–615.

(Fr., *n'est obligatoire que pour les parties en litige et dans le cas qui a été décide*). This is first of all an affirmation of the binding force of the judgment as between the parties, but only in respect of the particular case; such force attaches to the operative part of the judgment, read in the light of the reasons given by the Court, but it does not attach to the reasons given independently of their connection with the operative part. "All the parts of a judgment concerning the points in dispute explain and complete each other and are to be taken into account in order to determine the precise meaning and scope of the operative portion." [13] Secondly, Article 59 restricts the binding force of a judgment to the parties to a case, and excludes any possibility that the judgment may have binding force as to States not parties; this principle is implicit in Article 63,[14] also, yet paradoxically, Article 62 opens with the phrase "should a State consider that it has an interest of a legal nature which may be affected by the decision of a case" (Fr., *lorsqu'un État estime que dans un différend un interêt d'ordre juridique est pour lui en cause*). The provision in Article 60 that "the judgment is final and without appeal," confirms the first purpose of Article 59; it prevents any reopening of the proceeding in which a judgment has been given, except within the limits set by Article 60 for interpretation and by Article 61 for revision. Taken together, Articles 59 and 60 assure that once the Court has given a judgment, the matter adjudged is to remain *res judicata*, i.e., "definitive and obligatory." [15] Judge Anzilotti viewed Article 60 as assuring that a judgment would have "the formal value of *res judicata*," and Article 59 as determining "the material limits of the *res judicata*." [16] In the *German Interests in Upper Silesia Case*, the Court said that the object of Article 59 was "simply to prevent legal principles accepted by the Court in a particular case from being binding upon other States or in other disputes"; [17] but this seems to explain the provision only in part.

§540. Advisory Opinions. A decision whether or not a request for an advisory opinion relates to a dispute is usually taken by the Court informally,[18] though incidental reference to the decision may be made in an order or in the opinion itself. Whatever the decision, however, the

[13] Series B, No. 11, p. 30.

[14] Article 63 provides that, if a State exercises the right to intervene there provided for, "the construction given by the judgment will be equally binding upon it"; one may conclude *a contrario* that the construction is not to be binding upon a State which does not exercise the right. Article 59 therefore states explicitly what Article 63 implicitly admits. Records of First Assembly, Committees, I, pp. 477–8.

[15] Series A/B, No. 78, p. 175.

[16] Series A, No. 13, p. 23.

[17] *Idem*, No. 7, p. 19.

[18] As in the *Caphandaris-Molloff Agreement Case*. Series A/B, No. 45, p. 72.

form of the opinion will follow very closely that of a judgment. In the *Eastern Carelia Case*, the refusal to give an opinion was given much the same form as an opinion.[19] The opinion is delivered (Fr., *prononcé*) in open Court, after notice to the Secretary General of the League of Nations and to representatives of the States and organizations interested. A signed and sealed "original copy" is sent to the Secretary General of the League of Nations for deposit in the archives of the Secretariat, and certified copies are sent to States entitled to appear before the Court,[20] as well as to States and organizations concerned.[21]

§541. Languages Employed by the Court. Only the Court's official languages, French and English, are employed in its judgments, orders or opinions. If the parties agree that the case shall be conducted in one of these languages, Article 39 of the Statute requires a judgment to be in that language.[22] In such case, the text will be accompanied by a translation into the other official language; the final clauses of the judgment do not always refer to the existence of the translation.[23] As it is not always approved by the Court,[24] the translation is not to be relied upon in construing the judgment. If the parties have not agreed that the case shall be conducted in one of the official languages, the judgment must be in French and English, *i.e.*, the text will consist of two versions; the Court will designate one version as authoritative, and for this purpose it takes into account the language used in the proceedings and that in which the judgment was drafted. Both versions are adopted by the Court, and though one is authoritative the other may be resorted to in construing the judgment.[25]

The Statute lays down no rule as to the language to be used in advisory opinions, but Article 39 (2) is applied by analogy.[26] The opinions are always in a text consisting of two versions, of which one is delcared to be

[19] It was published as "No. 5" in the collection of Advisory Opinions. Series B, No. 5.
[20] Series E, No. 14, p. 31. *Cf.*, Series D, No. 2 (3d add.), p. 705.
[21] See §477, *supra*.
[22] In the *Lotus Case*, the *Brazilian Loans Case* and the *Castellorizo Case*, the special agreement provided that the judgment should be in French; but the language to be used in a judgment depends on the Statute and not on a provision in the special agreement.
[23] Such reference was made in the *Lotus Case*, Series A, No. 10, p. 32; and in the *Brazilian Loans Case*, *idem*, No. 21, p. 126. The reference was not made in the *Lighthouses Cases*, Series A/B, No. 62, p. 29, and *idem*, No. 71, p. 106; in the *Meuse Case*, *idem*, No. 70, p. 33; or in the *Electricity Company Case*, *idem*, No. 77, p. 84.
[24] Series E, No. 4, p. 278; *idem*, No. 6, pp. 288–9; *idem*, No. 14, pp. 136–8; *idem*, No. 15, p. 113.
[25] When a judgment is read in open Court, the authoritative version is read by the President as a general rule, but the operative part is usually read out by the Registrar in the other of the official languages also.
[26] Series C, No. 76, p. 110.

authoritative. Similarly, orders are usually promulgated in two versions, with indications that one is authoritative; in a few cases the order fails to refer to the languages in which the versions appear.[27]

Equality between the two official languages does not prevail in practice. In their agreements the parties have chosen French more often than English as the language of the case; and where no agreement existed they have more often employed French. The Court, too, has more frequently chosen French as the authoritative language of judgments and orders,[28] but the two languages have been almost equally used in advisory opinions.

§542. Publication of Judgments, Opinions and Orders. The earlier Rules provided for the publication of judgments and of advisory opinions in separate collections, but as the 1931 Rules provided for "a collection of the judgments, orders and advisory opinions," Series A and Series B of the Court's publications were consolidated into Series A/B in 1931. Article 22 of the 1936 Rules provides that "a collection of the judgments and advisory opinions of the Court, as also of such orders as the Court may decide to include therein, shall be printed and published under the responsibility of the Registrar." For some years all judgments and advisory opinions, and those orders which are of more general interest, have been published in Series A/B; all other orders are published in Series C.[29] Summary lists of points covered in judgments, opinions and orders are usually published in Series A/B, immediately preceding the texts. Down to 1936, Article 75 of the Rules provided for the correction of errors due to slips or accidental omissions,[30] but this was omitted from the 1936 Rules.[31]

Prior to the delivery of a judgment or advisory opinion, every precaution is taken to safeguard its secrecy. Sealed copies of advisory opinions are sent to the Secretary General of the League of Nations in time to be in his hands when the opinion is read in open Court; this practice was at one time extended to judgments,[32] though in several cases an exception was made to the general practice.[33]

[27] See Series C, No. 67, pp. 4154, 4155; Series C, No. 85, pp. 1370, 1374. The orders published in Series A/B, Nos. 66 and 67 were in French, English translations being given.

[28] See Series F, No. 2, pp. 12–4; Series F, No. 3, pp. 21–2.

[29] Series D, No. 2 (3d add.), pp. 328, 514, 897–8. The Court has a standing committee for dealing with publications questions. Series E, No. 7, p. 296.

[30] Errors were corrected in the *Serbian* and *Brazilian Loans Cases*. Series C, No. 16–III, p. 6.

[31] Series D, No. 2 (3d add.), pp. 457–9.

[32] Series E, No. 6, p. 299.

[33] In the *Serbian* and *Brazilian Loans Cases*. Series C, No. 16–III, p. 831; *idem*, No. 16–IV, pp. 313–4.

§543. Execution of Judgments.[34] It is no part of the Court's task to see that its judgments are carried out, and except for the possibility of its interpreting or revising a judgment its competence with reference to a dispute is exhausted when it has delivered a judgment on the merits. It has no power to pronounce upon the failure of a party to discharge the obligations flowing from a judgment unless such failure has led to the institution of a new proceeding.[35] It cannot penalize a defaulting State in any way. Article 61 of the Statute provides that the Court may condition the opening of a proceeding for revision upon previous compliance with the terms of the judgment of which revision is sought; but the Statute does not otherwise deal with the execution of judgments.[36] In the *Wimbledon Case*, the Court refused to "award interim interest at a higher rate in the event of the judgment not being complied with at the expiration of the time fixed for compliance," stating that it could not "contemplate such a contingency."[37] In several cases, special agreements have provided for a course of action to follow a judgment of the Court.[38]

A party before the Court clearly has a legal obligation to execute a judgment. If it is a member of the League of Nations,[39] it will be bound by Article 13 (4) of the Covenant to "carry out in full good faith any award or decision[40] that may be rendered,"[41] and not to resort "to war against a Member of the League which complies therewith." Article 13 adds that "in the event of any failure to carry out such an award or decision, the Council shall propose what steps should be taken to give effect thereto."[42] In various treaties which provide for the jurisdiction of the Court, it is stated that the Court's decision shall have the "force

[34] See, generally, E. Hambro, *L'exécution des sentences internationales* (1936); G. Scelle, in 55 *Recueil des Cours* (1936), pp. 156–77.

[35] In the second *Mavrommatis Case*, the Court found it unnecessary "to consider the question whether, in certain cases, it might have jurisdiction to decide disputes concerning the non-compliance with the terms of one of its judgments." Series A, No. 11, p. 14.

[36] The only provision in the Statute which may operate *in terrorem* is the statement in Article 49 that "formal note shall be taken of any refusal" to produce documents or supply explanations.

[37] Series A, No. 1, p. 32. The statement was repeated in the *Chorzów Case*, *idem*, No. 17, p. 63.

[38] In the *Serbian Loans Case*, Series C, No. 16-III, p. 294; and in the first *Lighthouses Case*, Series C, No. 74, p. 12.

[39] Article 13 of the Covenant might become applicable to a State which is not a member, under Article 17 (1) of the Covenant.

[40] The words *or decision* were added in 1924.

[41] A somewhat similar provision is to be found in Articles 18 (1899) and 37 (1907) of the Hague Conventions on Pacific Settlement.

[42] *Cf.*, Article 5 of the Locarno Guarantee Treaty of October 16, 1925. 54 League of Nations Treaty Series, p. 289.

and effect of an award under Article 13 of the Covenant." [43] The provisions of Article 13 have not been invoked with reference to any judgment of the Court. Another international instrument which contains provisions relating to execution of the Court's judgments is the constitution of the International Labor Organization, which provides (in Article 33) that if a Member of the Organization fails to carry out within the time specified the recommendations contained in the decision of the Court, any other Member may take against that Member the measures of an economic character indicated in the decision as appropriate to the case.[44] Provisions are common in bipartite treaties, also, by which States undertake to carry out decisions of the Court.[45] In Article 7 of the Protocol between Colombia and Peru, of May 24, 1934, the parties undertook, when a judgment had been delivered by the Court, to concert means of putting it into effect, and if they failed to reach an agreement, the necessary powers were conferred upon the Court "in addition to its ordinary competence, to make effective the judgment in which it has declared one" of the parties to be in the right.[46]

Relatively few of the Court's judgments call for the performance of a specific act by one of the parties, and no case has arisen in which a State has refused to carry out such a judgment. In the *Wimbledon Case*, the judgment provided that the German Government should pay (Fr., *sera tenu à payer*) to the French Government the sum of 140,749.35 French francs within three months; within that period the German Government sought the consent of the Guarantee Committee of the Reparation Commission to make the payment, but the latter refused, its refusal being communicated to the Court by the German Government.[47] Following the Court's judgment in the *Serbian Loans Case*, the Yugoslav Government and the bondholders entered into the negotiations which had been envisaged in the special agreement between the French and Yugoslav Governments, and a convention was concluded between them.[48] Following the Court's judgment in the *Brazilian Loans Case*, the Brazilian Government announced that its loans would be serviced as the judgment provided, but difficulties were encountered in making the payments.[49]

[43] This provision in various treaties for the protection of minorities originated in Article 12 of the Polish Minorities Treaty of June 28, 1919. 1 Hudson, International Legislation, p. 291.

[44] 1 Hudson, International Legislation, pp. 242–3. See §428 (3), *supra*.

[45] *E.g.*, the Italian-Swiss Treaty of September 20, 1924. Series D, No. 6, p. 91.

[46] 164 League of Nations Treaty Series, p. 21.

[47] Series E, No. 1, pp. 167–8. The French Government was represented on the Guarantee Committee of the Reparation Commission.

[48] Series E, No. 10, pp. 92–5.

[49] Series E, No. 10, pp. 96–8.

The judgment in the *Free Zones Case* was followed by the negotiations envisaged by the parties in their declarations before the Court, and by a so-called arbitral award; the withdrawal of the French customs line took place by the day appointed by the Court.[50] Two days after the delivery of the Court's judgment in the *Eastern Greenland Case*, the Norwegian Government issued a decree revoking the declaration of occupation which the Court had declared to be "unlawful and invalid." [51]

[50] *Idem*, pp. 106–127.
[51] Norsk Lovtidende, 2^{nen} Avdeling, 1933, p. 134. See also, Series C, No. 69, p. 71.

PART VI

THE APPLICATION OF LAW BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE

CHAPTER 28

THE LAW APPLICABLE BY THE COURT

§544. Choice of Law by the Parties. The first question which arises with regard to the sources of the law to be applied by the Court relates to the power of the parties in a case to determine the law to govern that case. If a proceeding is begun under a special agreement, that instrument may set forth rules of law which the parties have agreed upon as applicable to the case, or it may provide how a particular kind of law is to be appreciated, or it may provide that a particular rule of law is not to be applied; even in a proceeding begun by application, the parties may enter into a stipulation that particular rules of law are to be applied. The history of international arbitrations affords many examples of such action by the parties with reference to *ad hoc* arbitral tribunals. An outstanding case is the American-British treaty of May 8, 1871, relating to the *Alabama Claims* arbitration which laid down substantive rules for the tribunal to apply.[1] General arbitration treaties, also, have frequently referred to the possibility of such provisions in special agreements, and they have often made the tribunal's application of international law subject to any special rules laid down in the *compromis*.[2] A similar provision is contained in Articles 18 and 28 of the Geneva General Act of 1928, and in various conventions modeled on the General Act.[3] In view of this history, it may be said to have become an accepted principle that in their search for the applicable law *ad hoc* arbitral tribunals are to be guided first of all by provisions agreed upon by the parties.

The question then arises whether the principle is applicable to a

[1] Judge van Eysinga referred to this as a "classic example" of choice of law by the parties. Series A/B, No. 63, p. 135.

See also the agreements of Great Britain–Venezuela, February 2, 1897; Bolivia–Peru, December 30, 1902; and Colombia–Peru, April 13, 1910.

[2] *E.g.*, treaties of Brazil–Chile, May 18, 1899; Argentine–Uruguay, June 8, 1899; Argentine–Paraguay, November 6, 1899; Bolivia–Peru, November 21, 1901; Argentine–Bolivia, February 3, 1902; Italy–Peru, April 18, 1905; and Brazil–Peru, December 7, 1909.

[3] *E.g.*, treaties of Greece–Yugoslavia, March 27, 1929; Belgium–Czechoslovakia, April 23, 1929; Czechoslovakia–Rumania–Yugoslavia, May 21, 1929; Austria–Norway, October 1, 1930; and Bulgaria–Denmark, December 7, 1935.

court not created *ad hoc* but existing under a constitutional instrument which determines the manner of its functioning. Must the parties take such a court as they find it, or may they lay down rules of law for it to apply? Is a permanent judicial agency to be distinguished in this respect from an *ad hoc* arbitral agency? Procedure before the Permanent Court remains to a large extent subject to the control of the parties;[4] is this true also of the substantive rules of law which the Court must apply?[5] This problem does not seem to have been discussed by the 1920 Committee of Jurists. The provision in the second paragraph of Article 38 of the Statute that the Court may "decide a case *ex aequo et bono*, if the parties agree thereto," is a clear recognition of a particular control which the parties may exercise. It may also be thought that the parties' choice of law by a provision in a special agreement or in a stipulation is covered by the reference in Article 38 to "international conventions, whether general or particular, establishing rules expressly recognized by the contesting states"; the term "conventions" is there used in an inclusive sense, yet it would seem that Article 38 was not drafted with special agreements in view, and the latter may fall outside of its scope. The Rules adopted by the Court have not dealt with the point.[6]

It is notable that most of the special agreements which have been made have not included directions as to the substantive law to be applied, and no such stipulation has been entered into in a case begun by an application. The special agreement in the *Brazilian Loans Case* provided that in its appreciation of the national law of either country which might be applicable, the Court should not be bound by the decisions of the respective national courts; and when called upon to choose between two interpretations of this text the Court felt itself bound to adopt that interpretation "which is in principle compatible with a proper appreciation of its nature and functions."[7] This seems to intimate that the control which the parties may exercise is subject to some limitations, due to the constitutional nature of the Court. Conceivably the Court might decline to exercise jurisdiction in a case in which the special agreement failed to respect those limitations;[8] but in most instances it would

[4] See §502, *supra*.

[5] Opposite views on this point are expressed by Gihl, International Legislation (1937), p. 99; Fachiri, Permanent Court of International Justice (2d ed., 1932), p. 101.

[6] But see the proposal made by Judge Nyholm in 1922. Series D, No. 2, p. 361.

[7] Series A, No. 21, p. 124.

[8] Å. Hammarskjöld expressed the view that the jurisdiction of the Court cannot be accepted by States unless at the same time they accept the Court's application of law in conformity with Article 38; and that if two States wish other law to be applied they should take their case to another tribunal. 33 *Annuaire de l'Institut de Droit International* (1927), p. 822.

probably be disposed to deal with the submissions offered by the parties on the basis of the agreed law. In the *Chinn Case*, Judge van Eysinga stated that "if, in a given case, no international law exists or if the law is uncertain, it is comprehensible that the parties, in resorting to an international tribunal, should at the same time determine the law to be applied." [9]

§545. The Court as an Organ of International Law. The Statute of the Court fails to confer upon it an expressed mandate with reference to the application of international law. This is the more remarkable because disputes relating to "any question of international law" are included as a class of disputes to which declarations made under Article 36 of the Statute may apply. The history of efforts which preceded the establishment of the Court would also have led one to expect a more definite provision in its Statute relating to the application of international law. Article 15 of the 1899 Hague Convention on Pacific Settlement declared the object of international arbitration to be the settlement of disputes "on the basis of respect for law," [10] and Article 48 provided that a tribunal of the Permanent Court of Arbitration should determine its competence in applying "the principles of international law." [11] Under Article 7 of the Prize Court Convention of 1907, that projected Court was to apply treaty provisions where possible, and in the absence of such provisions it was to apply the rules of international law, and where no generally recognized rules exist it was to decide in accordance with the general principles of justice and equity; referring to this provision in its report, the 1920 Committee of Jurists said that "there can be no question of giving such an unrestricted field to the decisions of the Court." [12] Article 14 of the Covenant, providing for a court of *international justice* competent to deal with disputes of an *international character*, would also seem to have envisaged a court applying international law.[13] But for their contemplation that the Court would be given a general compulsory jurisdiction, the draftsmen of the Statute might have been more explicit on this point in 1920.[14]

[9] Series A/B, No. 63, p. 135.

[10] This statement was repeated in Article 37 of the 1907 Convention.

[11] In Article 73 of the 1907 Convention, "principles of law" was substituted for "principles of international law."

[12] Minutes of the 1920 Committee of Jurists, p. 729.

[13] M. Loder declared in 1920 that "the Covenant intended to establish the Permanent Court of International Justice to apply international law." *Idem*, p. 294. In the *Chinn Case*, Judge Schücking declared that the Court had "been set up by the Covenant as the custodian [Fr., *gardien*] of international law." Series A/B, No. 63, p. 149.

[14] Minutes of the 1920 Committee of Jurists, pp. 293–7.

This *lacuna* in the Statute does not obscure its general purpose that the Court should be an organ of international law. Nor has the Court itself entertained any doubt as to its mandate to find and to apply the law applicable to States in their relations *inter se*. In the *German Interests in Upper Silesia Case*, it referred to itself as the "organ of international law,[15] and in the *Brazilian Loans Case* as "a tribunal of international law." [16] In the *Free Zones Case*, it declared that its function was "to declare the law" and emphasized the limitations surrounding it as "a Court of justice"; [17] in the *Serbian Loans Case*, it said that its "true function" was to decide disputes between States "on the basis of international law," adding that Article 38 of the Statute contains a clear indication to this effect, and that "it is international law which governs relations between those who may be subject to its jurisdiction." [18] Most of the cases before the Court have required the interpretation of treaty provisions, a task which was said in the *Exchange of Populations Case* to "involve a question of international law." [19] The Court has so consistently held to the view that its principal task is to apply international law that, as Judge Anzilotti said in 1935, "it neither is nor can be disputed that the Court has been created to administer international law" (Fr., *pour être l'organe du droit international*).[20] Apart from the question of general competence, the Court may be asked by the parties in a particular case, as it was asked in the *Lotus Case*, to apply "the principles of international law."

In this connection the Court's conception of the universal nature of international law is of interest. Called upon in the *Lotus Case* to deal with "the principles of international law" referred to in the Lausanne Convention, it took this phrase to mean "the principles which are in force between all independent nations," and it sought the international law which "governs relations between independent States" and which "is applied between all nations belonging to the community of States." [21]

In the *Serbian Loans Case*, the Court also took the view that it may be called upon to deal "with disputes which do not require the application of international law," declaring that Article 36 of the Statute "expressly provides for this possibility," and that Article 38 does not

[15] Series A, No. 7, p. 19.
[16] *Idem*, No. 21, p. 124.
[17] Series A, No. 24, p. 15; Series A/B, No. 46, p. 138. *Cf.*, *idem*, p. 162.
[18] Series A, No. 20, pp. 19–20.
[19] Series B, No. 18, p. 17.
[20] Series A/B, No. 65, p. 61.
[21] Series A, No. 10, pp. 16–18.

exclude it; but it added that "cases in which the Court must apply international law will, no doubt, be the more frequent." [22]

§546. Finding the Law. As "a tribunal of international law," the Court has said that it is deemed to know what that law is. Yet no code of international law is at hand for its guidance, and it must therefore *find* the law to be applied. The limitations which surround this process of *finding* the law have not been set by the Statute; they are the general limitations which inhere in the judicial process. The Court is not free to cut out of whole cloth. It must make use of the available jural materials, but it may embark into new realms as those materials guide the way. Where previously established rules or principles do not suffice for a decision which it must take, it may have to lay down new rules or principles for the case in hand; if it is to serve the needs of a society of States, it must have a limited power to *create* law in some cases.[23] To this extent, legislation is an element of the judicial function. Yet where a development or extension of the law would require an elaborate legislative framework, the Court may well hesitate; other agencies may exist, or might be created, which would be better equipped to deal with such a situation.

In any case which comes before it the Court must, of course, confine itself to dealing with the issues which are raised by the parties in their submissions, and it should decide only the questions of facts or law which are involved in those issues. Once it has determined that a question of law is involved in the issues raised, however, the Court is not limited in dealing with that question, *i.e.*, in the process of *finding* the applicable law, by the divergent presentations made by the parties relating to it. It must be free to take a view of the applicable law which none of the parties has advanced. Even in the interpretation of a provision in a treaty, the Court is not bound, as it said in the *Free Zones Case*, "to choose between two or more constructions determined beforehand by the Parties, none of which may correspond to the opinion at which it may arrive"; this was referred to as "the freedom which normally appertains" to the Court.[24] Nor is it bound, in the interpretation of a judgment, "by formulae chosen by the parties." [25]

A general criticism may be made of the Court's apparent reluctance

[22] *Idem*, No. 20, pp. 19–20.

[23] The Court should not go so far as the direction given in Article 1 of the Swiss Civil Code of 1907, that a judge shall in the absence of an applicable legal disposition apply customary law, and in the absence of a custom apply the rules which he would establish if he were acting as a legislator. But *cf.*, Article 2 of the Five-Power Plan of 1920.

[24] Series A/B, No. 46, p. 138.

[25] Series A, No. 13, pp. 15–6.

to discuss principles of law even when the issues before it required their application—a reluctance more noticeable in the Court's later than in its earlier years. A proper sense of judicial caution has dictated its carefulness to avoid enunciations going beyond the issues presented, and to avoid even with respect to those issues formulations which might carry unnecessary implications. Yet in some cases more latitude might have been taken in stating principles which were being applied,[26] and the Court's hesitance in this respect has made some of its judgments and opinions both tedious and arid. In justification it may be added, however, that the bulk of the cases before the Court have turned either on jurisdictional points, or on the interpretation of treaty texts.

Though it possesses a large measure of freedom in its search for the international law applicable in a case, the Court must be guided by the directions in Article 38 as to the sources upon which it will draw.

§547. Sources of Law to Be Applied. Article 38 of the Statute sets out four categories of sources or materials which the Court is directed to apply: (1) international conventions; (2) international custom; (3) general principles of law; (4) judicial decisions and the teachings of publicists. As the text was proposed by the 1920 Committee of Jurists, the application of these categories was to be *in a successive order;* the deletion of this phrase would seem to have had little effect on the meaning of the direction.[27] If an applicable rule has been laid down by the parties in a convention, it will be controlling and the Court may not need to look further; if that is not the case, a sufficient guide may be found in the customary law; if resort to general principles of law is necessary, however, the Court would naturally want to know at the same time how these principles have been applied by courts and how they have been evaluated in juristic writings. Yet Article 38 did not establish a rigid hierarchy. In applying a provision in a convention, the Court may have to take into account the customary law prevailing when the convention was entered into, or general principles of law, as well as judicial precedents. A distinction may also have to be drawn between the categories listed, for they are not on an equal footing; while it is possible to *apply* a conventional or a customary rule of law, it seems more proper to say that general principles of law, judicial precedents, and juristic writings

[26] The Court is not inhibited by any provision similar to that in Article 5 of the French Civil Code, which forbids judges to lay down general principles.

[27] See Minutes of the 1920 Committee of Jurists, pp. 337, 338. Judge de Visscher has expressed the opinion that Article 38 establishes a successive order for the utilization of sources. 3 *Recueil d'études en l'honneur de F. Gény* (1936), pp. 396–7. *Cf.*, §187, *supra.*

have only the nature of sources from which an applicable rule may be deduced.[28]

Prior to 1920, agreements relating to the arbitration of particular disputes frequently set out in general terms the sources of the law to be applied. "Justice and equity," [29] "justice, equity and the law of nations," [30] and "treaties and general principles of international law," were favored formulations; and a series of nineteenth-century treaties referred to "principles of international law, and the practice and jurisprudence established by analogous modern tribunals of highest authority and prestige." [31] General treaties, and those concluded under the inspiration of the Hague Peace Conferences, were often silent on this point, however. If the text of Article 38 did not represent a great departure, except perhaps in the reference to general principles of law,[32] it supplied a ready enumeration which seemed to serve a need, and it has been adopted in whole or in part by several international tribunals [33] and in a number of subsequent treaties.[34] It is also incorporated by reference in Articles 18 and 28 of the Geneva General Act, and in a number of bipartite conventions inspired by the General Act.[35]

[28] Minutes of the 1920 Committee of Jurists, p. 338. In the *Danzig Decrees Case*, Judge Anzilotti said that Article 38 "only mentions international treaties or custom and the elements subsidiary to these two sources, to be applied if both of them are lacking." Series A/B, No. 65, p. 61.

[29] *E.g.*, in United States treaties with Great Britain, November 19, 1794; with Spain, October 27, 1795; and with New Granada, September 10, 1857.

[30] *E.g.*, treaty of United States–Venezuela, January 19, 1893.

[31] *E.g.*, treaties of France–Chile, November 2, 1882, October 19, 1894; Chile–Italy, December 7, 1882; Great Britain–Chile, January 4, 1883, September 26, 1893; Germany–Chile, August 23, 1884; Great Britain–Nicaragua, November 1, 1895; Italy–Peru, November 25, 1899.

For formulations by American and British courts, see Scott, Project of a Permanent Court of International Justice, pp. 107–11.

[32] On this point, however, Article 37 of a code of arbitration adopted by the Sixth International Peace Congress at Antwerp in 1894 is of interest: in default of stipulations in the *compromis* or a later convention, it provided that arbitrators should base their decision firstly upon the special international law formulated in treaties between the contracting nations, secondly upon the general international law formulated or in use by civilized nations, and thirdly upon the public or private law of the contesting nations or of other civilized nations. *Bulletin Officiel du VI^me^ Congrès International de la Paix*, 1895, pp. 112–3. The British delegation at the Hague Peace Conference of 1907 had proposed that in the absence of conventional law the International Prize Court should decide in conformity with the "general opinion" where all civilized nations are in agreement on a point of law. 2 *Actes et Documents*, pp. 1076–7.

[33] *E.g.*, the American–German Mixed Claims Commission, Report of Decisions, 1925, p. 7; Portugal–Germany, *Maziua* and *Naulilaa Cases*, 8 *Recueil des Tribunaux Arbitraux Mixtes*, pp. 409, 413.

[34] *E.g.*, treaties of Czechoslovakia–Poland, April 23, 1925; Finland–Norway, February 3, 1926; Poland–Yugoslavia, September 18, 1926; Norway–Poland, December 9, 1929; Netherlands–Japan, April 19, 1933; Turkey–Yugoslavia, November 27, 1933; and Irak–Iran, July 24, 1937. *Cf.*, Germany–Netherlands, May 20, 1926; and Denmark–Germany, June 2, 1926.

[35] *Cf.*, Article 20 of the Italian-Norwegian Convention of June 17, 1929.

§548. International Conventions. Article 38 of the Statute provides that the Court shall apply "international conventions, whether general or particular, establishing rules expressly recognized by the contesting States." The term *conventions* is used here, as in Article 63, in a general and inclusive sense.[36] It would seem to apply to any treaty, convention, protocol, or agreement, regardless of its title or form.[37] A convention may be *general* either because of the number of parties to it, or because of the character of its contents; it may be *particular* because of the limited number of parties, or because of the limited character of its subject-matter. A special agreement (*compromis*) or a stipulation between contesting parties may be in this sense a *particular convention*. The phrase *general or particular* seems to add little to the meaning in this connection.

The phrase *establishing rules expressly recognized by the contesting States* seems to place two limitations upon the conventions which the Court is to apply: a limitation based upon the subject-matter of the instrument, and a limitation based upon the identity of the parties to the instrument. Yet it may be doubted whether the phrase creates either of these limitations. No precise distinction can be drawn between rule-establishing and other conventions. Any instrument which creates obligations for the States which are parties to it, which regulates the conduct of those States in any way, may be said to establish rules (Fr., *règles*) in a broad sense of the term. The rule-form may not be given to the obligation; it may be stated as a principle rather than as a rule, yet no reason exists for a limitation on the Court's application of the instrument for this reason. It was certainly not the purpose to restrict the Court to the application of what are sometimes called law-making treaties or conventions, like the Declaration of Paris of 1856 concerning maritime law. Moreover, a State may have recognized a rule established by a convention though it is not a party to the convention. It has frequently occurred that States have admitted formulations made by other States to be proper statements of the law and as such binding for themselves. In the course of years the classification of diplomatic agents embodied in the Protocol of Vienna of March 9, 1815 was accepted by most States without

[36] Article 36 of the Statute employs the terms *treaty*, and *treaties and conventions;* Article 37 employs *treaty or convention.*

[37] In the *Austrian-German Customs Régime Case*, the Court said that obligatory international engagements "may be taken in the form of treaties, conventions, declarations, agreements, protocols, or exchange of notes." Series A/B, No. 41, p. 47. In the *Eastern Greenland Case*, it recognized an oral statement as a binding undertaking. *Idem*, No. 53, p. 73.

any formal accession, and the rules thus established may now be said to have been recognized by many States not parties to the Protocol. This result may be reached without saying that the rules have been incorporated into customary law,[38] and it seems to be covered by the phrase in Article 38 (1). To the extent that the rules laid down in an instrument must have been recognized by the contesting States before the Court, that phrase is limitative, but not otherwise.[39]

§549. International Custom. Article 38 of the Statute also directs the Court to apply "international custom, as evidence of a general practice accepted as law." This might have been cast more clearly as a provision for the Court's applying customary international law. It seems to emphasize the general law, as opposed to the special law embodied in conventions accepted by the parties.[40] It is not possible for the Court to apply a custom; instead it can observe the general practice of States, and if it finds that such practice is due to a conception that the law requires it, it may declare that a rule of law exists and proceed to apply it. The elements necessary are the concordant and recurring action of numerous States in the domain of international relations, the conception in each case that such action was enjoined by law, and the failure of other States to challenge that conception at the time. The appreciation of these elements is not a simple matter, and it is a task for persons trained in law.

In the *Lotus Case*, the Court had occasion to refer to customary law when it was called upon to say whether action taken by Turkey was contrary to a clause in the Lausanne Convention providing that questions of jurisdiction were to be governed by "the principles of international law." The French agent contended that the fact that collision cases were rarely encountered in the practice of national criminal courts proved a tacit consent of States that prosecutions should be confined to courts of the State whose flag was flown. The Court did not confine itself to a consideration of the arguments put forward, but "included in its researches all precedents, teachings and facts to which it had access and which might possibly have revealed the existence" of principles of

[38] The repeated formulation of a principle over a number of years in numerous international instruments may lead to a conclusion that the principle forms a part of the common international law.

[39] Some of the formulations which have been inspired by Article 38 have slightly different effect. The German-Swiss treaty of December 3, 1921, provides for the application of conventions in force between the parties, whether general or special, and the principles of law arising therefrom. 12 League of Nations Treaty Series, p. 271. The Japanese-Netherlands treaty of April 19, 1933 is to the same effect. 163 *idem*, p. 351.

[40] One of the preliminary drafts of this provision referred to custom accepted by the States parties to the dispute. Minutes of the 1920 Committee of Jurists, p. 351.

law. It sought "a custom having the force of law," a "usage generally accepted as expressing principles of law," with a proof that "States recognize themselves to be under an obligation." It was unwilling to speak of an international custom unless it should be shown that States' abstention from instituting criminal proceedings was due to "their being conscious of having a duty to abstain," and it emphasized the absence of protest by States against national legislation opposed to the French contentions.[41]

§550. General Principles of Law.[42] Article 38 of the Statute also directs the Court to apply "the general principles of law recognized by civilized nations." As all nations are civilized, as "law implies civilization," [43] the reference to "civilized nations" can serve only to exclude from consideration primitive systems of law.[44] Members of the 1920 Committee of Jurists expressed varying views as to the meaning of this provision when it was drafted,[45] and the confusion was not dissipated by the Committee's report. One of its purposes may have been, under the inspiration of the national legislation of some States,[46] to prevent the

[41] Series A, No. 10, pp. 18, 21, 23, 28, 31. Judge Nyholm, dissenting, said: "The ascertainment of a rule of international law implies consequently an investigation of the way in which customs acquire consistency and thus come to be considered as constituting rules governing international relations. . . . There must have been acts of State accomplished in the domain of international relations, whilst mere municipal laws are insufficient; moreover, the foundation of a custom must be the united *will* of several and even of many States constituting a *union of wills*, or a general *consensus of opinion* among the countries which have adopted the European system of civilization, or a manifestation of *international legal ethics* which takes place through the continual recurrence of events with an *innate consciousness of their being necessary*." (Pp. 59–60.) Judge Altamira, also dissenting, said that in the process of the development of a customary rule there are often "moments in time in which the rule, implicitly discernible, has not as yet taken shape in the eyes of the world, but is so forcibly suggested by precedents that it would be rendering good service to the cause of justice and law to assist its appearance in a form in which it will have all the force rightly belonging to rules of positive law appertaining to that category." (Pp. 106–7.)

Cf., Judge Negulesco's dissent in the *Danube Commission Case*, in which he spoke of "the necessity of immemorial usage consisting both of an uninterrupted recurrence of accomplished facts in the sphere of international relations and of ideas of justice common to the participating States and based upon the mutual convictions that the recurrence of these facts is the result of a compulsory rule." Series B, No. 14, p. 105. See also *ibid.*, p. 114.

[42] See, generally, Kopelmanas in 43 *Revue générale de droit international public* (1936), pp. 285–308; Scerni, *I principi generali di diritto riconosciuti dalle nazioni civili* (1932); Verdross, in 52 *Recueil des Cours* (1935), pp. 191–251.

[43] Minutes of the 1920 Committee of Jurists, p. 335.

[44] Somewhat similar references had been made in the preamble to the Hague Conventions on Pacific Settlement, and in the preamble to the Hague Conventions on Laws of War.

[45] M. de Lapradelle took the provision as a whole to refer to custom. Lord Phillimore thought it referred to the general principles "accepted by all nations *in foro domestico*, such as certain principles of procedure, the principle of good faith, and the principle of *res judicata*," and to "maxims of law." Baron Descamps thought the provision "necessary to meet the possibility of a *non-liquet*." Minutes of the 1920 Committee of Jurists, pp. 335–338. *Cf.*, *idem*, pp. 293–7.

[46] In some States, courts are required to decide cases before them and cannot evade this responsibility because of the non-existence of applicable law. The French Civil Code (Article 4) forbids a judge to refuse to decide under pretext of the silence, obscurity, or insufficiency of the law. The Swiss Civil Code of 1907 (Article 1) requires a judge, in default of applicable code

Court's abstaining from a decision because "no positive applicable rule exists." [47] The provision serves a useful purpose in that it emphasizes the creative role to be played by the Court. It confers such a wide freedom of choice that no fixed and definite content can be assigned to the terms employed. It has been widely hailed as a refutation of the extreme positive conception of international law, and even as revolutionary; on the other hand, it has been deprecated as adding to existing confusion.[48]

Taken out of its context, the phrase "general principles of law recognized by civilized nations" would refer primarily to the general principles of international law; [49] following the provisions in Article 38 relating to international conventions and international custom, however, it must be given a different, perhaps one may say a larger, content. It empowers the Court to go outside the field in which States have expressed their will to accept certain principles of law as governing their relations *inter se*, and to draw upon principles common to various systems of municipal law or generally agreed upon among interpreters of municipal law. It authorizes use to be made of analogies found in the national law of the various States.[50] It makes possible the expansion of international law along lines forged by legal thought and legal philosophy in different parts of the world. It enjoins the Court to consult a *jus gentium* before fixing the limits of the *droit des gens*.

In the jurisprudence of the Court, this provision looms less large than in the literature which it has inspired. Whether from a sense of caution or because of the nature of the cases which have come before it, the Court has never professed to draw upon "the general principles of law recog-

provisions and customary law, to apply the rules which he would establish if he were acting as a legislator. Article 3 of the preliminary part of the Italian Civil Code of 1865 provided for resort to general principles of law when a precise disposition is lacking and analogy fails; this appears in somewhat different form in the Civil Code of 1938. *Cf.*, Article 1 of the Chinese Civil Code of 1929.

[47] Minutes of the 1920 Committee of Jurists, pp. 296, 336. A rich literature exists on this point. See especially Gihl, "*Lacunes de droit international*," 3 *Acta scandinavica juris gentium* (1932), pp. 37–64; Harle, *Die allgemeinen Entscheidungsgrundlagen des Standigen Internationalen Gerichtshofes* (1933); Lauterpacht, Function of Law in the International Community (1933), pp. 63–9.

[48] See Makowski, in 36 *Recueil des Cours* (1931), p. 358.

[49] The preliminary draft of Baron Descamps referred to "the rules of international law as recognized by the legal conscience of civilized nations." Minutes of the 1920 Committee of Jurists, p. 306.

[50] A suggestion made by Judge Kosters in 1931 led a *rapporteur* of the *Institut de Droit International* to formulate the proposition that in the absence of rules of conventional or customary law and of general principles of law, a tribunal may apply the principles of law common to the contesting States. *Annuaire de l'Institut*, 1932, pp. 303–5, 324–5. Such a principle was applied by the Supreme Court of the United States in *Wyoming* v *Colorado* (1922) 259 U. S. 419.

nized by civilized nations" in its search for the applicable law. This does not mean that the provision has not influenced the thought and action of the Court, however; in dissenting or separate opinions, individual judges have frequently referred to it. On many occasions the Court has proceeded upon "principles of international law," or the "generally accepted principles of international law," or "principles taken from general international law" (Fr., *droit international commun*), but usually without specification of the sources from which they are taken.[51] It has assumed a broad competence to apply international law, and it has not felt itself confined within the limits of a law to be derived from conventions and custom.[52] It has endeavored to give effect to what has been called the *common law* applicable to international affairs,[53] but it has drawn no distinction between common law and customary law, nor between either and general principles of law.[54] So far as the record goes, it fails to justify the view that the provision relating to general principles of law is "revolutionary."

§551. Judicial Decisions and the Teachings of Publicists. "As subsidiary means [Fr., *moyen auxiliaire*] for the determination of rules of law," the Court is also directed to apply "judicial decisions and the teachings of the most highly qualified publicists of the various nations";[55] but this direction is expressly made "subject to the provisions of Article 59" that "the decision of the Court has no binding force except between the parties and in respect of that particular case." Judicial decisions and the teachings of publicists are not rules to be applied, but sources to be resorted to for finding applicable rules. What is meant by *subsidiary* is not clear. It may be thought to mean that these sources are to be subordinated to others mentioned in the article, *i.e.*, to be regarded only when sufficient guidance cannot be found in international conventions, international custom and general principles of law; the French term *auxiliaire* seems, however, to indicate that confirmation of rules

[51] The *Société Commerciale Case* is a clear case in which the Court applied a general principle of *res judicata*. Series A/B, No. 78.

[52] The limiting dictum in the *Lotus Case*, that "the rules of law binding upon States emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law," Series A, No. 10, p. 18, cannot be said to represent the views on which the Court has proceeded in a number of cases.

[53] As suggested by Lord Phillimore in 1920. Minutes of the 1920 Committee of Jurists, p. 316.

[54] On this latter distinction, see Le Fur in 3 *Recueil d'études en l'honneur de F. Gény*, pp. 362–74; Raestad, in 4 *Acta scandinavica juris gentium* (1933), pp. 61–84.

[55] In the original Statute, the French version contained no equivalent for "of the various nations."

found to exist may be sought by referring to jurisprudence and doctrine.[56] In view of the reference to Article 59, the term *judicial decisions* must include decisions of the Court itself; it includes also decisions of other international tribunals and of national courts.[57] As to the decisions of national courts, a useful caution was given by Judge Moore in the *Lotus Case* that international tribunals "are not to treat the judgments of the courts of one State on questions of international law as binding on other States, but, while giving to such judgments the weight due to judicial expressions of the view taken in the particular country, are to follow them as authority only so far as they may be found to be in harmony with international law." [58] No standards exist for saying who are "the most highly qualified publicists of the various nations." Judge Weiss said in the *Lotus Case* that "international law is not created by an accumulation of opinions and systems; neither is its source a sum total of judgments, even if they agree with each other." [59] In the *Brazilian Loans Case*, Judge Bustamante emphasized the importance of the time in which a publicist writes, and observed that "writers of legal treatises just as much as any one else, without wanting to and without knowing it, come under the irresistible influence of their surroundings, and the requirements of the national situation are reflected in their thoughts and have a great influence on their teachings." [60]

In its judgments and opinions, the Court has frequently referred to what it had held and what it had said in earlier judgments and opinions, and within limits it has shown itself disposed to build a consistent body of case-law in its jurisprudence. On several occasions, it has referred to the decisions of other international tribunals: in the *Jaworzina Case*, the *Meerauge Case* decided by an arbitral tribunal in 1902,[61] was cited to sustain a view taken by the Court.[62] In the *Lotus Case*, reference having been made by a party to the *Costa Rica Packet Case* decided by an arbitral

[56] See Minutes of the 1920 Committee of Jurists, pp. 332–6.

[57] In 1920, the Argentine Delegation proposed a text referring to the application of "judicial decisions, as against the State in which they have been delivered, if it is a party to the dispute." Records of First Assembly, Committees, I, p. 519.

[58] Series A, No. 10, p. 74. It is sometimes suggested that decisions of municipal courts may be regarded "as evidence of international custom." Lauterpacht, Development of International Law by the Permanent Court of International Justice (1934), p. 9. As municipal courts function in the field of municipal law, they are not organs of the State acting for it in the domain of international relations, even though they may purport to apply international law.

[59] Series A, No. 10, p. 43. *Cf.*, Minutes of the 1920 Committee of Jurists, p. 336.

[60] Series A, No. 21, p. 133.

[61] 3 Martens, *Nouveau recueil général* (3d ser.), p. 71.

[62] Series B, No. 8, pp. 42–3.

tribunal in 1897,[63] it was cited by the Court but found to be distinguishable from the case in hand.[64] In the *Chorzów Case*, it was said that "in accordance with the jurisprudence of arbitral tribunals" contingent and indeterminate damage could not be taken into account, but no cases were cited.[65] In the *Polish Postal Service Case*, the award of a tribunal of the Permanent Court of Arbitration in the *Pious Fund Case*[66] was cited with approval;[67] and in the *Eastern Greenland Case*, the award of a similar tribunal in the *Palmas Island Case*[68] was cited.[69]

On the other hand, the Court has shown little disposition to concern itself with the decisions of national courts, even when they have been cited by parties. In the *Chorzów Case*, a bare reference was made to the jurisprudence of municipal courts.[70] In the *Lotus Case*, in which national decisions concerning the jurisdiction of flag-States were cited by both parties, the Court cited some of the cases, but "without pausing to consider the value to be attributed to the judgments of municipal courts in connection with the establishment of the existence of a rule of international law," it concluded that the municipal jurisprudence was too divided to give any "indication of the existence of a restrictive rule of international law";[71] the judgment of an English court in the *Franconia Case*[72] was examined, but it was said that the conception of international law upon which a majority of the judges may have proceeded was "peculiar to English jurisprudence," not "generally accepted even in common-law countries," and "abandoned in more recent English decisions" which were cited.[73] In the *Personal Work of Employers Case*, a reference was made to municipal jurisprudence on the constitutionality of legislation, but no cases were cited.[74] In its application of the rule as to exhaustion of local remedies in the *Panevezys Case*, the Court made an extended examination of the *Jeglinas Case* decided by Lithuanian Courts, but held that no "course of decisions" of the Lithuanian Courts existed to relieve against the application of the rule.[75] If it is called upon to apply the

[63] 5 Moore, International Arbitrations, p. 4948; 23 Martens, *Nouveau recueil général* (2d ser.), p. 808.
[64] Series A, No. 10, p. 26.
[65] *Idem*, No. 17, p. 57. See also *ibid.*, pp. 31, 47; *idem*, No. 9, p. 31.
[66] Scott, Hague Court Reports, p. 3.
[67] Series B, No. 11, p. 30.
[68] Scott, Hague Court Reports (2d ser.), p. 84.
[69] Series A/B, No. 53, p. 45.
[70] Series A, No. 9, p. 31.
[71] *Idem*, No. 10, pp. 28–30.
[72] *Regina* v. *Keyn* (1877) L. R. 2 Ex. Div. 63.
[73] These decisions seem not to have been cited by the parties.
[74] Series B, No. 13, p. 20.
[75] Series A/B, No. 76, pp. 19–21. The *Jeglinas Case* had been referred to as an element of the issues before the Court. Similar reference was made in the *Chorzów Case* to a decision by a Polish Court at Katowice. Series A, No. 17, pp. 33–4.

municipal law of a State, the Court may have to examine the decisions of courts of that State: in the *Serbian* and *Brazilian Loans Cases*, it referred to the "doctrine" and "jurisprudence" of French courts, but without citations.[76] In dissenting and separate opinions, decisions of national courts are cited more freely and more frequently.

The teachings of publicists are treated less favorably at the hands of the Court. No treatise or doctrinal writing has been cited by the Court. In connection with its conclusion in the *Lotus Case* that the existence of a restrictive rule of international law had not been conclusively proved, it referred to "teachings of publicists" without attempting to assess their value, but it failed to find in them any useful indication.[77] Individual judges have not been so restrained in their references to the teachings of publicists; they have not hesitated to cite living authors, and even the published works of members of the Court itself.[78]

§552. Principles of Equity.[79] As the Statute fails to provide expressly for the application of international law, so it fails to provide expressly for the Court's application of equity. In 1920, M. de Lapradelle proposed that the Court should "judge in accordance with law, justice and equity," and M. Ricci-Busatti would have included "principles of equity" in what became Article 38 of the Statute;[80] the rejection of these proposals at that time was partly due to the extent of the jurisdiction envisaged for the Court. Prior to 1920, numerous special and general arbitration treaties referred to the application of equity, the term *equity* being almost invariably coupled with *justice* or with *law*. Such references go back for many years, as indicated by a British-Netherlands *règlement* of 1654,[81] and Article 25 of the Netherlands-Portugal treaty of 1661.[82] Several outstanding multipartite instruments refer to equity: *e.g.*, Article 28 of a *règlement* adopted at the Congress of Vienna in 1815 provided for decisions by an arbitral commission *en toute justice, et avec la plus grand equité;*[83] Article 7 of the 1907 Prize Court Convention provided for that Court's applying rules of international law, and where generally recognized rules do not exist *les principes généraux de la justice et de l'equité;*

[76] *Idem*, No. 20, p. 47; *idem*, No. 21, pp. 124–5.
[77] Series A, No. 10, pp. 27, 31. [78] As in *idem*, No. 22, p. 44.
[79] See, generally, Berlia, *La portée de la clause de jugement en équité en droit des gens* (1937).
[80] Minutes of the 1920 Committee of Jurists, pp. 295, 333–5. But M. Hagerup proposed recourse to equity only if the parties agreed. *Idem*, p. 296. See also Records of First Assembly, Committees, I, pp. 385–6, 403.
[81] 6 Dumont, *Corps Universel Diplomatique*, Part II, p. 88.
[82] *Ibid.*, p. 366.
[83] 2 Martens, *Nouveau recucil général*, p. 416.

the Treaty of Versailles of 1919 provided that the Reparations Commission should "not be bound by any particular code or rules of law," but should be "guided by justice, equity and good faith"; [84] an annex to the Spitzbergen Treaty of 1920, to which many States were parties, envisaged a tribunal applying rules of international law and the general principles of justice and equity.[85] References to equity have more frequently been made in bipartite treaties: an American-British treaty of 1794 authorized a claims commission to decide according to "justice, equity and the law of nations"; in claims conventions of 1853, 1854, 1863 and 1871, the United States and Great Britain required commissioners to take oath to decide "to the best of their judgment, and according to justice and equity," and in 1910, they agreed that a tribunal should decide "in accordance with treaty rights and with principles of international law and of equity." Both the United States and Great Britain concluded treaties of similar import with other States.[86] Such provision was included, also, in treaties between various American States,[87] and in some treaties between European States.[88] Since 1920, the United States has concluded a series of arbitration treaties applying to disputes "justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or [and] equity"; and a series of treaties among Scandinavian States has provided for the arbitration of disputes not falling under Article 36 of the Statute of the Court, in accordance with the principles of law and equity.[89] In some cases, also, recent special agreements have continued to refer to equity.[90]

While the jurisprudence of international tribunals has also associated *equity* with *law*, the tribunals which have been authorized to apply

[84] Part VIII, Annex II, paragraph 11. *Cf.*, *Claim of Standard Oil Co.*, 22 American Journal of International Law (1928), pp. 404, 416–20.

[85] 1 Hudson, International Legislation, pp. 436, 447.

[86] The United States with Spain, 1795; New Granada, 1857; Costa Rica, 1862; Peru, 1863; Mexico, 1868; France, 1880; Chile, 1892; Venezuela, 1892; and Ecuador, 1913. Great Britain with Portugal, 1840; and Haiti, 1904. The United States and Great Britain with Germany, 1899.

[87] Guatemala–Mexico, 1888; and Costa Rica–Central America, 1898. See also Venezuela's agreements with the United States, Belgium, Great Britain, Germany, Italy, Mexico, Netherlands, and Sweden–Norway in 1903.

[88] *E.g.*, the British-French-Portuguese-Spanish *compromis* of July 13, 1913, in Scott, Hague Court Reports (2d ser.), p. 199.

[89] Norway with Sweden, 1925, Denmark, 1926, and Iceland, 1930; Sweden with Denmark and Finland, 1926, and Iceland, 1930; Denmark with Finland, 1926, and Iceland, 1930; Finland with Iceland, 1930. The 1926 treaty between Norway and Finland is along different lines. The 1928 treaty between Denmark and Haiti empowered the Court to decide non-legal disputes *suivant les principles du droit et de l'equité*.

[90] Mexican agreements with the United States, 1923; France, 1924; Germany and Spain, 1925; Great Britain, 1926; Italy, 1927: and United States agreements with Norway, 1921; and Panama, 1926.

principles of equity have not gone far in determining what these principles are. Clearly, they are not to be derived from the municipal law of any particular State; an American-Norwegian tribunal stated in 1922 that "the majority of international lawyers seem to agree that these words [law and equity] are to be understood to mean general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any State." [91] In 1923 an American-British tribunal held that "no ground of equity" required the United States to pay compensation for cutting a cable; [92] but in 1926 the same tribunal held that the Cayuga Indians had a "just" claim against the United States.[93] In 1933, the American-Panamanian Commission found "no reason to scrutinize" whether the terms international law, justice and equity "embody an indivisible rule or mean that international law, justice, and equity have to be considered in the order in which they are mentioned, because either of these constructions leads to the conclusion that the Commission shall be guided rather by broad conceptions than by narrow interpretations." [94]

This long and continuous association of equity with the law which is applicable by international tribunals would seem to warrant a conclusion that equity is an element of international law itself. The conceptions introduced into the law as principles of equity cannot be listed with definiteness; but they are not to be discarded because they are vague, for that is a quality attaching to international law itself. They do not permit an individual judge to pursue merely personal predilections, and they must not be taken to undermine the established principles of the law. Their office is to liberalize and to temper the application of law, to prevent extreme injustice in particular cases, to lead into new directions for which received materials point the way.[95] In this view, it may be possible to say that equity is a part of international law in the same way

[91] Scott, Hague Court Reports (2d ser.), p. 65.

[92] *Eastern Extension Telegraph Company Case*, Nielsen's Report, p. 79. The meaning of *equity* was discussed at length before this commission. *Idem*, pp. 51–72.

[93] *Idem*, p. 307. In this case the tribunal invoked "general and universally admitted principles of justice and right dealing, as against the harsh operation of strict doctrines of legal personality in an anomalous situation." *Idem*, p. 320. See the criticism of this case in *idem*, pp. 273–86.

[94] *Perry Claim*, American and Panamanian General Claims Arbitration, Hunt's Report, p. 75.

[95] In 1937, the *Institut de Droit International* expressed the view that *l'equité est normalement inhérente à une saine application du droit, et que le juge international, aussi bien que le juge interne, est, de par sa tâche même, appelé à en tenir compte dans la mesure compatible avec le respect du droit;* but that *le juge international ne peut s'inspirer de l'équité pour rendre sa sentence, sans être lié par le droit en viguer, que si toutes les parties donnent une autorisation claire et expresse à cette fin. Annuaire de l'Institut*, 1937, p. 271.

that it has been absorbed by various systems of municipal law, without drawing upon general principles of municipal law; yet it is easier for a tribunal to include equity in the law which it applies if it has been expressly authorized to apply "the general principles of law recognized by civilized nations."

The Court may be said to have applied a principle of equity in the *Meuse Case* in 1937; it compared the Belgian lock against which the Netherlands complained to a lock previously built by the Netherlands, and declared that "in these circumstances, the Court finds it difficult to admit that the Netherlands are now warranted in complaining of the construction and operation of a lock of which they themselves set an example in the past." [96] This was a clear application of a principle of equity requiring equality between the parties, as one of the judges stated more explicitly in a separate opinion.[97]

§553. Decisions *ex aequo et bono*.[98] Article 38 of the Statute also provides that the previous enumeration in the Article "shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto." The phrase *ex aequo et bono*, incorporated in the Statute without much explanation,[99] has its roots in Roman law.[1] Modern usage has invested the phrase with only a general meaning, without making it a term of art. In the last century Chile entered into special arbitration agreements with several States providing for decisions *ex aequo et bono*,[2] and the example was later followed by Brazil.[3] The provision in Article 38 of the Court's Statute inspired many general agreements after 1920.[4] In

[96] Series A/B, No. 70, p. 25.

[97] *Idem*, p. 76. In the *German Interests in Upper Silesia Case*, also, the Court referred to "the principles of good faith." Series A, No. 7, p. 39.

[98] See, generally, Habicht, Power of the International Judge to Give a Decision *Ex Aequo et Bono* (1935).

[99] Records of First Assembly, Committees, I, 403. An earlier draft of Article 38 referred in (3) to "general principles of law and justice," which was explained to permit a decision to be founded *en bonne justice* without express reference to a particular text of law. *Idem*, pp. 385, 608.

[1] Dig. 1. 1. 1. pr. *Cf.*, Voigt, *Das jus naturale, aequum et bonum und jus gentium der Römer* (2 vols., 1856, 1858).

[2] Chile made such agreements with the United States, 1858 and 1873; Peru, 1868; France, 1897. The *Macedonian Case* under the 1858 agreement is reported in 2 Moore, International Arbitrations, p. 1463.

[3] Brazil made such agreements with Italy, 1895 and 1896; with Peru, 1904 and 1909; and with Bolivia, 1909.

[4] A bare reference to decisions *ex aequo et bono* is contained also in Article 13 of the General Convention of Inter-American Conciliation of January 5, 1929, 4 Hudson, International Legislation, pp. 2635, 2640. See also Article 8 of the rules drawn up for application by a tribunal for the handling of zones disputes between France and Switzerland, in 1933. Series E, No. 10, p. 125.

a series of German treaties,[5] provision was made that if the parties agree, an arbitral tribunal might decide in accordance with considerations of equity instead of basing its decision on legal principles (*anstatt sie auf Rechtsgrundsätze zu stützen, nach billigen Ermessen treffen*). In 1924, an Italian-Swiss treaty provided that if the Court should find a dispute to be of a non-juridical nature, it should deal with the dispute *ex aequo et bono;* and this provision was repeated in other treaties.[6] A Belgian-Swedish treaty of 1926 provided for the submission of disputes other than those in which the parties are in conflict as to their respective rights to arbitral tribunals for decision *ex aequo et bono;* this provision, too, was employed in many treaties.[7] The Belgian-Turkish treaty of 1931 provided for decisions *ex aequo et bono* in the absence of applicable rules of international law. The Geneva General Act of 1928 has an especial importance in this line of treaty-development; having provided that disputes in which the parties were in conflict as to their respective rights should be referred to the Court, it required other disputes to be referred to arbitral tribunals which (Article 28) were to apply the substantive rules enumerated in Article 38 of the Statute of the Court, and which were to decide *ex aequo et bono* in so far as there existed no such rule applicable to the dispute.[8] This provision was copied in numerous treaties.[9]

Though it was partly due to a tendency to imitate, this development of treaty law since 1920 indicates the views of many States as to the office

[5] With Switzerland, 1921; Sweden, 1924; Estonia and Finland, 1925; Denmark and Netherlands, 1926; and Luxemburg, 1929. Under most of these treaties, all except those of 1926, upon finding enumerated legal bases inadequate the tribunal was to apply the principles which in its opinion should be embodied in international law, even without the agreement of the parties.

[6] In Italian treaties with Spain, 1926; Chile and Lithuania, 1927; Finland, Greece and Turkey, 1928; Norway, 1929; Latvia, 1931; Colombia and Luxemburg, 1932: in Swiss treaties with Greece, 1925; Rumania and Spain 1926; Finland, 1927; Luxemburg, 1929: in the Portuguese-Spanish treaty of 1928, and the Luxemburg-Norwegian treaty of 1932. Treaties of Turkey with Bulgaria, 1929, and Greece, 1930, and the Colombian-Venezuelan treaty of 1939, are to the same effect, but add "if no rule of international law can be applied."

[7] In Belgian treaties with Denmark, Finland and Portugal, 1927: in Swedish treaties with Austria, 1926; France and Spain, 1928; and Portugal, 1932: in Spanish treaties with Belgium and Finland, 1928; France, 1929; Turkey, 1930; and Bulgaria, 1931: in Swiss treaties with Portugal, 1928; and Czechoslovakia, 1929: in Luxemburg treaties with Poland, 1928; and Portugal, 1929: in French treaties with Portugal, 1928; and Finland, 1930: in Norwegian treaties with Portugal, 1930, and Turkey, 1933: in the Danish-Turkish treaty of 1932: and in the Brazilian-Venezuelan treaty of 1940.

[8] See the comment by J. L. Brierly, 11 British Year Book of International Law (1930), pp. 124–33.

[9] In the following treaties: Greece–Yugoslavia, 1929; Belgium–Czechoslovakia, 1929; Czechoslovakia–Greece, 1929; Belgium–Greece, 1929; Czechoslovakia–Norway, 1929; Czechoslovakia–Luxemburg, 1929; Luxemburg–Rumania, 1930; Greece–Spain, 1930; Belgium–Yugoslavia, 1930; Austria–Greece, 1930; Belgium–Lithuania, 1930; Austria–Norway, 1930; Bulgaria–Norway, 1931; Belgium–Bulgaria, 1931; Denmark–Greece, 1933; Bulgaria–Denmark, 1935; Denmark–Yugoslavia, 1935.

to be served by decisions *ex aequo et bono*, and it must be taken into account in any effort to determine the nature of such decisions.[10] The jurisprudence is very meager. In the *Pugh Case* in 1933, the arbitrator did not refer to the direction given in the *compromis* to decide *ex aequo et bono*.[11]

Decisions applying the international law which includes equity, as in the *Meuse Case*, are not to be confused with decisions *ex aequo et bono* which may be given by the Court. For the latter, the agreement of the parties is required; for the former it is unnecessary. In a case where the parties are agreed that it may decide *ex aequo et bono*, the provision in the Statute would seem to enable the Court to go outside the realm of law for reaching its decision. It relieves the Court from the necessity of deciding according to law. It makes possible a decision based upon considerations of fair dealing and good faith, which may be independent of or even contrary to the law. Acting *ex aequo et bono*, the Court is not compelled to depart from applicable law, but it is permitted to do so, and it may even call upon a party to give up legal rights. Yet it does not have a complete freedom of action. It cannot act capriciously and arbitrarily. To the extent that it goes outside the applicable law, or acts where no law is applicable, it must proceed upon objective considerations of what is fair and just. Such considerations depend, in large measure, upon the judges' personal appreciation, and yet the Court would not be justified in reaching a result which could not be explained on rational grounds.

No case has arisen to date in which the Court has been called upon to decide *ex aequo et bono*. In the *Free Zones Case*, the Court said that if it could be given power to prescribe a settlement disregarding recognized rights and taking into account considerations of pure expediency only, such power "could only be derived from a clear and explicit provision to that effect." [12] Judge Kellogg said in that case that "the authority given to the Court to decide a case *ex aequo et bono* merely empowers it to apply the principles of equity and justice in the broader signification of this

[10] Numerous recent agreements also provide for the functioning of a tribunal as *amiabl, compositeur*. *E.g.*, Spanish treaties with Belgium, 1927; Denmark, Finland, Luxemburg, Austria, Czechoslovakia, Norway, 1928; Iceland, and Greece, 1929. See also Luxemburg–Norway, 1932. The Finnish-Spanish treaty provided both that the tribunal should decide *ex aequo et bono* and as *amiable compositeur*.

[11] Republic of Panama, *Memoria*, 1934, I, p. 470ff; Lapradelle, *Recueil général des décisions, etc.*, 1934, Part II, p. 4.

[12] Series A, No. 24, p. 10. In this case, the French agent had intimated that the *compromis* gave the Court powers similar to that of deciding *ex aequo et bono*, but this was denied by the Swiss agent. Series C, No. 19–I, pp. 34, 152.

latter word";[13] but Judge *ad hoc* Dreyfus thought it meant power "to play the part of an arbitrator in order to reach the solution which, in the light of present conditions, appeared to be the best, even if that solution required the abolition of the zones."[14]

§554. Private International Law.[15] In the application of the international law which governs the relations of States *inter se*, the Court may be called upon to deal with the principles governing the choice of the national law which regulates the creation or exercise of the rights or duties of States and individuals. It is not precluded from doing so by Article 38 of the Statute, and perhaps it may be said that the "general principles of law recognized by civilized nations" include some principles of private international law. To some extent the latter have been embodied in international conventions, such as the six Hague Conventions of 1902 and 1905,[16] and the interpretation and application of these conventions may call into play the public international law which the Court is competent to apply; a protocol opened to signature at The Hague on March 27, 1931, confers on the Court jurisdiction to deal with disputes relating to them.[17] Moreover, a dispute between two States may concern or may depend upon the application of a non-conventional principle of private international law. Referring to that branch of law "usually described as private international law or the doctrine of conflict of laws," the Court has said that its rules "may be common to several States and may even be established by international conventions or customs, and in the latter case may possess the character of true international law governing the relations between States."[18]

In numerous cases concerning questions of nationality and the status of aliens, the Court may be said to have applied private international law. In the *Serbian* and *Brazilian Loans Cases*, it was called upon to deal with questions of conflicts of laws: both cases related to disputes "involving the question as to the law which governs the contractual obligations

[13] Series A, No. 24, p. 40. [14] Series A/B, No. 46, p. 212.

[15] See, generally, A. Hammarskjöld, in 29 *Revue critique de droit international* (1934), pp. 315–44; Niboyet, in 40 *Recueil des Cours* (1932), pp. 153–233.

[16] Kosters and Bellemans, *Les Conventions de la Haye sur le Droit International Privé* (1921). Mention should also be made of the Convention relating to the Bustamante Code of Private International Law, 4 Hudson, International Legislation, p. 2279; the Geneva Conventions on Conflicts of Laws as to Bills of Exchange and Checks, of June 7, 1930, and March 19, 1931, 5 *idem*, pp. 550, 915; and the various treaties concluded at Montevideo in 1939 and 1940.

[17] Series D, No. 6, p. 529; 167 League of Nations Treaty Series, p. 341; 5 Hudson, International Legislation, p. 933. The Protocol was ratified by at least nine European States, and entered into force on April 12, 1936.

[18] Series A, No. 20, p. 41.

at issue," and the Court said it could "determine what this law is only by reference to the actual nature of these obligations and to the circumstances attendant upon their creation"; it admitted, however, that "the same law may not govern all aspects of the obligations"; it held that the Serbian law and Brazilian law, respectively, governed the creation of the obligations in the two cases, but that "the currency in which payment must or may be made in France" were "governed by French law." [19] The problem of choice of law may also have been involved in the *Société Commerciale Case*, but it was not dealt with by the Court.[20]

§555. Municipal Law.[21] In its application of international law, the Court will not ordinarily have to deal with questions of municipal law, but a dispute before the Court may be concerned with the municipal law (Fr., *le droit interne*) of a State as it bears upon the performance of the international obligations of that State or of some other State. In judging whether a State has carried out its international obligations, whether a State has accorded to the nationals of another State the treatment due to them, whether a State has carried out obligations assumed by contract, the Court may be called upon to examine, to interpret and to apply municipal law; many other cases may be put, particularly cases in which the application of international law depends upon facts which in turn depend upon or are created by a local law. Where the protection of property or contract rights of individuals is in question, these rights must be established by reference to the municipal law creating them.[22] The Court may have to determine as a fact whether a person possesses the nationality of a particular State; as questions of nationality are "in principle within the reserved domain" of the domestic jurisdiction of States,[23] and as "the national status of a person belonging to a State can only be based on the law of that State," [24] the determination of the fact will require an examination of the municipal law of the State in question. As the presentation of an international claim is in principle subordinated to the exhaustion of remedies afforded by municipal law,[25] the Court may have to examine the latter to determine the fact of exhaustion.[26]

[19] Series A, No. 20, pp. 41, 44; *idem*, No. 21, pp. 121–2.
[20] See, however, Series A/B, No. 78, p. 184.
[21] See, generally, C. W. Jenks, "Interpretation and Application of Municipal Law by the Permanent Court of International Justice," 19 British Year Book of International Law (1938), pp. 67–103.
[22] See Series A/B, No. 76, p. 18.
[23] Series B, No. 4, p. 24.
[24] *Idem*, No. 10, p. 19.
[25] Series A/B, No. 76, p. 18.
[26] It may even have to pass upon the jurisdiction of the local courts. But see *ibid.*, p. 19; *idem*, No. 77, pp. 78–9.

The Court has declared that it is "bound to apply municipal law when circumstances so require";[27] the "circumstances" must indicate that a point of municipal law is involved in a dispute between States, *i.e.*, in a dispute of an international character. As Judge Anzilotti has put it, the Court may have to examine municipal law from the standpoint of its consistency with international law, or as law governing facts of which the legal import is to be appraised.[28] No doubt can exist as to the Court's competence to deal with municipal law, and it is equally clear that municipal law will be applied by the Court only subject to the international obligations of the State concerned.

The question then arises as to the manner in which the Court is to ascertain the municipal law of a State. In its capacity as a tribunal of international law, the Court is deemed "to know what this law is," but it is "not obliged also to know the municipal law of the various countries."[29] It must ascertain municipal law "either by means of evidence furnished it by the Parties or by means of any researches which the Court may think fit to undertake or to cause to be undertaken."[30] Under Article 49 of the Statute it may call upon the agents in a case to supply "explanations" of municipal law. Evidence as to municipal law, or as to the lack of it, is sometimes presented by a party.[31] The problem may be a complicated one, due to the existence in the State whose law is to be ascertained of a mass of legislative enactments and regulations or of an oscillating line of judicial decisions. In general, the Court will seek to apply the "municipal law of a particular country . . . as it would be applied in that country"; hence it will "pay the utmost regard to the decisions of the municipal courts," and if they are "uncertain or divided," it will "select the interpretation which it considers most in conformity with the law."[32] "For the Court itself to undertake its own construction of municipal law, leaving on one side existing judicial decisions, with the

[27] Series A, No. 21, p. 124. [28] Series A/B, No. 65, p. 63.

[29] Series A, No. 21, p. 124. Judge Anzilotti stated in the *Danzig Decrees Case* that "the Court is reputed [*censée*] to know international law; but it is not reputed to know the domestic law of the different countries." Series A/B, No. 65, p. 61. *Cf.*, Series A, No. 5, pp. 29–30.

[30] Series A, No. 21, p. 124. In the *Société Commerciale Case*, Judge Hudson expressed the view that the Court was "not obliged to institute research" to find municipal law in that case. Series A/B, No. 78, p. 184.

[31] In the *Pázmány University Case*, the Hungarian agent produced a certificate of the Hungarian Minister of Justice to prove the non-existence of any legislative enactment or other measure abolishing the University's personality. Series A/B, No. 61, p. 230; Series C, No. 72, p. 316. In the first *Lighthouses Case*, the Court relied upon legal opinions presented by one party and not contested by the other party, for the history of Turkish constitutional practice. Series A/B, No. 62, p. 22. *Cf.*, Series A, No. 20, p. 45; Series A/B, No. 61, p. 231.

[32] Series A, No. 21, p. 124. However, a decision by a municipal tribunal cannot modify the effect of a previous adjudication by the Court. *Idem*, No. 17, pp. 33–4.

ensuing danger of contradicting the construction which has been placed on such law by the highest national tribunal and which, in its results, seems to the Court reasonable, would not be in conformity with the task for which the Court has been established and would not be compatible with the principles governing the selection of its members." [33]

In the *German Interests in Upper Silesia Case*, where it was called upon to deal with a particular Polish law, the Court said that "from the standpoint of international law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures," but it was willing to pronounce on the question whether in applying its law Poland had acted in conformity with its obligations toward Germany. That case raised numerous questions as to the ownership of property and as to the status of the owners, which had to be resolved on the basis of rights and status acquired under municipal law; for example, the Court held that the City of Ratibor was a "German national" within the meaning of that term in the Geneva Convention, because it was a "corporation of municipal law." [34] When later called upon to interpret the judgment, the Court said that it was based in part on a finding as to ownership "from the standpoint of municipal law." [35] In the *Serbian Loans Case*, where the Court sought the law governing Serbian obligations at the time at which they were entered into, it said that a sovereign State "cannot be presumed to have made the substance of its debt and the validity of the obligation accepted by it in respect thereof, subject to any law other than its own"; while Serbia might have intended another law to apply, no such intention was proved. Though Serbian law was held to apply to the obligations, it was held that the currency in which certain payments were to be made in France was governed by French law, that is, by "French legislation, as applied in France." [36] A similar result was reached in the *Brazilian Loans Case;* the provision in the special agreement in this latter case that "in estimating the weight to be attached to any municipal law of either country which may be applicable to the dispute," the Court was not to be "bound by

[33] Series A, No. 20, p. 46. It has been suggested that the Court might be given power to apply to municipal courts for opinions as to their municipal laws. C. W. Jenks, in 19 British Year Book of International Law (1938), p. 101. *Cf.*, 33 American Journal of International Law, (Supp. 1939), pp. 112–6; Articles 410–11 of the Bustamante Code, 4 Hudson, International Legislation, p. 2339.

[34] Series A, No. 7, pp. 19, 74.

[35] *Idem*, No. 13, p. 20.

[36] Series A, No. 20, pp. 41–7.

the decisions of the respective courts," was interpreted to mean that "while the Court is authorized to depart from the jurisprudence of the municipal courts, it remains entirely free to decide that there is no ground for attributing to the municipal law a meaning other than that attributed to it by that jurisprudence." [37] In the first *Lighthouses Case* between France and Greece, the Court was called upon to say whether a contract was duly entered into according to Ottoman law; it construed the Ottoman Constitution, and passed upon the validity of a decree-law as a part of Turkish law.[38] In the *Danzig Decrees Case*, the Court gave an advisory opinion on the question whether certain decrees were consistent with the Danzig Constitution; as the latter instrument had been placed under the guarantee of the League of Nations, the "international element" in the case was thought to justify the giving of the opinion, though it required the Court "to examine municipal legislation of the Free City, including the Danzig Constitution," as well as general principles of penal law.[39] In the *Pázmány University Case*, the Court examined the position of the University in Hungarian law and concluded that the University possessed a juridical personality, *i.e.*, a capacity in private law to own property, to receive legacies and donations, and to conclude contracts, with the result that the University was found to be the owner of certain property under Hungarian law and a "Hungarian national" within the meaning of that term as employed in Articles 246 and 250 of the Treaty of Trianon; it found also that the University Fund did not have a separate personality in Hungarian law. Examination was also made of Czechoslovak legislation applied to the University's estates in Czechoslovakia, and it was concluded that the measures taken "were in the nature of compulsory administration or supervision," and hence forbidden by provisions in the Treaty of Trianon.[40]

In numerous other cases, municipal law has been the concern of the Court. In the *German Settlers Case*, the Court analyzed the private rights created by German municipal law and the measures taken under Polish municipal law, in order to determine the extent of Poland's treaty obligations.[41] Called upon in the *Exchange of Populations Case* to state the meaning and scope of the word *established* in the Convention of Lausanne, the Court said that the local tie indicated did not depend on "the application of some particular law," as the Convention contemplated a situ-

[37] Series A, No. 21, pp. 123–5.
[38] Series A/B, No. 62, pp. 22–4.
[39] Series A/B, No. 65, p. 50. The Court did not refer to the jurisprudence of the Danzig courts which had been placed before it. Series C, No. 77, pp. 145–51.
[40] Series A/B, No. 61, p. 228ff.
[41] Series B, No. 6.

ation of fact without any reference to national legislation; an undertaking by the parties to the Convention to shape their respective laws to ensure the execution of its provisions merely stressed the self-evident principle that "a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken." [42] In the *Greco-Bulgarian Communities Case*, the Court declared it to be "a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty." [43] In the *Polish Nationals in Danzig Case*, an opinion was requested on the question whether in addition to certain treaty stipulations the Constitution of Danzig might also be invoked by Poland with reference to the treatment of Polish nationals in Danzig; the Court said that "according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted," and that "conversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent on it under international law or treaties in force." [44] In the *Memel Case*, the Court was called upon to interpret a Statute which was at the same time an instrument of international law and of municipal law; in holding that certain action taken by the Governor was contrary to the Statute "in its treaty aspect," the Court was careful to point out that this did not mean that the action "was of no effect in the sphere of municipal law." [45]

§556. Rôle of Precedent.[46] No direction has been given to the Court which would require it to follow precedents established in its own jurisprudence. Under Article 38 of the Statute, it is to apply "judicial decisions . . . as subsidiary means for the determination of rules of law," but this direction is made "subject to the provisions of Article 59" which restrict the binding force of a "decision" to the particular case

[42] *Idem*, No. 10, pp. 19–20.

[43] Series B, No. 17, p. 32. *Cf.*, Series A, No. 1, p. 29; *idem*, No. 24, p. 12; Series A/B, No. 46, p. 167.

[44] Series A/B, No. 44, p. 24. Article 32 of the Geneva General Act of September 26, 1928, is of interest in this connection: it provides that if the Court should find that a decision of a national court or other authority is at variance with international law, and if the constitutional law of the State would not allow, or would only inadequately allow, the cancellation of the decision by administrative procedure, the other State shall be granted equitable satisfaction in some other form. 4 Hudson, International Legislation, p. 2539.

[45] Series A/B, No. 49, p. 336.

[46] See, generally, W. E. Beckett, in 39 *Recueil des Cours* (1932), pp. 131–272; 50 *idem* (1934), pp. 189–310.

and to the parties in that case. If Articles 38 and 59 taken together do not exclude the Court's adoption of the principle of *stare decisis* with respect to its own jurisprudence, they do not encourage that course, and the Court has taken no step in that direction. On the other hand, these Articles place no obstacle in the way of the Court's finding guidance in its earlier judgments, or even treating them as precedents. Any tribunal which seeks to administer justice in an impersonal manner will be disposed to rely upon precedents where they exist. The Court has complete freedom in this respect, and nothing prevents it from following a general rule that it will be guided by the principles applied in its earlier adjudications unless cogent reasons should appear for departing from them.

In its jurisprudence to date, the Court has not evolved a definite principle as to the weight which it will attach to its earlier judgments. In numerous instances references have been made to principles previously applied, frequently with citations of the cases in which they were enunciated, and some principles have been so repeatedly applied that they may now be said to have become part of the international law of the Court.[47] Various principles of jurisdictional and procedural law have been followed through a long course of action, and in the field of substantive law some principles are outstanding for their repeated application. In its first judgment in 1923, in the *Wimbledon Case*, the Court declined "to see in the conclusion of any treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty," for the "right [Fr., *faculté*] of entering into international engagements is an attribute of State sovereignty";[48] this attitude was reiterated in 1925 in the *Exchange of Populations Case*,[49] and in 1927 in the *Danube Commission Case*.[50] In 1924, in the *Mavrommatis Case*, it was formulated as an "elementary principle of international law" that "a State is entitled to protect its subjects [Fr., *nationaux*] when injured by acts contrary to international law committed by another State," and that by taking up a case of one of its subjects, "a State is in reality asserting its own rights";[51] this principle was applied in 1928

[47] The method adopted by the Court in following previous judgments varies from time to time, and the references are not stereotyped: "as the Court has already had occasion to point out," Series B, No. 10, p. 21: or the Court "recalls what was said" in previous judgments, Series A, No. 10, p. 16, *idem*, No. 17, p. 63, *idem*, No. 20, p. 17, Series A/B, No. 65, p. 49, *idem*, No. 77, p. 82; or "it is unnecessary to repeat" what was previously said, Series B, No. 3, p. 56; or the Court "adheres to the rule applied" in a previous decision, *idem*, No. 14, p. 28: or the Court points out "as it has constantly held," Series A/B, No. 47, p. 249. In one case the Court purported to "follow the precedent" of an earlier case, Series B, No. 16, p. 15.

[48] Series A, No. 1, p. 25.

[49] Series B, No. 10, p. 21.

[50] *Idem*, No. 14, p. 36.

[51] Series A, No. 2, p. 12.

in the *Chorzów Case*,[52] and repeated in 1929 in the *Serbian Loans Case*[53] and in 1939 in the *Panevezys Case*.[54] In the *Wimbledon Case*, in 1923, the Court applied the principle that a violation of an international engagement involves an obligation to make reparation;[55] the same principle was enunciated in the *Chorzów Case* in 1927[56] and 1928.[57] In the *German Settlers Case*, in 1923, the principle of respect for vested private rights was applied though it had not been formally announced in the applicable treaty;[58] in the *German Interests in Upper Silesia Case* in 1926, the principle was invoked in the interpretation of a treaty, for being a "part of generally accepted international law" it constituted the basis of the treaty;[59] in the *Chinn Case*, in 1934, the Court seemed willing to apply the principle, but held that no vested rights had been violated.[60] These are but a few of the instances in which a principle established in one case has been applied as a precedent in a later case; they are sufficient, perhaps, to indicate that without declaring that it is bound to do so the Court has shown itself disposed to follow basic principles once they have been established in its jurisprudence.

§557. **The Cumulation of Case Law.**[61] Permanent tribunals usually show themselves disposed to shape their decisions into a consistent body of case-law. In the past the absence of permanent tribunals has delayed such a development in the field of international jurisprudence. The Court has not expressly been given the function of developing international law;[62] yet if it holds the respect of Governments and of the legal profession, that must be an inevitable by-product of its functioning over a long period of time. Apart from any question of precedent, various of its judgments and opinions make systematic approaches in particular fields of law. Several opinions relate to the application of provisions of the Covenant—those relating to the *Tunis and Morocco Nationality Decrees*,[63] *Eastern Carelia*,[64] the *Iraq-Turkey Frontier*,[65] and *Lithuania-Poland Railway Traffic*.[66] Various opinions have developed the constitutional law of the International Labor Organization—those relating to *Nomina-*

[52] *Idem*, No. 17, pp. 26–8.
[53] *Idem*, No. 20, p. 17. See also *idem*, No. 21, p. 101.
[54] Series A/B, No. 76, p. 16.
[55] Series A, No. 1, p. 30.
[56] *Idem*, No. 9, p. 21.
[57] *Idem*, No. 17, p. 29.
[58] Series B, No. 6, p. 38.
[59] Series A, No. 7, pp. 22, 31, 42. See also *idem*, No. 9, p. 27.
[60] Series A/B, No. 63, p. 88.
[61] See, generally, H. Lauterpacht, Development of International Law by the Permanent Court of International Justice (1934).
[62] See §187, *supra*.
[63] Series B, No. 4.
[64] *Idem*, No. 5.
[65] *Idem*, No. 12.
[66] Series A/B, No. 42.

tion of the Netherlands Workers' Delegate,[67] *Agricultural Labor,*[68] *Agricultural Production,*[69] *Personal Work of Employers,*[70] *Danzig and the International Labor Organization,*[71] and *Night Work of Women.*[72] A series of judgments and opinions deal with the Minorities Treaties—those relating to the *German Settlers in Poland,*[73] *Acquisition of Polish Nationality,*[74] *Rights of Minorities in Upper Silesia,*[75] *Minority Schools in Upper Silesia,*[76] *Minority Schools in Albania,*[77] and *Polish Nationals in Danzig.*[78] A series of opinions relates also to the international and constitutional position of Danzig—those relating to *Polish Postal Service in Danzig,*[79] *Jurisdiction of Danzig Courts,*[80] *Danzig and the International Labor Organization,*[81] *Polish War Vessel in Danzig,*[82] *Polish Nationals in Danzig,*[83] and *Constitutionality of Danzig Decrees.*[84] Several cases before the Court dealt with the fixing of frontiers and related problems—the *Jaworzina Case,*[85] the *St. Naoum Case,*[86] the *Iraq-Turkey Frontier Case,*[87] and the *Free Zones Case;*[88] several dealt with international waterways—the *Wimbledon Case,*[89] the *Danube Commission Case,*[90] the *Oder Commission Case,*[91] the *Chinn Case,*[92] and the *Meuse Case.*[93]

It is also possible to group various cases before the Court as dealing with the same general subject-matter. One group of cases relates to protection of nationals abroad, and a large group relates to problems arising in the interpretation of treaties. Moreover, some of the cases before the Court may be grouped with cases before other tribunals as dealing with the same subject-matter; thus, the *Eastern Greenland Case*[94] is to be grouped with the *Palmas Island Case,*[95] as both relate to the law of occupation, and the *Panevezys Case*[96] and the *Electricity Company Case*[97] may be grouped with the *Finnish Ships Case,*[98] as relating to the exhaustion of local remedies.

[67] Series B, No. 1.
[68] *Idem,* No. 2.
[69] *Idem,* No. 3.
[70] *Idem,* No. 13.
[71] *Idem,* No. 18.
[72] Series A/B, No. 50.
[73] Series B, No. 6.
[74] *Idem,* No. 7.
[75] Series A, No. 15.
[76] Series A/B, No. 40.
[77] *Idem,* No. 64.
[78] *Idem,* No. 44.
[79] Series B, No. 11.
[80] *Idem,* No. 15.
[81] *Idem,* No. 18.
[82] Series A/B, No. 43.
[83] *Idem,* No. 44.
[84] *Idem,* No. 65.
[85] Series B, No. 8.
[86] *Idem,* No. 9.
[87] *Idem,* No. 12.
[88] Series A/B, No. 46.
[89] Series A, No. 1.
[90] Series B, No. 14.
[91] Series A, No. 23.
[92] Series A/B, No. 63.
[93] *Idem,* No. 70.
[94] Series A/B, No. 53.
[95] Scott, Hague Court Reports (2d ser.), p. 83.
[96] Series A/B, No. 76.
[97] *Idem,* No. 77.
[98] Published by the British Foreign Office in 1934.

This cumulation of case-law is important both because it emphasizes the element of continuity in the work of the Court, and because of the greater guidance offered by the Court's jurisprudence to persons confronted with problems of international law.[99] Without exaggeration, the cumulation may be said to point toward "the harmonious development of the law" which was a desideratum with the draftsmen of the Statute in 1920.[1]

[99] The needs of such persons are admirably served by two digests of the Court's jurisprudence issued by the *Institut fur ausländisches öffentliches Recht und Völkerrecht*, in *Fontes Juris Gentium*, Series A, Sec. 1, Vols. 1 and 3 (1931, 1935); and by the Annual Digest and Reports of Public International Law Cases, now edited by H. Lauterpacht.

[1] Records of First Assembly, Committees, I, p. 477.

CHAPTER 29

INTERNATIONAL ENGAGEMENTS AND THEIR INTERPRETATION BY THE COURT

§558. International Engagements in the Court's Jurisprudence. In most of the cases which have come before it, either for judgment or for advisory opinion, the Court has been confronted with the necessity of dealing with an international engagement, and the issues drawn have called for the Court's determining whether an engagement existed or what interpretation was to be placed upon the text of an engagement admitted to exist. The law of treaties and of the interpretation of treaties is by far the largest subject in the Court's jurisprudence. Indeed, the value of its jurisprudence for most purposes is limited by the fact that the Court is usually dealing with a specific text, and the texts are seldom the same in two different cases. Yet the Court has appreciated the necessity of its maintaining a consistent attitude in dealing with the texts which have come before it, and the result has been both a clarification of the legal situations to which the texts have related and a significant contribution to the approach to be made in international law to the interpretation and application of conventional arrangements.

§559. Requisites of Engagements.[1] The Court has shown a decided preference for the term "international engagement" in its references to the assumption of obligations by States.[2] As it is used in Article 18 of the Covenant, this term is broader than the term "treaty," also employed in Article 18, or the term "treaties and conventions" employed in Article 36 of the Statute of the Court. Perhaps it is broader also than the term "agreement" which seems to involve action by more than one State. No general rules have been laid down by the court as governing

[1] See, generally, the Havana Convention on Treaties of February 20, 1928, in 4 Hudson, International Legislation, p. 2378; and the draft Convention on Treaties, prepared by the Research in International Law, in 29 American Journal of International Law (Supp. 1939), pp. 657–1226.

[2] The term *engagement international* is used in Article 36 of the Statute, with "international obligation" as the English equivalent.

the formalities necessary for entering into engagements. In the *Austro-German Customs Régime Case*, it was said that "from the standpoint of the obligatory character of international engagements, it is well known that such engagements may be taken in the form of treaties, conventions, declarations, agreements, protocols, or exchanges of notes." [3] This list was not intended to be exhaustive, however. The terms "arrangement," "act," "statute" and "*modus vivendi*" are in more or less common use, and the name chosen for an instrument, frequently due to political or casual considerations, is seldom of juridical significance.

In several cases the Court has been called upon to say whether in fact an engagement was entered into. In the *Eastern Carelia Case*, the Finnish Government relied upon a declaration as a part of the Treaty of Dorpat, but the Russian position was that the declaration had been "given solely for information"; the Court declined to pronounce upon this "question of fact." [4] In the *Danube Commission Case*, an interpretative protocol signed by delegates to the European Commission of the Danube and annexed to a *procès-verbal* of a session of the Danube Conference was held to be not a part of the Statute of the Danube.[5] In the *Austro-German Customs Régime Case*, Austria was held to have assumed certain engagements in the Geneva Protocol of 1922, though it took the form of a declaration.[6] In the *Free Zones Case*, the Court first reserved a question as to the "legal nature" of the manifesto of the Royal Chamber of Accounts of Sardinia of September 9, 1829; [7] but later it expressed the opinion that as the manifesto embodied the assent of the King of Sardinia, which had been given after a claim made by the Canton of Valais, and which had "terminated an international dispute relating to the interpretation of the Treaty of Turin," it represented an *accord des volontés* which conferred on the creation of the zone of Saint-Gingolph "the character of a treaty stipulation." [8]

On several occasions, also, the Court has had to deal with the legal effect of resolutions of the Council of the League of Nations. In the *Mavrommatis Case*, the provisions of the Palestine mandate were thought to "possess a special character by reason of the fact that they have been drawn up by the Council of the League of Nations," and Judge Moore

[3] Series A/B, No. 41, p. 47.
[4] Series B, No. 5, pp. 25–6, 28.
[5] Series B, No. 14, pp. 32–4. Judge Moore referred to the interpretative protocol as a "legally unclassified paper." *Ibid.*, p. 81.
[6] Series A/B, No. 41, p. 47.
[7] Series A, No. 22, p. 19.
[8] Series A, No. 24, p. 17; Series A/B, No. 46, p. 145.

declared the mandate to be "in a sense a legislative act of the Council." [9] In the *German Minority Schools Case*, the Court had to determine the character, force and scope of an "arrangement" adopted unanimously by the Council of the League of Nations, but as it was not disputed that the arrangement was valid and binding for both Germany and Poland, the Court refrained from saying whether this effect was due to the character of a resolution of the Council, or to the favorable votes given by representatives of Germany and Poland in the Council, or to an independent acceptance of the arrangement by the two States.[10] In the *Railway Traffic Case*, the Court declared that Lithuania and Poland were bound by their acceptance of a resolution of the Council; their acceptance seems to have been the result of the participation of their representatives in the adoption of the resolution by the Council, and the Court referred to it as an engagement.[11]

An engagement may be entered into by a State without being embodied in any formal instrument, and indeed without any writing to evidence it. In the *Eastern Greenland Case*, the Court held that an oral declaration made by M. Ihlen, the Norwegian Minister of Foreign Affairs, constituted "an engagement obliging Norway to refrain from occupying any part of Greenland." In conversations with the Danish Minister at Oslo, duly minuted on both sides, M. Ihlen had declared that the Norwegian Government would not make any difficulties in the settlement of the question of Greenland; the Court considered it "beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs." [12] Judge Anzilotti thought that there was "no rule of international law requiring that agreements of this kind must necessarily be in writing, in order to be valid." [13] No question of proof arose in this case, as both parties agreed upon the existence and the tenor of the declaration.

The Court has recognized engagements undertaken by States as a consequence of declarations made by their representatives appearing before it. Jurisdiction may be conferred on the Court by the declarations or conduct of agents; [14] and declarations made in other connections are

[9] Series A, No. 2, pp. 30, 69. [10] Series A/B, No. 40, p. 16.

[11] Series A/B, No. 42, p. 116. In the *Jaworzina Case*, a declaration by Czechoslovakia and Poland accepting a decision by the Conference of Ambassadors was deemed to give to the decision "the force of a contractual obligation." Series B, No. 8, p. 30.

[12] Series A/B, No. 53, p. 71. [13] *Idem*, p. 91. [14] See §428, *supra*.

equally binding. In the *Mavrommatis Case*, a declaration made by counsel for the British Government [15] as to the future, was later embodied in the judgment, and the Court declared its "binding character" to be beyond question.[16] Similar declarations were made by the Polish agent in the *German Interests in Upper Silesia Case*.[17] The Swiss agent made a declaration in the *Free Zones Case* concerning the attitude which the Swiss Government would adopt in certain contingencies, and requested that it be placed on record in the judgment of the Court; while the French agent expressed doubt as to the binding character of the declaration "from a constitutional point of view," the Court took the view that under the circumstances the declaration was binding on Switzerland, and it was "placed on record" in the operative part of the judgment.[18]

It may also be noted that the same text may serve several purposes; it may constitute an international engagement and a provision of national law, and its legal consequences may depend upon the aspect in which it is to be considered. Thus the Statute of Memel was regarded by the Court as "a conventional arrangement binding upon Lithuania," because it was an annex to the Convention of May 8, 1924, and referred to in Article 16 of that Convention, though the Statute had also "been enacted as a Lithuanian law"; the Court limited itself to interpreting the Statute "in its treaty aspect." [19]

Capacity to enter into international engagements has been characterized by the Court as "an attribute of State sovereignty." [20] It is therefore possessed by each State. The Court has shown no disposition to concern itself with a State's observance of limitations due to its own constitution. In the *Free Zones Case*, a Swiss declaration was held to be binding, in face of the assertion of doubts as to its validity under the Swiss constitution.[21] In the *Eastern Greenland Case*, Judge Anzilotti declared that "the question whether Norwegian constitutional law authorized the Minister for Foreign Affairs to make the [Ihlen] declaration . . . does not concern the Danish Government." [22]

[15] The counsel was also a member of the British Cabinet and purported to speak as such. See §487, *supra*.

[16] Series A, No. 5, p. 37.

[17] *Idem*, No. 7, p. 13.

[18] Series A/B, No. 46, pp. 169–70, 172. *Cf.*, the Belgian declaration in the *Société Commerciale Case*, Series A/B, No. 78, p. 178.

[19] Series A/B, No. 49, pp. 300, 336. *Cf.*, *idem*, No. 65, p. 50; *idem*, No. 71, p. 143.

[20] Series A, No. 1, p. 25; Series B, No. 10, p. 21.

[21] Series A/B, No. 46, pp. 170, 209–10.

[22] Series A/B, No. 53, pp. 91–2.

Few cases have arisen to call for a decision as to the validity of international engagements.[23] In the *Chinn Case*, in which the parties relied upon the St. German Convention of 1919 on the revision of the General Act of Berlin of 1885, the Court refused to deal with the validity of the Convention which had not been challenged by any government; but Judge van Eysinga questioned the validity of the Convention as an attempted modification of the Berlin Act by only some of the parties to the latter, and Judge Schücking thought the Convention to be "null and void" because of "the absolute illegality of its conclusion." [24] In the *Albanian Minority Schools Case*, the Court declined to express an opinion on the validity of certain arrangements "as international agreements imposing obligations on Albania." [25]

§560. Effectiveness of Engagements. Cases have seldom arisen to call for a determination of the precise time when an engagement becomes effective. In the *Oder Commission Case*, the Court took a reference to a "convention" in Article 338 of the Treaty of Versailles to mean "a convention made effective in accordance with the ordinary rules of international law," one such rule being that "conventions, save in certain exceptional cases, are binding only by virtue of their ratification"; and it refused to admit that a convention could produce effect "independently of ratification." [26] A signatory of an instrument which requires ratification is, as a general rule at any rate, under no obligation to ratify; as Judge Moore stated in the *Mavrommatis Case*, the contrary doctrine "is obsolete, and lingers only as an echo from the past." [27] In the *German Interests in Upper Silesia Case*, the Court found it unnecessary to consider the question whether a signatory of an instrument is "under an obligation to abstain from any action likely to interfere with its execution when ratification has taken place." [28] In general, a ratification should not be given a retroactive effect; but in the *Mavrommatis Case*, the Court said that even if the Greek application were premature because the Treaty of Lausanne had not been ratified when it was filed, "this circumstance

[23] In the *Wimbledon Case*, Judge *ad hoc* Schücking expressed the view that "a legally binding contractual obligation cannot be undertaken to perform acts which would violate the rights of third parties." Series A, No. 1, p. 47.

[24] Series A/B, No. 63, pp. 80, 135, 149. *Cf.*, a dissenting opinion in the *Free Zones Case*, Series A, No. 24, p. 27.

[25] Series A/B, No. 64, p. 10. See also Series C, No. 76, pp. 114–5, 137–9, 176–7.

[26] Series A, No. 23, pp. 20–1.

[27] Series A, No. 2, p. 57. See also Series B, No. 18, pp. 26–7.

[28] Series A, No. 7, p. 40. See also *idem*, No. 5, p. 39. *Cf.*, the discussion of this point by the Research in International Law, in 29 American Journal of International Law (Supp., 1935), pp. 778–87.

would now be covered by the subsequent deposit of the necessary ratifications." [29]

The Court has not pronounced upon the effect of a failure to comply with the requirement of registration of treaties and engagements, as laid down in Article 18 of the Covenant of the League of Nations.[30] Unfortunately it has not followed a general practice of citing the League of Nations Treaty Series, for such a practice might have directed attention to the instances in which registration had not been effected. In several cases, the Court did not hesitate to apply unregistered treaties without mention of the fact that they were unregistered. In the *Mavrommatis Case*, it based its jurisdiction in part upon the Concessions Protocol of July 24, 1923, and stated in the judgment of August 30, 1924 that this protocol had "become applicable as regards Great Britain and Greece," though it was not registered until September 5, 1924.[31] In the *Postal Service in Danzig Case*, reliance was placed on a Danzig-Polish agreement of October 24, 1921, which was not registered until some years after the Court's opinion.[32] It has not been thought that special agreements submitting cases to the Court require registration, though some of the agreements have been registered.[33]

§561. **Performance of Obligations Undertaken.** Though it has not referred to the maxim *pacta sunt servanda*, the Court has repeatedly declared that international engagements have binding force for the parties.[34] The assumption runs throughout its jurisprudence that States will in good faith observe and carry out the obligations which they have undertaken. Hence little hospitality has been shown to reasons advanced by parties for the non-performance of their obligations. In the *Exchange of Populations Case*, it was said to be a "self-evident" principle that "a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken." [35] In the *Free Zones Case*,

[29] Series A, No. 2, p. 34. The Concessions Protocol of July 24, 1923, which entered into force in August 6, 1924, applied as from that date to prior legal situations.

In a Chilean-Peruvian arbitration in 1875, the arbitrator held that a treaty of December 5, 1865, became operative from that date as a result of the exchange of ratifications on January 14, 1866. U. S. Foreign Relations, 1875, p. 191.

[30] See Hudson, "Legal Effect of Unregistered Treaties in Practice," 28 American Journal of International Law (1934), pp. 546–52.

[31] Series A, No. 2, p. 33; 28 League of Nations Treaty Series, p. 203.

[32] Series B, No. 11, pp. 11–2; 116 League of Nations Treaty Series, p. 5. See also the opinion in the *Danzig Courts Case*, Series B, No. 15.

[33] See §437, *supra*.

[34] In its first opinion, it declared that the engagement contained in paragraph 3 of Article 389 of the Treaty of Versailles was not "a mere moral obligation." Series B, No. 1, p. 19.

[35] *Idem*, No. 10, p. 20.

it was said that France could not "rely on her own legislation to limit the scope of her international obligations." [36] Nor may a State rely upon its own failure to enact legislation for the purpose of avoiding its obligations.[37] In the *Communities Case*, it was said to be "a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of a treaty." [38] It is equally clear, as the Court said in the *Polish Nationals in Danzig Case*, that "a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force." [39]

Other excuses for non-performance have been advanced before the Court. In the *Wimbledon Case*, two dissenting judges would have excused non-performance of Germany's obligations with respect to the Kiel Canal: "If, as a result of a war, a neutral or belligerent State is faced with the necessity of taking extraordinary measures temporarily affecting the application of such conventions in order to protect its neutrality or for the purpose of national defence, it is entitled to do so even if no express reservations are made in the convention." [40] This view was not shared by the Court, however. In the *Serbian Loans Case*, the impossibility of performance contended for was found not to exist, and in the *Brazilian Loans Case* no basis was found for a defense of impossibility of performance based on *force majeure;* [41] but the judgments intimate that these might in a proper case be excuses for non-performance. In the *Eastern Greenland Case*, Judge Anzilotti was willing to consider the effect of a mistake if it was "of an excusable character," but he concluded that no mistake had been made in that case; [42] and in the *Chinn Case* he stated that "necessity may excuse the non-performance of international obligations." [43] In the *Société Commerciale Case*, the Greek Government contended that owing to *force majeure* it had been prevented from executing certain arbitral awards, but the Court declined to deal with the point.[44]

§562. *Rebus Sic Stantibus.* The Court has not been confronted with a necessity of deciding on the so-called *clausula rebus sic stantibus*. In the *Nationality Decrees Case*, it was contended that certain treaties had

[36] Series A/B, No. 46, p. 167.
[37] See Series B, No. 15, pp. 26–7.
[38] Series B, No. 17, p. 32.
[39] Series A/B, No. 44, p. 24.
[40] Series A, No. 1, p. 36.
[41] Series A, No. 20/21, pp. 40, 120.
[42] Series A/B, No. 53, p. 92.
[43] *Idem*, No. 63, p. 113.
[44] *Idem*, No. 78, pp. 164, 177–8.

"lapsed by virtue of the principle known as the *clausula rebus sic stantibus*"; the Court was of the opinion that any pronouncement on this point would involve "recourse to the principles of international law concerning the duration of the validity of treaties," but that such a pronouncement was not necessary at that stage of the case.[45] In the *Free Zones Case*, the principle of the *clausula* was invoked by dissenting judges in the earlier stages;[46] and in the final judgment it was considered at some length by the Court.[47] The French contention was that the zones were created in 1815 "in view of and because of the existence of a particular state of facts," *viz.*, that in 1815 the Canton of Geneva was a free trade area which constituted an economic unit with the zones; that this state of facts disappeared when "the institution of Swiss Federal Customs in 1849 destroyed this economic unit"; and that in consequence the Court should declare the stipulations creating the zones to have lapsed. The Court stated that "to establish this position it is necessary, first of all, to prove that it was in consideration of the absence of customs duties at Geneva that the Powers decided, in 1815, in favour of the creation of the zones"; as this was not proved to the Court's satisfaction, the French argument "failed on the facts," and it therefore became "unnecessary for the Court to consider any of the questions of principle which arise in connection with the theory of the lapse of treaties by reason of change of circumstances, such as the extent to which the theory can be regarded as constituting a rule of international law, the occasions on which and the method by which effect can be given to the theory if recognized, and the question whether it would apply to treaties establishing rights such as that which Switzerland derived from the treaties of 1815 and 1816." This statement leaves unanswered the question whether the *clausula rebus sic stantibus* has become a principle of international law.[48]

§563. Effect of Engagements on States Not Parties. On several occasions the Court has had to deal with the effect of international instruments upon the position of States which are not parties to them. In general, a treaty may create rights for States not parties if this is clearly intended,[49]

[45] Series B, No. 4, p. 29.
[46] Series A, No. 22, pp. 29, 36, 41.
[47] Series A/B, No. 46, pp. 156–8.
[48] In the first phase of the *Free Zones Case*, Deputy-Judge Negulesco expressed the view that Article 19 of the Covenant of the League of Nations "confirms the validity of the clause *rebus sic stantibus* and at the same time rejects any claim to apply it unilaterally." Series A, No. 22, p. 30.
[49] It may also constitute a basis for action to be taken by international agencies on behalf of the international community. *Cf.*, Article 12 of the Polish Minorities Treaty of 1919. 1 Hudson, International Legislation, p. 291.

but it cannot impose obligations on such States.[50] In the *German Interests in Polish Upper Silesia Case*, Poland relied upon the Armistice of November 11, 1918, and the Protocol of Spa of December 1, 1918, though it was not expressly a party to either instrument; it claimed that by virtue of being one of the Allied and Associated Powers it was entitled to be considered a party to these instruments from the time of the later recognition accorded to it during the peace negotiations,[51] but the Court did not take this view, and found "no subsequent tacit adherence or accession on the part of Poland." As the instruments made no provision for adhesion, it was said to be "just as impossible to presume the existence of such a right—at all events in the case of an instrument of the nature of the Armistice Convention—as to presume that the provisions of these instruments can *ipso facto* be extended to apply to third States. A treaty only creates law as between the States which are parties to it; in case of doubt, no rights can be deduced from it in favour of third States." [52] In the *Free Zones Case*, the Court held that "Article 435 of the Treaty of Versailles is not binding upon Switzerland, who is not a party to that Treaty, except to the extent to which that country accepted it." [53] Though Switzerland had not acceded to the Declaration of November 20, 1815, it was held that the creation of the Gex Zone was a part of a territorial arrangement in favor of Switzerland, made as a result of an agreement between various States including Switzerland and France, and that the Zone had "the character of a contract to which Switzerland is a party." The Court declared: "It cannot be lightly presumed that stipulations favourable to a third State have been adopted with the object of creating an actual right in its favour. There is, however, nothing to prevent the will of sovereign States from having this object and this effect. The question of the existence of a right acquired under an instrument drawn between other States is therefore one to be decided in each

[50] On this latter point, agreements forming part of a general continental settlement, such as those concluded at the end of the War of 1914–18, may be viewed as exceptional. The commission of jurists which dealt with certain questions involved in the Aaland Islands dispute in 1920, emphasized the "European character" of the Convention of March 30, 1856, and the intention thereby to create "European law." League of Nations Official Journal, Special Supplement No. 3 (1920), p. 17. However, in a dissenting opinion in the *Danube Commission Case*, Judge Negulesco expressed the view that "decisions of the Great Powers, met together as the Concert of Europe, . . . have never been held to be legally binding upon States not represented in the Concert." Series B, No. 14, p. 95. See also Series A, No. 24, p. 27.

[51] Series C, No. 11, vol. II, pp. 616ff.

[52] Series A, No. 7, pp. 28–9. *Cf.*, Lord Finlay's dissent, asserting that on analogy to "contracts on behalf of companies not yet incorporated," the "Allied States made the Armistice on behalf of Poland, which was about to become a State." *Idem*, p. 84.

[53] Series A/B, No. 46, p. 141.

particular case: it must be ascertained whether the States which have stipulated in favour of a third State meant to create for that State an actual right which the latter has accepted as such." [54] Judges Altamira and Hurst, dissenting, made "every reservation in regard to a theory seeking to lay down, as a principle, that rights accorded third parties by international conventions, to which the favoured State is not a party, cannot be amended or abolished, even by the States which accorded them, without the consent of the third State." [55]

§564. International Engagements and Individuals. As a general rule an international instrument creates rights and duties only for the States which are parties. It does not confer rights, and it does not impose duties, on individuals. This was recognized by the Court in the *Jurisdiction of Danzig Courts Case*, when it said that "the *Beamtenabkommen*, being an international agreement, cannot, as such, create direct rights and obligations for private individuals;" but it added that "the very object of an international agreement, according to the intention of the contracting parties, may be the adoption by the parties of some definite rules creating individual rights and obligations and enforcible by the national courts." Such an intention being found in that case, the provisions of the *Beamtenabkommen* were said to be "directly applicable" as between Danzig railway officials and the Polish Railways Administration, so as to constitute part of the contract of service of the officials; the officials were therefore held to have a right of action in Danzig courts against the Polish Railways Administration for the recovery of pecuniary claims based upon the *Beamtenabkommen*.[56]

§565. Interpretation and Application. Interpretation, the process of determining the meaning of a text, may be distinguished from application, the process of determining the consequences of a text with reference to a given situation.[57] Numerous instruments have conferred jurisdiction on the Court over disputes relating to the interpretation *and* application of treaty provisions; the Court has said that *and* "in both ordinary and legal language, may, according to circumstances, equally have an alternative or a cumulative meaning," [58] but in some instruments *or* is used instead of *and*. The Court may be called upon to interpret a treaty provision

[54] Series A/B, No. 46, pp. 147–8. *Cf.*, Series A, No. 22, pp. 20, 26; and the dissenting opinions of Judge Negulesco and of Judge Dreyfus, *idem*, pp. 36–7, 43–4.
[55] Series A/B, No. 46, p. 185.
[56] Series B, No. 15, pp. 17–8, 21.
[57] See Judge *ad hoc* Ehrlich, in Series A, No. 9, p. 39.
[58] *Idem*, No. 6, p. 14. See §443, *supra*.

apart from any question of its application. In the *German Interests in Upper Silesia Case*, reference was made to treaty provisions relating to "interpretations unconnected with concrete cases of application," and it was said that "there seems to be no reason why States should not be able to ask the Court to give an abstract interpretation of a treaty; rather would it appear that this is one of the most important functions which it can fulfil." [59] Yet the cases are rare which call for the interpretation of a text without some reference to its application.

A dispute as to the application of a provision will almost invariably involve some question as to its interpretation. In the *Mavrommatis Case*, *application* was said to be "a wider, more elastic and less rigid term" than *execution*, the latter being "a form of application." [60] In the *German Interests in Upper Silesia Case*, differences of opinion resulting from interpretation and application were said to include disputes "as to the extent of the sphere of application." [61] In the *Chorzów Case*, it was said that differences relating to application include "not only those relating to the question whether the application of a particular clause has or has not been correct, but also those bearing upon the applicability" of the provisions, that is, "upon any act or omission creating a situation contrary" to the provisions; hence "differences relating to reparations" were held to be included.[62]

§566. The Function of Interpretation. The process of interpreting the text of an international instrument [63] is not to be viewed as a search for some preëxisting meaning. It may be true, as was said in the *Minority Schools in Upper Silesia Case*, that "in accordance with the rules of law," an interpretation once arrived at is to be given "retrospective effect," "in the sense that the terms of the Convention must be held to have always borne the meaning placed upon them by this interpretation"; [64] yet this does not mean that the interpretation merely gives form to a meaning which previously existed. Interpretation involves *giving* a meaning to the text. Few terms of art may be said to exist in international law, and as the terms employed in international instruments seldom have an exact meaning,[65] they can be interpreted only by giving content to

[59] Series A, No. 7, pp. 18–9. The judgment in the *Treaty of Neuilly Case*, Series A, No. 3, was cited by the Court as an example. [60] Series A, No. 5, pp. 47–8.

[61] *Idem*, No. 6, p. 16. *Cf.*, *ibid.*, p. 30. [62] Series A, No. 9, pp. 21–5.

[63] Of course the interpretation of a treaty does not "fall solely within the domestic jurisdiction of a single State." Series B, No. 4, p. 30. [64] Series A/B, No. 40, p. 19.

[65] The chemical formulas in the Convention on Manufacture of Narcotic Drugs of July 13, 1931, are exceptional. See League of Nations Official Journal, 1931, p. 1795; 5 Hudson, International Legislation, p. 1048.

them. This is not a matter of a mechanical operation; it is not a process which performs itself automatically; results have to be kept in mind,[66] judgment must be exercised, many factors must be appreciated.[67] Given a text, the Court may have to "look to its practical effect rather than to the predominant motive that may be conjectured to have inspired it." [68] There may be no danger in saying that it is the function of the Court to "ascertain the precise meaning" of a text,[69] if the nature of this process is kept in mind. Yet it serves little purpose to say that the Court must look for a "true meaning," or that "the question in every case must resolve itself into what the terms of the treaty actually mean." [70] Such expressions sometimes serve merely to hide the operations through which the Court must pass before it can arrive at a determination of the meaning to be given to a text. It is more proper to say that "the duty of the Court is to interpret the text as it stands, taking into consideration all the materials at the Court's disposal." [71]

Of course the Court does not enjoy a complete freedom in the process of interpretation thus conceived.[72] It is always under a duty to respect the text before it; unlike a legislative body, it cannot substitute a new text.[73] Nor can any complete list be made of the "materials at the Court's disposal" for explaining a given text.[74] Canons or technical rules of interpretation can serve but a limited usefulness, and none of them can be of rigid and universal application.[75] Within wide limits the Court must

[66] This was recognized by the Court in its opinion on the *Interpretation of the Treaty of Lausanne*, when it said that "any article designed to fix a frontier should, if possible, be so interpreted that the result of the application of its provisions in their entirety should be the establishment of a precise, complete and definite frontier." Series B, No. 12, p. 20.

[67] This process is sometimes hidden under an imputation to the parties of an intention to arrive at "the best possible solution of the difficulty." Series B, No. 14, p. 27. Judge Anzilotti found it to be "a fundamental rule in the interpretation of legal texts" that "when there are two interpretations, one of them attributing a reasonable meaning to each part of the text and the other not fulfilling these conditions, the first must be preferred." Series A/B, No. 41, p. 62.

[68] Series B, No. 13, p. 19.

[69] Series A/B, No. 44, p. 33.

[70] Series B, No. 2, pp. 23, 39.

[71] Series A/B, No. 44, p. 40.

[72] Dealing with national courts' function of interpretation, Austin characterized the process here described by the terrifying epithets of *bastard* and *spurious* interpretation. 2 Austin, Lectures on Jurisprudence (3d ed.), pp. 597, 1029.

[73] Series B, No. 7, p. 20.

[74] The following statement in the *Chorzów Factory Case* indicates that this has been appreciated by the Court: "For the interpretation of Article 23 of the Geneva Convention between Germany and Poland, account must be taken not only of the historical development of arbitration treaties, as well as of the terminology of such treaties, and of the grammatical and logical meaning of the words used, but also and more especially of the function which, in the intention of the contracting parties, is to be attributed to this provision." Series A, No. 9, p. 24.

[75] Nor are international instruments to be interpreted by international tribunals according to rules laid down by national tribunals. For example, the rule of "liberal construction" followed by the United States Supreme Court in dealing with treaties, *Nielsen* v. *Johnson* (1929) 279 U. S. 47, could not be adopted as a general rule by an international tribunal.

have a free hand; and it must be bound by no hard and fast rules of its own making.

This has been appreciated by the Court. Fortunately, it has formulated no rigid rules; its formulations have been in such guarded form as to leave it open to the Court to refuse to apply them, and it would be difficult to say that all of them have been consistently applied.

§567. Authentic Interpretation. The Court must follow an interpretation of an instrument upon which all the parties to the instrument have agreed. It has been scrupulously attentive to the facts in its willingness to find any such agreement. In the *Jaworzina Case*, it refused to admit the power of the Conference of Ambassadors to give a binding interpretation to its own previous decision after the task entrusted to the Conference had been fulfilled, saying that "it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it." [76] Apart from this principle, it was said also that "the opinion of the authors of a document cannot be endowed with a decisive value when that opinion has been formulated after the drafting of that document and conflicts with the opinion which they expressed at that time." [77] In the *Postal Service in Danzig Case*, it was said that "a so-called authentic interpretation of a judicial decision is in effect a new decision," and the Court denied that the proper meaning of a decision could be altered by an expression of a personal opinion by its author.[78] In the *Danube Commission Case*, an "interpretative protocol" annexed to the minutes of the Danube Conference was treated as a part of the preparatory work which could not prevail against the text of the Statute drawn up by the Conference.[79]

§568. Intention of the Parties. The judgments and opinions of the Court contain numerous references to the "intention of the parties" as a guide for interpretation. It is of first importance that the definitely entertained and expressed intentions of the parties should be effectuated,[80] and in some cases the results reached by the Court may be so explained. Yet it is necessary to be on guard against the use of this criterion merely as a palliating description of a result which has been arrived at by some

[76] Series B, No. 8, p. 37.

[77] *Ibid.*, p. 38. "The worst person to construe" a statute "is the person who is responsible for its drafting." Lord Halsbury in *Hilder* v. *Dexter* [1902] A. C. 474, 477.

[78] Series B, No. 11, p. 31.

[79] Series B, No. 14, pp. 34–5.

[80] It has been suggested that the criterion of intention is "hardly applicable" to "treaties imposed by force." Lauterpacht, Function of Law in the International Community (1933), p. 272. *Sed quaere.*

other method than the ascertainment of intention. In litigation, the simple case is relatively rare in which the parties may be said to have foreseen and endeavored to effect a solution of the precise problem presented.[81] The parties seldom proclaim their intention in unmistakable terms; and even if an intention is proclaimed, it must be found to have been expressed in the text.[82] More often, the problem raised before the Court was not foreseen when the instrument in question was being drafted, neither the particular problem nor the general class to which it belongs; or if it was foreseen its solution was not definitely agreed upon. The compromises which are inevitable in framing an international instrument frequently result in the acceptance of a "formula" which is possible only because it does not foreclose the contentions of any party. No great experience in international conferences is required to know that terms are sometimes employed in treaties of which no common understanding is reached in advance.[83] In some situations, a lack of clarity may even be a *desideratum;* the chief desire may be to continue uncertainty.[84] Where a text is not consciously "so framed as to perpetuate the divergence of views which had arisen," however, "a formula" may be chosen which will leave the solution even of the definitely foreseen problem to await future developments.[85]

It is precisely these kinds of situations which are calculated to produce the differences of which the Court will be seised; either (1) a situation was not foreseen, or (2) it was foreseen and no clear and definite provision was made for it. In a case involving an unforeseen situation, it can only

[81] This is true also of contracts before national courts. "Litigation usually reveals the absence of genuine agreement between the parties *ab initio*. If both parties had foreseen the difficulty, provision would have been made for it in the beginning when the contract was drawn up. When courts thus proceed to interpret the terms of the contract they are generally not merely seeking to discover the actual past meanings"; the "legal relations are determined by the courts and the jural system and not by the agreed will of the contesting parties." Morris R. Cohen, "The Basis of Contract," 46 Harvard Law Review (1933), p. 577.

[82] Series A/B, No. 43, p. 144.

[83] In 1919, the author served as a member of the Commissions which drafted the articles in the Treaty of Versailles relating to the Kiel Canal and those in the Polish Minorities Treaty, and as a member of the drafting committee which shaped the International Labor Conventions of 1919. A refreshing of recollection from the official records confirms his impression that the conferences which drafted these texts did not have their attention drawn to the precise problems presented to the Court in the cases which have called for their interpretation and application.

[84] This may have been true of the provision relating to the Danube, of which the Court said that its authors "were not all well acquainted with the situation which existed before the War between Galatz and Braila," but that they had agreed to maintain "that situation whatever it may have been." Series B, No. 14, pp. 31–32.

[85] Series B, No. 14, p. 27. In the *Free Zones Case*, Judges Altamira and Hurst insisted that account should be taken "of human psychology and more particularly of Governmental psychology." Series A/B, No. 46, p. 182–3.

be conjectured what the parties might have thought or said if their attention had been directed to a given possibility; the Court may very properly be asked to deal with this situation, though it cannot do so by a simple reference to the intention of the parties, and any reliance on assumed intention would be artificial.[86] This was recognized in the *Employment of Women Case* when the Court said: "The mere fact that, at the time when the convention . . . was concluded, certain facts or situations, which the terms of the convention in their ordinary meaning are wide enough to cover, were not thought of, does not justify interpreting those of its provisions which are general in scope otherwise than in accordance with their terms." [87] Where the "facts or situations" were foreseen and no definite provision was made for them, also, the Court may be called upon to apply a "formula" and to give it a content based upon considerations other than intention. Important as it may be, therefore, that effect be given to the intentions of the parties, it must be recognized that the problem of interpretation is not so simple that it can be resolved by a mere statement to that effect. In fact, no purpose is served by an assumption that the Court's function is so limited.

It is also possible that a treaty may contain provisions which were envisaged to apply to situations which could not be foreseen, and in such a case the task of interpretation may be still less confined to a mere effectuation of entertained intention.

§569. "Natural" Meaning. In the Court's earlier jurisprudence, a tendency was manifest to seek first the so-called "natural" meaning of the terms to be construed, and once it is found to weigh other considerations with a disposition to say that the "natural" meaning is not to be disturbed.[88] This may be a wise tendency, and no objection is to be made to a term which has a soothing effect and which tends to avoid arousals because of its indefinite content. Yet there may be some danger in allowing the "natural" meaning to overcome the results of other investigations. Numerous substitutions have been made for the term "natural" from time to time: a meaning may be described as "literal," [89] "grammati-

[86] It has been suggested that it is the duty of the judge "to find what, having regard to the available data, was the intention of the parties or what the intention of the parties must be presumed to have been." Lauterpacht, Function of Law in the International Community (1933), p. 130. *Sed quaere.*

[87] Series A/B, No. 50, p. 377.

[88] See especially Series A/B, No. 50, pp. 373, 378.

[89] Series A, No. 9, p. 24.

cal," [90] "ordinary," [91] "normal," [92] "logical," [93] or "reasonable." [94] It is often said that the meaning is "clear" [95] or "sufficiently clear," [96] in spite of the fact that the States concerned do not place the same construction on the text, or that some members of the Court do not agree with this conclusion.[97] It would be difficult to say that the various adjectives are always used by the Court synonymously, or that any of them is used as a term of art. "Natural" seems to have reference to ordinary usage.[98] On one occasion, standard dictionaries were consulted to determine usage, though "common use" was made to yield to context.[99] The legal terminology of the States concerned is not necessarily controlling.[1] Ordinary usage must clearly yield to the usage of the time, place and occasion, however, and the Court has therefore admitted that "natural" meaning may be displaced. It has been laid down as "a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd." [2] In the *Employment of Women Case*, a willingness was expressed "to find some valid ground for interpreting the provision otherwise than in accordance with the natural sense of the words"; but the grounds on which it had been suggested that the natural meaning could be displaced, did not "appear to the Court to be well founded." [3]

§570. Context. Even in arriving at the natural meaning of terms, the Court insists upon looking at them in their context, and it early announced that "the context is the final test." [4] The context is not simply the particular sentence, or the particular paragraph in which the

[90] Series B, No. 12, p. 23; Series A, No. 23, p. 26. [91] Series B, No. 11, p. 37.
[92] *Idem*, p. 39; Series A/B, No. 50, p. 377; *idem*, No. 53, p. 49.
[93] Series A, No. 9, p. 24; Series B, No. 12, p. 23. [94] Series B, No. 11, p. 39.
[95] Series B, No. 7, p. 20; Series A/B, No. 50, p. 373. [96] Series B, No. 12, p. 22.
[97] In the *Employment of Women Case*, a majority of the Court found the terms of Article 3 "in themselves clear and free from ambiguity"; while Judge Anzilotti found them, "to say the least . . . ambiguous." Series A/B, No. 50, pp. 373, 388.
[98] In one case, the Court referred to the "etymology" of a word and the "current practice of the language." Series B, No. 10, p. 18.
[99] Series B, No. 2, pp. 33, 35.
[1] "If an expression, not in itself of a legal nature, is used in a convention which derives legal consequences from it, it does not in the least follow" that a criterion for interpreting the expression "must be sought in the legislation of the respective contracting States." Series B, No. 10, p. 21. Yet in the *Minorities in Upper Silesia Case*, the term *debouter* in a Polish submission was given "the meaning ordinarily attaching to it in French law." Series A, No. 15, p. 20.
[2] Series B, No. 11, p. 39. See also Series A/B, No. 41, p. 60. In a dissenting opinion in the *Eastern Greenland Case*, Judge Anzilotti said that "a literal interpretation fails where it would lead to absurd or inconsistent results." Series A/B, No. 53, p. 82.
[3] Series A/B, No. 50, pp. 373, 378.
[4] Series B, No. 2, p. 35. See also *idem*, No. 11, p. 39; Series A/B, No. 62, p. 13.

term to be construed occurs.[5] It may be (1) a particular part of the instrument, or (2) the instrument as a whole, or (3) the versions of the text in different languages, or (4) the texts of several interrelated and interdependent instruments.

(1) *A Particular Part of an Instrument.* The various parts of a single instrument may be quite independent, either because of the history of their drafting or because each deals completely with a distinct subject-matter. Thus, in the judgment in the *Free Zones Case*, though it was said to be "impossible to interpret the second paragraph without regard to the first paragraph" of Article 435 of the Treaty of Versailles, that Article was taken by itself, independently of other articles in the same treaty, to form "a complete whole," both because of its position in the treaty and because of its origin.[6] In determining the competence of the International Labor Organization, the Court has considered Part XIII of the Treaty of Versailles as a whole; [7] and it has referred to "the entire framework of Part XIII." [8] In the *Wimbledon Case*, also, the provisions relating to the Kiel Canal, Section VI of Part XII of the Treaty of Versailles, were held to be "self-contained"; and it was said that "they would lose their *raison d'être*" if they had to be interpreted in connection with other sections of that part of the treaty.[9] On the other hand, one part of an instrument may be dependent on another part, in connection with which it must be construed; thus in the judgment concerning *German Interests in Upper Silesia*, the Court held that a "system of rules relating to large scale industry," forming part of the Geneva Convention, should be construed as a whole.[10]

(2) *An Instrument as a Whole.* In some cases, the Court has insisted that "the treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense." [11] Thus in the

[5] A scientific approach to the problem might also insist on the "context of situation."

[6] Series A/B, No. 46, p. 140. In this case, it was also a matter of some importance to say whether a reference to Article 435 in the special agreement was to be construed as a reference to that article and its annexes. See *idem*, p. 182.

[7] Series B, No. 2, pp. 23, 35.

[8] *Idem*, No. 13, p. 18.

[9] Series A, No. 1, p. 24.

[10] Series A, No. 7, p. 48. See also *idem*, No. 15, p. 31.

[11] Series B, No. 2, p. 23. See also Series A/B, No. 49, p. 317.

"A law cannot set up a rule in one article and, changing its mind, a contrary rule in the next article. Any such interpretation must be ill-founded." Judge Nyholm in Series B, No. 14, p. 76. Judge Anzilotti has formulated "a fundamental rule in interpreting legal texts that one should not lightly admit that they contain superfluous words: the right course, wherever possible, is to seek for an interpretation which allows a reason and a meaning to every word in the text." Series A/B, No. 62, p. 31. A preamble, and even a title, may have to be considered

Treaty of Lausanne Case, the Court not only read paragraph 2 of Article 3 in the light of paragraph 3 of the same article, but also inquired whether any other articles of the treaty were "calculated to throw any light upon the scope of Article 3." [12] This is essential when the treaty sets up a *régime;* in such cases the Court tends to construe the provision before it by reference to its place in a system. This may be seen in the Court's construction of provisions relating to Danzig and to Memel. In the *Postal Service in Danzig Case*, it was said that "the construction which the Court has placed on the various treaty stipulations is not only reasonable but is also supported by reference to the various articles taken by themselves and in their relation one to another." [13] In the *Statute of Memel Case*, there being no clear provision governing the question in dispute, the Court stated that "the Convention of Paris of 1924 and the Statute annexed to it must be considered as a whole in order to understand the *régime* which the Four Powers and Lithuania intended to establish for the Memel Territory"; and it rejected an argument of the applicants on the ground that "such an interpretation would destroy the general scheme of the Convention of Paris of 1924 and the Statute annexed to it." [14] In the *Meuse Case*, the Treaty of 1863 was said to have "brought into existence a certain régime which results from all of its provisions in conjunction. It forms a complete whole, the different provisions of which cannot be . . . considered apart by themselves." [15] On the other hand, the Court has refused in some cases to allow its construction of a part of a treaty to be influenced by other parts.[16]

(3) *Versions in Different Languages.* The text of an international instrument may be drawn up in two or more languages,[17] with or without provision as to which is to prevail in case of difference; in either case, it seems better to speak not of several texts in different languages, but of several versions of a single text.[18] The versions in all languages must

as a part of an instrument. Series A/B, No. 50, p. 373; *idem*, No. 63, p. 18; *idem*, No. 70, p. 21. See You, *Le préamble des traités internationaux* (1941). Yet "merely accidental" features of an instrument, such as the numbering of paragraphs, may be disregarded. Series A/B, No. 61, p. 247.

[12] Series B, No. 12, p. 21. But see *idem*, p. 22. [13] Series B, No. 11, pp. 39–40.

[14] Series A/B, No. 49, pp. 312, 317, 321. *Cf.*, Series B, No. 6, p. 37.

[15] Series A/B, No. 70, pp. 21, 23.

[16] Series A, No. 17, p. 42.

[17] Where a text is in one language, it must of course be given a meaning in that language. Series B, No. 10, p. 18. On the current practice as to the employment of several languages, see Hudson in 26 American Journal of International Law (1932), pp. 368–72.

[18] The Court has employed the term "version." Series A, No. 2, p. 18. It sometimes refers to the English and French "versions" of its judgments and opinions.

be considered together,[19] and a meaning is to be given to the composite of them.[20] Ordinarily, neither version should be subordinated to the other, and neither should be regarded as a translation of the other,[21] though a history of both should be taken into account. This was recognized in the second advisory opinion relating to the *Competence of the International Labor Organization*.[22] The rule was formulated in the *Mavrommatis Case* that "where two versions possessing equal authority exist one of which appears to have a wider bearing than the other," the Court "is bound to adopt the more limited interpretation which can be made to harmonise with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the parties," and "especial force" was said to be given to the rule "because the question concerns an instrument laying down the obligations of Great Britain in her capacity as Mandatory for Palestine and also because the original draft of this instrument was probably made in English"; it was held that "the wider meaning of the English text appears to be the only one which does not nullify the expression *contrôle public* in the French version." [23]

(4) *Related and Interdependent Instruments.* Two or more instruments may be so related, or so interdependent, that the text of one must be construed with reference to that of the other. Hence the Court held that in case of doubt as to the meaning of the provisions of the Polish-Danzig Convention of November 9, 1920, "recourse may be had to the Treaty of Versailles, not for the purpose of discarding the terms of the Convention, but with a view to elucidating their meaning." [24] In the *Minorities in Upper Silesia Case*, the Court "presumed" that provisions in the Polish Minorities Treaty which had been incorporated into the later Geneva Convention were not thereby given a different meaning: "there is a presumption that the provisions of the Convention are in

[19] Where a text is in two or more languages one of which is to prevail in case of difference, the version in the other language should still be taken into account in interpretation.

[20] The statement in 1 Oppenheim, International Law (2d ed.), p. 586, (3d ed.), p. 704, (4th ed.), p. 765, (5th ed.), p. 756, that in this case "each party is only bound by the text in its own language," seems clearly erroneous, as does the statement that "a party cannot claim the benefit of the text in the language of the other party." Oppenheim's statement may have been due to the views expressed by English courts in such cases as *Rex* v. *Brixton Prison* [1912] 3 K. B. 190, 197. In rare instances, treaties have provided that different versions will be binding for the different parties; *e.g.*, China's treaties with the Netherlands (1863) and with Spain (1864). 2 Treaties and Conventions between China and Foreign States (2d ed., 1917), pp. 350, 387. *Cf.*, Ehrlich, "*L'Interprétation des Traités*," 24 Recueil des Cours (1928), pp. 95–104.

[21] But see Series A, No. 2, p. 69.

[22] Series B, No. 2, pp. 35–9. If one version is clear and the other is not, the former might be allowed to prevail. *Reparation Commission* v. *German Government*, Annual Digest, 1923–1924, p. 334.

[23] Series A, No. 2, pp. 19–20.

[24] Series A/B, No. 44, p. 32.

conformity with the principles underlying the Minorities Treaty." [25] In the *Minority Schools in Albania Case*, the Court rejected the contention of the Greek Government that the Albanian Declaration should be "construed in the light of the historical and social conditions of Albania" and the Near East, and it interpreted the declaration from the point of view of "general principles of the treaties for the protection of minorities." [26] In the *German Interests in Upper Silesia Case*, the application of the Geneva Convention was found to be "hardly possible without giving an interpretation of Article 256 of the Treaty of Versailles and the other international stipulations cited by Poland," and it was held that the "interpretation of other international agreements is indisputably within the competence of the Court if such interpretation must be regarded as incidental to a decision on a point in regard to which it has jurisdiction." [27] In the *Danube Commission Case*, the Court spoke of "the whole system of the international acts applicable before the war to the maritime Danube." [28] In his opinion on *Danzig and the International Labor Organization*, Judge Huber thought that the Covenant of the League of Nations and Part XIII of the Treaty of Versailles were "organically connected." [29]

§571. Nature and Purpose of an Instrument. A consideration of the setting of an instrument necessarily leads to enquiry into the office which it was designed to serve. References have been made by the Court to the nature,[30] scope,[31] object,[32] spirit,[33] tenor,[34] function,[35] rôle,[36] aim,[37] purpose,[38] intention,[39] system,[40] scheme,[41] general plan,[42] and principles underlying [43]

[25] Series A, No. 15, p. 33. It seems difficult to justify the Court's willingness in this case to consider a German argument based upon the attitude taken by Poland in negotiating an agreement with Danzig, even though the Court did not attach "much importance to the argument." *Idem*, p. 40.

[26] Series A/B, No. 64, pp. 16–7.

[27] Series A, No. 6, p. 18.

[28] Series B, No. 14, p. 55. Yet in the *Meuse Case*, the treaty of 1863 was taken to be "entirely independent" of two other treaties concluded simultaneously as parts of a general arrangement. Series A/B, No. 70, p. 13.

[29] Series B, No. 18, p. 30.

[30] *Idem*, No. 12, p. 20.

[31] *Idem*, No. 10, p. 17; *idem*, No. 13, pp. 18, 19; *idem*, No. 17, p. 19.

[32] Series B, No. 6, p. 25; *idem*, No. 8, p. 40; *idem*, No. 13, p. 23; *idem*, No. 17, p. 21; Series A/B, No. 44, p. 27; *idem*, No. 70, p. 23.

[33] Series A, No. 1, p. 23; Series B, No. 16, pp. 19, 24.

[34] *Idem*, No. 14, p. 52.

[35] Series A, No. 9, p. 24.

[36] Series B, No. 12, p. 23.

[37] Series B, No. 13, p. 18; *idem*, No. 17, p. 21; Series A/B, No. 68, p. 60.

[38] Series A, No. 15, p. 33; Series B, No. 17, p. 19; Series A/B, No. 61, p. 248.

[39] Series B, No. 6, p. 25; Series A/B, No. 70, p. 23.

[40] Series A, No. 5, p. 49; Series B, No. 14, p. 37.

[41] Series A/B, No. 49, p. 317.

[42] *Idem*, No. 70, p. 32.

[43] Series A, No. 1, p. 24; *idem*, No. 23, p. 26; Series A/B, No. 43, pp. 142, 157; Series A/B, No. 64, p. 17.

instruments which it was called upon to interpret.[44] That interpretation is to be favored which will make the instrument effective to serve its purpose. No rules of interpretation, therefore, can be of universal validity, applicable in the same way to all international instruments.[45] Such appreciation has been shown by the Court, particularly in connection with its interpretation of treaties for the protection of minorities. In the *German Settlers Case*, it took account of "the main object" of a minorities treaty, and sought to assure that "the pledged protection may be certain and effective." [46] In the *Acquisition of Polish Nationality Case*, it said that "an interpretation which would deprive the Minorities Treaty of a great part of its value is inadmissible." [47] The same attitude was shown in the construction of the words "interpretation and application" in Article 23 of the German-Polish Convention of May 18, 1922, when the Court took account "not only of the historical development of arbitration treaties, as well as of the terminology of such treaties, and of the grammatical and logical meaning of the words used, but also and more especially of the function which, in the intention of the contracting Parties, is to be attributed to this provision." [48] When called upon to interpret an international labor convention, the Court considered "the fact that the improvement of the lot of the manual worker was the aim of Part XIII" of the Treaty of Versailles; and in the *Work of Employers Case*, it was said that "the Court, in determining the nature and scope of a measure, must look to its practical effect rather than to the predominant motive that may be conjectured to have inspired it." [49]

The jurisprudence of the Court does not establish any rigid timetable for the various steps in the process of interpretation. Yet it is to be noted that in the *Employment of Women Case*, the Court did not take account of the policy to be served by the instrument until after it had arrived at a conclusion as to the "natural" meaning of terms in the convention, and then only for the purpose of determining whether the "natural" meaning

[44] Hyde states the task of the interpreter to be "to get at the truth concerning the design of the parties as exemplified by their treaty." See his studies in 24 American Journal of International Law (1930), p. 1; 27 *idem* (1933), p. 502.

[45] Thus, the Covenant of the League of Nations may have to be interpreted less strictly than many other international instruments. In a memorandum signed by President Wilson, M. Clemenceau, and Mr. Lloyd George on May 6, 1919, it was said that "the articles of the Covenant are not subject to a narrow or technical construction." Miller, Drafting of the Covenant, p. 489. See also Ray, *Commentaire du Pacte de la Société des Nations* (1930), p. 12ff.

[46] Series B, No. 6, p. 25.

[47] Series B, No. 7, p. 17. *Cf.*, Series A/B, No. 64, p. 20.

[48] Series A, No. 9, p. 24. See also *idem*, p. 25.

[49] Series A/B, No. 50, p. 374; Series B, No. 13, p. 19. See also Series B, No. 3, p. 57.

could be displaced. Judge Anzilotti protested that it is not "possible to say that an article of a convention is clear until the subject and aim of the convention have been ascertained"; "the first question which arises, therefore, is what is the subject and aim of the convention." [50]

§572. **Use of *Travaux Prêparatoires*.**[51] It is doubtless a sound principle that when negotiations have resulted in the text of an instrument which is formalized by signature and possibly by ratification, that text should ordinarily be taken to embody the whole of the agreement reached in the course of the negotiations. Additions to the text are not to be made as a consequence of a study of preliminary drafts which were not incorporated into the instrument which was signed; nor are subtractions to be made by that means. A preliminary question may arise as to what is the text which was agreed upon.[52] Yet after it is disposed of, the construction of the text cannot be arrived at without a consideration of its setting, and the development of the negotiations forms a part of the history which constitutes that setting. Where a dispute revolves about issues connected with the preparation of a text, as did the dispute in the *Treaty of Lausanne Case*, it seems merely stultifying to say that *travaux prêparatoires* cannot be examined.

While the Court has always been careful to trace the history of the negotiations which have led to the signing of an instrument, it has shown itself somewhat reluctant to make use of preliminary drafts and other *travaux prêparatoires*.[53] The actual rules formulated on this subject have been stated in such a way as to leave the Court wide latitude, and it is doubtful whether its practice has been in any way circumscribed by such formulations. Even when the use of *travaux prêparatoires* has been said to be excluded, they have in most cases been used to confirm conclusions reached. The rule has frequently been stated that "there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself." [54] This leaves the door open for saying that *travaux prêparatoires* may be resorted to because the text is not "suffi-

[50] Series A/B, No. 50, p. 383. *Cf.*, Series B, No. 12, p. 19.

[51] See, generally, H. Lauterpracht, "Some Observations on Preparatory Work in the Interpretation of Treaties," 48 Harvard Law Review (1935), pp. 549–91; John H. Spencer, *L'Interprêtation des Traités par les Travaux prêparatoires* (1934).

[52] See Series B, No. 5, p. 26; *idem*, No. 14, p. 34.

[53] This term may also be applied to materials other than preliminary drafts. Using it in this broader sense, the Court may be said to have referred to *travaux prêparatoires* in the *Jaworzina Case*, when it expressed a willingness to study instructions given to representatives composing the Conference of Ambassadors. Series B, No. 8, p. 26.

[54] Series A, No. 10, p. 16; Series B, No. 14, p 28; Series A, No. 20, p. 30; Series A/B, No. 47, p. 249; *idem*, No. 50, p. 378.

ciently clear";[55] on this point, individual judges have sometimes dissented from the majority's view. On a few occasions the Court has shown a willingness to refer to *travaux préparatoires* without referring to this rule.[56] In the *Polish Nationals in Danzig Case*, where a text was found to be not "absolutely clear," the Court thought it "useful, in order to ascertain its precise meaning, to recall here somewhat in detail the various drafts which existed prior to the adoption of the text now in force."[57] Even in cases where the text has been found to be "sufficiently clear," however, usually the Court does not altogether refuse to examine *travaux préparatoires*, and it sometimes uses them to buttress the conclusions which have been reached independently. Thus, in its second advisory opinion, after the Court had reached its conclusion "on the construction of the text itself," it was observed that "there is certainly nothing in the preparatory work to disturb this conclusion."[58] In the *Lotus Case*, after a construction was given to the expression "principles of international law" as used in the Lausanne Convention, it was said that "the records of the preparation of the Convention . . . would not furnish anything calculated to overrule the construction indicated by the actual terms" of the Article, and *travaux préparatoires* were gone into to justify this statement.[59] In the *Treaty of Lausanne Case*, a text was found to be "sufficiently clear," and yet the Court proceeded to consider it "in the light of the negotiations."[60] With reference to the bonds in question in the *Serbian Loans Case*, the Court said that "as the words themselves are not ambiguous, there is no occasion to refer to the preliminary documents. But if these are examined, it will appear that they tend to confirm the agreement for gold payments."[61] In the *Employment of Women Case*, the Court was "so struck with the confident opinions expressed" that it was "led to examine the preparatory work of the Convention," disclaiming

The Supreme Court of the United States has followed a similar rule with reference to national legislation. *Standard Fashion Co.* v. *Magrane-Houston Co.* (1922) 258 U. S. 346, 356; *U. S.* v. *Missouri Pacific R. R. Co.* (1929) 278 U. S. 269, 278. But see *U. S.* v. *Dickerson* (1940) 310 U. S. 554, 562.

[55] The mere fact that the Council has asked for an interpretation of a provision ought not to cast doubt upon its clarity. *Cf.*, Series B, No. 12, p. 25.

[56] See the *Mavrommatis Case*, Series A, No. 2, p. 24; *idem*, No. 5, p. 47; and see Series B, No. 9, pp. 17–8; *idem*, No. 10, p. 16; Series A/B, No. 62, p. 20; *idem*, No. 72, p. 167. In individual opinions, the judges refer to *travaux préparatoires* quite frequently. *E.g.*, Series A, No. 22, p. 32; Series A/B, No. 71, p. 125.

[57] Series A/B, No. 44, p. 33. The same attitude was taken with reference to the special agreement in the first *Lighthouses Case*, *idem*, No. 62, p. 13.

[58] Series B, No. 2, p. 41. See also Series A/B, No. 47, p. 249.

[59] Series A, No. 10, p. 17.

[60] Series B, No. 12, p. 22. See also *idem*, No. 14, pp. 28–31.

[61] Series A, No. 20, p. 30.

an intention "to derogate in any way from the rule" laid down as to *travaux préparatoires;* its conclusion was only confirmed in consequence.[62]

The conclusion to be drawn from the jurisprudence is that while the Court professes a willingness to look into *travaux préparatoires* only for the purpose of resolving a doubt as to the text, it has on some occasions done so to confirm constructions as to which it had no doubt. In spite of the frequency of these occasions, it must be said that the Court has not exercised a complete freedom in the use of *travaux préparatoires;* a resort to them only after a conclusion has been reached is not the same as a resort to them before the conclusion is formulated.[63]

Once the decision is taken that *travaux préparatoires* may be resorted to, the Court has not been very definite in saying to what extent they may be relied upon. It has said, however, that "preparatory work should not be used for the purpose of changing the plain meaning of a text." [64] Judge Anzilotti has formulated a more definite rule that preparatory work is to be "adduced not to extend or limit the scope of a text clear in itself, but to verify the existence of an intention not necessarily emerging from the text but likewise not excluded by that text." [65] Under the approach made by the Court, it seems improbable that it will have a case in which it admits the "plain meaning" to be clear and yet will feel compelled by the *trauvaux préparatoires* to assign a different meaning to the text.

One quite definite ground for refusing to consider *travaux préparatoires* was stated in the *Danube Commission Case;* the history of certain articles of the Treaty of Versailles having been invoked, it was said that "the record of the work preparatory to the adoption of these articles being confidential and not being placed before the Court by, or with the consent of, the competent authority, the Court is not called upon to consider to what extent it might have been possible for it to take this preparatory work into account." [66] Perhaps it is a somewhat different question whether *travaux préparatoires* may be admitted as evidence; usually they are admitted without question, and in consequence they constitute a part

[62] Series A/B, No. 50, pp. 378–380.

[63] The element of sequence may be less important than the above indicates. Where *travaux préparatoires* are referred to in documents or argument before the Court, they will have been studied even before any conclusions are reached; this fact robs the actual formulations by the Court of some of their importance.

[64] Series B, No. 14, p. 31.

[65] Series A/B, No. 50, p. 388.

[66] Series B, No. 14, p. 32. But see the protest by Judge van Eysinga, Series A/B, No. 63, p. 136.

of the judges' background of knowledge, whatever rule may be formulated as to their use. In connection with the second advisory opinion, the objection was made that such materials should not be considered by the Court, not that they should not be admitted as evidence.[67] In the *Oder Commission Case*, however, the Court was asked to rule that no attention should be paid to passages in the Polish case and counter-case which referred to records of the preparatory work of the Treaty of Versailles, *viz.*, the minutes of the Commission on Ports, Waterways and Railways, and by its order of August 20, 1929, the Court ruled that these minutes should "be excluded as evidence from the proceedings in the present case"; the chief ground of this order was that "three of the parties concerned in the present case did not take part in the work of the conference which prepared the Treaty of Versailles." [68]

§573. Legal Background. Any international instrument must be interpreted in the light of the prevailing international law, by which the parties must be taken to have charted their course.[69] This was insisted on in the *Wimbledon Case*, where Judges Anzilotti and Huber stated that "treaty stipulations cannot be interpreted as limiting" a State's right of self-protection, "even though these stipulations do not conflict with such an interpretation." [70] In the *German Interests in Upper Silesia Case*, the Court took the "generally accepted international law" to constitute, at least in part, "the basis of the Geneva Convention." [71] In the *Oder Commission Case*, the Court found it proper to explore "the principles underlying the matter to which the text refers," and Article 331 of the Treaty of Versailles was "interpreted in the light of these principles," *viz.*, "the principles governing international fluvial law in general"; [72] and in interpreting Article 338 of the same treaty, it was said to be "hardly justifiable to deduce from a somewhat ill-chosen expression an intention to derogate from a rule of international law so important as that relating to the ratification of conventions." [73] In the *Treaty of Lausanne Case*, the provisions

[67] Series B, No. 2, p. 41; Series C, No. 1, pp. 187–9.

[68] Series A, No. 23, pp. 41–3. The three parties referred to were Denmark, Germany and Sweden. Denmark and Sweden were not parties to the Treaty of Versailles. Germany, though a party to that treaty, was not represented in the Commission on Ports, Waterways and Railways of the Preliminary Peace Conference at Paris; to the extent of taking note of this fact, the Court took account of *travaux préparatoires*.

[69] The following statement by the French-Mexican Claims Commission seems to be apposite: "Every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms or in a different way." *Georges Pinson Case* (1928), Annual Digest, 1927–1928, Case No. 292.

[70] Series A, No. 1, p. 37. [71] Series A, No. 7, p. 42. *Cf.*, *ibid.*, pp. 21, 22; *idem*, No. 9, p. 27.

[72] Series A, No. 23, pp. 26, 29. But *cf.*, the *Meuse Case*, Series A/B, No. 70, p. 16.

[73] *Idem*, p. 20.

of the Covenant concerning unanimity were said to be subject to the "well-known rule that no one can be judge in his own suit." [74] To some extent also, the Court might take account of the municipal laws of the parties as a part of the legal background of an instrument, though in the *Exchange of Populations Case* it showed itself reluctant to do so.[75] It has also referred to the "precedents supplied by international practice." [76]

§574. Political and Social Background. Quite clearly, the Court would not be justified in dealing with an international instrument as if it had been concluded *in vacuo*. It must take account of the circumstances in which the parties acted if it would understand their purposes, and its construction of an instrument may very properly be influenced by factors of a political or social significance. International legislation which the Court must apply is frequently designed to deal with such factors. As the Court has phrased it, "the making of laws, whether national or international, is a political act and as such may involve the application of political principles." [77] If international law is to be builded on sound foundations, it is no more possible to ignore the political and social phases of the prevailing international order than it is possible to ignore similar phases of the prevailing national order in the building of municipal law.[78]

This has been appreciated by the Court in a long course of action. In the *German Interests in Upper Silesia Case*, the Geneva Convention was interpreted "in the light of war-time legislation to which the régime of liquidation belongs." [79] In the *Jaworzina Case*, extended reference was made to the general political situation in which decisions had been taken by the Supreme Council and the Conference of Ambassadors for defining the Polish-Czechoslovak frontier.[80] In determining the nature of the vote to be taken by the Council of the League of Nations under Article 3 of the Treaty of Lausanne, the Court had in mind the "political position" of certain States which might require them to "bear the larger share of the responsibilities and consequences." [81] The Definitive Statute of the Danube was viewed by the Court with reference to "the historical facts upon which it rests." [82] The construction placed on the treatics

[74] Series B, No. 12, p. 32.
[75] Series B, No. 10, pp. 19, 21.
[76] Series B, No. 7, p. 17.
[77] *Work of Employers Case*, Series B, No. 13, p. 22. Yet in this case the Court refused to consider "political principles or social theories" not referred to in the text of the Constitution of the International Labor Organization. *Ibid.*, p. 23.
[78] This is shown in the foundations of the public law of the United States as they were laid by Chief Justice John Marshall, and in the decisions of the United States Supreme Court with reference to the 14th amendment to the Constitution of the United States.
[79] Series A, No. 7, p. 74.
[80] Series B, No. 8, pp. 20–22.
[81] Series B, No. 12, p. 29.
[82] Series B, No. 14, p. 28.

applicable to the proposed Austro-German customs régime was preceded by a reference to "the existing political settlement which has laid down in Europe the consequences of the break-up of the Austro-Hungarian monarchy," the existence of Austria being "an essential feature" of that settlement, and the Court's conclusions were based on this background of "circumstances";[83] this was surely a sounder attitude than that taken by a minority of the Court which was not "concerned with political considerations," and which saw the question presented as "purely legal."[84] In the advisory opinion on *Polish War Vessels in Danzig*, the Court took notice, as of a "matter of history," of the assurances given to Poland of a free and secure access to the sea,[85] but it found no reasons for assuming that these assurances had not been completely fulfilled in the later agreements. In the *Polish Nationals in Danzig Case*, an interpretation of treaty provisions was made "in the light of the circumstances which led to the creation of Danzig as a Free City."[86] In the *Greco-Bulgarian Communities Case*, the Court insisted on the "traditional conception" of a "community" in Eastern countries, and held that the Greco-Bulgarian Convention should be taken to embody that conception.[87]

§575. Analogous Provisions. An aid to the interpretation of a text may sometimes be found in analogous provisions either in the same instrument, or more rarely in an instrument to which other States are parties. Even if a part of a treaty or convention is taken to be a self-contained whole, analogies may be drawn from other parts; thus, in the *Wimbledon Case*, though the provisions of the Treaty of Versailles relating to the Kiel Canal were said to be self-contained, the wording of Article 380 was "compared with that of the other provisions to be found in Part XII," and instruments relating to other international canals were examined in detail.[88] In the *German Settlers Case*, the Court drew upon analogies in Article 75 of the Treaty of Versailles relating to Alsace-Lorraine and in other articles, in its application of Article 256 of the same treaty.[89] In the *Jaworzina Case*, a comparison was made with "a treaty concluded

[83] Series A/B, No. 41, p. 42. Judge Anzilotti also insisted in this case that "account must be taken of the movement . . . the aim of which is to effect the political union" of Austria and Germany. *Idem*, p. 70.

[84] *Idem*, p. 75. Some of the criticism of the Court's opinion in this case was due to a failure to appreciate the nature of the judicial process which had to be followed in order to reply to the question put. See Borchard, in 25 American Journal of International Law (1931), pp. 711–6.

[85] Series A/B, No. 43, p. 144.

[86] Series A/B, No. 44, p. 27.

[87] Series B, No. 17, p. 21. *Cf.*, Series A/B, No. 64, p. 16.

[88] Series A, No. 1, pp. 23, 25–8.

[89] Series B, No. 6, p. 38. *Cf.*, Series A, No. 7, p. 30.

only a few days after" and "signed by the same persons." [90] In the *Chorzów Case*, it refused to draw any conclusion from the terminology in general arbitration agreements for interpreting a compromissory clause in the Geneva Convention, though it found some analogy in the classification of disputes in Article 13 of the Covenant and Article 36 of the Court's Statute.[91] In interpreting the *Convention on the Employment of Women at Night*, the Court was willing "to attach some importance" to provisions in the eight-hour day convention, also drawn up by the International Labor Conference in 1919, because of its "similarity both in structure and in expression." [92] On the other hand, the Court has declared it to be a general principle of interpretation that "an obligation imposed on one contracting party cannot be based on the fact that it is mentioned in the annex to a section of a treaty dealing with a different subject matter." [93]

§576. Action by the Parties. In the process of *giving* a meaning to a text, the Court cannot ignore action which may have been taken by the parties to an instrument, either contemporaneously with its drafting or subsequently,[94] though as it said in the *Brazilian Loans Case*, "where reference is had to the conduct of the Parties as an aid to interpretation, it is necessary to consider whether that conduct itself permits of but one inference." [95] Contemporaneous action by the parties, related to the instrument itself, may be taken to indicate the purpose which the instrument was designed to serve.[96] In the *Work of Employers Case* the Court relied upon the inclusion of an item in the agenda of the first International Labor Conference, "as a contemporaneous practical interpretation made by the High Contracting Parties of the scope of the competence which they had conferred upon the International Labour Organization." [97] Subsequent action taken by the parties may also furnish some indication of the purpose with which an instrument was concluded, though caution must be exercised in finding such an indication. In the *Treaty of Lausanne Case*, the Court declared that "the facts subsequent to the conclusion of the Treaty of Lausanne can only concern the Court in so far as they are calculated to throw light on the intention of the parties at the time

[90] Series B, No. 8, p. 38. *Cf.*, *idem*, No. 12, p. 20; *idem*, No. 13, p. 19. But see Series A, No. 23, p. 30; Series A/B, No. 70, p. 13.
[91] Series A, No. 9, pp. 22–23.
[92] Series A/B, No. 50, pp. 380–381.
[93] Series A, No. 3, p. 9.
[94] *Cf.*, M. Ehrlich's statement, Series A, No. 9, p. 43.
[95] Series A, No. 21, p. 119.
[96] In the *Jaworzina Case*, one of the contemporary documents relied upon was not related to the decision to be interpreted. Series B, No. 8, pp. 33, 38. See also *idem*, No. 14, p. 58.
[97] Series B No. 13, p. 19. However, this result might have been rested on reading Part XIII of the Treaty of Versailles as a whole. See also *idem*, No. 8, p. 33.

of the conclusion of the treaty." [98] It seems doubtful whether this limitation has always been observed, however.

In the *Agricultural Labor Case*, a willingness was expressed "if there were any ambiguity" to "consider the action which has been taken under the Treaty" for the "purpose of arriving at the true meaning"; though no ambiguity was found to exist, the Court did refer to action taken under the Treaty.[99] Later the Court referred to the actual exercise of competence by the International Labor Organization in the adoption of the convention on the use of white lead in painting.[1] In several cases, the function of interpretation bore a close resemblance to the function exercised by certain national courts in passing upon the constitutionality of legislation, and on one occasion the Court pointed out that "it is not an unusual thing, in countries in which legislative power is limited by a fundamental charter, for the courts, in deciding whether certain legislation is constitutional, or *intra vires*, to resort to practice, national or international, for the determination of the extent of a particular governmental power." [2] Such action by national courts is based upon a reluctance to disturb a course of action under legislation and upon a desire to take into account the results of a particular interpretation given in practice to a constitutional provision. The attitude of the Court in these cases was based upon a similar reluctance and a similar desire; in other words, it has not observed the limitation placed upon itself in the *Treaty of Lausanne Case*. With the lapse of time, intentions entertained by the draftsmen of an instrument may lose some of their importance, and a course of action by those who must live with and under the provisions of the instrument may assume a correspondingly greater significance. In the *Jurisdiction of Danzig Courts Case*, the fact that the *Beamtenabkommen* had been actually put into force by the parties was taken to indicate their intention that it should govern directly the relations between the Polish Railways Administration and the Danzig officials.[3]

What has been said applies to action which is common to all the parties to an instrument. Action taken by a single party may involve an admission which will militate against some position it may assume,[4] but it is not necessarily to be taken into account in interpretation.

[98] Series B, No. 12, p. 24. [99] *Idem*, No. 2, p. 39. *Cf.*, Series A/B, No. 72, p. 168.

[1] Series B, No. 13, p. 19. *Cf.*, Series A, No. 20/21, pp. 38, 119.

[2] Series B, No. 13, p. 20. This is particularly true of the Supreme Court of the United States. [3] Series B, No. 15, pp. 18, 20–21.

[4] See Series A, No. 3, p. 8. But the Court refuses to take account of abortive negotiations for settling a dispute. Series A, No. 9, p. 19; *idem*, No. 17, pp. 51, 62.

§577. Liberal or Restrictive Interpretation. The Court has not attempted to formulate any general principle that instruments must be liberally or strictly construed. A national court may be justified in adopting a policy of the liberal construction of treaties to which the State is a party, for it will seldom be called upon to construe a treaty with other States before it;[5] an international court before which only States may be parties would not be justified in adopting any such principle. In the *Postal Service in Danzig Case*, the Court said that "rules as to a strict or liberal construction of treaty stipulations can be applied only in cases where ordinary methods of interpretation have failed."[6] No rules for extensive interpretation have been formulated;[7] and where specific rules for a restrictive interpretation are announced,[8] a *caveat* is usually entered to avoid their automatic application. The Court has adopted a rule of restrictive interpretation of texts conferring jurisdiction upon itself: "Every special agreement, like every clause conferring jurisdiction on the Court, must be interpreted strictly." Yet this rule is not to be so applied that the special agreement would fail to enunciate the question in dispute and prejudge the answer,[9] or fail to have "appropriate effects."[10] Again, it has been said that limitations on the exercise of sovereign rights must be strictly construed; but this is only "in case of doubt,"[11] and in applying this rule in the *Wimbledon Case* the Court felt itself "obliged to stop at the point where the so-called restrictive interpretation would be contrary to the plain terms of the article and would destroy what has been clearly granted."[12] In the *Oder Commission Case*, it was contended that where a text is doubtful, that construction should be given to it "which imposes the least restriction on the freedom of States," but the Court thought that while the argument was "sound in itself," the rule was to be "employed only with the greatest caution";

[5] The Supreme Court of the United States has frequently stated that "treaties are to be liberally construed." See *Jordan* v. *Tashiro* (1928) 278 U. S. 123, 127; *Nielsen* v. *Johnson* (1929) 279 U. S. 47, 51. *Quaere*, whether even in a national court the principle should be stated so broadly.

[6] Series B, No. 11, p. 39.

[7] However, the Court said in the *Jaworzina Case* that as the object of a clause in a decision was "one of equity, it must not be interpreted in too rigid a manner." Series B, No. 8, p. 40.

[8] In their individual opinions, judges have sometimes referred to rules of restrictive interpretation as "presumptions." *E.g.*, Series A, No. 9, p. 40.

[9] Series A/B, No. 46, pp. 138–139.

[10] Series A, No. 22, p. 13. See also *idem*, No. 24, p. 14.

[11] Series A, No. 1, p. 24; *idem*, No. 24, p. 12; Series A/B, No. 46, p. 167. *Cf.*, *idem*, No. 74, pp. 23–4.

[12] Series A, No. 1, pp. 24–25. In this case, Judge *ad hoc* Schücking declared that "all treaties concerning servitudes must be interpreted strictly." Judges Anzilotti and Huber were reluctant to interpret a treaty so as to limit a State's self-protection, and this consideration was said to apply "with particular force in the case of perpetual provisions without reciprocity which affect the interests of third States." *Idem*, pp. 37, 43.

"only when, in spite of all pertinent considerations, the intention of the parties still remains doubtful," is that interpretation to be given "which is most favourable to the freedom of States." [13] In the *Treaty of Lausanne Case*, it was said to be a sound principle that "if the wording of a treaty provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum of obligations for the parties should be adopted"; but the text there involved was said to be clear.[14]

A clear instance of restrictive interpretation is to be found in the interpretation of texts which form an exceptional part of a system or régime into which they must be fitted. Thus, in the *Nationality Decrees Case*, it was said that since paragraph 8 of Article 15 of the Covenant is "an exception to the principles affirmed in the preceding paragraph," it did not "lend itself to an extensive interpretation." [15] In the *Mavrommatis Case*, "a strict interpretation" of Article 6 of the Lausanne Protocol was thought to be "the only one which is in harmony with the system of the Protocol." [16] In the *German Interests in Upper Silesia Case*, it was said that "the liability to expropriation of rural property constitutes, under the Geneva Convention, an exception; in case of doubt as to the scope of this exception, its terms must therefore be strictly construed." [17]

§578. Special Rules of Interpretation. On a few occasions the Court has formulated special rules of interpretation, some of which it has borrowed from municipal law. Thus, in the *Mavrommatis Case*, it held that as between Article 11 of the Palestine Mandate and the Lausanne Protocol XII, "in cases of doubt, the Protocol, being a special and more recent agreement, should prevail." [18] In the *Serbian Loans Case*, where it was called upon to interpret provisions in a bond, it declared that "the special words, according to elementary principles of interpretation, control the general expressions." [19] In the *Brazilian Loans Case*, it was said to be "a familiar rule for the construction of instruments that, where they are found to be ambigious, they should be taken *contra proferentem*"; and it was held that an ambiguity in a prospectus of the loans might be resolved against the Brazilian Government which was responsible for it, that meaning being given which the terms "would naturally carry to those taking the bonds under the prospectus." [20] The Court has also applied the maxim *expressio unius exclusio alterius*.[21]

[13] Series A, No. 23, p. 26.
[14] Series B, No. 12, p 25.
[15] Series B, No. 4, p. 25. See also Series A, No. 2, p. 85; *idem*, No. 7, p. 22.
[16] Series A, No. 5, p. 49.
[17] *Idem*, No. 7, p. 76.
[18] *Idem*, No. 2, p. 31. *Cf.*, *idem*, No. 7, p. 29; *idem*, No. 15, p. 31.
[19] *Idem*, No. 20, p. 30. *Cf.*, *idem*, No. 7, p. 33.
[20] *Idem*, No. 21, p. 114.
[21] Series A/B, No. 42, p. 121.

APPENDICES

I. INSTRUMENTS RELATING TO THE CONSTITUTION OF THE COURT

APPENDIX NO. 1

Resolution of the Assembly of the League of Nations, Geneva, December 13th, 1920

English version from Series D, No. 1 (3d. ed.), p. 7.[1]

1. The Assembly unanimously declares its approval of the draft Statute of the Permanent Court of International Justice—as amended by the Assembly—which was prepared by the Council under Article 14 of the Covenant [2] and submitted to the Assembly for its approval.

2. In view of the special wording of Article 14, the Statute of the Court shall be submitted within the shortest possible time to the Members of the League of Nations for adoption in the form of a Protocol duly ratified and declaring their recognition of this Statute. It shall be the duty of the Council to submit the Statute to the Members.

3. As soon as this Protocol has been ratified by the majority of the Members of the League, the Statute of the Court shall come into force and the Court shall be called upon to sit in conformity with the said Statute in all disputes between the Members or States which have ratified, as well as between the other States to which the Court is open under Article 35, paragraph 2, of the said Statute.

4. The said Protocol shall likewise remain open for signature by the States mentioned in the Annex to the Covenant.

APPENDIX NO. 2

Protocol of Signature of the Statute of the Permanent Court of International Justice, Geneva, December 16, 1920

English version from Series D, No. 1 (4th ed.), p. 7.[1]

The Members of the League of Nations, through the undersigned, duly authorized, declare their acceptance of the adjoined Statute of the Permanent

[1] The text includes a French version, also.

[2] Article 14 of the Covenant of the League of Nations:
The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the Parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

Court of International Justice,[2] which was approved by a unanimous vote of the Assembly of the League on the 13th December, 1920, at Geneva.

Consequently, they hereby declare that they accept the jurisdiction of the Court in accordance with the terms and subject to the conditions of the above-mentioned Statute.

The present Protocol, which has been drawn up in accordance with the decision taken by the Assembly of the League of Nations on the 13th December, 1920, is subject to ratification. Each Power shall send its ratification to the Secretary-General of the League of Nations; the latter shall take the necessary steps to notify such ratification to the other signatory Powers. The ratification shall be deposited in the archives of the Secretariat of the League of Nations.

The said Protocol shall remain open for signature by the Members of the League of Nations and by the States mentioned in the Annex to the Covenant of the League.

The Statute of the Court shall come into force as provided in the above-mentioned decision.

Executed at Geneva, in a single copy, the French and English texts of which shall both be authentic.

December 16th, 1920.

[*Signatures omitted.*]

SIGNATURE AND RATIFICATION OF THE PROTOCOL OF SIGNATURE OF DECEMBER 16, 1920

(*As of December 31, 1942*)

States [3]	*Signature* [4]	*Deposit of Ratification* [4]
Afghanistan		
Albania	June 18, 1921	July 13, 1921
United States of America	Dec. 9, 1929	
Argentine Republic	Dec. 28, 1935	
Australia	June 16, 1921	Aug. 4, 1921
Austria	June 18, 1921	July 23, 1921
Belgium	May 9, 1921	Aug. 29, 1921
Bolivia	June 20, 1921	July 7, 1936
Brazil	Dec. 18, 1920	Nov. 1, 1921
British Empire	Dec. 18, 1920	Aug. 4, 1921
Bulgaria	April 10, 1921	Aug. 12, 1921
Canada	March 30, 1921	Aug. 4, 1921
Chile	Sept. 7, 1921	July 20, 1928
China	Dec. 18, 1920	May 13, 1922
Colombia	Before Jan. 28, 1921	Jan. 6, 1932
Costa Rica	Before Jan. 28, 1921	

[2] The text of the amended Statute is reproduced at pp. 669–81, *infra*.

[3] The States to which the Protocol of Signature was opened for signature are listed. They include all of the Members of the League of Nations since 1920, and the two additional States mentioned in the Annex to the Covenant of the League of Nations.

[4] The dates have been compiled from various official documents, more especially League of Nations Document A. 6. 1939. Annex I. V.

States	*Signature*	*Deposit of Ratification*
Cuba	Before Jan. 28, 1921	Jan. 12, 1922
Czechoslovakia	May 19, 1921	Sept. 2, 1921
Denmark	Dec. 18, 1920	June 13, 1921
Dominican Republic	Sept. 30, 1924	Feb. 4, 1933
Ecuador		
Egypt	May 30, 1939	
Estonia	Oct. 18, 1921	May 2, 1923
Ethiopia	July 12, 1926	July 16, 1926
Finland	June 28, 1921	April 6, 1922
France	Dec. 18, 1920	Aug. 7, 1921
Germany	Dec. 10, 1926	Mar. 11, 1927
Greece	Dec. 17, 1920	Oct. 3, 1921
Guatemala	Dec. 17, 1926	
Haiti	Before Sept. 5, 1921	Sept. 7, 1921
Honduras		
Hungary	Aug. 1, 1923	Nov. 20, 1925
India	Dec. 18, 1920	Aug. 4, 1921
Iran (Persia)	April 4, 1921	April 25, 1931
Iraq	Sept. 22, 1938	
Ireland		(Aug. 21, 1926) [5]
Italy	Dec. 18, 1920	June 20, 1921
Japan	Dec. 17, 1920	Nov. 16, 1921
Latvia	Jan. 21, 1922	Feb. 12, 1924
Liberia	July 24, 1921	
Lithuania	Oct. 5, 1921	May 16, 1922
Luxemburg	Before Feb. 12, 1921	Sept. 15, 1930
Mexico		
Netherlands	Dec. 18, 1920	Aug. 6, 1921
New Zealand	Dec. 17, 1920	Aug. 4, 1921
Nicaragua	Sept. 14, 1929	Nov. 29, 1939 [6]
Norway	Dec. 17, 1920	Aug. 20, 1921
Panama	Dec. 18, 1920	June 14, 1929
Paraguay	Dec. 17, 1920	May 11, 1933
Peru	Sept. 14, 1929	Mar. 29, 1932
Poland	Dec. 18, 1920	Aug. 26, 1921
Portugal	Dec. 17, 1920	Oct. 8, 1921
Rumania	April 15, 1921	Aug. 8, 1921
El Salvador	Dec. 18, 1920	Aug. 29, 1930
Saudi Arabia [7]		
South Africa	Dec. 18, 1920	Aug. 4, 1921
Soviet Union		
Spain	April 6, 1921	Aug. 30, 1921
Sweden	Dec. 17, 1920	Feb. 21, 1921
Switzerland	Dec. 18, 1920	July 25, 1921
Thailand (Siam)	Dec. 17, 1920	Feb. 27, 1922
Turkey	March 12, 1936	
Uruguay	Dec. 17, 1920	Sept. 27, 1921
Venezuela	Before Jan. 28, 1921	Dec. 2, 1921
Yugoslavia	May 30, 1921	Aug. 12, 1921

Total number of signatory states: 59
Total number of ratifying states: 51

[5] The signature on behalf of the British Empire, on December 18, 1920, applied to what later became the Irish Free State; on August 21, 1926, the Secretary General of the League of Nations was informed that the Irish Free State should be included among the states which had ratified the Protocol of Signature.

[6] On this date Nicaragua's ratification was notified to the Secretary-General of the League of Nations by telegraph.

[7] In 1932, the name of the Kingdom of the Hedjaz and Nejd was changed to Saudi Arabia.

APPENDIX NO. 3

Protocol for the Revision of the Statute of the Permanent Court of International Justice, Geneva, September 14, 1929

(In force, February 1, 1936)

English version from Series D, No. 1 (4th ed.), pp. 9–10.[1]

1. The undersigned, duly authorised, agree, on behalf of the Governments which they represent, to make in the Statute of the Permanent Court of International Justice the amendments which are set out in the Annex to the present Protocol [2] and which form the subject of the resolution of the Assembly of the League of Nations of September 14th, 1929.

2. The present protocol, of which the French and English texts are both authentic, shall be presented for signature to all the signatories of the Protocol of December 16th, 1920, to which the Statute of the Permanent Court of International Justice is annexed, and to the United States of America.

3. The present Protocol shall be ratified. The instruments of ratification shall be deposited, if possible before September 1st, 1930, with the Secretary-General of the League of Nations, who shall inform the Members of the League of Nations and the States mentioned in the Annex to the Covenant.

4. The present Protocol shall enter into force on September 1st, 1930, provided that the Council of the League of Nations has satisfied itself that those Members of the League of Nations and States mentioned in the Annex to the Covenant which have ratified the Protocol of December 16th, 1920, and whose ratification of the present Protocol has not been received by that date, have no objection to the coming into force of the amendments to the Statute of the Court which are annexed to the present Protocol.

5. After the entry into force of the present Protocol, the new provisions shall form part of the Statute adopted in 1920 and the provisions of the original articles which have been made the subject of amendment shall be abrogated. It is understood that, until January 1st, 1931, the Court shall continue to perform its functions in accordance with the Statute of 1920.

6. After the entry into force of the present Protocol, any acceptance of the Statute of the Court shall constitute an acceptance of the Statute as amended.

7. For the purposes of the present Protocol, the United States of America shall be in the same position as a State which has ratified the Protocol of December 16th, 1920.

Done at Geneva, the fourteenth day of September nineteen hundred and twenty-nine, in a single copy which shall be deposited in the archives of the

[1] The text includes a French version, also.

[2] The amendments are incorporated in the amended text of the Statute reproduced at pp. 669–81, *infra*.

Secretariat of the League of Nations. The Secretary-General shall deliver authenticated copies to the Members of the League of Nations and to the States mentioned in the Annex to the Covenant.

[*Signatures and Annex omitted.*]

APPENDIX NO. 4

Revised Statute of the Permanent Court of International Justice [1]

English version from Series D, No. 1 (4th. ed.), pp. 13–28.[2]

Article 1. A Permanent Court of International Justice is hereby established, in accordance with Article 14 of the Covenant of the League of Nations. This Court shall be in addition to the Court of Arbitration organized by the Conventions of The Hague of 1899 and 1907, and to the special Tribunals of Arbitration to which States are always at liberty to submit their disputes for settlement.

Chapter I. Organization of the Court

Art. 2. The Permanent Court of International Justice shall be composed of a body of independent judges, elected regardless of their nationality from amongst persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are juris consults of recognized competence in international law.

Art. 3.* The Court shall consist of fifteen members.[3]

Art. 4.* The members of the Court shall be elected by the Assembly and by the Council from a list of persons nominated by the national groups in the Court of Arbitration, in accordance with the following provisions.

In the case of Members of the League of Nations not represented in the Permanent Court of Arbitration, the lists of candidates shall be drawn up by national groups appointed for this purpose by their Governments under the same conditions as those prescribed for members of the Permanent Court of Arbitration by Article 44 of the Convention of The Hague of 1907 for the pacific settlement of international disputes.

[1] The asterisk indicates that the article was amended or added as result of the entry into force on February 1, 1936 of the Revision Protocol of September 14, 1929. The original text is indicated in the notes.

[2] The text includes a French version, also.

[3] Original text of Art. 3:

The Court shall consist of fifteen members: eleven judges and four deputy-judges. The number of judges and deputy-judges may hereafter be increased by the Assembly, upon the proposal of the Council of the League of Nations, to a total of fifteen judges and six deputy-judges.

The conditions under which a State which has accepted the Statute of the Court but is not a member of the League of Nations, may participate in electing the members of the Court shall, in the absence of a special agreement, be laid down by the Assembly on the proposal of the Council.[4]

Art. 5. At least three months before the date of the election, the Secretary-General of the League of Nations shall address a written request to the members of the Court of Arbitration belonging to the States mentioned in the Annex to the Covenant or to the States which join the League subsequently, and to the persons appointed under paragraph 2 of Article 4, inviting them to undertake, within a given time, by national groups, the nomination of persons in a position to accept the duties of a member of the Court.

No group may nominate more than four persons, not more than two of whom shall be of their own nationality. In no case must the number of candidates nominated be more than double the number of seats to be filled.

Art. 6. Before making these nominations, each national group is recommended to consult its Highest Court of Justice, its Legal Faculties and Schools of Law, and its National Academies and national sections of International Academies devoted to the study of law.

Art. 7. The Secretary-General of the League of Nations shall prepare a list in alphabetical order of all the persons thus nominated. Save as provided in Article 12, paragraph 2, these shall be the only persons eligible for appointment.

The Secretary-General shall submit this list to the Assembly and to the Council.

Art. 8.* The Assembly and the Council shall proceed independently of one another to elect the members of the Court.[5]

Art. 9. At every election, the electors shall bear in mind that not only should all the persons appointed as members of the Court possess the qualifications required, but the whole body also should represent the main forms of civilization and the principal legal systems of the world.

Art. 10. Those candidates who obtain an absolute majority of votes in the Assembly and in the Council shall be considered as elected.

In the event of more than one national of the same Member of the League being elected by the votes of both the Assembly and the Council, the eldest of these only shall be considered as elected.

Art. 11. If, after the first meeting held for the purpose of the election, one or more seats remain to be filled, a second and, if necessary, a third meeting shall take place.

Art. 12. If, after the third meeting, one or more seats still remain unfilled, a joint conference consisting of six members, three appointed by the Assembly and three by the Council, may be formed, at any time, at the request of either

[4] The original text did not contain the third paragraph.

[5] Original text of Art. 8:

The Assembly and the Council shall proceed independently of one another to elect, firstly the judges, then the deputy-judges.

the Assembly or the Council, for the purpose of choosing one name for each seat still vacant, to submit to the Assembly and the Council for their respective acceptance.

If the Conference is unanimously agreed upon any person who fulfils the required conditions, he may be included in its list, even though he was not included in the list of nominations referred to in Articles 4 and 5.

If the joint conference is satisfied that it will not be successful in procuring an election, those members of the Court who have already been appointed shall, within a period to be fixed by the Council, proceed to fill the vacant seats by selection from amongst those candidates who have obtained votes either in the Assembly or in the Council.

In the event of an equality of votes amongst the judges, the eldest judge shall have a casting vote.

Art. 13.* The members of the Court shall be elected for nine years.

They may be re-elected.

They shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun.

In the case of the resignation of a member of the Court, the resignation will be addressed to the President of the Court for transmission to the Secretary-General of the League of Nations.

This last notification makes the place vacant.[6]

Art. 14.* Vacancies which may occur shall be filled by the same method as that laid down for the first election, subject to the following provision: the Secretary-General of the League of Nations shall, within one month of the occurrence of the vacancy, proceed to issue the invitations provided for in Article 5, and the date of the election shall be fixed by the Council at its next session.[7]

Art. 15.* A member of the Court elected to replace a member whose period of appointment has not expired, will hold the appointment for the remainder of his predecessor's term.[8]

Art. 16.* The members of the Court may not exercise any political or administrative function, nor engage in any other occupation of a professional nature.[9]

[6] The original text did not contain the fourth and fifth paragraphs.

[7] Original text of Art. 14:

Vacancies which may occur shall be filled by the same method as that laid down for the first election. A member of the Court elected to replace a member whose period of appointment had not expired will hold the appointment for the remainder of his predecessor's term.

[8] Original text of Art. 15:

Deputy-judges shall be called upon to sit in the order laid down in a list.

This list shall be prepared by the Court and shall have regard firstly to priority of election and secondly to age.

[9] Original text of this paragraph:

The ordinary members of the Court may not exercise any political or administrative function. This provision does not apply to the deputy-judges except when performing their duties on the Court.

Any doubt on this point is settled by the decision of the Court.

Art. 17.* No member of the Court may act as agent, counsel or advocate in any case.[10]

No member may participate in the decision of any case in which he has previously taken an active part as agent, counsel or advocate for one of the contesting parties, or as a member of a national or international Court, or of a commission of enquiry, or in any other capacity.

Any doubt on this point is settled by the decision of the Court.

Art. 18. A member of the Court cannot be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfil the required conditions.

Formal notification thereof shall be made to the Secretary-General of the League of Nations, by the Registrar.

This notification makes the place vacant.

Art. 19. The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities.

Art. 20. Every member of the Court shall, before taking up his duties, make a solemn declaration in open Court that he will exercise his powers impartially and conscientiously.

Art. 21. The Court shall elect its President and Vice-President for three years; they may be re-elected.

It shall appoint its Registrar.

The duties of Registrar of the Court shall not be deemed incompatible with those of Secretary-General of the Permanent Court of Arbitration.

Art. 22. The seat of the Court shall be established at The Hague.

The President and Registrar shall reside at the seat of the Court.

Art. 23.* The Court shall remain permanently in session, except during the judicial vacations, the dates and duration of which shall be fixed by the Court.

Members of the Court whose homes are situated at more than five days' normal journey from The Hague shall be entitled, apart from the judicial vacations, to six months' leave every three years, not including the time spent in travelling.

Members of the Court shall be bound, unless they are on regular leave or prevented from attending by illness or other serious reason duly explained to the President, to hold themselves permanently at the disposal of the Court.[11]

[10] Original text of this paragraph:

No member of the Court can act as agent, counsel or advocate in any case of an international nature. This provision only applies to the deputy-judges as regards cases in which they are called upon to exercise their functions on the Court.

[11] Original text of Art. 23:

A session of the Court shall be held every year.

Unless otherwise provided by Rules of Court, this session shall begin on the 15th of June, and shall continue for so long as may be deemed necessary to finish the cases on the list.

The President may summon an extraordinary session of the Court whenever necessary.

Art. 24. If, for some special reason, a member of the Court considers that he should not take part in the decision of a particular case, he shall so inform the President.

If the President considers that for some special reason one of the members of the Court should not sit on a particular case, he shall give him notice accordingly.

If in any such case the member of the Court and the President disagree, the matter shall be settled by the decision of the Court.

Art. 25.* The full Court shall sit except when it is expressly provided otherwise.

Subject to the condition that the number of judges available to constitute the Court is not thereby reduced below eleven, the Rules of Court may provide for allowing one or more judges, according to circumstances and in rotation, to be dispensed from sitting.

Provided always that a quorum of nine judges shall suffice to constitute the Court.[12]

Art. 26.* Labour cases, particularly cases referred to in Part XIII (Labour) of the Treaty of Versailles and the corresponding portions of the other Treaties of Peace, shall be heard and determined by the Court under the following conditions:

The Court will appoint every three years a special Chamber of five judges, selected so far as possible with due regard to the provisions of Article 9. In addition, two judges shall be selected for the purpose of replacing a judge who finds it impossible to sit. If the parties so demand, cases will be heard and determined by this Chamber. In the absence of any such demand, the full Court will sit. In both cases, the judges will be assisted by four technical assessors sitting with them, but without the right to vote, and chosen with a view to ensuring a just representation of the competing interests.[13]

The technical assessors shall be chosen for each particular case in accordance with rules of procedure under Article 30 from a list of "Assessors for Labour Cases" composed of two persons nominated by each Member of the

[12] Original text of the second and third paragraphs:

If eleven judges cannot be present, the number shall be made up by calling on deputy-judges to sit.

If, however, eleven judges are not available, a quorum of nine judges shall suffice to constitute the Court.

[13] Original text of the fourth and fifth sentences of this paragraph: In the absence of any such demand, the Court will sit with the number of judges provided for in Article 25. On all occasions the judges will be assisted by four technical assessors sitting with them, but without the right to vote, and chosen with a view to ensuring a just representation of the competing interests.

The original text contained as a third paragraph:

If there is a national of one only of the parties sitting as a judge in the Chamber referred to in the preceding paragraph, the President will invite one of the other judges to retire in favour of a judge chosen by the other party in accordance with Article 31.

League of Nations and an equivalent number nominated by the Governing Body of the Labour Office. The Governing Body will nominate, as to one-half, representatives of the workers, and, as to one-half, representatives of employers from the list referred to in Article 412 of the Treaty of Versailles and the corresponding Articles of the other Treaties of Peace.

Recourse may always be had to the summary procedure provided for in Article 29, in the cases referred to in the first paragraph of the present Article, if the parties so request.[14]

In Labour cases, the International Office shall be at liberty to furnish the Court with all relevant information, and for this purpose the Director of that Office shall receive copies of all the written proceedings.

Art. 27.* Cases relating to transit and communications, particularly cases referred to in Part XII (Ports, Waterways and Railways) of the Treaty of Versailles and the corresponding portions of the other Treaties of Peace, shall be heard and determined by the Court under the following conditions:

The Court will appoint every three years a special Chamber of five judges, selected so far as possible with due regard to the provisions of Article 9. In addition, two judges shall be selected for the purpose of replacing a judge who finds it impossible to sit. If the parties so demand, cases will be heard and determined by this Chamber. In the absence of any such demand, the full Court will sit.[15] When desired by the parties or decided by the Court, the judges will be assisted by four technical assessors sitting with them, but without the right to vote.

The technical assessors shall be chosen for each particular case in accordance with rules of procedure under Article 30 from a list of "Assessors for Transit and Communications Cases" composed of two persons nominated by each Member of the League of Nations.

Recourse may always be had to the summary procedure provided for in Article 29, in the cases referred to in the first paragraph of the present Article, if the parties so request.[16]

Art. 28. The special chambers provided for in Articles 26 and 27 may, with consent of the parties to the dispute, sit elsewhere than at The Hague.

Art. 29.* With a view to the speedy despatch of business, the Court shall form annually a Chamber composed of five judges who, at the request of the contesting parties, may hear and determine cases by summary procedure. In

[14] This paragraph did not appear in the original text.

[15] In the original text, this sentence read as follows: In the absence of any such demand, the Court will sit with the number of judges provided for in Article 25.

The original text contained as a third paragraph:

If there is a national of one only of the parties sitting as a judge in the chamber referred to in the preceding paragraph, the President will invite one of the other judges to retire in favour of a judge chosen by the other party in accordance with Article 31.

[16] This paragraph did not appear in the original text.

addition, two judges shall be selected for the purpose of replacing a judge who finds it impossible to sit.[17]

Art. 30. The Court shall frame rules for regulating its procedure. In particular, it shall lay down rules for summary procedure.

Art. 31.* Judges of the nationality of each of the contesting parties shall retain their right to sit in the case before the Court.

If the Court includes upon the Bench a judge of the nationality of one of the parties, the other party may choose a person to sit as judge. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5.

If the Court includes upon the Bench no judge of the nationality of the contesting parties, each of these parties may proceed to select a judge as provided in the preceding paragraph.

The present provision shall apply to the case of Articles 26, 27 and 29. In such cases, the President shall request one or, if necessary, two of the members of the Court forming the Chamber to give place to the members of the Court of the nationality of the parties concerned, and, failing such or if they are unable to be present, to the judges specially appointed by the parties.

Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point is settled by the decision of the Court.

Judges selected as laid down in paragraphs 2, 3 and 4 of this Article shall fulfil the conditions required by Articles 2, 17 (paragraph 2), 20 and 24 of this Statute. They shall take part in the decision on terms of complete equality with their colleagues.[18]

Art. 32.* The members of the Court shall receive an annual salary.

The President shall receive a special annual allowance.

The Vice-President shall receive a special allowance for every day on which he acts as President.

[17] Original text of Art. 29:

With a view to the speedy despatch of business, the Court shall form annually a chamber composed of three judges who, at the request of the contesting parties, may hear and determine cases by summary procedure.

[18] Original text of Art. 31:

Judges of the nationality of each contesting party shall retain their right to sit in the case before the Court.

If the Court includes upon the Bench a judge of the nationality of one of the parties only, the other party may select from among the deputy-judges a judge of its nationality, if there be one. If there should not be one, the party may choose a judge, preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5.

If the Court includes upon the Bench no judge of the nationality of the contesting parties, each of these may proceed to select or choose a judge as provided in the preceding paragraph.

Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point is settled by the decision of the Court.

Judges selected or chosen as laid down in paragraphs 2 and 3 of this article shall fulfil the conditions required by Articles 2, 16, 17, 20, 24 of this Statute. They shall take part in the decision on an equal footing with their colleagues.

The judges appointed under Article 31, other than members of the Court, shall receive an indemnity for each day on which they sit.

These salaries, allowances and indemnities shall be fixed by the Assembly of the League of Nations on the proposal of the Council. They may not be decreased during the term of office.

The salary of the Registrar shall be fixed by the Assembly on the proposal of the Court.

Regulations made by the Assembly shall fix the conditions under which retiring pensions may be given to members of the Court and to the Registrar, and the conditions under which members of the Court and the Registrar shall have their travelling expenses refunded.

The above salaries, indemnities and allowances shall be free of all taxation.[19]

Art. 33. The expenses of the Court shall be borne by the League of Nations, in such a manner as shall be decided by the Assembly upon the proposal of the Council.

Chapter II. Competence of the Court

Art. 34. Only States or Members of the League of Nations can be parties in cases before the Court.

Art. 35.* The Court shall be open to the Members of the League and also to States mentioned in the Annex to the Covenant.

The conditions under which the Court shall be open to other States shall, subject to the special provisions contained in treaties in force, be laid down by the Council, but in no case shall such provisions place the parties in a position of inequality before the Court.

When a State which is not a Member of the League of Nations is a party to a dispute, the Court will fix the amount which that party is to contribute towards the expenses of the Court. This provision shall not apply if such State is bearing a share of the expenses of the Court.[20]

[19] Original text of Art. 32:

The judges shall receive an annual indemnity to be determined by the Assembly of the League of Nations upon the proposal of the Council. This indemnity must not be decreased during the period of a judge's appointment.

The President shall receive a special grant for his period of office, to be fixed in the same way.

The Vice-President, judges and deputy-judges, shall receive a grant for the actual performance of their duties, to be fixed in the same way.

Travelling expenses incurred in the performance of their duties shall be refunded to judges and deputy-judges who do not reside at the seat of the Court.

Grants due to judges selected or chosen as provided in Article 31 shall be determined in the same way.

The salary of the Registrar shall be decided by the Council upon the proposal of the Court.

The Assembly of the League of Nations shall lay down, on the proposal of the Council, a special regulation fixing the conditions under which retiring pensions may be given to the personnel of the Court.

[20] The original text did not contain the second sentence of this paragraph.

Art. 36. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force.

The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or ratifying the Protocol to which the present Statute is adjoined, or at a later moment, declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning:

(*a*) the interpretation of a treaty;

(*b*) any question of international law;

(*c*) the existence of any fact which, if established, would constitute a breach of an international obligation;

(*d*) the nature or extent of the reparation to be made for the breach of an international obligation.

The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain Members or States, or for a certain time.

In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Art. 37. When a treaty or convention in force provides for the reference of a matter to a tribunal to be instituted by the League of Nations, the Court will be such tribunal.

Art. 38. The Court shall apply:

1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

2. International custom, as evidence of a general practice accepted as law;

3. The general principles of law recognized by civilized nations;

4. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

Chapter III. Procedure

Art. 39.* The official languages of the Court shall be French and English. If the parties agree that the case shall be conducted in French, the judgment will be delivered in French. If the parties agree that the case shall be conducted in English, the judgment will be delivered in English.

In the absence of an agreement as to which language shall be employed, each party may, in the pleadings, use the language which it prefers; the decision of the Court will be given in French and English. In this case the Court will at

the same time determine which of the two texts shall be considered as authoritative.

The Court may, at the request of any party, authorize a language other than French or English to be used.[21]

Art. 40.* Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the contesting parties must be indicated.

The Registrar shall forthwith communicate the application to all concerned.

He shall also notify the Members of the League of Nations through the Secretary-General, and also any States entitled to appear before the Court.[22]

Art. 41. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to reserve the respective rights of either party.

Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and the Council.

Art. 42. The parties shall be represented by agents.

They may have the assistance of counsel or advocates before the Court.

Art. 43. The procedure shall consist of two parts: written and oral.

The written proceedings shall consist of the communication to the judges and to the parties of Cases, Counter-Cases and, if necessary, Replies; also all papers and documents in support.

These communications shall be made through the Registrar, in the order and within the time fixed by the Court.

A certified copy of every document produced by one party shall be communicated to the other party.

The oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel and advocates.

Art. 44. For the service of all notices upon persons other than the agents, counsel and advocates, the Court shall apply direct to the government of the State upon whose territory the notice has to be served.

The same provision shall apply whenever steps are to be taken to procure evidence on the spot.

Art. 45.* The hearing shall be under the control of the President or, if he is unable to preside, of the Vice-President; if neither is able to preside, the senior judge present shall preside.[23]

[21] Original text of this paragraph:
The Court may, at the request of the parties, authorize a language other than French or English to be used.

[22] Original text of this paragraph:
He shall also notify the Members of the League of Nations through the Secretary-General.

[23] Original text of Art. 45:
The hearing shall be under the control of the President or, in his absence, of the Vice-President; if both are absent, the senior judge shall preside.

Art. 46. The hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted.

Art. 47. Minutes shall be made at each hearing, and signed by the Registrar and the President.

These minutes shall be the only authentic record.

Art. 48. The Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence.

Art. 49. The Court may, even before the hearing begins, call upon the agents to produce any document, or to supply any explanations. Formal note shall be taken of any refusal.

Art. 50. The Court may, at any time, entrust any individual, body, bureau, commission or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.

Art. 51. During the hearing any relevant questions are to be put to the witnesses and experts under the conditions laid down by the Court in the rules of procedure referred to in Article 30.

Art. 52. After the Court has received the proofs and evidence within the time specified for the purpose, it may refuse to accept any further oral or written evidence that one party may desire to present unless the other side consents.

Art. 53. Whenever one of the parties shall not appear before the Court, or shall fail to defend his case, the other party may call upon the Court to decide in favour of his claim.

The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.

Art. 54. When, subject to the control of the Court, the agents, advocates and counsel have completed their presentation of the case, the President shall declare the hearing closed.

The Court shall withdraw to consider the judgment.

The deliberations of the Court shall take place in private and remain secret.

Art. 55. All questions shall be decided by a majority of the judges present at the hearing.

In the event of an equality of votes, the President or his deputy shall have a casting vote.

Art. 56. The judgment shall state the reasons on which it is based.

It shall contain the names of the judges who have taken part in the decision.

Art. 57. If the judgment does not represent in whole or in part the unanimous opinion of the judges, dissenting judges are entitled to deliver a separate opinion.

Art. 58. The judgment shall be signed by the President and by the Registrar. It shall be read in open Court, due notice having been given to the agents.

Art. 59. The decision of the Court has no binding force except between the parties and in respect of that particular case.

Art. 60. The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

Art. 61. An application for revision of a judgment can be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.

The proceedings for revision will be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.

The application for revision must be made at latest within six months of the discovery of the new fact.

No application for revision may be made after the lapse of ten years from the date of the sentence.

Art. 62. Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene as a third party.

It will be for the Court to decide upon this request.

Art. 63. Whenever the construction of a convention to which States other than those concerned in the case are parties is in question, the Registrar shall notify all such States forthwith.

Every State so notified has the right to intervene in the proceedings: but if it uses this right, the construction given by the judgment will be equally binding upon it.

Art. 64. Unless otherwise decided by the Court, each party shall bear its own costs.

Chapter IV. Advisory Opinions [24]

Art. 65.* Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request, signed either by the President of the Assembly or the President of the Council of the League of Nations, or by the Secretary-General of the League under instructions from the Assembly or the Council.

[24] The original text did not contain Articles 65–8.

The request shall contain an exact statement of the question upon which an opinion is required, and shall be accompanied by all documents likely to throw light upon the question.

Art. 66.* — 1. The Registrar shall forthwith give notice of the request for an advisory opinion to the Members of the League of Nations, through the Secretary-General of the League, and to any States entitled to appear before the Court.

The Registrar shall also, by means of a special and direct communication, notify any Member of the League or State admitted to appear before the Court or international organization considered by the Court (or, should it not be sitting, by the President) as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time-limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.

Should any Member or State referred to in the first paragraph have failed to receive the communication specified above, such Member or State may express a desire to submit a written statement, or to be heard; and the Court will decide.

2. Members, States, and organizations having presented written or oral statements or both shall be admitted to comment on the statements made by other Members, States, or organizations in the form, to the extent and within the time-limits which the Court, or, should it not be sitting, the President, shall decide in each particular case. Accordingly, the Registrar shall in due time communicate any such written statements to Members, States, and organizations having submitted similar statements.

Art. 67.* The Court shall deliver its advisory opinions in open Court, notice having been given to the Secretary-General of the League of Nations and to the representatives of Members of the League, of States and of international organizations immediately concerned.

Art. 68.* In the exercise of its advisory functions, the Court shall further be guided by the provisions of the Statute which apply in contentious cases to the extent to which it recognises them to be applicable.

APPENDIX NO. 5

The "Optional Clause" and Declarations Accepting the Court's Compulsory Jurisdiction

(As of December 31, 1942)

The undersigned, being duly authorized thereto, further declare, on behalf of their Government, that, from this date, they accept as compulsory *ipso facto* and without special convention, the jurisdiction of the Court in conformity

with Article 36, paragraph 2, of the Statute of the Court, under the following conditions: [1]

Albania.—On behalf of the Kingdom of Albania and subject to ratification, I recognize as compulsory *ipso facto* and without special agreement in relation to any other Member of the League of Nations or State accepting the same obligation, that is to say, on condition of reciprocity, the Optional Clause provided for by Article 36 of the Statute of the Permanent Court of International Justice, for a period of five years from the date of the deposit of the instrument of ratification, in any of the disputes enumerated in the said article arising after the ratification of the present declaration with regard to situations or facts subsequent to this ratification, other than

(*a*) disputes relating to the territorial status of Albania;

(*b*) disputes with regard to questions which, by international law, fall exclusively within the jurisdiction of the Kingdom of Albania;

(*c*) disputes relating directly or indirectly to the application of treaties or conventions accepted by the Kingdom of Albania and providing for another method of pacific settlement.

Geneva, September 17, 1930.[2]

(Signed) MEHDI FRASHERI.

Argentine Republic.—On behalf of the Argentine Republic, subject to ratification by the National Congress, I recognise as compulsory, *ipso facto* and without special convention, in relation to any other Member or State accepting the same obligation, that is to say, on condition of reciprocity, the jurisdiction of the Permanent Court of International Justice, in conformity with Article 36, paragraph 2 of the Statute of the Court, for a period of ten years from the date of the deposit of the instrument of ratification, in any disputs arising after the ratification of the present declaration with regard to situations or facts subsequent to this ratification, except in cases where the parties have agreed or shall agree to have recourse to another method of pacific settlement.

The present declaration does not apply:

(1) to questions already settled;

(2) to questions which, by international law, fall within the local jurisdiction or the constitutional regime of each State.

Geneva, December 28, 1935.[3]

(Signed) ENRIQUE RUIZ GUIÑAZÚ.

[1] The text includes a French version, also.

[2] Translation. Ratification deposited September 17, 1930. The declaration was renewed on November 7, 1935, for a period of five years as from September 17, 1935.

[3] Translation. No ratification has been deposited.

Australia.—On behalf of His Majesty's Government in the Commonwealth of Australia and subject to ratification, I accept as compulsory *ipso facto* and without special convention on condition of reciprocity the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute of the Court, for a period of ten years and thereafter until such time as notice may be given to terminate the acceptance, over all disputes arising after the ratification of the present declaration with regard to situations or facts subsequent to the said ratification;

other than disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method of peaceful settlement; and

disputes with the Government of any other Member of the League which is a member of the British Commonwealth of Nations, all of which disputes shall be settled in such manner as the parties have agreed or shall agree; and

disputes with regard to questions which by international law fall exclusively within the jurisdiction of the Commonwealth of Australia;

and subject to the condition that His Majesty's Government in the Commonwealth of Australia reserve the right to require that proceedings in the Court shall be suspended in respect of any dispute which has been submitted to and is under consideration by the Council of the League of Nations, provided that notice to suspend is given after the dispute has been submitted to the Council and is given within ten days of the notification of the initiation of the proceedings in the Court, and provided also that such suspension shall be limited to a period of twelve months or such longer period as may be agreed by the parties to the dispute or determined by a decision of all the Members of the Council other than the parties to the dispute.

Geneva, September 20, 1929.[4]

(Signed) GRANVILLE RYRIE.

Austria.—On behalf of the Austrian Republic, I declare that the latter recognizes in relation to any other Member or State which accepts the same obligation, that is to say, on the condition of reciprocity, the jurisdiction of

[4] Ratification deposited August 18, 1930. On September 8, 1939, Australia notified the Secretary-General that it would "not regard its acceptance of optional clause as covering any disputes arising out of events occurring during present crisis"; reservations as to the effect of this action were made by several States. By a declaration of August 21, 1940, communicated to the Secretary-General on September 2, 1940, Australia terminated its declaration of September 20, 1929. By another declaration of the same date Australia accepted the jurisdiction of the Court for a period of five years from August 21, 1940, and thereafter until such time as notice may be given to terminate the acceptance, over all disputes covered by the declaration of September 20, 1929, excepting, however, "disputes arising out of events occurring at a time when His Majesty's Government in the Commonwealth of Australia were involved in hostilities." This declaration was not subject to ratification.

the Permanent Court as compulsory, *ipso facto* and without any special convention, for a period of five years.

March 14, 1922.[5]

(Signed) EMERICH PFLÜGL.

Belgium.—On behalf of the Belgian Government, I recognize as compulsory, *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute of the Court, for a period of fifteen years, in any disputes arising after the ratification of the present declaration with regard to situations or facts subsequent to this ratification, except in cases where the parties have agreed or shall agree to have recourse to another method of pacific settlement.

Geneva, September 25, 1925.[6]

(Signed) P. HYMANS.

Bolivia.—On behalf of the Republic of Bolivia, the undersigned, duly authorized thereto, recognizes as compulsory, *ipso facto* and without special convention, unconditionally in relation to any other Member or State accepting the same obligation, that is to say, on the sole condition of reciprocity, the jurisdiction of the Permanent Court of International Justice, for a period of ten years.

Geneva, July 7, 1936.[7]

(Signed) A. COSTA DU RELS.

Brazil.—[The instrument of ratification of the Protocol deposited November 1, 1921, with the Secretariat of the League of Nations by the Brazilian Government contains the following passage:] ". . . we declare to recognize as compulsory, in accordance with the said resolution of the National Legislature, the jurisdiction of the said Court for the period of five years, on condition of reciprocity and as soon as it has likewise been recognized as such by two at least of the Powers permanently represented on the Council of the League of Nations." [8]

[5] Translation. Not subject to ratification. This declaration was renewed by a declaration of January 12, 1927 for a period of ten years from March 13, 1927, and by a declaration of March 22, 1937, "for a further period of five years as from March 13, 1937."

[6] Translation. Ratification deposited March 10, 1926.

[7] Translation. Ratification deposited July 7, 1936.

[8] Translation. The condition was met on February 5, 1930. The declaration was renewed on January 26, 1937, "for a period of ten years, on condition of reciprocity, with the exception of questions which, by international law, fall exclusively within the jurisdiction of the Brazilian Courts of law, or which belong to the constitutional régime of each State."

Bulgaria.—On behalf of the Government of the Kingdom of Bulgaria, I recognize, in relation to any other Member or State which accepts the same obligation, the jurisdiction of the Court as compulsory, *ipso facto* and without any special convention, unconditionally.

July 29, 1921.[9] (Signed) S. POMÉNOV.

Canada.—On behalf of His Majesty's Government in Canada and subject to ratification, I accept as compulsory *ipso facto* and without special convention, on condition of reciprocity, the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute, for a period of ten years and thereafter until such time as notice may be given to terminate the acceptance, in all disputes arising after ratification of the present declaration with regard to situations or facts subsequent to said ratification:

other than disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method of peaceful settlement; and

disputes with the Government of any other Member of the League which is a member of the British Commonwealth of Nations, all of which disputes shall be settled in such manner as the parties have agreed or shall agree; and

disputes with regard to questions which by international law fall exclusively within the jurisdiction of the Dominion of Canada;

and subject to the condition that His Majesty's Government in Canada reserve the right to require that proceedings in the Court shall be suspended in respect of any dispute which has been submitted to and is under consideration by the Council of the League of Nations, provided that notice to suspend is given after the dispute has been submitted to the Council and is given within ten days of the notification of the initiation of the proceedings in the Court, and provided also that such suspension shall be limited to a period of twelve months or such longer period as may be agreed by the parties to the dispute or determined by a decision of all the Members of the Council other than the parties to the dispute.

Geneva, September 20, 1929.[10] (Signed) R. DANDURAND.

China.—The Chinese Government recognizes as compulsory *ipso facto* and without special convention, in relation to any Member or State which

[9] Translation. This declaration became effective on August 12, 1921, date of the deposit of Bulgaria's ratification of the Protocol of Signature. No ratification was required.

[10] Ratification deposited July 28, 1930. On December 8, 1939, Canada notified the Secretary-General of the League of Nations that it would not regard its declaration "as covering disputes arising out of events occurring during the present war"; reservations as to the effect of this action were made by several States.

accepts the same obligation, that is to say, on the sole condition of reciprocity, the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute of the Court, for a period of five years.

May 13, 1922.[11]

(Signed) Ts. F. TANG.

Colombia.—The Republic of Colombia recognizes as compulsory *ipso facto* and without special agreement, on condition of reciprocity, in relation to any other State accepting the same obligation, the jurisdiction of the Permanent Court of International Justice, in accordance with Article 36 of the Statute.

Geneva, January 6, 1932.[12]

(Signed) A. J. RESTREPO.

Costa Rica.—On condition of reciprocity.

[Before January 28, 1921.][13]

(Signed) MANUEL M. DE PERALTA.

Czechoslovakia.—On behalf of the Czechoslovak Republic and subject to ratification, I recognize as compulsory *ipso facto* and without special agreement in relation to any other Member of the League of Nations or State accepting the same obligation, that is to say, on condition of reciprocity, the jurisdiction of the Court, in conformity with Article 36, paragraph 2, of its Statute, for a period of ten years from the date of the deposit of the instrument of ratification, in any dispute arising after the ratification of the present declaration with regard to situations or facts subsequent to this ratification, except in cases where the parties have agreed or shall agree to have recourse to another method of pacific settlement, and subject to the right, for either of the parties to the dispute, to submit the dispute, before any recourse to the Court, to the Council of the League of Nations.

Geneva, September 19, 1929.[14]

(Signed) DR. EDUARD BENEŠ.

Denmark.—On behalf of the Danish Government and subject to ratification, I recognize, in relation to any Member or State accepting the same obligation, that is to say, on the sole condition of reciprocity, the jurisdiction

[11] Translation. Ratification not required.
[12] Translation. Ratification not required. The declaration was corrected on October 30, 1937, to apply only to "disputes arising out of facts subsequent to January 6, 1932."
[13] Translation. As Costa Rica has not deposited a ratification of the Protocol of Signature of December 16, 1920, the declaration has not come into force.
[14] Translation. No ratification has been deposited.

of the Court as compulsory, *ipso facto* and without special convention, for a period of five years.

[December 18, 1920.] [15]

(Signed) HERLUF ZAHLE.

Dominican Republic.—On behalf of the Government of the Dominican Republic and subject to ratification, I recognize, in relation to any other Member or State accepting the same obligation, that is to say, on the sole condition of reciprocity, the jurisdiction of the Court as compulsory *ipso facto* and without special convention.

September 30, 1924.[16]

(Signed) JACINTO R. DE CASTRO.

Egypt.—On behalf of the Royal Egyptian Government and subject to ratification, I accept as compulsory *ipso facto* and without special agreement, in relation to any other Member of the League of Nations or to any State accepting the same obligation, that is to say on condition of reciprocity, the jurisdiction of the Court, in conformity with Article 36, paragraph 2, of its Statute, for a period of five years from the date of the deposit of the instrument of ratification, over all disputes arising after the ratification of this Declaration, with regard to situations or facts subsequent to the said ratification, except in cases where the Parties have agreed or shall agree to have recourse to another method of pacific settlement.

The present Declaration does not apply to disputes relating to the right of sovereignty of Egypt, or to questions which, by international law, fall exclusively within its jurisdiction.

Geneva, May 30, 1939.[17]

(Signed) FAKHRY.

Estonia.—[The instrument of ratification [18] of the Protocol of Signature contains the following:] "The Estonian Republic declares that it recognizes as compulsory *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligation, that is to say, on condition of reciprocity, the jurisdiction of the Court, in conformity with Article 36,

[15] Translation. Ratification deposited June 13, 1921. This declaration was renewed by the declaration of December 11, 1925, ratified on March 28, 1926, for a period of ten years as from June 13, 1926, and by the declaration of June 4, 1936, ratified on May 24, 1937, for a period of ten years as from June 13, 1936.

[16] Translation. Ratification deposited February 4, 1933.

[17] Translation. No ratification has been deposited.

[18] Deposited May 2, 1923. The original is in French.

paragraph 2, of the Statute of the Court, for a period of five years, in any future dispute in respect of which the parties have not agreed to have recourse to another method of pacific settlement." [19]

Ethiopia.—On behalf of the Imperial Ethiopian Government the undersigned recognizes as compulsory, *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligation, that is to say, on the sole condition of reciprocity, the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute, for a period of five years, excepting future disputes in respect of which the parties have agreed to have recourse to another method of pacific settlement.

July 12, 1926.[20]

(Signed) LAGARDE, DUC D'ENTOTTO.

Finland.—On behalf of the Republic of Finland, and subject to ratification, I recognize, in relation to any other Member or State which accepts the same obligation, that is to say, on the sole condition of reciprocity, the jurisdiction of the Court as compulsory, *ipso facto* and without any special convention, for a period of five years.

[June 28, 1921.] [21]

(Signed) ENCKELL.

France.—On behalf of the Government of the French Republic and subject to ratification, I recognize as compulsory *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court, in conformity with Article 36, paragraph 2, of the Statute of the Court, for a period of five years, in any disputes arising after the ratification of the present declaration with regard to situations or facts subsequent to this ratification, and which could not have been settled by a procedure of conciliation or by the Council, according to the terms of Article 15, paragraph 6, of the Covenant, with reservation as to the case where the parties have agreed or shall agree to have recourse to another method of settlement

[19] This declaration was renewed by letter of June 25, 1928, for a period of ten years as from May 2, 1928, and by letter of May 6, 1938, for a further period of ten years as from May 2, 1938.

[20] Translation. Ratification deposited July 16, 1926. This declaration was renewed on April 15, 1932, for a period of two years as from July 16, 1931, and on September 18, 1934, for a period of two years as from September 18, 1934, "with retroactive effect covering the period comprised between July 16, 1933, and the date of signature" of the new declaration.

[21] Translation. Ratification deposited April 6, 1922. The declaration was renewed on March 3, 1927, for a period of ten years as from April 6, 1927, and on April 9, 1937, for a period of ten years as from April 6, 1927, and on April 9, 1937, for a period of ten years as from April 6, 1937.

by arbitration. This declaration replaces the declaration of October 2, 1924, which has now lapsed.[22]

Geneva, September 19, 1929.[23]

(Signed) LOUCHEUR.

Germany.—On behalf of the German Government, I recognize as compulsory, *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute of the Court, for a period of five years, in any disputes arising after the ratification of the present declaration with regard to situations or facts subsequent to this ratification, except in cases where the parties have agreed or shall agree to have recourse to another method of pacific settlement.

Geneva, September 23, 1927.[24]

(Signed) [G.] STRESEMANN.

Great Britain.—On behalf of His Majesty's Government in the United Kingdom and subject to ratification, I accept as compulsory *ipso facto* and without special convention on condition of reciprocity the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute of the Court, for a period of ten years and thereafter until such time as notice may be given to terminate the acceptance, over all disputes arising after the ratification of the present declaration with regard to situations or facts subsequent to the said ratification:

other than disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method of peaceful settlement; and

disputes with the Government of any other Member of the League which is a member of the British Commonwealth of Nations, all of which disputes shall be settled in such manner as the parties have agreed or shall agree; and

disputes with regard to questions which by international law fall exclusively within the jurisdiction of the United Kingdom;

[22] The declaration of October 2, 1924, did not enter into force. For the text, see Series D, No. 6, p. 45, note.

[23] Translation. Ratification deposited April 25, 1931. This declaration was renewed for a period of five years from April 25, 1936, by the declaration of April 7, 1936, communicated to the Secretary-General on April 11, 1936. On September 11, 1939, the French Government notified the Secretary-General that "its acceptance of Article 36 of the Statute of the Permanent Court of International Justice cannot henceforward be operative in regard to disputes relating to events occurring during the course of the present war"; reservations as to the effect of this action were made by several States.

[24] Translation. Ratification deposited February 29, 1928. This declaration was renewed by the declaration of February 9, 1933, ratified on July 5, 1933, for a period of five years from March 1, 1933.

and subject to the condition that His Majesty's Government reserve the right to require that proceedings in the Court shall be suspended in respect of any dispute which has been submitted to and is under consideration by the Council of the League of Nations, provided that notice to suspend is given after the dispute has been submitted to the Council and is given within ten days of the notification of the initiation of the proceedings in the Court, and provided also that such suspension shall be limited to a period of twelve months or such longer period as may be agreed by the parties to the dispute or determined by a decision of all the Members of the Council other than the parties to the dispute.

Geneva, September 19, 1929.[25]

(Signed) ARTHUR HENDERSON.

Greece.—Duly authorized by the Hellenic Government, acting in virtue of special approval by the legislative power, I declare that I accept on behalf of Greece the Optional Clause provided in Article 36 of the Statute of the Permanent Court of International Justice, for a period of five years and on condition of reciprocity for all the classes of disputes mentioned in the said Article 36, with the exception of:

(*a*) disputes relating to the territorial status of Greece, including disputes relating to its rights of sovereignty over its ports and lines of communication;

(*b*) disputes relating directly or indirectly to the application of treaties or conventions accepted by Greece and providing for another procedure.

This acceptance is effective as from the date of signature of the present declaration.

Geneva, September 12, 1929.[26]

(Signed) A. MICHALAKOPOULOS.

[25] Ratification deposited February 5, 1930. On September 11, 1939, Great Britain notified the Secretary-General that it would not regard its "acceptance of the Optional Clause as covering disputes arising out of events occurring during the present hostilities"; reservations as to the effect of this action were made by several States. By a declaration of February 28, 1940, communicated to the Secretary-General on March 7, 1940, Great Britain terminated its declaration of September 19, 1929. By another declaration of the same date Great Britain accepted the jurisdiction of the Court for a period of five years from February 28, 1940, and thereafter until such time as notice may be given to terminate the acceptance, over all disputes covered by the declaration of September 19, 1929, excepting, however, "disputes arising out of events occurring at a time when His Majesty's Government in the United Kingdom were involved in hostilities." This declaration was not subject to ratification.

[26] Translation. Not subject to ratification. This declaration was renewed, with slight changes in wording, by the declaration of September 12, 1934, ratified on July 19, 1935, for a period of five years as from September 12, 1934, and by the declaration of September 8, 1939, ratified on February 20, 1940, for a further period of five years as from September 12, 1939.

Guatemala.—On behalf of the Republic of Guatemala, I accept, subject to ratification and on the sole condition of reciprocity, the jurisdiction of the Court in all classes of legal disputes concerning:

(*a*) the interpretation of a treaty;
(*b*) any question of international law;
(*c*) the existence of any fact which, if established, would constitute a breach of an international obligation;
(*d*) the nature or extent of the reparation to be made for the breach of an international obligation.

Geneva, December 17, 1926.[27]

(Signed) F. A. FIGUEROA.

Haiti.—On behalf of the Republic of Haiti, I recognize the jurisdiction of the Permanent Court of International Justice as compulsory.

[September 7, 1921.] [28]

(Signed) F. ADDOR.

Hungary.—On behalf of the Royal Hungarian Government, and subject to ratification, I recognize, in relation to any other Member or State accepting the same obligation, that is to say, on the sole condition of reciprocity, the jurisdiction of the Court as compulsory *ipso facto* and without special convention, in conformity with Article 36, paragraph 2, of the Statute, for a period of five years to be reckoned as from the deposit of the instrument of the ratification.

Geneva, September 14, 1928.[29]

(Signed) LOUIS WALKO.

India.—On behalf of the Government of India and subject to ratification, I accept as compulsory *ipso facto* and without special convention on condition of reciprocity the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute of the Court, for a period of ten years and thereafter until such time as notice may be given to terminate the acceptance, over all disputes arising after the ratification of the present declaration with regard to situations or facts subsequent to the said ratification:

other than disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method of peaceful settlement; and

[27] Translation. No ratification has been deposited.
[28] Translation. Not subject to ratification.
[29] Translation. Ratification deposited August 13, 1929. This declaration was renewed by the declaration of May 30, 1934, ratified on August 9, 1934, for a period of five years as from August 13, 1934. The declaration of July 12, 1930, renewing the previous declaration for the period from August 13, 1939, to April 10, 1941, has not been ratified.

disputes with the Government of any other Member of the League which is a member of the British Commonwealth of Nations, all of which disputes shall be settled in such manner as the parties have agreed or shall agree; and

disputes with regard to questions which by international law fall exclusively within the jurisdiction of India;

and subject to the condition that the Government of India reserve the right to require that proceedings in the Court shall be suspended in respect of any dispute which has been submitted to and is under consideration by the Council of the League of Nations, provided that notice to suspend is given after the dispute has been submitted to the Council and is given within ten days of the notification of the initiation of the proceedings in the Court, and provided also that such suspension shall be limited to a period of twelve months or such longer period as may be agreed by the parties to the dispute or determined by a decision of all the Members of the Council other than the parties to the dispute.

Geneva, September 19, 1929.[30]

(Signed) MD. HABIBULLAH.

Iran.—The Imperial Government of Persia recognizes as compulsory *ipso facto* and without special agreement in relation to any other State accepting the same obligation, that is to say, on condition of reciprocity, the jurisdiction of the Permanent Court of International Justice, in accordance with Article 36, paragraph 2, of the Statute of the Court, in any disputes arising after the ratification of the present declaration with regard to situations or facts relating directly or indirectly to the application of treaties or conventions accepted by Persia and subsequent to the ratification of this declaration, with the exception of:

(*a*) disputes relating to the territorial status of Persia, including those concerning the rights of sovereignty of Persia over its islands and ports;

(*b*) disputes in regard to which the parties have agreed or shall agree to have recourse to some other method of peaceful settlement;

(*c*) disputes with regard to questions which, by international law, fall exclusively within the jurisdiction of Persia.

[30] Ratification deposited February 5, 1930. On October 2, 1939, India notified the Secretary-General that its "acceptance of the Optional Clause will not be regarded as covering disputes arising out of events occurring during the present hostilities"; reservations as to the effect of this action were made by several States. By a declaration of February 28, 1930, communicated to the Secretary-General on March 7, 1940, India terminated its declaration of September 19, 1929. By another declaration of the same date India accepted the jurisdiction of the Court for a period of five years from February 28, 1940, and thereafter until such time as notice may be given to terminate the acceptance, over all disputes covered by the declaration of September 19, 1929, excepting, however, "disputes arising out of events occurring at a time when the Government of India were involved in hostilities." This declaration was not subject to ratification.

However, the Imperial Government of Persia reserves the right to require that proceedings in the Court shall be suspended in respect of any dispute which has been submitted to the Council of the League of Nations.

The present declaration is made for a period of six years. At the expiration of that period, it shall continue to bear its full effects until notification is given of its abrogation.

Geneva, October 2, 1930.[31]

(Signed) HUSSEIN ALÂ.

Iraq.—On behalf of the Government of Iraq and subject to ratification, I accept as compulsory *ipso facto* and without special agreement on condition of reciprocity the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute of the Court for a period of five years from the date of the deposit of the instrument of ratification and thereafter until such time as notice be given to terminate the acceptance, over all disputes arising after the ratification of this Declaration with regard to situations or facts subsequent to the said ratification, with the exception of:

1. Disputes in regard to which the Parties to the dispute have agreed or shall agree to have recourse to some other method of peaceful settlement;
2. Disputes with the Government of any other Arab State, all of which disputes shall be settled in such a manner as the Parties have agreed or shall agree;
3. Disputes with regard to questions which by international law fall exclusively within the jurisdiction of Iraq;
4. Disputes affecting the territorial status of Iraq, including those concerning the right of sovereignty of Iraq over its waters and communications;

and subject to the condition that the Government of Iraq reserve the right to require that proceedings in the Permanent Court of International Justice shall be suspended in respect of any dispute which has been submitted to and is under consideration by the Council or Assembly of the League of Nations.

Geneva, September 22, 1938.[32]

(Signed) T. SUWAIDY.

Ireland.—On behalf of the Irish Free State, I declare that I accept as compulsory *ipso facto* and without special convention the jurisdiction of the Court in conformity with Article 36 of the Statute of the Permanent Court of International Justice for a period of twenty years and on the sole condition of reciprocity. This declaration is subject to ratification.

Geneva, September 14, 1929.[33]

(Signed) P. MCGILLIGAN.

[31] Translation. Ratification deposited September 19, 1932.
[32] No ratification has been deposited.
[33] Ratification deposited July 11, 1930.

Italy.—The Italian Government declares to recognize as compulsory *ipso facto*, in relation to any other Member or State accepting the same obligation, and for a period of five years, subject to any other method of settlement provided by a special convention, and in any case where a solution through the diplomatic channel or further by the action of the Council of the League of Nations could not be reached, the jurisdiction of the Court on the following classes of legal disputes arising after the ratification of the present declaration, and concerning:

(*a*) the interpretation of a treaty;
(*b*) any question of international law;
(*c*) the existence of any fact which, if established, would constitute a breach of an international obligation;
(*d*) the nature or extent of the reparation to be made for the breach of an international obligation.

Geneva, September 9, 1929.[34]

(Signed) VITTORIO SCIALOJA.

Latvia.—On behalf of the Latvian Government and subject to ratification by the Saeima, I recognize as compulsory, *ipso facto* and without special agreement in relation to any other Member or State accepting the same obligation, that is to say, on condition of reciprocity, the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute of the Court, for a period of five years, in any disputes arising after the ratification of the present declaration with regard to situations or facts subsequent to this ratification, except in cases where the parties have agreed or shall agree to have recourse to another method of pacific settlement. This declaration replaces the declaration made on September 11, 1923.[35]

Geneva, September 10, 1929.[36]

(Signed) A. BALODIS.

Liberia.—On behalf of the Government of the Republic of Liberia, and subject to ratification by the Liberian Senate, I recognize, in relation to any other Member or State which accepts the same obligation, that is to say, on the sole condition of reciprocity, the jurisdiction of the Court as compulsory, *ipso facto* and without any special convention.

[Before September 1, 1921.][37]

(Signed) R. LEHMAN.

[34] Translation. Ratification deposited September 7, 1931.
[35] The declaration of September 11, 1923, did not enter into force. For the text see Series D, No. 6, p. 44, note.
[36] Translation. Ratification deposited February 26, 1930. This declaration was renewed by the declaration of January 31, 1935, ratified on February 26, 1935, for a period of five years and thereafter until notification is given of its abrogation.
[37] Translation. No ratification has been deposited.

Lithuania.—For a period of five years.

October 5, 1921.[38]

(Signed) GALVANAUSKAS.

Luxemburg.—The Government of the Grand-Duchy of Luxemburg recognizes as compulsory, *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, that is to say, on condition of reciprocity, the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute, in any disputes arising after the signature of the present declaration with regard to situations or facts subsequent to this signature, except in cases where the parties have agreed or shall agree to have recourse to another procedure or to another method of pacific settlement. The present declaration is made for a period of five years. Unless it is denounced six months before the expiration of that period, it shall be considered as renewed for a further period of five years and similarly thereafter.

Geneva, September 15, 1930.[39]

(Signed) BECH.

Netherlands.—On behalf of the Government of the Netherlands, I recognize, in relation to any other Member or State which accepts the same obligation, that is to say, on the condition of reciprocity, the jurisdiction of the Court as compulsory, *ipso facto* and without any special convention, in conformity with Article 36, paragraph 2, of the Statute of the Court, for a period of five years, in respect of any future dispute in regard to which the parties have not agreed to have recourse to some other means of friendly settlement.

August 6, 1921.[40]

(Signed) MOSSELMANS.

New Zealand.—On behalf of His Majesty's Government in the Dominion of New Zealand and subject to ratification, I accept as compulsory *ipso facto* and without special convention on condition of reciprocity the jurisdiction of

[38] Translation. Ratification deposited May 16, 1922. The declaration was renewed on January 14, 1930, for a period of five years as from January 14, 1930. By a new declaration of March 8, 1935, communicated to the Secretary-General on March 12, 1935, Lithuania recognized "as compulsory, *ipso facto* and without special agreement, on condition of reciprocity, the jurisdiction of the Permanent Court of International Justice, in accordance with Article 36, paragraph 2, of the Statute of the Court, for a further period of five years taking effect as from January 14, 1935." The new declaration was not subject to ratification.

[39] Translation. Not subject to ratification. A previous declaration made by Luxemburg in 1921 was not ratified. For the text, see Series D, No. 6, p. 52, note.

[40] Translation. Not subject to ratification. This declaration was renewed on September 2, 1926, "for a period of ten years as from August 6, 1926, for any future disputes excepting those in regard to which the parties have agreed, since the coming into force of the Statute of the Permanent Court of International Justice, to have recourse to another method of pacific settlement." The latter declaration was renewed on August 5, 1936, for a period of ten years as from August 6, 1936.

the Court in conformity with Article 36, paragraph 2, of the Statute of the Court, for a period of ten years and thereafter until such time as notice may be given to terminate the acceptance, over all disputes arising after the ratification of the present declaration with regard to situations or facts subsequent to the said ratification:

other than disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method of peaceful settlement; and

disputes with the Government of any other Member of the League which is a member of the British Commonwealth of Nations, all of which disputes shall be settled in such manner as the parties have agreed or shall agree; and

disputes with regard to questions which by international law fall exclusively within the jurisdiction of the Dominion of New Zealand;

and subject to the condition that His Majesty's Government in New Zealand reserve the right to require that proceedings in the Court shall be suspended in respect of any dispute which has been submitted to and is under consideration by the Council of the League of Nations, provided that notice to suspend is given after the dispute has been submitted to the Council and is given within ten days of the notification of the initiation of the proceedings in the Court and provided also that such suspension shall be limited to a period of twelve months or such longer period as may be agreed by the parties to the dispute or determined by a decision of all the Members of the Council other than the parties to the dispute.

Geneva, September 19, 1929.[41]

(Signed) C. J. PARR.

Nicaragua.—On behalf of the Republic of Nicaragua I recognize as compulsory unconditionally the jurisdiction of the Permanent Court of International Justice.

Geneva, September 24, 1929.[42]

(Signed) T. F. MEDINA.

[41] Ratification deposited March 29, 1930. On September 16, 1939, New Zealand notified the Secretary-General that it would "not regard its acceptance of the Optional Clause as covering disputes which may arise out of events occurring during the present hostilities"; reservations as to the effect of this action were made by several States. By a declaration of March 30, 1940, communicated to the Secretary-General on April 5, 1940, New Zealand terminated its declaration of September 19, 1929. By a new declaration of April 1, 1940, communicated to the Secretary-General on April 8, 1940, New Zealand accepted the jurisdiction of the Court for a period of five years from April 1, 1940, and thereafter until notice may be given to terminate the acceptance, over all disputes covered by the declaration of September 19, 1929, excepting, however, "disputes arising out of events occurring at a time when His Majesty's Government in New Zealand were involved in hostilities." The new declaration was not subject to ratification.

[42] Translation. This declaration became effective on November 29, 1939, when the Nicaraguan Government notified the Secretary-General of the League of Nations by telegraph of Nicaragua's ratification of the Protocol of Signature.

Norway.—On behalf of the Government of His Majesty the King of Norway, and subject to ratification, I recognize, in relation to any other Member or State which accepts the same obligation, that is to say, on the sole condition of reciprocity, the jurisdiction of the Court as compulsory, *ipso facto* and without any special convention, for a period of five years.

September 6, 1921.[43]

(Signed) FRIDTJOF NANSEN.

Panama.—On behalf of the Government of Panama, I recognize, in relation to any other Member or State which accepts the same obligation, that is to say, on the sole condition of reciprocity, the jurisdiction of the Court as compulsory, *ipso facto* and without any special convention.

October 25, 1921.[44]

(Signed) R. A. AMADOR.

Paraguay.—[The instrument of ratification by Paraguay of the Protocol of Signature of December 16, 1920, deposited with the Secretariat of the League of Nations on May 11, 1933, contains the following passage:] "The Congress of the Nation has also authorised by the said Law No. 1,298 the acceptance pure and simple, as compulsory *ipso facto* and without special convention, of the jurisdiction of the Permanent Court of International Justice, as set out in Article 36, paragraph 2, of the Statute." [45]

Peru.—On behalf of the Republic of Peru and subject to ratification, I recognize as compulsory *ipso facto* without special agreement in relation to any other Member of the League of Nations or to any State accepting the same obligation, the jurisdiction of the Court, in conformity with Article 36, paragraph 2, of its Statute, for a period of ten years from the date of deposit of the instrument of ratification, in any dispute arising with regard to situations and facts subsequent to that ratification, except in cases where the parties have agreed either to have recourse to another method of settlement by arbitration, or to submit the dispute previously to the Council of the League of Nations.

Geneva, September 19, 1929.[46]

(Signed) M. H. CORNEJO.

[43] Translation. Ratification deposited October 3, 1921. The declaration was renewed on September 22, 1926, for a period of ten years as from October 3, 1926, and on May 19, 1936, for a period of ten years as from October 3, 1936. The last renewal was communicated to the Secretary-General on May 29, 1936. The renewals were made "without reservation regarding ratification."

[44] Translation. Ratification deposited June 14, 1929.

[45] Translation. On May 27, 1938, Paraguay communicated to the Secretary-General *à toutes fins utiles* the text of a decree promulgated by the acting President of the Republic on April 26, 1938, providing for the withdrawal of Paraguay's acceptance of the Court's jurisdiction; reservations as to the effect of this action were made by several States.

[46] Translation. Ratification deposited March 29, 1932.

Poland.—On behalf of the Republic of Poland, subject to ratification, the undersigned recognizes as compulsory *ipso facto* and without special agreement, in relation to any other Member of the League of Nations or State accepting the same obligation, the jurisdiction of the Permanent Court of International Justice in conformity with Article 36, paragraph 2, of the Statute of the Court, for a period of five years, in any future dispute arising after the ratification of the present declaration with regard to situations or facts subsequent to such ratification, except in cases where the parties have agreed or shall agree to have recourse to another method of peaceful settlement.

The present declaration does not apply to disputes:

(1) with regard to matters which by international law are solely within the domestic jurisdiction of States, or

(2) arising between Poland and States which refuse to establish or maintain normal diplomatic relations with Poland, or

(3) connected directly or indirectly with the World War or with the Polish-Soviet war, or

(4) resulting directly or indirectly from the provisions of the treaty of peace signed at Riga, on March 18, 1921,[47] or

(5) relating to provisions of internal law connected with points (3) and (4).

Geneva, January 24, 1931.[48]

(Signed) AUGUSTE ZALESKI.

Portugal.—On behalf of Portugal, I recognize, in relation to any Member or State accepting the same obligation, the jurisdiction of the Court as compulsory, *ipso facto* and without special convention.

[December 18, 1920.][49]

(Signed) AFFONSO COSTA.

Rumania.—The Rumanian Government declares that it accedes to the Optional Clause of Article 36 of the Statute of the Permanent Court of International Justice for a period of five years in respect of the Governments recognized by Rumania and on condition of reciprocity in regard to legal disputes arising out of situations or facts subsequent to the ratification by the Rumanian Parliament of this accession and with the exception of matters for which a special procedure has been or may be established and subject to the right of Rumania to submit the dispute to the Council of the League of Nations before having recourse to the Court.

[47] 6 *League of Nations Treaty Series*, p. 52.
[48] Translation. No ratification has been deposited.
[49] Translation. Ratification deposited October 8, 1921.

The following are, however, excepted:

(*a*) any question of substance or of procedure which might directly or indirectly cause the existing territorial integrity of Rumania and her sovereign rights, including her rights over her ports and communications, to be brought into question.

(*b*) disputes relating to questions which, according to international law, fall under the domestic jurisdiction of Rumania.

Geneva, October 8, 1930.[50]

(Signed) C. ANTONIADE.

El Salvador.—On condition of reciprocity.

[December 18, 1920.] [51]

J. GUSTAVO GUERRERO.
ARTURO R. AVILA.

South Africa.—On behalf of His Majesty's Government in the Union of South Africa and subject to ratification, I accept as compulsory *ipso facto* and without special convention on condition of reciprocity the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute of the Court, for a period of ten years and thereafter until such time as notice may be given to terminate the acceptance, over all disputes arising after the ratification of the present declaration with regard to situations or facts subsequent to the said ratification:

other than disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method of peaceful settlement; and

disputes with the Government of any other Member of the League which is a member of the British Commonwealth of Nations, all of which disputes shall be settled in such manner as the parties have agreed or shall agree; and

disputes with regard to questions which by international law fall exclusively within the jurisdiction of the Union of South Africa;

and subject to the condition that His Majesty's Government in the Union of South Africa reserve the right to require that proceedings in the Court shall

[50] Translation. Ratification deposited June 9, 1931. The declaration was renewed on June 4, 1936, for a period of five years as from June 9, 1936.

[51] Translation. The ratification of the Protocol of Signature deposited on August 29, 1930, was subject to reservations formulated in the decision of the Executive Power of El Salvador of May 26, 1930, in the following terms:

"The provisions of this Statute do not apply to any disputes or differences concerning points or questions which cannot be submitted to arbitration in accordance with the political Constitution of this Republic.

"The provisions of this Statute also do not apply to disputes which arose before that date or to pecuniary claims made against the Nation, it being further understood that Article 36 binds El Salvador only in regard to States which accept the arbitration in that form."

be suspended in respect of any dispute which has been submitted to and is under consideration by the Council of the League of Nations, provided that notice to suspend is given after the dispute has been submitted to the Council and is given within ten days of the notification of the initiation of the proceedings in the Court, and provided also that such suspension shall be limited to a period of twelve months or such longer period as may be agreed by the parties to the dispute or determined by a decision of all the Members of the Council other than the parties to the dispute.

Geneva, September 19, 1929.[52]

(Signed) ERIC H. LOUW.

Spain.—On behalf of the Government of His Majesty the King of Spain, I recognize as compulsory *ipso facto* and without special agreement in relation to any other Member or State accepting the same obligation, that is to say, on condition of reciprocity, the jurisdiction of the Court for a period of ten years, in any dispute arising after the signature of the present declaration with regard to situations or facts subsequent to this signature, except in cases where the parties have agreed or shall agree to have recourse to another method of pacific settlement.

Geneva, September 21, 1928.[53]

(Signed) J. QUIÑONES DE LEÓN.

Sweden.—On behalf of the Government of His Majesty the King of Sweden, I recognize, in relation to any other Member or State which accepts the same obligation, that is to say, on the condition of reciprocity, the jurisdiction of the Court as compulsory, *ipso facto* and without any special convention, for a period of five years.

Geneva, August 16, 1921.[54]

(Signed) [P. DE] ADLERCREUTZ.

Switzerland.—On behalf of the Swiss Government and subject to ratification by the Federal Assembly, I recognize, in relation to any Member or State accepting the same obligation, that is to say, on the sole condition of

[52] Ratification deposited April 7, 1930. On September 18, 1939, the Union of South Africa notified the Secretary-General that it would not regard its "acceptance of the Optional Clause as covering disputes arising out of events occurring during the present hostilities"; reservations as to the effect of this action were made by several States. By a declaration of April 7, 1940, communicated to the Secretary-General on April 20, 1940, the Union of South Africa terminated its declaration of September 19, 1929. By another declaration of the same date the Union of South Africa accepted the jurisdiction of the Court "until such time as notice may be given to terminate the acceptance," under limitations analogous to those contained in the previous declaration, but excepting, in addition, "disputes arising out of events occurring during any period in which the Union of South Africa is engaged in hostilities as a belligerent." This declaration was not subject to ratification.

[53] Translation. Not subject to ratification.

[54] Translation. Not subject to ratification. The declaration was renewed on March 18, 1926, for a period of ten years as from August 16, 1926, and on April 18, 1936, for a period of ten years as from August 16, 1936.

reciprocity, the jurisdiction of the Court as compulsory, *ipso facto* and without special convention, for a period of five years.

[December 18, 1920.] [55]

(Signed) MOTTA.

Thailand.—On behalf of the Siamese Government, I recognize, subject to ratification, in relation to any other Member or State which accepts the same obligation, that is to say, on the condition of reciprocity, the jurisdiction of the Court as compulsory *ipso facto* and without any special convention, in conformity with Article 36, paragraph 2, of the Statute of the Court for a period of ten years, in all disputes as to which no other means of pacific settlement is agreed upon between the parties.

Geneva, September 20, 1929.[56]

(Signed) VARNVAIDYA.

Turkey.—On behalf of the Turkish Republic, I recognize as compulsory, *ipso facto* and without special agreement, in relation to any Member of the League of Nations or State accepting the same obligation, that is to say, on condition of reciprocity, the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute of the Court, for a period of five years, in any of the disputes enumerated in the same Article, arising after the signature of the present declaration, with the exception of disputes relating directly or indirectly to the application of treaties or conventions concluded by Turkey and providing for another method of peaceful settlement.

Geneva, March 12, 1936.[57]

(Signed) CEMAL HÜSNÜ TARÂY.

Uruguay.—On behalf of the Government of Uruguay, I recognize, in relation to any Member or State accepting the same obligation, that is to say, on the sole condition of reciprocity, the jurisdiction of the Court as compulsory, *ipso facto* and without special convention.

[Before January 28, 1921.] [58]

(Signed) B. FERNANDEZ Y MEDINA.

Yugoslavia.—On behalf of the Kingdom of Yugoslavia and subject to ratification, I recognize, as compulsory *ipso facto* and without special agreement, in relation to any other Member of the League of Nations, or State the Government of which is recognized by the Kingdom of Yugoslavia, and accepting the

[55] Translation. Ratification deposited July 25, 1921. The declaration was renewed on March 1, 1926, for a period of ten years as from the date of the deposit of the ratification instrument (July 24, 1926), and on September 23, 1936 for a period of ten years to be reckoned as from the deposit of the instrument of ratification (April 17, 1937).

[56] Ratification deposited May 7, 1930. This declaration was renewed by the declaration of May 3, 1940, communicated to the Secretary-General on May 9, 1940, for a period of ten years as from May 7, 1940.

[57] Translation. No ratification has been deposited.

[58] Translation. Ratification deposited September 27, 1921.

same obligation, that is to say, on condition of reciprocity, the jurisdiction of the Permanent Court of International Justice, in conformity with Article 36 of its Statute, for a period of five years from the date of the deposit of the instrument of ratification, in any disputes arising after the ratification of the present declaration, except disputes with regard to questions which, by international law, fall exclusively within the jurisdiction of the Kingdom of Yugoslavia, and except in cases where the parties have agreed or shall agree to have recourse to some other method of peaceful settlement.

May 16, 1930.[59]

(Signed) DR. V. MARINKOVICH.

Declarations under the Council Resolution of May 17, 1922 [60]

Liechtenstein.—The Principality of Liechtenstein, represented by the Head of the Government, hereby accepts the jurisdiction of the Permanent Court of International Justice, in accordance with the Covenant of the League of Nations and with the terms of the Statute and Rules of the Court, in respect of all disputes which have already arisen or which may arise in the future. The Principality of Liechtenstein undertakes to carry out in full good faith the decision or decisions of the Court and not to resort to war against a State complying therewith.

At the same time, the Principality of Liechtenstein accepts as compulsory, *ipso facto* and without special convention, the jurisdiction of the Court, in conformity with Article 36, paragraph 2, of the Statute of the Court and No. 2, paragraph 4, of the Resolution of the Council of the League of Nations of May 17, 1922, for a period of five years in any disputes which have already arisen or which may arise in the future, except in cases where the Parties have agreed or shall agree to have recourse to another method of pacific settlement.

[March 22, 1939.] [61]

(Signed) VOGT.

Monaco.—The Principality of Monaco, represented by the Minister of State, Director of External Relations, hereby accepts the jurisdiction of the Permanent Court of International Justice, in accordance with the Covenant of the League of Nations and with the terms of the Statute and Rules of the Court, in respect of all disputes which have already arisen or which may arise in the future. The Principality of Monaco undertakes to carry out in full good faith the decision or decisions of the Court and not to resort to war against a State complying therewith.

At the same time, the Principality of Monaco accepts as compulsory, *ipso*

[59] Translation. Ratification deposited November 24, 1930.

[60] For the text of the Council's Resolution, see p. 755, *infra*.

[61] Translation. Not subject to ratification. The declaration was communicated to the Registry of the Court on March 29, 1939.

facto and without special convention, the jurisdiction of the Court, in conformity with Article 36, paragraph 2, of the Statute of the Court and No. 2, paragraph 4, of the Resolution of the Council of May 17, 1922, for a period of five years in any disputes arising after the present Declaration with regard to situations or facts subsequent to this Declaration, except in cases where the Parties have agreed or shall agree to have recourse to another method of pacific settlement.

Monaco, April 22, 1937.[62]

(Signed) M. BOUILLOUX-LAFONT.

SIGNATURE AND RATIFICATION OF THE "OPTIONAL CLAUSE" AND DECLARATIONS ACCEPTING COMPULSORY JURISDICTION

States	*Date of Signature*	*Date of Deposit of Ratification*	*Effective Until*
Albania	Sept. 17, 1930 Nov. 7, 1935 [1]	Sept. 17, 1930 Not required	Sept. 17, 1935 Sept. 17, 1940
Argentine Republic	Dec. 28, 1935		
Australia	Sept. 20, 1929 Aug. 21, 1940	Aug. 18, 1930 Not required	Sept. 2, 1940 Aug. 21, 1945 [2]
Austria	March 14, 1922 Jan. 12, 1927 March 22, 1937 [1]	Not required March 13, 1927 June 30, 1937	March 14, 1927 March 13, 1937 March 13, 1942
Belgium	Sept. 25, 1925	March 10, 1926	March 10, 1941
Bolivia	July 7, 1936	July 7, 1936	July 7, 1946
Brazil	Nov. 1, 1921 Jan. 26, 1937	(Nov. 1, 1921) [3] Jan. 26, 1937	Feb. 5, 1935 Jan. 26, 1947
Bulgaria	July 29, 1921	(Aug. 12, 1921) [3]	Indefinite
Canada	Sept. 20, 1929	July 28, 1930	July 28 1940 [2]
China	May 13, 1922	(May 13, 1922) [3]	May 13, 1927
Colombia	Jan. 6, 1932 Oct. 30, 1937	(Jan. 6, 1932) [3] Oct. 30, 1937	Indefinite Indefinite
Costa Rica	Before Jan. 28, 1921		
Czechoslovakia	Sept. 19, 1929		
Denmark	Dec. 18, 1920 Dec. 11, 1925 June 4, 1936	June 13, 1921 March 28, 1926 May 24, 1937 [1]	June 13, 1926 June 13, 1936 June 13, 1946
Dominican Republic	Sept. 30, 1924	Feb. 4, 1933	Indefinite
Egypt	May 30, 1939		
Estonia	May 2, 1923 June 25, 1928 [1] May 6, 1938 [1]	(May 2, 1923) [3] Not required Not required	May 2, 1928 May 2, 1938 May 2, 1948
Ethiopia	July 12, 1926 April 15, 1932 [1] Sept. 18, 1934 [1]	July 16, 1926 Not required Not required	July 16, 1931 July 16, 1937 Sept. 18, 1936
Finland	June 28, 1921 March 3, 1927 April 9, 1937 [1]	April 6, 1922 Not required Not required	April 6, 1927 April 6, 1937 April 6, 1947
France	Oct. 2, 1924 Sept. 19, 1929 April 7, 1936	April 25, 1931 Not required Feb. 29, 1928	April 25, 1936 April 25, 1941 March 1, 1933
Germany	Sept. 23, 1927 Feb. 9, 1933	July 5, 1933 [1]	March 1, 1938

[62] Translation. The declaration and its document of ratification were communicated to the Registry of the Court on April 26, 1937.

[1] With retroactive effect to date of expiration of previous declaration.

[2] Effective thereafter until notice of termination.

[3] Date of deposit of the ratification of the Protocol of Signature.

States	*Date of Signature*	*Date of Deposit of Ratification*	*Effective Until*
Great Britain	Sept. 19, 1929 Feb. 28, 1940	Feb. 5, 1930 Not required	March 7, 1940 Feb. 28, 1945 [2]
Greece	Sept. 12, 1929 Sept. 12, 1934 Sept. 8, 1939	Not required July 19, 1935 [1] Feb. 20, 1940 [1]	Sept. 12, 1934 Sept. 12, 1939 Sept. 12, 1944
Guatemala	Dec. 17, 1926		
Haiti	Sept. 7, 1921	(Sept. 7, 1921) [3]	Indefinite
Hungary	Sept. 14, 1928 May 30, 1934 July 12, 1939	Aug. 13, 1929 Aug. 9, 1934	Aug. 13, 1934 Aug. 13, 1939
India	Sept. 19, 1929 Feb. 28, 1940	Feb. 5, 1930 Not required	March 7, 1940 Feb. 28, 1945 [2]
Iran (Persia)	Oct. 2, 1930	Sept. 19, 1932	Sept. 19, 1938 [2]
Iraq	Sept. 22, 1938		
Ireland	Sept. 14, 1929	July 11, 1930	July 11, 1950
Italy	Sept. 9, 1929	Sept. 7, 1931	Sept. 7, 1936
Latvia	Sept. 11, 1923 Sept. 10, 1929 Jan. 31, 1935	Feb. 26, 1930 Feb. 26, 1935	Feb. 26, 1935 Feb. 26, 1940 [2]
Liberia	Before Sept. 1, 1921		
Lithuania	Oct. 5, 1921 Jan. 14, 1930 March 8, 1935 [1]	May 16, 1922 Not required Not required	May 16, 1927 Jan. 14, 1935 Jan. 14, 1940
Luxemburg	Before Feb. 12, 1921 Sept. 15, 1930	Not required	Sept. 15, 1935 [4]
Netherlands	Aug. 6, 1921 Sept. 2, 1926 [1] Aug. 5, 1936	Not required Not required Not required	Aug. 6, 1926 Aug. 6, 1936 Aug. 6, 1946
New Zealand	Sept. 19, 1929 April 1, 1940	March 29, 1930 Not required	April 5, 1940 April 1, 1945 [2]
Nicaragua	Sept. 24, 1929	(Nov. 29, 1939) [5]	Indefinite
Norway	Sept. 6, 1921 Sept. 22, 1926 May 19, 1936	Oct. 3, 1921 Not required Not required	Oct. 3, 1926 Oct. 3, 1936 Oct. 3, 1946
Panama	Oct. 25, 1921	June 14, 1929	Indefinite
Paraguay	May 11, 1933	(May 11, 1933) [3]	Indefinite [6]
Peru	Sept. 19, 1929	March 29, 1932	March 29, 1942
Poland	Jan. 24, 1931		
Portugal	Dec. 18, 1920	(Oct. 8, 1921) [3]	Indefinite
Rumania	Oct. 8, 1930 June 4, 1936	June 9, 1931 Not required	June 9, 1936 June 9, 1941
El Salvador	Dec. 18, 1920	(Aug. 29, 1930) [3]	Indefinite
South Africa	Sept. 19, 1929 April 7, 1940	April 7, 1930 Not required	April 20, 1940 Notice of termination

[1] With retroactive effect to date of expiration of previous declaration.
[2] Effective thereafter until notice of termination.
[3] Date of deposit of ratification of the Protocol of Signature.
[4] Unless denounced six months before the expiration of this period, this declaration is to be considered as renewed for a further period of five years, and similarly thereafter.
[5] Date of notification of ratification of the Protocol of Signature.
[6] Withdrawn by decree of April 26, 1938.

States	*Date of Signature*	*Date of Deposit of Ratification*	*Effective Until*
Spain	Sept. 21, 1928	Not required	Sept. 21, 1938
Sweden	Aug. 16, 1921	Not required	Aug. 16, 1926
	March 18, 1926	Not required	Aug. 16, 1936
	April 18, 1936	Not required	Aug. 16, 1946
Switzerland	Dec. 18, 1920	July 25, 1921	July 25, 1926
	March 1, 1926	July 24, 1926	July 24, 1936
	Sept. 23, 1936	April 17, 1937	April 17, 1947
Thailand (Siam)	Sept. 20, 1929	May 7, 1930	May 7, 1940
	May 3, 1940	Not required	May 7, 1950
Turkey	March 12, 1936		
Uruguay	Before Jan. 28, 1921	Sept. 27, 1921	Indefinite
Yugoslavia	May 16, 1930	Nov. 24, 1930	Nov. 24, 1935
Liechtenstein [1]	March 22, 1939	Not required	March 29, 1944
Monaco [1]	April 22, 1937	April 26, 1937	April 26, 1942

[1] Declaration under the Council's Resolution of May 17, 1922.

II. INSTRUMENTS GOVERNING THE COURT'S PROCEDURE AND ADMINISTRATION

APPENDIX NO. 6

Rules of Court, Adopted on February 21, 1931

English version from Series D, No. 1 (2d. ed.), pp. 23–49.[1]

Preamble

The Court,
By virtue of Article 30 of its Statute,
Adopts the present Rules:

CHAPTER I. THE COURT

Heading 1. Constitution of the Court

SECTION A. JUDGES AND ASSESSORS

Article 1. Subject to the provisions of Article 14 of the Statute, the term of office of judges and deputy-judges shall commence on January 1st of the year following their election.

***†Art. 2.** Judges and deputy-judges elected at an earlier session of the Assembly and of the Council of the League of Nations shall take precedence respectively over judges and deputy-judges elected at a subsequent session. Judges and deputy-judges elected during the same session shall take precedence according to age. Judges shall take precedence over deputy-judges.

National judges chosen from outside the Court, under the terms of Article 31 of the Statute, shall take precedence after deputy-judges in order of age.

The list of deputy-judges shall be prepared in accordance with these principles.

The Vice-President shall take his seat on the right of the President. The other members of the Court shall take their seats on the left and right of the President in the order laid down above.

[1] The text includes a French version, also. The articles revised in 1926 are marked with an asterisk; those amended in 1931 are marked with a dagger. For convenience, the earlier texts of 1922 and 1926 are also reproduced here.

[1922 and 1926 text of the fourth paragraph:]

The Vice-President shall take his seat on the right of the President. The other members of the Court shall take their seats to the right and left of the President in the order laid down above.

[The 1926 Rules also contained as a final paragraph:]

Nevertheless the retiring President, whatever may be his seniority according to the preceding provisions, shall take his seat on the right of the President, the Vice-President taking in such case his seat on the left. This rule, however, shall not affect the other privileges or the powers conferred by the Statute or Rules of Court upon the Vice-President or the eldest judge.

*†**Art. 3.** Deputy-judges whose presence is necessary shall be summoned in the order laid down in the list referred to in the preceding article, that is to say, each of them will be summoned in rotation throughout the list.

Should a deputy-judge be so far from the seat of the Court that, in the opinion of the President, a summons would not reach him in sufficient time, the deputy-judge next on the list shall be summoned; nevertheless, the judge to whom the summons should have been addressed shall be called upon, if possible, on the next occasion that the presence of a deputy-judge is required.

Should a deputy-judge be summoned to take his seat in a particular case as a national judge, under the terms of Article 31 of the Statute or of Article 71 of the Rules, such summons shall not be regarded as coming within the terms of the present article.

[1922 text of a third paragraph:]

A deputy-judge who has begun a case shall be summoned again, if necessary out of his turn, in order to continue to sit in the case until it is finished.

[1922 and 1926 text of the final paragraph:]

Should a deputy-judge be summoned to take his seat in a particular case as a national judge, under the terms of Article 31 of the Statute, such summons shall not be regarded as coming within the terms of the present article.

***Art. 4.** In case in which one or more parties are entitled to choose a judge *ad hoc* of their nationality, the full Court may sit with a number of judges exceeding the number of regular judges fixed by the Statute.

[1922 text of the first paragraph:]

In cases in which one or more parties are entitled to choose a judge ad hoc *of their nationality, the full Court may sit with a number of judges exceeding eleven.*

When the Court has satisfied itself, in accordance with Article 31 of the Statute, that there are several parties in the same interest and that none of

them has a judge of its nationality upon the bench, the Court shall invite them, within a period to be fixed by the Court, to select by common agreement a deputy-judge of the nationality of one of the parties, should there be one; or, should there not be one, a judge chosen in accordance with the principles of the above-mentioned article.

Should the parties have failed to notify the Court of their selection or choice when the time limit expires, they shall be regarded as having renounced the right conferred upon them by Article 31.

Art. 5. Before entering upon his duties, each member of the Court or judge summoned to complete the Court, under the terms of Article 31 of the Statute, shall make the following solemn declaration in accordance with Article 20 of the Statute:

> "I solemnly declare that I will exercise all my powers and duties as a judge honorably and faithfully, impartially and conscientiously."

A special public sitting of the Court may, if necessary, be convened for this purpose.

At the public inaugural sitting held after a new election of the whole Court the required declaration shall be made first by the President, secondly by the Vice-President, and then by the remaining judges in the order laid down in Article 2.

Art. 6. For the purpose of applying Article 18 of the Statute, the President, or if necessary the Vice-President, shall convene the judges and deputy-judges. The member affected shall be allowed to furnish explanations. When he has done so the question shall be discussed and a vote shall be taken, the member in question not being present. If the members present are unanimously agreed, the Registrar shall issue the notification prescribed in the above-mentioned article.

Art. 7. The President shall take steps to obtain all information which might be helpful to the Court in selecting technical assessors in each case. With regard to the questions referred to in Article 26 of the Statute, he shall, in particular, consult the Governing Body of the International Labour Office.

The assessors shall be appointed by an absolute majority of votes, either by the Court or by the special Chamber which has to deal with the case in question.

Art. 8. Assessors shall make the following solemn declaration at the first sitting of the Court at which they are present:

> "I solemnly declare that I will exercise my duties and powers as an assessor honorably and faithfully, impartially and conscientiously, and that I will scrupulously observe all the provisions of the Statute and of the Rules of Court."

SECTION B. THE PRESIDENCY

†**Art. 9.** The election of the President and the Vice-President shall take place in the last quarter of the last year of office of the retiring President and Vice-President.

After a new election of the whole Court, the election of the President and of the Vice-President shall take place at the commencement of the following session. The President and Vice-President elected in these circumstances shall take up their duties on the day of their election. They shall remain in office until the end of the second year after the year of their election.

Should the President or the Vice-President cease to belong to the Court before the expiration of their normal term of office, an election shall be held for the purpose of appointing a substitute for the unexpired portion of their term of office.

The elections referred to in the present article shall take place by secret ballot. The candidate obtaining an absolute majority of votes shall be declared elected.

[1922 and 1926 text of the first and third paragraphs:]

The election of the President and Vice-President shall take place at the end of the ordinary session immediately before the normal termination of the period of office of the retiring President and Vice-President.

Should the President or the Vice-President cease to belong to the Court before the expiration of their normal term of office, an election shall be held for the purpose of appointing a substitute for the unexpired portion of their term of office. If necessary, an extraordinary session of the Court may be convened for this purpose.

Art. 10. The President shall direct the work and administration of the Court; he shall preside at the meetings of the full Court.

†**Art. 11.** The Vice-President shall take the place of the President, should the latter be unable to fulfill his duties, or, should he cease to hold office, until the new President has been appointed by the Court.

[1922 and 1926 text:]

The Vice-President shall take the place of the President, should the latter be unable to be present, or, should he cease to hold office, until the new President has been appointed by the Court.

†**Art. 12.** The discharge of the duties of the President shall always be assured at the seat of the Court, either by the President himself or by the Vice-President.

If at the same time both the President and the Vice-President are unable to fulfill their duties, or if both appointments are vacant at the same time, the

duties of President are discharged by the oldest among the judges who have been longest on the bench.

After a new election of the whole Court, and until the election of the President and the Vice-President, the duties of President are discharged by the oldest judge.

[1922 and 1926 text:]

The President shall reside within a radius of ten kilometres from the Peace Palace at The Hague.

The main annual vacation of the President shall not exceed three months.

*†**Art. 13.** If the President is a national of one of the Parties to the case, the functions of President pass in respect of that case to the Vice-President, or if he is similarly prevented from presiding, to the oldest among the judges who have been longest on the bench and who is not for the same reason prevented from presiding.

[1922 text:]

After a new election of the whole Court and until such time as the President and Vice-President have been elected, the judge who takes precedence according to the order laid down in Article 2, shall perform the duties of President.

The same principle shall be applied should both the President and the Vice-President be unable to be present, or should both appointments be vacant at the same time.

[The 1926 text added to the second paragraph of the 1922 text:]

Whenever, according to the rules in force, the functions of President should be exercised by a national of one of the parties to the suit, they shall pass, for the purposes of the case in question, in the order of seniority established by the Rules of Court, to the first judge not similarly situated.

Section C. The Chambers

†**Art. 14.** The members of the Chambers constituted by virtue of Articles 26, 27 and 29 of the Statute shall be appointed at a meeting of the full Court by an absolute majority of votes, regard being had for the purposes of this selection to any preference expressed by the judges, so far as the provisions of Article 9 of the Statute permit.

The substitutes mentioned in Articles 26 and 27 of the Statute shall be appointed in the same manner. Two judges shall also be chosen to replace any member of the Chamber for summary procedure who may be unable to sit.

The election shall take place in the last quarter of the year, and the period of appointment of the members elected shall commence on January 1st of the following year.

[1922 and 1926 text of the third paragraph:]

The election shall take place at the end of the ordinary session of the Court, and the period of appointment of the members elected shall commence on January 1st of the following year.

Nevertheless, after a new election of the whole Court, the election shall take place at the beginning of the following session. The period of appointment shall commence on the date of election and shall terminate, in the case of the Chamber referred to in Article 29 of the Statute, at the end of the same year and, in the case of the Chambers referred to in Articles 26 and 27 of the Statute, at the end of the second year after the year of election.

The Presidents of the Chambers shall be appointed at a sitting of the full Court. Nevertheless, the President of the Court shall, *ex officio*, preside over any Chamber of which he may be elected a member; similarly, the Vice-President of the Court shall, *ex officio*, preside over any Chamber of which he may be elected a member, provided that the President is not also a member.

Art. 15. The special Chambers for labor cases and for communications and transit cases may not sit with a greater number than five judges.

Except as provided in the second paragraph of the preceding article, the composition of the Chamber for summary procedure may not be altered.

Art. 16. Deputy-judges shall not be summoned to complete the special Chambers or the Chamber for summary procedure, unless sufficient judges are not available to complete the number required.

Section D. The Registry

*†**Art. 17.** The Court shall select its Registrar from amongst candidates proposed by members of the Court. The latter shall receive adequate notice of the date on which the list of candidates will be closed so as to enable nominations and information concerning the nationals of distant countries to be received in sufficient time.

Nominations must give the necessary particulars regarding age, nationality, university degrees and linguistic attainments of candidates, as also regarding their judicial and diplomatic qualifications, their experience in connection with the work of the League of Nations and their present profession.

The election shall be by secret ballot and by an absolute majority of votes.

The Registrar shall be elected for a term of seven years commencing on January 1st of the year following that in which the election takes place. He may be re-elected.

Should the Registrar cease to hold his office before the expiration of the term above mentioned, an election shall be held for the purpose of appointing a successor. Such election shall be for a full term of seven years.

The Court shall appoint a Deputy-Registrar to assist the Registrar, to act as Registrar in his absence, and, in the event of his ceasing to hold the office, to perform its duties until a new Registrar shall have been appointed. The Deputy-Registrar shall be appointed under the same conditions and in the same way as the Registrar.

[1922 text:]

The Court shall select its Registrar from amongst candidates proposed by members of the Court.

The election shall be by secret ballot and by a majority of votes. In the event of an equality of votes, the President shall have a casting vote.

The Registrar shall be elected for a term of seven years commencing on January 1st of the year following that in which the election takes place. He may be re-elected.

Should the Registrar cease to hold his office before the expiration of the term above mentioned, an election shall be held for the purpose of appointing a successor.

[1926 text of the fourth, and a fifth, paragraph:]

Should the Registrar cease to hold his office before the expiration of the term above mentioned, an election shall be held for the purpose of appointing a successor. Each election shall be for a full term of seven years.

The Court shall appoint a Deputy-Registrar to assist the Registrar, to act as Registrar in his absence, and, in the event of his ceasing to hold the office, to perform its duties until a new Registrar shall have been appointed. The Deputy-Registrar shall be appointed in the same way as the Registrar.

***Art. 18.** Before taking up his duties, the Registrar shall make the following declaration at a meeting of the full Court:

> "I solemnly declare that I will perform the duties conferred upon me as Registrar of the Permanent Court of International Justice in all loyalty, discretion and good conscience."

The Deputy-Registrar shall make a similar declaration in the same conditions.

[1922 text of the second paragraph:]

The other members of the Registry shall make a similar declaration before the President, the Registrar being present.

***†Art. 19.** The Registrar is entitled to two months holiday in each year.

[1922 text:]

The Registrar shall reside within a radius of ten kilometres from the Peace Palace at The Hague.

The main annual vacation of the Registrar shall not exceed two months.

[1926 text of the first paragraph:]

The Registrar and the Deputy-Registrar shall reside within a radius of ten kilometres from the Peace Palace at The Hague.

*Art. 20. The officials of the Registry, other than the Deputy-Registrar, shall be appointed by the Court on proposals submitted by the Registrar.

On taking up their duties, such officials shall make the following declaration before the President, the Registrar being present:

"I solemnly declare that I will perform the duties conferred upon me as official of the Permanent Court of International Justice in all loyalty, discretion and good conscience."

[1922 text:]

The staff of the Registry shall be appointed by the Court on proposals submitted by the Registrar.

†Art. 21. The Court shall determine or modify the organization of the Registry upon proposals submitted by the Registrar.

The Regulations for the staff of the Registry shall be drawn up having regard to the organization decided upon by the Court and to the provisions of the Regulations for the staff of the Secretariat of the League of Nations, to which they shall, as far as possible, conform. They shall be adopted by the President, on the proposal of the Registrar, subject to subsequent approval by the Court.

[1922 and 1926 text:]

The Regulations for the Staff of the Registry shall be adopted by the President on the proposal of the Registrar, subject to subsequent approval by the Court.

*†Art. 22. On the proposal of the Registrar or Deputy-Registrar, as the case may be, the Court, or, if it is not sitting, the President, shall appoint the official of the Registry who is to act as substitute for the Registrar, should both the Registrar and Deputy-Registrar be unable to be present, or, should both appointments be vacant at the same time, until a successor to the Registrar has been appointed.

[1922 text:]

The Court shall determine or modify the organization of the Registry upon proposals submitted by the Registrar. On the proposal of the Registrar, the President shall appoint the member of the Registry who is to act for the Registrar in his absence or, in the event of his ceasing to hold his office, until a successor has been appointed.

[1926 text:]

The Court shall determine or modify the organization of the Registry upon proposals submitted by the Registrar. On the proposal of the Registrar or Deputy-Registrar, as the case may be, the Court, or, if it is not in session, the President, shall appoint the official of the Registry who is to act as substitute for the Registrar, should both the Registrar and Deputy-Registrar be unable to be present, or, should both appointments be vacant at the same time, until a successor to the Registrar has been appointed.

Art. 23. The registers kept in the archives shall be so arranged as to give particulars with regard to the following points amongst others:

(1) For each case or question, all documents pertaining to it and all action taken with regard to it in chronological order; all such documents shall bear the same file number and shall be numbered consecutively within the file;

(2) All decisions of the Court in chronological order, with references to the respective files;

(3) All advisory opinions given by the Court in chronological order, with references to the respective files;

(4) All notifications and similar communications sent out by the Court, with references to the respective files.

Indexes kept in the archives shall comprise:

(1) A card index of names with necessary references;

(2) A card index of subject matter with like references.

***Art. 24.** The Registrar shall be the channel for all communications to and from the Court.

The Registrar shall reply to any enquiries concerning its activities, including enquiries from the Press, subject, however, to the provisions of Article 42 of the present Rules and to the observance of professional secrecy.

[1922 text:]

During hours to be fixed by the President, the Registrar shall receive any documents and reply to any enquiries, subject to the provisions of Article 38 of the present Rules and to the observance of professional secrecy.

***Art. 25.** The Registrar shall ensure that the date of despatch and receipt of all communications and notifications may readily be verified. Communications and notifications sent by post shall be registered. Communications addressed to the official representatives or to the agents of the parties shall be considered as having been addressed to the parties themselves. The date of receipt shall be noted on all documents received by the Registrar, and a

receipt bearing this date and the number under which the document has been registered shall be given to the sender, if a request to that effect be made.

[The 1922 text also contained as a first paragraph:]

The Registrar shall be the channel for all communications to and from the Court.

***Art. 26.** The Registrar shall be responsible for the archives, the accounts and all administrative work. He shall have the custody of the seals and stamps of the Court. He, or the Deputy-Registrar, shall be present at all meetings of the full Court and either he, or the Deputy-Registrar, or an official appointed by the Registrar, with the approval of the Court, to represent him, shall be present at all sittings of the various Chambers; the Registrar shall be responsible for drawing up the minutes of the meetings.

[1922 text of the first paragraph:]

The Registrar shall be responsible for the archives, the accounts and all administrative work. He shall have the custody of the seals and stamps of the Court. He shall himself be present at all meetings of the full Court and either he, or a person appointed to represent him with the approval of the Court, shall be present at all sittings of the various Chambers; he shall be responsible for drawing up the minutes of the meetings.

He shall further undertake all duties which may be laid upon him by the present Rules.

The duties of the Registry shall be set forth in detail in a list of instructions to be submitted by the Registrar to the President for his approval.

Heading 2. Working of the Court

†Art. 27. — 1. The ordinary session of the Court opens on February 1st in each year.

2. The session continues until the session list referred to in Article 28 is finished. The President declares the session closed when the agenda is exhausted.

3. The President may summon an extraordinary session of the Court whenever he thinks it desirable, as, for instance, when a case submitted to the Court is ready for hearing or to deal with urgent administrative matters.

4. Judges are bound to be present at the ordinary session of the Court and at all sessions to which they are summoned by the President, unless they are on leave or are prevented by illness or other serious reasons duly explained to the President and communicated by him to the Court.

Deputy-judges are bound to be present at all sessions to which they are summoned by the President unless they are prevented by some reason duly explained to the President and communicated by him to the Court.

5. Judges whose homes are situated at more than five days' normal journey from The Hague and who by reason of the fulfilment of their duties in the Court are obliged to live away from their own country are entitled in the course of each period of three years of duty to leave for six months in addition to the time spent on travelling.

The order in which these leaves are to be taken shall be laid down in a list drawn up by the Court according to the seniority in age of the persons entitled. This order can only be departed from for serious reasons duly admitted by the Court.

The number of judges on leave at any one time must not exceed two.

The President and the Vice-President must not take their leave at the same time.

6. If the day fixed for the opening of a session is regarded as a holiday at the place where the Court is sitting, the session shall be opened on the working day following.

[1922 and 1926 text:]

In the year following a new election of the whole Court the ordinary annual session shall commence on the fifteenth of January.

If the day fixed for the opening of a session is regarded as a holiday at the place where the Court is sitting, the session shall be opened on the working day following.

†**Art. 28.** The general list of cases submitted to the Court for decision or for advisory opinion shall be prepared and kept up to date by the Registrar on the instructions and subject to the authority of the President. Cases shall be entered in the list and numbered successively according to the date of the receipt of the document submitting the case to the Court.

For each session of the Court a session list shall be prepared in the same way, indicating the contentious cases and the cases for advisory opinion which are ready for hearing, whether submitted to the full Court or to the Special Chambers or the Chamber for Summary Procedure. Cases shall be entered in the order which they occupy in the general list, but subject to the priority resulting from Article 57 or accorded by the Court to a particular case in exceptional circumstances.

When the list includes no cases other than those submitted to the Special Chambers or the Chamber for Summary Procedure, the session shall only continue as a session of the Special Chamber or of the Chamber for Summary Procedure, as the case may be.

If in the course of the session a case submitted to the Court, either for decision or for an advisory opinion, becomes ready for hearing, it shall be entered in the session list, unless the Court decides to the contrary.

Adjournments which are applied for in cases which are submitted to the Court for decision or for advisory opinion and are ready for hearing may be granted by the Court in case of need. If the Court is not sitting, adjournments may in such cases be granted by the President.

[1922 and 1926 text:]

The list of cases shall be prepared and kept up to date by the Registrar under the responsibility of the President. The list for each session shall contain all questions submitted to the Court for an advisory opinion and all cases in regard to which the written proceedings are concluded, in the order in which the documents submitting each question or case have been received by the Registrar. If in the course of a session, a question is submitted to the Court or the written proceedings in regard to any case are concluded, the Court shall decide whether such question or case shall be added to the list for that session.

The Registrar shall prepare and keep up to date extracts from the above list showing the cases to be dealt with by the respective Chambers.

The Registrar shall also prepare and keep a list of cases for revision.

Art. 29. During the sessions the dates and hours of sittings shall be fixed by the President.

***Art. 30.** If at any sitting of the full Court, it is impossible to obtain the prescribed quorum, the Court shall adjourn until the quorum is obtained. Judges *ad hoc* shall not be taken into account for the calculation of the quorum.[1]

***Art. 31.** The Court shall sit in private to deliberate upon the decision of any case or upon any advisory opinion; also, when dealing with any administrative matter.

During the deliberation referred to in the preceding paragraph, only persons authorized to take part in the deliberation and the Registrar or, in his absence, the Deputy-Registrar, shall be present. No other person shall be admitted except by virtue of a special decision taken by the Court, having regard to exceptional circumstances.

Every member of the Court who is present at the deliberation shall state his opinion together with the reasons on which it is based.

The decision of the Court shall be based upon the conclusions adopted after final discussion by a majority of the members voting in an order inverse to the order of precedence established by Article 2.

Any member of the Court may request that a question which is to be voted upon shall be drawn up in precise terms in both the official languages and distributed to the Court. A request to this effect shall be complied with.

[1] The second sentence of this Article was added in 1926.

No detailed minutes shall be prepared of the Court's private meetings for deliberation upon judgments or advisory opinions; such minutes, which are to be considered as confidential, shall record only the subject of the debates, votes taken, with the names of those voting for and against a motion, and statements expressly made for insertion in the minutes.

Subject to a contrary decision by the Court, the same procedure shall apply to private meetings for deliberation upon administrative matters.

After the final vote taken on a judgment or advisory opinion, any judge who desires to set forth his individual opinion must do so in accordance with Article 57 of the Statute.

[1922 text:]

The Court shall sit in private to deliberate upon the decision of any case or on the reply to any question submitted to it.

During the deliberation referred to in the preceding paragraph, only persons authorized to take part in the deliberation and the Registrar shall be present. No other person shall be admitted except by virtue of a special decision taken by the Court, having regard to exceptional circumstances.

Every member of the Court who is present at the deliberation shall state his opinion together with the reasons on which it is based.

The decision of the Court shall be based upon the conclusions adopted after final discussion by a majority of the members.

Any member of the Court may request that a question which is to be voted upon shall be drawn up in precise terms in both the official languages and distributed to the Court. A request to this effect shall be complied with.

CHAPTER II. PROCEDURE

Heading 1. Contentious Procedure

Section A. General Provisions

Art. 32. The rules contained under this heading shall in no way preclude the adoption by the Court of such other rules as may be jointly proposed by the parties concerned, due regard being paid to the particular circumstances of each case.

Art. 33. The Court shall fix time limits in each case by assigning a definite date for the completion of the various acts of procedure, having regard as far as possible to any agreement between the parties.

The Court may extend time limits which it has fixed. It may likewise decide in certain circumstances that any proceeding taken after the expiration of a time limit shall be considered as valid.

If the Court is not sitting, the powers conferred upon it by this article shall be exercised by the President, subject to any subsequent decision of the Court.

***Art. 34.** The originals of all documents of the written proceedings submitted to the Court shall be signed by the agent or agents duly appointed; they shall be dated.

The original shall be accompanied by ten copies certified as correct. Subject to any contrary arrangement between the Registrar and the agent or agents, it shall likewise be accompanied by a further forty printed copies.

The President may order additional printed copies to be supplied.

[1922 text:]

All documents of the written proceedings submitted to the Court shall be accompanied by not less than thirty printed copies certified correct. The President may order additional copies to be supplied.

SECTION B. — PROCEDURE BEFORE THE COURT AND BEFORE THE SPECIAL CHAMBERS (ARTICLES 26 AND 27 OF THE STATUTE)

I. Institution of Proceedings

***Art. 35.** — (1) When a case is brought before the Court by means of a special agreement, the latter, or the document notifying the Court of the agreement, shall mention:

(*a*) the names of the agents appointed by the respective parties for the purposes of the case;

(*b*) the permanent addresses at the seat of the Court to which notices and communications intended for the respective parties are to be sent.

In all other cases in which the Court has jurisdiction, the application, in addition to the specification of the subject of the dispute and the names of the parties concerned, a succinct statement of facts, and an indication of the claim, shall include:

(*a*) the name or names of the agent or agents appointed for the purposes of the case;

(*b*) the permanent addresses at the seat of the Court to which subsequent notices and communications in regard to the case are to be sent.

Should proceedings be instituted by means of an application, the first document sent in reply thereto shall likewise mention the name or names of the agent or agents and the addresses at the seat of the Court.

Whenever possible, the agents should remain at the seat of the Court pending the trial and determination of the case.

(2) The declaration provided for in the Resolution of the Council of the League of Nations of May 17th, 1922 (Annex [2]), shall, when it is required under Article 35 of the Statute, be filed with the Registry not later than the time fixed for the deposit of the first document of the written procedure.

[2] Reproduced at p. 755, *infra*.

(3) Should the notice of a special agreement, or the application, contain a request that the case be referred to one of the special Chambers mentioned in Articles 26 and 27 of the Statute, such request shall be complied with, provided that the parties are in agreement.

Similarly, a request to the effect that technical assessors be attached to the Court, in accordance with Article 27 of the Statute, or that the case be referred to the Chamber for Summary Procedure, shall also be granted; compliance with the latter request is, however, subject to the condition that the case does not relate to the matters dealt with in Articles 26 and 27 of the Statute.

[1922 text:]

When a case is brought before the Court by means of a special agreement, the latter, or the document notifying the Court of the agreement, shall mention the addresses selected at the seat of the Court to which notices and communications intended for the respective parties are to be sent.

In all other cases in which the Court has jurisdiction, the application shall include, in addition to an indication of the subject of the dispute and the names of the parties concerned, a succinct statement of facts, an indication of the claim and the address selected at the seat of the Court to which notices and communications are to be sent.

Should proceedings be instituted by means of an application, the first document sent in reply thereto shall mention the address selected at the seat of the Court to which subsequent notices and communications in regard to the case are to be sent.

Should the notice of a special agreement, or the application, contain a request that the case be referred to one of the special Chambers mentioned in Articles 26 and 27 of the Statute, such request shall be complied with, provided that the parties are in agreement.

Similarly, a request to the effect that technical assessors be attached to the Court, in accordance with Article 27 of the Statute, or that the case be referred to the Chamber for summary procedure, shall also be granted; compliance with the latter request is, however, subject to the condition that the case does not refer to any of the questions indicated in Articles 26 and 27 of the Statute.

Art. 36. The Registrar shall forthwith communicate to all members of the Court special agreements or applications which have been notified to him.

He shall also transmit them through the channels provided for in the Statute or by special arrangement, as the case may be, to all Members of the League of Nations and to all States not Members of the League entitled to appear before the Court.[3]

[3] The second paragraph of this Article was added in 1926.

II. Written Proceedings

Art. 37. Should the parties agree that the proceedings shall be conducted in French or in English, the documents constituting the written procedure shall be submitted only in the language adopted by the parties.

In the absence of an agreement with regard to the language to be employed, documents shall be submitted in French or in English.

Should the use of a language other than French or English be authorized, a translation into French or into English shall be attached to the original of each document submitted.

The Registrar shall not be bound to make translations of documents submitted in accordance with the above rules.

In the case of voluminous documents the Court, or the President if the Court is not sitting, may, at the request of the party concerned, sanction the submission of translations of portions of documents only.

***Art. 38.** When proceedings are begun by means of an application, any preliminary objection shall be filed after the filing of the Case by the applicant and within the time fixed for the filing of the Counter-Case.

The document submitting the objection shall contain a statement of facts and of law on which the plea is based, a statement of conclusions and a list of the documents in support; these documents shall be attached; it shall mention the evidence which the party may desire to produce.

Upon receipt by the Registrar of the document submitting the objection, the Court, or the President if the Court is not sitting, shall fix the time within which the party against whom the plea is directed may submit a written statement of its observations and conclusions; documents in support shall be attached and evidence which it is proposed to produce shall be mentioned.

Unless otherwise decided by the Court, the further proceedings shall be oral. The provisions of paragraphs 4 and 5 of Article 69 of the Rules shall apply.

[1922 text:]

The Court, or the President, if the Court is not sitting, may, after hearing the parties, order the Registrar to hold the Cases and Counter-Cases of each suit at the disposal of the government of any State which is entitled to appear before the Court.

Art. 39. In cases in which proceedings have been instituted by means of a special agreement, the following documents may be presented in the order stated below, provided that no agreement to the contrary has been concluded between the parties:

a Case, submitted by each party within the same limit of time;

a Counter-Case, submitted by each party within the same limit of time;

a Reply, submitted by each party within the same limit of time.

When proceedings are instituted by means of an application, failing any agreement to the contrary between the parties, the documents shall be presented in the order stated below:

the Case by the applicant;
the Counter-Case by the respondent;
the Reply by the applicant;
the Rejoinder by the respondent.

Art. 40. Cases shall contain:

(1) a statement of the facts on which the claim is based;
(2) a statement of law;
(3) a statement of conclusions;
(4) a list of the documents in support; these documents shall be attached to the case.

Counter-Cases shall contain:

(1) the affirmation or contestation of the facts stated in the Case;
(2) a statement of additional facts, if any;
(3) a statement of law;
(4) conclusions based on the facts stated; these conclusions may include counter-claims, in so far as the latter come within the jurisdiction of the Court;
(5) a list of the documents in support; these documents shall be attached to the Counter-Case.

†**Art. 41.** Upon the termination of the written proceedings the Court, or the President, if the Court is not sitting, shall fix a date for the commencement of the oral proceedings.

[1922 and 1926 text:]

Upon the termination of the written proceedings the President shall fix a date for the commencement of the oral proceedings.

*†**Art. 42.** The Registrar shall forward to each of the members of the Court, and to the parties, a copy or copies of all documents in the case as he receives them.

The Court, or the President, if the Court is not sitting, may, after hearing the parties, order the Registrar to hold the Cases and Counter-Cases of each suit at the disposal of the government of any State which is entitled to appear before the Court.

In the same way, the Court or the President may, with the consent of the parties, authorize the documents of the written proceedings in regard to a particular case to be made accessible to the public before the termination of the case.[4]

[4] The third paragraph of this Article was added in 1931.

[1922 text:]

The Registrar shall forward to each of the members of the Court, a copy of all documents in the case as he receives them.

III. Oral Proceedings

Art. 43. In the case of a public sitting, the Registrar shall publish in the Press all necessary information as to the date and hour fixed.

Art. 44. The Registrar shall arrange for the interpretation from French into English and from English into French of all statements, questions and answers which the Court may direct to be so interpreted.

Whenever a language other than French or English is employed, either under the terms of the third paragraph of Article 39 of the Statute or in a particular instance, the necessary arrangements for translation into one of the two official languages shall be made by the party concerned. In the case of witnesses or experts who appear at the instance of the Court, these arrangements shall be made by the Registrar.

Art. 45. The Court shall determine in each case whether the representatives of the parties shall address the Court before or after the production of the evidence; the parties shall, however, retain the right to comment on the evidence given.

Art. 46. The order in which the agents, advocates or counsel shall be called upon to speak shall be determined by the Court, failing an agreement between the parties on the subject.

Art. 47. In sufficient time before the opening of the oral proceedings, each party shall inform the Court and the other parties of all evidence which it intends to produce, together with the names, Christian names, description and residence of witnesses whom it desires to be heard.

It shall further give a general indication of the point or points to which the evidence is to refer.

Art. 48. The Court may, subject to the provisions of Article 44 of the Statute, invite the parties to call witnesses, or may call for the production of any other evidence on points of fact in regard to which the parties are not in agreement.

Art. 49. The Court, or the President should the Court not be sitting, shall, at the request of one of the parties or on its own initiative, take the necessary steps for the examination of witnesses out of Court.

Art. 50. Each witness shall make the following solemn declaration before giving his evidence in Court:

> "I solemnly declare upon my honor and conscience that I will speak the truth, the whole truth and nothing but the truth."

Art. 51. Witnesses shall be examined by the representatives of the parties under the control of the President. Questions may be put to them by the President and afterwards by the judges.

Art. 52. The indemnities of witnesses who appear at the instance of the Court shall be paid out of the funds of the Court.

Art. 53. Any report or record of an enquiry carried out at the request of the Court, under the terms of Article 50 of the Statute, and reports furnished to the Court by experts, in accordance with the same article, shall be forthwith communicated to the parties.

***Art. 54.** A verbatim record shall be made of the oral proceedings, including the evidence taken, under the supervision of the Registrar.

The report of the evidence of each witness shall be read to him in order that, subject to the direction of the Court, any mistakes may be corrected.

The report of statements made by agents, advocates or counsel, shall be communicated to them for their correction or revision, subject to the direction of the Court.

[1922 text:]

A record shall be made of the evidence taken. The portion containing the evidence of each witness shall be read over to him and approved by him.

As regards the remainder of the oral proceedings, the Court shall decide in each case whether verbatim records of all or certain portions of them shall be prepared for its own use.

***Art. 55.** The minutes mentioned in Article 47 of the Statute shall in particular include:

(1) the names of the judges;
(2) the names of the agents, advocates and counsel;
(3) the names, Christian names, description and residence of witnesses heard;
(4) a specification of other evidence produced;
(5) any declarations made by the parties;
(6) all decisions taken by the Court during the hearing.

The minutes of public sittings shall be printed and published.[5]

***Art. 56.** The party in whose favor an order for the payment of costs has been made may present his bill of costs after judgment has been delivered.

[1922 text:]

Before the oral proceedings are concluded, each party may present his bill of costs.

[5] This paragraph was added in 1926.

IV. Interim Protection

†**Art. 57.** An application made to the Court by one or both of the parties, for the indication of interim measures of protection, shall have priority over all other cases. The decision thereon shall be treated as a matter of urgency, and if the Court is not sitting it shall be convened without delay by the President for the purpose.

If no application is made, and if the Court is not sitting, the President may convene the Court to submit to it the question whether such measures are expedient.

In all cases, the Court shall only indicate measures of protection after giving the parties an opportunity of presenting their observations on the subject.

[1922 and 1926 text:]

When the Court is not sitting, any measures for the preservation in the meantime of the respective rights of the parties shall be indicated by the President.

Any refusal by the parties to conform to the suggestions of the Court or of the President, with regard to such measures, shall be placed on record.

V. Intervention

Art. 58. An application for permission to intervene, under the terms of Article 62 of the Statute, must be communicated to the Registrar at latest before the commencement of the oral proceedings.

Nevertheless the Court may, in exceptional circumstances, consider an application submitted at a later stage.

***Art. 59.** The application referred to in the preceding article shall contain:

(1) a specification of the case in which the applicant desires to intervene;

(2) a statement of law and of fact justifying intervention;

(3) a list of the documents in support of the application; these documents shall be attached.

Such application shall be immediately communicated to the parties, who shall send to the Registrar any observations which they may desire to make within a period to be fixed by the Court, or by the President, should the Court not be sitting.

Such observations shall be communicated to the State desiring to intervene and to all parties. The intervener and the original parties may comment thereon in Court; for this purpose the matter shall be placed on the agenda for a hearing the date and hour of which shall be notified to all concerned. The Court will give its decision on the application in the form of a judgment.[6]

If the application is not contested, the President, if the Court is not sitting, may, subject to any subsequent decision of the Court as regards the admissibility of the application, fix, at the request of the State by which the application

is made, time limits within which such State is authorized to file a Case on the merits and within which the other parties may file their Counter-Cases. These time limits, however, may not extend beyond the beginning of the session in the course of which the case shall be heard.[6]

***Art. 60.** The notification provided for in Article 63 of the Statute shall be sent to every State or Member of the League of Nations which is a party to the convention relied upon in the special agreement or in the application as governing the case submitted to the Court.

The Court, or the President if the Court is not sitting, shall fix the times within which States desiring to intervene are to file any Cases.

The Registrar shall take the necessary steps to enable the intervening State to inspect the documents in the case, in so far as they relate to the interpretation of the convention in question, and to submit its observations thereon to the Court. Such observations shall be communicated to the parties, who may comment thereon in Court. The Court may authorize the intervening State to reply.

[1922 text:]

Any State desiring to intervene, under the terms of Article 63 of the Statute, shall inform the Registrar in writing at latest before the commencement of the oral proceedings.

The Court, or the President if the Court is not sitting, shall take the necessary steps to enable the intervening State to inspect the documents in the case, in so far as they relate to the interpretation of the convention in question, and to submit its observations thereon to the Court.

VI. Agreement

Art. 61. If the parties conclude an agreement regarding the settlement of the dispute and give written notice of such agreement to the Court before the close of the proceedings, the Court shall officially record the conclusion of the agreement.

Should the parties by mutual agreement notify the Court in writing that they intend to break off proceedings, the Court shall officially record the fact and proceedings shall be terminated.

VII. Judgment

***Art. 62.** The judgment shall contain:

(1) the date on which it is pronounced;
(2) the names of the judges participating;
(3) the names and style of the parties;
(4) the names of the agents of the parties;

[6] This paragraph was added in 1926.

(5) the conclusions of the parties;
(6) the matters of fact;
(7) the reasons in point of law;
(8) the operative provisions of the judgment;
(9) the decision, if any, referred to in Article 64 of the Statute;
(10) the number of the judges constituting the majority contemplated in Article 55 of the Statute.[7]

Dissenting judges may, if they so desire, attach to the judgment either an exposition of their individual opinion or the statement of their dissent.

[1922 text of the second paragraph:]

The opinions of judges who dissent from the judgment, shall be attached thereto should they express a desire to that effect.

***Art. 63.** When the judgment has been read in public, duly signed and sealed copies thereof shall be forwarded to the parties.

This text shall forthwith be communicated by the Registrar, through the channels agreed upon, to Members of the League of Nations and to States entitled to appear before the Court.

[1922 text:]

After having been read in open Court the text of the judgment shall forthwith be communicated to all parties concerned and to the Secretary-General of the League of Nations.

Art. 64. The judgment shall be regarded as taking effect on the day on which it is read in open Court, in accordance with Article 58 of the Statute.

†Art. 65. A collection of the judgments, orders and advisory opinions of the Court shall be printed and published under the responsibility of the Registrar.

[1922 and 1926 text:]

A collection of the judgments of the Court shall be printed and published under the responsibility of the Registrar.

VIII. Revision and Interpretation

***Art. 66.** — 1. Application for revision shall be made in the same form as the application mentioned in Article 40 of the Statute.

It shall contain:

(*a*) a specification of the judgment impeached;
(*b*) the facts upon which the application is based;
(*c*) a list of the supporting documents; these documents shall be attached to the application.

[7] This sub-paragraph was added in 1926.

It shall be the duty of the Registrar to give immediate notice of an application for revision to the other parties concerned. The latter may submit observations within a time limit to be fixed by the Court, or by the President should the Court not be sitting.

If the Court, under the third paragraph of Article 61 of the Statute, by a special judgment makes the admission of the application conditional upon previous compliance with the terms of the judgment impeached, this condition shall be immediately communicated to the applicant by the Registrar, and proceedings in revision shall be stayed pending receipt by the Registrar of proof of previous compliance with the original judgment and until such proof shall have been accepted by the Court.

2. A request to the Court to construe a judgment which it has given may be made either by the notification of a special agreement between all the parties or by an application by one or more of the parties.

The agreement or application shall contain:

(*a*) a specification of the judgment the interpretation of which is requested;

(*b*) an indication of the precise point or points in dispute.

If the request for interpretation is made by means of an application, it shall be the duty of the Registrar to give immediate notice of such application to the other parties, and the latter may submit observations within a time limit to be fixed by the Court or by the President, as the case may be.

The Court may, whether the request be made by agreement or by application, invite the parties to furnish further written or oral explanations.

3. If the judgment impeached or to be construed was pronounced by the full Court, the application for revision or the request for interpretation shall also be dealt with by the full Court. If the judgment was pronounced by one of the Chambers mentioned in Articles 26, 27 or 29 of the Statute, the application for revision or the request for interpretation shall be dealt with by the same Chamber. The provisions of Article 13 of the Statute shall apply in all cases.

4. Objections to the Court's jurisdiction to revise or to construe a judgment, or other similar preliminary objections, shall be dealt with according to the procedure laid down in Article 38 of the present Rules.

5. The Court's decision on requests for revision or interpretation shall be given in the form of a judgment.

[1922 text:]

Application for revision shall be made in the same form as the application mentioned in Article 40 of the Statute.

It shall contain:

(*1*) *the reference to the judgment impeached;*

(*2*) *the fact on which the application is based;*

(3) a list of the documents in support; these documents shall be attached.

It shall be the duty of the Registrar to give immediate notice of an application for revision to the other parties concerned. The latter may submit observations within a time limit to be fixed by the Court, or by the President should the Court not be sitting.

If the judgment impeached was pronounced by the full Court, the application or revision shall also be dealt with by the full Court. If the judgment impeached was pronounced by one of the Chambers mentioned in Articles 26, 27 or 29 of the Statute, the application for revision shall be dealt with by the same Chamber. The provisions of Article 13 of the Statute shall apply in all cases.

If the Court, under the third paragraph of Article 61 of the Statute, makes a special order rendering the admission of the application conditional upon previous compliance with the terms of the judgment impeached, this condition shall be immediately communicated to the applicant by the Registrar, and proceedings in revision shall be stayed pending receipt by the Registrar of proof of previous compliance with the original judgment and until such proof shall have been accepted by the Court.

SECTION C. SUMMARY PROCEDURE

Art. 67. Except as provided under the present section, the rules for procedure before the full Court shall apply to summary procedure.

***Art. 68.** Upon receipt by the Registrar of the document instituting proceedings in a case which, by virtue of an agreement between the parties, is to be dealt with by summary procedure, the President of the Court shall, as soon as possible, notify the members of the Chamber referred to in Article 29 of the Statute. The Chamber or, if it is not in session, its President, shall fix the time within which the first document of the written procedure, provided for in the following article, shall be filed.

The President shall convene the Chamber at the earliest date that may be required by the circumstances of the case.

[1922 text:]

Upon receipt by the Registrar of the document instituting proceedings in a case which, by virtue of an agreement between the parties, is to be dealt with by summary procedure, the President shall convene as soon as possible the Chamber referred to in Article 29 of the Statute.

***Art. 69.** Summary proceedings are opened by the presentation of Cases according to the provisions of Article 39, paragraph 1, of the present Rules. If a Case is presented by one party only, the other party or parties shall present a Counter-Case. In the event of the simultaneous presentation of Cases by the parties, the Chamber may invite the presentation, under the same conditions, of Counter-Cases.

The Cases and Counter-Cases, which shall be communicated by the Registrar to the members of the Chamber and to opposing parties, shall mention all evidence which the parties may desire to produce.

Should the Chamber consider that the documents do not furnish adequate information, it may, in the absence of an agreement to the contrary between the parties, institute oral proceedings. It shall fix a date for the commencement of the oral proceedings.

At the hearing, the Chamber shall call upon the parties to supply oral explanations. It may sanction the production of any evidence mentioned in the documents.

If it is desired that witnesses or experts whose names are mentioned in the documents should be heard, such witnesses or experts must be available to appear before the Chamber when required.

[1922 text:]

The proceedings are opened by the presentation of a Case by each party. These Cases shall be communicated by the Registrar to the members of the Chamber and to the opposing party.

The Cases shall contain reference to all evidence which the parties may desire to produce.

Should the Chamber consider that the Cases do not furnish adequate information, it may, in the absence of an agreement to the contrary between the parties, institute oral proceedings. It shall fix a date for the commencement of the oral proceedings.

At the hearing, the Chamber shall call upon the parties to supply oral explanations. It may sanction the production of any evidence mentioned in the Cases.

If it is desired that witnesses or experts whose names are mentioned in the Case should be heard, such witnesses or experts must be available to appear before the Chamber when required.

Art. 70. The judgment is the judgment of the Court rendered in the Chamber for Summary Procedure. It shall be read at a public sitting of the Chamber.

Heading 2. Advisory Procedure

***Art. 71.** Advisory opinions shall be given after deliberation by the full Court. They shall mention the number of the judges constituting the majority.

On a question relating to an existing dispute between two or more States or Members of the League of Nations, Article 31 of the Statute shall apply. In case of doubt the Court shall decide.[9]

Dissenting judges may, if they so desire, attach to the opinion of the Court either an exposition of their individual opinion or the statement of their dissent.

[9] This paragraph was added by amendment on September 7, 1927.

[1922 text:]

Advisory opinions shall be given after deliberation by the full Court.

The opinions of dissenting judges may, at their request, be attached to the opinion of the Court.

Art. 72. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request, signed either by the President of the Assembly or the President of the Council of the League of Nations, or by the Secretary-General of the League under instructions from the Assembly or the Council.

The request shall contain an exact statement of the question upon which an opinion is required, and shall be accompanied by all documents likely to throw light upon the question.

***Art. 73.** — 1. The Registrar shall forthwith give notice of the request for an advisory opinion to the members of the Court, to the Members of the League of Nations, through the Secretary-General of the League, and to any States entitled to appear before the Court.

The Registrar shall also, by means of a special and direct communication, notify any Member of the League or States admitted to appear before the Court or international organizations considered by the Court (or, should it not be sitting, by the President) as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.

Should any State or Member referred to in the first paragraph have failed to receive the communication specified above, such State or Member may express a desire to submit a written statement, or to be heard; and the Court will decide.

2. States, Members and organizations having presented written or oral statements or both shall be admitted to comment on the statements made by other States, Members or organizations, in the form, to the extent and within the time limits which the Court or, should it not be sitting, the President shall decide in each particular case. Accordingly, the Registrar shall in due time communicate any such written statements to States, Members and organizations having submitted similar statements.

[1922 text:]

The Registrar shall forthwith give notice of the request for an advisory opinion to the members of the Court, and to the Members of the League of Nations, through the Secretary-General of the League, and to the States mentioned in the Annex to the Covenant.

Notice of such request shall also be given to any international organizations which are likely to be able to furnish information on the question.

*†**Art. 74.** Advisory opinions shall be read in open Court, notice having been given to the Secretary-General of the League of Nations and to the representatives of States, of Members of the League and of international organizations immediately concerned. The Registrar shall take the necessary steps in order to ensure that the text of the advisory opinion is in the hands of the Secretary-General at the seat of the League at the date and hour fixed for the meeting held for the reading of the opinion.

Signed and sealed original copies of advisory opinions shall be placed in the archives of the Court and of the Secretariat of the League. Certified copies thereof shall be transmitted by the Registrar to States, to Members of the League, and to international organizations immediately concerned.

[1922 text:]

Any advisory opinion which may be given by the Court and the request in response to which it was given, shall be printed and published in a special collection for which the Registrar shall be responsible.

[The 1926 text included as a third paragraph:]

Any advisory opinion which may be given by the Court and the request in response to which it is given, shall be printed and published in a special collection for which the Registrar shall be responsible.

Heading 3. Errors

Art. 75. The Court, or the President if the Court is not sitting, shall be entitled to correct an error in any order, judgment or opinion, arising from a slip or accidental omission.

APPENDIX NO. 7

Rules of Court, Adopted on March 11, 1936

English version from Series D, No. 1 (4th ed.), pp. 31–61.[1]

PREAMBLE

The Court,

Having regard to the Statute annexed to the Protocol of December 16th, 1920, and the amendments to this Statute annexed to the Protocol of September 14th, 1929, in force as from February 1st, 1936;

Having regard to Article 30 of this Statute;

Adopts the present Rules:

[1] The text includes a French version, also.

Heading I

CONSTITUTION AND WORKING OF THE COURT

SECTION I. — CONSTITUTION OF THE COURT

Judges and Technical Assessors

Article 1. The term of office of members of the Court shall begin to run on January 1st of the year following their election, except in the case of an election under Article 14 of the Statute, in which case the term of office shall begin on the date of election.

Art. 2.—1. Members of the Court elected at an earlier session of the Assembly and of the Council of the League of Nations shall take precedence over members elected at a subsequent session. Members elected during the same session shall take precedence according to age. Judges nominated under Article 31 of the Statute of the Court from outside the Court shall take precedence after the other judges in order of age.

2. The Vice-President shall take his seat on the right of the President. The other judges shall take their seats on the left and right of the President in the order laid down above.

Art. 3.—1. Any State which considers that it possesses and which intends to exercise the right to nominate a judge under Article 31 of the Statute of the Court shall so notify the Court by the date fixed for the filing of the Memorial. The name of the person chosen to sit as judge shall be indicated, either with the notification above mentioned, or within a period to be fixed by the President. These notifications shall be communicated to the other parties and they may submit their views to the Court within a period to be fixed by the President. If any doubt or objection should arise, the decision shall rest with the Court, if necessary after hearing the parties.

2. If, on receipt of one or more notifications under the terms of the preceding paragraph, the Court finds that there are several parties in the same interest and that none of them has a judge of its nationality upon the Bench, it shall fix a period within which these parties, acting in concert, may nominate a judge under Article 31 of the Statute. If, at the expiration of this time-limit, no notification of a nomination by them has been made, they shall be regarded as having renounced the right conferred upon them by Article 31 of the Statute.

Art. 4. Where one or more parties are entitled to nominate a judge under Article 31 of the Statute, the full Court may sit with a number of judges exceeding the number of members of the Court fixed by the Statute.

Art. 5.—1. The declaration to be made by every judge in accordance with Article 20 of the Statute of the Court shall be worded as follows:

> "I solemnly declare that I will exercise all my powers and duties as a judge honourably and faithfully, impartially and conscientiously."

2. This declaration shall be made at the first public sitting of the Court at which the judge is present after his election or nomination. A special public sitting of the Court may be held for this purpose.

3. At the public inaugural sitting held after a new election of the whole Court the required declaration shall be made first by the President, next by the Vice-President, and then by the remaining judges in the order laid down in Article 2 of the present Rules.

Art. 6. For the purpose of applying Article 18 of the Statute of the Court the President, or if necessary the Vice-President, shall convene the members of the Court. The member affected shall be allowed to furnish explanations. When he has done so the question shall be discussed and a vote shall be taken, the member in question not being present. If the members present are unanimous, the Registrar shall issue the notification prescribed in the above-mentioned Article.

Art. 7.—1. The President shall take steps to obtain all relevant information with a view to the selection of the technical assessors to be appointed in a case. For cases falling under Article 26 of the Statute of the Court, he shall consult the Governing Body of the International Labour Office.

2. Assessors shall be appointed by an absolute majority of votes by the full Court or by the Chamber which has to deal with the case in question, as the case may be.

3. A request for assessors to be attached to the Court under Article 27, paragraph 2, of the Statute must at latest be submitted with the first document of the written proceedings. Such a request shall be complied with if the parties are in agreement. If the parties are not in agreement, the decision rests with the full Court or with the Chamber, as the case may be.

Art. 8. Before taking up their duties, assessors shall make the following solemn declaration at a public sitting:

> "I solemnly declare that I will exercise my duties and powers as an assessor honourably and faithfully, impartially and conscientiously, and that I will scrupulously observe all the provisions of the Statute and of the Rules of Court."

The Presidency

Art. 9.—1. The President and the Vice-President shall be elected in the last quarter of the last year of office of the retiring President and Vice-President. They shall take up their duties on the following January 1st.

2. After a new election of the whole Court, the election of the President and of the Vice-President shall take place at the commencement of the following year. The President and Vice-President elected in these circumstances shall take up their duties on the date of their election. They shall remain in office until the end of the second year after the year of their election.

3. Should the President or the Vice-President cease to belong to the Court before the expiration of his normal term of office, an election shall be held for the purpose of appointing a successor for the unexpired portion of his term of office.

4. The elections referred to in the present Article shall take place by secret ballot. The candidate obtaining an absolute majority of votes shall be declared elected.

Art. 10. The President shall direct the work and administration of the Court; he shall preside at the meetings of the full Court.

Art. 11. The Vice-President shall take the place of the President, if the latter is unable to fulfil his duties. In the event of the President ceasing to hold office, the same rule shall apply until his successor has been appointed by the Court.

Art. 12.—1. The discharge of the duties of the President shall always be assured at the seat of the Court, either by the President himself or by the Vice-President.

2. If at the same time both the President and the Vice-President are unable to fulfil their duties, or if both appointments are vacant at the same time, the duties of President shall be discharged by the oldest among the members of the Court who have been longest on the Bench.

3. After a new election of the whole Court, and until the election of the President and the Vice-President, the duties of President shall be discharged by the oldest member of the Court.

Art. 13.—1. If the President is a national of one of the parties to a case brought before the Court, he will hand over his functions as President in respect of that case. The same rule applies to the Vice-President or to any member of the Court who might be called on to act as President.

2. If, after a new election of the whole Court, the newly elected President sits, under Article 13 of the Statute of the Court, in order to finish a case which he had begun during his preceding term of office as judge, the duties of President, in respect of such case, shall be discharged by the member of the Court who presided when the case was last under examination, unless the latter is unable to sit, in which case the former Vice-President or the oldest among the members of the Court who have been longest on the Bench shall discharge the duties of President.

3. If, owing to the expiry of a President's period of office, a new President is elected, and if the Court sits after the end of the said period in order to finish a case which it had begun to examine during that period, the former President shall retain the functions of President in respect of that case. Should he be unable to fulfil his duties, his place shall be taken by the newly elected President.

The Registry

Art. 14.—1. The Court shall select its Registrar from amongst candidates proposed by members of the Court. The latter shall receive adequate notice of the date on which the list of candidates will be closed so as to enable nominations and information concerning the nationals of distant countries to be received in sufficient time.

2. Nominations must give the necessary particulars regarding age, nationality, university degrees and linguistic attainments of candidates, as also regarding their judicial and diplomatic qualifications, their experience in connection with the work of the League of Nations and their present profession.

3. The election shall be by secret ballot and by an absolute majority of votes.

4. The Registrar shall be elected for a term of seven years reckoned from January 1st of the year following that in which the election takes place. He may be re-elected.

5. Should the Registrar cease to hold his office before the expiration of the term above mentioned, an election shall be held for the purpose of appointing a successor. Such election shall be for a term of seven years.

6. The Court shall appoint a Deputy-Registrar to assist the Registrar, to act as Registrar in his absence and, in the event of his ceasing to hold the office, to perform the duties until a new Registrar shall have been appointed. The Deputy-Registrar shall be appointed under the same conditions and in the same way as the Registrar.

Art. 15.—1. Before taking up his duties, the Registrar shall make the following declaration at a meeting of the full Court:

> "I solemnly declare that I will perform the duties conferred upon me as Registrar of the Permanent Court of International Justice in all loyalty, discretion and good conscience."

2. The Deputy-Registrar shall make a similar declaration in the same conditions.

Art. 16. The Registrar is entitled to two months' holiday in each year.

Art. 17.—1. The officials of the Registry, other than the Deputy-Registrar, shall be appointed by the Court on proposals submitted by the Registrar.

2. On taking up their duties, such officials shall make the following declaration before the President, the Registrar being present:

> "I solemnly declare that I will perform the duties conferred upon me as an official of the Permanent Court of International Justice in all loyalty, discretion and good conscience."

Art. 18.—1. The Court shall determine or modify the organization of the Registry upon proposals submitted by the Registrar.

2. The Regulations for the staff of the Registry shall be drawn up having regard to the organization decided upon by the Court and to the provisions of the Regulations for the staff of the Secretariat of the League of Nations, to which they shall, as far as possible, conform. They shall be adopted by the President on the proposal of the Registrar, subject to subsequent approval by the Court.[2]

Art. 19. In case both the Registrar and the Deputy-Registrar are unable to be present, or in case both appointments are vacant at the same time, the President, on the proposal of the Registrar or the Deputy-Registrar, as the case may be, shall appoint the official of the Registry who is to act as substitute for the Registrar until a successor to the Registrar has been appointed.

Art. 20.—1. The General List of cases submitted to the Court for decision or for advisory opinion shall be prepared and kept up to date by the Registrar on the instructions and subject to the authority of the President. Cases shall be entered in the list and numbered successively according to the date of the receipt of the document bringing the case before the Court.

2. The General List shall contain the following headings:

I. Number in list.
II. Short title.
III. Date of registration.
IV. Registration number.
V. File number in the archives.
VI. Nature of case.
VII. Parties.
VIII. Interventions.
IX. Method of submission.
X. Date of document instituting proceedings.
XI. Time-limits for filing documents in the written proceedings.
XII. Prolongation, if any, of time-limits.
XIII. Date of termination of the written proceedings.
XIV. Postponements.
XV. Date of the beginning of the hearing (date of the first public sitting).
XVI. Observations.
XVII. References to earlier or subsequent cases.
XVIII. Result (nature and date).
XIX. Removal from the list (nature and date).
XX. References to publications of the Court relating to the case.

3. The General List shall also contain a space for notes, if any, and spaces for the inscription, above the initials of the President and of the Registrar, of

[2] For the text of the Staff Regulations as amended, see pp. 756–60, *infra*.

the dates of the entry of the case, of its result, or of its removal from the list, as the case may be.

Art. 21.—1. The Registrar shall be the channel for all communications to and from the Court.

2. The Registrar shall ensure that the date of despatch and receipt of all communications and notifications may readily be verified. Communications and notifications sent by post shall be registered. Communications addressed to the agents of the parties shall be considered as having been addressed to the parties themselves. The date of receipt shall be noted on all documents received by the Registrar, and a receipt bearing this date and the number under which the document has been registered shall be given to the sender.

3. The Registrar shall, subject to the obligations of secrecy attaching to his official duties, reply to all enquiries concerning the work of the Court, including enquiries from the Press.

4. The Registrar shall publish in the Press all necessary information as to the date and hour fixed for public sittings.

Art. 22. A collection of the judgments and advisory opinions of the Court, as also of such orders as the Court may decide to include therein, shall be printed and published under the responsibility of the Registrar.

Art. 23.—1. The Registrar shall be responsible for the archives, the accounts and all administrative work. He shall have the custody of the seals and stamps of the Court. The Registrar or the Deputy-Registrar shall be present at all sittings of the full Court and at sittings of the Special Chambers and of the Chamber for Summary Procedure. The Registrar shall be responsible for drawing up the minutes of the meetings.

2. He shall undertake, in addition, all duties which may be laid upon him by the present Rules.

3. The duties of the Registry shall be set forth in detail in a list of instructions submitted by the Registrar to the President and approved by him.[3]

The Special Chambers and the Chamber for Summary Procedure

Art. 24.—1. The members of the Chambers constituted by virtue of Articles 26, 27 and 29 of the Statute of the Court and also the substitute members shall be appointed at a meeting of the full Court by secret ballot and by an absolute majority of votes.

2. The election shall take place in the last quarter of the year and the period of appointment of the persons elected shall commence on January 1st of the following year.

3. Nevertheless, after a new election of the whole Court, the election shall take place at the beginning of the following year. The period of appointment shall commence on the date of election and shall terminate, in the case of the

[3] For the text of Instructions for the Registry, see pp. 760–75, *infra*.

Chamber referred to in Article 29 of the Statute, at the end of the same year and, in the case of the Chambers referred to in Articles 26 and 27 of the Statute, at the end of the second year after the year of election.

4. The Presidents of the Chambers shall be appointed at a sitting of the full Court. Nevertheless, the President of the Court shall preside *ex officio* over any Chamber of which he may be elected a member; similarly, the Vice-President of the Court shall preside *ex officio* over any Chamber of which he may be elected a member and of which the President of the Court is not a member.

5. The Chambers referred to in Articles 26, 27 and 29 of the Statute of the Court may not sit with a greater number than five judges.

SECTION 2.—WORKING OF THE COURT

Art. 25.—1. The judicial year shall begin on January 1st in each year.

2. In the absence of a special resolution by the Court, the dates and duration of the judicial vacations are fixed as follows: (*a*) from December 18th to January 7th; (*b*) from the Sunday before Easter to the second Sunday after Easter; (*c*) from July 15th to September 15th.

3. In case of urgency, the President can always convene the members of the Court during the periods mentioned in the preceding paragraph.

4. The public holidays which are customary at the place where the Court is sitting will be observed by the Court.

Art. 26.—1. The order in which the leaves provided for in Article 23, paragraph 2, of the Statute of the Court are to be taken shall be laid down in a list drawn up by the Court for each period of three years. This order can only be departed from for serious reasons duly admitted by the Court.

2. The number of members of the Court on leave at any one time must not exceed two. The President and the Vice-President must not take their leave at the same time.

Art. 27. Members of the Court who are prevented by illness or other serious reasons from attending a sitting of the Court to which they have been summoned by the President, shall notify the President who will inform the Court.

Art. 28.—1. The date and hour of sittings of the full Court shall be fixed by the President of the Court.

2. The date and hour of sittings of the Chambers referred to in Articles 26, 27 and 29 of the Statute of the Court shall be fixed by the Presidents of the Chambers respectively. The first sitting, however, of a Chamber in any particular case is fixed by the President of the Court.

Art. 29. If a sitting of the full Court has been convened and it is found that there is no quorum, the President shall adjourn the sitting until a quorum has been obtained. Judges nominated under Article 31 of the Statute shall not be taken into account for the calculation of the quorum.

Art. 30.—1. The Court shall sit in private to deliberate upon disputes which are submitted to it and upon advisory opinions which it is asked to give.

2. During the deliberations referred to in the preceding paragraph, only persons authorized to take part therein and the Registrar or his substitute shall be present. No other person shall be admitted except by virtue of a special decision taken by the Court.

3. Every judge who is present at the deliberations shall state his opinion together with the reasons on which it is based.

4. Any judge may request that a question which is to be voted upon shall be drawn up in precise terms in both the official languages and distributed to the Court. Effect shall be given to any such request.

5. The decision of the Court shall be based upon the conclusions adopted after final discussion by a majority of the judges voting in an order inverse to the order laid down by Article 2 of the present Rules.

6. No detailed minutes shall be prepared of the private meetings of the Court for deliberation upon judgments or advisory opinions; the minutes of these meetings are to be considered as confidential and shall record only the subject of the debates, the votes taken, the names of those voting for and against a motion and statements expressly made for insertion in the minutes.

7. After the final vote taken on a judgment or advisory opinion, any judge who desires to set forth his individual opinion must do so in accordance with Article 57 of the Statute.

8. Unless otherwise decided by the Court, paragraphs 2, 4 and 5 of this Article shall apply to deliberations by the Court in private upon any administrative matter.

Heading II

CONTENTIOUS PROCEDURE

Art. 31. The rules contained in Sections 1, 2 and 4 of this Heading shall not preclude the adoption by the Court of particular modifications or additions proposed jointly by the parties and considered by the Court to be appropriate to the case and in the circumstances.

SECTION 1.—PROCEDURE BEFORE THE FULL COURT

I.—*General Rules*

Institution of Proceedings

Art. 32.—1. When a case is brought before the Court by means of a special agreement, Article 40, paragraph 1, of the Statute of the Court shall apply.

2. When a case is brought before the Court by means of an application, the application must, as laid down in Article 40, paragraph 1, of the Statute,

indicate the party making it, the party against whom the claim is brought and the subject of the dispute. It must also, as far as possible, specify the provision on which the applicant founds the jurisdiction of the Court, state the precise nature of the claim and give a succinct statement of the facts and grounds on which the claim is based, these facts and grounds being developed in the Memorial, to which the evidence will be annexed.

3. The original of an application shall be signed either by the agent of the party submitting it, or by the diplomatic representative of that party at The Hague, or by a duly authorized person. If the document bears the signature of a person other than the diplomatic representative of that party at The Hague, the signature must be legalized by this diplomatic representative or by the competent authority of the government concerned.

Art. 33.—1. When a case is brought before the Court by means of an application, the Registrar shall transmit forthwith to the party against whom the claim is brought a copy of the application certified by him to be correct.

2. When a case is brought before the Court by means of a special agreement filed by one only of the parties, the Registrar shall notify forthwith the other party that it has been so filed.

Art. 34.—1. The Registrar shall transmit forthwith to all the members of the Court copies of special agreements or applications submitting a case to the Court.

2. He shall also transmit through the channels indicated in the Statute of the Court or in a special arrangement, as the case may be, copies to Members of the League of Nations and to States entitled to appear before the Court.

Art. 35.—1. When a case is brought before the Court by means of a special agreement, the appointment of the agent or agents of the party or parties lodging the special agreement shall be notified at the same time as the special agreement is filed. If the special agreement is filed by one only of the parties, the other party shall, when acknowledging receipt of the communication announcing the filing of the special agreement, or failing this, as soon as possible, inform the Court of the name of its agent.

2. When a case is brought before the Court by means of an application, the application, or the covering letter, shall state the name of the agent of the applicant government.

3. The party against whom the application is directed and to whom it is communicated shall, when acknowledging receipt of the communication, or failing this, as soon as possible, inform the Court of the name of its agent.

4. Applications to intervene under Article 64 of the present Rules, interventions under Article 66 and requests under Article 78 for the revision, or under Article 79 for the interpretation, of a judgment, shall similarly be accompanied by the appointment of an agent.

5. The appointment of an agent must be accompanied by a mention of his permanent address at the seat of the Court to which all communications as to the case are to be sent.

Art. 36. The declaration provided for in the Resolution of the Council of the League of Nations dated May 17th, 1922,[4] shall be filed with the Registry at the same time as the notification of the appointment of the agent.

Preliminary Measures

Art. 37.—1. In every case submitted to the Court, the President ascertains the views of the parties with regard to questions connected with the procedure; for this purpose he may summon the agents to a meeting as soon as they have been appointed.

2. In the light of the information obtained by the President, the Court will make the necessary orders to determine *inter alia* the number and order of the documents of the written proceedings and the time-limits within which they must be presented.

3. In the making of an order under the foregoing paragraph, any agreement between the parties is to be taken into account so far as possible.

4. The Court may extend time-limits which have been fixed. It may also, in special circumstances and after giving the agent of the opposing party an opportunity of submitting his views, decide that a proceeding taken after the expiration of a time-limit shall be considered as valid.

5. If the Court is not sitting and without prejudice to any subsequent decision of the Court, its powers under this Article shall be exercised by the President.

Art. 38. Time-limits shall be fixed by assigning a definite date for the completion of the various acts of procedure.

Written Proceedings

Art. 39.—1. Should the parties agree that the proceedings shall be conducted wholly in French, or wholly in English, the documents of the written proceedings shall be submitted only in the language adopted by the parties.

2. In the absence of an agreement with regard to the language to be employed, the documents shall be submitted in French or in English.

3. Should the use of a language other than French or English be authorized, a translation into French or into English shall be attached to the original of each document submitted.

4. The Registrar shall not be bound to make translations of the documents of the written proceedings.

[4] For the terms of the Council Resolution, see p. 755, *infra*.

Art. 40.—1. The original of every document of the written proceedings shall be signed by the agent and filed with the Court accompanied by fifty printed copies bearing the signature of the agent in print.

2. When a copy of a document of the written proceedings is communicated to the other party under Article 43, paragraph 4, of the Statute of the Court, the Registrar shall certify that it is a correct copy of the original filed with the Court.

3. All documents of the written proceedings shall be dated. When a document has to be filed by a certain date, it is the date of the receipt of the document by the Registry which will be regarded by the Court as the material date.

4. If the Registrar at the request of the agent of a party arranges for the printing, at the cost of the government which this agent represents, of a document which it is intended to file with the Court, the text must be transmitted to the Registry in sufficient time to enable the printed document to be filed before the expiry of any time-limit which may apply to it.

5. When, under this Article, a document has to be filed in a number of copies fixed in advance, the President may require additional copies to be supplied.

6. The correction of a slip or error in a document which has been filed is permissible at any time with the consent of the other party, or by leave of the President.

Art. 41.—1. If proceedings are instituted by means of a special agreement, the following documents may, subject to Article 37, paragraphs 2 and 3, of the present Rules, be presented in the order stated below:

a Memorial, by each party within the same time-limit;
a Counter-Memorial, by each party within the same time-limit;
a Reply, by each party within the same time-limit.

2. If proceedings are instituted by means of an application, the documents shall, subject to Article 37, paragraphs 2 and 3, of the present Rules, be presented in the order stated below:

the Memorial by the applicant;
the Counter-Memorial by the respondent;
the Reply by the applicant;
the Rejoinder by the respondent.

Art. 42.—1. A Memorial shall contain: a statement of the facts on which the claim is based, a statement of law, and the submissions.

2. A Counter-Memorial shall contain: the admission or denial of the facts stated in the Memorial; any additional facts, if necessary; observations con-

cerning the statement of law in the Memorial, a statement of law in answer thereto, and the submissions.

Art. 43.—1. A copy of every document in support of the arguments set forth therein must be attached to the Memorial or Counter-Memorial; a list of such documents shall be given after the submissions. If, on account of the length of a document, extracts only are attached, the document itself or a complete copy of it must, if possible, and unless the document has been published and is of a public character, be communicated to the Registrar for the use of the Court and of the other party.

2. Any document filed as an annex which is in a language other than French or English, must be accompanied by a translation into one of the official languages of the Court. Nevertheless, in the case of lengthy documents, translations of extracts may be submitted, subject, however, to any subsequent decision by the Court, or, if it is not sitting, by the President.

3. Paragraphs 1 and 2 of the present Article shall apply also to the other documents of the written proceedings.

Art. 44.—1. The Registrar shall forward to the judges and to the parties copies of all the documents in the case, as and when he receives them.

2. The Court, or the President if the Court is not sitting, may, after obtaining the views of the parties, decide that the Registrar shall hold the documents of the written proceedings in a particular case at the disposal of the government of any Member of the League of Nations or State which is entitled to appear before the Court.

3. The Court, or the President, if the Court is not sitting, may, with the consent of the parties, authorize the documents of the written proceedings in regard to a particular case to be made accessible to the public before the termination of the case.

Art. 45. Upon the termination of the written proceedings, the case is ready for hearing.

Art. 46.—1. Subject to the priority resulting from Article 61 of the present Rules, cases submitted to the Court will be taken in the order in which they become ready for hearing. When several cases are ready for hearing, the order in which they will be taken is determined by the position which they occupy in the General List.

2. Nevertheless, the Court may, in special circumstances, decide to take a case in priority to other cases which are ready for hearing and which precede it in the General List.

3. If the parties to a case which is ready for hearing are agreed in asking for the case to be put after other cases which are ready for hearing and which follow it in the General List, the President may grant such an adjournment: if the parties are not in agreement, the President decides whether or not to submit the question to the Court.

Oral Proceedings

Art. 47.—1. When a case is ready for hearing, the date for the commencement of the oral proceedings shall be fixed by the Court, or by the President if the Court is not sitting.

2. If occasion should arise, the Court or the President, if the Court is not sitting, may decide that the commencement or continuance of the hearings shall be postponed.

Art. 48.—1. Except as provided in the following paragraph, no new document may be submitted to the Court after the termination of the written proceedings save with the consent of the other party. The party desiring to produce the new document shall file the original or a certified copy thereof with the Registry, which will be responsible for communicating it to the other party and will inform the Court. The other party shall be held to have given its consent if it does not lodge an objection to the production of the document.

2. If this consent is not given, the Court, after hearing the parties, may either refuse to allow the production or may sanction the production of the new document. If the Court sanctions the production of the new document, an opportunity shall be given to the other party of commenting upon it.

Art. 49.—1. In sufficient time before the opening of the oral proceedings, each party shall inform the Court and, through the Registry, the other parties, of the names, Christian names, description and residence of witnesses and experts whom it desires to be heard. It shall further give a general indication of the point or points to which the evidence is to refer.

2. Similarly, and subject to Article 48 of these Rules and to the preceding paragraph of this Article, each party shall indicate all other evidence which it intends to produce or which it intends to request the Court to take, including any request for the holding of an expert enquiry.

Art. 50. The Court shall determine whether the parties shall address the Court before or after the production of the evidence; the parties shall, however, retain the right to comment on the evidence given.

Art. 51. The order in which the agents, counsel or advocates shall be called upon to speak shall be determined by the Court, unless there is an agreement between the parties on the subject.

Art. 52.—1. During the hearing, which is under the control of the President, the latter, either in the name of the Court or on his own behalf, may put questions to the parties or may ask them for explanations.

2. Similarly, each of the judges may put questions to the parties or ask for explanations; nevertheless, he shall first apprise the President.

3. The parties shall be free to answer at once or at a later date.

Art. 53.—1. Witnesses and experts shall be examined by the agents, counsel or advocates of the parties under the control of the President. Questions may be put to them by the President and by the judges.

2. Each witness shall make the following solemn declaration before giving his evidence in Court:

> "I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth."

3. Each expert shall make the following solemn declaration before making his statement in Court:

> "I solemnly declare upon my honour and conscience that my statement will be in accordance with my sincere belief."

Art. 54. The Court may invite the parties to call witnesses or experts, or may call for the production of any other evidence on points of fact in regard to which the parties are not in agreement. If need be, the Court shall apply the provisions of Article 44 of the Statute of the Court.

Art. 55. The indemnities of witnesses or experts who appear at the instance of the Court shall be paid out of the funds of the Court.

Art. 56. The Court, or the President should the Court not be sitting, shall, at the request of one of the parties or on its own initiative, take the necessary steps for the examination of witnesses or experts otherwise than before the Court itself.

Art. 57.—1. If the Court considers it necessary to arrange for an enquiry or an expert report, it shall issue an order to this effect, after duly hearing the parties, stating the subject of the enquiry or expert report, and setting out the number and appointment of the persons to hold the enquiry or of the experts and the formalities to be observed.

2. Any report or record of an enquiry and any expert report shall be communicated to the parties.

Art. 58.—1. In the absence of any decision to the contrary by the Court, or by the President if the Court is not sitting at the time when the decision has to be made, speeches or statements made before the Court in one of the official languages shall be translated into the other official language; the same rule shall apply in regard to questions and answers. The Registrar shall make the necessary arrangements for this purpose.

2. Whenever a language other than French or English is employed with the authorization of the Court, the necessary arrangements for a translation into one of the two official languages shall be made by the party concerned; the evidence of witnesses and the statements of experts shall, however, be translated under the supervision of the Court. In the case of witnesses or

experts who appear at the instance of the Court, arrangements for translation shall be made by the Registry.

3. The persons making the translations referred to in the preceding paragraph shall make the following solemn declaration in Court:

> "I solemnly declare upon my honour and conscience that my translation will be a complete and faithful rendering of what I am called upon to translate."

Art. 59.—1. The minutes mentioned in Article 47 of the Statute of the Court shall include:

> the names of the judges present;
> the names of the agents, counsel or advocates present;
> the names, Christian names, description and residence of witnesses and experts heard;
> a statement of the evidence produced at the hearing;
> declaration made on behalf of the parties;
> a brief mention of questions put to the parties by the President or by the judges;
> any decisions delivered or announced by the Court during the hearing.

2. The minutes of public sittings shall be printed and published.

Art. 60.—1. In respect of each hearing held by the Court, a shorthand note shall be made under the supervision of the Registrar of the oral proceedings, including the evidence taken, and shall be appended to the minutes referred to in Article 59 of the present Rules. This note, unless otherwise decided by the Court, shall contain any interpretations from one official language to the other made in Court by the interpreters.

2. The report of the evidence of each witness or expert shall be read to him in order that, under the supervision of the Court, any mistakes may be corrected.

3. Reports of speeches or declarations made by agents, counsel or advocates shall be communicated to them for correction or revision, under the supervision of the Court.

II.—*Occasional Rules*

Interim Protection

Art. 61.—1. A request for the indication of interim measures of protection may be filed at any time during the proceedings in the case in connection with which it is made. The request shall specify the case to which it relates, the rights to be protected and the interim measures of which the indication is proposed.

2. A request for the indication of interim measures of protection shall have priority over all other cases. The decision thereon shall be treated as a matter of urgency.

3. If the Court is not sitting, the members shall be convened by the President forthwith. Pending the meeting of the Court and a decision by it, the President shall, if need be, take such measures as may appear to him necessary in order to enable the Court to give an effective decision.

4. The Court may indicate interim measures of protection other than those proposed in the request.

5. The rejection of a request for the indication of interim measures of protection shall not prevent the party which has made it from making a fresh request in the same case based on new facts.

6. The Court may indicate interim measures of protection *proprio motu*. If the Court is not sitting, the President may convene the members in order to submit to the Court the question whether it is expedient to indicate such measures.

7. The Court may at any time by reason of a change in the situation revoke or modify its decision indicating interim measures of protection.

8. The Court shall only indicate interim measures of protection after giving the parties an opportunity of presenting their observations on the subject. The same rule applies when the Court revokes or modifies a decision indicating such measures.

9. When the President has occasion to convene the members of the Court, judges who have been appointed under Article 31 of the Statute of the Court shall be convened if their presence can be assured at the date fixed by the President for hearing the parties.

Preliminary Objections

Art. 62.—1. A preliminary objection must be filed at the latest before the expiry of the time-limit fixed for the filing by the party submitting the objection of the first document of the written proceedings to be filed by that party.

2. The preliminary objection shall set out the facts and the law on which the objection is based, the submissions and a list of the documents in support; these documents shall be attached; it shall mention any evidence which the party may desire to produce.

3. Upon receipt by the Registrar of the objection, the proceedings on the merits shall be suspended and the Court, or the President if the Court is not sitting, shall fix the time within which the party against whom the objection is directed may present a written statement of its observations and submissions; documents in support shall be attached and evidence which it is proposed to produce shall be mentioned.

4. Unless otherwise decided by the Court, the further proceedings shall be oral.

5. After hearing the parties the Court shall give its decision on the objection or shall join the objection to the merits. If the Court overrules the objection or joins it to the merits, it shall once more fix time-limits for the further proceedings.

Counter-claims

Art. 63. When proceedings have been instituted by means of an application, a counter-claim may be presented in the submissions of the Counter-Memorial, provided that such counter-claim is directly connected with the subject of the application and that it comes within the jurisdiction of the Court. Any claim which is not directly connected with the subject of the original application must be put forward by means of a separate application and may form the subject of distinct proceedings or be joined by the Court to the original proceedings.

Intervention

Art. 64.—1. An application for permission to intervene under the terms of Article 62 of the Statute of the Court shall be filed with the Registry at latest before the commencement of the oral proceedings.

2. The application shall contain:

a specification of the case;

a statement of law and of fact justifying intervention;

a list of the documents in support of the application; these documents shall be attached.

3. The application shall be communicated to the parties, who shall send to the Registry their observations in writing within a period to be fixed by the Court, or by the President, if the Court is not sitting.

4. The application to intervene shall be placed on the agenda for a hearing, the date and hour of which shall be notified to all concerned. Nevertheless, if the parties have not, in their written observations, opposed the application to intervene, the Court may decide that there shall be no oral argument.

5. The Court will give its decision on the application in the form of a judgment.

Art. 65.—1. If the Court admits the intervention and if the party intervening expresses a desire to file a Memorial on the merits, the Court shall fix the time-limits within which the Memorial shall be filed and within which the other parties may reply by Counter-Memorials; the same course shall be followed in regard to the Reply and the Rejoinder. If the Court is not sitting, the time-limits shall be fixed by the President.

2. If the Court has not yet given its decision upon the intervention and the application to intervene is not opposed, the President, if the Court is not sitting, may, without prejudice to the decision of the Court on the question whether the application should be granted, fix the time-limits within which the intervening party may file a Memorial on the merits and the other parties may reply by Counter-Memorials.

3. In the cases referred to in the two preceding paragraphs, the time-limits shall, so far as possible, coincide with those already fixed in the case.

Art. 66.—1. The notification provided for in Article 63 of the Statute of the Court shall be sent to every Member of the League of Nations or State which is a party to a convention invoked in the special agreement or in the application as governing the case referred to the Court. A Member or State desiring to avail itself of the right conferred by the above-mentioned Article shall file a declaration to that effect with the Registry.

2. Any Member of the League of Nations or State, which is a party to the convention in question and to which the notification referred to has not been sent, may in the same way file with the Registry a declaration of intention to intervene under Article 63 of the Statute.

3. Such declarations shall be communicated to the parties. If any objection or doubt should arise as to whether the intervention is admissible under Article 63 of the Statute, the decision shall rest with the Court.

4. The Registrar shall take the necessary steps to enable the intervening party to inspect the documents in the case in so far as they relate to the interpretation of the convention in question, and to submit its written observations thereon to the Court within a time-limit to be fixed by the Court or by the President if the Court is not sitting.

5. These observations shall be communicated to the other parties and may be discussed by them in the course of the oral proceedings; in these proceedings the intervening party shall take part.

Appeals to the Court

Art. 67.—1. When an appeal is made to the Court against a decision given by some other tribunal, the proceedings before the Court shall be governed by the provisions of the Statute of the Court and of the present Rules.

2. If the document instituting the appeal must be filed within a certain limit of time, the date of the receipt of this document in the Registry will be taken by the Court as the material date.

3. The document instituting the appeal shall contain a precise statement of the grounds of the objections to the decision complained of, and these constitute the subject of the dispute referred to the Court.

4. An authenticated copy of the decision complained of shall be attached to the document instituting the appeal.

5. It lies upon the parties to produce before the Court any useful and relevant material upon which the decision complained of was rendered.

Settlement and Discontinuance

Art. 68. If at any time before judgment has been delivered, the parties conclude an agreement as to the settlement of the dispute and so inform the Court in writing, or by mutual agreement inform the Court in writing that they are not going on with the proceedings, the Court will make an order officially recording the conclusion of the settlement or the discontinuance of the proceedings; in either case the order will prescribe the removal of the case from the list.

Art. 69.—1. If in the course of proceedings instituted by means of an application, the applicant informs the Court in writing that it is not going on with the proceedings, and if, at the date on which this communication is received by the Registry, the respondent has not yet taken any step in the proceedings, the Court will make an order officially recording the discontinuance of the proceedings and directing the removal of the case from the list. A copy of this order shall be sent by the Registrar to the respondent.

2. If, at the time when the notice of discontinuance is received, the respondent has already taken some step in the proceedings, the Court, or the President if the Court is not sitting, shall fix a time-limit within which the respondent must state whether it opposes the discontinuance of the proceedings. If no objection is made to the discontinuance before the expiration of the time-limit, acquiescence will be presumed and the Court will make an order officially recording the discontinuance of the proceedings and directing the removal of the case from the list. If objection is made, the proceedings shall continue.

SECTION 2.—PROCEDURE BEFORE THE SPECIAL CHAMBERS AND THE CHAMBER FOR SUMMARY PROCEDURE

Art. 70. Procedure before the Chambers mentioned in Articles 26, 27 and 29 of the Statute of the Court shall, subject to the provisions of the Statute and of these Rules relating to the Chambers, be governed by the provisions as to procedure before the full Court.

Art. 71.—1. A request that a case should be referred to one of the Chambers mentioned in Articles 26, 27 and 29 of the Statute of the Court, must be made in the document instituting proceedings or must accompany that document. Effect will be given to the request if the parties are in agreement.

2. Upon receipt by the Registry of the document instituting proceedings in a case brought before one of the Chambers mentioned in Articles 26, 27 and

29 of the Statute, the President of the Court shall communicate the document to the members of the Chamber concerned. He shall also take such steps as may be necessary to assure the application of Article 31, paragraph 4, of the Statute.

3. The President of the Court shall convene the Chamber at the earliest date compatible with the requirements of the procedure.

4. As soon as the Chamber has met in order to go into the case submitted to it, the powers of the President of the Court in respect of the case shall be exercised by the President of the Chamber.

Art. 72.—1. The procedure before the Chamber for Summary Procedure shall consist of two parts: written and oral.

2. The written proceedings shall consist of the presentation of a single written statement by each party in the order indicated in Article 41 of the present Rules; to it must be attached the documents in support. The Chamber may however, if the parties so request or in view of the circumstances and after hearing the parties, call for the presentation of such other written statement as may appear fitting.

3. The written statements shall be communicated by the Registrar to the members of the Chamber and to opposing parties. They shall mention all evidence, other than the documents referred to in the preceding paragraph, which the parties desire to produce.

4. When the case is ready for hearing, the President of the Chamber shall fix a date for the opening of the oral proceedings, unless the parties agree to dispense with them; even if there are no oral proceedings, the Chamber always retains the right to call upon the parties to supply verbal explanations.

5. Witnesses or experts whose names are mentioned in the written proceedings must be available so as to appear before the Chamber when their presence is required.

Art. 73. Judgments given by the Special Chambers or by the Chamber for Summary Procedure are judgments rendered by the Court. They will be read, however, at a public sitting of the Chamber.

SECTION 3.—JUDGMENTS

Art. 74.—1. The judgment shall contain:

the date on which it is pronounced;
the names of the judges participating;
a statement of who are the parties;
the names of the agents of the parties;
a summary of the proceedings;
the submissions of the parties;
a statement of the facts;

the reasons in point of law;
the operative provisions of the judgment;
the decision, if any, in regard to costs;
the number of the judges constituting the majority.

2. Dissenting judges may, if they so desire, attach to the judgment either an exposition of their individual opinion or a statement of their dissent.

Art. 75.—1. When the judgment has been read in public, one original copy, duly signed and sealed, shall be placed in the Archives of the Court and another shall be forwarded to each of the parties.

2. A copy of the judgment shall be sent by the Registrar to Members of the League of Nations and to States entitled to appear before the Court.

Art. 76. The judgment shall be regarded as taking effect on the day on which it is read in open Court.

Art. 77. The party in whose favour an order for the payment of the costs has been made may present his bill of costs after judgment has been delivered.

SECTION 4.—REQUESTS FOR THE REVISION OR INTERPRETATION OF A JUDGMENT

Art. 78.—1. A request for the revision of a judgment shall be made by an application.

The application shall contain:

a specification of the judgment of which the revision is desired;
the particulars necessary to show that the conditions laid down by Article 61 of the Statute of the Court are fulfilled;
a list of the documents in support; these documents shall be attached to the application.

2. The request for revision shall be communicated by the Registrar to the other parties. The latter may submit observations within a time-limit to be fixed by the Court, or by the President if the Court is not sitting.

3. If the Court makes the admission of the application conditional upon previous compliance with the judgment to be revised, this condition shall be communicated forthwith to the applicant by the Registrar and proceedings in revision shall be stayed pending receipt by the Court of proof of compliance with the judgment.

Art. 79.—1. A request to the Court to interpret a judgment which it has given may be made either by the notification of a special agreement between the parties or by an application by one or more of the parties.

2. The special agreement or application shall contain:

a specification of the judgment of which the interpretation is requested;
mention of the precise point or points in dispute.

3. If the request for interpretation is made by means of an application, the Registrar shall communicate the application to the other parties, and the latter may submit observations within a time-limit to be fixed by the Court, or by the President if the Court is not sitting.

4. Whether the request be made by special agreement or by application, the Court may invite the parties to furnish further written or oral explanations.

Art. 80. If the judgment to be revised or to be interpreted was rendered by the full Court, the request for its revision or for its interpretation shall be dealt with by the full Court. If the judgment was pronounced by one of the Chambers mentioned in Articles 26, 27 or 29 of the Statute of the Court, the request for revision or for interpretation shall be dealt with by the same Chamber.

Art. 81. The decision of the Court on requests for revision or interpretation shall be given in the form of a judgment.

Heading III

Advisory Opinions

Art. 82. In proceedings in regard to advisory opinions, the Court shall, in addition to the provisions of Chapter IV of the Statute of the Court, apply the provisions of the articles hereinafter set out. It shall also be guided by the provisions of the present Rules which apply in contentious cases to the extent to which it recognizes them to be applicable, according as the advisory opinion for which the Court is asked relates, in the terms of Article 14 of the Covenant of the League of Nations, to a "dispute" or to a "question."

Art. 83. If the question upon which an advisory opinion is requested relates to an existing dispute between two or more Members of the League of Nations or States, Article 31 of the Statute of the Court shall apply, as also the provisions of the present Rules concerning the application of that Article.

Art. 84.—1. Advisory opinions shall be given after deliberation by the full Court. They shall mention the number of judges constituting the majority.

2. Dissenting judges may, if they so desire, attach to the opinion of the Court either an exposition of their individual opinion or the statement of their dissent.

Art. 85. — 1. The Registrar shall take the necessary steps in order to ensure that the text of the advisory opinion is in the hands of the Secretary-General at the seat of the League of Nations at the date and hour fixed for the sitting to be held for the reading of the opinion.

2. One original copy, duly signed and sealed, of every advisory opinion shall be placed in the archives of the Court and another in those of the Secretariat of the League of Nations. Certified copies thereof shall be transmitted

by the Registrar to Members of the League of Nations, to States and to international organizations directly concerned.

FINAL PROVISION

Art. 86. The present Rules of Court which are adopted this eleventh day of March, 1936, repeal, as from this date, the Rules adopted on March 24th, 1922, as revised on July 31st, 1926, and amended on September 7th, 1927, and February 21st, 1931.

DONE at The Hague, this eleventh day of March nineteen hundred and thirty-six.

(*Signed*) CECIL J. B. HURST, *President.*
(*Signed*) Å. HAMMARSKJÖLD, *Registrar.*

ANNEX TO ARTICLE 36

RESOLUTION ADOPTED BY THE COUNCIL ON MAY 17TH, 1922

The Council of the League of Nations, in virtue of the powers conferred upon it by Article 35, paragraph 2, of the Statute of the Permanent Court of International Justice, and subject to the provisions of that article,

RESOLVES:

1. The Permanent Court of International Justice shall be open to a State which is not a Member of the League of Nations or mentioned in the Annex to the Covenant of the League, upon the following condition, namely: that such 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 Covenant of the League of Nations and with the terms and subject to the conditions of the Statute and Rules of the Court, and undertakes to carry out in full good faith the decision or decisions of the Court and not to resort to war against a State complying therewith.

2. Such declaration may be either particular or general.

A particular declaration is one accepting the jurisdiction of the Court in respect only of a particular dispute or disputes which have already arisen.

A general declaration is one accepting the jurisdiction generally in respect of all disputes or of a particular class or classes of disputes which have already arisen or which may arise in the future.

A State in making such a general declaration may accept the jurisdiction of the Court as compulsory, *ipso facto*, and without special convention, in conformity with Article 36 of the Statute of the Court; but such acceptance may not, without special convention, be relied upon vis-à-vis Members of the League or States mentioned in the Annex to the Covenant which have signed or may hereafter sign the "optional clause" provided for by the additional protocol of December 16th, 1920.

3. The original declarations made under the terms of this Resolution shall be kept in the custody of the Registrar of the Court, in accordance with the practice of the Court. Certified true copies thereof shall be transmitted, in accordance with the practice of the Court, to all Members of the League of Nations, and States mentioned in the Annex to the Covenant, and to such other States as the Court may determine, and to the Secretary-General of the League of Nations.

4. The Council of the League of Nations reserves the right to rescind or amend this Resolution by a Resolution which shall be communicated to the Court; and on the receipt of such communication and to the extent determined by the new Resolution, existing declarations shall cease to be effective except in regard to disputes which are already before the Court.

5. All questions as to the validity or the effect of a declaration made under the terms of this Resolution shall be decided by the Court.

APPENDIX NO. 8

Staff Regulations for the Registry of the Court, as Amended to March 12, 1936 [1]

English version from Series D, No. 1 (3d. ed.), pp. 75-79.[2]

Preamble. The present Statute for the Staff has been drawn up in accordance with Article 18, paragraph 2, of the Rules of Court and with the relevant decisions of the Assembly of the League of Nations; it applies to all officials of the Registry.

Article 1. The Staff of the Registry comprises established, temporary and auxiliary officials.

Art. 2. The appointment of established officials is subject to the provisions of the present Regulations.

Temporary or auxiliary appointments are made, subject to the provisions of Article 5 below, on conditions to be fixed in each particular case, having regard to the provisions above mentioned.

Art. 3. Appointments shall be made in all cases by means of a letter addressed by the Registrar to the person concerned and replied to by the latter. This letter, which shall contain an express reference to the present Regulations, shall indicate the position offered, the category in which it is placed, the commencing salary and the special conditions, if any, applicable to the case.

The letter above mentioned, together with the reply thereto, shall constitute the official's title to his appointment.

Any question arising in connection with the rights and duties resulting from this appointment which is not expressly dealt with in the present Regulations shall be settled by the Registrar, who will supply any deficiencies, having regard to the rules in force in the Staff Regulations of the Secretariat of the League of Nations and the International Labour Office.

Differences between the Registrar and officials of the Registry which may arise in connection with the application of the provisions of the present Regulations and of those referred to in the preceding paragraph shall, failing agreement

[1] These regulations were adopted by the President of the Court, February 6, 1931, and approved by the Court, February 20, 1931.

[2] The text includes a French version, also.

with the Registrar and without prejudice to the application of the provisions of the Regulations concerning a pensions scheme for the staff of the League of Nations, be submitted, either by the Registrar or by the official concerned, to the Court or to any person or persons selected by it from amongst its members and to whom the necessary powers are delegated.

Art. 4.—(1) Established officials are appointed for periods of seven years, Save in the case of the post of Deputy-Registrar (Rules of Court, Article 14. paragraph 6), the appointment, at the expiration of each period of seven years and failing notice to the contrary, shall be automatically renewed for a further period of seven years, until the age-limit is reached. In the event of the non-renewal of the appointment, six months' notice shall be given.

(2) Even during a period of seven years and without prejudice to the terms of Article 13 (below), the Registrar, subject to the notice laid down above, may terminate the appointment of an official in the case of incompetency, not calling for disciplinary measures, as also in the event of the suppression of the post as a result of reorganization.

In these circumstances, the official concerned shall receive an equitable indemnity, fixed in accordance with the principles indicated in Article 3, paragraph 3, above.

(3) At any time during the period of their appointment, officials may terminate it by giving six months' notice, which may, in any particular case, be reduced by agreement between the Registrar and the person concerned.

(4) The age-limit referred to in No. 1 above shall be sixty years, though the Registrar shall have the right to retain the services of an official for a further period, which, normally, will not exceed five years.

Art. 5.—(1) Temporary appointments shall be made for uninterrupted periods of a duration of less than seven years and more than six months.

(2) Auxiliary appointments shall be made for isolated or consecutive periods not in principle exceeding the period comprised between two judicial vacations.

Art. 6.—(1) Newly appointed or promoted officials of the Registry are divided into categories at all times corresponding to those provided for in the Staff Regulations of the Secretariat of the League of Nations and of the International Labour Office, and in the annexes to these regulations; for the calculation of the salaries of officials of the Registry, 1 florin is taken as equaling two Swiss francs.

(2) The commencing salary of an official in his category shall be fixed by the Registrar. The salary thus fixed may be increased in the proportion and up to the maximum indicated in the Regulations and annexes referred to in paragraph 1.

(3) The provisions of paragraphs 1 and 2 of this Article shall not affect rights acquired under contracts in force on November 1st, 1935.

(4) The salaries of all officials entitled to a pension under the Regulations of the Pensions Fund of the League of Nations shall be payable subject to deduction of the contributions prescribed by those Regulations.

The salaries of all officials who, after the coming into force of the Regulations of the Pensions Fund, remain members of the Staff Provident Fund, shall be payable subject to deduction of the prescribed contribution to that Fund.

Art. 7. In each category, the daily rates of subsistence allowance are the same as those laid down, at the time when the journey is undertaken, for officials of the corresponding category in the Secretariat of the League of Nations and in the International Labour Office, the amount in Swiss francs being converted into florins at the rate of 1 florin to 2 Swiss francs.

Travelling expenses incurred on official business will be refunded on presentation of a detailed statement approved by the Registrar.

Art. 8. Salaries shall be fixed in Dutch florins and payable in the same currency. The same rule shall apply as regards any allowances and travelling expenses.

Art. 9. The hours of work shall be forty-two per week. The Registrar may, however, in so far as the pressure of work permits, reduce this number to thirty-eight by deciding that the Office shall be closed on Saturday afternoon.

The office hours shall, in general, be from 9.30 A.M. to 6 P.M. The luncheon interval is one hour and a half.

These hours may be modified by the Registrar as the work of the Office may require.

Officials whose annual salary does not exceed 5,000 florins shall be entitled to overtime pay for each hour of work done during the week over and above the regulation forty-two hours. The rate of overtime pay shall be fixed by the Registrar.

In the case of officials whose salary is between 5,000 and 5,625 florins, corresponding additional leave shall be granted in place of overtime pay.

In all circumstances, the staff whose salary is between 3,000 and 5,000 florins, and who do not form part of shifts which relieve each other, shall be entitled to receive overtime pay for work done either after 8 P.M. or on Sundays or holidays.

Art. 10.—(1) Without prejudice to the Registrar's right to grant leave in special circumstances, officials holding a permanent or temporary appointment are entitled to a regular annual holiday of the same duration as that of officials of the Secretariat of the League of Nations and of the International Labour Office, belonging to the corresponding categories. The holidays of Staff engaged on an auxiliary basis are fixed by the Registrar in each particular case. The Registrar shall prepare a roster of holidays.

(2) The public holidays observed in the Netherlands shall not be regarded as working days.

(3) The members of the Staff engaged on an international basis shall be entitled to have refunded the cost of one return journey each year for the purpose of proceeding to their recognized homes. Similarly, they shall be entitled, once every three years, to have refunded the travelling expenses incurred by their wives and children under age in proceeding to their recognized homes. In order to take advantage of this right, each member of the Staff must have informed the Registrar, as soon as possible after his appointment, of the name of the place which is to be regarded as his or her recognized home.

Art. 11. Sick leave is granted in accordance with conditions to be determined after paying due regard to each particular case.

In principle, such leave shall be granted without reduction of salary. Should the leave be of long duration, a reduction may be considered. Any decision as to a reduction of salary shall be taken by the Registrar, subject to the approval of the President.

In the event of absence from duty on the ground of illness extending over more than three consecutive days, the official concerned must furnish a medical certificate.

Art. 12.—(1) The officials of the Registry shall have the benefit of the pensions scheme instituted for the Staff of the League of Nations, under the conditions and with the rights and obligations resulting from the regulations establishing this scheme.

(2) Officials of the Registry who, *ipso facto*, are entitled to benefit by this scheme and those who desire to do so, shall undergo medical examination by a duly qualified doctor selected by the Registrar, in order to verify that the official is in good health at the time of his appointment, that he is free from any defect or disease likely to interfere with the proper discharge of his duties, and that there is no record of disease in his past medical history or clearly marked predisposition to any disease likely to cause premature invalidity or death.

(3) The Court undertakes to refund 50 per cent of the premiums payable on sickness insurance policies taken out by officials of the Registry and duly approved for the purpose by the Registrar.

Art. 13. The Registrar may, with the approval of the President, adopt disciplinary measures in regard to any official of the Registry involving:

(*a*) a reprimand, addressed to the official in writing and entered in the personal file relating to the official;

(*b*) a reduction of salary;

(*c*) suspension, with or without total or partial deprivation of salary; except in special cases, suspensions shall have no effect upon the seniority of the official concerned from the point of view of his right to pension;

(*d*) dismissal, with or without notice.

In all the cases enumerated under (*a*) to (*d*) above, the official concerned shall have the right of appeal to the full Court.

Art. 14. The present Statute of the Staff may be modified by the Registrar with the approval of the President. The Registrar shall take into consideration any proposal made to this effect by at least three members of the staff.

APPENDIX NO. 9

Instructions for the Registry, 1938

Text from Series E, No. 14, pp. 28–46.

Preamble. The present instructions are drawn up in accordance with Article 23, paragraph 3, of the Rules of Court.

PART I.—The Registrar

Article 1. The Registrar is responsible for all departments of the Registry. The Staff is under his control and he alone is authorized to direct the work of the Registry of which he is the Head.

Art. 2.—1. The Deputy-Registrar will replace the Registrar, amongst other things in his capacity as Head of the Registry, as laid down in Article 14 of the Rules.

2. Should both the Registrar and the Deputy-Registrar be unable to perform their duties, a substitute as provided in Article 19 of the Rules will be appointed. His powers will be those of the Registrar in his capacity as the Head of the Registry.

3. The officials of the Registry will have the same duties towards the Deputy-Registrar and towards the substitute referred to in the preceding paragraph, when replacing the Registrar, as towards the Registrar himself.

PART II.—Duties of the Registrar

(*a*) General

Art. 3.—1. The Registrar is responsible for the preparation of cases for consideration by the Court. He assists the Drafting Committee appointed by the Court for the preparation of the text of judgments or opinions.

2. The official correspondence of the Court is prepared under the responsibility of the Registrar in conformity with Article 21 of the Rules. Letters not reserved for the President's signature are signed by the Registrar, or by the Deputy-Registrar or Heads of Services, in so far as he may delegate this

duty to them. Notes drawn up in the third person are prepared in the Registrar's name.

Art. 4. The Registrar will make all arrangements, notably in application of Article 58 of the Rules, for the engagement of the necessary auxiliary staff.

Art. 5.—1. The Registrar will inform the members of the Court of the dates fixed by the President for the assembly of the Court.

2. He will do likewise in the case of the convocation of the Chambers as provided in Article 28, paragraph 2, of the Rules.

Art. 6.—1. In accordance with Article 20 of the Rules, the Registrar will prepare and keep up to date the general list of cases submitted to the Court for judgment or for advisory opinion.

2. He will prepare the agenda setting out administrative questions and will append explanatory notes thereto.

3. When this agenda has been approved by the President, the Registrar will send copies thereof to members of the Court.

Art. 7.—1. The Registrar will place on the administrative agenda the question of the appointment of the Court's representative who is to attend meetings of the Supervisory Commission and of the Assembly and its Finance Committee.

2. He will also place on this agenda annually at the proper time the approval of the budget estimates for the following year and the election of members for the Chamber of Summary Procedure for the next judicial year.

3. Every third year, reckoning from the most recent general election of members of the Court, he will place on the agenda the list of long leaves (Art. 23 of the Court's Statute) for the ensuing period of three years, the election of the President and Vice-President of the Court and that of members of the Chambers referred to in Articles 26 and 27 of the Statute.

Art. 8. Whenever the Court has to deal with a case which has previously been before it, the Registrar will notify every judge who has already sat in the case, even if the presence of such judge on the Bench is not required for the other cases before the Court.

Art. 9. The Registrar will collect for submission to the President all information with regard to technical assessors likely to be of use for the purpose of the application of Article 7 of the Rules.

Art. 10. Should the Court meet at a place other than that in which its seat is established, the Registrar will cause the necessary preparations to be made.

Art. 11. In all contentious cases and cases for advisory opinion submitted to the Court, the Registrar will issue the communications and notifications provided for by the Statute (Arts, 40, 41, 43, 44, 63, 66, 67) and by the Rules (Arts. 3, 33, 34, 44, 48, 49, 57, 60, 64, 66, 69, 72, 78, 79).

Art. 12. The "relevant information" referred to in paragraph 5 of Article 26 of the Statute will be supplied through the intermediary of the Registrar.

Art. 13.—1. The Registrar will inform all concerned of the dates and hours of meetings. He will communicate to the judges the agenda, which must include all questions to be dealt with during the meeting.

2. He will cause the dates and times of all public sittings to be published; in the case of a public sitting for the reading of a judgment, advisory opinion or order, he will send a special notification to all agents whose appointment and address at the seat of the Court have been duly brought to his knowledge.

Art. 14. For every document of procedure filed with the Registry, a receipt upon a special form, prepared in accordance with the terms of Article 21 of the Rules, will be given.

Art. 15. Any failure to conform with the directions contained in the Statute or Rules of the Court which may be noted by the Registrar in a document instituting proceedings or in a document of the written proceedings, shall be brought by him to the notice of the party or person from whom the document in question emanates.

Art. 16. When the Court receives a request presented under Article 65 of the Statute, the Registrar may ask the Secretary-General of the League of Nations for any additional information.

Art. 17.—1. The Registrar will obtain from the Court the special authorization contemplated by Article 30, paragraph 2, of the Rules, in respect of every person whose presence is required at private meetings of the Court.

2. He will ensure that, in the circumstances contemplated by Article 58, paragraph 2, of the Rules, the interpreters make the solemn declaration prescribed by paragraph 3 of the same Article.

Art. 18.—1. In accordance with Article 58 of the Rules, the Registrar will make all arrangements for the oral translation of speeches and statements made by the parties or by witnesses or experts appearing at the instance of the Court.

2. He will, in the circumstances contemplated by Article 58, paragraph 2 of the Rules, ensure that the supervision of the Court is effectively exercised in respect of the translation of evidence or statements.

Art. 19.—1. The Registrar will obtain from witnesses or experts called at the instance of the Court a statement of their expenses and of the subsistence allowance claimed by them, and will cause the amount due to them to be paid to the persons concerned.

2. The Registrar will take the necessary steps to recover from the parties to a suit concerning a question of transit or communications the amount of any expenses and allowances which he may have paid to technical assessors sitting at their request.

Art. 20. The Registrar will be responsible for the preparation of the minutes and shorthand notes referred to in Articles 23, 59 and 60 of the Rules.

Art. 21. The Registrar will place the necessary staff at the disposal of any

individual or body entrusted with an enquiry or with the preparation of an expert opinion, under the terms of Article 50 of the Statute.

Art. 22.—1. The Registrar will be responsible for the communication, in accordance with the terms of Articles 75 and 85 of the Rules, of judgments or advisory opinions rendered by the Court.

2. Advisory opinions will, like judgments, be communicated to all States entitled to appear before the Court.

3. Orders published in the collection of decisions referred to in Article 24 below will, for the purpose of their communication, be assimilated to judgments and advisory opinions of the Court.

Art. 23.—1. Subject to the limitations prescribed in Article 21 of the Rules, the Registrar will communicate to the Press all information concerning the activities of the Court.

2. Before the 25th of each month he will supply to the Secretariat of the League of Nations all information the publication of which in the *Monthly Summary of the Work of the League of Nations* appears desirable.

Art. 24.—1. In addition to the collection of judgments, advisory opinions and orders prescribed by Article 22 of the Rules, the Registrar will arrange for the printing, in the publications destined for this purpose, of the minutes of public sittings (Art. 59 of the Rules) and of all other documents in connection with cases the publication of which is not forbidden by a decision of the Court. Similarly, he is responsible for the publication of the annual reports and of any other volumes which the Court may decide to have published. He will conclude the necessary contracts with the printers for this purpose.

2. Of each publication the Registrar will reserve the necessary number of copies for gratuitous distribution by the Court,

(*a*) To members of the Court
(*b*) To Members of the League of Nations
(*c*) To organizations of the League of Nations
(*d*) To national associations for the League of Nations

} (Through the Secretariat of the League of Nations.)

(*e*) To States not Members of the League of Nations which are entitled to appear before the Court

(*f*) To persons or institutions having made a special application granted by the Registrar, in agreement with the Court's publisher, after consideration of each particular case.

Art. 25. In accordance with the procedure laid down in No. 3 of the Resolution adopted by the Council of the League of Nations on May 17th, 1922, the Registrar will transmit copies of the declarations contemplated by this Resolution to the States specified therein.

Art. 26.—1. The Registrar will inform the Secretary-General of the League of Nations of any changes which may occur in the composition of the Court,

including any case of the application by the Court of Article 18 of the Statute.

2. He will communicate to the Members of the League of Nations, through the Secretary-General of the League, and to other States entitled to appear before the Court the long leave list referred to above in Article 7, paragraph 3.

(*b*) Financial Administration

Art. 27. The Registrar is responsible for estimating the financial requirements of the Court and for submitting such estimates first to the Court or the President, as the case may be, and then to the Supervisory Commission. He will be responsible for the expenditure of all funds voted and for the appropriation of such expenditure to the proper items of the budget.

Art. 28.—1. Budget estimates for each year will be divided into two sections, one including ordinary expenditure and the other capital expenditure.

2. The sections will be sub-divided into chapters corresponding to the various categories of expenditure.

Art. 29.—1. The budget estimates will consist of:

(*a*) a summary of chapters;

(*b*) a full statement of items indicating in each case, in addition to the sum asked for, the sum voted for the current year and the sum voted and the amount actually expended in the preceding year;

(*c*) whenever possible, detailed schedules and explanatory statements.

2. Important differences in the amounts estimated for the same items in successive years will be fully explained by means of notes.

Art. 30. Budget estimates will be submitted for approval to the Court or, if the Court is not sitting, to the President, in the last week of March.

Art. 31. Budget estimates duly approved will be communicated by the Registrar to the Secretary-General of the League of Nations, for transmission to the Supervisory Commission, upon a date between April 1st and May 1st to be agreed upon between the Registrar and the Secretary-General.

Art. 32. When the Supervisory Commission considers the Court's budget, the latter will be represented before the Commission by the Registrar or such other official as the Court may appoint for the purpose.

Art. 33. In order to prevent any excess of expenditure over the amount voted for each item of the budget, the Registrar will cause a record to be prepared of all appropriations made and of liabilities incurred, showing at any time the balance available under each item.

Art. 34.—1. If necessary, the Registrar may ask the Court to authorize by a special resolution transfers from one item to another of the same chapter of the budget. He will immediately communicate such resolutions to the Secretary-General of the League of Nations, in order to enable the latter to

take the measures necessary under Article 29 of the League's Financial Regulations.

2. The Registrar may himself authorize any transfers, which circumstances may render necessary, as between sub-heads of the same item of the budget. Such transfers need not be communicated to the Secretary-General.

Art. 35.—1. Between March 1st and 15th of each year the Registrar will submit to the Court, or to the President if the Court is not sitting, the accounts of the previous year, with annexes.

2. Between March 15th and April 1st, he will forward the documents in question to the Supervisory Commission.

Art. 36. The Registrar alone is entitled to incur liabilities in the name of the Court. It is for him to judge in what cases he should obtain previous authorization from the Court or the President.

Art. 37.—1. The Registrar will cause an accurate record to be kept of all capital acquisitions and of all supplies purchased and used during each year. He will annually submit to the Auditor of the League of Nations between 15th and 30th January a statement showing the stores in hand on December 31st, distinguishing stores purchased on capital account and stores purchased on ordinary expenditure account.

2. The Registrar will cause to be submitted annually to the Auditor, before January 15th, a statement of unpaid debts incurred during the preceding year; should the accounts not be received in sufficient time, the orders or deliveries will be entered in the statement for an approximate amount.

Art. 38.—1. The Registrar will hold at the disposal of the Auditor, should he make a request to that effect, any document which may be of use to him in his examination of the accounts or other duties.

2. The Registrar will send to the Auditor, on or about the 10th of each month, a statement of receipts and expenditures for the preceding month.

Art. 39. The funds of the Court will be deposited by the Registrar at the interest with a bank offering the requisite guarantees. The interest obtained will be shown in the accounts.

PART III.—The Officials of the Registry

Art. 40. Permanent officials of the Registry are appointed, in the case of the Deputy-Registrar, in accordance with the procedure laid down in Article 14 of the Rules, and, in other cases, in accordance with Article 17 of the Rules.

Art. 41.—1. Apart from the Deputy-Registrar, to whom Article 15 of the Rules applies, every official of the Registry will make the declaration provided for in Article 17 of the Rules before the President, the Registrar being present.

2. A record of this declaration will be made by the Registrar, signed by the President and the Registrar and deposited in the archives of the Court.

Art. 42. The Registrar will take all steps necessary to preserve the diplomatic character conferred upon officials of the Registry under Article 7 of the Covenant of the League of Nations.

PART IV.—The Duties of the Officials of the Registry

A.—The Deputy-Registrar

Art. 43. — 1. The Deputy-Registrar shares the duties falling upon the Registrar, both in connection with the exercise of the judicial and advisory powers of the Court (Rules of Court, Arts. 23 and 30) and in connection with the direction of the Registry (Part II above).

2. The Registrar will divide the work between himself and the Deputy-Registrar, ensuring that it is so organized that both of them are at all times fully conversant with all branches of the Court's and of the Registry's work.

B.—The Editing Secretaries

Art. 44. The Registrar will allocate among the Principal Editing Secretaries and the Editing Secretaries all tasks which he sees fit to entrust to them. Apart from the duties of Secretary to the Presidency, which are performed by a Principal Editing Secretary, these tasks comprise *inter alia:* the preparation of correspondence, legal research, the preparation and translation of documents, interpretation at meetings of the Court, the writing of minutes, the editing of the Confidential Bulletin and the preparation of the Court's publications.

C.—The Archives and Distribution Service

Art. 45.—1. The Court's Archivist is responsible to the Registrar for keeping the archives and indexes and for the despatch and distribution of documents in accordance with the following provisions.

2. She will perform these various duties with the help of her assistants.

Art. 46.—1. All documents in the archives will be kept under lock and key.

2. No file or original of any document registered in the archives may be taken out of the offices of the Registry without express permission from the Registrar.

Art. 47.—1. The archives will contain files duly kept up to date of all notifications sent to the Court concerning:

(*a*) declarations whereby Members of the League of Nations or States mentioned in the Annex to the Covenant have accepted the compulsory jurisdiction of the Court, and likewise general declarations whereby States other than the foregoing have accepted the jurisdiction of the Court under the Resolution of the Council of the League of Nations of May 17th, 1922;

(*b*) the articles of treaties, conventions or international agreements, in which provision is made for recourse to the jurisdiction of the Court, together with the text of the articles, a list of the States affected and the conditions governing the competence of the Court in each case;

(*c*) the channel and procedure to be used for direct communications between the Court and each government.

2. They will also contain:

(*a*) the lists of nominations mentioned in Articles 4 and 5 of the Statute and complete particulars concerning the members of the Court and of its three Chambers, as also concerning the assessors for labour cases and for communications and transit cases;

(*b*) an official file of the documents of the written proceedings and an official file of correspondence in respect of each case dealt with by the Court or pending before it;

(*c*) correspondence exchanged with other organizations of the League of Nations;

(*d*) the general correspondence of the Court;

(*e*) the personal files of members of the Registry, which are confidential in character and will be kept by the Archivist personally.

3. In addition to the files above mentioned, the archives will contain the general list of cases, duly kept up to date under the instructions of the Registrar; the office copies, duly signed and sealed, of judgments, advisory opinions and orders of the Court, as also manuscripts of drafts which have been used in the preparation of the Court's decisions.

4. In case of doubt, the allocation of documents to the various files will be decided by the Registrar.

5. Card indexes, by names and subjects, will be kept by the Archives:

(*a*) of correspondence and documents relating to cases submitted to the Court;

(*b*) of general correspondence;

(*c*) of distributed documents.

Art. 48.—1. The post, on arrival at the Registry, will be delivered to the Archivist who, after sorting it, will open official letters. Every document will be immediately registered, as prescribed in Article 49 below, and submitted to the Registrar, together with previous correspondence, if any.

2. Every outgoing document, the official character of which will be indicated by the signature or initials of the Registrar, will be handed, together with the necessary number of copies, any enclosures and the requisite envelope, to the Archivist for registration and despatch.

Art. 49.—1. Incoming documents will be registered by writing in the register entitled *In Register* the particulars indicated by the various columns of this register, and by writing upon the document itself the date of receipt, the

consecutive number in the register, the reference to the file concerned and the reference number within this file.

2. Outgoing documents will be registered by entering similar particulars in the register entitled *Out Register* and by writing on the document itself and on the copies thereof kept in the archives the consecutive number in the *Out Register* and the reference number of the document, if any, to which the outgoing document is a reply. Reference numbers and *In Register* numbers will be written upon the document and upon copies thereof by the typist in accordance with the instructions of the person drafting the document.

3. To each of the files to which the various documents are allotted will be attached a list of the documents contained therein (file register).

4. In the case of outgoing letters, a second copy will be inserted in a chronological file.

5. The file registers will be brought up to date as each document is registered. Nevertheless, in order to prevent delay in the despatch of outgoing documents, the necessary entries concerning them, except those which must appear on the documents themselves, may be made later, but as soon as possible, from the particulars upon the copies.

Art. 50.—1. The Archivist is responsible for the despatch of any document inscribed in the *Out Register*. She will ascertain that the required annexes are attached thereto; she will also satisfy herself that every letter, note or telegram is duly signed or initialled.

2. A confirmation of every telegram, upon a special form, will be immediately sent by post to the person to whom the telegram is addressed.

3. Within the town, any packet which is not sent by post will be delivered in return for a receipt, to be made out according to the detailed provisions in the annex.[1]

4. For despatches by post, the Archivist will affix the official stamp of the Court on all packets; they will then be stamped at the Post Office with the Court's special postage stamps in accordance with the arrangement made with the Netherlands' Postal Authorities.

5. The despatch of letters, telegrams and parcels is to be regulated by the strictest economy.

6. The messengers' registers, in which the costs of despatch are noted, will be checked by the Archivist.

Art. 51.—1. The Archivist will search in correspondence and documents for any information for which she may be asked.

2. She will keep a diary in which will be entered at the required date a note to the effect that a given document is to be handed to the official who has given instructions for the note to be made.

[1] Not reproduced.

3. She will send to the Registrar daily press cuttings taken from the papers subscribed to by the Registry.

Art. 52.—1. The assistant in charge of the distribution of documents will be responsible for the despatch and distribution of all the Court's multigraphed or printed documents and of documents filed by the parties or persons concerned in cases before the Court. These documents will be communicated to: (*a*) members of the Court; (*b*) officials of the Registry; (*c*) the Press, in certain cases; (*d*) in certain cases, to persons or institutions which have made a special application considered by the Registrar in each particular case, and which, if their application is granted, are placed on a special list.

2. She will keep up to date the registers of all despatches. In the case of the persons or institutions referred to in No. 1 (*d*) above, the registers must show whether the distribution of documents is made subject to certain conditions such as the sending of other publications in exchange, the payment of carriage, etc.

3. She will ensure that the stock of the Court's printed publications is maintained and will make a note of the numbers of those publications the available stock of which, for free distribution, is exhausted. She will keep up to date the collections of the Court's publications placed in the judges' rooms and in the room where the private meetings of the Court are held.

4. She will see that the instructions concerning documents set out in the following annex [2] are carried out.

D.—Indexing

Art. 53. The duties of the official in charge of indexing will be as follows:

1. The keeping of card indexes by names and subjects of the minutes of meetings of the Court.

2. The preparation: (*a*) of indexes of all the Court's publications, and (*b*) of certain special indexes.

3. Research in the minutes of meetings of the Court.

4. Indexing and cataloguing undertaken at the request of the Head of the Documents Department.

E.—Shorthand, Typing and Multigraphing Department

Art. 54.—1. The Head of this Department, upon which falls the clerical side of the preparation and the reproduction of all documents (including correspondence and the shorthand notes of hearings of the Court), will be responsible for the carrying out of this work with the assistance of verbatim reporters, shorthand typists and multigraphists.

2. The Head of the Department will invariably observe the Rules laid down in the annex to this Article.[2]

[2] Not reproduced.

F.—Accountant-Establishment Officer

Art. 55. The Accountant-Establishment Officer is responsible to the Registrar for the following: (1) accounts, (2) payments, (3) purchases, (4) equipment and supplies.

Art. 56.—1. The following books will be kept: (*a*) budget ledger, (*b*) bank book, (*c*) current account ledger, (*d*) cash book, (*e*) a register for each financial year of the contributions of Member States and of payments made in respect of such contributions, (*f*) a register of salaries of the permanent staff, (*g*) the registers necessary for the verification at any time of supplies and equipment.

2. In the budget ledger will be inscribed under headings corresponding to the chapters and items of the budget: (*a*) the credit originally voted; (*b*) this credit with modifications resulting from any transfers; and (*c*) actual expenditure chargeable to the various chapters and items.

3. For the purpose of keeping this ledger, every cheque issued by the Court shall be regarded as expended and entered accordingly, whether or not it has been presented to the Bank for payment.

4. In the bank book will be inscribed all operations affecting the Court's banking account, in particular the issue of cheques and their presentation for payment according to the notification forms sent by the Bank.

5. In the current account ledger will be inscribed, on receipt of notification from the Bank, cheques issued by the Court which have been presented for payment.

6. In the cash book will be noted all payments in cash as they are made.

Art. 57. The budget ledger will be supplemented by a register entitled "Personal Accounts," which will be kept so as to show at any time, in respect of each member of the Court and each official, payments made to the person concerned. Each person has the right to inspect his personal account.

Art. 58.—1. The cash will be checked by the Accountant-Establishment Officer at the commencement of each working day.

2. It will be controlled by the Registrar at intervals to be fixed by him. He will approve the accounts by means of his signature in the cash book.

Art. 59. The Accountant-Establishment Officer will prepare in the first week of each month a summary of the accounts of the preceding month upon a special form.

Art. 60.—1. All payments will be made in return for receipts, which in the case of transactions falling under the jurisdiction of the Courts of the Netherlands will be stamped in accordance with local legislation. Other receipts will be prepared on a special form.

2. The payment of any allowances and the reimbursement of travelling expenses to judges, judges *ad hoc* and assessors will only be made on presentation of a claim for repayment upon a special form duly signed by the person concerned, countersigned by the Registrar and approved by the President.

3. The salaries of the permanent staff will be paid on the basis of the register of salaries provided for above in Article 56, No. 1, (*f*). The register will be initialled by the Registrar. Salaries of temporary or auxiliary staff will be paid on the basis of the letter of appointment signed by the Registrar.

4. Payments to the staff of subsistence allowance and refunds of travelling expenses (including authorized journeys of an official and his family, if any, to his native country) will be made upon presentation of a detailed application upon a special form signed by the person concerned and by the Registrar in token of his approval. In the case of journeys on duty, the application, to be valid, must be accompanied by a signed letter from the Registrar instructing the person concerned to undertake the journey in question.

5. Except with the approval of the Registrar, accounts for supplies will only be paid if the account is accompanied by the order form signed by him.

6. Salaries of less than 6,000 florins per annum will be paid half monthly; other salaries will be paid monthly in arrears.

7. Except with the written permission of the Registrar, payment of advances is forbidden; should an advance be made, interest from the date of payment until the day the sum advanced falls due will be deducted.

Art. 61.—1. All purchases will be made by means of an order form signed by the Registrar.

2. When required, the Accountant-Establishment Officer will obtain at least three tenders for submission to the Registrar for his decision.

Art. 62.—1. A messenger specially designated for the purpose will receive each month a sum to cover certain postal and telegraphic charges and minor expenses. He will enter postal and telegraph charges in a book which will be verified and initialled every morning by the Archivist.

2. Every month the Hall porter of the Peace Palace will receive a sum for minor expenses (postage due). He will render an account on a special form.

3. A statement of letters stamped upon despatch by the Netherlands Posts, Telegraph and Telephone Administration will be presented monthly to the Accountant-Establishment Officer who verifies it and submits it to the Registrar.

4. All the foregoing accounts will be settled monthly after approval by the Registrar.

Art. 63. The Registrar will ensure that no expenditure is incurred which is not provided for in the Budget, that no payment is made except where an obligation actually exists and that the strictest economy is observed in incurring liabilities.

Art. 64.—1. The Accountant-Establishment Officer will prepare and keep up to date separate inventories (*a*) for the supplies of stationery and the like, and (*b*) for furniture and equipment.

2. The inventory of supplies will be brought up to date each week and submitted to the Registrar.

3. The inventory of furniture, etc., will be kept up to date as purchases are made or losses occur.

Art. 65.—1. Every Monday the Accountant-Establishment Officer will place at the disposal of the staff supplies of stationery, etc., sufficient to meet the consumption estimated for the week.

2. Every person who uses the supplies thus made available will immediately enter on the control-sheet attached to the particular species the quantity taken, and will sign his name.

3. The Accountant-Establishment Officer will verify the entries when bringing the inventory up to date.

Art. 66.—1. Officials are forbidden to use stationery belonging to the Court for private purposes.

2. Members of the Court may apply to the Registrar for the use of the Court's services and stationery even for work which is not strictly speaking within the domain of the Court. As regards the Court's services, the Registrar will comply in so far as it is compatible with the requirements of the work of the Court; as regards stationery, he will comply subject to repayments by the member concerned of the cost price. The amount will be deducted from the next monthly payment of salary to the member.

Art. 67. The Accountant-Establishment Officer is responsible that a sufficient stock of all necessary material is available for the work of the Court and of the Registry.

G.—Printing Department

Art. 68.—1. The duties of the Head of the Printing Department include:

(*a*) preparation and examination of all estimates, "dummies," etc., relating to the Court's publications;

(*b*) the typographical arrangement and "preparation for press" of manuscripts intended for printing;

(*c*) correction of proofs and supervision of time devoted to author's corrections;

(*d*) preparation of the tables of the Court's publications reproducing speeches, oral statements and documents;

(*e*) verification of costs of printing.

2. The duties above mentioned under 1 (*b*), 1 (*c*) and 1 (*e*) also apply in respect of any documents of the written proceedings which the Registrar causes to be printed at the charges of the parties under Article 40, paragraph 4, of the Rules.

3. The Head of the Printing Department will as a rule attend the meetings of the Publications Committee set up by the Court; he will supply this Committee with all information of a technical nature and will prepare the minutes of its meetings.

4. Generally speaking, the Head of the Printing Department will act as intermediary in all dealings between the Registry and the printers of the Court's publications.

5. He will keep in close and permanent contact with the Publisher and if need be with the agents for sale, with a view to the consideration and carrying out of all measures calculated to ensure a wider circulation of the publications of the Court, such as the preparation and bringing up to date of catalogues of these publications and the technical organization of exhibitions.

Art. 69.—1. With regard to the typographical preparation of manuscripts, the correction of proofs and the verification of charges, the Head of the Printing Department will ensure that the conditions of the printing contract and the *Typographical Rules for the Publication of the Court* are strictly complied with. He also verifies concordance between the French and English texts of each publication.

2. The order to print may only be given when the Registrar's approval, after inspection of definitive, paginated proofs, has been obtained.

Art. 70.—1. As regards the printing of documents urgently required (judgments, advisory opinions, preliminary volumes, etc.), the Head of the Printing Department will take all measures necessary to ensure that the work is carried out as promptly as possible.

2. As the Court's publications are printed at Leyden, he may proceed to that town whenever he considers it necessary to do so to ensure satisfactory performance of the work, after having on each occasion informed the Registrar. His travelling expenses will be refunded, as also any other expenses which may be involved by remaining at Leyden.

H.—Documents Department

Art. 71. The Head of the Documents Department is also responsible for the Court's Library and bibliography.

Art. 72.—1. The Head of the Documents Department will supply the members of the Court, the Registrar and the officials of the Registry with all information for which they may ask for the purposes of their work, and will procure for them all texts and sources which they may need either from the collections in the Court's Library or in the Carnegie Library, or, if need be, from other libraries.

2. He will send regularly to the Registrar all newly published works acquired either for the Court's private Library or for the Carnegie Library and will call his attention to review articles concerning the Court.

Art. 73.—1. The Head of the Documents Department will prepare, in respect of each case submitted to the Court, a chronological list, with bibliographical references, of the documents relied upon in the documents of the written proceedings filed by the parties or persons concerned.

2. Every year he will prepare, for publication in a special chapter of the Court's Annual Report, a complete bibliography of works and articles, official or otherwise, relating to the Court. A special print of this bibliography will be sent by him to the correspondents in the various countries who assist him in his research and documentation work. He will prepare and keep up to date an index of the names of authors and an index of subjects in respect of the bibliographies already published.

3. He will supply members of the Court, the Registrar and officials of the Registry with any bibliographical information for which he may be asked on a particular subject.

Art. 74.—1. The Head of the Documents Department, in his capacity as the Court's librarian, will be responsible for the books, periodicals and documents belonging to the Court's Library and remaining the property of the League of Nations.

2. He will as a rule attend meetings of the Library Committee set up by the Court; he will supply this Committee with all information of a technical nature and will prepare the minutes of its meetings.

3. Subject to the approval of the Registrar, he will prepare the lists of purchases for submission to the Library Committee and will collect all information likely to assist the latter in making its choice. With due regard to obtaining the most favourable conditions, he will prepare the orders for works to be purchased in accordance with the Committee's decisions and will check the consignments and accounts received from booksellers or publishers.

4. He will keep an *In Register* showing in chronological order the titles of works acquired by the Court; the name of the donor or bookseller, the price of the work and, when necessary, the date of its deposit in the Carnegie Library at the Peace Palace will be indicated.

5. He will supervise the carrying out of the contract entered into with the Carnegie Foundation regarding the Library and will report thereon to the Registrar. He will append to works deposited in the Carnegie Library the full title of such works in quadruplicate and a receipt indicating the title and condition of books deposited, as also the number of volumes. This receipt will be signed by the Director of the Carnegie Library. The receipts will be numbered and kept under lock and key.

6. He will retain duly classified in the Court's private Library the publications of the League of Nations and of the International Labour Office, the texts of certain important treaties, dictionaries and works of reference, as also works of which the Carnegie Library already has a copy.

7. He will prepare and keep up to date a *catalogue of authors' names* and a *catalogue of subjects* in respect of all books, periodicals and documents belonging to the Court's private Library, whether kept in that Library, deposited in the offices of the Court or Registry, or handed over to the Carnegie Library. All

these works will be marked by him with the stamp of the Court and, in so far as may be considered necessary, he will have them bound.

8. He will keep a *register of works on loan* showing the titles of such works, to whom they have been lent and the dates on which they are taken out and returned.

PART V.—AMENDMENTS

Art. 75. The present instructions may be modified by means of amendments to be approved by the President.

III. INFORMATION CONCERNING THE COURT

APPENDIX NO. 10

Members and Officers of the Court

(1) JUDGES AND DEPUTY-JUDGES, 1922–1930 [1]

Judge	*Nationality*
Rafael ALTAMIRA y Crevea	Spanish
Dionisio ANZILOTTI (*President*, 1928–30)	Italian
Ruy BARBOSA [2]	Brazilian
Antonio Sánchez DE BUSTAMANTE y Sirven	Cuban
Viscount FINLAY [3]	British
Henri FROMAGEOT [4]	French
Hans Max HUBER (*President*, 1925–27)	Swiss
Charles Evans HUGHES [5]	American
Cecil James Barrington HURST [6]	British
Frank Billings KELLOGG [7]	American
Bernard Cornelis Johannes LODER (*President*, 1922–24)	Dutch
John Bassett MOORE [8]	American
Didrik Galtrup Gjedde NYHOLM	Danish
Yorozu ODA	Japanese
Epitacio da Silva PESSÔA [9]	Brazilian
Charles André WEISS [10]	French

Deputy-Judge	*Nationality*
Frederik Valdemar Nikolaï BEICHMANN	Norwegian
Demètre NEGULESCO	Rumanian
WANG Ch'ung-hui	Chinese
Michailo YOVANOVITCH	Serb-Croat-Slovene

[1] For biographical data, see Publications of the Court, Series E, No. 1, pp. 14–26; No. 5, pp. 25, 33; No. 6, p. 20.
[2] Deceased March 1, 1923.
[3] Deceased March 9, 1929.
[4] Elected September 19, 1929.
[5] Elected September 8, 1928; resigned on February 15, 1930.
[6] Elected September 19, 1929.
[7] Elected September 25, 1930.
[8] Resigned by letter dated April 11, 1928.
[9] Elected September 10, 1923.
[10] Deceased August 31, 1928.

(2) Judges and Deputy-Judges, 1931–1942 [1]

Judge	*Nationality*
Minéitcirô Adatci (*President*, 1931–33) [2]	Japanese
Rafael Altamira y Crevea	Spanish
Dionisio Anzilotti	Italian
Antonio Sánchez de Bustamante y Sirven	Cuban
Cheng Tien-Hsi [3]	Chinese
Rafael Waldemar Erich [4]	Finnish
Willem Jan Mari van Eysinga	Netherland
Henri Fromageot	French
J. Gustavo Guerrero (*President*, 1936–42)	Salvadoran
Åke Hammarskjöld [5]	Swedish
Manley O. Hudson [3]	American
Cecil James Barrington Hurst (*President*, 1934–6)	British
Frank Billings Kellogg [6]	American
Harukazu Nagaoka [7]	Japanese
Demètre Negulesco	Rumanian
Edouard Rolin-Jaequemyns [8]	Belgian
Michel Jean César Rostworowski [9]	Polish
Walther Schücking [10]	German
Francisco José Urrutia [11]	Colombian
Charles de Visscher [12]	Belgian
Wang Ch'ung-hui [13]	Chinese

Deputy-Judge [14]	*Nationality*
Rafael Waldemar Erich	Finnish
José Caeiro da Matta	Portuguese
Mileta Novacovitch	Yugoslav
Josef Redlich	Austrian

(3) Registrars of the Court, 1922–1942

Åke Hammarskjöld [2]	Swedish
Julio López Oliván [3]	Spanish

[1] For biographical data, see Publications of the Court, Series E, No. 7, pp. 21–41; No. 12, pp. 23–4; No. 13, pp. 23–6; No. 15, pp. 17–8.
[2] Deceased December 28, 1934.
[3] Elected October 8, 1936.
[4] Elected September 26, 1938.
[5] Elected October 8, 1936; deceased July 7, 1937.
[6] Resigned September 9, 1935.
[7] Elected September 14, 1935; resigned January 15, 1942.
[8] Deceased July 11, 1936.
[9] Deceased March 24, 1940.
[10] Deceased August 25, 1935.
[11] Resigned January 9, 1942.
[12] Elected May 27, 1937.
[13] Resigned January 15, 1936.
[14] The office of deputy-judge was abolished on February 1, 1936.
[15] First appointed February 3, 1922; resigned October 8, 1936.
[16] Appointed December 5, 1936.

APPENDIX NO. 11

Sessions of the Court, 1922–1942

Preliminary	January 30 to March 24, 1922
First (ordinary)	June 15 to August 12, 1922
Second (extraordinary)	January 8 to February 7, 1923
Third (ordinary)	June 15 to September 15, 1923
Fourth (extraordinary)	November 12 to December 6, 1923
Fifth (ordinary)	June 16 to September 4, 1924
Sixth (extraordinary)	January 12 to March 26, 1925
Seventh (extraordinary)	April 14 to May 16, 1925
Eighth (ordinary)	June 15 to June 19 July 15 to August 25, 1925
Ninth (extraordinary)	October 22 to November 21, 1925
Tenth (extraordinary)	February 2 to May 25, 1926
Eleventh (ordinary)	June 15 to July 31, 1926
Twelfth (ordinary)	June 15 to December 16, 1927
Thirteenth (extraordinary)	February 6 to April 26, 1928
Fourteenth (ordinary)	June 15 to September 13, 1928
Fifteenth (extraordinary)	November 12 to November 21, 1928
Sixteenth (extraordinary)	May 13 to July 12, 1929
Seventeenth (ordinary)	June 17 to September 10, 1929
Eighteenth (ordinary)	June 16 to August 26, 1930
Nineteenth (extraordinary)	October 23 to December 6, 1930
Twentieth (ordinary)	January 15 to February 21, 1931
Twenty-first (extraordinary)	April 20 to May 15, 1931
Twenty-second (extraordinary)	July 16 to October 15, 1931
Twenty-third (extraordinary)	November 5, 1931, to February 4, 1932
Twenty-fourth (ordinary)	February 1 to March 8, 1932
Twenty-fifth (extraordinary)	April 18 to August 11, 1932
Twenty-sixth (extraordinary)	October 14, 1932, to April 5, 1933
Twenty-seventh (ordinary)	February 1 to April 19, 1933
Twenty-eighth (extraordinary)	May 10 to May 16, 1933
Twenty-ninth (extraordinary)	July 10 to July 29, 1933
Thirtieth (extraordinary)	October 20 to December 15, 1933
Thirty-first (ordinary)	February 1 to March 22, 1934
Thirty-second (extraordinary)	May 15 to June 1, 1934
Thirty-third (extraordinary)	October 22 to December 12, 1934
Thirty-fourth (ordinary)	February 1 to April 10, 1935
Thirty-fifth (extraordinary)	October 28 to December 4, 1935

Judicial Year 1936	February 1 to March 17 April 28 to May 19 June 3 to June 25 October 26 to December 16
Judicial Year 1937	May 3 to July 9 September 20 to November 6
Judicial Year 1938	April 29 to June 30 July 13 to July 14 November 28 to December 1
Judicial Year 1939	January 19 to April 4 May 15 to June 15 November 28 to December 5
Judicial Year 1940	February 19 to February 26
Judicial Year 1941	(None)
Judicial Year 1942	(None)

APPENDIX NO. 12

Work of the Court, 1922–1942

Year	*New Cases*	*Advisory Opinions*	*Judgments*	*Orders* *	*Withdrawals of Cases*
1922	4	3			
1923	5	5 **	2		
1924	4	1	2		
1925	5	3	3		1
1926	3	1	1	2	
1927	5	1	4	4	
1928	6	2	2	17	
1929			3	8	2
1930	2	2		7	
1931	9	4		12	
1932	6	3	3	10	
1933	3		2	17	5
1934	1		2	2	
1935	4	2		6	
1936	3		1	14	1
1937	2		3	11	
1938	2		1	12	1
1939	1		3	4	
1940				2	
1941					
1942					
Total	65	27	32	137	10

* No Orders were rendered prior to 1926.
**Including the refusal to give an opinion in the *Eastern Carelia Case.*

APPENDIX NO. 13

Publications of the Court, 1922–1942

Series A—Judgments and Orders.
Nos. 1 to 24 (1922–1930).

Series B—Advisory Opinions.
Nos. 1 to 18 (1922–1930).

Series A/B—Judgments, Orders and Advisory Opinions.
Nos. 40 to 80 (1931–1940).

Series C—Acts and Documents relating to Judgments and Advisory Opinions.
Nos. 1 to 19 (1922–1930); Nos. 52 to 87 (1931–1939).

Series D—Acts and Documents concerning the Organization of the Court.
Nos. 1 to 6 (1922–1940).

Series E—Annual Reports.
Nos. 1 to 15 (1925–1939).

Series F—General Indexes.
Nos. 1 to 4 (1922–1936).

APPENDIX NO. 14

Unofficial Publications of Judgments, Orders and Opinions

In English

World Court Reports, edited by Manley O. Hudson. I (1922–26), II (1927–32), III (1932–35), IV (1936–42). Washington: Carnegie Endowment for International Peace, 1934–43.

In German

Entscheidungen des Ständigen Internationalen Gerichtshofs. Institut für Internationales Recht in Kiel. I (1922–23), II (1924), III (1925), IV (1926), V (1927), VI (1928), VII (1929–30), VIII (1931), IX (1932), X (1933). Leyden: Sijthoff, 1929–34. — XI (1934). Kiel: Schmidt & Klaunig, 1936. — XII (1935). Leipzig: Koehler, 1937.

In Spanish

Colección de decisiones del Tribunal Permanente de Justicia Internacional. Instituto Ibero-Americano de Derecho Comparado. I (1922–23), II (1924–26). Madrid: 1924–26.

REFERENCES TO CASES

(The numbers refer to pages)

REFERENCES TO PERSONS

(The numbers refer to pages)

SUBJECT INDEX

(The references are to pages)