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The Projected Arab Court of Justice: A Study to its Draft Statute and Rules, with Specific Reference to the International Court of Justice and Principles of Islamic Shariah

A Thesis Submitted for the Degree of
Doctor of Philosophy
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TO

MY WIFE SANA,

MY SONS

ABDULLA, ALI & ABDULRAHMAN.

"O (you) the one in (complete) rest and satisfaction! Come back to your Lord, well-pleased (yourself) and well-pleasing unto Him! Enter you, then, among My honoured slaves, and enter you My Paradise!"

Quran, 89:27-30.

IN MEMORY OF HIS HIGHNESS
SHAIKH ISA BIN SALMAN AL-KHALIFAH
THE AMIR OF THE STATE OF BAHRAIN
WHO DIED WHILE THIS THESIS WAS GOING TO FINISH

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Summary

The judicial settlement of international disputes is an important requirement for peace in the international community. Therefore, creating judicial organs within regional or international organisations finds support among states and the majority of international lawyers. The present thesis deals with the projected Arab Court of Justice (ACJ) as a regional international court, expected to be created within the League of Arab States system. The present thesis dealing with the projected ACJ, consists of five chapters and final conclusions.

Chapter one deals mainly with the basic structure of the League of Arab States itself, its membership, its organs, the settlement of disputes, and the reasons that are delaying the creation of the ACJ and the role it will be expected to play in settling inter-Arab disputes. In the second chapter comprehensive information on the function of the judicial power in Islamic Shariah is presented, including the status of judges in Islam, their appointment, qualifications, independence and other issues related to them. Chapter three concentrates on the organisation of the projected ACJ, comparing its draft Statute with the Statute of the International Court of Justice (ICJ) and other regional international courts. The chapter will also show how far the Arab draftsmen have been influenced by principles and rules of Islamic Shariah, especially in matters relating to the qualification of judges. Furthermore, the chapter will discuss other points related to the organisation of the bench such as nomination of candidates, system of election, constituting chambers, appointing ad hoc judges etc. The fourth chapter explains

in detail at the level of theory as well as of practice the role of Islamic Shariah as a source to be applied by the projected ACJ. The chapter points to the need to discuss the origins and fundamental conceptions of Islamic Shariah as a law capable to be applied by the projected ACJ. Chapter five continues with a discussion of the jurisdiction of the ACJ, and makes detailed reference to the concepts of jurisdiction *ratione personae*, *ratione materiae* and the function of the ACJ to give advisory opinions. The thesis considers whether the Arab drafters have developed the above terms or have simply adopted them as they exist in the Statute of the International Court of Justice. The conclusions summarise the findings of the Thesis, and are accompanied by some critical remarks.

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Table of Abbreviations

A	Publications of the Permanent Court of International Justice, Series A, Collection of Judgments.
A/B	Publication of the Permanent Court of International Justice, Series A/B, Judgment, Orders and Advisory Opinions.
ACI	Arab Court of Investment.
ACJ	Arab Court of Justice.
AD	Annual Digest Reports of Public International Law Cases.
AJCL	American Journal of Comparative Law.
AJIL	American Journal of International Law.
ALQ	Arab Law Quarterly.
Annuaire IDI	Annuaire de I'Institute de Droit International.
Art(s).	Article(s).
AUC	The Arab Unified Command.
AYBIL	The Australian Year Book of International Law.
BYbIL	British Year Book of International Law.
C	Publication of the Permanent Court of International Justice, Series C, Acts and Documents relating to the judgments and opinions of the Court.
Cf	compare.
CILJ	Cornell International Law Journal.
CJEC	Court of Justice of the European Communities.
CJTL	Columbia Journal of Transnational Law.
CLB	Commonwealth Law Bulletin.
CLJ	Cambridge Law Journal.
CLP	Current Legal Problems.
CLR	Columbia Law Review.
CMO	The Consultative Military Organisation.
Collective Security Treaty	The Treaty of Joint Defence and Economic Cooperation.
CWL	Current World Leaders.
CYbIL	The Canadian Yearbook of International Law.
D	Publications of the Permanent Court of International Justice, Series D, Acts and Documents concerning the Organization of the Court.
DJILP	Denver Journal of International Law and Policy.
Doc(s).	Document(s).
E	Publications of the Permanent Court of International Justice, Annual Reports of the Court.
EC	European Community or European Communities.
ECHR	European Court of Human Rights.
ed(s).	Editor(s).

edn.	Edition.
EJPS	The Egyptian Journal of Political Science.
EPIL	Encyclopedia of Public International Law.
et al.	and others.
EU	European Union.
FAO	Food and Agriculture Organization.
GA	General Assembly.
GAOR	General Assembly Official Record.
GCC	Gulf Co-operation Council.
GUOS	Glasgow University Oriental Society.
HLR	Harvard Law Review.
i.a.	among others.
i.e.	that is.
IAEA	International Atomic Energy Agency.
IBRD	International Bank for Reconstruction and Development.
ICAO	International Civil Aviation Organization.
ICJ	International Court of Justice.
ICJ Pleadings	International Court of Justice, Pleadings, Oral Arguments, Documents, (case by case).
ICJ Rep.	International Court of Justice, Reports of Judgment, Advisory Opinion and Orders.
ICLQ	International and Comparative Law Quarterly.
IDA	International Development Association.
IFAD	International Fund for Agricultural Development.
IFC	International Finance Corporation.
IICJ	International Islamic Court of Justice.
IJIL	Indian Journal of International Law.
IJMES	International Journal of Middle East Studies.
ILM	International Legal Materials.
ILO	International Labour Organization.
IMF	International Monetary Fund.
IMO	International Maritime Organization.
Isl.CLQ	Islamic & Comparative Law Quarterly.
Isl.Rev.	The Islamic Review.
Isl.Stud.	Islamic Studies.
Isr.LR	Israel Law Review.
ITU	International Telecommunication Union.
JAA	Journal of Arab Affairs.
JCLIL	Journal of Comparative Legislation and International Law.
JDC	The Joint Defence Council.
JILP	Journal of International Law and Politics.
JPHS	Journal of Pakistan Historical Society.
JSIS	Journal of Shariah and Islamic Studies.
LNTS	League of Nations Treaty Series.
LQR	The Law Quarterly Review.
MAFQ	al Mujallah al 'Arabiyah lil Fiqh wa al Qada'.

MPCPAC	Minutes of the Preparatory Committee of the Plenary Arab Conference.
MPSC	Minutes of Political Sub Committee.
NILR	Netherlands International Law Review.
No(s).	Number(s).
OAU	Organisation of African Unity.
OIC	The Organisation of Islamic Conference.
p.	Page.
para.	Paragraph.
PCA	Permanent Court of Arbitration.
PMC	The Permanent Military Commission.
Proc. ASIL	Proceedings of the American Society of International Law.
PYBIL	Pace Yearbook of International Law.
Res.	Resolution.
Revue Belge	Revue Belge de Droit International.
Revue Egyptienne	Revue Egyptienne de Droit International.
S.C.O.R.	Security Council Official Records.
SC	Security Council.
Ser.	Series.
SJILC	Syracuse Journal of International Law & Commerce.
SSL	Scandinavian Studies in Law.
Stud.Isl.	Studies in Islam.
Stv.Isl.	Stvdia Islamica.
The Arab League	The League of Arab States.
The Review	International Commission of Jurists.
UK	United Kingdom.
UN	United Nations.
UNCIO	United Nation Conference of International Organization.
UNESCO	United Nations Economic, Social and Cultural Organization.
UNIDO	United Nations Industrial Development Organization.
UNTS	United Nations Treaty Series.
v.	against.
VJIL	Virginia Journal of International Law.
vol(s).	Volume(s).
WHO	World Health Organization.
WIPO	World Intellectual Property Organization.
WMO	World Meteorological Organization.
YBICJ	Yearbook of the International Court of Justice.
YBWA	The Year Book of World Affairs.
YLJ	The Yale Law Journal.

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Passage through the Great Belt, (Finland v. Denmark), Order of 10 September 1992, *ICJ Rep.*, (1992) p. 348.

Phosphates in Morocco, Judgment, *PCIJ* (1938) Ser. A/B, No. 74, p. 10.

Protection of French Nationals and Protected Persons in Egypt, (France v. Egypt), Order of 29 March 1950, *ICJ Rep.*, (1950) p. 59.

Question of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lokerbie, (Libyan Arab Jamahiriya v. United States of America), Provisional Measures, Order of 14 April 1992, *ICJ Rep.*, (1992) p. 114.

Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lokerbie, (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, *ICJ Rep.*, (1992) p. 3

Railway Traffic between Lithuania and Poland, Advisory Opinion, *PCIJ* (1931) Ser. A/B, No. 42.

Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, *ICJ Rep.*, (1949) p. 174.

Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case, Order of 22 September 1995, *ICJ Rep.*, (1995) p. 228.

Reservations to the Convention of the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, *ICJ Rep.*, (1951) p. 15.

Right of Passage over Indian Territory, (Portugal v. India), Preliminary Objections, Judgment, *ICJ Rep.*, (1957) p. 125.

Rights of Minorities in Upper Silesia (Minority Schools), Judgment No. 12, *PCIJ* (1928) Ser. A, No. 15.

Rights of Nationals of the United States of America in Morocco, (France v. United States of America), Judgment, *ICJ Rep.*, (1952) p. 176.

Serbian Loans, Judgment No 14, *PCIJ* (1929) Ser. A, No. 20.

South West Africa, (Ethiopia v. South Africa; Liberia v. South Africa), Order of 18 March 1965, *ICJ Rep.*, (1965) p. 3.

South West Africa, Order of 29 November 1965, *ICJ Rep.*, (1965) p. 9.

South West Africa, Second Phase, Judgment, *ICJ Rep.*, (1966) p.6.

Sovereignty over Certain Frontier Land, (Belgium/Netherlands), Judgment, *ICJ Rep.*, (1959) p.209.

Status of Eastern Carelia, Advisory Opinion, *PCIJ* (1923) Ser. B, No. 5.

Temple of Preah Vihear, (Cambodia v. Thailand), Merits, Judgment, *ICJ Rep.*, (1962) p. 6.

Temple of Preah Vihear, Preliminary Objections, Judgment, *ICJ Rep.*, (1961) p. 17.

Territorial Dispute, (Libyan Arab Jamahiriya/Chad), Order of 26 October 1990, *ICJ Rep.*, (1990) p. 149.

Territorial Jurisdiction of the International Commission of the River Order, Judgment No. 16, *PCIJ* (1929) Ser. A, No. 23.

Trail of Pakistani Prisoners of War, (Pakistan v. India), Interim Protection, Order of 13 July 1973, *ICJ Rep.*, (1973) p. 328.

Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, *PCIJ* (1932), Ser. A/B, No. 44.

Treaty of Neuilly, Article 179, Annex, Paragraph 4 (Interpretation), Judgment No. 3, *PCIJ* (1924) Ser. A, No. 3.

United States Diplomatic and Consular Staff in Tehran, (United States of America v. Iran), Judgment, *ICJ Rep.*, (1980) p. 3.

Western Sahara, Advisory Opinion, *ICJ Rep.*, (1975) p. 12.

Western Sahara, Order of 22 May 1975, *ICJ Rep.*, (1975), p. 6.

Introduction

The League of Arab States, created in 1945, is one of the oldest international regional organisations. Its aim is to strengthen relations between Arab states, which alone are permitted to be its members. The Arab League has proclaimed that the settlement of disputes between its members should be resolved by peaceful means. The use of force is prohibited.

The international community has at its disposal peaceful methods by which states can settle their disputes. States either can choose political means for resolving political disputes or judicial means for justiciable disputes. Art. 33 (1) of United Nations Charter, the best basic reference to consult on dispute resolution, provides that "the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

When considering the system of the League of Arab States with respect to the settlement of disputes, it appears that, unlike the Charter of the United Nations, the Pact of the Arab League has adopted just one kind of political method, namely, mediation, although to a restricted extent member states can also have recourse to arbitration. Despite the importance of the judicial method, the founding Arab states failed, for many reasons, to include a relevant provision in the 1945 Pact of the Arab League. The only reference to an Arab Court of Justice (ACJ) occurs in

Art. 19, which provides for the creation of *inter alia* an ACJ if sufficient amendments are made to the Pact with the approval of a two-thirds majority of member states. Subsequently, member states of the League have realised the importance of a judicial organ within their organisation. Several attempts have been made to create such a judicial organ since the early fifties; but unfortunately, none of these efforts have had any chance of success except that of being shelved. However, a recent proposal, approved by a great majority of member states, was drafted in 1990. Arab draftsmen took into consideration the previous drafts for the ACJ and tried to prepare an acceptable draft to secure the approval of the member states. The 1990 draft Statute needed to be approved by the Heads of member states, for which purpose, a summit meeting was needed, but the invasion of Iraq in Kuwait in 1990 prevented such a summit taking place. Since then, the draft Statute has been awaiting the leaders' approval. Between 1990 and1995 the reconsideration of the draft Statute was continued in order to create a first class model, hoping to find the acceptance of all Arab states. The present study will concentrate on the latest draft Statute, the 1995 draft, which also has been approved by the great majority of the member states. The draft Statute and the draft Rules of the ACJ are written in Arabic therefore, a non-official translation of both had to be made by the present author.[1] The previous drafts will also be referred and discussed whenever necessary.

It would have been very complicated to discuss in detail every Article of the draft Statute of the ACJ; therefore selected issues have been chosen because of

[1] See Annexes 2 and 3.

their importance and controversial nature. It is also necessary to refer to the historical background relating to the creation and the function of the League of Arab States. This will aid the understanding of the special nature and characteristics of the League which are reflected also in the draft Statute of the ACJ.

In addition, the study deals with the principles and roles of Islamic Shariah as a legal system, in order to clarify two major points: (1) Islamic opinion on the judicial power, with particular reference to the nature of this power, the system of the judges and their qualifications; and (2) the legal sources for litigation of Islamic Shariah as Islamic international law, in order to know whether Islamic Shariah can be applied by the projected ACJ and if so, what would be the scope of its application. The reason why these two points are discussed is because the application of Islamic Shariah is included in the draft Statute of the ACJ in two respects. Firstly, according to Art. 6 of the draft Statute, an Arab judge holding a position in the Court has to be qualified in international law as well as Islamic Shariah. Secondly, according to Art. 23 (1), Islamic Shariah shall be one of the sources that may be applied to disputes by the projected ACJ.

The main purpose of the study is to answer the following questions: Why was the League of Arab states established? Why have the founding states disregarded the creation of a judicial organ within the League system? After more than fifty years since the creation of the Arab League, is there still a need to establish such a Court? What will be the role of the Court in promoting inter-Arab relations? What will be the position of Islamic Shariah in the Court, and

how will it be applied? What will be the scope of the jurisdiction of the Court? Does the draft Statute develop sufficient grounds for the concepts of jurisdiction *ratione personae* and *ratione materiae*, and the advisory jurisdiction of the Court, especially when these concepts are compared with these found in the provisions of the Statute of the International Court of Justice?

Since the establishment of the League of Arab States, huge amounts of detailed literature have been generated to cover its various aspects, whether in Arabic, English or French. Unfortunately, the projected ACJ has not enjoyed the same attention. This poses difficulties when looking for references relating to the ACJ. Only three published works exist on the subject and they have accordingly been relied on in the present thesis:

> **1.** Foda, Ezzeldin, *The Projected Arab Court of Justice: a study in regional jurisdiction with specific reference to the Muslim law of nations*, The Hague: Martinus Nijhoff, (1957).
> **2.** Ben Miled Hela, *La Compétence de la Cour Arabe de Justice: Selon L'Avant-Projet de Statut*, (**The Competence of the Arab Court of Justice: According to the Draft Statute**), Tunisia: Memoire Pour la D.E.A. de Droit International Public, (1982).
> **3.** Dachraoui Achouak, *La Cour Arabe de Justice: Etude de L'Avant-Projet de Statut*, (**Arab Court of Justice: Study of the Preliminary Draft Statute**), Tunisia: Memoire Pour le D.E.A. en Sciences Politiques, (1982).

In addition, some documents (all of them in Arabic) relating to the establishment of the projected ACJ have been compiled from different places. First visits to Egypt and to the Secretariat General of the Arab League were necessary to obtain the draft Statute and draft Rules of the ACJ. The present author has obtained the most recent unpublished documents relating to the establishment of the projected ACJ namely, "Minutes of the Permanent Legal

Committee of the League of Arab States, Cairo 5-9 November 1995". These documents contain correspondence between member states of the Arab League regarding their views on the 1995 draft Statute of the projected Arab Court. They will be referred in the present thesis as the unpublished letter. The library of the Arab League has also been consulted as well as the libraries of University of Ain Shams and University of Cairo. Some other documents were found in the League of Arab States (Tunis office) when a second visit to Tunis was made for the same purpose. The London office of the Arab League also helped the present author to find other documents, out of print Arabic books and Articles relating to the Arab League and the projected ACJ. Because the draft Statute of the ACJ is based on the Statute of the ICJ, it has been helpful to refer to the judgments and opinions of the ICJ, and its predecessor the PCIJ, as well as to the opinions and views of international lawyers on specific issues.

This study is divided into five chapters:

Chapter One:	The Place of the Arab Court of Justice in the League Arab States.
Chapter Two:	Judicial Power in Islamic Shariah.
Chapter Three:	The Organisation of the Court.
Chapter Four:	Application of Islamic Shariah by the Arab Court of Justice.
Chapter Five:	Jurisdiction of the Court.

The conclusions summarise the findings of the Thesis, and are accompanied by some critical remarks.

Chapter I
The Place of the Arab Court of Justice in the League of Arab States

Before discussing the expected judicial function of the Arab Court of Justice,[1] it is necessary to give some general information about the League of Arab States[2] as a regional organisation in the Arab world. The present chapter is going to clarify why the Arab League was established; how membership in it is obtained; and what its organs are; how member states settle their disputes; what are the available methods; and lastly, why the ACJ has not been established within the Arab League system despite its importance and necessity.

1. 1. The Establishment of the Arab League [3]

Arab nationalism (al Qawmiyyah al Arabiyyah) may be considered as one of the strongest in the world, because Arabs believe they constitute one nation, embracing the same religion (Islam), speaking the same language, living in a connected territory, with common interests, tradition, history and ancestry.[4]

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[1] Hereinafter cited as: The ACJ.

[2] Hereinafter cited as: The Arab League.

[3] It is to be noted that the Arab League is one of the oldest organisations in the world created after the second world war, even older than the United Nations (hereinafter cited as: UN) because the signing and ratifying of its Pact was on 22nd March 1945, whereas the signature of the Charter of the UN was in 26th June 1945. It is also older than the Organisation of the American States (1949) and the European Community (1952). See, Ball, Margaret, The Organisation of American States and the Council of Europe, XXVI *BYbIL* (1949) p.p. 150-176; Simma, Bruno, *The Charter of The United Nations: A Commentary*, Oxford: Oxford University Press, (1995) p. 10.

[4] Haim, Sylvia G., *Arab Nationalism: An Anthology*, Los Angeles: University of California Press, (1974) p.p. 120-127; Gomaa, Ahmed M., *The Foundation of the League of Arab States: Wartime Diplomacy and Inter-Arab Politics 1941 to 1945*, London: Longman Group Ltd., (1977) p. 3. (hereinafter cited as: Gomaa, *The Foundation of the Arab League*).

The Arabs as an ethnic entity have suffered several kinds of domination which started with the Tartarian invasion in the thirteenth century of the Abbasids Caliphate,[5] and ended with the rule of the Ottoman Empire in most Islamic Arab states during some four centuries (1516-1917). From the beginning of the 19th century, European states were prepared to dominate some Arab states still under the weakening rule of the Ottoman Empire. European powers knew that Arab states enjoyed a strategic position, had a great wealth of natural and economic resources, especially after the discovery of oil in some of them. The importance of the Suez Canal too should not be forgotten.[6]

During the first World War (1914-1918), resistance against Ottoman rule increased, especially when Britain promised Prince Hussain, the Sheriff of Mecca, the leader of Arab resistance, to support him in order to gain his independence in return for using his troops in the war against Germany which was supported by Ottoman forces.[7] Unfortunately, this promise did not materialise and Britain did

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[5] In fact, after the death of the Prophet Muhammad on 632 A.D., there were two main successive dynasties in Islamic state: the Umayyads (661-750), which ruled from Damascus, and the Abbasids (750-1258), which ruled from Baghdad. For further details see Robinson, Neal, *Islam: A Concise Introduction*, Surrey: Curzon Press, (1999) p. 22.

[6] For example, France dominated Algeria in 1830, Tunisia in 1881, and Morocco in 1912. Britain dominated Egypt in 1882. Italy dominated Libya in 1912. Then after the first World War both of France and Britain shared Arab states between themselves, so Syria and Lebanon were put under the French mandate, Iraq, Palestine and Jordan under the British mandate, at the same time those countries in the Arabian Gulf (*Persian Gulf*) were put under British colonialism. For more details see Shihab, Mufeed Muhamad, *Jami'at al Duwal al 'Arabiyyah: Mithaquha wa Injazatuha*, (*The League of Arab States: its Charter and its Implementations*), al Qahirah: Ma'had al Buhuth wal Dirasat al 'Arabiyah, (1978) p. 4. (hereinafter cited as: Shihab, *The Arab League*); Hasou, Tawfig Y., *The Struggle for the Arab World: Egypt's and Nasser and the Arab League*, London: Kegan Paul plc, (1985) p.p. 4-5. Hassuna, Hussein A., *The League of Arab States and Regional Disputes: A Study of Middle East Conflicts*, New York: Oceana Publications INC, (1975) p. 3. (hereinafter cited as: Hassuna, *The League of Arab States*).

[7] See Letter from Sir Henry MacMahon to Sheriff Hussain, 14th December 1915, (Correspondence between Sir Henry MacMahon and the Sheriff Hussein of Mecca, in Great Britain), Parliamentary Papers, Miscellaneous No. 3 (1939), Cmd. 5957, London, 1939, Letter No. 6, p. 12; Mansfield,

not recognise the independence of Arab states. Rather, Britain and France acted in accordance with the Lausanne Treaty of 1923, and even before that, under the Sykes Picot Agreement at the San Remo conference of 1916,[8] decided to distribute the majority of Ottoman territory between themselves, and help Jews to settle in the Palestine region according to the Balfour declaration of 2nd November 1917.[9]

The situation between the two World Wars did not change. Most Arab states struggled against foreign domination in order to reacquire their independence, enjoy their right to self determination, and declare their condemnation of foreign colonialism and the attempted division of the Arab nation.[10] The struggle has not stopped since then; popular resistance has remained strong, and the rejection of foreign influence on Arab territory has become very important.

The situation in the region became very critical in World War II after 1939. British Government, in its first declaration of 29 May 1941 announced its support

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Peter, *The Middle East: A Political and Economic Survey*, Oxford: Oxford University Press, (1980) p.p. 14-15.

[8] For more information about Lausanne Treaty and Sykes Picot Agreement see, Khalil, Muhamad, *The Arab States and the Arab League: A Documentary Record*, vol. 2, Beirut: Khayats, (1962) p.p. 304-307 and p.p. 295-298. (hereinafter cited as: Khalil, *Documentary Record*).

[9] The Balfour Declaration refers to Arthur James Balfour who was Foreign Secretary in the British Government. The declaration was a letter prepared in March 1916 and issued in November 1917, expressed British government approval of establishing in Palestine, a national home for the Jewish people. See the British (Balfour) Declaration of sympathy with Zionist Aspirations, Khalil, *Documentary Record*, *supra* note 8, p.p. 483-484.

[10] For example there was the 1919 Egyptian Public Revolution against British occupation, Iraqis revolution in 1920 against the British mandatory, Syrian and Lebanon Revolution in 1925 against the French mandatory, the first Revolution of Palestine in 1920, and the second in 1936 against the British strategy of establishing a national home for the Jewish people in Palestine, and Libyan Revolution against Italian colonialism in 1923.

for Arab movements aimed at gaining independence. The declaration made at the Mansion House by Mr. Eden[11] declared:

> "The Arab world has made great strides since the settlement reached at the end of the last War, and many Arab thinkers desire for the Arab peoples a greater degree of unity than they now enjoy. In reaching out towards this unity they hope for support. No such appeal from our friends should go unanswered. It seems to me both natural and right that the cultural, and economic ties, too, should be strengthened. His Majesty's Government for their part will give their full support to any scheme that commands general approval."[12]

After less than two years, Mr Eden reiterated his promise for the support of Arab unity in an answer to a Parliamentary question, when he announced:[13]

> "As they have already made plain, His Majesty's Government would view with sympathy any movement among Arabs to promote their economic, cultural or political unity. But clearly the initiative in any scheme would have to come from the Arabs themselves, and so far as I am aware no such scheme, which would command general approval, has yet been worked out."

It is unfair to ascribe the creation of the Arab League only to British support and disregard other motives. No doubt various declarations were followed by great tangible results in the region, because they informed the Arab states, when most of them were under British, French or Italian mandate, that Britain did not oppose Arab unity, but also it is worth saying that the declarations in question were made as a consequence of a strong struggle and absolute rejection of all kinds of foreign presence in the region. Great Britain found it was best to

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[11] Eden, Robert Anthony, (1897-1977) British Statesman, served as General-Staff during World War I (1914-1918), then elected as a Conservative Party member to the House of Commons (1926-1929), was Minister of Foreign Affairs (1940-1945), and finally, Prime Minister (1955-1957).

[12] *The Times*, "Mr. Eden Defines the problems", Friday, 30th May 1941, Col. 6, p. 5; Izzeddin, Nejla, *The Arab World: Past, Present, and Future*, Chicago: Henry Regnery Company, (1953) p. 321; Seton-Williams, M. V., *Britain and the Arab States: A Survey of Anglo-Arab Relations 1920-1948*, London: Luzac & Company, LTD, (1983) p. 221. (hereinafter cited as: Seton-Williams, *Britain and the Arab States*).

[13] Parliamentary Debates, House of Commons, vol. 387, Col. 139, Wednesday, 24th February 1943.

neutralise Arab pressure demanding freedom and unity, and obtain Arab support by giving some hope with promises of support. British declarations helped bar German access. Germany too had declared its sympathy toward Arab unity. The British Government later found itself facing new powers in the Middle East in competition with its interests, especially when the United States of America gained oil concessions in the Kingdom of Saudi Arabia and the Union of Soviet Socialist Republics started to propagate communist ideas.[14]

The British Government was one of the first to express sympathy and support when the Arab League become active. Mr. Law, Secretary of State for Foreign Affairs said in the House of Commons:[15]

> "His Majesty's Government have welcomed the successful formation of the League of Arab States. They will await with sympathy and interest the results of the detailed conversations which are now to be begun for reducing the various barriers which divide the Arab peoples and for promoting cooperation between them. They hope that these discussions will yield useful and practical results."

Several possibilities to achieve this desired Arab unity appeared. The first was a plan for creating what could be called Great Syria consisting of Syria, Lebanon, Jordan and Arab Palestine. A second plan concerned the Fertile Crescent, consisting of Syria, Jordan, Arab Palestine, Iraq and Lebanon. The third was a project which would bring all Arab states, independent at that time, into one union consisting of the above mentioned states plus Saudi Arabia, Yemen and Egypt.[16]

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[14] For more details see Bashir, al Shafiee M., *at Tanzim ad Dawli*, (*The International Organisations*), al Mansorah: Maktabat al Jala' al Jadidah, (1980) p.p. 464-465. (hereinafter cited as: Bashir, *The International Organisations*).

[15] Parliamentary Debates, House of Commons, vol. 410, Col. 1885, Wednesday, 9th May 1945.

[16] al Shuqayri, Ahmed, *al Jami'ah al 'Arabiyah: Kayf takun Jami'ah wa Kayf takun 'Arabiyyah*, (*The Arab League: How it could be League and How it could be Arabic*), Tunis: Dar Bu Salamih

The prospects took a very important place in Arabic public opinion. Therefore, to avoid any conflict which could emerge as a result of a difference in ideas, and to unify the Arabs' position, the Egyptian Government invited the prime ministers of the then independent Arab states to discuss various proposals with them. The invitations took place as follows: Iraq, 13 July-6 August 1943; Jordan, 28 August-1 September 1943; Saudi Arabia, 11 October-2 November 1043; Syria, 26 October-3 November 1943; Lebanon, 9-13 January 1944 and South Yemen 6-9 February 1944. During these meetings the representatives exchanged ideas on several Arab concerns, on ways to strengthen relations in different fields between Arab states, and they discussed how they could create an Arab union.[17]

Later an invitation from the Egyptian government to the leaders of the independent Arab states prepared the way to participation in a conference at the Antoniadis Palace in Alexandria from 25th September till 7th October 1944; attending this Conference were representatives from Egypt, Iraq, Jordan, Lebanon, Syria; Saudi Arabia and South Yemen sent observers. The idea of establishing the Arab League was approved, and a protocol known as the "Alexandria Protocol"

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lil Nashir, (1979) p.p. 35-39; Khadduri, Majid, The Arab League as a Regional Arrangement, 40 *AJIL* (1956) p.p. 763-764. (hereinafter cited as: Khadduri, The Arab League); see also al Jabburi, Jamil, *Minutes of the Preparatory Committee of the Plenary Arab Conference, Alexandria*, Part 1, 31 *JAA* (1983) p.p. 149-153. (hereinafter cited as: al Jabburi, *Preparatory Committee*).

[17] al Ghunaimi, Muhamad Talat, *al ahkam al 'Ammh fi Qanun al Omam*, (*General Principals in the Law of Nations*), Alexandria: Munsha'at al Ma'arif, (1972) p. 1006. (hereinafter cited as: al Ghunaimi, *The Law of Nations*); Philip, W. Ireland, The Pact of the League of Arab States, 39 *AJIL* (1945) p. 798; see also Gomaa, *The Foundation of the Arab League*, *supra* note 4, p.p. 153-187.

was adopted by all those attending.[18] It included the main and general principles of the formation of the projected Arab League. Later the prime ministers of the seven states met again in Cairo on 22 March 1945 and unanimously approved the Pact of the Arab League, as drafted by the Political Sub-Committee which formed for this purpose.[19]

1. 1. 1. Alexandria Protocol [20]

This protocol is the first official document drafted for the Arab League. It contained the main principles on the form of this regional organisation, and covered other subjects of great importance for the Arab states. Its preamble started by making clear the determination of the Arab states attending the meeting of the Preliminary Committee of the General Arab Conference to unite Arab public opinion to establish the Arab League and strengthen the ties between the Arab states. Independent Arab states that gathered and agreed to establish the Arab League decided to treat the Alexandrian Protocol as expressing their main aims and desire to achieve the establishment of the League. Five main points were covered by the Protocol as follows: (1) The establishment of the League of

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[18] Except by the Saudi Arabia and Yemenis representatives who did not sign the protocol, declaring that they had to submit it to their governments for approval before signature. Later on they got their government's approval and signed it. See, Khadduri, The Arab League, *supra* note 16, p. 765; al Jabburi, *Preparatory Committee*, *supra* note 16, p.p. 160-163.

[19] al Jabburi, Jamil, *Minutes of the Preliminary Committee of the Plenary Arab Conference*, Part 2, 32 *JAA* (1983) p.p. 110-126.

[20] For the full text of Alexandria Protocol see Khalil, *Documentary Record*, *supra* note 8, p.p. 53-56.

Arab states; (2) Economic, cultural and social cooperation; (3) The future strengthening of bonds; (4) Lebanon; (5) Palestine.[21]

1. 1. 2. The Pact of the Arab League [22]

By virtue of the signature of the Pact, the Arab League as a regional, political organisation acquired international legal personality just like other international organisations, such as the United Nations, Council of Europe, the Organisation of American states, the Organisation of African Unity and the Organisation of Islamic Conference.[23] All the members of the Arab League are at present members of the UN; there is no incompatibility between these memberships, as the Charter of the UN allows the creation of regional agencies if their activities are consistent with the principles of the UN.[24]

It is possible to amend the Pact of the Arab League with the consent of two-thirds majority of the member states, especially to promote firmer and stronger ties between the states belonging to the League, to create an ACJ, and to regulate the relations of the League with international bodies created to guarantee security and peace.[25] The Pact consists of a Preamble, twenty Articles, and three Appendices. It is important to note that even though Islam is the official religion in most of the

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[21] For further details see *Arab Unity Declaration: Minutes Regarding the Discussions and Ratification of Alexandria Protocol*, Reprinted in 43 *JAA* (1985) p.p. 283-313; 44 *JAA* (1985) p.p. 226-265; 46 *JAA* (1986) p.p. 251-277.

[22] For full text of the Pact of the Arab League, 70 *UNTS* (1950) p.p. 248-262; Khalil, *Documentary Record*, *supra* note 8, p.p. 56-61; also see Annex 1.

[23] Abu al Saud, Ameenah H., Jami'at al Dowal al 'Arabiyyah wa Imkanat al Tatwir, (The League of Arab States and the Availability of Developing), 89 *JAA* (1997) p. 7. (hereinafter cited as: Abu al Saud, The League of Arab States); al Jamal, Yahya, ash Shakhsiyah al Qanuniyah ad Dawliyah li Jami'at ad Dowal al 'Arabiyyah, (International Legal Personality of the League of Arab States), 28 *JAA* (1983) p. 133.

[24] Art. 52 of the Charter of the UN.

[25] Art. 19 of the Pact of the Arab League.

members of the Arab League neither the Alexandria Protocol nor the Arab League Pact refer directly or indirectly to Islam. This, however, did not prevent the Arab draftsmen from including principles of Islamic Shariah in the draft Statute of the ACJ.[26]

1. 2. Organs of the Arab League

There are two types of organ in the Arab League. The first type created on the basis of the Arab League's Pact, includes: the League's Council; the Permanent Secretary-General and the Permanent Committees. The second type was created under the Treaty of Joint Defence and Economic Cooperation adopted by the member states of the Arab League.[27] It includes: the Joint Defence Council (JDC); Consultative Military Organisation (CMO); the Permanent Military Commission (PMC); the Arab Unified Command (AUC) and the Economic Council (EC).[28]

1. 2. 1. Organs Created under the Pact

1. The League's Council

The Council of the Arab League which consists of representatives of member states[29] is the highest authority within the League's system. The Pact of the Arab League and the internal regulations[30] define its constitution, competence and voting system. Although the Pact and the Rules do not specify the level to which

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[26] The judge should be qualified in Islamic Shariah and International Law, also Islamic Shariah is considered as one of the sources to be applied by the Court. See Arts. 6 and 23 (1/B) of the draft Statute of the ACJ. These questions are discussed at length *infra.*

[27] Hereinafter cited as: Collective Security Treaty.

[28] Shihab, *The Arab League*, *supra* note 6, p. 99.

[29] Art. 3 (1) of the Pact of the Arab League; Art. 1 of the Rules of the League Council.

[30] Hereinafter cited as: Rules of the League Council.

the representatives should belong; since the establishment of the Arab League, the Council representatives of member states are prime ministers[31] or foreign ministers and sometimes permanent deputies to the League or ambassadors of the members states at Cairo.

Since 1964, when Egyptian President Gamal Abdel Naser convened the assembly of the League Council at the level of heads of states, sessions have been held twice a year, one at the level of ministers of foreign affairs, and the other at the level of heads of states as the Arab Summit Conference.[32] It has been accepted that this Summit Conference shall meet once a year in ordinary session during the month of September; it is possible for it to meet at any time in an extraordinary session. Until 1996 twenty three summit conferences have been held, some of them in ordinary but most in extraordinary sessions.[33]

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[31] That was only at the beginning of the creation of the Arab League.

[32] Ghali, Boutros B., The Arab League (1945-1970), 25 *Revue Egyptienne* (1969) p. 76. (hereinafter cited as: Ghali, The Arab League); Sarhan, Abdul Aziz M., *Azmat al Munazzmat al 'Arabiyah wal Islamiyah fi 'Asr al Haimanah al Americiyah al Israeliyah*, (*Stalemates of Islamic Arabic Organisations in the Era of the American and Israeli Supremacy*), al Qahirah: Dar an Nahdah al 'Arabiyah, (1994) p.p. 143-144; Ghanem, Muhammad H., *Muhadrat 'An Jami'at ad Dowal al 'Arabiyah*, (*Lectures on the League of Arab States*), al Qahirah: Ma'had al Buhuth wad Dirasat al 'Arabiyah, (1966) p.p. 18-119. (hereinafter cited as: Ghanem, *Lectures on the Arab League*). It is to be noted that draft amendment to the Pact of the Arab League, which is still under study, proposes that representation to the League Council should be on two levels, one at the Ministerial level and the other higher Council at the level of head states. For more details see al Baharna, Husain, Mithaq al Jami'ah bain al Qutriyah wal Qawmiyah wat Ta'dilat al Muqtaraha, (The Pact of the League between the Regionalism and Nationalism and the Proposed Amendments, in Markaz Dirasat al Wihdah al 'Arabiyyah (ed.), *Jami'at al Dowal al 'Arabiyyah: al Waqi' wa al Tumuh*, (*The League of Arab States*: *Reality and Aspiration*), Beirut: Markaz Dirasat al Wihdah al 'Arabiyyah, (1992) p. 117.

[33] Jabur, Nahlah M. A., Jami'at ad Dowal al 'Arabiyah: Nash'atuha wa Tatwuraha wa Dawruha al Mustaqbali, (The League of Arab States: its Creation, Development and Future Role), 82 *JAA* (1995) p. 248. (hereinafter cited as: Jabur, The League of Arab States); see also Minutes of the Summit Conference of 1996 can be found in XXXV *ILM* (1996) p.p. 1280-1290.

The voting procedures included in the Arab League's Pact provide that unanimity shall be the general rule, so those decisions taken by unanimous votes shall bind all member states, whereas, decisions taken by majority vote shall bind only those members which have accepted them. Each member state has only one vote in the Council, irrespective of the number of its representatives.[34] The Arab League Council meets in ordinary session twice a year, in March and September, An extraordinary session is possible upon the request of at least two members states whenever the need arises; the session shall be considered valid if attended by representatives of the majority of the member states.[35] Council meetings are convened at the invitation of the Secretary-General, and representatives of member states alternately assume the presidency of the Council at each of its ordinary sessions according to the alphabetical order of the list of the states.[36]

Council resolutions require approval by a majority of member states or by two-thirds majority,[37] or unanimity in accordance with the provisions of the Pact, while decisions on necessary measures to repulse aggression against a member state can only be taken unanimously; the vote of the aggressor is not counted if it is a League member.[38]

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[34] Arts. 3 (1) and 7 of the Pact of the Arab League.

[35] Art. 11 of the League's Pact; Art. 11 of the Rules of the League Council. Amendment made to Art. 11 of the Pact of the Arab League by Res. No. 1457/29 on 27th April 1958 in which this Resolution provides: "The Council of the League will meet in ordinary session twice a year in the month of March and October." According to this amendment September become the second ordinary session of the League Council instead of October.

[36] Art. 15 of the Pact of the Arab League; Art. 14 of the Rules of the Arab League Council.

[37] Two-thirds means here two-thirds or more than two-thirds when unanimity is lacking. (This footnote appears in the original Arabic text).

[38] Art. 6 of the Pact of the Arab League; Art. 11 of the Rules of the League Council.

Cairo is the permanent seat of the Arab League-Secretariat General, nevertheless, the League's Council may convene at any other agreed place.[39] According to the decision of the Council held in Baghdad in March 1979, Tunisia was chosen to be the temporary headquarters of the Arab League during the suspension of Egypt's membership. In 1990, the headquarters returned to Cairo when the suspension was removed.[40]

The Pact grants the Council several competences. These include: appointing the Secretary General, amending the Pact, expelling members from the League, accepting new members, mediating in disputes that arise between members or between members and non-members. In addition the Council has to promote the realisation of the objectives of the League and supervise the execution of agreements which the member states have concluded, also it has to decide upon the means by which the League is to cooperate with international bodies in order to guarantee security and peace, and regulate economic and social relations.[41]

2. The Permanent Secretariat General

The Secretariat-General consists of the Secretary-General, at ambassadorial level, a number of assistant Secretaries, at the level of ministerial plenipotentiaries, and a suitable number of principal officials. The Secretary-General is nominated by the League's Council and is appointed for a renewable

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[39] Art. 10 of the Pact of the Arab League.

[40] Hatta, Nasif, Athar Intiqal al Maqar 'Ala Dawr al Jami'ah al 'Arabiyah, (The Effect of Moving the Headquarters on the Role of the Arab League), in Markaz Dirasat al Wihdah al 'Arabiyyah (ed.), *Jami'at al Dowal al 'Arabiyyah: al Waqi' wa al Tumuh*, (*The League of Arab States: Reality and Aspiration*), Beirut: Markaz Dirasat al Wihdah al 'Arabiyyah, (1992) p.p. 651-654.

[41] Arts. 3, 5, 12 (2), and 19 (1) of the Pact of the Arab League; For further details see Obaidallah, Abdullah, H., *The League of Arab States and Arab Unity*, A thesis submitted in partial fulfilment

five year term.[42] A majority of two-thirds of member states of the League is needed for the appointment to be valid. The Assistant Secretaries and principal officials are nominated by the Secretary-General, subject to approval by the League's Council.[43]

The responsibilities of the Secretary-General include several functions: to enforce the resolutions of the Council in the name of the Arab League; take financial actions within the limits of the budget approved by the Council and the Committee; carry out any other assignment entrusted to him by these bodies; in general he is responsible for all acts of the Secretariat-General on behalf of the League Council.[44]

3. The Permanent Committees

There are 11 Committees created in accordance with Arts. 2 and 4 of the Pact of the Arab League: the Political Committee, the Social and Cultural Affairs Committee, the Communication Committee, the Information Committee, the Oil Experts Committee, the Committee for Meteorology, the Health Committee, the Administrative and Financial Affairs Committee, the Human Rights Committee

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of the requirements for the degree of Master of Arts at Mankato State University, Mankato, Minnesota, (1984) p.p. 35-36.

[42] There are no conditions which prohibit member states from nominating one of their citizens to hold the position of the Secretary-General. However, since the creation of the Arab League all who have been appointed for this office are Egyptians except when the headquarters of the Arab League were removed to Tunis. We think it is better to allow other member states in the Arab League to nominate one of their citizens to hold this position. For further details about the conditions required in the person to hold this position see El Saket, Muhamad Abdul Wahhab, *al Amin al 'Am li Jami'at al Duwal al 'Arabiyyah*, (*The Secretary-General of the League of Arab States*), al Qahirah: Dar al Fikr al 'Arabi, (1973-1974) p.p. 105-116. (hereinafter cited as: El Saket, *The Secretary General*).

[43] Art. 12 of the Pact of the Arab League; Art. 2 of the Rules of the Secretary General.

[44] For more details about the competence of the Secretary-General see El Saket, *The Secretary General*, *supra* note 42, p. 271.

and the Conference of Liaison Officers of the Regional Offices for the Boycott of Israel.[45]

The main task of the committees is to formulate the principles and extent of cooperation between member states, and draft international agreements for discussion and approval by the League's Council. They convene at the permanent seat of the League (Cairo); however, it is possible with the approval of the Secretary-General, to meet in another member state. The quorum in each committee is constituted by the attendance of the representatives of the majority of the member states, and resolutions are passed by a majority of those present. In addition, Chairmen are appointed from the Council for each of the Committees for a period of two years.[46]

1. 2. 2. Organs Created under the Collective Security Treaty

The Pact of the Arab League does not embody in its Articles provisions on collective security for the member states, so five years after the creation of the Arab League, the Council decided to conclude a Collective Security Treaty in order to deal with what the Pact neglected. This Treaty was adopted on 13th April 1950, and approved by member states on 17th June 1950.[47] The Treaty set up the following organs:

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[45] Shihab, Mufeed, The League of Arab States, 1 *EPIL* (1992) p.p. 204-205.

[46] Arts. 5, 7, and 9 of the Rules of the Committees; see also Abdul Munim, Ahmed F., *Jami'at al Duwal al 'Arabiyah 1945-1985: Dirasah Tarikhiyah Siyasiyah*, (*The League of Arab States 1945-1985: Historical, Political Study*), Beirut: Markaz Dirasat al Wihdah al 'Arabiyah, (1986) p.p. 21-23.

[47] Ali, Muhamad I., *al Wajiz fi al Munazzmat ad Dawliyah*, (*Summary in International Organisations*), al Qahirah: Dar al Kitab al Jami'i, (1982) p. 439. (hereinafter cited as: Ali, *International Organisations*); Abu Heef, Ali Sadeq, *al Qanun al Dawli al 'Am*, (*Public International Law*), Alexandria: Munsha'at al Ma'arif, (1995) p. 688.

1. The Joint Defence Council (JDC)

By Art. 6 of the Collective Security Treaty, the JDC consists of the foreign ministers and the defence ministers of the contracting states or their representatives; it exercises its competence under the supervision of the League Council. With regard to Arts. 2, 3 and 4 of the Collective Security Treaty, the Council must take all the available and necessary actions to repel any possible aggression against any of the contracting states.[48]

2. The Consultative Military Organisation (CMO)

The CMO was created by the Protocol supplementary to the Collective Security Treaty on 2nd February, 1951. It consists of the Chiefs of Staff of the contracting states, superintends the Permanent Military Commission and guides it in all its duties, considers all its reports and proposals before submitting them to the Joint Defence Council. The CMO has to submit its reports and proposals

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[48] Art. 2 provides: "The Contracting states shall consider that an armed aggression committed against any one or more of them, or against their forces, to be an aggression against them all. For this reason, and in accordance with the right of legitimate self-defence, both individual and collective, they undertake to hasten to the aid of the state or states against whom an aggression is committed, and to take immediately, individually and collectively, all measures and to utilise all means available, including the use of armed force, to repulse the aggression and to restore security and peace. And, in application of Art. 6 of the Pact of the Arab League and Art. 51 of the UN Charter, the Council of the Arab League and the UN Security Council shall be immediately notified of the act of aggression and of the measures and procedures adopted concerning same." Art. 3 provides: "The contracting states shall consult together at the request of any one of them, whenever the territorial integrity, independence or security of any of them is threatened. In the event of the danger of an impending war, or of the emergence of an international contingency the danger of which is apprehended, the contracting states shall immediately proceed to unify their plans and efforts for adopting such preventive and defensive measures as the situation requires." Art. 4 provides: "In a desire to discharge fully the above mentioned obligations, the contracting states shall cooperate with each other for consolidating and strengthening their military power. They shall participate, according to their resources and needs, in preparing the individual and collective means of defence to resist any armed aggression."

regarding its functions to the JDC which considers them and may take any necessary action.[49]

3. The Permanent Military Commission (PMC)

This consists of representatives of the General Staffs of the Armies of contracting states. Its main duty to draw up plans for joint defence and their implementation. All its reports and proposals are submitted to the JDC.[50]

4. The Arab Unified Command (AUC)

By Art. 5 of the Military Annex to the Collective Security Treaty it is provided that the Chief command of all the forces in the field shall be vested in the state whose forces operating in the field are greater in number and equipment than those of each of the other states, unless the commander-in-chief is elected in a manner different with the consensus of the governments of the contracting states. The Commander-in-Chief shall be assisted in the direction of military operations by a joint council of chiefs of staff. Accordingly, the League Council in 1964 agreed to create the AUC to achieve Arab collective aims.[51]

5. The Economic Council

The Economic Council created by the contracting states, comprises the ministers involved in economic affairs or their representatives, to present recommendations for the fulfilment of all aims coordinated with the development

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[49] For the full text of the supplementary Protocol see Khalil, *Documentary Record*, *supra* note 8, p.p. 105-106.

[50] Art. 5 of the Collective Security Treaty; see also Shihab, Mufeed M., *al Munazzmat al Dawliyah*, (*The International Organisations*),al Qahirah: Dar al Nahdah al 'Arabiyah, (1990) p. 449. (hereinafter cited as: Shihab, *The International Organisations*).

[51] Khalil, *Documentary Record*, *supra* note 8, p. 104-105; Shihab, *The Arab League*, *supra* note 6, p. 113.

of the economies of Arab states, to exploit their natural resources, to facilitate the exchange of their respective agricultural and industrial products, to organise and to coordinate their economic activities and generally conclude any necessary inter-Arab agreements serving given adjectives.[52]

1. 3. Membership in the Arab League

As a result of limiting membership in the Arab League to only Arab states, the draft Statute of the ACJ also provides that only Arab states, as a general rule, can be parties to the Statute of the Court, and non Arab states are thus prevented from being parties to this Statute. Art. 2 of the draft Statute provides 'Member states of the League of Arab states are *ipso facto* parties to the present Statute.' Therefore, discussing membership in the Arab League becomes necessary. Art. 1 of the Pact of the Arab League provides:

> "The League of Arab states is composed of the independent Arab states which have signed this Pact.
> Any independent Arab state has the right to become a member of the League. If it desires to do so, it shall submit a request which will be deposited with the Permanent Secretariat-General and submitted to the Council at the first meeting held after submission of the request."

Thus the Arab League comprises those independent Arab states which signed and ratified the Pact in 1945.[53] It is also possible for any other independent Arab state to become associated with the Arab League and become a member by depositing a membership application with the Permanent Secretariat-General and accepting the obligations mentioned in the Pact of the Arab League and respect for

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[52] Jabur, The League of Arab States, *supra* note 33, p. 228.

[53] Those states are known as founding members are as follows: Egypt, Iraq, Jordan, Lebanon, Saudi Arabia, Syria and North Yemen.

its Rules without any reservation.[54] There are currently twenty two members. Therefore, it becomes necessary to talk in brief about the possibilities of acquisition of membership and loss of membership in accordance with the Arab League Pact.

1. 3. 1. Acquisition of Membership

Any entity which desires as a state become a League member should enjoy certain qualifications and follow certain procedures for acquiring membership as provided for by Art. 1 of the Pact of the Arab League. The qualifications in question concern:

1. Statehood

States are the most important subjects of international law. The attributes of statehood are population, defined territory, government and capacity to enter into relations with other states.[55] Therefore, membership of the Arab League is open only to states possessing these attributes.

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[54] As soon as any Arab state acquires its independence, the first thing its government does is apply for membership in the Arab League, which is considered as the Home of Arabs. The twenty two members, including the founding ones, are as follows: (the following arrangement of member states names will be made according to their date of association) Libya 28/3/1953 (Res. 497), Sudan 19/1/1957 (Res. 1107), Morocco 1/10/1958 (Res. 1496), Tunisia 1/10/1958 (Res. 1497), Kuwait 20/7/1961 (Res. 1777), Algeria 16/8/1962 (Res. 1584), South Yemen 12/12/1967 (Res. 2374), but regarding the unification of North and South Yemen on 22 May 1990 only one state has appeared as a member in the Arab League named Republic of Yemen. Bahrain 11/9/1971 (Res. 2793), Qatar 11/9/1971 (Res. 2794), Oman 29/9/1971 (Res. 2860), United Arab Emirates 26/12/1971 (Res. 2864), Mauritania 26/22/1973 (Res. 62/d6), Somalia 14/2/1974 (Res. 3112), Palestine 9/9/1976 (Res. 3462), Djibouti 4/9/1977 (Res. 3614), and Comorros 20/11/1993 (Res. 5327). The numbers of these resolutions have been obtained from the League of Arab States: London office.

[55] Barry, E. Carter and Phillip, R. Trimble, *International Law*, Canada: Little, Brown and Company, (1991) p.p. 411-418; Crawford, James, The Criteria for Statehood in International Law, XLVIII *BYbIL* (1976-77) p.p. 111-119.

2. Independence

It is necessary that any state which aspires to apply for membership to any international organisation should be independent, because it will otherwise not be able to carry out the obligations of membership. Additionally, independence under international law has a very special meaning. It consists of a number of rights and duties that a state should exercise, for example, the right to exercise full jurisdiction over its territory and population, or the right to protect and secure its territory and population from any foreign aggression even by using force in self-defence.[56]

Since the establishment of the Arab League, several arguments have been considered by its Council regarding the possession of independence by a state which wants to apply for membership. Should the Council refuse a state membership of the Arab League simply because it is not considered to be an independent state? At 1954 the League Council decided not to accept Oman as member of the Arab League because it allegedly did not fulfil the requirements,[57] despite the fact that most of the founding members of the Arab League such as Egypt, Lebanon, Syria and Transjordan(Jordan) were not at that time enjoying full independence in the legal meaning of the term.[58] It is to be noted that a wide interpretation has been applied by the League Council to the meaning of the term

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[56] Shaw, M. N., *International Law*, Cambridge: Cambridge University Press, (1997) p. 149; Amerasinghe, Chittharanjan. F., *Principles of the Institutional Law of International Organisations*, Cambridge: Cambridge University Press, (1996) p. 111. (hereinafter cited as: Amerasinghe, *Principles of International Organisations*).

[57] Shihab, *The International Organisations*, *supra* note 50, p. 427.

[58] Gomaa, *The Foundation of the Arab League*, *supra* note 4, p. 242; Khadduri, The Arab League, *supra* note 16, p.p. 766-768.

'independence'. It was argued that it is not necessary a state to enjoy full independence to qualify for Arab League membership, but it is required that state must at least enjoy a limited scope of self-government and enjoy international recognition from a number of other states. The Council is competent to decide if this condition is fulfilled.[59]

3. To be an Arab State

The Arab League's Pact excludes non-Arab states from membership, which means only Arab states can be accepted as a member of the organisation in order to retain very strongly and clearly the Arab nature of the League. Being an Arab state although an important provision, is not defined by the Pact of the Arab League. A wide discussion was carried out by the founding states before drafting the Pact in 1944 in order to reach a suitable interpretation of the word 'Arab'. It was understood that this denoted a matter of civilisation, common language, common culture, common destiny and common aspiration to qualify as an Arab Nation. Despite that differences have appeared as some writers have said this condition is fulfilled merely if the population speaks Arabic, whereas others have said that it is not enough only to speak Arabic, but that candidates must also prove that they have a strong relation with Arabism, and to feel as if they are part of the Arab Nation.[60] The practice followed is that the League's Council has the responsibility to discuss the satisfactory existence of this condition when a

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[59] al Daqqaq, Muhamad al Saed, *al Tanzim al Dawli*, (*The International Organisations*), al Qahirah: Dar al Jami'ah al Jadidah lil Nashir, (1990) p.p. 626-628. (hereinafter cited as: al Daqqaq, *The International Organisations*).

[60] For more details see Ali, *International Organisations*, *supra* note 47, p.p. 419-421; Ghali, The Arab League, *supra* note 32, p. 70.

particular state applies for membership, and to take its decision accordingly. Political motives usually play a very important role in the Council's decision.[61]

4. Approval by the League Council

Even though the Pact mentions that every independent Arab state has the right to become a member in the Arab League, membership does not follow automatically without an application by the state concerned. When a state desires to become an Arab League member it must submit its written request to the Permanent Secretariat-General, thereupon the League Council will consider the application at the first meeting after the submission of the request. It is also possible to arrange an extraordinary session to consider an application.[62]

Regarding the Pact requirements, membership is deemed to be a right for any independent Arab state. This fact has led the League Council in most cases to avoid finding whether an application fails to fulfil the conditions, unless the question affects the security of the Arab League.[63] Unfortunately, the Pact in this point does not specify the number of votes required for the League Council's approval of a new member.[64] This has led to differences in opinion between Arab

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[61] The League Council did not face any problems to make its decision with regard to some membership applications, because most of the applicants have possessed the Arabism requirement, but when particular states applied for membership like Djibouti, Mauritania and Somalia, the Council found itself in a serious confusion, but finally, the decision was made to give them full membership in the Arab League, which demonstrated the political role in this matter. For more details of these arguments, see Ali, *International Organisations*, *supra* note 47, p.p. 419-421.

[62] *Ibid.*, p.p. 421-423.

[63] I think there is a great difference between membership in the Arab League and membership in the UN. "Membership in the United Nations is open to all other *Peace Loving* States which accept the obligations contained in the present Charter." Art. 4 of the Charter of the UN. Whereas membership in the Arab League by virtue of Art. 1 (2) of the Pact is considered as a Right for any independent Arab state. See also Shihab, *The Arab League*, *supra* note 6, p. 63.

[64] *Cf.* the Charter of the UN in which Art. 18 (2) provides:

jurists; some of them claim a unanimous vote is required in accordance with the general principle for voting in the Arab League's Pact, whereas, others argue that only a majority vote is necessary for the League Council to take a decision to accept a new member.[65]

The second opinion is preferable. It is supported by the League Council's practice. Numerous states have been accepted as members in the Arab League by a majority vote, such as Kuwait despite the objection of Iraq, South Yemen in spite of the reservation of Saudi Arabia, Oman despite the reservation of Saudi Arabia and North Yemen, and United Arab Emirates despite the abstention of the Saudi Arabia in the vote while Iraq expressed reservations and North Yemen objected. All these decisions mean that the League's Council has applied in its practice with regard to membership majority instead of unanimity voting.[66]

Furthermore, the League Council resolution (2718) on 2nd March 1971 could be used as another evidence to support the idea that only a majority vote is necessary for the League Council to take a decision to accept a new member. Although this resolution did not explicitly provide that a majority vote is required in the case of membership, it does demonstrate that the unanimous vote required in Art. 6 concerns only matters dealing with the sovereignty of member states. In

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"Decisions of the General Assembly on important questions shall be made by a two thirds majority of the members present and voting. These questions shall include: the admission of new member to the United Nations."

[65] Ali, *International Organisations*, *supra* note 47, p.p. 422-425; al Ghunaimi, Muhamad T., *Jami'at al Duwal al 'Arabiyyah: Dirasah Qanuniyah Siyasiyah*, (*The League of Arab States: Legal, Political Study*), Alexandria: Munsha'at al Ma'arif, (1974) p. 83. (hereinafter cited as: al Ghunaimi, *The Arab League*).

[66] For more details about voting procedures for the League Council see Macdonald, Robert W., *The League of Arab States: A Study in the Dynamics of Regional Organisation*, New Jersey: Princeton University Press, (1965) p.p. 56-61.

view of the fact that membership is not considered as a matter of sovereignty, Art. 6 of the Pact accordingly, cannot be applied on matters of membership.[67]

1. 3. 2. Loss of Membership [68]

The Pact of the Arab League has granted its members the right to withdraw from the League if their respective interest demands such withdrawal.[69] The League Council has the right to expel any member failing to fulfil its obligations under the Pact.[70] Thus, two main kinds of loss of membership should be considered below, withdrawal and expulsion, without forgetting loss of international legal personality, suspension and how they may effect membership.[71]

1. Withdrawal

Most international organisations permit in their Charters members to withdraw after a period of notice given in advance.[72] This is the case with the Arab League. It is permitted for any member to withdraw from it at any time, the only condition being to inform the League's Council one year before withdrawal is

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[67] For further discussion see al Daqqaq, *The International Organisations*, *supra* note 59, p.p. 629-632.

[68] Ghali, Botrus B., Fuqdan al 'Udwiyah fi Jami'at al Duwal al 'Arabiyyah, (Loss of membership in the League of Arab States), 11 *Revue Egyptienne* (1955) p.p. 123-135.

[69] Art. 18 (1) of the Pact of the Arab League provides: "If a member state contemplates withdrawal from the League, it shall inform the Council of its intention one year before such withdrawal is to go into effect." Art. 19 (3) on the other hand, provides: "If a state does not accept such an amendment (to the Pact) it may withdraw at such time as the amendment goes into effect, without being bound by the Provisions of the preceding Art. 18 (1)."

[70] Art. 18 (2) provides: "The Council of the League may consider any state which fails to fulfil its obligation under the Pact as having become separated from the League."

[71] One of the main points which is going to be clarified when discussing the jurisdiction of the ACJ is whether losing membership from the Arab League for any reason will affect the state's right to appear before the Court or not.

[72] There was disagreement between delegations who drafted the UN Charter regarding to the right of withdrawal from this Organisation, but at the end of considerations it was agreed not to mention it in the Charter. For more details see, Schwelb, Egon, Withdrawal from the United Nations: The Indonesian Intermezzo, 23 *CLP* (1979) p. 145; Feinberg, N., Unilateral Withdrawal from an International Organisation, XXXIX *BYbIL* (1963) p.p. 199-202.

to take effect.[73] The necessity for this condition is to inform other members of the organisation in advance and to give the League's Council enough time to discuss the situation with the member concerned, possibly eliminating causes underlying the intention to withdraw and to reach a suitable resolution. The Pact is deficient in dealing with withdrawal in comparison with the Covenant of the League of Nations. Art. 1 (3) of the Covenant provided for withdrawal from the League and required the member to inform the League's Council two years in advance before such withdrawal, and also that a state must fulfill all the obligations toward the League before the withdrawal could take effect. No similar requirement is found in the Arab League Pact.[74]

The relationship between members in a regional organisation is supposed to be stronger than in a universal organisation, so it is submitted that the period for informing the League Council of an intention to withdraw should be more than one year or more than the period mentioned in the League of Nations Covenant, because of the special nature of the structure of the Arab League.[75]

Historically, since the establishment of the Arab League no member state has attempted to withdraw from it despite the fact that there have been many disagreements and disputes between the members. However, the League Council

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[73] al Ghunaimi, *The Law of Nations*, *supra* note 17, p. 1015.

[74] *Cf.* Covenant of the League of Nations in which Art. 1 (3) provides:

> "Any member of the League may, after two years notice of its intention so to do, withdraw from the League, provided that all its international obligations and all its obligations under this covenant shall have been fulfilled at the time of its withdrawal."

[75] Ghanem, *Lectures on the Arab League*, *supra* note 32, p. 44.

has faced a lot of boycotting of its sessions by some member states.[76] Art. 19 of the Pact provides that it is possible for any member to withdraw from the Arab League if it does not favor an amendment made to the Pact. In such a situation a year's notice is not required.[77]

2. Expulsion

The League's Council has the authority to expel any member state which fails to fulfil its obligations under the Pact.[78] The decision does not take effect unless adopted by unanimity, not counting the vote of the member concerned. Since the creation of the Arab League, the League Council has not used this competence. However, the most important practice in this matter is Resolution (292/12) adopted on 1st April 1960, which states that:[79]

> "Any member state entering into negotiations with Israel with a view of the conclusion of a unilateral political military or economic agreement will immediately be excluded from the League in accordance with the provisions of Art. 18 of the Pact."

3. Suspension [80]

Initially, the League's Pact did not provide for suspension in its Articles.[81] Nevertheless, a Resolution was adopted by the League's Council during the

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[76] Some examples of such boycotting sessions are Jordan in June 1950, Tunisia in 1958, Iraq, Jordan and Tunisia in December 1959, and Egypt in 1962. For more details see Ghali, The Arab League, *supra* note 32, p. 72; Shihab, *The International Organisations*, *supra* note 50, p. 429.

[77] al Ghunaimi, *The Law of Nations*, *supra* note 17, p. 1015.

[78] The Council of the League of Nations had the right to expel any member from the League. Art. 16 (4) provided that: "Any member of the League which has violated any covenant of the League may be declared to be no longer a member of the League by a vote of the Council concurred in by the representatives of all the other members of the League represented thereon."

[79] For further details see Ghali, The Arab League, *supra* note 32, p. 73.

[80] South Yemen was the first member state of the Arab League to have its membership suspended. That was in July 1978 but after just few months it started to attend the session of the League's Council again and became an active member, see Shihab, *The International Organisations*, *supra* note 50, p. 431.

[81] *Cf.* Art. 5 of the Charter of the UN.

Conference of the Arab Ministers of Foreign Affairs and Economy, held in Iraq from 27-31 March 1979 to suspend Egypt's membership and to terminate all its rights and privileges subsequent to the signature of the peace treaty with Israel.[82] In addition to suspension, political and economic measures were taken, such as the discontinuation of economic contributions, interruption of diplomatic relations and the removal of the League's permanent seat from Cairo to Tunisia.[83]

No doubt, the League's Council has no legal authority to take such action against any of its members. The only measures which can be taken is expulsion under Art. 18 (2), which means that the Resolution breached the Pact, but, as usual, political reasons always play their role.[84]

4. Loss of International Legal Personality

If any member state in the Arab League loses its international legal personality as a result of unification with another state, or for any other reason, its membership immediately terminates. This is a general principle of international law of state succession.[85] In the history of the Arab League, member states have twice lost their membership as a result of unification. The first was upon the

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[82] Eighteen member states and Palestine Liberation Organisation attended this Conference, Egypt, Oman and Sudan were absent. For more details about this treaty and other related documents see 17 *ILM* (1978) p.p. 1463-1474; 18 *ILM* (1979) p.p. 362-393.

[83] Bashir, *The International Organisations*, *supra* note 14, p.p. 479-480; Shihab, *The International Organisations*, *supra* note 50, p. 431. Egypt's membership was suspended for around ten years. When it started to practise its activities as a member in the Organisation of Islamic Conference (OIC) diplomatic relations had been resumed by most of Arab states. This helped to clear the way for it to regain membership in the Arab League. In 1989 an invitation sent to the Egyptian Government to attend the extraordinary Conference of Head of States which was to be held in Casablanca, and by this attendance its suspension was terminated.

[84] For more details see Abul Wafa, Ahmed, *al Wasit fi al Munazzmat al Dawliyah*, (*Intermediary in International Organisations*), al Qahirah: Dar al Nahdah al 'Arabiyah, (1996) p.p. 493-493. (hereinafter cited as: Abul Wafa, *International Organisations*); al Daqqaq, *The International Organisations*, *supra* note 59, p.p. 637-638.

[85] Amerasinghe, *Principles of International Organisations*, *supra* note 56, p.p. 111-113.

unification of Egypt and Syria in 1958 to form the United Arab Republic (UAR), and the second in 1990 when North and South Yemen formed the Republic of Yemen. Should the unified states subsequently dissolve, each resulting state can resume its original membership. This has happened with the dissolution of the UAR in 1961.[86]

1. 4. The Pact of the Arab League and the Settlement of Disputes

Settling disputes by peaceful means between states is a very important issue in the international community.[87] All the regional or international organisations refer to it in their constitutions.[88] The Pact of the Arab League commends the use of peaceful methods and prohibits the use of force to settle international disputes between its members. In this connection, the Iraqi delegation stated in the Preparatory Committee of the Plenary Arab Conference:[89]

> "we hope that the use of force will be prohibited for the settlement of such disputes as will arise between one State and another. This we further hope, should be so expanded as to make it compulsory for

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[86] Shihab, *The Arab League*, *supra* note 6, p. 67.

[87] al Rashidi, Ahmed H., Jami'at ad Dowal al 'Arabiyah wa fad al Munaz'at Silmiyyan: Dirasah Muqaranah lil Khibrah at Tarikhiyah, (The League of Arab States and Settling Disputes by Peaceful Meaning: Comparison Study to the Historical Practice), 37 *JAA* (1984) p.p. 148-166; al Majzub, Muhamad, Observation on the Role of the Arab League in the Settlement of Inter-Arab Disputes, 1 *Arab Affairs* (1986) p.p. 138-145. (hereinafter cited as: al Majzub, Arab League and Settlement of Inter-Arab Disputes); Shukri, Muhamad Aziz, Preventive and Conflict Resolutions by the Arab League, (A paper Presented to the Conference on the Golden Jubilee of the League), London, 5th April 1995 p.p. 5-6.

[88] The UN as the greatest international organisation in the present time promotes the use of peaceful means in settling international disputes. Art. 33 (1) of its Charter enumerates all the available methods to which any party to a dispute can resort "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, or resort to regional agencies or arrangements, or other peaceful means of their own choice." See Van Dervort, Thomas R., *International Law and Organization: An Introduction*, London: SAGE Publications Ltd., (1998) p. 426.

[89] The League of Arab States, *Minutes of the Preparatory Committee of the Plenary Arab Conference* (hereinafter cited as: *MPCPAC*), Alexandria, (1944) p. 42. Translation quoted form Foda, Ezzeldin, *The Projected Arab Court of Justice: a study in regional jurisdiction with specific reference to the Muslim law of nations*, The Hague: Martinus Nijhoff, (1957) p. 3. (hereinafter cited as: Foda, *The Projected Arab Court*).

> member States-in certain matters-to adopt no plans that are, at least, inconsistent with the general plan unanimously agreed upon."

It is to be understood that when the Arab League was created, the respected ideology in the Arab world was the 'rule of law'. This led delegations of the original states to support the idea of settling inter-Arab disputes by peaceful means, and to prohibit the use of force.[90] This approach is apparent in the Minutes of the Preparatory Committee meetings which drafted the proposal of the Pact of the Arab League. Delegations accepted unanimously the use of arbitration as a peaceful method in settling disputes between member states. However some of them, such as Egypt and Saudi Arabia, supported the idea of compulsory arbitration as the best means for the maintenance of peace and security in the Arab region, whereas others such as Lebanon and Iraq opposed this idea and argued for only voluntary arbitration. It is however to be noted that the most notable disagreement between the delegations in the Preparatory Committee was whether the power of compulsory or voluntary arbitration should be given to the League Council to settle such disputes as may arise between member states. Differences in ideas lead to the postponement of the creation of the ACJ as a judicial organ in the Arab League system.[91]

The Egyptian attitude toward compulsory arbitration intended to give the League Council full powers to intervene in any dispute that might arise between

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[90] Izz al Rijal, Omar, Jami'at al Dowal al 'Arabiyyah wa Munaz'at al Hudud al 'Arabiyyah, (The League of Arab States and the Arab Boundaries Disputes), 111 *al Siyasah al Dawliyah* (1993) p.p. 201-202; Ghali, The Arab League, *supra* note 32, p. 81; al Majzub, Arab League and Settlement of Inter-Arab Disputes, *supra* note 88, p. 138.

[91] al Rashidi, Ahmed H., al Tahkim al Dawli fi al Khibrah al 'Arabiyah al Mu'asirah, (The International Arbitration in the Arabian Contemporary Practice), 62 *JAA* (1990) p. 121; al Kadhem, S. J., The Role of the League of Arab States in Settling inter-Arab Disputes, 32 *Revue Egyptienne* (1976) p.p. 16-17. (hereinafter cited as: al Kadhem, The Role of the League).

member states, otherwise their peace and security would be endangered. Its proposal to the Preparatory Committee insisted upon this idea:

> "the Council should, in the common interest, intervene before a situation reaches the stage of using, or of threatened use of, force, since any dispute, if left unsettled, might be aggravated to such an extent that a remedy would be impossible."[92]

The Saudi Arabian delegation strongly supported the idea of compulsory arbitration proposed by the Egyptian delegation. In January 1945 it sent a memorandum to the Egyptian delegation expressing support. It was as follows:

> "War is prohibited among Arab States. Any dispute between two parties of the Arab group, [or] any negligence by either party in complying with its commitments under the Pact shall be settled by conciliation, mediation or arbitration on a just and equitably fraternal basis, so that the dispute involved may be settled and any unexecuted commitments carried out. Should either party decline to accept arbitration or abide by any award given, the other Arab States should advise him and guide him to the righteous path. If such a party turns the advice down and continues to be aggressive, they may, in consultations between them, decide on such action as would stop aggression and establish justice and equity among the Arab nations."[93]

It should be understood that the Saudi proposal on compulsory arbitration was influenced by the Islamic notion of the proper way of settling disputes even before the creation of the Arab League.[94] This led Saudi Arabia to take early

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[92] *MPCPAC*, p. 42. Translation quoted from Foda, *The Projected Arab Court*, *supra* note 90, p.p. 10-11.

[93] The League of Arab States, *Minutes of Political Sub-Committee*, (Cairo February 1945), Cairo, (1946) p. 17. (hereinafter cited as: *MPSC*). Translation quoted from Foda, *The Projected Arab Court*, *supra* note 90, p. 12.

[94] Islam as a religion and legal system also supports the use of peaceful methods in settling all disputes which may arise in the Muslim community, in order to protect Muslim brotherhood, and to obey Allah's commandments. Allah said in the Holy Quran: "The believers are nothing else than brothers (in the Islamic religion). So make reconciliation between your brothers, and fear Allah, that may receive mercy". Quran, 49:10. So if any dispute arises between Muslims, the others have to intervene between the disputants in order to solve the conflict. Allah said in the Holy Quran: "And if two parties or groups among the believers fall into fighting, then make peace between them both. But if one of them rebels against the other, then fight you (all) against the one that rebels till it complies with command of Allah; then if it complies, then make reconciliation between them justly, and equitably. Verily! Allah loves those who are equitable". Quran, 49:9. In this thesis the translation used of the meaning of Quran is al Hilali, Muhammad T., and Khan, Muhammad M.,

action in this direction by concluding several treaties with its neighbours such as Transjordan (Jordan), Yemen, and Iraq. These treaties embodied the idea of compulsory arbitration as an effective method for settling disputes arising between them.[95]

The Lebanese attitude towards compulsory arbitration was to reject it. The Lebanese government believed that compulsory arbitration affected states' independence and sovereignty. So, during the Preliminary Sub-Committee meeting, the Lebanese delegation announced that its government would not accept any proposal on compulsory arbitration in general, or any kind of arbitration at all in disputes related to the independence, sovereignty, and territorial integrity of member states. It agreed that any other disputes were to be settled by voluntary arbitration if the parties accepted, whether before the League Council or before the ACJ.[96]

The Iraqi delegation believed that the best way of settling inter-Arab disputes was to resort to peaceful methods such as arbitration, but it accepted only

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Interpretation of the Meanings of the Noble Quran in the English Language: A Summarised version of At Tabari, Al Qurtubi, and Ibn Kathir with comments from Sahih al Bukhari, (Summarised in one volume), Riyadh: Maktabat Dar-us-Salam, (1994). (hereinafter cited as: Quran).

[95] The first Treaty was concluded with Transjordan in 27th July 1933, known as the Treaty of Friendship and Good Neighbourliness, together with a protocol on Arbitration and a Schedule appended to the Treaty. The second was the Treaty of Islamic Friendship and Brotherhood with Yemen, known as Taif Treaty, 20th May 1934, appended to this Treaty Arbitration Convention of 29th May 1934. The Third Treaty known as The Treaty of Arab Brotherhood and Alliance with Iraq, 2nd April 1936. The full text of these Treaties, Khalil, *Documentary Record*, *supra* note 8, p.p. 212-224; Seton-Williams, *Britain and the Arab States*, *supra* note 12, p.p. 298-301.

[96] *MPSC*, p. 23; *MPCPAC*, p. 35.

voluntary arbitration. Its memorandum to the Preliminary Sub-Committee on 24th February 1945 stated that:[97]

> "it is possible for the Iraqi government to accept any provision that would render the Arab League Council competent to intervene for the settlement of disputes, especially those arising over previous agreement and conventions, where the disputants have accepted such intervention."

Another memorandum submitted to the Political Sub-Committee on 26 February 1945 explained the reason why the Iraqi delegation rejected compulsory arbitration. It stated:[98]

> "The League Council would be composed of representatives of Arab States, hence a political organ. Its authority to intervene for the settlement of such disputes as may arise between member States, without the consent of the two disputant parties, would create a serious situation threatening the whole structure of the League. Furthermore, it would put some of the League members in such critical situations that they would be compelled to avoid being implicated in matters that are not consistent with the interests of those States. It is not proper that we should enter into an organisation which aims, through continued cooperation, at the realisation of unsound bases which would produce corruption, contrary to the organisation's objectives."

The final agreement between original states in the projected Arab League was to give its Council optional jurisdiction with voluntary methods for the settlement of disputes between member states. This appears in two places, Art. 5 of the Pact of the Arab League and Art. 1 of the Collective Security Treaty. Unfortunately, neither Art. 5 nor Art. 1 enumerate specific methods that should be followed by member states if any dispute arises between them, and at the same time do not bind members states to resort to the League Council to ask for intervention before referring their dispute to another regional or international organisation.[99]

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[97] *MPSC*, p. 63. Translation quoted form Foda, *The Projected Arab Court*, *supra* note 90, p. 13.
[98] *MPSC*, p. 64. Translation quoted form Foda, *The Projected Arab Court*, *supra* note 90, p. 14.
[99] Abu al Saud, The League of Arab States, *supra* note 23, p. 18.

Furthermore, it should be understood, as it appears in Art. 5 of the Pact of the Arab League, that only two kinds of peaceful settlement methods are available to member states, namely, mediation and arbitration, considered as voluntary methods, and the Council of the League has no compulsory jurisdiction as a mediator or arbitrator. All its interventions require the request and consent of the parties.[100] It has the authority to intervene as an arbitrator in any dispute arising between member states on condition that a disputant has asked for intervention and the dispute does not relate to a state's independence, sovereignty or territorial integrity. Its decision shall be made by majority vote, shall be compulsory and binding on the disputant, who should not take part in the deliberations or voting.[101] On the other hand, the League Council has the right to mediate in any dispute that could lead to a war between two or more member states, or between a member state and third state, in order to reach proper reconciliation whether the disputant has asked for mediation or not. Its decisions shall be taken by majority vote, not counting the vote of the disputant; they do not bind the disputing parties.[102]

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[100] It is to be noted that even the League Council granted limited competence to intervene as an arbitrator, this does not mean it is considered as a judicial organ within the Arab League system. In this regard Foda argued:

> "As a matter of fact, the Council of the Arab League is not a tribunal and cannot be a tribunal in the strict sense. It might not include a sufficient number of competent international jurists. Moreover, the fact that the Arab States are obligated under Article 5 to execute the arbitral decision of the Council passed by majority vote, does not give the Council the character of a tribunal." See his *The Projected Arab Court*, *supra* note 92, p. 43.

[101] al Ghunaimi, *The Arab League*, *supra* note 66, p.p. 54-56.

[102] Ghanem, *Lectures on the Arab League*, *supra* note 32, p.p. 47-49; al Ghunaimi, *The Arab League*, *supra* note 66, p. 56. Despite the non binding decision of the League Council, nevertheless, it is recommended that the parties have to accept its mediation to avoid tension which could lead to war, such as the second Gulf War, 1990 between Iraq and Kuwait. This is one of several examples which prove the inability of the League of Arab states to solve its disputes between members, because there are not any organs available for this purpose.

Three kinds of disputes are considered under Art. 5 of the Arab League's Pact: (1) disputes relating to a state's independence, its sovereignty or its territorial integrity; (2) disputes which could lead to war; and (3) disputes not relating to the above matters. Unfortunately, regarding the first group of disputes, Art. 5 does not define the meaning of 'independence', 'sovereignty', or 'territorial integrity'. This ambiguous situation has led to disagreement between writers, some of whom argue that the League Council can define any of these terms.[103] Regarding the second group of disputes, the Pact again does not designate who has the authority to decide whether, or not, such a dispute may lead to war. Therefore, the League Council only may be competent to consider disputes as not falling under the other categories. In other words, it has competence as to disputes not related to states' independence, sovereignty or its territorial integrity.[104]

This however gives an indication that the system of the settlement of disputes in the Arab League is not adequate to settle inter-Arab disputes. Since the creation of the Arab League, many inter-Arab disputes have arisen and this organisation failed to settle them because of the incapability of the present system of settlement of disputes. It is therefore necessary to reconsider the existing system and reform the Pact by following the system that the UN has adopted, by including the judicial organ as one of the main organs of the Arab League.[105]

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[103] Pogany, Istvan, *The Arab League and Peacekeeping in the Lebanon*, England: Avebury Gower Publishing Company Limited, (1987) p. 12; Foda, *The Projected Arab Court*, *supra* note 90, p. 38.

[104] al Kadhem, The Role of the League, *supra* note 92, p. 20.

[105] For more details about disputes which the Arab League failed to solved within its system see, for example, Hilal, Ali Addeen, Jami'at ad Dowal al 'Arabiyah wan Nizam al 'Arabi: Tarh li Ishkalat al Tatweer, (The League of Arab States and the Arabic Regime: presenting to the developing ambiguities), 69 *JAA* (1992) p.p. 13-16.

1. 5. The Necessity of the ACJ within the Arab League System

One may ask if is it necessary to establish a regional international court while the ICJ at The Hague exists? The answer to this question has generated disagreement between international lawyers. Some have rejected the idea, such as Jenks, arguing that two major legal problems will arise when such a Court is established. Firstly, a conflict regarding jurisdiction between the two Courts, the international and the regional. Secondly, the future unity of international law may be adversely influenced by regional legal conceptions in respect of matters where it is thought desirable that uniform rules of world-wide validity should exist.[106] The majority of international lawyers have recognised the importance of regional international courts, and supported the reasons which call for the creation of such Courts.[107]

It seems to be necessary for any regional or international organisation to have a judicial organ just as its needs legislative, executive and administrative organs.[108] The practice of many regional organisations has adopted the idea of creating judicial organs within their respective systems in order to settle

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[106] Jenks, C. Wilfred, Regionalism in International Judicial Organisation, 37 *AJIL* (1943) p.p. 314-316.

[107] For example, see Hudson, Manley O., *International Tribunals: Past and Future*, Washington: Brookings Institution, (1944) p.p. 245-249; Bederman, David J., The Glorious Past and Uncertain Future of International Claims Tribunals, in Jains, Mark W. (ed.), *The International Courts for the Twenty-First Century*, The Netherlands: Martinus Nijhoff Publishers, (1992) p. 171; Shihab, *The Arab League*, *supra* note 6, p. 116; Abul Wafa, *International Organisations*, *supra* note 84, p.p. 610-611.

[108] al Rashidi, Ahmed H., Hawl Dharorat al Jihaz al Qadai fi Nitaq Jami'at ad Dowal al 'Arabiyah: Dirasah fi Dho' Ahkam al Qanun ad Dawli, (About the Necessity of the Judicial Organ in the League of Arab States: A study on the Light of the Principles of Public International Law), 59 *JAA* (1989) p. 7. (hereinafter cited as: al Rashidi, About the Necessity of the Judicial Organ.); see also Bilder, Richard, International Disputes Settlement and the Role of International Adjudication, in Lori F. Damrosch (ed.), *The International Court of Justice at a Crossroads*, New York: Transnational Publishers, Inc., (1987) p.p. 158-162.

international disputes between their members, thus imitating the UN model.[109] Unlike the Charter of the UN, the Pact of the Arab League does not provide, however, for the creation of an ACJ as one of its organs.[110] The only reference to the ACJ in the 1954 Pact is in Art. 19 (1) when member states agreed to amend the Pact for various reasons, comprising, *inter-alia*, the creation of the Court. Art. 19 (1) provides:

> "The present Pact may be amended with the consent of two thirds of the states belonging to the League, especially in order to make firmer and stronger the ties between the member states, to create an Arab Court of Justice, and to regulate the relations of the League with any international bodies to be created in the future to guarantee security and peace."

Below two main points will be considered: the expected role of the ACJ in settling inter-Arab disputes; and the previous attempts to reform the Pact of the Arab League in order to include a judicial organ within its system.

1. 5. 1. The Expected Role of the ACJ

Many international lawyers have rightly argued that international courts and tribunals can play an important role and serve organisations and their members in

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[109] For example, according to the European Convention of Human Rights of 4th November 1950, and then to the American Convention of Human Rights of 22nd November 1969, the European Court of Human Rights on the one hand, and the Inter-American Court of Human Rights on the other hand, were created and granted, both, competence in matters relating to Human Rights violations in connection with provisions of these conventions; The Court of Justice of European Communities was established according to the convention of 25th March 1957 which created institutions common to the European Communities. This Court was granted jurisdiction in matters concerning the European Economic Community, European Coal and Steal Community, and the European Atomic Energy Community. There is also the Treaty concerning the creation and the Statute of the Benelux Court of Justice of March 1965; The Treaty creating the Court of Justice of the Cartagena Agreement of 28th May 1976. See Office of Legal Affairs Codification Division, *Handbook on the Peaceful Settlement of Disputes Between States*, New York: United Nations Publications, (1992) p.p. 68-69.

[110] At present only three organs are available within the Arab League system, the ACJ is not one of them, they are as follows: The League Council (Art. 3); The Secretariat-General (Art. 12); and The Permanent Committees (Arts. 2 and 3). Also see above p.p. 14-19.

the settlement of disputes, interpretation and application of conventions and treaties; and the progressive development of international law. We can assume that the ACJ too can fulfill the same functions in the Arab region.

1. Settlement of Disputes

International disputes can be settled in three ways: use of force, diplomatic methods, or judicial settlement. According to the Pact of the Arab League, the use of force is prohibited, and in most circumstances political methods are not satisfactory to solve justiciable disputes. Therefore, the remaining alternative is recourse to judicial settlement by submitting conflicts between member states to the ACJ as a factor in the maintenance of peace and security in the Arab region. Most if not all Arab states have disputes with neighbors and all of them can be considered as justiciable, independent from their political background.[111] Furthermore, it could be said that Arab states are at the present quite willing to use judicial methods in settling their disputes, at least in limited cases, when they feel that political methods cannot solve given conflicts. This was the case, for example, in the Western Sahara dispute when the case was submitted to the ICJ through the General Assembly, and Morocco was one of those states involved in

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[111] al Majzub, Arab League and Settlement of Inter-Arab Disputes, *supra* note 88, p.p. 138-139; al Rashidi, About the Necessity of the Judicial Organ, *supra* note 109, p.p. 19-20; *Cf.* Couvreur, Ph., The Effectiveness of the International Court of Justice in the Peaceful Settlement of Disputes, in A. S. Muller, D. RaiČ and J. M. Thuránszky (eds.), *The International Court of Justice: Its Future Role After Fifty Years*, The Hague: Martinus Nijhoff Publishers, (1997) p.p. 83-84.

this dispute;[112] so did Tunisia and Libya for their continental shelf dispute;[113] and Qatar and Bahrain in a maritime dispute.[114] Furthermore, if we assume that in a dispute between two Arab states its contents are related to a breach of international obligation in the Arab part of the world, the dispute could be settled conveniently by the ACJ, as political organs cannot deal comprehensively with justiciable disputes when a breach of any international legal obligation is one of the aspects of the dispute. In addition, disputes may arise not only between member states of the Arab League, but also between its organs, be they those created under the Pact or under the Collective Security Treaty, regarding the contents and scope of their duties. In such a situation, the only organ capable to settle disputes could be a judicial organ.[115]

2. Interpretation of Treaties

No doubt the interpretation of treaties as a legal matter is most suitable for treatment by a judicial body.[116] Accordingly, the ACJ could be expected to play a very valuable judicial role within the scope of its competence including the interpretation of both conventions and treaties. It could interpret, for example,

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[112] *Western Sahara*, Advisory Opinion, *ICJ Rep.*, (1975) p.p. 12-13. It is to be noted that the case was submitted to the Court according to resolution 3292 (XXXIX) of the General Assembly of the UN dated 13th December 1974 requesting the Court to give an advisory opinion on several questions. The Moroccan government appeared before the Court with other four states namely, Mauritania, Zaire, Algeria and Spain. *Ibid.*, p.p. 16-17.

[113] *Continental Shelf*, (Tunisia v. Libyan Arab Jamahiriya), *ICJ Rep.*, (1982) p. 18.

[114] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), *ICJ Rep.*, (1991) p. 50.

[115] For example, when a conflict arose between the Security Council and the General Assembly of the UN regarding the conditions of admission of a state to membership in the UN, the Security Council asked the Court for advisory opinion. See *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, *ICJ Rep*, (1947-1948) p. 57.

[116] This however, does not mean other organs in any organisation cannot practice interpretation. For example, the Security Council and the General Assembly of the UN, may interpret the Charter

ambiguous Articles of the Pact of the Arab League and of the Collective Security Treaty, and provisions in any other bilateral or multilateral treaties in force concluded between two or more member states of the Arab League or between a member state and non-member states, if such treaties provide that in any disputes arising between its parties regarding the interpretation or application of a provision, the parties shall refer the matter to the ACJ.[117]

With regard to the Pact of the Arab League, there are many Articles that are not sufficiently clear and need to be interpreted, for example, the terms 'independent', 'force', 'aggression', 'measures', 'self defense', that appear in Arts. 1, 5, and 6.[118] Furthermore, the question of the number of votes required for the League Council's approval for a new member needs clarification as to whether this is a majority or unanimity vote.[119]

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of the UN, but these interpretations are without binding force. For further discussion in this matter see *UNCIO*, vol. 13 (1945) p.p. 708-709.

[117] The ACJ will be not the first international court to deal with such matters; many cases have been referred to the ICJ relating to treaty law, and the Court has played an excellent role in this respect. For example, see the question of authentic interpretation of a treaty addressed in 1951, *Ambatielos* case, (Greece v. United Kingdom), *ICJ Rep.*, (1951) p. 10; the issue concerning reservations settled by the Court in the case on Reservations to the Genocide convention, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, *ICJ Rep.*, (1951) p. 15; the capacity to conclude a treaty which was dealt with by the Court in the 1949 Reparations for injuries case, *Reparations for Injuries Suffered in the Service of the United Nations*, *ICJ Rep.*, (1949) p. 172; the definition of a treaty dealt with in the Anglo-Iranian Oil Company case, *Anglo-Iranian Company* case, (Iran v. United Kingdom), (Preliminary Objection), *ICJ Rep.*, (1952) p. 93; the intertemporal rule dealing with assignment of a particular meaning of a term used in treaty addressed by the Court in the Anglo-Norwegian Fisheries case, *Fisheries* case, (United Kingdom v. Norway), *ICJ Rep.*, (1951) p. 116; and lastly, when the Court found itself competent to deal with the conclusion of treaty by discussing the nature of the text which may present to it whether it is a treaty or not in the case between Qatar and Bahrain, *Maritime Delimitation and Territorial Questions Between and Bahrain*, (Qatar v. Bahrain), Jurisdiction and Admissibility, *ICJ Rep.*, (1994) p. 112.

[118] al Rashidi, About the Necessity of the Judicial Organ, *supra* note 109, p.p. 24-25; and his Hawl ad Dawr al Mutawaqqa' li Mahkamat al 'Adl al 'Arabiyah fi Ta'ziz al 'Amal al 'Arabi al Mushtarak, (About the Expected Role of the Arab Court of Justice in Strengthening Joint Arabic Actions), 82 *JAA* (1995) p. 25.

[119] For general reading in this matter see Pollux, The Interpretation of the Charter, *BYbIL* (1946) p.p. 54-82.

Some bilateral and multilateral treaties include a provision to refer to the ACJ if any dispute arises between the parties regarding the interpretation or application of a provision, for example in the 'United Convention for Arabic Capital Investment in the Arab Countries', approved by the twelfth Summit in November 1981. By Art. 25, any dispute regarding the interpretation and application of the convention is to be solved by either conciliation, arbitration, or recourse to the ACJ.[120] The ACJ can also play an important role if granted a competence to give advisory opinions on any legal question in any conflict between member states or between organs of the Arab League as to their respective competences.[121] In this connection, Pomerance has emphasized the importance of the advisory competence of international courts or tribunals:[122]

> "In several municipal systems, it was noted, advisory jurisdiction was deemed judicial and was 'of undoubted utility'; and the new general organisation will undoubtedly require 'authoritative legal advice'- more authoritative than what might emanate from *ad hoc* committees of jurists-on the interpretation of its constitution. Empowering states to request opinions would afford them the opportunity of clarifying their legal rights before differences 'ripened into an issue or definite dispute'; of aiding them to reach a firm basis for negotiations; and of achieving all this without inuring the hostility often imputed litigant states in contentious proceedings."

3. Development of International Law

With regard to the progressive development of international law, the ACJ is expected to give a new impetus to the development of the Arab conception of

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[120] For further details see below chapter V, p. 264.

[121] Madani, al Sayed Muhammad, al Hajah Ila Insha' Mahkamat 'Adl 'Arabiyah fi Itar Jami'at ad Dowal al 'Arabiyah, (The Necessity of Establishing an Arab Court of Justice within the League of Arab States System), 67 *MMUS* (1970) p.p. 58-59. (hereinafter cited as: Madani, The Necessity of the Arab Court).

[122] Pomerance, Michla, The Advisory Role of the International Court of Justice and its 'Judicial' Character: Past and Future Prisms, in A. S. Muller, D. RaiČ and J. M. Thuránszky (eds.), *The International Court of Justice: Its Future Role After Fifty Years*, The Hague: Martinus Nijhoff Publishers, (1997) p. 286.

international law, especially customary Arab international law. Beyond it, the ACJ could then deal with various aspects of international law. Concerning the law of treaties, it could make pronouncements on the basic principles governing the relevant conduct of states; it could also deal *inter alia* with customary rules concerning maritime matters.[123] Furthermore, because it is one of the sources that may be applied by the ACJ, Islamic Shariah may have a chance to help redefine the real and true concept of Muslim international law. Foda argues in this regard:[124]

> "the Arab Court would understand Arab custom Islamic legal conception, the psychology of the social groups of the Arab world and their habitual ways of behaving. Arab Court is undoubtedly more capable of applying Arab custom or Islamic principles of law, if this seems the most appropriate law to be applied in settling a dispute. A satisfactory settlement of this kind would result, naturally, in increasing confidence in the role of the judiciary as an agency for peace."

1. 5. 2. Attempts of Inclusion of a Judicial Organ in the Pact of the Arab League

Reference to the previous attempts to create the ACJ as a judicial organ within the Arab League system has to start with an analysis of concrete realities in the Arab world. For such a purpose mention has to be made of history. However,

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[123] These kinds of subjects are dealt by the ICJ as well and it has played a considerable role in this matter. For more details see Eduardo Jiménez de Aréchaga, The Work and Jurisprudence of the International Court of Justice 1947-1986, LVIII *BYbIL* (1987) p.p. 2-8.

[124] Foda, *The Projected Arab Court*, *supra* note 90, p. 73; see also Madani, The Necessity of the Arab Court, *supra* note 122, p.p. 64-66; *Cf.* How the ICJ since its creation helped in the development of international Law in Partan, Daniel G., Increasing the Effectiveness of the International Court, in Richard F., Friedrich K., & Saul H. M. (eds.), *International Law: A Contemporary Perspective*, London: Westview Press, (1985) p. 384; Jennings, Robert Y., The Proper Work and Purposes of the International Court of Justice, in A. S. Muller, D. RaiČ and J. M. Thuránszky (eds.), *The International Court of Justice: Its Future Role After Fifty Years*, The Hague: Martinus Nijhoff Publishers, (1997) p. 42.

some factors have contributed to the failure of all previous attempts. It is also obvious that the disappearance or the persistence of the same factors may determine the future of the actual project for establishing the ACJ. A short survey of the history of the proposed Court reveals the existence of apparent as well as latent reasons specific to the Arab states. Such reasons have determined the failure of previous attempts.[125]

1. 5. 2. 1. Apparent Reasons for the Failure

The Arab states have felt the necessity to create an ACJ for two reasons: Firstly, to be able to settle through a judicial organ some disputes which may arise between them. Secondly, to fulfil the organisation's intention in the application of Art. 19 of the Pact of the Arab League. All of the attempts to create a Court, from the beginning of the fifties, were contemplated within the efforts to reform the whole original Pact of the Arab League.[126] However, the Court has been the subject of only three detailed projects with all efforts ending in failure. The failure could be related to two major facts: political disorder in the Arab World, on the one hand, and diverging opinion on legal matters between the Arab states regarding the contents of the projects on the other.

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[125] Dachraoui Achouak, *La Cour Arabe de Justice: Etude de L'avant-Projet de Statut*, (*Arab Court of Justice: Study of the Preliminary Draft Statute*), Tunisia: Memoire Pour le D.E.A. en Sciences Politiques, (1982) p.p. 8-9. (hereinafter cited as: Dachraoui, *Arab Court of Justice*).

[126] It is outside the scope of this study to go in more details about the necessity of amend the present Pact, but most Arab jurists who still dream that the Arab League become an active organisation in settling inter-Arab disputes support the idea of that amendment. Furthermore, establishing the ACJ as the principal judicial organ within the Arab League system means such an amendment becomes important. For more details in this point see Shaban, Sadiq, Dukhool Ta'deel al Mithaq Hayyez al Tanfeeth, (The Entrance of the Amendment of the Pact into Force), 9 *JAA* (1981) p.p. 34-41.

1. Political Disorder in the Arab World

Political instability in some member states of the Arab League, the Zionist challenge as a considerable factor, the Arab-Israeli wars, inter-Arab conflicts, the reactions of some Arab states toward Egypt and the will of some states as Syria, Iraq and Egypt to assume, each, the leadership of the Arab World; the first Gulf War between Iran and Iraq in the 1980s, the second Gulf War involving the invasion of Kuwait by Iraq in 1990, have all prevented Arab leaders to meet and discuss the major problems that the Arab League faces. In addition, many other internal problems in various member states contributed to the failure of attempts to reform the Pact and at the same time create the ACJ.[127] The analysis of the different reform projects show how, more or less obviously, all these historic factors have influenced developments and conditioned the failures.

A. The Syrian Attempt in 1951

After the defeat of 1948 in the Arab-Israeli armed confrontation, the Arabs called for the first time for reform. The defeat showed the intrinsic weakness of the Arab League which became then the subject of violent critique so much so that it was going to collapse were it not for intervention of certain Arab states to support and to reinforce it. Some suggestions were made by Syria. Indeed, in January 1951 Mr Nazim al Qudsi, president of the Syrian delegation presented to the League Council a project for the reform of the Pact. The Council submitted it to the governments of the member states to study it and to comment on it.[128]

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[127] Diyab, Muhammad Abdul Hakam, Ihya' Mashru' Mahkamat al 'Adl al 'Arabiyah Dharori wa Mulih, (Animation of the Draft Statute of the Arab Court of Justice is Necessary and Urgent), 1 *Arrabitah* (1998) p. 4; Dachraoui, *Arab Court of Justice*, *supra* note 126, p. 9.

[128] Res. No. 377/13, on 2nd February 1951.

Responses were to be given in three months and submitted to a commission formed by delegates from all Arab states under the presidency of the Foreign Minister of Syria. The project remained shelved because of political instability in Egypt before the revolution of July 23, 1952.[129]

B. The Iraqi Attempt in 1954

Three years later, on 10th January 1954, the Iraqi government presented through its Foreign Minister, Mr Fadhel al Jamali, a new project of reform for the Pact of the Arab League. It was discussed within the League's Council and transmitted to the member states for comments,[130] but the conflict between Iraq and other member states, concerning the Baghdad Pact, led to the postponement sine die of further consideration of the project.[131]

C. The Secretary-General's Attempt in 1955

With reference to what was presented to the reform commission in December 1954, and to suggestions sent by the Arab states in July 1955, with the aim to create a new organ as a General Assembly to modify the unanimity rule, to reinforce the Collective Security Treaty and to create the ACJ within the Arab League system, the League Council decided to form a new commission with the representatives of member states of the Arab League in order to discuss the suggestions proposed in April 1954, but the commission did not have the

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[129] Ghali, The Arab League, *supra* note 32, p. 114.
[130] Res. No. 667/13, on 27th January 1954.
[131] Dachraoui, *Arab Court of Justice*, *supra* note 126, p. 10.

opportunity to meet because of the political situation in Egypt concerning Suez Canal.[132]

D. Projects for Reform between 1959 and 1964

Another project for the reform of the Pact was submitted by the Moroccan government after its admission to the Arab League. In September 1959 in his speech before the League's Council in Casablanca during the 32nd session, King Mohammed V called for certain reforms to the Arab League. The King's suggestion was to organise a meeting of the Arab countries to consider new attributions of the Arab League and to study the means which would help it to resolve eventual internal and external problems.[133] A detailed memorandum, presented before the political commission, developed the King's point of view through the following two ideas: (1) revision of the legal and political links which united the Arab states; (2) creation of an ACJ, but disagreements between certain Arab countries and Egypt led to the boycott of the Organisation's meetings by the former. There was indeed a disagreement between Tunisia and Egypt because of Egyptian intervention in Tunisian internal affairs. At the same time there was a dangerous escalation in the disagreement between Egypt and Iraq after the support given by the Egyptian government to the military rebellion (in 1959) against Abdulkarim Qasim.[134]

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[132] *Ibid.*

[133] Ghali, The Arab League, *supra* note 32, p. 114; Dachraoui, *Arab Court of Justice*, *supra* note 126, p. 11.

[134] For further details see Ghali, Botrus B., *Jami'at ad Dowal al 'Arabiyah wa Taswiyat al Munaz'at al Mahaliyah*, (*The League of Arab States and the Settlement of Regional Disputes*), al Qahirah: Dar At Tiba'ah al Hadithah, (1977) p. 93. (hereinafter cited as: Ghali, *The Arab League and Settlement of Disputes*); al Majzub, Arab League and Settlement of Inter-Arab Disputes, *supra* note 88, p. 142.

After Tunisia and Iraq started participating in the Arab League the commission's project was finally discussed during the meeting of the League Council in June 1961. By Art. 8, of the commission project, the creation of an ACJ was planned as a principal judicial organ within the Arab League. Discussions went on until 5th July 1961, without any positive results. During this time, Tunisia and Iraq also presented, individually, a reform proposal to the Project, but, the inter-Arab crisis due to the failure of the union between Syria and Egypt on the one hand, and the disagreements between Iraq and other Arab countries on the other, prevented a successful implementation of the reform.[135]

E. The Attempt of the Arab Summit in 1966 and 1974

A few years later, during the third Arab Summit of the Kings and Heads of states held in September 1965, the idea of a reform to the Pact was revived to fulfil the wish formulated by the Iraqis when the Arab Foreign Ministers met to prepare the summit. With joint efforts, Algeria, Iraq and Syria elaborated a common project for the revision of the Pact. The project foresaw the creation of a conciliation and arbitration commission and the establishment of the ACJ for the pacific settlement of inter-Arab disputes. The reason of the failure or delay of this attempt was the Arab-Israeli war of 1967.

Nothing happened till 1972, when the League's Council in its meeting decided the creation of a commission for the Pact's revision.[136] On 29th October 1974, during the seventh Arab Summit, the Kings and Heads of Arab states gave

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[135] Dachraoui, *Arab Court of Justice*, *supra* note 126, p.p. 11-12.

[136] Res. No. 2962, and 2936, on 12th September 1972.

their consent to make a revision. The commission met on 27th January 1975 to discuss the following points: collective security, political cooperation, economic and cultural cooperation, co-ordination between the different organs of the League, settlement of disputes within the League, recourse to diplomatic means of settlement before an eventual judicial recourse before an ACJ, the creation of an ACJ. The commission presented its final report in 1976, but the normalisation of relations between Egypt and Israel and the suspension of Egypt's membership within the Arab League blocked the reforms.[137]

All these attempts to reform the constitutive Pact of the League foresaw without any exception the creation of an Arab Court of Justice.

2. Juridical Disagreements

These disagreements may be seen to be the expression of the so to speak political under-development of the whole Arab nation. In fact, all reform projects reflect subjective and individualistic visions of the interests of the Arab world. The particularistic interests of the different Arab countries are contradictory. These contradictions appeared during the discussion of the four main projects of the ACJ presented in 1950, 1964, 1975 and 1979.[138]

The first idea of creating the ACJ was suggested, however, in 1944 by the Political Sub-Committee, when some delegations proposed to grant to such a judicial organ limited jurisdiction to settle disputes between members states and

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[137] Dachraoui, *Arab Court of Justice*, *supra* note 126, p.p. 12-13.

[138] For further details see Shukri, Muhammad Aziz., Nahwa Mahkamat 'Adl 'Arabiyah Jadidah, (Towards a New Arab Court Justice), 2 *Qadaya Arabiyah*, (1980) p.p. 5-8. (hereinafter cited as: Shukri, Towards a New Arab Court).

any related cases in inter-Arab relations, as well as in any disputes between members and third states. The states were to choose whether to resort to the League Council as an arbitrator or to the World Court (the ICJ) at The Hague.[139] Unfortunately, this suggestion failed to move forward because of the major disagreement in opinions regarding the powers of compulsory arbitration to be granted to the League Council under the pretense that the League Council, as a political organ in the Arab League system, was not qualified to settle international disputes, especially legal ones.[140]

When the Political Sub-Committee drafted the Collective Security Treaty in 1950, the idea of creating the ACJ arose again as an important requirement, especially when member states noticed the weakness and inapplicability of Art. 5 of the Pact of the Arab League concerning the settlement of inter-Arab disputes. On 11th April 1950 the Lebanese representative presented to the Secretary-General of the Arab League the following proposal:[141]

> "Art. 19 of the Arab League Pact provides its amendment with the approval of a two thirds majority of the member States, especially for the purpose of strengthening inter-Arab relations and of creating an Arab Court of Justice. The establishment of an Arab Court of Justice will undoubtedly complete the fulfilment of the objectives of the Pact which the member States have accepted to consolidate their strong bonds, and to create an atmosphere of confidence, justice and peace throughout the Arab World. When the Political Committee studied the draft of Joint Defence and Economic Cooperation Treaty between member States of the Arab League, and discussed the first Article thereof which affirms the determination of these States to settle all disputes by peaceful means, the need was felt for the establishment of that Court with a view to fulfilling the objectives of the provision referred to above.

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[139] *MPSC*, p.p. 18-19.

[140] *MPSC*, p. 19; see also Abazah, Disoqi T., Nahwa Mahkamat 'Adl 'Arabiyah, (Towards Arab Court of Justice), 16 *MAFQ* (1994) p. 442.

[141] Foda, *The Projected Arab Court*, *supra* note 90, p. 75.

> For the above reasons, I beg to request that this question be included in the agenda for the current Session of the League Council, and would recommend the appointment of a special commission to draft the Statute of an Arab Court of Justice for submission to the next Session of the Council of the League."

Accordingly, a special commission was appointed to draft the Statute of the projected ACJ. It was known as the Three-Man commission. It met for the first time on 3rd Jun 1950, finished the draft of the projected ACJ and submitted it to the League Council during its 21st session.[142] Unfortunately, the draft Statute did not meet the approval of member states because of disagreement about the nature of the jurisdiction of the Court. The draft Statute was shelved.[143]

In 1963 another attempt was made by the legal department of the Secretariat-General of the Arab League. It adopted a new draft Statute for the ACJ. Before any action was taken, the Secretariat-General made a survey to get the views of member states on three main points: the Court's jurisdiction (compulsory or voluntary); the competence of the Court, namely, whether it should have judicial and advisory functions or be granted only judicial functions; and the enforceability of the Court's judgments, in particular, which League organ was to be involved with this task and how ?[144] Ten member states gave their views on the above points; of these, three member states did not want to establish the Court; six welcomed the establishment of the Court on condition that it be granted just an optional jurisdiction; and the remaining one member state accepted the idea of

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[142] It is to be noted that this commission was appointed according to the League Council Res. 316/12, of 13th April 1950.

[143] For full text of this draft Statute see Khalil, *Documentary Record*, *supra* note 8, p.p. 72-79.

[144] Shukri, Muhammad Aziz, Mahkamat al 'Adl al 'Arabiyah al Murtaqabah, (The Expected Arab Court of Justice), 4 *JAA* (1981) p. 71. (hereinafter cited as: Shukri, The Expected the Arab Court); Dachraoui, *Arab Court of Justice*, *supra* note 126, p. 18.

creating a Court with compulsory jurisdiction. Not all member states approved the advisory function of the Court in addition to its judicial function. A few of them accepted such a proposal whereas the majority approved the judicial function only. With regard to the enforceability of the Court's judgments, the League Council was suggested as an organ responsible for enforcement by the majority of states that had responded to the survey, whereas the remaining member states failed to express their views.[145]

On the basis of these replies the Permanent Legal Committee prepared a draft Statute for the ACJ in five chapters: the constitution of the Court; the Court's jurisdiction; the Court's procedure; the advisory competence of the Court; and general rules. However, this proposal too was not supported by the member states and was shelved.[146]

New appeals were made in 1972/73 in order to reconsider the question of the creation of an ACJ, and so the former Secretary-General Mr Mahmoud Riyad and some member states tried to implement this objective and presented new projects (governmental on the one hand and personal but under official authorisation on the other hand). The most noteworthy of these projects was Hamad Sultan's, which was inspired by the Charter of the UN and Statute of the ICJ, but he did not discuss the subject of the Court's competence.[147] This project was adopted by the expert commission created at the end of the seventh Summit conference in Rabat

[145] See Report of the Permanent Legal Committee on 13th June 1964.
[146] Shukri, Towards a New Arab Court, *supra* note 139, p. 7.
[147] Shukri, The Expected Arab Court of Justice, *supra* note 145, p. 72.

from 30th October-2nd November 1974, which opted for the obligatory competence of the Court. In its final report it stated:[148]

> a. that the Arab Court of Justice is the principal judicial organ of the Arab League and it has to work according to the Statute annexed to the Pact.
> b. that the Arab Court of Justice will have an obligatory competence and all the member states will be parties to the Statute.
> c. that its decision will be compulsory and have to be enforced in good faith. In case of non agreement of one party, the other one could be able to refer to the League's Council which would take the necessary measures.
> d. that the Arab Court of Justice have the consultative competence. So each principal organ or specialised organism of the League could ask for an opinion from the Court regarding all juridical questions confronted.

The project appeared to be the most suitable. It corresponded to the aspirations and personal convictions of its draftsmen, but it did not reflect the concrete reality of the Arab World and its aspirations regarding the independence and sovereignty of its states. That is why the project was deferred from one session to another, and finally did not succeed to gain the member states' attention when the Arab League head office was transferred to Tunis after the Camp David accords.[149] Apart from these apparent reasons, other latent reasons inherent to the Arab states and to their organisation were behind the cause of the failure of the creation of the ACJ.

When the headquarters of the Arab League were moved from Egypt to Tunisia, the League Council issued its Res. 3843 of 28 June 1979 that included proposals to make major amendments to the Arab League Pact in order to face new political and legal developments. A special committee was appointed for this

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[148] Dachraoui, *Arab Court of Justice*, *supra* note 126, p.p. 15-16; Shukri, The Expected Arab Court, *supra* note 145, p. 73.

[149] See above p.p. 26-27.

purpose, known as the 'Committee for developing the Arab League and amending its Pact'. The Commission held several meetings 3-12 November 1979. The meetings resulted in a unanimous agreement to establish an ACJ as one of the Arab League organs, similar to the ICJ within the UN, with its Statute forming an integral part of the Arab League Pact. It was to have compulsory jurisdiction over the member states that accepted it. No further actions were taken because of disagreement between member states, again, regarding the question of compulsory jurisdiction.[150]

The League Council, at the annual meeting of 1987, decided to take positive action to make major amendments to the Arab League Pact and create the ACJ, but the second Gulf war (the invasion of Kuwait by Iraq in 1990) postponed any action until 1996 when the Secretary-General of the Arab League presented to the League Council a final proposal on the projected ACJ.[151] The only unsettled argument between member states concerned the compulsory jurisdiction of the ACJ and this still need the approval by the heads of member states at an Arab summit conference. The draft Statute was prepared by the Permanent Legal Committee created for this purpose by the Secretariat-General of the Arab

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[150] Markaz al Dirasat wal Buhuth wal Nashir (ed.), *Masalat Tadil Mithaq Jamiat al Dowal al 'Arabiyah*, (*The matter of Amending the Pact of the League of Arab States*), Tunis: Kulliyat al Huquq wal Ulum al Siyasiyah wal Iqtisadiyah bi Tunis, (1981) p.p. 44-45.

[151] In his speech, Ahmed Esmat Abdul Majeed, the Secretary-General of the Arab League preferred just to make the necessary amendment to the Arab League Pact because according to his view, it is difficult to make major reforms to the Pact, and therefore, he admitted that, at present, the most important step for member states was to agree to create the ACJ as the principal judicial organ of the Arab League. See his lecture before the Egyptian Institute of International Law on 22nd November 1992, Jamiat al Dowal al Arabiyah wal Qadaya al Muasirah, (The League of Arab States and Present Issues), reprinted in 73 *JAA* (1993) p.p. 10-11.

League.[152] The draft comprised 53 Articles divided into seven chapters as follows: (1) Organisation of the Court. (Arts. 1-5); (2) The Judges. (Arts. 6-20); (3) Judicial Competence of the Court. (Arts. 21-23); (4) Procedures. (Arts. 24-49); (5) Advisory Opinions. (Art. 50); (6) Privileges and Immunities. (Arts. 51-52); (7) Amendments. (Art. 53). The present thesis will concentrate on this draft Statute.[153]

1. 5. 2. 2. Latent Reasons for the Failure

These reasons, even if not expressly declared, have deeply determined the Arab Sates' comportment towards the attempts to establish an ACJ. In fact, attitudes reveal a lack of effective will to create such an organ. This can be explained by the preference of the Arab states to have a political settlement for their disputes rather than a judicial settlement, in addition to their mistrust towards a settlement system within the framework of the Arab League.[154]

1. Arab Preference for Political Settlement

Generally, judicial settlement is pushed into the background in the pacific settlement of disputes. Reference to it is only after made the exhaustion of diplomatic efforts. This common attitude by states, including Arab states, reveals a preference for political settlement for several reasons: (1) the view that certain

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[152] Report and Recommendations of the Permanent Legal Committee, 5-9 November 1995. (unpublished report from the Secretariat-General of the Arab League/Cairo); Minutes of the Permanent Legal Committee of the League of Arab States, Cairo, 5-9 November 1995, p.p. 1-3. (unpublished Minutes from the Legal Department of the Ministry of Foreign Affairs/Bahrain).

[153] For full text of this draft Statute and the Rules of the ACJ, with the author's translation into English, see Annexes 2 and 3.

[154] al Majzub, Arab League and Settlement of Inter-Arab Disputes, *supra* note 88, p. 41; Ghali, *The Arab League and Settlement of Disputes*, *supra* note 135, p.p. 186-188.

disputes by virtue of their nature cannot dealt with by judicial settlement and a need more political or diplomatic settlement; (2) the fear of a definitive, binding and compulsory settlement and lastly (3) the view that recourse to a judicial settlement detaches the dispute from the domestic jurisdiction.[155] In his speech before the ASIL Rogers declared:[156]

> "The basic problem is the reluctance of states to refer international disputes to the Court. States have not been willing to accept the idea of going to the Court on a regular basis, expecting to win some cases and lose others. If the legal advisor of the foreign ministry is not confident of victory, he recommends against litigation."

Another reason inherent in the jurisdictional system of the Arab League has led its member states to orient their choice towards political settlement. Indeed, the archaic imperfections of the jurisdictional settlement of disputes scheduled by the Arab League has favoured such an orientation since the Pact did not institutionalise an ACJ. Also if its eventual creation was envisaged by Art. 5, the Pact did not schedule more than a possibility of the voluntary arbitration of disputes and has excluded disagreements linked to "the sovereignty, the independence and the territorial integrity of the states." What does then remain of inter-state disputes? This system's inadequacy in the Arab League has driven Arab states toward political settlement to the detriment of judicial resources.[157]

This has been facilitated all the more by the fact that Arab states have a personal and personalised conception of political power. Indeed, a

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[155] Rovine, Arthur W., The National Interest and the World Court, in Leo Gross (ed.), *The Future of the International Court of Justice*, vol. 1, New York: Oceana Publications, INC., (1976) p.p. 316-317.

[156] Rogers, William P., The Rule of Law and the Settlement of International Disputes, 64 *Proc ASIL*, (1970) p. 286.

[157] Dachraoui, *Arab Court of Justice*, *supra* note 126, p. 17.

psychosociological study of Arab political regimes has shown the identification of political power with the monarch or Head of state. Consequently, inter-Arab disagreement is considered as a conflict between two persons. A judicial settlement compromises the prestige of the sovereigns concerned insofar as it supposes the existence of a loser. A political settlement allows the avoidance of such a situation and the ability to handle with tact the sensitivity of the heads of state in disputes. Therefore, it is not surprising that disputes have nearly always been settled on the occasion of a summit meeting.

All these considerations shows why the Arab states have a weak inclination to create an ACJ. They are used to resolve their disputes politically and do not have confidence in their organisation as an instrument for the pacific settlement of disputes.[158]

2. Arab States' Mistrust Concerning the Settlement of Disputes within the Arab League

The lack of confidence of Arab states in the role which their organisation would play as an instrument for the pacific settlement of disputes follows from the incapacity of the Arab League to resolve the conflicts which have marked Arab history. This incapacity can be explained by the fact that the Arab League has never been a supranational organisation invested with real powers. Furthermore, the Egyptian hegemony within the Arab World, the fact that the headquarters of the Arab League have always been in Cairo and all the secretaries-general have been without exception Egyptians has contributed additionally to its

[158] *Ibid.*, p. 18.

inefficiency.[159] Indeed, different examples show that Egypt has done everything to paralyse the action of the League and to hamper its organs when the League's intervention has been against its political interests. For example, during the civil war in Yemen, when Egypt was on the side of the revolutionary Yemenites, the Arab League, when the case was submitted to it, did not undertake any attempt nor submit any suggestion to resolve the dispute. Its role was limited simply to the creation of a commission of a technical character sent to Yemen to establish the facts.[160] In fact Mr. Botrus Ghali argued then that the non-effectiveness of the Arab League in this case consisted in Yemen in treating the conflict as an internal and not as an international dispute. When conflicts between member states of the Arab League arise the intervention of the Arab League becomes a very sensitive matter.[161]

This also manifested itself on the occasion of the border conflict between Egypt and Sudan in 1958. When the Sudanese delegate made a request to the Arab League, the Secretary-General did not try to call together the Ministers of Foreign Affairs Council to study the situation. But it could be concluded, according to Mr. Botrus Ghali's view that the actual reason for it was that the Secretary-General received promises from the Egyptian government to settle the dispute peacefully.[162]

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[159] *Ibid.*

[160] Hassuna, *The League of Arab States*, *supra* note 6, p. 28; Dachraoui, *Arab Court of Justice*, *supra* note 126, p. 19.

[161] Ghali, *The Arab League and Settlement of Disputes*, *supra* note 135, p. 29.

[162] *Ibid.*, p. 61.

The disagreement of Jordan and Lebanon with the United Arab Republic may equally reveal how the Arab League was hindered from acting. Indeed, after having removed the case from the Security-Council's agenda in application of Art. 52 (1) of the Charter of the UN, the Arab League failed to settle the dispute regarding the root of the dispute because the meetings of the League Council were delayed and it did not take the necessary measures in order to put an end to the dispute. It was expected that the League Council, just as the UN Security Council, was to sent at least observers to Lebanon, but this however did not happen.[163]

This inefficiency of Arab League intervention has, as a consequence, orientated the Arab states towards other organisations such the UN or OAU for the settlement of disputes. Dachraoui concludes that in the major part of Arab conflicts, the states which submitted their case to the UN and not to the Arab League were conflicts either with Egypt itself or with one of its allies.[164] Thus, in the dispute in 1958 between Lebanon and the United Arab Republic, the former refused to submit the dispute to the Arab League through its Council and preferred instead to refer it to the UN Security-Council.[165] The same reaction was seen during the dispute between Algeria and Morocco in 1963. The latter refused the mediation offered by the League's Council of the Arab League fearing its partiality in view of the manifest Egyptian support for Algeria. The offer for an

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[163] Dachraoui, *Arab Court of Justice*, *supra* note 126, p.p. 19-20; Ghali, *The Arab League and Settlement of Disputes*, *supra* note 135, p.p. 73, 79.

[164] Dachraoui, *Arab Court of Justice*, *supra* note 126, p. 20.

[165] For more information see Hassuna, *The League of Arab States*, *supra* note 6, p.p. 61-83.

OAU commission for mediation was accepted. The commission was charged to investigate the conflict's source and submit a proposition for settlement.[166]

All attempts and all projects reflect a declared non-effective willingness to establish the ACJ. Vague impulses have not had the necessary strength to create the ACJ. Furthermore, most of the projects presented were either governmental or projects made with official support. They did not reflect the preoccupation of all the member states of the organisation but the expression of a member state's opinion. However, the last draft Statute, the subject of the present thesis, can be excluded from the above critical remarks, because all member states have expressed their views on its Articles. It may be said the time for establishing the ACJ has approached, and Arab states have to overcome their political disputes and all their minor disagreements in order to create this judicial organ as a necessity, at present, for all Arabs.[167]

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[166] Ghali, The Arab League, *supra* note 32, p.p. 82-83.

[167] In the Arab Summit Conference which held in Cairo 21-23 June 1996, it was generally resolved the establishment of the Arab Court of Justice. See XXXV *ILM* (1996) p. 1289; see also speech of the Secretary-General before the League Council (session 110) in 96 *JAA* (1998) p. 250.

Concluding Remarks

The Arab League as a regional international organisation can play a considerable role in the settlement of inter-Arab disputes if the Arab states grant it their support and respect. More then fifty years have passed since the League's creation; many events have happened during that time in the Arab World; all the Arab states have become independent, and some have decided to enter into a union. In addition, the international political strategy of Arab states members in the Arab League has changed, especially toward Israel, and a new approach to the peace process is needed which is different to that adopted when the original Pact of the Arab League was drafted which should therefore be reformed in order to face the new political and legal international situation.

However, the settlement of inter-Arab disputes within the Arab League is a most important point the Arab states have to reconsider. The creation of the ACJ as a judicial organ within the Arab League system becomes not only a political requirement but also an Arab national and legal requirement. This requirement cannot become a fact unless Arab states outline their common aim, understand the exact function of the Court, and agree unanimously that the decision of this Court should be respected and applied in good faith. The procedures which involve the creation of the Court should be accelerated.

As it is clear that all the previous attempts to draft the Statutes of the ACJ failed to find the support of the Arab states, it is to be hoped that the 1995 draft Statute will get the approval of Arab states as soon as the chance for a Summit

meeting offers itself. It is clear that the draft Statute is influenced by the Statute of the ICJ at The Hague. This must not become a reason to neglect the specific nature of the ACJ as an the Arab Court for settling inter-Arab disputes according to the Arab conception of Islamic and international law.

Article 6 of the draft Statute required that the judges of the ACJ must be qualified in Islamic Shariah as well as in international law. The ACJ is considered as a regional international court applying principles and rules of international law as well as Islamic Shariah. Therefore, it is logical to require that the judges in this Court must possess qualifications in both international law and Islamic Shariah. The question rises at this point, does the application of these two different legal systems, international law and Islamic Shariah, need a difference in expertise? If so, do we need every judge to be qualified, at the same time, in both international law and Islamic Shariah, or should the Court as a whole be comprised of judges, some of whom are qualified in international law and others in Islamic Shariah. The next chapter, accordingly, will discuss the main points related to the judicial power in the Islamic Shariah with a concentration on the requirements of judiciary in Islam. That is because an understanding of the exact meaning of the term 'qualification in Islamic Shariah' as a necessary requirement for the ACJ judges cannot be achieved without knowing the real concept of the judicial power under Islamic Shariah, and whether "qualification in Islamic Shariah" has different meaning in international law.

Chapter II
Judicial Power in Islamic Shariah

The draft Statute of the ACJ requires that the judge should be qualified in international law as well as in Islamic Shariah. Art. 6 of the draft Statute provides:

> "The Court shall be composed of a body of independent judges who are citizens of member states, and are persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial office, or are jurisconsults of recognised competence in Islamic Shariah and international law."

The present chapter will outline the Islamic Shariah view on the judicial power in order to find out whether Arab draftsmen have really been influenced by principles of Islamic Shariah when drafting the Statute of the proposed ACJ or not, particularly, with regard to the qualifications required of judges. It is necessary to say here that the judgeship in Islam is an especially complex question, so I have chosen the most important issues to compare with the system of judges in the ACJ. Accordingly, five major issues are going to be discussed here as follows: the legality of the judicial power, qualifications of judges, their appointment, removal and independence.

2. 1. The Legality of the Judicial Power in Islam

The judiciary has been given a very special and intensive attention by Islamic Shariah, the same as it has in positive law. However, the interest in Islamic Shariah is great, because the office of the judge is considered to be a sacred and superior job, on account of its relation to religious belief, and for seeking reward from Allah. Muslim jurists believe that judgeship is a task of the Prophets in all

divine religions, ordered by Allah to settle and solve disputes between people on the basis of faith and justice.[1] Some verses from Quran and some Hadiths from Sunnah regarding this subject should be reviewed to make the idea more clear, without neglecting the consensus opinion of the jurists (ijma).[2]

Firstly, in the Quran: that judgments between people should be settled by justice is shown in the Quran when Allah said; "Verily! Allah commands that you should render back the trust to those, to whom they are due; and that when you judge between men, you judge with justice."[3] There are many other verses which attest that judges have the position of Prophets, and that Allah ordered them to judge between people. Here are some of them: "Surely, we have sent down to you (O Muhammad) the Book (this Quran) in truth that you might judge between individuals by that which Allah has shown you (i.e., has taught you through Divine inspiration), so be not a pleader for the treacherous."[4] Also "And for every Ummah (a Community or a Nation), there is a Messenger; when their Messenger comes the matter will be judged between them with justice, and they will not be

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[1] Azad, Ghulam Murtaza, Conduct and Qualities of Qadi, 24 *Isl.Stud.*, (1985) p. 51; for further discussion about the judges in Islam see Schacht, Joseph, *An Introduction to Islamic Law*, Oxford: Oxford University Press, (1996) p.p. 188-189. (hereinafter cited as: Schacht, *Introduction to Islamic Law*).

[2] It is however to be noted that the injunctions of Islamic Shariah as a legal system are based on two types of sources. Primary sources such as the Quran and the Sunnah, and secondary sources such as ijtihad (reasoning) and ijma (consensus). The Quran is the word of Allah revealed to His Prophet Muhammad. It is the only non-disputable source between Islamic schools. The Sunnah comes at the second stage after the Quran, which includes the sayings, deeds and approvals of the Prophet. It is treated as the explanation of the scared text (the Quran) and giving further direction. Ijma may be defined as the jurists' consensus after the death of the Prophet on particular cases. The present thesis will concentrate comprehensively on the sources of Islamic Shariah. See below chapter IV, p. 181.

[3] Quran, 4:58.

[4] Quran, 4:105.

wronged."[5] Finally, "O David! Verily! We have placed you as a successor on earth, so judge you between men in truth (and justice) and follow not your desire for it will mislead you from the path of Allah."[6]

Secondly, in the Sunnah: to demonstrate that the judicial function is a very serious task, it is reported by Abu Hurairah that the Prophet said; "He who has been appointed as a judge (Qadi) is as if he has been slaughtered without a knife." In another Hadith Abu Hurairah also reported that the Prophet said; "Judges are of three types, one of whom will go to paradise and two to Hell. The one who will go to Paradise is a man who knows what is right and gives judgment accordingly; but a man who knows what is right and acts tyrannically in his judgment will go to Hell; and a man who gives judgment for people when he is ignorant will go to Hell."[7] This does not mean that the Sunnah discourages people to accept the office of judge, especially those who are qualified, but this Hadith makes clear that there is great responsibility for the person who accepts this position. He has to bear in mind the fairness of Allah, without any benefits in the present life. This is supported as 'Amr bin al 'As is reported to have said that he heard the Prophet say; "If a Qadi gives a verdict according to the best of his knowledge and his verdict is correct (i.e. agrees with Allah and His Messenger's verdict) he will receive a double reward, and if he gives a verdict according to the best of his

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[5] Quran, 10:47.

[6] Quran, 38:26.

[7] *Sunan Abu Dawud*, *supra* note 7, vol. 3, Hadith No. 3566, p. 1013.

knowledge and his verdict is wrong (i.e. against that of Allah and His Messenger's verdict) even then he will get a reward."[8]

In addition, the Sunnah provides some principles to be implemented by judges. It is prohibited for the Qadi to make his decision between two litigants while he is angry. It is also reported that 'Abdlrahman bin Abu Bakra wrote to his son who was in Sijistan: Do not judge between two persons when you are angry, for I heard the Prophet saying: "A Qadi should not judge between two persons while he is an angry mood."[9] Over and above, the practice of the Prophet confirmed the legality of justice when He appointed some of His companions to this position, and sent them to different places of the Islamic state.[10]

Thirdly, consensus opinion (ijma): all Muslim jurists have agreed unanimously that the judiciary has the authority to settle disputes, and to pronounce judgments that bind the litigants.[11] They have characterised the

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[8] Khan, Muhammad Muhsin (trans.), *al Lu'l' wal-Marjan fima Ittafaq 'Alayh Ash Shaykhan* (*A Collection of Agreed upon Ahadith from Al Bukhari and Muslim*), vol. 2, Riyadh: Dar us Salam Publications, (1995) Hadith No. 1118, p.p. 82-83.

[9] al Shawkani, *Nail al Awtar*, *supra* note 7, vol. 8, p. 306; al Bukhari, Mohammed bin Esmail, *Sahih al Bukhari*, (194-256), Mohammed Muhsin Khan (trans.), Medina: Dar al Fikr, vol. 9, Riyadh: Dar-us-Salam Publishers and Distributors, (1997) Hadith No. 7158, p. 169. (hereinafter cited as: *Sahih al Bukhari*).

[10] For example His appointment to Ali bin Abi Talib, Muadh bin Jabal, 'Utab bin Sayyid, Abu Musa al Ash'ari, and Ma'qal bin Ysar. See al Bakir, Muhammad Abdul Rahman, *as Sultah al Qadaiyah Wa Shakhsiyat al Qadi fi an Nidham al Islami*, al Qahirah: al Zahraa lil I'lam wan Nashir, (1988) p.p. 74-77. (hereinafter cited as: al Bakir, *as Sultah al Qadaiyah*); Ibn al Ukhuwwa, Diya' ad Din Muhammad ibn Muhammad al Qurashi al Shafi'i, *The Ma'alim al Qurba fi Ahkam al Hisba*, Reuben Levy (ed.), London: Cambridge University Press, (1938) p. 78. (hereinafter cited as: Ibn al Ukhuwwa, *Ma'alim al Qurba*). Furthermore Ibn 'Abbas reported that Allah's Messenger judged on the basis of an oath by the defender, and in other cases He judges on the basis of an oath and a witness (by the plaintiff). See two Hadiths in this matter in Muslim bin al Hajjaj, *Sahih Muslim*, Siddiqi, Abdul Hamid (trans.), vol. III. A, Lahore: Sh. Muhammad Ashraf Publishers, (1990) Hadiths No. 1711 and 1712, p. 294.

[11] al Mirsifawi, Jamal Sadiq, *Nidham al Qada' fi al Islam (Islamic Judiciary System): Selections of Papers Presented to the Conference on Islamic Jurisprudence Organised by The Islamic University of Imam Muhammad Ibn Sa'ud*, Riyadh: Imam University Press, (1984) p. 10. (hereinafter cited as: al Mirsifawi, *Islamic Judiciary System*).

eligibility of office of the judge in five types as follows: (1) collective obligation (Fard Kifayah); (2) specified obligation (Fard 'Ain); (3) compulsory obligation (Wajib); (4) recommended (Mandub); (5) forbidden (Haram).[12]

Firstly, collective obligation (Farad Kifayah) which is general, means that the fulfilment of such an obligation by a sufficient number of individuals excuses other individuals from fulfilling it. Therefore, Muslim jurists agree that accepting the position of the judge among Muslim nations means that if one of the qualified people has accepted the position and assumed the charge of it, the commandment of Allah will be unenforceable among the rest of the others. Secondly, judicial office is a specified obligation (Fard 'Ayn) for the caliph, as one of his main duties, therefore he has to exercise it on his own or find an expert person for this position. Thirdly, it is considered to be a compulsory obligation (Wajib), for any qualified Muslim who has been asked by the caliph to hold this position, especially when there is no one else who possesses the same qualifications. For that reason, jurists have agreed among themselves that, if any qualified person refuses to accept the office of judge, the caliph has the authority to force him according to the extent of public interest. Fourthly, it becomes only recommended (Mandub) for him if there is another person has more knowledge for this position. Lastly, it is forbidden (Haram) for him to accept the job if he knows that he is not competent for it.[13]

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[12] For further information about the concept of the scale of these five religious qualifications in Islamic Shariah see, Schacht, *Introduction to Islamic Law*, *supra* note 1, p.p. 120-121.

[13] al Simnani, abi al Qasim Ali bin Muhammad, *Rawdat al Qudat wa Tariq al Najat*, Salah al Din al Nahi (ed.), vol. 1, Beirut: Muassasat Ari Risalah, (1984) p.p. 82, 85. (hereinafter cited as: al Simnani, *Rawdat al Qudat*); al Kasani, Ala' al Din abi Bakir (d. 587 A.H.), *Bda'i' as Sana'i' fi Tartib ash Shara'i'*, vol. 7, Beirut: Dar al Kutub al 'Ilmiyah, (1986) p. 2. (hereinafter cited as: al

2. 2. The Judge's Qualifications

Before a person is appointed as a Qadi, he should fulfil eight conditions. The possession of the first three is unanimously agreed by jurists. These are as follows: Islam, adulthood, and sanity. Jurists disagree about the other five: some of them consider them necessary for a person to be qualified as Qadi, while others consider them unnecessary. These are as follows: freedom, defect-free senses (able bodied), attainment of independent reasoning (ijtihad), manhood, and probity.[14]

2. 2. 1. Islam

Islam is considered as the most important requirement for the Qadi in Islamic Shariah because the fundamental duty for him is to apply the rules and principles of Shariah which are deemed to be divine legislation, and a part of his faith and belief. So a non-Muslim judge will face conflicting interests when he is appointed to this job (especially when he judges between Muslim litigants), because he has to give his judgment according to Islamic Shariah, while he does not believe in Islam. For that reason he cannot implement these rules and principles.

Kasani, *Bda'i' as Sana'i'*); Bin Qudama, Muwaffaq al Din Ali (541-620 A.H.), *al Mughni* (*The Sufficient*), Abdullah bin Abdul Muhsin al Turki & Abdul Fattah Muhammad al Hilu (eds.), vol. 14, al Qahirah: Hajar lit Tiba'ah wan Nashr wat Tawzi', (1990) p.p. 5-9. (hereinafter cited as: Bin Qudama, al *Mughni*); Bin Farhun, Burhan al Din abi al Wafa, *Tabsirat al Hukkam fi Usul al Aqdia wa Manahij al Ahkam*, vol. 1, Beirut: Dar al Kutub al 'Ilmiyah, p.p. 11-12. (hereinafter cited as: Bin Farhun, *Tabsirat al Hukkam*); al Mawardi, abi al Hassan Ali bin Muhammad (d. 450 A.H.), *Adab al Qadi*, Muhi Hilal al Sarhan (ed.), vol. 1, Baghdad: Matba'at al Irshad, (1971) p.p. 142-145. (hereinafter cited as: al Mawardi, *Adab al Qadi*); al Bakir, *as Sultah al Qadaiyah*, *supra* note 11, p.p. 83-86.

[14] Azad, Ghulam Murtaza, Qualifications of Qadi, 23 *Isl.Stud.*, (1984) p.p. 249-263. (hereinafter cited as: Azad, Qualifications of Qadi); Ibn al Ukhuwwa, *Ma'alim al Qurba*, *supra* note 11, p.p. 80-81.

All Muslim jurists agree that it is prohibited to appoint a non-Muslim as judge to give his decision in a dispute between Muslims, and if this happens, all his judicial decisions are null and void, because the judicial office is a guardianship, and there is no guardianship by non-Muslims upon Muslims.[15] Allah said; "And never will Allah grant to the disbelievers a way (to triumph) over the believers."[16] But if the responsible person has designated a non-Muslim as a judge, in this case, and to avoid any delay in people's interests, and according to the principle 'Necessities know no Law', he will act as a temporary judge. This means his decision can be effective; nevertheless, his appointment is unlawful.[17] However, does the situation change if the litigation is between non-Muslims? In another words, is it possible to select a non-Muslim judge to settle disputes justly between non-Muslims? Only the Hanafis permitted the appointment of a non-Muslim judge if his jurisdiction is just between non-Muslims, because litigation is a guardianship like the capacity to bear witness, and non-Muslims may have such ability in relation to non-Muslims as between themselves (dhimmis). The evidence used to support this idea is that when 'Umar bin al Khattab heard that

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[15] For example, Sunni jurists who support this idea are: al Mawardi, *Adab al Qadi*, *supra* note 14, p. 631; Bin Qudama, *al Mughni*, *supra* note 14, p. 12; al Simnani, *Rawdat al Qudat*, *supra* note 14, vol. 1, p. 52; Bin Farhun, *Tabsirat al Hukkam*, *supra* note 14, p. 18; Ibn Hazm, abi Muhammad Ali bin Ahmed (d. 456 A.H.), *al Muhalla*, Ahmed Muhammad Shaker (ed.), vol. 9, al Qahirah: Dar at Turath, p. 363. (hereinafter cited as: Ibn Hazm, *al Muhalla*). On the other hand, Shi'i jurist such as: al 'Amili, Muhammad bin al Hassan al Hur (d. 1104 A. H.), *Wasa'il ash Shiah ila Tahsil Masa'il ash Shariah*, Muhammad al Razi (ed.), vol. 18, Beirut: Dar Ihia' at Turath al Arabi, p.p. 2-3. (hereinafter cited as: al 'Amili, *Wasa'il ash Shi'ah*). It is to be noted that Shi'is school has their own requirements on the person who may be appointed as a judge. These conditions are not required in Sunni schools. For more details see the same reference of al 'Amili p.p. 6-17, 20-52, 89-154.

[16] Quran, 4:141.

[17] al Mawardi, Abu al Hassan (d. 450 A. H.), *al Ahkam as Sultaniyah*, (*The Laws of Islamic Governance*), Asadullah Yate (trans.), London: Ta-Ha Publication Ltd., (1996) p. 99. (hereinafter cited as: al Mawardi, *al Ahkam as Sultaniyah*).

'Umar bin al 'Ass had appointed a judge from the Egyptian Coptic Christians to settle disputes just between Coptic, he approved that appointment.[18] Nevertheless, the majority of jurists do not accept such judgeship and prohibit such an appointment in all matters, even if his jurisdiction is between non-Muslims.[19]

2. 2. 2. Adulthood

It is normal to disqualify those who are not of full age, both in Islamic Shariah and in positive Law (man-made law). In Shariah, if that happened, the appointment as well as the decision given by non-adult judge would be null and void, because as children do not possess legal capacity for themselves, how can they have that capacity for others? Ali bin Abi Talib said to 'Umar bin al Khattab that, as narrated by 'Aisha: The Prophet said: "The deeds of the following three persons are not recorded by the pen and are not responsible for what they do; an insane person till he becomes sane, a child till he grows to the age of puberty, a sleeping person till he wakes up."[20]

Accordingly, one may ask whether there is any particular age required for a person before he is appointed as a judge? In Islamic Shariah there is not any particular age required for the person to be Qadi, it is enough for him to be a mature and adult. It is reported that al Ma'mun (a Muslim caliph) had appointed Yahya ibn Aktham as a judge in al-Basra when he was only eighteen. Some

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[18] al Nawawi, Abdul Khaliq, *al Qada' fi al Islam*, al Qahirah: [S. N], (1976) p.p. 113-116. (hereinafter cited as: al Nawawi, *al Qada' fi al Islam*); al Mirsifawi, *Islamic Judiciary System*, *supra* note 12, p. 13.

[19] al Mawardi, *Adab al Qadi, supra* note 14, p. 631; Ibn Hazm, *al Muhalla*, *supra* note 16, p. 363; al Simnani, *Rawdat al Qudat*, *supra* note 14, vol. 1, p. 52.

[20] *Sahih al Bukhari*, *supra* note 10, vol. 8, Hadith No. 6814, p. 421.

people were not satisfied with this appointment and declared their objections to it. Al Ma'mun wrote to Yahya and asked: How old should the judge be? Yahya answered; (and he knew what the caliph meant by his question) "I am the same age of 'Utab bin 'Usaid when he was appointed by the Prophet as a judge in Mecca." Despite this fact, the older the judge is, the more respectable his character,[21] and if the judge is very old and his age has not affected his capacity to do the duties of judgeship properly, he can continue his term of office until he dies or asks for retirement. This means, in other words, that there is no age limit and compulsory retirement for the judge in Islamic Shariah.[22]

2. 2. 3. Sanity

The judge should be legally competent, so it is prohibited to appoint the insane, or the mentally deranged, because such persons are not legally responsible for their actions, and they cannot distinguish between right or wrong. Besides, they cannot fulfil the legal office proficiently. In brief the judge should be in his full capacity, otherwise, his appointment together with his decisions will be null and void and produce no legal effect.[23]

2. 2. 4. Freedom

In the past when slavery was widespread, the argument on this condition was important. This has now become just a historical issue, because the system of slavery has come to an end. However, when the qualifications of judges are discussed, this condition is still counted as one of them.

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[21] al Bakir, *as Sultah al Qadaiyah*, *supra* note 11, p.p. 324-325.
[22] al Nawawi, *al Qada' fi al Islam*, *supra* note 19, p.p. 111-112.
[23] al Mawardi discussed this condition in depth in his *Adab al Qadi*, *supra* note 14, p.p. 618-625.

There are two main opinions with regard to it. First, freedom is required in the person to be qualified for the position of the judgeship. The supporters of this opinion used the following text from Quran as an evidence. Allah said; "And take for witness two just persons from among you (Muslims) and establish the witness for Allah."[24] The first school interpreted the term 'just persons' in this verse as a freeman. On the contrary, the second opinion allowed the appointment of a slave as a judge. Their evidence was quoted from another text of the Quran when Allah said: "Verily! Allah commands that you should render back the trusts to those, to whom they are due; and that when you judge between men, you judge with justice."[25] The interpretation of this verse was that it was a commandment from Allah to all kinds of people, without any distinction between men, women, slaves or free.[26]

2. 2. 5. Defect-free Senses (able bodied)

First of all, a distinction must be made between two different expressions: lack of defects as to the senses, and lack of defects as to physical organs. Lack of defects relating to the senses means that the candidate is not dumb, deaf, or blind, i.e. he should be able to speak, hear, and see, whereas the lack of defects concerning physical organs means that the appointee, for example, is not one-eyed, lame, or humpbacked. There is no disagreement between jurists about the second point. They agree that it is not prohibited to appoint a judge if he is

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[24] Quran, 65:2.

[25] Quran, 4:58.

[26] al Mawardi, *al Ahkam as Sultaniyah*, *supra* note 18, p.p. 98-99; and in his *Adab al Qadi*, *supra* note 14, p.p. 629-630; al Bakir, *as Sultah al Qadaiyah*, *supra* note 11, p.p. 334-336; al Kasani, *Bda'i' al Sana'i'*, *supra* note 14, vol. 7, p. 3; al Nawawi, *al Qada' fi al Islam*, *supra* note 19,

physically disabled, because this defect does not prevent him from doing his job properly. However if he is not, he will have more dignity and veneration. On the other hand, the senses should be found in the Qadi without any defect, so if a deaf person was appointed, he would not be able to hear the parties to a dispute; the same could be said about the blind and the dumb as they would not be able to distinguish between the claimant and the defender, or would not be able to express views and most of the people would not understand his indications. So, no doubt, the selection of such persons might cause injustice, and therefore, their decision is not effective.[27]

2. 2. 6. Independent Reasoning (Ijtihad)

Ijtihad as a secondary source in Islamic Shariah will be discussed in detail later in chapter four. Here we want to clarify the conditions which a person should fulfil in order to be considered as mujtahid, and then to review jurists' arguments on the appointment of mujtahid and non-mujtahid as a judge. In general, mujtahid means 'the person who has the capability of extraction.' There are cumulative requirements which should be found in the person in order to consider him as mujtahid. These are as follows:[28]

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p.p. 125-126; Bin Farhun, *Tabsirat al Hukkam*, *supra* note 14, p. 18; al Simnani, *Rawdat al Qudat*, *supra* note 14, p. 52; Bin Qudama, *al Mughni*, *supra* note 14, p. 12.

[27] al Mawardi, *Adab al Qadi*, *supra* note 14, p.p. 621-624; al Bakir, *as Sultah al Qadaiyah*, *supra* note 11, p.p. 330-333; al Nawawi, *al Qada' fi al Islam*, *supra* note 19, p.p. 126-127.

[28] Bin Farhun, *Tabsirat al Hukkam*, *supra* note 14, p.p. 18-19; al Mawardi, *al Ahkam as Sultaniyah*, *supra* note 18, p.p. 100-101.

1. He must have full knowledge of the Quran and Sunnah injunctions, and understand their meaning, and when and how to use them to make his extraction in a particular case in order to issue a decision accordingly.

2. He must know the abrogation (Naskh) of text from the Quran and Sunnah, which is very substantial, in order to avoid using any abrogated (Mansukh) verse from the Quran or a Hadith from the Sunnah in his judgment.[29]

3. He must be really qualified in the principles of Islamic jurisprudence (Usul al Fiqh), because he cannot extract a judgment without the science of Shariah based on a deep knowledge of Usul al Fiqh.

4. He must know all the previous consensus rulings to avoid making any new decision which might conflict with the unanimous resolutions (ijma) of Islamic jurists.

5. He must also be a master in Arabic, both grammatically and linguistically, so he can understand the exact meaning of every expression of the Quran or the Sunnah. In this matter Allah said; "Verily we have sent it down as an Arabic Quran in order that you may understand."[30]

On the other hand, it seems difficult to give a definite answer regarding the possession of ijtihad by the judge, because Muslim jurists disagree about the necessity of this condition. Some of them argue that it is permissible and a valid condition, while others hold that it is only a praiseworthy condition. Those who

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[29] For more details about abrogation in Islamic Shariah see al Shawkani, al Hafiz Muhammad bin Ali, *Irshad al Fuhul ila Tahqeeq al Haq min 'Ilm al Usul*, vol. 2, Maser: Dar al Kutbi, (1990) p.p. 71-122; Burton, John, *The Sources of Islamic Law: Theories of Abrogation*, Edinburgh: Edinburgh University Press, (1990) p.p. 1-8.

[30] Quran, 12:2.

have said ijtihad is permissible and a valid condition are the majority of Muslims jurists "Hanbali, Shafi'i, Maliki, and some of Hanafi," who argue that if the judge is not qualified as mujtahid, the selection shall be invalid and any judgments would not have effect.[31] This means they do not permit the appointment of the imitating persons (Muqalideen), those who simply repeat the rulings of other jurists, because they do not possess the ability of ijtihad and this is important for the performance of judicial duties. So the appointment of such a person is inoperative if he is elected and his judgments are not binding. This idea is supported and evidenced in the Quran and Sunnah. From the Quran, this is shown when Allah said; "O you who believe! Obey Allah and obey the Messenger Muhammad, and those of you (Muslims) who are in authority. (And) if you differ in anything amongst yourselves, refer it to Allah and his Messenger, if you believe in Allah and the last day."[32] The destination of the word 'refer', according to their interpretation of this verse, is that "to Allah" means to the Quran, and "to the Messenger" means to the Sunnah. In other words, no one could make such a reference unless he has a deep knowledge and the qualifications which enable him to be mujtahid, because only a mujtahid has the ability to interpret the Quran and Sunnah. As to the Sunnah, it has been reported that the Prophet sent Mu'adh ibn Jabal, as a governor to Yemen; The Prophet asked him: "How will you decide the cases that will be brought before you? Mu'adh replied; I shall decide them

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[31] Bin Qudama, *al Mughni*, *supra* note 14, p.p. 14-16; al Mawardi, *Adab al Qadi*, *supra* note 14, p. 637; al Simnani, *Rawdat al Qudat*, *supra* note 14, p. 54; Bin Farhun, *Tabsirat al Hukkam*, *supra* note 14, p.p. 18-19; al Qasimi, Dhafir, *Nidam al Hukm fi ash Shariah wat Tarikh: as Sultah al Qadaiyah*, Beirut: Dar an Nafa'is, (1978) p. 100. (hereinafter cited as: al Qasimi, *as Sultah al Qadaiyah*).

[32] Quran, 4:59.

according to the book of Allah (Quran). He asked (what will you do) if you find nothing concerning (a particular matter) in the book of Allah? He replied: I shall decide it according to the Sunnah of the Apostle of Allah. He asked: (what will you do) if you find nothing about it in the Sunnah of the Apostle of Allah? Then replied Mu'adh: I shall exercise my own judgment, (ajtahidu bi ra'yi) without the least hesitation. Thereupon the Prophet slapped him upon the chest and said; praised be to Allah who helped the messenger of Allah's Messenger to find a thing which pleases the latter!"[33] On the basis of this Hadith, the supporters of this opinion claim that ijtihad is deemed to be the most important condition that should be found in the judge.

The second view was adopted by the majority of Hanafi, some of the Malikis, and Zaydi who permitted the appointment of imitates. Their opinion is based on the Hadith reported by Ali bin Abi Talib when he was sent, by the Prophet, as a judge to Yemen. He is reported to have said: "When Allah's Messenger intended to sent me to the Yemen as judge, I asked him: Oh Messenger of Allah: You are sending me and I am young, and I have no knowledge of the duties of a judge? He replied: Allah will guide your heart and keep your tongue firmly (attached to the truth). When two litigants sit in front of you, do not decide until you hear what the other has to say the way you heard from the first; for it is more suitable for the correct judgement to become clear to you. Later on Ali said; best that you should have a clear idea of the best decision. He said: I had been a judge (for long); or

[33] *Cf.* the translation with *Sunan Abu Dawud*, *supra* note 7, vol. 3, Hadith No. 3585, p. 1019.

he said: I have no doubts about a decision afterwards."[34] Accordingly, it is supposed that there is no cause to insist that the judge should be mujtahid, because the Prophet appointed Ali bin Abi Talib while he was young and unqualified to be mujtahid, and this, in their view, is clear evidence to disregard the ability of ijtihad in the judge. However, it should not be forgotten that the person who was appointed was Ali bin Abi Talib under the responsibility of Allah's Messenger, who could know what others could not, which means the analogy in this case is not right. In addition, the group of jurists also argued by pointing to another evidence by saying that a non-mujtahid judge can practice his judicial job without any problems, because he can settle disputes and solve them between litigants according to other jurists' independent reasoning (ijtihad).[35]

2. 2. 7. Manhood

Jurists have agreed unanimously that men may be appointed as judges, but they have differed in opinion about the appointment of women. The jurists can be divided into three main groups. A very strict group that does not allow women to be selected as judges in any circumstances; others who have some flexibility in their opinion, and allow the appointment in limited circumstances; and lastly, there are those who are considered to be very tolerant and permit the appointment of women without any conditions.

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[34] *Ibid.*, Hadith No. 3575, p. 1016.

[35] al Kasani, *Bada'i' as Sana'i'*, *supra* note 14, p. 3; Bin Farhun, *Tabsirat al Hukkam*, *supra* note 14, p. 19; al Nawawi, *al Qada' fi al Islam*, *supra* note 19, p.p. 166-170; al Bakir, *as Sultah al Qadaiyah*, *supra* note 11, p.p. 343-348; al Mirsifawi, *Islamic Judiciary System*, *supra* note 12, p.p. 19-24.

The first opinion, of the majority of jurists who adopt an absolute prohibition in selecting women as judges, admit that if the appointment is made, it will be invalid and any judgments will be void.[36] The evidence for it is taken from the Quran and Sunnah. From the Quran, Allah said; "Men are the protectors and maintainers of Women, because, Allah has made the one of them to excel the other, and because they spend (to support them) for their means."[37] The other proof is that narrated by Abu Bakra: During the days (of the battle) of Al Jamal (the camel), Allah benefited me with a word I had heard from Allah's Messenger after I had been about to join the companions of Al Jamal and fight along with them. When Allah's Messenger was informed that Persians had crowned the daughter of Kisra (Caesar) as their ruler, He said: "Such people as ruled by a lady will never be successful."[38]

The second opinion was expressed by Hanafi, who permitted women to be appointed as judges only in matters where they are competent to testify, for example, concerning pregnancy and related matters, monthly-period, childhood, virginity and all matters common only to women, because women have more knowledge than men in such matters, and men cannot bear witness in them because there is no access for them in such matters under Islamic Shariah.[39] They also argue that the judiciary is some sort of a guardianship and similar to

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[36] Bin Farhun, *Tabsirat al Hukkam*, *supra* note 14, p. 19; al Mawardi, *Adab al Qadi*, *supra* note 14, p. 625; al Simnani, *Rawdat al Qudat*, *supra* note 14, vol. 1, p.p. 62-63; Bin Qudama, *al Mughni*, *supra* note 14, p.p. 12-13. Shi'i' jurists also prohibit the appointment of women as judge for the same reasons. See al 'Amili, *Wasa'il ash Shi'ah*, *supra* note 16, p. 6.

[37] Quran, 4:34.

[38] *Sahih al Bukhari*, *supra* note 10,.vol. 5, Hadith No. 4425, p. 436.

[39] al Kasani, *Bada'i' as Sana'i'*, *supra* note 14, p. 3.

testimony, so whenever a woman can give testimony, she can be a judge. This means in matters of crimes and punishment (Hudud and Qasas), she cannot be a judge because her testimony is not accepted. So if she is appointed as a judge and her jurisdiction (walaya) is in crimes and punishment, her decision will not have effect and her appointment will be invalid as well.[40]

The last opinion was held by ibn Hazm, who allows women to be appointed as judges in all circumstances without any conditions or exceptions, even in matters of crimes and punishment. His analogy was made on the formal and legal opinion (Fatwa) which can be produced by women in particular cases. So as long as she can deliver a legal opinion, by analogy she can be, and has the ability to be, a judge.[41] No doubt there are some differences between a judgment and legal opinion. Chief amongst these is that a Fatwa is non obligatory whereas judicial decisions are final and obligatory.[42]

At present, in most Arab states women play a considerable role in modern development and have become an active person parallel with men in different social, political and commercial fields. Above all, they have proved their ability to exceed all difficulties. Therefore, and without going in much details in discussing the evidence of each group relating to the appointment of women as a judge, we can state that no explicit text from the Quran and Sunnah prohibits such an appointment. Every jurist in the different Islamic schools applies his own

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[40] al Mirsifawi, *Islamic Judiciary System*, *supra* note 12, p. 25.

[41] Ibn Hazm, *al Muhalla*, *supra* note 16, p.p. 429-230.

[42] For more details see al Bakir, *as Sultah al Qadaiyah*, *supra* note 11, p.p. 97-106; Tanzil-ul-Rahman, Adab al Qadi, 5 *Isl. Stud.*, (1966) p.p. 201-202.

reasoning (ijtihad) in this matter by presenting his evidence from either the Quran or the Sunnah and interpreting the given evidence according to his knowledge. Accordingly, it is believed that it is not necessarily the case that the non-appointment of women as judges is related to Islamic Shariah but it could be related to the Arab custom which in most Arab states still retains some reservations regarding the appearance of women in particular jobs. For example, in Egypt, or the Gulf States women have still not been appointed as judges even in civil courts which apply positive (man-made) law. This is not because the law in Egypt or in the Gulf States prohibits this appointment but because custom still plays its rule there, while in Tunisia women have been appointed as judges because the custom there is more liberal.

2. 2. 8. Probity

Justice (Adalah) in Islamic Shariah is a very accurate conception based on general principles. A person who might be elected as a judge should be faithful, truthful, sincere, patient, honourable, and has to show high principles and good character. Furthermore, he has to avoid perpetrating the great sins (al Kaba'ir) such as murder, adultery, sodomy, drinking of intoxicants, running away from the battlefield, giving false evidence, delaying the performance of obligatory prayer at the due time, slandering with commission of adultery, and gambling. He is also supposed not to persist in doing venial sins (al Sagha'ir) such as laughing during prayer, or sitting with sinners.[43]

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[43] al Mawardi, *al Ahkam as Sultaniyah*, *supra* note 18, p. 99; al Bakir, *as Sultah al Qadaiyah*, *supra* note 11, p. 337; Azad, Qualification of Qadi, *supra* note 15, p. 257.

Jurists are divided into two main opinions on the nomination of a sinner (Fasiq) not meeting the legal requirements as a judge. The first opinion from a majority of jurists stipulated justice as a condition which must be found in a person in order for him to be judge, accordingly, it is not permissible to select a Fasiq who does not fulfil the above stated qualities.[44] This is based on the verse that states; "O you who believe! If a rebellious evil person comes to you with news, verify it, lest you harm people in ignorance, and afterwards you be come to regret full what you have done."[45] Moreover, as a result of rejecting the sinners' testimony, by this group of jurists, an analogy was made to reject him as a judge as well.

The second opinion was held by Hanafi and some of Maliki, who allowed the appointment of sinner as a judge and accepted his judgment. The testimony of unjust person, in their views, was acceptable. So a person who can give testimony can also be appointed as a judge.[46]

2. 3. Judge's Appointment

The caliph is in charge of the appointment of judges. In fact, this is one of the main duties that he should exercise personally or deputise someone else to exercise it. Jurists have agreed unanimously that it is his personal responsibility, and he will be held to account by Allah about it in the last day if he practises it with negligence. The Prophet did practise the judicial authority personally; at the

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[44] al Mawardi, *Adab al Qadi*, *supra* note 14, p.p. 634-636.

[45] Quran, 49:6.

[46] al Kasani, *Bada'i' as Sana'i'*, *supra* note 14, p. 3; Bin Farhun, *Tabsirat al Hukkam*, *supra* note 14, p. 18.

same time He appointed some of His companions as judges and sent them to the far regions. The same thing happened with His successor Abu Bakir in the first period of his ruling, when later on when found himself very busy and could not practice the office of judge and the presidential duties simultaneously, so he deputised it to 'Umar bin al Khattab.[47] This was when the Islamic state was still small and the duties of the caliph were not that extensive. However, the situation changed when the Islamic state became bigger and the ruler's duties increased. So the Imam started to transfer most of his functions, including the judgeship, to his representative who was called Wazir at Tafwid.[48]

In addition to the caliph or his representative who have the right to appoint the judge, jurists gave influential people in power, in conditions of necessity, the authority to select judges. This could be if the caliph or his representative were killed, lost or taken as prisoners of war. In such cases the appointment would be lawful and when the Imam or his representative reappeared, all the judges appointed in their absence would have to resign and a new set of judges would be elected.[49]

Relating to the same subject, when the Imam or the caliph seeks to delegate any person as a judge, first of all he has to be sure that the person in question satisfies all the qualifications required for the position. This could be in two ways,

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[47] al Qasim, *as Sultah al Qadaiyah, supra* note 31, p. 117; al Nawawi, *al Qada' fi al Islam, supra* note 19, p.p. 94-98; al Bakir, *as Sultah al Qadaiyah, supra* note 11, p.p. 404-406.

[48] It is has to be mentioned that this position of the representative corresponds to the position of the prime minister in parliamentary government. For more details see al Tamawi, Sulayman Muhammad, *as Sultat al Thalath fi ad Dasatir al Arabiyah wa fi al Fikr as Siyasi al Islami: Dirasah Muqaranah*, al Qahirah: Matba'at Jami'at 'Ain Shams, (1986) p. 469.

[49] al Mawardi, *Adab al Qadi, supra* note 14, p. 139. al Bakir, *as Sultah al Qadaiyah, supra* note 11, p. 406.

either by previous personal knowledge or by examination.[50] Personal knowledge means that the Imam already knows whether the person to be appointed is qualified for the office of judge or not.[51] Generally, however, the caliph does not know the candidates. Therefore, an examination becomes necessary to show to the Imam the candidate's legal ability, and depending on the result, a decision will be taken.[52]

Once the decision on the appointment is taken, it should be declared to the public to avoid any uncertainty that a particular person has been selected as judge. The declaration must also include the territorial jurisdiction to inform the appointee as well as the people as to where he is going to exercise his judicial power. Furthermore the caliph has to determine the subject matter of the jurisdiction of the judge as well, because in Islam, unless the competence of judge is defined, he is considered to be qualified to determine all cases.[53]

2. 4. Judicial Vacancy

Different reasons could lead the judge to leave his position, or the judicial office could be vacant for different reasons, such as resignation, transgression, apostasy etc.

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[50] al Qasimi, *as Sultah al Qadaiyah*, *supra* note 32, p.p. 131-135.

[51] This is what happened to Ali bin Abi Talib when he was appointed as a judge for Yemen. So according to the previous knowledge the Prophet had of Ali, He just advised him what to do if litigants come before him. See al Mawardi, *al Ahkam as Sultaniyah*, *supra* note 18, p. 67; Bin Farhun, *Tabsirat al Hukkam*, *supra* note 14, p. 22. Bin Qudama, *al Mughni*, *supra* note 14, vol. 11, p. 378. al Mirsifawi, *Islamic Judiciary System*, *supra* note 12, p. 43.

[52] This is what happened to Mu'adh bin Jabal when the Prophet asked him several questions before sending him as a judge to Yemen to be sure that he was a fully qualified person for this position. For more details see Bin Farhun, *Tabsirat al Hukkam*, *supra* note 14, p. 22. al Mawardi, *Adab al Qadi*, *supra* note 14, p. 175.

[53] al Mawardi, *al Ahkam as* Sultaniyah, *supra* note 18, p. 106; and his *Adab al Qadi*, *supra* note 14, p.p. 153, 155, 160, 164, 166.

2. 4. 1. Resignation

Some jurists have said that it is permissible for the judge to resign during his term of office at any time he likes and his resignation is valid without the agreement of the caliph or his representative.[54] Whereas al Mawardi has argued that a judge's resignation is not effective until the caliph or his representative has approved it as the latter is the authority responsible for the judge's appointment.[55] However, others like Abu Ya'la have said that without any excuse, the judge cannot resign from his job. Accordingly, the Qadi has to have a serious reason to relinquish his position and the Imam has to be satisfied before accepting his resignation.[56] Others have said that the judge is considered as a representative of the nation (Ummah) and he accordingly has not the right to resign by his own decision. This means that under no circumstance can he resign from his job as a judge.[57]

2. 4. 2. Transgression

This condition has been discussed in the section on the appointment of the rebellious evil person as a Qadi. All that can be said here is that jurists who reject the appointment of a sinner also argue that if the judge commits a sin during his term of office, he has to resign. Those who claim that a sinner can be elected as a

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[54] al Simnani, *Rawdat al Qudat*, *supra* note 14, p. 127.

[55] al Mawardi, *Adab al Qadi*, *supra* note 14, vol. 2, p. 401.

[56] al Mawardi, *al Ahkam as Sultaniyah*, *supra* note 18, p. 59.

[57] al Bakir, *as Sultah al Qadaiyah*, *supra* note 11, p. 572; al Nawawi, *al Qada' fi al Islam*, *supra* note 19, p.p. 159-161.

judge do not stipulate that the judge should be discharged from his term of office if he commits a sin.[58]

2. 4. 3. Apostasy

Some jurists consider that apostasy is a reason to discharge a judge from his judicial office, because how can he make his decision according to Shariah while he does not fully believe in Islam. Others like Hanafis have said that apostasy does not count as a reason for resignation, especially if the judge reverts to Islam and turns to Allah in repentance.[59]

2. 4. 4. Other Reasons

It is axiomatic that the death of the judge makes his position vacant, or if he loses his legal capacity i.e., becomes insane, or he loses his freedom according to those who do not accept the appointment of slaves. This also occurs if he loses some of his senses, without which he cannot master his job, like losing his sight, hearing or power of speech. In view of the fact that administrating justice is considered as one of the important conditions that a judge should be found to fulfil, most jurists have decided that it is necessary to dismiss him if it is found that he is unjust in his judgment, does not exercise his authority properly, abstains from judging between litigants, or behaves inadequately. Also judges appointed as temporary judges during the absence of the caliph or his representative, should also resign and new judges should be appointed when the caliph or the legal Islamic governmental rule is restored in the state. On the other hand, the Qadi is

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[58] Bin Farhun, *Tabsirat al Hukkam*, *supra* note 14, p. 78; al Mawardi, *al Ahkam as Sultaniyah*, *supra* note 18, p. 84.

[59] al Mirsifawi, *Islamic Judiciary System*, *supra* note 12, p.p. 51-52.

allowed to recuse himself temporarily if he has any interest in a particular case or if one of the parties to a dispute is one of his relatives or friends.[60]

2. 5. Independence of Judges

As should be now apparent, there is a strong tie between the office of a judge and religion in Islam, because the judge is to make decisions according to the Shariah. This is based on the verses that; "And whosoever does not judge by what Allah has revealed, such are the Kafirun (i.e. disbelievers-of a lesser degree as they do not act on Allah's laws)."[61] "And whosoever does not judge by what Allah has revealed, such are the Zalimun (polytheists and wrong-doers-of a lesser degree)."[62] "And whosoever does not judge by what Allah has revealed (then) such (people) are the Fasiqun (the rebellious) i.e. disobedient (of lesser degree) to Allah."[63]

Independence of judges means that they should be protected during their term of office from any influence, and they should enjoy stable and comfortable conditions of work in order to help them make their decision independently without any fear, worry, or intervention. Islam requires that these conditions be secured and that a fair-minded judge in the an Islamic state be guaranteed that no one, even the caliph, will intervene in his job. On the contrary, he will get the caliph's support as long as he makes his decision within the Shariah, and also because both the caliph and the judge have agreed to achieve the particular aim of

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[60] al Qasimi, *as Sultah al Qadaiyah*, *supra* note 32, p.p. 176-177.
[61] Quran, 5:44.
[62] Quran, 5:45.
[63] Quran, 5:47.

"establishing justice", and are to please Allah who will judge them if they neglect their duties.

Throughout the ages of Islamic history, judicial power has been held in high esteem by most if not all Muslims whether governors or people, as it is strongly believed that, when the judge settles disputes between individuals, he not only intends to perform legal actions but also seeks Allah's satisfaction. Therefore, it is to be said that in Muslim jurists' view the judicial function in Islam may be described as the best form of worship. After faith in Allah, there is nothing more obligatory than a just decision.

This belief has led Muslims, in general, not to intervene in any case that may be brought before the Qadi, to avoid Allah's anger and punishment. Furthermore, intervention in judicial affairs conflicts with principles of justice. Allah said; "Verily! Allah commands that you should render back the trusts to those, to whom they are due; and that when you judge between men, you judge with justice."[64] All these things ensure that the Qadi in the Muslim community enjoys a high standard of independence.

[64] Quran, 4:58.

Concluding Remarks

We conclude from the foregoing discussion that the office of the judge has been given special protection and enjoyed particular care in Islam, because it is considered to be a divine office, and whoever accepts it will be held to account to Allah if he neglects his judicial duties. As a result of the importance of this position, the qualifications of judges have been discussed comprehensively by Muslim jurists, and it has been held a high standard of qualifications in the candidate is required.

According to the present draft Statute of the ACJ, judges of this Court should be qualified in Islamic Shariah. The next chapter will examine the organisation of the ACJ and the system of judges, and while discussing other points in this regard, a special consideration of the qualification of judges in the ACJ will be undertaken in order to find out how far the Arab draftsmen were influenced by the principles of Islamic Shariah in this matter, and whether every principle and rule in this draft Statute will be rooted in Islamic Shariah or the Statute of the ICJ or both. In addition, some important questions have to be put into consideration during our discussion, did the Arab draftsmen expressly provide that the judges of the ACJ should be Muslim? That is because there is a contentious opinion (ijma) between Muslim jurists regarding the prohibition on the appointment of a non-Muslim as a judge especially when he is granted competence to apply the principles and rules of Islamic Shariah. Another important question is, what about the appointment of women as a judge in the projected ACJ? Will Arab states

accept such an appointment? Will their acceptance or refusal relate to Arab custom, politics or principles of Islamic Shariah? The next chapter will focus on those and other related questions.

Chapter III
The Organisation of the Court

The aim of the present chapter is to discuss the main points of the organisation of the ACJ, such as the qualification of the judges, system of election, *ad hoc* judges, chambers and other related subjects. During the consideration of these subjects we will indicate how far Arab draftsmen were influenced by political circumstances on the one hand, and principles and rules of Islamic Shariah and the Statute of the ICJ on the other hand. In general, principles and procedures governing the organisation of the ACJ are contained in chapters one and two, (Articles 1-20) of the draft Statute of the ACJ. These principles and procedures are mostly the same as Articles 2-23 of the Statute of the ICJ.

The general points contained in these Articles are that the ACJ comprises seven judges elected among candidates nominated by states that are parties to the Court's Statute, no two of whom may be nationals of the same state: the League Council is responsible for the election of the judges, which is run by secret ballot from a list of qualified persons, prepared by the Secretary-General in alphabetical order of all persons nominated: they serve for a term of six years and they may be re-elected: the terms of three judges who are elected at the first election expire at the end of the first three years, and the term of the remaining four expire at the end of six years: the Court elects its President and Vice-President for a period of two years; they are eligible for re-election: incidental vacancies of the Court occurring by resignation, removal or death are filled by the same method; thus, a

person elected at an incidental election to replace a member whose term of office has expired for any of the above reasons, should only hold office for the remainder of his predecessor's term.

3. 1. The Judges' Qualifications

The reputation of any judiciary, whether national or international, depends upon the quality of its judges. Whenever they possess high standards of qualifications, this means the reputation of the Court itself will remain high. Art. 6 of the draft Statute of the ACJ lays down, in general, the qualifications which will be required of its judges. It provides:

> "The Court shall be composed of a body of independent Judges, who are citizens of member states, and are persons of high moral character, who possess the qualifications required in their respective countries for appointment of the highest judicial office, or are jurisconsults of recognised competence in Islamic Shariah and international law."

The formulation of this Article follows closely, with minor changes, the wording of Art. 2 of the Statute of the ICJ which also states the personal and professional requirement for its judges: high moral character, eligibility to highest judicial office, or recognised competence in international law.[1]

It has to be mentioned that neither the Pact of the Arab League nor the draft Statute nor the draft Rules of the ACJ include any indications of how to establish the existence of judges' qualifications. This is also true of the ICJ. Accordingly, there is no international machinery responsible to investigate whether candidates

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[1] This Article provides:

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

actually possess such qualifications. The matter will be left to the good sense of every member state that desires to ensure that the ACJ is composed of highly qualified judges, that the reputation of the Court as a whole remains high, simply because every state may become a litigant before the Court.[2]

On the other hand, it becomes clear that Art. 6 of the draft Statute stipulates two different types of qualifications required in each candidate, qualification for appointment to the highest judicial office in their own countries, recognised competence in Islamic Shariah and international law. Actually, there is no relationship between the qualification to hold the highest judicial office of a judge in national courts and to be qualified in international law. In another words, it is not necessary that the judge who may hold a high position in national courts is usually deemed qualified to be the right person to hold the same position in an international court, because each court has its own nature, applicable law, and types of jurisdiction. For that reason, any international court is considered 'international' not because its judges will be from different nationalities, but because it is an international court applying international law. In this regard Rosenne criticised the ICJ Statute when he argued that "the order in which those two qualifications are stated is not logical."[3] The need for a solid background and

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[2] See for more details Rosenne, Shabtai, *The World Court: What it is and How it Works*, London: Martinus Nijhoff Publishers, (1995) p. 45. (hereinafter cited as: Rosenne, *The World Court*); also see his The Composition of the Court, in Leo Gross (ed.), *The Future of the International Court of Justice*, vol. 1, New York: Oceana Publications, INC., (1979) p.p. 387-388.

[3] Rosenne, Shabtai, *The Law and Practice of the International Court 1920-1996*, vol. I, The Hague: Martinus Nijhoff Publishers, (1997) p. 367. (hereinafter cited as: Rosenne, *The Law and Practice*).

high standard of qualification in international law is much more important than holding the highest judicial office in his own country.[4]

This criticism cannot to be levelled against the qualification of a judge in the Islamic Shariah, because the branch of law which regulates principles of international relations of the Islamic state is based on the same sources as that branch which regulates internal relations. In another words, unlike positive law, there is no difference between municipal law and international law in the Islamic Shariah.

In spite of this point, the qualifications required for the Arab judges, provided for in the draft Statute of the ACJ, should differ from person to person. Compared with the judges in the ICJ it becomes clear that judges of this Court have held the highest judicial office in their own countries; others were former university professors of international law, legal advisors or delegations for their countries at international conferences; others were diplomats or other professionals in international legal affairs; and some pleaded before the ICJ as advocates. Moreover, numerous judges had been members of the International Law Commission before election as judges in the Court. This means the majority of judges of the ICJ are qualified in international law, which is considered as an important requirement in every candidate.[5]

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[4] See Fitzmaurice, Gerald, Enlargement of the Contentious Jurisdiction of the Court, in Leo Gross (ed.), *The Future of the International Court of Justice*, New York: Oceana Publications, INC., (1976) p.p. 467-468.

[5] Oda, Shigeru, The International Court of Justice Viewed from the Bench (1976-1993), 244 *Recueil Des Cours* (1993) p. 113. (hereinafter cited as: Oda, The International Court); Prott, Lyndel V., *The Latent Power of Culture and the International Judges*, Abingdon: Professional Books Limited, (1979) p. 27; For more details about the legal backgrounds of judges of the ICJ see 49 *YBICJ* (1994-95) p.p. 20-59.

It is not expected that the ACJ will face any difficulties in finding candidates to hold the position of judges. A considerable number of persons, citizens of member states of the Arab League, fulfil the requirements of Art. 6 and have substantial knowledge and personal experience in both multilateral diplomacy and international law.

A problem arose when Arab draftsmen stipulated qualifications in Islamic Shariah as a second requirement in candidates while requiring at the same time that they be qualified in international law. So one may ask whether the Arab draftsmen intended to exclude from appointment those who are not qualified in Islamic Shariah although they possess a high standard qualification in international law? Not only that, but what exactly is the degree of qualification in Islamic Shariah that the Arab draftsmen requite?

Our own view on this complicated point, on a close reading of Art. 6, whether in the original version or in translation, is that it appears the Arab draftsmen made a direct relationship between the qualification in Islamic Shariah and international law, and stipulated that every candidate has to be qualified in both in order to be considered as a legitimate candidate, because the word 'and' is used instead of 'or' in the phrase "jurisconsults of recognised competence in Islamic Shariah and international law." Evidence supporting this interpretation is that when the state of Qatar gave its view on this point in its letter to the Secretary-General of the Arab League, it stated:[6]

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[6] See *Unpublished Document Relating to the Establishment of the Arab Court of Justice and Discussion of the 1995 Draft Statute*, (hereinafter cited as: *Unpublished Letter*), *Unpublished Letter* from the Permanent Mission of State of Qatar to the Arab League Cairo, to the Secretary-

> "It is understood that the sentence 'in Islamic Shariah and International Law' means every judge should have recognised competence in Islamic Shariah and International Law, and because those who may be qualified in international law may not necessary qualified in Islamic Shariah, and....., therefore it is recommended to amend the wording to 'in Islamic Shariah or international law."

The Secretary-General of the Arab League did not a give clear answer to this important question which was stated by Qatar. His response was as follows:[7]

> "The combination between the qualification in both Islamic Shariah and international law in the Court's judges is not impossible and is considered as a recommended requirement."

This insistence by the Secretary-General to keep the wording of Art. 6 as it is without changes and the absence of any other state supporting the Qataris' point of view give us a clear indication that Arab draftsmen want the ACJ to be composed of judges who are professionals in Islamic Shariah and international law at the same time. This is a practically impossible and illogical requirement, and would lead to unacceptable legal results.

On the one hand, it will exclude non-Muslims who are citizens of member states of the Arab League from appointment as a judge in the Court, even if they are qualified in international law, despite the fact that most cases which may be brought before the ACJ will be settled according to the principles and rules of international law, in which principles of Islamic Shariah are not required. Most if not all inter Arab disputes are boundary disputes, and there are lot of examples

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General of the League of Arab States (Secretary-General Office), No. 12/3-104, dated, 10/09/1995, p. 3.

[7] *Unpublished Letter*, from the Secretary-General (Secretary-General Office) to the Permanent Mission of the State of Qatar in to the League of Arab States, no number given, dated, 13/09/1995, p. 1.

that could be cited here.[8] The most recent case between member states in the Arab League brought before the ICJ is the Maritime Delimitation between Bahrain and Qatar.[9] We believe that in this case, if the parties decide to bring it to the ACJ, its decision needs judges qualified in international law more than Islamic Shariah simply because this dispute is a technical dispute that needs special rules accepted by both of the parties. Principles of international law in this point are more clear than principles of Islamic Shariah.

On the other hand, Art. 18 (5) of the draft Statute of the ACJ, stipulates that *ad hoc* judges shall fulfil the conditions required by Art. 6, which means, according to the wording of this Article, litigating states are not allowed to appoint an *ad hoc* judge to sit in a particular case if he is not qualified in Islamic Shariah. We believe this conclusion will decrease the number of cases which might be brought before the Court, especially if Islamic Shariah is not the law to be applied in that particular case. The same argument which has been made about the titular judges also applies to the *ad hoc* judges. If state A desires to appoint an *ad hoc* judge in its dispute with state B which is a technical dispute, for example over a maritime boundary, and both have agreed that principles of international law comprise the law to be applied in their case, and state A appoints a Western jurist who is considered as a professional in this kind of cases, while state B appoints an *ad hoc* judge who is only qualified in the Islamic Shariah, the illogical result in

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[8] See Izz al Rijal, Omar, Jami'at ad Dowal al 'Arabiyah wa Munaz'at al Hudud al 'Arabiyah, (The League of Arab States and the Arab Boundaries Disputes), 111 *Mujallat as Siyasah* ad *Dawliyah* (1993) p.p. 201-206.

[9] *Case Concerning Maritime Delimitations and Territorial Questions Between Qatar and Bahrain* (Qatar v. Bahrain), *ICJ Rep.*, (1991) p. 50.

this example is that the appointment of state A is illegal and the appointment of state B is legal. This may lead state A not to accept the jurisdiction of the ACJ and a preference to settle the dispute before the ICJ.

We are not against the idea that judges of the ACJ should be qualified in Islamic Shariah as well as international law. Our reservation on this point is that it is not required that every judge in the Court must be qualified in Islamic Shariah and international law because this is difficult condition to be achieved. Rather the Arab draftsmen should have adopted logical provisions suited to Arab political and legal circumstances for simple reason that Islamic Shariah is not the only primary source in the present draft Statute, further it has not been given any priority in application, so why the draftsmen adopt this requirement? On the other hand, if the Islamic Shariah is the only primary source to be applied by the projected ACJ the matter then will be different because in this case it becomes necessary to require that every judge of the Court has to be qualified in Islamic Shariah as the International Islamic Court of Justice (IICJ) has requested.[10] To make this idea clearer, when the draftsmen of the Statute of the IICJ required that every judge should be qualified in Islamic Shariah, they also provided that

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[10] The idea of the creation of IICJ appeared in 1980 when the Third Islamic Summit of the Organisation of the Islamic Conference adopted Resolution No. 11/3 which provides for the establishment of this Court. A special expert committee was appointed to prepare its Statute. It is however to be noted that this Statute's still not in force because ratification by two-thirds majority (31 out of 45) member states as provided in Art. 49 of the OIC Charter has not been achieved. Amendment must be made to Art. 3 of the Charter of the OIC before activating the projected IICJ by adding another paragraph designating this Court as the principal judicial organ of the OIC in addition with the other three organs: Kings and Heads of States and Government; Foreign Ministers; and General Secretariat and subsidiary organs. For more details about this Court see Rifat, Ahmed M., *Mahkamat al 'Adl al Islamiyah ad Dawliyah*, (*International Islamic Court of Justice*), al Qahirah: Dar an Nahdah al 'Arabiyah, (1992); al Ashal, Abdulla, *Usul at Tanzim al Islami*, (*The Origin of Islamic Organisations*), al Qahirah: Dar an Nahdah al Arabiyah, (1988) p.p. 185-205; Shihab, Mufeed, The Organisation of the Islamic Conference, 3 *EPIL* (1997)

principles of Islamic Shariah were the primary source to which the Court had to have recourse in every case brought before it where this was necessary.[11] Moreover, when they discussed the qualification of judges in the draft Statute of the IICJ, they laid down clear provisions. Art. 4 provides:

> "To be eligible for membership of the Court, a candidate must be a Muslim of high moral character, and national of one of the member States of the Organisation provided that he is at least forty years of age, a Shariah jurist of recognised competence and experienced in international law and possesses the qualification required in his own country for appointment to the highest Ifta or judicial office."[12]

This Article settles the basic principal problems which may arise in regard to the qualification of candidates. Islam was the first condition required, then the candidate should be a Shariah jurist appointed in the highest *Ifta* or judicial office, but in international law it is only recommended that he has experience in this field. Compare Art. 36 (1, 3, 5) of Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, in which eighteen judges will be elected from two lists: at least nine have to be qualified in criminal law experience, and five qualified in international law.[13]

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p.p. 827-828. It should be noted that all Arab states which are members of the Arab League are Muslim states and also members of the Organisation of the Islamic Conference.

[11] Art. 27 of the draft Statute of the IICJ.

[12] Ifta (casuistry) means the deliverance of formal legal opinion. The person who gives this formal legal opinion on any question is called a Mufti or expounder of the law of the Quran and Sunnah. This Article stated clearly what kind of qualifications is required in each candidate. It requires that the nominee has to be a Shariah jurist which means he must have finished at least his undergraduate Islamic Studies from a recognised Islamic school or University. In addition he has to possesses the qualification for appointment to the highest judicial office or ifta.

[13] For more details about this Court see Ambos, Kai, Establishing an International Criminal Court and an International Criminal Code, 7 *EJIL* (1996) p.p. 519-544.

This does not mean that the person who may be appointed as judge, whether in the IICJ or ACJ, has to posses the quality of reasoning to be a mujtahid. This condition is disputed as a necessity, for the ability of ijtihad is also not necessary in candidates for the two Courts. It is to be noted that there is no clear provision clarifying the types of qualifications in Islamic Shariah which every candidate for the election to the ACJ should possess. For that reason the Sultanate of Oman recommended that every candidate should be a Muslim jurist and have worked at least ten years in a national Islamic Court.[14]

In addition, as the IICJ is considered to be an International Islamic Court, its aim is to settle disputes between Muslim states members of the OIC, according to Islamic Shariah in the first place and only then according to international law if this is relevant. For this reason, non-Muslims citizens of member states of the OIC are excluded from appointment to the Court because, according to Islamic jurists' views, they cannot implement the rules of Islamic Shariah.[15] This matter in the case of the ACJ is different, because this Court is not an Islamic international court like the IICJ. Furthermore, it is not required that judges, according to Art. 6 of the draft Statute, should be Muslim to be allowed to take up judgeship in the ACJ. But why did the draftsmen not mention these two important points explicitly in the draft Statute of the ACJ?

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[14] *Unpublished Letter* from the Permanent Mission of the Sultanate of Oman to the League of Arab States to the Secretary-General of the League of Arab States (Secretary-General Office) No. 3906/21080/50024/140, dated, 15/01/1995, p. 1.

[15] According to Art. VIII of the Charter of the OIC only Muslim states are eligible to join this Organisation. See al Ahsan, Abdullah, *The Organisation of the Islamic Conference: An Introduction to an Islamic Political Institution*, Herndon, Va. USA: The International Institute of Islamic Thought, (1988) p.p. 45-46.

We believe the reason may be one of the following: (1) member states want to make clear (for political reasons) that they do not desire to create an Islamic international court within the Arab League system in the same way as that under the OIC. (2) the draftsmen may have intended not to deal with these points in depth, and just mentioned the rule in general and left the details to the general principles of Islamic Shariah regarding the appointment of judges.

In conclusion, it is very difficult to find a person who possesses the high standard of qualification in both Islamic Shariah and international law at the same time as provided for in Art. 6 of the ACJ draft Statute.[16] So we strongly recommend a revision of Art. 6 to substitute 'or' instead of 'and'. This would allow the Article to be interpreted as meaning that the whole court could be composed of persons some of whom are qualified in Islamic Shariah and others qualified in international law. Nevertheless, all judges qualified in Islamic Shariah must be Muslims, and non-Muslim citizens should only allowed to be members of the Court if they just determine cases settled by principles other than those of Islamic Shariah. When any litigating state requests the Court to settle the dispute according to Islamic Shariah, they have to be disqualified for the particular case or cases. In this case an amendment is needed to the draft Statute by adding this idea.

International judges, like national judges, must be independent. So Art. 6 of the draft Statute of the ACJ refers to the independence of judges as another

[16] In numerous Muslim Universities, such as al Azhar University in Egypt and al Ain University in UAE, students should study at the same time, for the bachelor's degree, Islamic Shariah and Law, but we cannot say that this is enough to consider such graduates as professionally qualified in both.

important requirement. It is considered as a first and superior requirement in different places in the draft Statute. But what is the exact meaning of the word 'independence' which expressly appears in Art. 6 of the draft Statute? The answer to this question may be found in the arguments of the Committee of Jurists made when revising Art. 2 of the Statute of the ICJ. At San Francisco it was explained that it means a judge is to enjoy the freedom from any harassment or political control while he exercises his duties at the Court:[17]

> "...After discussion as to whether the word 'independence' should be replaced by the word 'impartial' the committee unanimously agreed to adopt Article 2 as it stood.
> It was felt by several delegates that deletion of the word 'independence' would give rise to misinterpretation, since it is important that the judge of the Court should be not only impartial but also independent of control by their own countries or United Nations Organization".

Lachs had his own view on judges' independence. He argued that:[18]

> "independence is a quality of man, and dependent on his character; it is not dependent on political system. One may test it by the writings in which he presents his views and by his judicial record. By his fruits ye shall know him. Independence is a 'personal' quality; it is the man who is to be evaluated, and not a system."

Furthermore, in order to satisfy this requirement, the judges of the ICJ are clearly under an obligation not to hold any other positions while their term of office still exists. In other words, candidates who are elected should immediately

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[17] Report of the Committee of Jurists in *UNCIO*, vol. 13, (1945) p. 174.

[18] Lachs, Manfred, A Few Thoughts on the Independence of Judges of the International Court of Justice, 25 *CJTL* (1987) p. 596; also see his separate opinion in case Concerning *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. USA), *ICJ Rep.*, (1986) p. 158. When he argued that: "A judge-as needs no emphasis-is bound to be impartial, objective, detached, disinterested and unbiased." For comprehensive explanation of these qualities see Schwarzenberger, George, The Judicial Corps of the International Court of Justice, 36 *YBWA* (1982) p.p. 241-267; Prott, Lyndel V., The Future of the International Court of Justice, 33 *YBWA* (1979) p.p. 291-294; for further details see Shelton, Dinah, The Independence of International Tribunals, 56 *The Review* (1996) p.p. 23-49; also see Fitzmaurice's separate opinion in *Barcelona Traction, Light and Power Company, Limited*, case (Belgium v. Spain), *ICJ Rep.*, (1961) p. 133.

resign from any position in the service of a government or international organisation. In some cases they may be forced to leave their private functions as well. For example, in one case, the President suggested that judge Sir Percy Spencer had to resign from the directorship of certain companies,[19] and also when judge Sir Muhammad Zafrullah Khan was excluded from sitting in the South West Africa case, because he had been an active Pakistani delegate to the UN General Assembly when it was discussing the situation in South Africa.[20] This however does not mean that a judge has to be excluded from a case to which his own country is a party, because that does not conflict with the principles of independence and impartiality of judges.

It is to be noted that the draft Statute of the ACJ has introduced two other important provisions in order to secure the independence and impartiality of judges. No similar provisions are found in the Statute of the ICJ. The first para. 3 of Art. 14 prohibits members of the Court from working with any party to a dispute whether it is a principal party or intervening in a case. This obligation exists for three years after the termination of his office in the Court. It reads as follows:

> "A Judge whose term of office expires may not, within three years, work with any body that was a principal or intervening party in a case in whose decision that Judge participated. In a case of breach, the issue shall be submitted to the Court to take the appropriate action. However, an exception may be made on the basis of a reasoned decision."

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[19] See correspondence between the Prime Minister of Australia (R. Menziens) and judge Sir Percy Spender, *The Times* (London), Friday, 12th September 1958 p. 9.

[20] See *South West Africa* case, Second Phase, (Ethiopia v. South West Africa; Liberia v. South West Africa), *ICJ Rep.*, (1965) p. 3.

Second, Art. 15 provides that "Judges of the Court may not be dismissed". This Article states explicitly that judges of the ACJ are really protected from influence and control of their governments, which means that as soon as a judge is elected, his government has no power to dismiss him from his position.[21]

3. 2. The System of Elections

There is a strong relation between the nomination and election of members. Elections start when states nominate their candidates following the Secretary-General's invitation. Arts. 7 (2, 3) and 8 of the draft Statute regulate the nomination of candidates and the election of members of the ACJ. These two Articles show that, unlike the international drafters, the Arab draftsmen follow the principle of direct nomination of candidates. On the one hand, Art. 7 provides:

> "2. Each member state shall be entitled, upon the invitation of the League's Secretary-General, to nominate one of its citizens, at least two months before the date of election.
> 3. Elections shall be run according to the League's Council decision, by secret ballot from a list of persons which shall be prepared by the League's Secretary-General containing the names of the candidates in alphabetical order."

Art. 8 on the other hand provides:

> "No more than one Judge of the same nationality may be appointed as a member of the Court."

It has to be mentioned that the draft Statute of the IICJ also employed direct nomination but was more successful in laying down clear and simple provisions with regard to the nomination of candidates and election of members.[22]

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[21] This will be discussed later in this chapter when dealing with vacancies of judges, see below p. 126.

[22] See Art. 5 of the draft Statute of the IICJ.

3. 2. 1. Nomination of Candidates

It is regrettable to say that the wording of Art. 7 has dissolved the flavour and meaning of 'independence' that the Arab draftsmen had already adopted in Art. 6 of the draft Statute. However, before we can state our own view on this, further information must be given about the system of nomination of candidates in the Statute of the ICJ. From a close reading of those Articles regulating the nomination of candidates in the Statute of the ICJ (Arts. 5-7), it becomes clear that the international drafters have followed the principle of indirect nomination of candidates. This idea means that every candidate is nominated not directly by his own government, but indirectly by 'national groups' created in each country for this purpose; their main function is to check that candidates possess the qualifications required to be a member of the Court, and also to limit the control of the governments on their nominees.[23]

The idea of indirect nomination was first raised when the Statute of the PCIJ was drafted in 1920. It was suggested that the four persons who had already been nominated by their governments as Arbitrators in the Permanent Court of Arbitration (PCA) should nominate candidates for the PCIJ. Countries not parties to the Hague Conventions[24] and not members of the PCA, were entitled to create

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[23] For more details see Fachiri, Alexander, P., *The Permanent Court of International Justice: Its Constitution, Procedure and Work*, Germany: Fotokop Wilhelm Weihert KG, (1980) p. 35. (hereinafter cited as: Fachiri, *The Permanent Court*); Eagleton, Clyde, Choice of Judges for the International Court of Justice, 47 *AJIL* (1953) p.p. 462-463; Rosenne, *The World Court*, *supra* note 2, p. 62.

[24] It is however to be understood that the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes presented the object of international arbitration as a method for settling disputes between states by judges chosen by them. The 1899 Hague Convention pointed to the beginning of a new period of arbitration by creating the PCA which started functioning in 1902 and remains in existence and has its seat at The Hague. Art. 44 of 1907 Hague Convention granted the contracting parties the right to nominate not more than four persons of

ad hoc national groups for this purpose.[25] The PCIJ Statute recommended that the national groups have to consult, before nominating candidates, the respective highest court of justice, legal faculties and schools of law, and national academies and national sections of international academies devoted to the study of law. This recommendation was provided to double check that every candidate possesses the qualifications required by the Statute.[26]

When the Statute was redrafted in 1945 to establish the ICJ, there were serious attempts to modify the provisions. It was disputed that the system of indirect nomination had worked as intended, but it was also argued that changing the system would lead to the same result, especially as governments would

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known competency in questions of international law and of highest moral reputation for the position of Arbitrator. For more details about the PCA see Official Legal Affairs Codification Division, *Handbook on the Peaceful Settlement of Disputes Between States*, New York: United Nations Publications, (1992) p.p. 55-61; Copithorne, M., D., The Permanent Court of Arbitration and the Election of Members of the International Court of Justice, XVI *CYbIL* (1987) p.p. 318-318; Scott, James B., The Election of Judges for the Permanent Court of International Justice, 15 *AJIL* (1921) p. 556; McWhinney, Edward, Judicial Settlement of Disputes Jurisdiction and Justiciability, 211 *Recueil Des Cours* (1990) p.p. 129-131. (hereinafter cited as: McWhinney, Judicial Settlement of Disputes); and his Law, Politics and "Regionalism" in the Nomination and Election of World Court Judges, 13 *SJILC* (1986) p.p. 3-8. (hereinafter cited as: McWhinney, Election of World Court Judges).

[25] Art. 4 of the Statute of the PCIJ provides:

> "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 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."

[26] McWhinney, Election of World Court Judges, *supra* note 24, p. 8; Fachiri, *The Permanent Court*, *supra* note 23, p. 35; also see Art. 6 of the ICJ Statute which provides:

> "Before making those 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."

undertake a serious consultations like those entrusted to the national groups. Ultimately, it was decided not to change the system.[27]

The procedure of nominating candidates for the ICJ is found in the provisions of Arts. 4 and 5 of its Statute. The provisions of these two Articles are summarised in the following points: first, if a state is a member of the United Nations and party to the Hague Convention, in this case, the nomination is to be made by the national groups that already have been created by each state. If, on the other hand, a state is a member of the United Nations but not a party to the Hague Convention, the government is to create an *ad hoc* national group similar to those prescribed for members of the PCA. Lastly, if a particular state is a party to the Statute of the ICJ but not a member of the United Nations, then, this state may participate in electing members of the Court according to the conditions which shall be laid down by the General Assembly upon the recommendation of the Security Council.[28]

At least three months before the date of election, the Secretary-General of the UN has to communicate with the national groups, through the foreign ministry of each country, and invite them to undertake the nomination. Every national group may nominate not more than four persons, of whom not more than two may be of its nationality; and in no case may the number of candidates nominated by a group be more than double the number of seats to be filled.[29] Furthermore, names of the

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[27] See *UNCIO*, vol. 13 (1945) p.p. 180, 388-389; also see vol. 14, p.p. 189-195, 825.
[28] Rosenne, *The Law and Practice*, *supra* note 3, p.p. 375-376.
[29] Art. 5 of the Statute of the ICJ.

candidates are to be listed in alphabetical order by the Secretary-General before being presented to the General Assembly and Security Council. Only persons who are presented in this list are eligible for election.[30] The Secretary-General customarily circulates biographical particulars of the candidates to enable the electors and advise them to take their decision with a full knowledge of the candidates.[31]

Unlike the ICJ Statute, the draft Statute of the ACJ does not create national groups whose job is to nominate candidates. The nomination of candidates in the ACJ is to be made directly by the governments of member states (through the foreign minister) to the Secretary-General following his previous invitation to the governments requesting them to nominate their candidates. Every country has the right to nominate just one of its citizens at least two months before the date of the election. Thus of twenty two candidates, only seven will become judges of the ACJ. The Secretary-General has to prepare a list containing the names of candidates in alphabetical order and submit it to the League Council. This is the only political organ within the Arab League system responsible for participating in the election.[32]

Despite the theoretical justification, the use of national groups does not always mean that the impartiality of nomination candidates is secured, to the

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[30] Art. 7 of the Statute of the ICJ.

[31] Hudson, Manley O., *The Permanent Court of International Justice 1920-1942 A Treaties*, New York: The Macmillan Company, (1943) p. 251. (hereinafter cited as: Hudson *The Permanent Court*); Rosenne, *The World Court*, *supra* note 2, p. 63; also see his *The Law and Practice*, *supra* note 3, p. 377 (footnote 34).

[32] For more details about the League Council in the Arab League see chapter I, p.p. 15-18.

exclusion of political influences when a particular state wishes to appoint a particular person. Nevertheless, adopting indirect nomination by creating these groups is much better than direct nomination. There is disagreement between jurists on this matter, some favour their retention in the present Statute of the ICJ, while others argue that they have become out of date. For example Rosenne concludes:[33]

> "although at times there may be an elements of artificiality in the nominating process, especially since, in the present circumstances, a ready-made national group does not exist for most parties to the Statute, the decision of 1945 to retain the existing system was wise...[T]he present nominating system, if conscientiously applied, does offer the best possibility of ensuring that the candidates will dully qualified."

On the other hand, McWhinney's view is that:[34]

> "This raises the question whether the legal fiction of national groups operating and nominating independently of their respective national governments should not yield today, in any future revision of the Court Statute, to the contemporary reality that the choice of judges for the international court is now deemed by member States of the United Nations as politically too important to be left to legal "laymen", outside the professional legal divisions of the national foreign ministers."

By comparing Art. 7 of the present draft Statute of the ACJ with the first draft Statute prepared by the Three-Man Commission in 1950,[35] it becomes clear that the drafters of the 1950 ACJ Statute also adopted the provision of direct nomination as no national groups were mentioned. At the same time, however, every state was granted the right to nominate three persons, not more than two of

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[33] Rosenne, *The World Court*, *supra* note 2, p. 63.

[34] McWhinney, Judicial Settlement of Disputes, *supra* note 24, p. 135; for further details about the advantages and disadvantages of national groups see Hudson, *The Permanent Court*, *supra* note 31, p.p. 265-267.

[35] More details see Foda, Ezzeldin, *The Projected Arab Court of Justice: A Study in Regional Jurisdiction with Specific Reference to the Muslim Law of Nations*, The Hague: Martinus Nijhoff, (1957) p.p. 188-189, 226. (hereinafter cited as: Foda, *The Projected Arab Court*).

whom were to be of its own nationality. In addition, it required every state before making its nomination, to consult its highest judicial institutions, its legal faculties, its lawyers' unions and other associations devoted to the study of law. These provisions are absent in the present draft Statute.

We believe that the most important issue that arises as a result of direct nomination is that the judge who displeases his own government during his term of office might not be renominated. It would be better if the Arab draftsmen adopted indirect nomination by revising Art. 7, and that *ad hoc* national groups be created for the purpose of nominating candidates. These national groups should also be requested, similar to the matter relations to the ICJ, before making their nomination, to consult its highest judicial institutions, legal faculties, lawyer's unions and other associations devoted to the study of law.

Furthermore, in the Statutes of both the ACJ and the ICJ no provision is made regarding the withdrawal of candidates. But Art. 5 (1) of the Statute of the ICJ is more clear in this regard then the draft Statute of the ACJ. It laid down the condition relating to 'the nomination of person in a position to accept the duties of a member of the Court'. So the interpretation given to this Article was that once the nominee declared his unwillingness to be one of the candidates, he must not be forced to accept the duties of a member of the Court. Therefore his name should be excluded from the list prepared by the Secretary-General and submitted to the Security Council and General Assembly.[36]

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[36] *Cf.* Art. 5 (1) of the ICJ with Art. 7 (2, 3) of the draft Statute of the ACJ; for more discussion see Rosenne, Shabtai, Elections of Members of the International Court of Justice: Late Nominations and Withdrawals of Candidates, 70 *AJIL* (1976) p.p. 547-549.

3. 2. 2. Election of the Members

Procedures of election in the draft Statute of the ACJ are, compared with those in the Statute of the ICJ, very simple. The difference in nature and structure between the UN as a global organisation, and the Arab League as a regional organisation, led the Arab draftsmen to adopt different procedures. There are two considerable differences between the two systems. Firstly, members of the ICJ are elected jointly by the Security Council and General Assembly, each with its own complicated procedure.[37] In the Arab League system, the League Council is the only political organ. Secondly, when an election is held for the ACJ, the Arab League Council needs to consider just one requirement, that every candidate fulfils the qualifications required by Art. 6 of the draft Statute. Concerning the ICJ, both the General Assembly and the Security Council have to take account that the Court as a whole has to comprise not just highly qualified judges but, in addition, to ensures that the representation of the main forms of civilisation and principal legal system of the World is achieved. This makes the system of election in the ICJ more complicated.[38]

When the Arab League's Secretary-General finishes preparing the list which contains the names of twenty two candidates organised in alphabetical order, he has to inform the League Council. Accordingly, the League Council has to decide

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[37] Art. 8 of the Statute of the ICJ; for further details about the procedures for election in the General Assembly and Security Council see Muller, Sam, and Blokker Niels, The 1996 Elections to the International Court of Justice: New Tendencies in the Post-Cold War Era, 47 *ICLQ* (1998) p.p. 215-217; Rosenne, *The Law and Practice*, *supra* note 3, p.p. 381-386.

[38] Shahabuddeen, Mohamed, The World Court at the Turn of the Century, in A. S. Muller, D. RaiČ and J. M. Thuránszky (eds.), *The International Court of Justice: Its Future Role After Fifty Years*, The Hague: Martinus Nijhoff Publishers, (1997) p.p. 9-16.

when the election is to be held. There is no further rule clarifying on which level the League Council should meet for the purpose of the election. Every member state through its delegation in the League Council must elect, by secret ballot, seven candidates, from those presented in the list.

By Art. 9 of the draft Statute of the ACJ, the candidate who obtains the greatest number of votes in the ballot will be considered elected; in the event of equal votes, the eldest is deemed elected. It is however to be noted that there is no further proviso to deal with the problem that would arise if a candidate has not obtained the greatest number of votes and the candidates are at the same time of the same age. In other words, it is necessary to allow the League Council to organise a second or third meeting if one or more seats remain to be filled. This is expressly provided for in Art. 11 of the Statute of the ICJ.[39]

We can conclude from the above mentioned procedures concerning nomination of candidates and election of judges of the ACJ that Arab draftsmen were more influenced by the Statute of the ICJ than by principles of Islamic Shariah regarding the appointment of judges. This however does not mean those procedures which have been adopted conflict with principles of Islamic Shariah.

3. 3. Term of Office of Judges

The provisions which govern the term of office of judges in the draft Statute of the ACJ are laid down in Arts. 7 (1), 10 (1) and 17 (3). Generally, it appears

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[39] This Article reads as follows:

> "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."

that the Arab draftsmen adopted the same provisions in this matter as those already adopted by the ICJ Statute in Arts. 13 (1) and 15. The term of office in the ICJ, according to Art. 13 (1) is nine years. "The members of the Court shall be elected for nine years." A person who is elected to replace a judge whose term of office had not expired shall only hold office for the remainder of the term.[40] All members of the Court are eligible for re-election[41] and there is no age limit or compulsory retirement for the judges.[42] Art. 2 of 1978 Rules of the ICJ elucidates the beginning of the term of office of judges. For a member elected at a triennial election, the term begins on the date of election, which is normally held on 6 February.[43]

These provisions on the term of office have been criticised by the Institute of the International Law, which argued that the relevant Articles should be

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[40] Art. 15 of the Statute of the ICJ; also see Rosenne, Shabtai, The Election of Five Members of the International Court of Justice in 1981, 76 *AJIL* (1982) p. 364. When Judge Sir Humphry Waldock, the President of the Court, suddenly died at The Hague on 15th August 1981, his death was close to the end of his term of office, which mean the person elected would fill the same seat for just a few weeks. Accordingly, the Security Council, according the recommendation of the Secretary-General, decided:

> "on the basis of consultation with the members of the Security Council...., the Council considers that, as the vacancy which has arisen...., will be filled through the regular election procedure as from 6 February 1982, no purpose would be served by invoking the procedures of the Statute of the Court relating to the filling of a causal vacancy for the reminder of Sir Humphrey's term of office. Those procedures are applicable in cases where otherwise a considerable delay would elapse in filling a vacancy. No such delay is involved in this instance, as the seat will be filled as from 6 February 1982." UN Doc. A/36/451-5/14645, (26th August 1981).

[41] This means immediate re-election. *Cf. International Organisations Re-Eligibility of Members of Executive Board Who Cease to be Members of the Delegation of their States-Constitution UNESCO*, A D, 16 (1949), case No. 113, p. 335.

[42] For example, Manfred Lachs held office as a judge in the ICJ for around twenty six years 1967-1993. See 47 *YBICJ* (1992-93) p. 10; Eyffinger, Arthur, *The International Court of Justice 1946-1996*, London: Kluwer Law International, (1996) p. 303. (hereinafter cited as: Eyffinger, *The International Court*).

[43] For further details on this point see Rosenne, Shabtai, The 1981 Occasional Elections to Fill Two Vacancies on the International Court of Justice, 75 *AJIL* (1981) p.p. 349-361.

redrafted.[44] It was suggested that the term of office should be increased to fifteen years' subject to compulsory retirement at the age of seventy five. The same provisions should apply to those members elected to fill occasional vacancies. Their term of office should also be for a fifteen years' term, without paying any attention to the term for which their predecessors held office.[45] Rosenne commented on these proposals by saying:[46]

> "it is desirable to distinguish those relating to the members elected in regular elections, and those relating to the occasional vacancies. It is believed that the relatively short term of office inevitably offered to members elected to fill occasional vacancies may deter qualified persons from agreeing to be candidates. Such disadvantages would be overcome where the members of the Court elected at occasional elections to serve a full term."

Returning to the draft Statute of the ACJ, it is clear that this Court comprises seven judges elected for six years. The term of office of three of them elected in the first election expires at the end of three years.[47] In this regard Algeria suggested that:[48]

> "it is preferable to keep the term of office of judges just for three years eligible for renewal just for another time, in order to allow other judges in member States to hold this position for a reasonable period."

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[44] Also see, Bowett, D. W., [et.al], The International Court of Justice, Efficiency of procedures and Working Methods: Report of the Study Group Established by the British Institute of International and Comparative Law as a Contribution to the UN Decade of International Law, 45 *ICLQ* [supp.], (1996) p.p. 20-21.

[45] See 45 *Annuaire IDI*, (1945-II) p. 297 in which the Institute of International Law argued:

> "With a view to reinforcing the independence of the judges, it is suggested that members of the Court should be elected for fifteen years and should not be re-eligible. In this event an age limit should be laid down; it might be fixed at seventy five years."

[46] Rosenne, Shabtai, *The Law and Practice of the International Court of Justice*, (2nd revised edn.), Lancaster: Martinus Nijhoff Publishers, (1985) p. 191. (hereinafter cited as: Rosenne, *The Law and Practice*).

[47] Arts. 7 (1), 10 (1, 2) of the draft Statute of the ACJ.

[48] *Unpublished Letter* from the Algerian Embassy in Cairo to the Secretariat General No. 106/95, dated 05/07/1995.

Accordingly, the Secretary-General of the Arab League responded that:[49]

> "In order to attribute stability on the position of judges of the Arab Court, the term of office is fixed as six years. Notably, that term of office of judges in the Statute of the International Court of Justice is nine years. The present draft Statute adopted a compromise solution by determining the period of six years. In addition, this draft Statute, also deleted those provisions relating to the expiration of term of office of some judges after their first election because it is found keeping these provisions in the present draft Statute becomes unnecessary. Furthermore, it grants the judges more stability in holding their position."

On the other hand, if the office of a judge becomes vacant for any reason prior to the expiration of his term, his successor will hold the position just for the remainder of the an expired term.[50] Regarding the number of times of re-election, it seems that the Arab draftsmen followed the ICJ as a model in that all the judges are eligible for re-election.[51]

We believe that the Arab draftsmen should take into consideration the difference between term of office and eligibility for re-election, as both are strongly related. If the term of office is long enough, so that judges during their term can develop the jurisprudence of the Court, eligibility for re-election becomes worthless. It is also necessary to change the blood of the Court by nominating other judges and giving them a chance to develop the Court's jurisprudence.

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[49] *Unpublished Letter* from the General Administration of Legal Affairs, Cairo, No. 8963/3, dated 11/07/1995, p. 2.

[50] Art. 17 (3) of the draft Statute of the ACJ.

[51] *Cf.* the draft Statute of the IICJ in which Judges are eligible only for one re-election. Art. 3 (A) in this matter provides: "The Court shall be composed of seven judges who shall be elected by the Islamic conference of foreign Ministers for four years and may be re elected for another term only."

Regarding the age limit of judges, neither the draft Statute nor the Rules of the ACJ include any relevant provision by specifying a specific age at the time of nomination or at the time for a compulsory retirement age.[52] Referring to the general principles of the Islamic Shariah in the given context, Muslim jurists do not require any minimum age for a person to be qualified to hold the office of a judge. The only condition he must fulfil is to be an adult, but that does not prevent Arab draftsmen from imposing a particular age adapted to the system of the draft Statute of the ACJ.

There is no clear mention of the commencement of the term of office, unlike Art. 2 (2) of the 1978 Rule of the ICJ. The wording of Art.1 (2) of the ACJ Rules provides:

> "Members of the Court shall take up their duties with effect from the first day of the Court's annual term on which the full Court meets. The terms provided for in Article 10 of the Statute shall be calculated with effect from that date."

3. 4. Oath

Before taking up his duties, each judge of the ACJ is required, by Art. 11 of the draft Statute, to take an oath in open Court, that he will perform his duties and exercise his power as a judge faithfully, honourably and impartially. This oath has to be recorded in a special register, in open session before the Court.

Ad hoc judges, are required to take the same oath which is taken by the titular judges of the Court, in the first sitting following their selection.[53] If the case is

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[52] See Art. 4 of the draft Statute of IICJ which provides that to be eligible for membership of the Court a nominee should be at least forty years of age, but this Article does not mention any age at which judges must resign.

[53] Art. 4 (3) of the draft Rules of the ACJ.

heard in a closed session, the Court should hold a special public sitting to enable those *ad hoc* judges take their oaths.[54] On the other hand, judges who are re-elected immediately upon the expiration of their prior terms of office need not repeat the oath; the same rule is applicable to *ad hoc* judges in successive phases of the same case.[55] If they sat in a previous case between the same parties, however, they have to take a new oath for every subsequent case in which they sit.[56] It seems that the oath made by judges of ACJ is considered to be a religious oath.[57] Accordingly, Art. 11, of the draft Statute of this Court reads as:

> "I swear by Allah Almighty that I will perform the duties of my office faithfully, honourably and impartially."

This is unlike the solemn declaration which is made by the judges of the ICJ as an international declaration. Art. 20 of the Statute of this Court provides:

> "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."

We believe that the respective results are logical, because the nature of the two Courts is different. The ICJ judges come from various countries with different languages, religion, culture, education and legal knowledge. That is why Art. 9 requires that in addition to the personal qualification of judges, the body of

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[54] See *Asylum* case, (Colombia v. Peru), *ICJ Pleadings*, (1950), vol. II, p. 15. Similarly, after the ICJ election of 1957, a special public sitting was held for the purpose of the oath see 12 *YBICJ* (1957-58) p. 98.

[55] *Ambatielos* case, (Greece v. United Kingdom), *ICJ Pleadings*, (1952) p. 345.

[56] *Haya de la Torre* case, (Colombia v. Peru), *ICJ Pleadings*, (1950) p. 131.

[57] Similarly, the draft Statute of the IICJ requires that every judge must take an Islamic oath before exercising his duties before the Court. Art. 9 provides:

> "Every member of the Court shall, at the first session in open Court after his election, take the following oath: In the name of the God Almighty, I swear to fear only God in the discharge of my duties, to act impartially in accordance with the provisions of Islamic Shariah and the principles of Islam and to abide by the provisions of this Statute and those of the Charter of the Organisation of the Islamic Conference".

the Court as a whole should represent the main forms of civilisation and principal legal systems of the world.[58] For that reason Foda has argued:[59]

> "The affirmation of office should avoid any embarrassment arising out of religious or other scruples relation to 'swearing' or taking an oath. It should be an international declaration, not a national, in order to avoid any tendency to place the judges in the position of political representatives, as happened in the practice of the Central American Court of Justice."

We do not agree with Foda in his conclusion because in the case of the ACJ all its judges have the same language, education, culture and mostly the same religion. Muslims believe that Allah is the Lord of all mankind including non-Muslims. That is why Muslims' oath should be in the name of Allah. Accordingly we do not think that any embarrassment will be caused to the ACJ judges, as a result of the adoption of a religious oath, rather than an international oath, by the Arab draftsmen.

3. 5. The Presidency

Talking about the Presidency means talking about the main control, the heart and the spine of the Court. By reading the Articles which regulate the Presidency of the ACJ, it appears that the President of the Court has onerous duties. By Arts. 10 (4) of the draft Statute and Art. 2 (1) of the draft Rules of the ACJ, the Court elects its President and Vice-President from among its members, to hold office for a renewable two year term. They undertake their duties immediately after being elected. The election should be held following the first session of the

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[58] For more details in this point see Lachs, Manfred, Some Reflections on the Nationality of Judges of the International Court of Justice, 4 *PYBIL* (1992) p.p. 49-55.

[59] Foda, *The Projected Arab Court*, *supra* note 35, p. 190; also see Hudson, who argued that the national oath prevented judges in the Central American Court of Justice from enjoying sufficient independence of their governments in his *The Permanent Court*, *supra* note 31, p.p. 69-70.

Court, by secret ballot and absolute majority.[60] If the President is unable to perform his duties, the Vice-President shall take his place, and if both of them cannot fulfil their duties, the Presidency of the Court passes to the oldest member, who has been longest on the bench.[61] The President and Vice-President have been assigned numerous duties which may be summarised as follows: to regulate the work and administration of the Court, direct its affairs, preside over its meetings, supervise its Secretariat, and represent it with regard to administrative affairs.[62]

The Presidency also includes granting the President and the Vice-President precedence over all other members of the Court. After them in precedence is the oldest in age, elected with them at the same time. In the public meetings of the ICJ, the Vice-President is normally seen sitting directly on the President's right, and other judges set to his right and left in order of precedence, but it is to be understood that, in the closed deliberations of the Court, judges vote in the reverse order of precedence as is the general rule in judicial bodies.[63]

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[60] In general, the same provision is found in the Statute and Rules of the ICJ, provided that according to Art. 21 of the ICJ Statute, the term of office of the President is three years instead of two in the Arab draft Statute. Full details see, Spender, Percy, The Office of President of the International Court of Justice, 1 *AYBIL* (1965) p.p. 9-22; Rosenne, Shabtai, The President of the International Court of Justice, in Vaughan Lowe, and Malgosia Fitzmaurice (eds.), *Fifty Years of the International Court of Justice: Essays in honour of Sir Robert Jennings*, Cambridge: Cambridge University Press, (1996) p.p. 406-423. (hereinafter cited as: Rosenne, The President of the ICJ).

[61] Arts. 3 (2) and 8 (2) of the draft Rules of the ACJ. *Cf.* Art. 3 (5, 6) of the 1978 Rules of the ICJ. Rosenne argued that "when a judge other than the President is called upon to assume the duties of the President, he is known as 'Acting President'; and when a member is serving as acting President, he will take precedence over all judges *pro hac vica*." See his *The Law and Practice*, *supra* note 46, p. 193.

[62] Art. 3 (1) of the draft Statute of the ACJ.

[63] Rosenne, *The World Court*, *supra* note 2, p. 27; and his, *The Law and Practice*, *supra* note 46, p. 194.

The President and the Registrar of the Court of the ACJ are obligated by Art. 12 of the draft Statute to reside at the seat of the Court (Cairo). No similar obligation is imposed upon the remaining judges. Like the ICJ judges, they are not obligated to reside permanently at the seat of the Court. Furthermore, the President together with the Registrar, according to Art. 63 (2) of the draft Rules, have to sign all formal decisions of the Court, Judgments, Advisory Opinions, and Orders.[64] By Art. 40 of the draft Statute, the hearing of the case shall be under his control, and minutes of the hearings are to be signed by him and the Registrar.

In the practice of the ICJ, consultation normally is to be made between the Registrar and the President, who has the final decision, regarding the name of a case, whenever no suggestion has been made by the parties.[65] This may be a good example for the expected relationship between the President and the Registrar of the ACJ.

It is expected that the President of the ACJ will represent the Court at the meetings of the Council of the Arab League, just as the President of the ICJ normally represents the Court at meetings of the General Assembly,[66] but unfortunately no such provision has been laid down in this regard by the draft Statute or in the Rules of the ACJ. The President is considered as the President of

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[64] Compare in this regards with the Statute of the ICJ in Rosenne, The President of the ICJ, *supra* note 60, p. 411.

[65] For example, compare the original name of the case *Concerning the Guardianship of An Infant*, (Netherlands v. Sweden), *ICJ Rep.*, (1957) p. 102, with the name given to the case by the Court after the pleading, case *Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants*, *ICJ Rep.*, (1958) p. 55.

[66] Rosenne, *The Law and Practice*, *supra* note 3, p. 406.

the ACJ, the principal judicial organ of the Arab League,[67] and is at the same time, considered to be as the President of the Bench whenever he sits in a case, except when he is disqualified to act as President or to sit as a judge.[68]

The President of the ICJ is supposed to take all the measures necessary to ensure the continuous exercise of the functions of the Presidency at the seat of the Court. This provision is stated explicitly in the wording of Art. 13 (3) of the 1978 Rules. No similar provision is found in the draft Statute or draft Rules of the ACJ. Normally, when the President is absent, the Vice-President or the oldest judge has to exercise his functions.[69] Similarly, Art. 20 (6) of the 1978 Rules of the ICJ gives the President the power, in the event of urgency, to convene the Court at any time. It seems that the Arab draftsmen have not paid any attention either in the draft Statute or draft Rules to regulate such matters.

According to Art. 32 (1) of the 1978 Rules of the ICJ, the President is obligated to stand down as President in a case in which he is a national of one of parties. His position and duties are then be transferred to the Vice-President, and if the latter is unable to act, for any reason, then the presidency passes the next oldest judge.[70] Again this important provision cannot be found in the Arab draft

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[67] Art. 1 (1) of the draft Statute of the ACJ.

[68] For more details on the distinction between the term 'Court' and the term 'Bench', see letter of 18th March 1982 from the Registrar to the agent of Canada: *Gulf of Maine* case, *ICJ Pleadings*, (1984) VII, p.p. 297-299, (Doc. 23).

[69] For examples, see the order of Judge Oda, when he was Vice-President in the present Court, fixing new time limits in the case *Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), *ICJ Rep.*, (1993) p. 470.

[70] See case *Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libya v. United Kingdom) and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libya v. United States). In this case, President Sir Robert Jennings

Statute or draft Rules of the ACJ. Only a general rule appears, in this regard, as Art. 19 (3) of the draft Statute provides:

> "if there is a reason to prevent the President or Vice President from participating in particular case, the Court shall decide this matter, by the unanimous agreement of its remaining members."

This Article could be interpreted by considering the nationality of the President as a sufficient reason to prevent him to participate as President in any particular case that involves his national state as a party.

Art. 44 (4) of the 1978 Rules of the ICJ grants the President the power to take interlocutory decisions, even when the Court is sitting.[71] These decisions are final and not eligible for appeal. No similar provision is found in the draft Statute or draft Rules of the ACJ.

The draft Statute of the ACJ has adopted the same ICJ provision regarding the casting vote of the President, as Art. 26 provides that all decisions are to be taken by majority of the judges present, and in case of equality of votes, the President shall have a casting vote.[72] It is interesting to note that during the

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(because of his UK nationality) decided that he had to vacate his position as President when the Court decided to join the two cases in one (Libya against UK and USA) according to Art. 47 of the 1978 Rules of the ICJ, in 47 *YBICJ* (1992-93) p. 178.

[71] For example see *Competence of the ILO in Regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture*, Advisory Opinion, *PCIJ* (1922) Ser. B, No. 2, p.p. 28, 66. In this case the President took decisions while the Court was not sitting; On the other hand, the President made orders regarding the time limits in the case *Concerning East Timor* (Portugal v. Australia), *ICJ Rep.*, (1993) p. 32, and in the case *Concerning Oil Platforms*, (Islamic Republic of Iran v. United States of America), *ICJ Rep.*, (1993) p. 35 during the Court's deliberation on another case. It appears that decisions of the President which are taken while the Court is not sitting are not eligible for appeal, *PCIJ* (1927) Ser. E, No. 3, p. 210.

[72] *Cf.* this Article with Art. 55 of the ICJ Statute. For more details see Rosenne, The President of the ICJ, *supra* note 60, p.p. 410-411.

history of the two World Courts (the PCIJ and the ICJ), only four decisions have been made by the casting vote of the President.[73]

3. 6. Judicial Vacancies

Vacancies caused by the death, removal from duty or resignation of judges are filled by the same methods as those laid down for the original election. Art. 16 of the draft Statute of the ACJ enumerates conditions in which the office of judge becomes vacant. It provides:

> "The office of a judge shall be deemed vacant in each of the following cases:
> 1. death;
> 2. resignation;
> 3. removal from duty."

Art. 17 of the draft Statute lays down some further procedures to be followed in such a case.[74] According to para. 1, if a judge desires to resign from the Court, he has to submit his resignation to the President in writing. The President then has to inform the Secretary-General of the Arab League in order to enable him to set in motion the occasional election to fill the vacancy. It provides:[75]

> "1. If a Judge wishes to resign, he shall submit his resignation in writing to the President, who should inform the League Secretary-General and accordingly this position falls vacant."

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[73] *Lotus* case, Judgment, *PCIJ* (1927) Ser. A, No. 10; *South West Africa* cases (Ethiopia v. South Africa and Liberia v. South Africa) *ICJ Rep.*, (1966) p. 6; see also *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, *ICJ Rep.*, (1996) p. 66 and *Legality of the Threat or Use of Nuclear Weapons*, *ICJ Rep.*, (1996) p. 595.

[74] *Cf.* Arts. 14 (4), 18 (1) of the Statute of the ICJ.

[75] *Cf.* the provisions of resignation in the ICJ in Bernárdez, Santiago Torres, Resignations at the World Court, in Yoram Dinstein & Mala Tabory (eds.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, London: Martinus Nijhoff Publishers, (1989) p.p. 953-975; Rosenne, Shabtai, *Procedure in the International Court: A Commentary on the Rules of the International Court of Justice*, The Hague: Martinus Nijhoff Publishers, (1983) p. 24. (hereinafter cited as: Rosenne, *Procedure in the International Court*).

By para. 2 of the same Article, if the Court finds that a judge has ceased to be able to carry out his duties, it can take the decision to relive him from his position. The decision is to be taken by the unanimous agreement of the other judges and it must state explicitly the reasons why the judge has been relieved from his duty. The Secretary-General of the Arab League must be informed:

> "2. If a Judge ceases to be able to carry out his duties, he may not be relieved from his duty except by the unanimous agreement of the remaining Judges. Upon the issuance of a reasoned decision concerning his removal from duty and its communication to the League Secretary-General, his office shall be deemed vacant."

By Art. 5 of the draft Rules, the President has to convene the Court, the member affected shall be allowed to defend himself and when he has done so, voting shall be conducted in his absence. Unanimity is necessary to make that decision valid.[76]

It appears that the Arab draftsmen followed the same provisions of judicial vacancies as adopted by the Statute of the ICJ nevertheless they have distinguished between two types of judicial removal, removal by an external authority and removal by an internal authority, and in each condition different terms have been used. For removal which could be effected by external authority, the word *'Azl* is used in the Arabic text and translated by the present author into English as dismissal. On the other hand, for removal which could be made by internal authority, the word *I'fa'* is used in the Arabic text and translated into English as removal from office; but how may these two terms work to produce different results within the present Arab draft Statute? No clear answer can be

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[76] *Cf.* this provision in the Statute and the Rules of the ICJ. See also for example, Rosenne, *The Law and Practice*, *supra* note 46, p. 195.

found by referring to the unpublished documents relating to the establishment of the ACJ and discussions of 1995 draft Statute. When Iraq asked the Secretariat General to give a clear meaning to the word *I'fa* (removal from duty) which was used in the 1995 draft Statute, the General Administration of Legal Affairs (Secretariat General) failed to give a clear answer to the Iraqi question, and advised Iraq to refer to Art. 17 (2) in which a clear meaning of the term *I'fa* would be found.[77]

Although Art. 15 of the draft Statute provides that judges of the Court may not be dismissed, "qudat al mahkamah ghair qabileen lil 'Azl", no further information is given to show how this Article is to be applied. However, in order to deduce the real aim of the Arab draftsmen and to know why they adopted this provision, it becomes necessary to return back to Art. 16 (3) of the draft Statute. This Article, as mentioned, enumerates the conditions that make the office of a judge vacant, and a close reading of it makes it appear that the word *I'fa'* (removal from duty) was used. Then in Art. 17 (2) again the same word is used to mean the judges can only be removed (relived from office) by an internal authority (the Court) if they become unable to carry out their duties. Accordingly, the correct conclusion appears to be, the Arab draftsmen have adopted the general rule that judges may not dismissed, but in an exceptional condition may be removed (relieved) from their offices if they cease to be able to carry out their duties.

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[77] See *Unpublished Letter* from the Permanent Mission of Iraq to the League of Arab States No. 01/03/263, dated 10/07/1995 and *Unpublished Letter* from the General Administration of Legal Affairs (Secretariat General) No. 3981/03, dated, 02/08/1995.

In conclusion "dismissal" in the draft Statute of the ACJ may be defined as removal of a judge by an external authority that may be done by the state party to a dispute for any political reasons, which is absolutely prohibited whether in the draft Statute of the ACJ or the Statute of the ICJ. The term "removal from duty", on the other hand, may be defined as removal of a judge not by an external authority but by the Court itself, if he becomes unable or unqualified to fulfil his duties for legal reason. Very strict procedures should be followed by the Court in such cases.[78]

But why these two terms have been used by the Arab draftsmen? Why did the Arab draftsmen not use only the term dismissal as the Statute of the ICJ does? It is assumed that the Arab draftsmen want to make clear that no political influence could be exercised upon the judges of the ACJ once the direct nomination of candidate has been adopted. On the other hand, in Arabic the term dismissal (*'Azl*) is mostly used in the case when a particular judge commits any action that contradicts his position as a judge, for example, if he accepts bribes, but removal from duty (*I'fa*) may be made for any reason and does not mean that the judge has committed any action that contradicts his position. Therefore, the distinction between these two terms has been adopted by the Arab draftsmen in the present draft Statute.

[78] It is worth mentioning here that, since the establishment of the ICJ in 1945, no judge has been removed according to Art. 18 of the ICJ Statute. But in some other cases, judges have been requested or obliged to step down according to Arts. 16, 17, and 18 of the Statute of the ICJ in relation to particular case.

3. 7. Incompatibility of Functions and Disqualification of Members

The provisions that regulate these two matters appear in Arts. 14 and 19 of the draft Statute of the ACJ. Art. 14 contains three paragraphs. The provisions adopted in the first two paragraphs are mostly the same as those in Arts. 16 and 17 of the Statute of the ICJ, whereas the third adopts a new rule not found in the Statute of the ICJ.

By Art. 14 (1/A), judges are required not to exercise any political or administrative function or to take up any duties in the capacity of agents, counsel, or advocates, or engage in any occupation of professional nature.[79] However, we wonder how a member of the Court can carry on regular professional duties while he is at the same time holding the office of judgeship in the Court as a regular judge.[80] It seems this paragraph prohibits two kinds of functions to be exercised, those which have the general nature of "any administrative and political function", and those which are considered as professional functions, the exercise of which may affect and conflict with judicial independence and impartiality, namely "to act as agent, counsel, or advocate."[81]

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[79] It is worth mentioning here that on 14th December 1950, the General Assembly of the United Nations adopted Resolution No. 427 (V), and requested the Secretary-General to appoint an *ad hoc* committee of three impartial persons with a view to settle the question of prisoners of war, and find out a suitable solution for their problems to be accepted by states concerned. The matter was discussed with the members of the World Court, accordingly, Vice-President Guerrero became a member of this committee. The question raised whether this appointment conflicted with his position in the Court or not. 5 *YBICJ* (1950-51) p. 103; also see Rosenne, *Law and Practice*, *supra* note 46, p.p. 195-196 who argues:

> " it seems that this principles may also require a judge to divest himself of financial and other material holdings which could lead to a conflict of interests."

[80] For more details in this point see Fachiri, *The Permanent Court*, *supra* note 23, p. 44.

[81] The question has arisen before the World Court whether a judge can accept any arbitral function or not. The decision taken by the Court in this regard concluded that judge must not accept the function of arbitrator, chairman of commission of conciliation or enquiry, or any similar function, if there is any provision to the effect that decision taken by him, or one in which he has taken part,

Para. (1/B) of the same Article contains an additional provision which requires judges during their term of office not to participate in the decision of any case in which they have already taken part as agents, counsels, advocates or experts, or in any case which has been previously laid before them in their capacities as a member of a national or international court or commission of inquiry or any other capacity.[82] It is clear that the difference between the two paragraphs is that the first regulates external functions which may exercised by judges while the second regulates their internal functions.

By the wording of para. 2, if any doubt is raised regarding the compliance of any judge with the provision of para. 1, the matter is to be settled by the decision of the Court. No special procedure is provided for the manner in which a such decision is to be reached by the Court. The matter may be governed by returning to the general procedure used for reaching decisions.[83]

The most important principle adopted by the Arab draftsmen is in the third paragraph of Art. 14. It actually prevents any doubt being cast upon the impartiality of the judges of the Court. Its requires them, for three years after the expiration of their term of office, not to work with or become an employee of any government which has previously brought any case before the Court, where the judge concerned participated in the decision of the dispute and delivery of the

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may be the subject of an application to the Court, or if there is a possibility that such a decision may be the subject of such an application. See 8 *YBICJ* (1953-54) p. 96.

[82] In some cases which have appeared before the World Court, judges of this Court have not been disqualified even though, they were involved in functions which conflict with the provisions of Art. 17 of the ICJ Statute, parallel to Art. 14 (1/B) of the draft Statute of the ACJ. See Rosenne, *The Law and Practice*, *supra* note 46, p. 197.

[83] See Art. 26 of the draft Statute of the ACJ which deals with casting vote.

judgment. This kind of provision cannot be found in the Statute of the ICJ. It seems that Arab draftsmen have been influenced, when drafting this Article, by Art. 4 of the Protocol of the Statute of the Court of Justice of the European Coal and Steel Community which also contains a similar provision. It provides:[84]

> "The judges may not...acquire or retain, directly or indirectly, any interest in any business related to coal and steel during their term of office and for three years after ceasing hold office."

On the other hand, under Art. 19 of the draft Statute of the ACJ three kinds of abstention may prevent a judge from taking part in a particular case. First, if the judge himself considers that he cannot take part in the case (recusation). Second, if the President or any other judge considers that one of the judges in the Court is not eligible to take part in the decision of a particular case (disqualification). Third, regarding only the President and Vice-President, when there is a reason to prevent one or both of them from participating in a particular case. This Article reads as follows:

> "1. If, for some special reason, a Judge considers that he should not take part in the decision of a particular case, he shall so inform the President. The President shall accordingly notify the Court.
> 2. If the President or any of the Judges considers that for some special reason one of the Judges should not take part in the decision of a particular case, the President shall notify the relevant Judge, stating the reasons on which this challenge is based. If the President and the impugned Judge disagree, the Court shall decide in accordance with the majority of the remaining members.
> 3. If there is a reason to prevent the President or Vice-President from participating in a particular case, the Court shall decide this matter by the unanimous agreement of its remaining members."

In the first situation, the judge concerned has to inform the President that he cannot take part in a case, and the President has to inform the Court accordingly. In the second, the President has to inform the judge concerned that he is not

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[84] For further details see Lasok, K. P. E., *The European Court of Justice: Practice and Procedure*,

qualified to take part in the case, stating the reasons on which this challenge is based. If the judge in question does not agree, the remaining judges of the Court then have to decide the matter. A majority vote is required. However, when the President or the Vice-President is thought to be not qualified to sit in particular case, a unanimous vote of the remaining judges is required disqualify them.

It appears that the Arab draftsmen did not give the President alone the right to disqualify a particular judge from taking part in a case. This competence, unlike the regulation of this matter in the ICJ Statute, can be exercised by the President and any other member of the Court. Gross criticised Art. 24 (2) of the Statute of the ICJ which grants the President alone such a right by saying:[85]

> "As there is no particular reason why the President alone should have the right to raise the matter, it could also be provided that any member of the Court could initiate the appropriate proceedings."

In conclusion, these kinds of disqualification are mostly based on personal interests which may bias a person in the exercise of the judicial function. This could happen when particular judge, for example, disqualifies himself because one of his relatives is appointed as agent, counsel, or advocate in the given case, whereas disqualification of judges under Art. 14 of the draft Statute of the ACJ is mostly based on political or professional matters.

3. 8. The Composition of the Court

As a general rule, the Court has to sit with a full complement of its judges. Nevertheless, in exceptional cases, it is possible for it to hear cases while some of

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London: Butterworths, (1994) p. 16.

[85] Gross, Leo, The International Court of Justice: Consideration of Requirements for Enhancing its Role in the International Legal Order, in his as (ed.), *The Future of the International Court of*

its members are absent. In principle, a judge has to attend all the Courts' meetings, but he may be allowed to be absent if he is ill or has other serious reasons for absence. There is however no provision either in the draft Statute or in the draft Rules of the ACJ which requires judges to hold themselves permanently at the disposal of the Court as in the Statute of the ICJ.[86]

Arts. 7 (1) and 25 (1) of the draft Statute of the ACJ deal with the matters of regulating the composition of the Court. Art. 7 (1) provides that "the Court shall consist of seven judges elected from candidates." Art. 25 (1) provides "the full Court shall decide cases brought before it. A quorum of five judges shall suffice to constitute the Court, provided that the President or whoever represents him shall participate."[87] If the quorum, is for any reason not completed, then the President can delay the meeting of the Court until a quorum is obtained.[88]

Judges of the ACJ who are temporarily absent from part of the hearings are allowed to take part in the deliberation of the Court and adhere to the judgment. No explicit provision is to be found whether in the draft Statute or draft Rules of the ACJ dealing with this principles. However Art. 42 (2) of the draft Statute provides "The judgment shall include [....,] the names of the Judges who took part

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Justice, vol. 1, New York: Oceana Publications, INC., (1976) p. 60. (hereinafter cited as: Gross, The International Court of Justice).

[86] See Art. 23 (3) of the Statute of the ICJ which provides:

> "Members of the Court shall be bound, unless they are on leave or prevented from attending by illness or other serious reasons duly explained to the President, to hold themselves permanently at the disposal of the Court".

[87] This exact provision was also adopted by the IICJ in which Arts. 3 and 13 of its draft Statute which provide that seven judges are required to constitute the full Court and five for the quorum. However, Arts. 3 (1) and 25 (3) of the Statute of the ICJ require fifteen judges for the Bench and nine for the quorum. For a further discussion about the reason for choosing of number, see *UNCIO*, vol. 13, (1945) p.p. 143, 387 and vol. 14, p.p. 262, 276, 824.

[88] Art. 11 of the draft Statute of the ACJ.

and their signatures and the reasons on which the judgment is based." According to the practice of the ICJ, every judgment, advisory opinion, and order starts with a list of judges. The list only includes those judges who were present when the decision was rendered.[89] Judges not present during the hearings are not allowed to participate in the drafting of the judgment.[90] In this matter, Art. 41 of the draft Statute of the ACJ provides:[91]

> "1. The President shall declare, upon the closure of pleadings, that the case is pending judgment.
> 2. The deliberations of the Court remain secret. Only Judges who have heard the oral pleadings shall take part therein."

Normally, the composition of the Court is liable to change from case to case given the *ad hoc* disqualification of some of its judges, or by adding, in some other cases, national judges or *ad hoc* judges. In other words, judges in some conditions may cease to take part in a particular case. Accordingly, one may ask, whether a judge may be relieved form his office before finishing a case he has started to hear.

The solution adopted by the ICJ is not the same as that provided for the ACJ. In the former "the members of the Court shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any case which they may have begun."[92] This means that if a judge in the ICJ has participated in just one session of oral pleadings in a particular case, and then his

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[89] For example see *Corfu Channel* case, *ICJ Pleadings*, (1947), vol. III, p.p. 195-196; *Asylum* case, *ICJ Pleadings*, (1949), vol. II, p. 85.

[90] See for example, *Corfu Channel* case, *ICJ Pleadings*, (1947), vol. IV, p. 702; *ILO Administrative Tribunals* (*UNESCO*) case, *ICJ Pleadings*, (1956) p. 227.

[91] *Cf.* these provisions with Arts. 45, 46, 54 (3) of the ICJ Statute.

[92] Art. 13 (3) of the Statute and Art. 33 of the 1978 Rules of the ICJ.

term of office expires, he has to finish this case until a decision in that phase of the case is delivered. In the latter, it appears that the Arab draftsmen adopted limiting provisions regarding finishing cases. A judge of the ACJ whose term of office has expired is bound to continue to discharge his duties until his place is filled. He is permitted however to finish cases in which he has participated, on condition that the pleadings have been closed in those cases and are awaiting judgment. Art. 13 of the draft Statute provides:

> "Judges whose term of office expires shall continue deciding cases in which pleadings have been closed and is pending judgment."

3. 9. Seat of the Court

The draft Statute does not mention any particular place that can be considered as a permanent seat for the ACJ. The only provision with regard to the seat of the Court could be found in Art. 1 (2) which makes the permanent seat of the Court the same place as the permanent seat of the Arab League. It provides:

> "The permanent seat of the League of Arab States shall be the permanent seat of the Court."

By Art. 10 of the Pact of the Arab League, the city of Cairo is the permanent seat of the Arab League. It provides:

> "The permanent seat of the League of Arab States shall be Cairo. The Council of the League may meet at any other place it designates."

This provision differs from those adopted by the Statute of the ICJ and by many other regional Courts. When the Statute of the ICJ was revised at San Francisco, it was recommended that the seat of this Court should be established in a territory other than that where the political bodies of the organisation usually meet. It was therefore agreed to retain the seat of the Court at the Hague, the Netherlands (Peace Palace), while the headquarters of the UN was created in New

York.[93] It is interesting to note that the Egyptian delegation to the Committee of Jurists was the first person who called for the separation between the legal organ (ICJ) from the political organ (UN headquarters). The delegation's view was supported by other delegations.[94] The same approach was adopted when the Statute of the purposed IICJ was being drafted. The draftsmen followed the ICJ Statute by creating the permanent seat of this Court in a place other than where the organisation of the Islamic Conference regularly meets. Art. 2 (1) of the draft Statute of the IICJ provides: "The seat of the Court shall be established in the City of Kuwait", whereas the permanent seat of the OIC was established in Jeddah City, Saudi Arabia, according to Art. V (5) of the Charter of this organisation.

It is worth mentioning that not all delegations were satisfied with the idea of creating the seat of the ACJ at the seat of the Arab League. The Iraqi delegation made the following observation:[95]

> "Paragraph 2, of the first Article should be reworded, so the Court's seat should not be the Arab League headquarters. The interest of the Arab States which are members in Arab organisations may be promoted if such organisations are not concentrated in one State but distributed among them all. In addition, the International Community provides us with examples proving that the Court's seat should not be its political headquarters."

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[93] For further details see *UNCIO*, vol. 14, (1945) p. 405; and Art. 22 of the Statute of the ICJ; also see Eyffinger, *The International Court*, *supra* note 42, p.p. 114-124; Rosenne, *The World Court*, *supra* note 2, p. 50; see also Jennings, Robert Y., The Role of the International Court of Justice, LXVIII *BYbIL* (1997) p. 2. (hereinafter cited as: Jennings, The Role of the ICJ).

[94] See *UNCIO*, vol. 14, (1945) p.p. 62-63.

[95] See Iraqi's objection in *Unpublished Letter* No. 01/03/263, dated 10/07/1995 p. 1 and the Secretary-General's response in Letter No. 3981/3, dated 03/08/1995 p. 1. It has to be mentioned that some Arab jurists were delighted with the creation of the seat of the Court at Cairo City, for example Shihab in his draft Statute which was proposed in 1977 according to the request of the Secretary-General of the Arab League, Shihab, Mufeed M., *Jami'at ad Dowal al 'Arabiyah: Mithaquha wa Injazatuha*, (*The League of Arab States: its Charter and Implementations*), al Qahirah: Ma'had al Buhuth wad Dirasat al 'Arabiyah, (1978) p. 388, particularly Art. 13 (1); and also Musalhi, Muhammad al Husaine, *Mashru' Mahkamat al 'Adl al 'Arabiyah*, (*The Projected Arab Court of Justice*), Riyadh: Dar an Nashir bi al Markaz al 'Arabi lid Dirasat al Amniyah wat Tadreeb, (1991) p. 40.

We believe that the draftsmen have made a considerable mistake, not just because they made the permanent seat of the Court at the same place where the Arab League functions, but also when they related the establishment of the seat of the Court to the seat of the Arab League, because any changes to the seat of the headquarters due to political circumstances means that the seat of the Court has to be changed. This will put the Court under the direct influence of political circumstances and may affect its work. It was expected from the Arab draftsmen that they would keep the Court far from any political influence in the sphere of the relations between member states, for example, when in 1979 Egypt's membership was suspended prior to the signature of the Peace Treaty with Israel and as a result of that the permanent seat of the Arab League was removed from Cairo to Tunisia.[96]

The third paragraph of Art. 1, makes clear that the establishment of the Court at Cairo does not prevent the Court from sitting and exercising its functions elsewhere whenever it thinks this to be desirable. It provides:

> "The Court may, when necessary, decide to sit and exercise its functions elsewhere whenever the Court considers it desirable."

This means that the Court itself decides, but not the parties to a dispute, when it becomes necessary, to exercise its functions elsewhere than at its permanent seat. It has to be noted that since the establishment of the ICJ, its seat has never moved from the Hague, even if a litigating state has lodged a relevant request. For

[96] For more details see chapter 1, p.p. 30-31. Egypt also faced similar legal problems when the removal of the regional headquarters of the WHO was claimed by its General Manager. This may referred to the ICJ for advisory opinion asking about the legality of this action. For further details see chapter V, p.p. 302-304.

example, when South Africa invited the Court to visit South Africa, the ICJ refused this invitation. The Court explained:[97]

> "the Court would naturally exercise this option for a particular case when considerations of the convenience of the parties and of the effective administration of the judicial functions made such a departure from its headquarters desirable."

But that does not mean the Court never visits the scene of the dispute when it finds that action becomes necessary. The PCIJ and its successor the ICJ have done that, but this was not a change in the seat of the Court but rather an attempt to gain evidence.[98]

3. 10. *Ad Hoc* Judges

What happens if a state party to a dispute finds that one of the titular judges on the bench has the nationality of the other party to the dispute? Or if either of the parties to the case does not have a judge of their nationality among the titular judges? Or if both parties each have a member of their nationality on the bench? These three possibilities have been considered by Art. 18 (2, 3, 4) of the draft Statute of the ACJ which is parallel to Art. 31 of the Statute of the ICJ. This means, as a general rule in the two Courts, that a judge of the nationality of each litigating state is not prevented from examining a case before the Court.[99] Art. 18 provides:

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[97] See *South West Africa* cases, (Ethiopia v. South Africa; Liberia v. South Africa), Order of 29 November 1965, *ICJ Rep.*, (1965) p. 9; also see *South West Africa* case, Second Phase, Judgment, *ICJ Rep.*, (1966) p. 9; for further discussion see Gross, The International Court of Justice, *supra* note 85, p.p. 65-66; and his The Time Element in the Contentious Proceedings in the International Court of Justice, 63 *AJIL* (1969) p. 84.

[98] See *Diversion of Water from Meuse*, Judgment, *PCIJ* (1937) Ser. A/B, No. 70, p. 9; and *Case Concerning the Gabcikovo-Nagymaros Project*, (Hungary/Slovakia), Order of 5 Feb. 1997, *ICJ Rep.*, (1997) p. 4.

[99] Fachiri, *The Permanent Court*, *supra* note 23, p.p. 56-57; Eyffinger, *The International Court*, *supra* note 42, p.p. 163-164.

> "1. A Judge of the nationality of each of the parties may not be prevented from examining a case submitted to the Court.
> 2. If a Judge is a national of a state which is a party to the dispute, all the other parties may select a Judge *ad hoc* to participate in the decision of the case in question.
> 3. If no Judge in the Court is national of one of the parties, each party may select a Judge *ad hoc*.
> 4. Should there be several parties in the same interest, they shall be considered one party with regard to the provisions of paragraphs 2 and 3 of this Article. Any doubt upon this point shall be settled by the decision of the Court."

By comparing this with Art. 31 of the Statute of the ICJ, it appears that the two Articles have the same general provisions but the drafting of the ICJ Article is clearer. Para. 2 of the ICJ Statute lays down clear provisions regarding the appointment of an *ad hoc* judge by recommending to state parties to a dispute to chose their *ad hoc* judge among persons who have been nominated but not elected as ICJ judges. "Such a person shall be chosen preferably from among those persons who have been nominated as candidates as provided in Article 4 and 5." This provision cannot be found in either the draft Statute or the draft Rules of the ACJ. Further, para. 4 of Art. 31 of the Statute of the ICJ allows *ad hoc* judges to sit in chambers. This is an important provision, because this encourages states to use a chamber of the Court. The Arab draftsmen have not paid any attention to this provision. The relevant paragraph of the Statute of the ICJ reads as follows:

> "The provisions of this Article shall apply to the case of Articles 26 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 chosen by the parties."

Before going into more details in discussing the system of *ad hoc* judges in the present draft Statute of the ACJ, it seems necessary to distinguish between the

two types of judges: the regular judges, and the *ad hoc* judges.[100] Regular judges, whether national or non national, are those nominated by a 'national group' within the Permanent Court of Arbitration, or specially appointed by their government party to the Statute and are elected by the General Assembly and Security Council in the ICJ or by the Arab League Council in the ACJ.[101] *Ad hoc* judges are persons always appointed directly by their government to sit on the bench in any particular case.[102]

One may ask whether it is necessary that an *ad hoc* judge should be a national of the state which appointed him to sit on the bench. In the practice of the ICJ, possessing the nationality of one of litigating states is not necessary. It is permitted to appoint an *ad hoc* judge to sit in particular case even if he is not a national of the government that appointed him.[103]

The idea of appointing *ad hoc* judges from litigating states was rooted in the Permanent Court of Arbitration and then transferred to the Statute of the PCIJ and its successor the ICJ.[104] Yet the system of *ad hoc* judges has been the subject of disagreement between jurists on several occasions. Many criticisms against this system have been made such as, for example, that it diminishes the principle that

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[100] Eyffinger, *The International Court*, *supra* note 42, p. 165.

[101] Arts. 4-8 of the Statute of the ICJ and Arts. 7-9 of the draft Statute of the ACJ.

[102] Art. 18 (2, 3) of the draft Statute of the ACJ, and Art. 31 (2, 3) of the Statute of the ICJ.

[103] Rosenne, *The World Court*, *supra* note 2, p. 75; Eyffinger, *The International Court*, *supra* note 42, p. 165; also see as an example, the list of judges *ad hoc* who were chosen in several cases although they were not nationals of any parties to the dispute in 46 *YBICJ* (1991-92) p.p. 12-15; also in 47 *YBICJ* (1992-93) p.p. 13-16.

[104] Hill, Norman L., National Judges in the Permanent Court of International Justice, 25 *AJIL* (1931) p.p. 670-674; II Ro Suh, Voting Behaviour of National Judges in International Court, 63 *AJIL* (1969) p.p. 224-225. (hereinafter cited as: II Ro Suh, Voting Behaviour).

no one should be a judge in his own case.[105] In 1945, the Institute of International Law discussed the *ad hoc* judges system and after a considerable debate adopted the following Resolution:

> "If the system of *ad hoc* judges cannot be abandoned, it is as a minimum highly desirable that the appointment of such judges should be subject to guarantees as nearly possible equivalent to those governing the election of titular judges. The appointment of such judges might, for instance, be entrusted to the national group of the Permanent Court of Arbitration of the State concerned, or to the national group appointed by the government in pursuance to Article 4, paragraph 2, of the Statute."[106]

Chagla, who was appointed as an *ad hoc* judge in the Right of Passage case, also declared that "[he thought] the system of *ad hoc* judges is bad."[107]

We believe that the system of *ad hoc* judges, despite its disadvantages which will be mentioned below, also has some advantages, at least in the view of the litigating states. Firstly, if the idea of *ad hoc* judges were dropped from the system of the ICJ or ACJ, the number of cases which may brought before these two Courts may decrease, because litigating states like, for political reasons, their view to be supported not just during the public hearings, but also during the later phase of private deliberations.[108] This, however, does not mean that *ad hoc* judges

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[105] Lauterpacht, H. (ed.), *Oppenheim's International Law: A Treatise*, vol. II, London: Longmans, Green and Co., (1955) p.p. 78-79; Gross, The International Court of Justice, *supra* note 85, p.p. 61-62.

[106] 45 *Annuaire IDI*, (1954/II) p. 298; for more discussion see II Ro Suh, Voting Behaviour, *supra* note 104, p. 231. It has to be mentioned that according to Art. 7 (1) of the draft Statute of the ACJ, regular Judges are appointed directly by their government. So there is no possibility to adopt the provision which requires that the *ad hoc* judges have to be appointed by national groups.

[107] Chagla, Mahomedali C., Rule of Law and the International Court of Justice, *Proc. ASIL* (1960) p. 242; for more details about this case see, *Right of Passage Over Indian Territory* (Portugal v. India) *ICJ Rep.*, (1957) p.p. 3, 125.

[108] Rosenne, *The Law and Practice*, *supra* note 3, p. 204; Plender, Richard, Procedure in the European Court: Comparisons and Proposals, 267 *Recueil Des Cours*, (1997) p. 46.

have always voted in favour of their government,[109] but rather because their participation in the formulation of judgment is more important than their influence on the actual decision. Secondly, it has been argued that an *ad hoc* judge is considered to be better informed about the national problems that gave rise to the case.[110]

By Art. 4 (1) of the draft ACJ Rules, a state party to a dispute which wishes to exercise its right to choose an *ad hoc* judge has to notify the Registrar prior to the commencement of hearings, stating the name of the person chosen as its *ad hoc* judge. The Registrar then has to notify the other parties to comment on this choice within a time limit fixed by the President. This Article has confirmed that the appointment of *ad hoc* judges is a right of the state concerned and not of the Court.

Art. 18 (5) of the draft Statute of the ACJ provides that *ad hoc* judges should fulfil the same conditions required by Art. 6, 11 and 14. This means, in other words, that an *ad hoc* judge has to be a citizen of a member state and qualified in Islamic Shariah and international law; he has to take the same oath taken by titular judges; and also he is not allowed to engage in any political functions or to act as

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[109] There is at least one case that could be mentioned here, the *Application for Revision an Interpretation of the Judgment of 24 February 1982 in the case Concerning the Continental Shelf (Tunisia/ Libyan Arab Jamahiriya)*, Judgment, *ICJ Rep.*, (1985) p. 247; for further discussion see Rosenne, *The Law and Practice*, vol. III, *supra* note 3, p.p. 1128-1129. The same idea could be said regarding the national titular judges who also should not represent their governments but enjoy full independence in expressing their views even if that against their governments. See the following cases which show that sometimes judges may vote contrary to the views held by their governments, for example, Judges McNair, Basdevant and Hachworth in *The Monetary Gold Removed from Rome in 1943* case, (Italy v. French, UK., USA.), *ICJ Rep.*, (1954) p. 35; Judge Basdevant in *The Minquiers and Ecrehos* case, (France v. U. K.), *ICJ Rep.*, (1953) p. 74; Judge McNair in *The Anglo-Iranian Oil Co.* case, (United Kingdom v. Iran), *ICJ Rep.*, (1952) p. 116.

[110] Eyffinger, *The International Court*, *supra* note 42, p.p. 164-165; Gross, The International Court of Justice, *supra* note 85, p.p. 62-63; *UNCIO*, vol. 14, (1945) p. 113.

an agent, counsel or advocate in any case of an international nature. Art. 18 (5) provides:

> "A Judge *ad hoc* shall fulfil the conditions required by Articles 6, 11 and 14 of this Statute, and may participate in meetings, proceedings and in deciding judgments on an equal footing with the original Judges."

On the other hand, *ad hoc* judges are not obliged to give up their normal jobs. The only condition they have to keep in mind is to give preference to the requirements of the Court.[111] When discussing the qualifications of judges in the ACJ, we concluded that Art. 6 must be revised to make it more flexible by requiring that not all members of the Court have to be qualified in both Islamic Shariah and international law, but that the Court as whole should comprise judges who are qualified in either Islamic Shariah or international law. If this revision is made, then there will be no problem to refer to Art. 6 and require that an *ad hoc* judge should fulfil the same qualifications as required for the titular judge. Art. 6 also requires that titular judges should be citizens of the member states. Does this means that the draft Statute requires litigating states to appoint *ad hoc* judges who are their own nationals? We found in the practice of the ICJ, that an *ad hoc* judge need not be a national of one of the litigating states. So the Arab draftsmen have to reconsider this Article by distinguishing between *ad hoc* judges and titular judges as to nationality and qualifications in order to avoid any legal or procedural problems.

Unlike the 1978 Rules of the ICJ, the draft Rules of the ACJ do not lay down any details about *ad hoc* judges. So by analogy with the provisions of the ICJ

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[111] Rosenne, *The World Court*, *supra* note 2, p. 75.

Rules, it should be the case that they participate on a footing of equality with regular judges on the bench, both in hearing the case and in the formation of the decision. However, the titular judges have precedence over *ad hoc* judges in order of seniority of age.[112] They are entitled, like the titular judges, to write dissenting and separate opinions,[113] but *ad hoc* judges are not taken into account in the calculation of the quorum.[114]

One the other hand, neither the ICJ Statute nor the 1978 Rules contain any express provision to permit *ad hoc* judges to participate in advisory opinion proceedings. Despite this fact, an *ad hoc* judge was first appointed since the creation of the present World Court (the ICJ) in advisory proceedings in the Namibia case.[115] The practice of the first period of the PCIJ's life did allow *ad hoc* judges to participate in some types of advisory opinion. Fachiri argued in this regard:

> "it will be noted that the right to have a national judge does not exist in every advisory case it only arises where the question submitted to the Court relates an existing international dispute, and, therefore, substantially the same considerations are applicable as in contentious cases."[116]

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[112] Art. 7 (2, 3) of the 1978 Rules of the ICJ.

[113] For more details in this point see Rosenne, *The Law and Practice*, *supra* note 3, p.p. 204-205; Oda defined dissenting and separate opinions as follows: "A dissenting opinion is given by any judge who differs from the court as to the actual conclusion and a separate opinion is given by any judge who agrees with the conclusion of the court but for different reasons." Oda, The International Court, *supra* note 5, p. 125.

[114] Art. 20 (3) of the 1978 Rules of the ICJ.

[115] Advisory Opinion in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, *ICJ Rep.*, (1971) p.p. 12, 16; for further details about this case see Pomerance, Michla, The Admission of Judge Ad Hoc in Advisory Proceedings: Some Reflections in the Light of the Namibia Case, 67 *AJIL* (1973) p.p. 446-447, 449-454.

[116] Fachiri, *The Permanent Court*, *supra* note 23, p. 60; in the following cases *ad hoc* judges were appointed: *Jurisdiction of the Courts of Danzig*, Advisory Opinion, *PCIJ* (1928) Ser. B, No. 15, p. 274; *Greco-Bulgarian "Communities"*, Advisory Opinion, *PCIJ* (1930) Ser. B, No. 17, p. 306; *Railway Traffic between Lithuania and Poland*, Advisory Opinion, *PCIJ* (1931) Ser. A/B, No. 42,

Art. 68 of the Statute of the ICJ is the justification for this appointment. This Article provides:

> "In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable."

This may be taken into account in the draft Statute of the ACJ by allowing *ad hoc* judges to participate in advisory opinion proceedings even although the draft Statute does not give any clear permission to allow them such competence. It has to be mentioned that the same provision of Art. 68 can be found in Art. 50 (4) of the draft Statute of the ACJ which may help the Arab Court to take the same decision as has been taken by the ICJ.

3. 11. Chambers

Cases before the ICJ are to be decided by a full Court of fifteen, or at least by nine judges who constitute a quorum. However, it is also possible, as an alternative, to have cases decided by a smaller number of judges meeting as a 'Chamber'. The Statute of the ICJ provides for three kinds of chambers: the Chamber of Summary Procedure; Chambers dealing with particular categories of cases (Special Chambers); and a Chamber for dealing with a particular case (*ad hoc* Chamber).[117] Neither Special Chambers nor the Chamber of Summary Procedure have ever been used by the ICJ, while since 1981 four cases have been

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p. 324; *Access to, or Anchorage in, the Port of Danzig, of Polish War Vessels*, Advisory Opinion, *PCIJ* (1931) Ser. A/B, No. 43, p. 326.

[117] For more details see Valencia-Ospina, Eduardo, The Use of Chambers of the International Court of Justice, in Vaughan Lowe & Malgosia Fitzmaurice (eds.), *Fifty Years of the International Court of Justice: Essays in honour of Sir Robert Jennings*, Cambridge: Cambridge University Press, (1996) p.p. 504-506. (hereinafter cited as: Valencia-Ospina, The Use of Chambers of the ICJ); Jennings, Robert Y., The United Nations at Fifty: The International Court of Justice After Fifty Years, 89 *AJIL* (1995) p.p. 496-497.

decided by *ad hoc* Chambers in accordance with the request of the parties. For that reason, a discussion of the historical background of Chambers in the ICJ becomes necessary in order to find out whether the Arab draftsmen are adopting the same kind of Chambers in the draft Statute of the ACJ.

It has to be mentioned, at the outset, that not all jurists are satisfied with the general idea of creating chambers as an additional choice in the ICJ. Some argue that recourse to these kind of chambers does not make any sense, as long as the procedures to be followed before them are the same as before the full Court. Judge Oda for example, has argued that:[118]

> "I do not see any incentive for states in dispute to prefer a chamber consisting of small number of judges to the full court, as the procedures employed in both stances remain the same."

Jennings on the other hand, said that the general purpose of creating chambers seems to be speed and informality. In this regard he argued:[119]

> "The intention of Articles 26-29 of the Court's Statute seems to have been twofold: to provide for speedy justice where the parties want it, and also to provide for 'particular categories of cases; for example, labour cases and cases relating to transit and communications."

A. The Chamber of Summary Procedure

The Chamber of Summary Procedure is to be formed annually by the Court without the necessity of a request from the parties of a dispute. It is composed of five judges, three elected by secret ballot; the remaining two are the President and Vice-President acting *ex officio*. At the same time two other judges are to be elected by the same procedures to act as substitutes. The purpose of forming this

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[118] Oda, The International Court, *supra* note 5, p. 55; also see Toope, Stephen J., Pragmatic Compromise or More Transaction? The Use of Chamber Procedures in International Adjudication, 31 *VJIL* (1990) p. 54.

[119] Jennings, The Role of the ICJ, *supra* note 93, p. 36.

kind of chamber is to accelerate the work of the Court or in other words, to hear and determine cases according to the request of the parties by using summary procedures.[120] The wording of Art. 29 of the Statute of the ICJ in this regard explicitly provides:[121]

> "with a view to the speedy despatch of business, the Court shall form annually a chamber composed of five judges which, at the request of the parties, may hear and determine cases by summary procedure. In addition, two judges shall be selected for the purpose of replacing judges who find it impossible to sit."

It is to be noted the previous World Court (PCIJ) also knew this kind of chamber under Art. 29 of its Statute. However, this chamber was used only once during the entire history of this Court in the Treaty of Neuilly case.[122] This kind of chamber has never functioned or been called upon to meet since the establishment of the ICJ.[123]

B. Special Chambers

The Statute allows the ICJ to form, in advance, one or more special chambers, to deal with particular categories of cases such as labour cases and cases relating to transit and communications. When this kind of chamber is to be formed, the Court has to determine the number of its members, their term of office, the date at which they will take up their duties, and the category of cases for which each chamber is established. The members of these chambers, whether three or more, are elected by secret ballot, and should be experts in the particular

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[120] It has to be mentioned that only parties to a dispute can decide whether their case is to be decided by chamber of summary procedure or not, but their right to intervene in the establishment of this chamber is limited to the appointment of an *ad hoc* judge.

[121] See also Arts. 15 (1), 18 (1) of the 1978 Rules of the ICJ.

[122] Or more precisely, two linked cases: the *Treaty of Neuilly* case, (Greece v. Bulgaria) Art. 179, Annex, Para. 4, Interpretation of Judgment No. 3, *PCIJ* (1924) Ser. A, No. 3; Interpretation of Judgment No. 3, *PCIJ* (1925) Ser. A, No. 4.

[123] 49 *YBICJ* (1994-95) p. 17.

field or have special knowledge, as such chambers are created to deal with cases which have a technical nature.[124] Art. 26 (1) of the Statute of the ICJ provides:[125]

> "The Court may from time to time form one or more chambers, composed of three or more judges, as the Court may determine, for dealing with particular categories of cases; for example, labour cases and cases relating to transit and communications."

It is not necessary under Art. 17 (3) of the 1978 Rules of the ICJ, unlike in the case of the previous World Court (PCIJ), that the judges who compose special chambers represent the main forms of civilisation and principal legal systems of the world. The draftsmen of the present Court (ICJ) dropped this provision from the 1945 Statute.[126]

Since 1945, no special chamber has been formed under the provision of Art. 26 (1). Nevertheless, in August 1993, the Court decided to form a Special Chamber dealing with cases involving issues of international environmental law.[127] This chamber is composed of seven judges and was initially constituted for a period of six months, which was then the remaining period of the then

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[124] Eyffinger, *The International Court*, *supra* note 42, p. 161.

[125] See also Art. 26 (3) of the Statute of the ICJ; Arts. 16, 18 (1) of the 1978 Rules of the ICJ.

[126] *Cf.* Arts. 26, 27 of the Statute of the PCIJ in International Court of Justice (ed.), *International Court of Justice: Selected Documents Relating to the Drafting of the Statute*, Washington: United States Government Printing Office, (1945) p.p. 63-64; also see Oda, Shigeru, Further Thoughts on the Chambers Procedure of the International Court of Justice, 82 *AJIL* (1988) p. 557. (hereinafter cited as: Oda, Further Thought of the Chambers Procedures); Schwebel, Stephen M., *Ad hoc* Chambers of the International Court of Justice, 81 *AJIL* (1987) p.p. 831-832. (hereinafter cited as: Schwebel, *Ad hoc* Chambers); McWhinney, Edward, Special Chambers Within the International Court of Justice: The Preliminary, Procedural Aspect of the Gulf Maine Case, *SJILC* (1985) p.p. 5-6; see also in this regard the comments of Shabtai Rosenne in his *Procedure in the International Court*, *supra* note 75, p.p. 188-191.

[127] For more details about the Chamber dealing with environmental cases see Valencia-Ospina, The Use of Chambers of the ICJ, *supra* note 117, p.p. 521-527. It has to be mentioned that only two environmental cases have been brought before the full Court since its establishment up to the present time: *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests* case, (New Zealand v. France), *ICJ Rep.*, (1995) p. 228; *Gabcikovo-Nagymaros Project* (Hungary v. Slovakia), *ICJ Rep.*, (1994) p. 151; also see Evans, Malcolm D. (ed.), International Court of Justice: Recent Cases, 47 *ICLQ* (1998) p.p. 668-669.

composition of the Court until February 1994. It still remains functioning according to the decision of the Court in February 1997.[128] It was the first special chamber to be formed in the whole history of the ICJ and its predecessor the PCIJ deal with particular categories of cases, but it has yet to decide a case.[129] This action was taken by the ICJ as a result of the recent development and importance of environmental matters.[130] However some jurists, such as judge Oda, have another view of this kind of chamber. He has argued:[131]

> "I am unable to state why this action was taken at that time, so the intention behind the creation of this particular chamber must, I am afraid, be left to speculation."

C. *Ad Hoc* Chambers

The ICJ is also allowed, at the request of the parties, to form a chamber to deal with a particular case. This kind of chamber was first intended by Art. 26 (2) of the present Statute which provides:[132]

> "The Court may at any time form a chamber for dealing with a particular case. The number of judges to constitute [this] chamber shall be determined by the Court with the approval of the parties."

During the first 39 years of the life of the ICJ, no *ad hoc* Chamber was formed according to this Article.[133] Yet, four *ad hoc* Chambers have been formed

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[128] 49 *YBICJ* (1994-95) p. 17.

[129] As mentioned before, the PCIJ had also known two Special Chambers, for labour cases (Art. 26) and for transit and communications cases (Art. 27).

[130] See 48 *YBICJ* (1993-94) p. 18; also Fitzmaurice, Malgosia, Environmental Protection and the International Court of Justice, in Vaughan Lowe, and Malgosia Fitzmaurice (eds.), *Fifty Years of the International Court of Justice: Essays in honour of Sir Robert Jennings*, Cambridge: Cambridge University Press, (1996) p.p. 302-308.

[131] Oda, The International Court, *supra* note 5, p. 55.

[132] See *UNCIO*, vol. 14, (1945) p.p. 834-835.

[133] It has to be mentioned that there were several declarations from jurists recommending recourse to this kind of chamber. For example, see Rogers William P., The Rule of the Law and the Settlement of International Disputes, 64 *AJIL* (1970) p. 288; Jessup, Philip C., To Form a More Perfect United Nations, 129 *Recueil Des Cours* (1970-I) p. 21.

since 1981 as follows: Gulf Maine case;[134] Frontier Dispute case;[135] Land, Island and Maritime Frontier Dispute case;[136] ELSI case.[137]

It was realised that the reason for parties' abstention from recourse to this type of chamber was because of the Court's Rules which provided for the election of its members by secret ballot.[138] This may contradict the wish of the parties who may like to constitute a chamber composed of judges chosen by them.[139] So changes to the Court's Rules became an important requirement in order to motivate states to have recourse to *ad hoc* Chambers. The Beagle Channel case in 1971 helped to take the idea of reconsidering the Rules of the Court more seriously. In this case, one party wanted to go to the Court, while the other required arbitration. Finally, the parties (Argentina/Chile) agreed that instead of submitting their case to the Court, to conclude a compromise using an *ad hoc* arbitral tribunal. They selected five members of the Court to sit as an *ad hoc*

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[134] This was the first case submitted to a Chamber and brought to the ICJ. See the joint letter of the parties to the Registry dated 25 November 1981, case *Concerning Delimitation of the Maritime Boundary in the Gulf Maine Area*, (Canada v. United State of America); constituted on 20 January 1982, *ICJ Rep.*, (1982) p. 3.

[135] Joint letter of the parties to the Registry dated 14 October 1983, case *Concerning the Frontier Dispute*, (Burkina Faso v. Mali); constituted on 3 April 1985, *ICJ Rep.*, (1985) p. 6.

[136] Joint letter of the parties to the Registry dated 11 December 1986, case *Concerning the Land, Island and Maritime Frontier Dispute*, (El Salvador v. Honduras: Nicaragua [as from 13 September 1990] intervening); constituted on 8 May 1987, *ICJ Rep.*, (1987) p. 10, and *ICJ Rep.*, (1990) p.p. 3-4.

[137] Letter of the United States to the Registry dated 6 February 1987; telegram of the Italian Minister of Foreign Affairs dated 13 February 1987, case *Concerning Elettronica Sicula S. p. A. (ELSI)*, (United State v. Italy); constituted on 2 March 1987, *ICJ Rep.*, (1987) p. 3.

[138] Art. 18 (1) of the 1978 Rules of the ICJ provides that 'Elections to all Chambers shall take place by secret ballot."

[139] Schwebel, *Ad hoc* Chambers, *supra* note 126, p. 837; and his Chambers of the International Court of Justice Formed for Particular Cases, in Yoram Dinstein & Mala Tabory (eds.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, London: Martinus Nijhoff Publishers, (1989) p. 747.

Arbitral panel.[140] It then became necessary to make changes to the Rules of the Court by which the parties were given a voice in the composition of the *ad hoc* Chamber. They can now choose the members of such a chamber who satisfy them and thus exclude others.[141]

It is to be noted that the original Rules of the ICJ, the 1946 Rules, provide with regard to the composition of the chamber that "the President shall ascertain the views of the parties as to the number of judges to constitute its chamber."[142] This provision was first revised in 1972. The 1972 Rules provide that "the President shall consult the agents of the parties regarding the composition of the chamber."[143] Finally in Art. 17 (1) of the 1978 Rules the President shall ascertain the parties' views regarding the composition of the Court. It provides:

> "A request for the formation of a Chamber to deal with a particular case, as provided for in Article 26, paragraph 2, of the Statute, may be filed at any time until the closure of the written proceedings. Upon receipt of a request made by one party, the President shall ascertain whether the other party assents."

It has to be understood that in the four *ad hoc* Chambers mentioned above, the President ascertained the views of the parties regarding the composition of the chamber. This raises a question, what it is meant by 'ascertain'? We believe that the main requirements needed to form an *ad hoc* Chamber is the consent of the parties and the explicit wishes of those judges who will be nominated as members of the chamber. The parties may take into account some personal abilities in the

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[140] *Beagle Channel Arbitration* (Argentina v. Chile), 25 *YBICJ* (1970-71) p. 114; 52 *ILR* (1979) p. 93.

[141] Schwebel, Stephen M., *Justice in International Law: Selected Writings of Judge Stephen M. Schwebel*, Cambridge: Cambridge University Press, (1994) p. 103; see also in this regard the comments of Shabtai Rosenne, *Procedure in the International Court*, *supra* note 75, p.p. 38-47.

[142] Art. 71 (3).

[143] Art. 26 (1).

judges to be chosen, without disregard to his political beliefs or any other reasons; but how is this wish expressed? Do the parties give the President particular names of judges? Oda has noted in this matter that:[144]

> "he was not in a position to tell how the judges of Chambers were chosen by the full Court in each case."

During the process of revising the 1978 Rules, consulting the parties in the composition of the *ad hoc* Chamber was criticised and has been criticised since then.[145] On the other hand, the recourse to this type of chamber was strongly recommended by the United Nations General Assembly in its Resolution 2323 (XXIX) 1974 on a 'Review of the Role of the International Court of Justice', which declared:[146]

> "...Considering that the International Court of Justice has recently amended the Rules of Court with a view to facilitating recourse to it for the judicial settlement of dispute, inter alia by simplifying, the procedure, reducing the likelihood of undue delays and costs and allowing for greater influence of parties on the composition of *ad hoc* chambers,...Draws the attention of States to the possibility of making use of Chambers as provided in Articles 26 and 29 of the State of the International Court of Justice and in the Rules of the Court, including those which would deal with particular categories of cases."

It appears by a close reading of the relevant Articles which regulate the procedure to be followed to constitute an *ad hoc* Chamber, that the function of this kind of chamber seems to be similar to arbitration, especially in its constitution

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[144] Oda, The International Court, *supra* note 5, p. 58.

[145] Hambro, Edvard, Will the Revised Rules of Court Lead to greater Willingness on the Part of Prospective Clients?, in Leo Gross (ed.), *The Future of the International Court of Justice*, vol. 1, New York: Oceana Publications, INC, (1976) p.p. 368-369; Eduardo Jiménez de Aréchaga, The Amendments to the Rules of Procedure of the International Court of Justice, 67 *AJIL* (1973) p.p. 2-3; also see *Delimitation of Maritime Boundary in the Gulf of Maine Area*, (Canada v. USA), constitution of Chamber, *ICJ Rep.*, (1982) p.p. 11-13; Shahabuddeen (dissenting opinion) in *Land, Island and Maritime Frontier Dispute* (El Salvador v. Handuras) *ICJ Rep.*, (1990) p. 18; Lauterpacht, Elihu, *Aspects of the Administration of International Justice*, Cambridge: Grotius Publications Limited, (1991) p. 90.

[146] GAOR supp. (No. 31) UN Doc. A/9631, vol. 1, (1974) p.p. 141-142.

and the necessity for the parties approval. This may raise a question: why use an *ad hoc* Chamber and not arbitration?[147]

Judges who are selected to constitute the *ad hoc* Chamber have to obtain the consent of the parties. In other words, when such parties decide to settle their dispute before an *ad hoc* Chamber, instead of the full Court, this means that the composition of the full Court does not suit them, so the only other choice is to resort to an *ad hoc* Chamber or arbitration.[148] Judge Oda declared in the Frontier Dispute case that:[149]

> "The Court, being sovereign in judicial proceedings, is free to choose any composition it likes; yet the possibility must also be borne in mind that sovereign States have the legal right to withdraw a case if they prefer a composition different from that determined by the Court. In practical terms, therefore, it is inevitable, if a chamber is to be viable, that its composition must result from a consensus between the parties and the Court. To ensure that viability, it accordingly behoves the Court to take account of the views of the Parties when proceeding to the election."

But on the other hand, it is important to note that the procedure to be followed before the ICJ is not the same as in Arbitral Tribunals. Judge Oda argued on this point:[150]

> "I submit that an *ad hoc* chamber of the ICJ may in some measure to be equated to an arbitral tribunals that may be set up by an agreement of the States in dispute, although, unlike an arbitration, the proceedings of an *ad hoc* chamber of the ICJ are governed by the firmly established procedure of the Court and, in addition, the expenses borne by the parties may be less onerous because of the use of the ample facilities of the Court, which charges no Court fees. The most important difference in that a case submitted to an *ad hoc* Chamber is adjudged in the same way as proceedings before the full

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[147] Hyde, James N., A Special Chamber of the International Court of Justice-An Alternative to *Ad hoc* Arbitration, 62 *AJIL* (1968) p. 439.

[148] More details see Oda, The International Court, *supra* note 5, p.p. 58-59; and also his Further Thought on the Chambers Procedure, *supra* note 126, p. 558.

[149] *Land, Island and Maritime Frontier Dispute* case, (El Salvador v. Honduras), *ICJ Rep.*, (1987) p. 13.

[150] Oda, The International Court, *supra* note 5, p. 59.

> Court and is concluded with a judgment that has the same effect as one rendered by the full Court."

It is clear that chambers in the Statute of the ICJ are of three types and each has its own nature, functions, and jurisdiction. Unfortunately, these explicit differences cannot be found in the draft Statute of the ACJ. In spite of the fact that the Arab draftsmen recognised chambers as another essential choice to which the parties can have recourse in order to settle their disputes, they nevertheless did not succeed to produce accurate provisions clarifying the differences of these chambers.

Closely reading Art. 25 (2, 3) of the draft Statute of the ACJ, which is considered as the only Article which regulates chambers in this Statute, one can note the misunderstanding of the true concept of chambers by the Arab draftsmen who have not distinguished the three kinds of chambers in the ICJ Statute. This Article permits the Court, upon the consent of the parties, to form just one chamber, known under the name 'Special Chamber', composed of at least three judges, to deal with a particular case. The formation of such a chamber is possible only when the following two conditions are present: a particular case has a technical nature or the parties want their case to be considered in a summary procedure. No attention to an *ad hoc* Chamber appears in this Article or in any other. It provides:

> "2. The Court may, with the consent of parties to the dispute, form a special Chamber dealing with particular case because of its technical nature or the need to follow summary procedures.
> 3. The Chamber shall be formed of at least three Judges and its meetings shall not be valid unless all its members are present.
> In all cases a judgment shall be considered as rendered by the Court."

On the other hand, Arts. 6-9 of the draft Rules of the ACJ involve regulating chambers in this Court and, surprisingly, the Arab draftsmen adopted the same provisions of the 1978 Rules of the ICJ relating to Special Chambers and the Chamber for Summary Procedures including the *ad hoc* Chamber. This means there is no coordination between the draft Statute and draft Rules of the ACJ. A revision of both is necessary.

When the Arab draftsmen provided for forming a Chamber of Summary Procedure, they adopted with minor differences the exact provisions of the Statute (Art. 29), and the 1978 Rules (Art. 15) of the ICJ. This chamber is formed every year, as with the ICJ Statute, and composed of three members, elected by secret ballot, instead of five as in the case of the ICJ. In addition, two substitute members replace members of the chamber who for any reason are unable to sit in a given case, but no provision is made to include the President and Vice-President acting *ex officio.*

On the other hand, a chamber which can be formed to deal with cases which have a technical nature is to be considered as parallel to the Special Chamber provided by Art. 26 (1) of the ICJ Statute with the following differences: in the draft Statute of the ACJ, only one chamber can be formed to deal with a particular case due to its "technical nature", while in the ICJ Statute one or more chambers can be formed to deal with particular categories of cases. The Arab draftsmen, on the other hand, have avoided giving examples for the Special Chamber which may be formed according to Art. 25 (2), in contrast to the case of the ICJ which provides that Special Chambers are to be formed for dealing with labour, transit

and communication. We believe that it is not necessary to give examples for those special chambers which may be formed to deal with particular matters, because the practice of the ICJ shows the possibility of forming special chambers to deal with matters not mentioned in the given examples. This happened exactly when the ICJ formed a special chamber to deal with cases involving issues of international environment law. Furthermore, it has to be mentioned at this point, that the Arab draftsmen failed to differentiate between Special Chambers and *ad hoc* Chambers. The latter are normally formed to deal with a particular case, while Special Chambers are formed to deal with particular categories of cases. This confusion can be found in the wording of Art. 25, which uses in relation to the forming of a Special Chamber the terms "for a particular case" instead of "particular categories of cases."

As mentioned before, no provisions can be found in the draft Statute of the ACJ regarding *ad hoc* Chambers while Art. 8 of the draft Rules provides if the Court decides to form a Chamber to deal with a particular case, consultation should be made by the President regarding its formation with the parties concerned. Accordingly, a report has to be prepared by him and submitted to the Court. It is, on the other hand, stipulated that the President has to preside over this chamber and if he is not available, the Vice-President, and if both are absent, the senior member of this chamber presides.[151] When comparing this Article with

[151] Art. 8 of the draft Rules of the ACJ provides:

"1. If the Court decides to form a Chamber for deciding a particular case, the President shall consult the concerned parties regarding the composition of such a Chamber. A report in this regard shall be prepared for the Court.

2. This Chamber shall be presided over by the President and, in his absence, by the Vice-President. If neither are present, the senior member shall preside."

Art. 17 of the 1978 Rules of the ICJ, it appears that some provisions are missing and others are different. On the one hand, Art. 17 of the 1978 Rules of the ICJ contains a time limit in which parties can request the Court to form an *ad hoc* Chamber. It provides:

> "A request for the formation of a Chamber dealing with particular case..., may be filed at any time until the closure of the written proceeding."

No similar provision can be found in the draft Rules of the ACJ. So the question may be raised whether an *ad hoc* Chamber can be formed at any time even after the closure of the written proceedings or will the 1978 Rules be applied by analogy in this regard? Furthermore, the consultation which has to be made by the President with the parties to the dispute is based on the 1972 Rules of the ICJ which were revised by the 1978 Rules. Major changes were made, especially when the draftsmen changed the word 'consult' to 'ascertain'. However, the most important point is that the Arab draftsmen have disregarded any provision which would clarify how the parties are to be consulted and when the election is to be held, unlike Art. 17 (3) of the 1978 Rules of the ICJ which provides:

> "when the Court has determined, with the approval of the parties, the number of its Members who are to constitute the chamber, it shall proceed to their election [by secret ballot]."

It has to be noted that, as in the Statute of the ICJ, it is provided in the draft Statute of the ACJ that a judgment given by a chamber is considered as rendered by the Court.[152] In this conclusion, it is interesting to refer to the dissenting

[152] See Art. 25 (3) of the draft Statute of the ACJ, Art. 27 of the Statute of the ICJ.

opinion of Judge Tarassov when he interpreted Art. 27 in the Frontier Dispute case:[153]

> "According to Article 27 of the Statute, a judgment given by an ad hoc chamber is to be considered as rendered by the full Court. As a result of the present order adopted by a majority of judges, the Application [for permission to intervene] will have no more then two possible courses of action- it can either abandon its intention of preserving and defending its interests against possible violation as a result of judicial processes in the International Court of Justice or it can submit its Application to the chamber. If it opts for the latter course, the applicant will have to abide by the decision of five judges, only two of whom are Members of the Court, but whose decision will have the status of a judgment of the Court. In the event that permission to intervene is summarily rejected, or if the judgment on its merits fails to provide a proper safeguard of its lawful interests as an intervening party, the Applicant will not be able to appeal, as the court's judgment will have been rendered."

For the above mentioned reasons, it seems necessary to reorganise and redraft those Articles regulating the chambers in the draft Statute and the draft Rules of the ACJ. The 1978 Rules of the ICJ is an excellent model to follow in order to redraft the draft Rules of the ACJ, while it is preferable to follow the provision of Art. 15 of the draft Statute of the IICJ which regulates chambers in this Court and take it as a model to reconsider Art. 25 (2, 3) of the draft Statute of the ACJ. This recommended Article reads as follows:

> "a. The Court may form one or more Chambers composed of three or more judges for dealing with particular categories of cases.
> b. The Court may form a Chamber for dealing with particular case. The number of judges to constitute such a Chamber shall be determined by the Court with the approval of the parties.
> c. The Court may form annually a Chamber composed of three judges which, at the request of the parties, may hear and determine cases by summary procedures."

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[153] *Land, Island and Maritime Frontier Dispute* (El Salvador v. Honduras/ Nicaragua intervening in 1990) *ICJ Rep.*, (1990) p. 16; for further details see Rosenne, Shabtai, Article 27 of the Statute of the International Court of Justice, 32 *VJIL* (1992) p.p. 213-231.

4. 12. Registrar and Registry

By Art. 5 of the draft Statute, the ACJ has the power to elect its Registrar, Deputy-Registrar and other officers as may be necessary. The Registrar and his Deputy are elected by secret ballot and by an absolute majority of votes from a list of candidates proposed by the members of the Court, serve for period of two years and are eligible for re-election. Both of them, before taking up their duties, must take an oath before the Court. Their duties, which are usually performed under the supervision of the President, may be divided into four main types: diplomatic, administrative, judicial and linguistic. They are considered as a channel of communication to and from the Court. The Court can select other officers to assist the Registrar and his Deputy, upon the recommendation of the Registrar.[154]

3. 13. Diplomatic Privileges and Immunities

Generally, privileges and immunities have been granted to states and their diplomatic agents by other states as a result of the development of customary international law, in order to fulfil their functions and duties independently.[155] The necessity of granting international organisations privileges and immunities is to "enable [them] to function properly without undue interference in their affairs by states and thus ensure the independent discharge of the tasks entrusted to them."[156]

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[154] Arts. 14, 15, and 16 of the draft Rule of the ACJ.

[155] Amerasinghe, Chittharanjan F., *Principles of the Institutional Law and International Organisations*, Cambridge: Cambridge University Press, (1996) p. 369; Robert Jennings & Arthur Watt (eds.), *Oppenheim's International Law*, vol. 1, London: Longman, (1996) p.p. 1090-1092.

[156] Scobbie, Iain, International Organizations and International Relations, in René-Jean Dupuy (ed.), *A Handbook on International Organizations*, 2nd edn., London: Martinus Nijhoff Publishers, (1998) p. 833.

When talking about privileges and immunities generally, the 1961 Vienna Convention on Diplomatic Relations is the main source of law on this matter. The preamble of this Convention states that the purpose of granting such privileges and immunities is "to ensure the efficient performance of the functions of diplomatic missions as representing states", but earlier, the Charter of the UN granted the organisation, and the Court as an integral part, the right to enjoy functional privileges and immunities.[157]

Art. 19 of the Statute of the ICJ provides that members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities. Moreover, functional privileges and immunities are extended according to Art. 42 (3) of the Statute of the ICJ, to the agent, counsel and advocates of parties before the Court in order that they can exercise their duties before the Court independently.[158]

When the Pact of the Arab League was drafted, the question of the privileges and immunities granted to the members of the Council of the League and other officials in this organisation was discussed. Art. 14 of the Pact of the Arab League provides:[159]

> "The members of the Council of the League, the members of its Committees and such of its officials as shall be designated in the internal organisation, shall enjoy, in the exercise of their duties, diplomatic privileges and immunities.

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[157] Art. 105 (1, 2); also see the general Convention on the Privileges and Immunities of the United Nations of 1946 in, 1 *UNTS* (1946/47) No. 4, p.p. 16-32.

[158] It is to be noted that this provision was not found in the Statute of the previous Court, the PCIJ. It was suggested that the above provision should be added to the new Statute of the ICJ, because it appeared that members of the Court "might have travel through several countries to reach the Court, and also because of the possibility that special Chambers of the Court might sit at places other than The Hague." See *UNCIO*, vol. 13, (1945) p. 208.

[159] For full text of the Pact of the Arab League see Appendix *I*.

> The premises occupied by the institutions of the League shall be inviolable."

The Convention on the Privileges and Immunities of the Arab League was drafted and approved by the League Council and entered into force on 10th May 1953. This Convention contains 38 Articles covering subjects such as property and assets, facilities in respect of communications, the representatives of member states, officials, experts and travel documents.[160]

Arts. 51 and 52 of the draft Statute regulate the privileges and immunities of the projected ACJ and its judges. It appears by a close reading of these two Articles that the Arab draftsmen have distinguished between the Court on the one hand, and the judges on the other.

By Art. 51, in performing its functions and for achieving its purposes, the ACJ enjoys immunities and privileges in all member states of the Arab League. These privileges and immunities extend to the Registrar of the Court, Officers, Experts, Witnesses and Representatives of parties before the Court, in order to protect their independence and freedom while they exercise their functions and duties. The Convention of the privileges and immunities of the Arab League is to be applied to them.[161]

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[160] For unofficial English translation to this Convention see Khalil, Muhammad, *The Arab State and the Arab League: A Documentary Record*, vol. 2, Beirut: Khayats, (1962) p.p. 116-122.

[161] It provides:

> "1. The Court shall enjoy, in the member states, such immunities and privileges as may be required for achieving its purposes and performing its functions.
>
> 2. The Court's Registrar, officers, experts, witnesses, and representatives of parties appearing before the Court shall enjoy such immunities and privileges as may be necessary to safeguard their independence and freedom while performing their functions and duties.
>
> 3. The Convention on the Privileges and Immunities of the League of Arab States shall apply concerning the implementation of paragraphs 1 and 2 of this Article."

However, according to Art. 52, judges of the Court are granted a different treatment while exercising their duties, that is, that accorded to diplomatic envoys, particularly under the Vienna Convention of 1961.[162]

[162] Art. 52 provides:

> "1. Judges in the member states shall enjoy the same Privileges and Diplomatic Immunities accorded to diplomatic envoys in accordance with international agreements, particularly the Vienna Convention of 1961."

Concluding Remarks

The Statute of the ICJ can be taken as a good model to be followed when assessing the draft Statute of the ACJ. Statutes of other international courts and tribunals also can be taken into account. The most important thing that should be realised is that when any provision is taken from any other court, it should be studied closely to determine whether it will suit Arab legal and political circumstances. On the other hand, any single provision taken from court Statutes should not be treated in isolation but in relation with other related Articles, and any changes in a provision should cover all Articles related to it.

It seems that the Arab draftsmen were influenced more by the Statute of the ICJ than by the principles of Islamic Shariah when drafting the Articles relating to the composition of the proposed ACJ. In a number of places, they did not succeed to draw provisions from the World Court Statute, especially in matters in which different provisions are needed. After more than forty five years of discussion about the establishment of the ACJ within the Arab League system, no agreement upon the major points has been achieved. It is furthermore realised that the Arab draftsmen have not finalised their point of view regarding matters which are strongly related to principles of Islamic Shariah, for example no clear provision can be found in the draft Statute regulate the appointment of non-Muslims, and women. Furthermore, the position of Arab draftsmen regarding the qualification of judges is not so clear. This has resulted in unclear provisions adopted in the present draft Statute.

The next chapter will discuss the Islamic Shariah as a legal source to be applied by the projected ACJ, which is considered as another important point which needed special treatment by the Arab draftsmen. The most important question to arise in this point is how the Arab draftsmen managed to use Islamic Shariah as well as international law as these are different legal systems. Did they give either system priority in application, and will the application of international law conflict with principles of the Islamic Shariah? The next chapter will concentrate on Islamic Shariah by studying its definition and sources, including a general historical background about the Siyar (Islamic international law).

Chapter IV
Application of the Islamic Shariah by the Arab Court of Justice

The importance of discussing Islamic Shariah in the present chapter arises because Shariah is one of the primary sources to be applied by the projected ACJ. When the Arab draftsmen dealt with the composition of the Court, they stipulated that the judges must be qualified in Islamic Shariah and international law.[1] In the present chapter the concept of Islamic Shariah and its sources of legislation will be discussed in terms of four main subjects: (1) international law sources in general; (2) the definition of Islamic Shariah (3) the Islamic Shariah sources; and (4) the application of the Islamic Shariah by the ACJ.

4. 1. Sources of International Law in General

At the national level, it is easy to recognise how law is made, and who is responsible to enact municipal laws. Most modern states refer in this respect to their respective constitutions, legislative power, or to the judicial process (case law) if a particular state follows such a system. The matter is more difficult and complicated at the international level; there is no constitution for the international community that could be taken as a fundamental legislative instrument;[2] if one points to the decisions of the World Courts, whether the ICJ or its predecessor the

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[1] This appears in Art. 6 of the draft Statute of the ACJ. For further details see below chapter II, p. 65 and chapter III, p. 92.

[2] Lauterpacht, Hersch, The Absence of an International Legislature and the Compulsory Jurisdiction of International Tribunals, XI *BYbIL* (1930) p. 134.

PCIJ, these decisions legally bind only the parties to the dispute,[3] which means that *stare decisis* (or case law) is not considered as a primary source of international law.[4]

When discussing the sources of international law, it is important to find out what actually the law is; and not only that, it appears that every case brought before the World Court needs, first of all, an intensive investigation in order to reach an explicit answer about the law to be applied in the given case. In another words, the first problem that may face the ICJ is to which source it will have recourse, taking into consideration any particular rule agreed by the parties.[5] Normally when international lawyers want to discuss the sources of international law, they refer to Art. 38 of the Statute of the ICJ which enumerates the main sources of international law, despite the fact that the term 'source' is not used.[6] This Article provides:

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[3] According to Art. 59 of the Statute of the ICJ which provides: "The decision of the Court has no binding force except between the parties and respect of that particular case". This Article follows the same provision and without any changes from its predecessor in the PCIJ Statute.

[4] Shaw, M. N., *International Law*, Cambridge: Cambridge University Press, (1994) p.p. 58-59. This opinion is not absolutely correct because the World Court, in its practice, has put into consideration its previous decisions when deciding a new case, or in other words, the past decisions of the Court have often affected its future course of action. Shahabuddeen has argued that: "....the Court seeks guidance from its previous decisions, that it regards them as reliable expositions of the law and that, though having the power to depart from them, it will not lightly exercise that power. In these respects, the submission is that the Court uses its previous decisions in much the same way as that in which a common law court of last resort will today treat its own previous decisions." Shahabuddeen, Mohamed, *Precedent in the World Court*, Cambridge: Cambridge University Press, (1996) p.p. 2-3; also see Fitzmaurice, Gerald, *The Law and Procedure of the International Court of Justice*, Cambridge: Crotius Publications Limited, vol. 1, (1986) p. xxxii; Lauterpacht, Hersch, *The Development of International Law by the International Court*, London: Steven's & Sons, (1958) p.p. 9-11.

[5] Mendelson, Maurice, The International Court of Justice and the Sources of International Law, in Vaughan Lowe & Malgosia Fitzmaurice (eds.), *Fifty Years of the International Court of Justice: Essay in Honours of Sir Robert Jennings*, Cambridge: Cambridge University Press, (1996) p. 63.

[6] There have appeared different terms in addition to the term 'source' such as 'cause', 'basis', 'origin' and 'evidence' of international law, and jurists differs in their conception and definitions. For more details see Corbett, P. E., The Consent of States and the Sources of the Law of Nations,

> "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> a. international conventions, whether general of particular, establishing rules expressly recognised by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognised by civilised nations;
> d. subject to the provisions of Art. 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
> 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto."[7]

The agreed interpretation of this Article is that international law consists of, or has as its basis as primary sources, international conventions, international custom, and general principles of law recognised by civilised nations. Judicial decisions and teachings of highly qualified publicists are not considered as sources of law; they are just subsidiary means for finding what the law is. So no rule can be treated as international law unless it is derived from one of the primary sources mentioned in sub paragraphs a-c, of Art. 38 (1) of the Statute of the ICJ, because the secondary sources cannot create law by themselves.[8]

VI *BYbIL* (1925) p.p. 20, 29-30. (hereinafter cited as: Corbett, Sources of the Law of Nations); Robert Jennings & Arthur Watt (eds.), *Oppenheim's International Law*, London: Longman, vol. 1 part 1, (1992) p. 23. (hereinafter cited as: *Oppenheim's International Law*); Parry, Clive, *The Sources and Evidences of International Law*, Manchester: Manchester University Press, (1965) p.p. 1-5. (hereinafter cited as: Parry, *The Sources and Evidences*); Degan, V. D., *Sources of International Law*, London: Martinus Nijhoff Publishers, (1997) p.p. 1-2.

[7] It is however to be noted that this Article follows the same conception of its predecessor the PCIJ, the only change made to this Article is that the words "whose function is to decide in accordance with international law such disputes as are submitted to it" are inserted in paragraph 1. For more details see *Advisory Committee of Jurists, Procès-verbaury of Proceedings of the Committee*, (16 June-24 July, 1920, League of Nations Publication, 1920); International Court of Justice (ed.), *International Court of Justice: Selected Documents Relating to the Drafting of the Statute*, Washington: United States Government Printing Office, (1946) p.p. 9, 45-46; Hudson, Manley O., The Twenty Fourth Year of the World Court, 40 *AJIL* (1946) p.p. 35-36.

[8] Verzijl, J. H. W., *International Law in Historical Perspective*, Leyden: A. W. Sijthoff, vol. 1, (1968) p. 8; Gross, Leo, The International Court of Justice: Consideration of Requirements for Enhancing its Role in the International Legal Order, 65 *AJIL* (1971) p. 320. (hereinafter cited as: Gross, The International Court of Justice); Buergenthal, Thomas, & Maier, Harold G., *Public International Law*, USA: West Publishing co., (1990) p. 21; Gihl, Torsten, The Legal Character and Sources of International Law, 1 *SSL* (1957) p.p. 71-72; Sørensen, Max, *Manual of Public*

Furthermore, Art. 38 (1) does not mention or explain which of those three sources takes priority in application; whether treaties have preference over custom, and custom over general principles of law. However, in World Court practice treaties and conventions that bind the parties are first taken into account. If the dispute cannot be settled on that basis alone, then international customary law has to be taken into account, either as the only source or as an additional one. If the dispute cannot be solved using either source, the Court then must have recourse to the third choice, general principles of law recognised by civilised nations. If there are no rules that could be taken from these three categories, the Court will then resort to the previous judicial decisions' and jurists' opinions.[9] This however does not prevent the World Court to have recourse to all the recognised sources in its quest for the rules applicable in such disputes that are brought before it.[10]

It is an indisputable fact that the World Court is to apply the spirit of the law and not only the letter of the law in its judgments. For this reason, a distinction must be made between two complicated and difficult terms: the Court's *ex aequo et bono* power and equity as a general principle of law. It is to be noted that the word 'equity' does not appear in Art. 38 or in any other Articles of the Statute of the PCIJ or the ICJ, but the World Court itself on several occasions has indicated that it considers the principles of equity to constitute an integral part of

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International Law, London: Macmillan, (1968) p. 122. (hereinafter cited as: Sørensen, *Manual of Public International Law*).

[9] Simma, Bruno, *The Charter of The United Nations* (*a commentary*), Oxford: Oxford University Press, (1995) p. 992; Shearer, I. A., *Starke's International Law*, London: Butterworths, (1994) p. 48.

[10] Thirlway, Hugh, The Law and Procedure of the International Court of Justice 1960-1989, LX *BYbIL* (1989) p. 144.

international law. In the Diversion of Water from the Meuse case judge Hudson declared:[11]

> "what are widely known as principles of equity have long been considered to constitute a part of international law, and as such they have often been applied by international tribunals."

Regarding the power to decide a case *ex aequo et bono*, authorisation must be given to the World Court from the parties according to para. 2 of Art. 38 before it can so decide a case, whereas deciding a case according to equity does not need any kind of authorisation or special agreement from the parties.[12] When the World Court decides a case *ex aequo et bono*, it does not mean it has to refer to equity, because each term has its own specific reference.[13] Jennings has argued in this matter that:

> "the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto, this does not plainly refer to equity in the ordinary and proper sense of the word; for equity is a part of the law, and is moreover a general principle of law. Consequently the application of equity properly so called cannot depend upon the existence of any special agreement thereto by the parties.
> Presumably, therefore, decision *ex aequo et bono* in this context refers to the possibility of some kind of political, or compromise, determination, beyond the quite considerable equitable discretion that the Court in fact had in its application of the law to almost any conceivable case."[14]

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[11] *Diversion of Water from the Meuse* case, Judgment, *PCIJ* (1937) Ser. A/B, No. 70, p. 73.

[12] *Free Zones of Upper Savoy and the District of Gex*, Order, *PCIJ* (1930) Ser. A, No. 24, p. 10; also see *Frontier Dispute* case, (Burkina Faso v. Republic of Mali), *ICJ Rep.*, (1986) p.p. 567-568, [para. 28].

[13] For more details see Brownlie, Ian, *Principles of Public International Law*, Oxford: Clarendon Press, (1996) p.p. 26-27; Jenks, C. W., Equity As A Part of the Law Applied by the Permanent Court of International Justice, LIII *LQR* (1937) p.p. 519-524; Cheng, Bin, Justice and Equity in International Law, 8 *CLP* (1955) p.p. 202-208; Lapidoth, Ruth, Equity In International Law, *Proc. ASIL* (1987) p.p. 143-145; Lauterpacht, Elihu, *Aspects of the Administration of International Justice*, Cambridge: Grotius Publications Limited, (1991) p.p. 117-118. (hereinafter cited as: Lauterpacht, *Administration of International Justice*); also see *Continental Shelf*, (Tunisia v. Libya Arab Jamahiriya), *ICJ Rep.*, (1982) p. 60, [para.71].

[14] Jennings, Robert. Y., General Course on Principles of International Law, 121 *Recueil Des Cours* (1967) p. 343.

It is not the aim of the present chapter to discuss the power of the Court to decide a case *ex aequo et bono* or to discuss equity. The purpose of introducing this subject here is to find an answer to an important question that may arise before the projected ACJ as a regional Court applying international law and Islamic Shariah at the same time. If the projected ACJ decided a case *ex aequo et bono* or did so by applying equity, then could this conflict with the principles of Islamic Shariah? If this were the case, then how could it decide a case by using either method?[15]

Lastly, questions have arisen whether Art. 38 of the Statute of the ICJ enumerates all the sources of international law or not. Actually, a number of jurists are in agreement that there are other sources which have been excluded and they have suggested amendments to this Article in order to include United Nations law as a source of International Law, whether primary or subsidiary, and also resolutions and declarations of the General Assembly as subsidiary means.[16]

4. 2. The Concept of the Islamic Shariah in the Statute of the ACJ

In order to understand the concept of Islamic Shariah as a legal system capable to regulate internal as well as external relations of Islamic states, a clear distinction must be made between its scope as a national legal system on the one

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[15] This subject will be discussed later when discussing Art. 23 of the draft Statute of the ACJ which concerns the applicable law by this Court. see below p. 217.

[16] For discussions of amendment of the Statute in 1945, see *UNCIO*, vol. 13, (1945) p.p. 164, 284-285, 392, and vol. 14, p.p. 170, 205, 670-671; Gross, The International Court of Justice, *supra* note 8, p. 319; Higgins, Rosalyn, The United Nations and Law Making: The Political Organs, *Proc. ASIL* (1970) p.p. 37-48; Schwelb, Egon, The process of Amending the Statute of the International Court of Justice, 64 *AJIL* (1970) p.p. 880-891; Rosenne, Shabtai, *The Law and Practice of the International Court 1920-1996*, vol. I, The Hague: Martinus Nijhoff Publishers, (1997) p. 95; Parry, *The Sources and Evidences*, *supra* note 6, p.p. 109-115.

hand, and an international legal system on the other. This approach requires a general discussion of its definition, and then an outline of the Muslim conception of Islamic international law. Therefore, this section will discuss these two main points: (1) the definition of Islamic Shariah; (2) Islamic international law.

4. 2. 1. Definition of Islamic Shariah

The linguistic meaning of Shariah in Arabic is "the road to the watering place where humans and animals daily gather to drink, or the clear path to be followed."[17] In this sense Allah said in the Quran: "To each among you, We have prescribed a law and a clear way."[18] "Then we have put you (O Mohammed) on a plain way of (Our) commandment [which we commanded Our Messengers before you i.e. the legal ways and laws of Islamic Monotheism]. So follow you that (Islamic Monotheism and its laws), and follow not the desires of those who know not."[19] However, the legal meaning of Shariah is the "sum total of injunctions (rules and principles) which were revealed from Allah to His slaves through one of His Prophets."[20]

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[17] Mustafa, Ebrahim [et.al], *Al Mu'jam Al Wasit*, (Arabic Arabic Dictionary), al Qahirah: Majma' al Lughah al Arabiyah, (1972) p. 479. (hereinafter cited as: *al Mu'jam al Wasit*); Gibb, H. A. R., & Kramers, J. H., *Shorter Encyclopaedia of Islam*, Leiden, E. J. Brill, (1991) p. 524. (hereinafter cited as: Gibb, *Encyclopaedia of Islam*).

[18] Quran, 5:48.

[19] Quran, 45:18.

[20] The relationship between the linguistic and legal meanings of Shariah is that both of them share the same conception of straightness, because it is revealed from Allah. For more details see Shalabi, Mohammed Mustafa, *al Madkhal fi at Ta'rif bil Fiqh al Islami*, (*An Introduction to the Definition of Islamic Jurisprudence*), Beirut: Dar an Nahdah al Arabiyah, (1969) p. 27. (hereinafter cited as: Shalabi, *Introduction to Islamic Jurisprudence*); Husni, Abbas, Khasai's al Tashri' al Islami Dirash Muqaranah bil Qanun al Wadh'i, (The Characteristics of the Islamic Shariah (Law) Compared with Positive (man-made) Laws, 24 *JSIS* (1994) p. 17. (Hereinafter cited as: Husni, The Characteristics of the Islamic Shariah).

A distinction must be made between two terms, 'Shariah' and 'Fiqh'. First of all it is to be noted that both Shariah and Fiqh have been translated into English as Islamic Law.[21] However, Muslim jurists usually mean by the first term the divine law which Allah has revealed to His Prophet, and He and His Prophet only have the best understanding of its definite meaning and commandments. Fiqh, on the other hand, is the process of discovering and understanding the injunctions, rules and principles of Shariah.[22] So Fiqh differs from Shariah in some of the following points: Shariah is considered as the sum of revealed injunctions found in Quran and Sunnah, but Fiqh is deemed as a body of laws deduced from Shariah by jurists to cover particular situations; Shariah is unchangeable, because it is revealed by Allah, whereas Fiqh changes according to the circumstances under which it is applied; lastly, Shariah deals with general rules and principles whereas Fiqh deals with the practical details in order to establish how these general rules can be applied in given circumstances.[23] Fiqh literally means, 'understanding, intelligence and also means jurisprudence.' The person who is working with or learning it is called a (Faqih) jurist.[24] Legally, Fiqh refers to "the science of deducing Shariah from evidence found in its sources."[25] Fiqh is mentioned in the

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[21] Schacht, Joseph, Islamic Law in Contemporary States, 8 *AJCL* (1959) p. 136. In this thesis the term 'Islamic Shariah' has been used instead.

[22] Omar, Mohamed Abdel Khalek, Reasoning in Islamic Law, 12 *ALQ* (1997) p. 149. (hereinafter cited as: Omar, Reasoning in Islamic Law).

[23] Differences in the interpretation and understanding the Quran and Sunnah led to the establishment of Islamic schools which are called after their founders. For more details see Philips, Abu Aminah Bilal, *The Evolution of Fiqh: Islamic law and the Madhabs*, Riyadh: Tawhid publications, (1990) p. 2. (hereinafter cited as: Philips, *The Evolution of Fiqh*).

[24] *al Mu'jam al Wasit*, *supra* note 17, p. 698; Gibb, *Encyclopaedia of Islam*, *supra* note 17, p. 102; Muhairi, Butti, S. B., Islamisation and Modernisation Within The UAE Penal Law: Shariah In The Pre Modern Period, 10 *ALQ* (1995) p. 291.

[25] For same definition see Husni, The Characteristics of the Islamic Shariah, *supra* note 20, p.p. 42-43; Philips, *The Evolution of Fiqh*, *supra* note 23, p. 1.

Quran which gives it a special meaning as a true or accurate understanding. Allah said: "Say: All things are from Allah, so what is wrong with these people that they fail to understand any word?"[26] In another verse He said: "And surely, We have created many of the jinn and mankind for Hell. They have hearts wherewith they understand not, they have eyes wherewith they see not, and they have ears wherewith they hear not (the truth). They are like cattle, nay even more astray; those! They are the heedless ones."[27] The same meaning was mentioned in the Sunnah when the Prophet said: "To whomsoever Allah wishes good, He gives the Fiqh (true understanding) of the religion."[28]

Islamic Shariah is deemed to be a comprehensive system which regulates all Muslims' activities, their relationship to Allah, their relations with each other, and at the same time it regulates how an Islamic nation conducts its affairs with other communities (non-Muslim nations) whether in war or peace.[29] The question thus raised relevant to this study is whether there is an Islamic international law within the Islamic Shariah system that can regulate the external relations of the Islamic states with other states.

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[26] Quran, 4:78.

[27] Quran, 7:179. Also in another verse Allah said: "They said; O Shuaib! We do not understand much of what you say." Quran, 11:91.

[28] al Bukhari, Mohammed bin Esmail, *Sahih al Bukhari*, (194-256), by Mohammed Muhsin Khan (trans.), Medina: Dar al Fikr, vol. 1, p. 61. (hereinafter cited as: *Sahih al Bukhari*).

[29] Gragg, Kenneth, *The House of Islam*, California: Dickenson Publishing Company INC. (1969) p.p. 45-46; also see al Zarqa, Mustafa, *al Madkhal al Fiqhi al 'Amm*, Dimashq: Jami'at Dimashq, (1959) p.p. 25-26, 31, 62. (hereinafter cited as: al Zarqa, *al Madkhal al Fiqhi*); Husni, The Characteristics of the Islamic Shariah, *supra* note 20, p.p. 84-87.

4. 2. 2. Islamic International Law

The branch of Islamic Shariah which involves regulating the intercourse of Islamic states with non-Islamic states is called Siyar or Islamic international law.[30] It is based on the same sources and has the same character as the Islamic Shariah.[31] The early Muslim jurists discussed Siyar either under the general heading of jihad (holy war) or under specific subjects such as maghazi (invasion), ghanima (spoil), ridda (apostasy), and aman (safe conduct); but almost all limited their discussions to the law of war.[32] A very early study of the Siyar was made by al Shaybani who wrote a number of books on this subject.[33] Nevertheless, a clear definition of it has been made by his successors in their comments on his writings. Sarkhasi defines the term "Siyar" as follows:

> "The Siyar is plural of sirah and this book is named after this term. It presents the conduct of Muslims in their intercourse with the unbelievers of enemy territory as well as with the people with whom Muslims made treaties, who may have been temporarily (musta'mins) or permanently (dhimmis) in Islamic territory; with apostates, who were the worst of the unbelievers, since they adjured after they accepted Islam, and with baghis (rebels) who were not counted as

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[30] Siyar means conduct and behaviour. Its first usage was by historians when they dealt with the life or biography of the Prophet especially in relation to His wars. Subsequently this term used to mean the conduct of the state in its intercourse with other communities. See Gibb, *Encyclopaedia of Islam*, *supra* note 17, p. 547; Julian Johansen, al Sarkhasi's Contribution to International Relations and International Law in Islam, 2 *Islamica*, part 4, (1998) p. 55; Hamidullah, Muhammad, *Muslim Conduct of State*, Lahore: Sh. Muhammad Ashraf, (1953) p.p. 10-12. (hereinafter cited as: Hamidullah, *Muslim Conduct of State*).

[31] Hamidullah, Mohammed, The International Law in Islam, 39 *Isl.Rev.* (1951) p. 8. (hereinafter cited as: Hamidullah, The International Law in Islam); Gottingen, Hans Kruse, The Foundation of Islamic International Jurisprudence, 3 *JPHS* (1955) p.p. 234-235.

[32] Akhtar, Shameem, An Inquiry into the Nature, Origin, and Sources of Islamic Law of Nations, 10 *Isl.Stud.* (1971) p. 31.

[33] al Shaybani, Abu Abdullah bin Mohammad ibn al Hassan ibn Farqad, (132 A.H./750 A.D.-189 A.H./804 A.D.) is considered the founder of Muslim international law. His famous book is, Kitab al Siyar (book of Siyar). For further details about al Shaybani's life and writings see Khadduri, Majid, *The Islamic Law of Nations, Shaybani's Siyar*, (trans.), Baltimore: The Johns Hopkins Press, (1966) p.p. 22-38. (hereinafter cited as: Khadduri; *The Islamic Law of Nations*).

> unbelievers, nevertheless they were ignorant and their understanding of Islam was erroneous."[34]

Islamic international law is rich in definitions, the same as public international law. Every Muslim jurist defines it from the aspect he feels it is most important. For Hamidullah, Muslim international law is defined as "The part of the law and custom of the land and treaty obligations which a Muslim *de facto* or *de jure* state observes in its dealing with other *de facto* or *de jure* states."[35] Khadduri maintains that the term 'law of nations' means "The sum total of the rules and practices of Islam's intercourse with other peoples."[36] Al Ghunaimi defines Muslim international law as "The sum total of rules and practices which Islam ordains or tolerates in international relations."[37] Mahmassani defines it as "The rules of conduct laid down by tradition of the Prophet or His companions concerning military campaigns (maghazi)."[38] Public international law, on the other hand, is defined as "the law which regulates the intercourse between all the members of the international community of states in accordance with principles of equality and justice."[39] Islamic international law, according to these definitions,

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[34] al Sarkhasi, Shams ad Din, *al Mabsut*, Beirut: Dar al Ma'rifah, vol. 10, (1989) p. 2; *Cf.* the translation with Hamidullah, *Muslim Conduct of State*, *supra* note 30, p.p. 11-12; Khadduri, *The Islamic Law of Nations*, *supra* note 33, p. 40.

[35] Hamidullah, *Muslim Conduct of States*, *supra* note 30, p. 3.

[36] Khadduri, *War and Peace in the Law of Islam*, London: The Johns Hopkins Press, (1955) p. 47. (hereinafter cited as: Khadduri, *War and Peace in Islam*).

[37] al Ghunaimi, Muhammad Tal'at., *The Muslim Conception of International Law and the Western Approach*, The Hague: Martinus Nijhoff, (1968) p. 96. (hereinafter cited as: al Ghunaimi, *The Muslim Conception of International Law*).

[38] Mahmassani, Sobhi, The Principles of International Law in the Light of Islamic Doctrine, 116 *Recueil Des Cours* (1966) p. 235. (hereinafter cited as: Mahmassani, The Principles of International Law).

[39] An-Na'im, Abdullahi Ahmed, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law*, New York: Syracuse University Press, (1996) p. 137. (hereinafter cited as: An-Na'im, *Toward an Islamic Reformation*); for similar definitions see for example, *Oppenheim's International Law*, *supra* note 6, p. 4; Starke, J. G., *Introduction to International Law*, 10th edn.,

contains the same conceptions as public international law in its general concept but at the same time it has its own view on some matters of international relations. However, the most important point to be mentioned here is that if international law as positive law is based on three primary sources, treaties, customs and general principles of law, then Islamic international law is considered as divine law based on other types of sources such as the Quran and the Sunnah. Despite this fact, some western writers reject the idea that there is a distinct school of Islamic international law.[40]

It is not the aim of this study to compare Islamic international law and public international law in order to find the differences and similarities between them. Only one point needs emphasis here, namely, that Islamic international law is not necessarily the same as public international law. This branch of law generally regulates the international relations of Muslim states, which is seen to encompass all Muslim peoples in the World as one nation (Ummah), with other non-Muslim states in both war and peace. It is assumed that when the Arab draftsmen included principles of Islamic Shariah as a source to be applied by the ACJ their intention was to mean the application of the Islamic Shariah as a comprehensive legal system including that branch which is called Muslim International law, that may be defined as "the sum roles and practice of Islam's relations either with each other or with other people".

London: Butterworths, (1989) p. 3; Sørensen, *Manual of Public International Law*, *supra* note 8, p. 1.

[40] Westbrook, David A., Islamic International Law and Public International Law: Separate Expression of World Order, 33 *VJIL* (1993) p.p. 822, 859-884; see also Kruse, Hans, The Notion of Siyar, 2 *JPHS* (1954) p.p. 24-25.

At the present time, the modern international community consists of numerous states that are deemed to be equal and independent. Their relationship is not regulated by the internal legal system of any one of them but by an international system known as international law. Any conflicts should be settled by peaceful means according to the Charter of the UN; it may be the best instrument to clarify the purpose and principles of modern international law because it is the only general treaty that legally binds virtually all states, including Arab and Muslim states.[41]

The matter in classical Islamic thought relating to international relations was absolutely different. The world was divided into two parts: Dar El Islam (the territory of Islam) and Dar El Harb (the territory of war or enemy territory).[42] Nonetheless, not all Muslim jurists accepted that the world was divided in this way as Dar El Islam and Dar El Harb. Al Shafi'i, for example, added another temporary division, called Dar El Sulh or Dar El 'Ahd (the territory of Peaceful agreement). This is a place not under the control of a Muslim ruler, but in which non-Muslim states have agreed to pay jizyah (poll tax) or give up some of their territorial rights to the Muslim state.[43]

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[41] Art. 1 and 2 of the Charter of the UN. It is to be noted that only the 1949 Geneva Conventions have more parties than the UN Charter.

[42] There was a similar idea in medieval Christian thought. Before 1860 international law essentially only regulated the relationship between Christian nations. Non Christians had no rights before European or Christian international law. For more details see Cassese, Antonio, *International Law in a Divided World*, Oxford: Oxford University Press, (1994) p.p. 34-54. (hereinafter cited as: Cassese, *International Law in a Divided World*); Scott, James Brown, The Codification of International Law, 18 *AJIL* (1924) p. 261; Wilk, Kurt, International Law and Global Ideological Conflict: Reflections on the Universality of International Law, 45 *AJIL* (1951) p. 648; Wright, Quincy, International Law and Ideologies, 48 *AJIL* (1945) p. 617.

[43] al Shafi'i, al Imam Muhammad ibn Idris (150-204), *al Umm*, vol. 4, Beirut: Dar al Fikr, (1990) p. 192; Gibb, *Encyclopaedia of Islam*, *supra* note 17, p. 68.

Dar El Islam comprises Muslims and non-Muslim territories held under Islamic sovereignty. Its inhabitants were Muslims and the people of the tolerated religions or the people of the book, ahl al kitab (Christians and Jews), who refuse to accept Islam as their religion and in return they accept to pay jizyah (poll tax) to the Muslim authorities whose duty is to secure their lives, property and all human rights.[44] In Dar El Islam, war is forbidden,[45] Islamic Shariah is the authority, Allah's divine ordinances are obeyed and a Muslim sovereign is the ruler. All Muslims residing in Dar El Islam are obligated to protect and defend this territory through jihad if it is invaded.[46] The opposite of Dar El Islam is Dar El Harb, which consists of all the communities outside the territory or the control of Islam. Its inhabitants are people who fail to accept Islam as their religion.

The Imam or caliph has the responsibility to place Dar El Harb under Dar El Islam, in order to achieve the enforcement of Islamic Shariah throughout the world and to unite the world into one nation (Ummah) under the sovereignty of an Islamic state. Jihad is the one of the instruments by which Muslims can achieve this objective.[47] This means that Dar El Islam is at war with Dar El Harb until this

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[44] For further discussion of the status of non-Muslims under Muslim rule, see Doi, Abdur Rahman I., *Non-Muslims under Shariah* (*Islamic Law*), London: Ta Ha Publishers Ltd., (1983).

[45] For modern study about the forbidden war in Dar El Islam see Bedjaoui, Muhammad, The Gulf War of 1980-1988 and the Islamic Conception of International Law, in Dekker, Ige F., & Post, Harry H. G. (eds.), *The Gulf War of 1980-1988: The Iran-Iraq War in International Legal Perspective*, London: Martinus Nijhoff Publishers, (1992) p.p. 283-288; also see *Western Sahara* case, *ICJ Rep.* (1975) p.p. 12, 40-49.

[46] al Zuhaili, Wahbah, *al 'Elaqat ad Dawliyah fi al Islam: Muqaran bil Qanun ad Dawli al Hadith*, (*International Relations In Islam: Comparison with the Modern International Law*), Beirut: Muassasat ar Risalah, (1981) p.p. 104-105.

[47] Jihad is derived from jahada or juhd which means ability, exertion or power. Normally this is translated to English as Holy War. In Islamic Shariah jihad is defined as "the struggle for the cause of Allah by all means, including speech, life and property." See al Kasani, 'Ala' al Din Abi Baker bin Masud, *Bdai' as Sanai' fi Tartib ash Sharai'* , Beirut: Dar al Kutub, al 'Ilmiyah, (1986) p. 97; Mahmassani, The Principles of International Law, *supra* note 38, p.p. 279-280.

requirement is fulfilled. It is the Imam's duty to decide when jihad is necessary and also he is the only one who can decide which other instrument to use to bring Dar El Harb under Islamic control. He may opt for jihad or diplomatic methods such as creating temporary peaceful relations by concluding agreements between them.[48] This does not mean that Islam is a religion against peace, but in the Islamic view peace can only achieved if there is a universal community bound by Islamic Shariah.[49] There are a number of verses in the Quran which prove that jihad in Islam is intended as an instrument of exception. Allah says: "But if they incline to peace, you also incline to it, and (put your) trust in Allah. Verily, He is the All-Hearer, the All-Knower."[50] Ibn Umar is reported to have said that Allah's Messenger said:

> "I have been ordered (by Allah) to fight against the people till they testify that none has the right to be worshipped but Allah and that Muhammad is Allah's Messenger, and offer prayers perfectly and give the obligatory charity, so if they perform all that, then they save their bloods (lives), and properties from me except for Islamic Law, and their reckoning (accounts) will be with (done by) Allah.[51]

Some modern Muslim scholars object to the dual division of the world as a principle of Islamic legal theory, because one of its principles concerning the terms of Dar El Islam and Dar El Harb are an innovation of the Abbassids

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[48] Khadduri, Majid, The Islamic System: Its Competition and Co Existence with Western System, *Proc. ASIL*, (1959) p.p. 49-50; and his Article, Islam and Modern Law of Nations, 50 *AJIL* (1956) p.p. 359-360; see also Ahmed, Mahmood Hassan, *al 'Elaqat al Dawliyah fi al Islam*, (*International Relations in Islam*), Ash Shariqah: Dar al Thaqafah al Arabiyah, (1996) p.p. 76-77; For more details about peace treaties which were concluded between Muslims and non-Muslims see Piscatori, James P., *Islam in a World of Nation-States*, Cambridge: Cambridge University Press, (1994) p.p. 49-62.

[49] Allah Says: "And fight them until there is no more disbelief and worshipping of others along with Allah and (all and every kind of) worship is for Allah alone. But if they cease, let there be no transgression except against polytheists." Quran, 2:193; also see Khadduri, Majid, *The Islamic Conception of Justice*, London: The John Hopkins University Press, (1984) p.p. 167-168.

[50] Quran, 8:61.

[51] *Sahih al Bukhari*, *supra* note 28, vol. 1, Hadith No. 24.

jurists.[52] Their view is based on the presumption that this notion of division is dependent on the idea of constant or aggressive jihad, and if this concept cannot be maintained, the division should also be dropped; they support their opinion by saying that the two terms, Dar El Islam and Dar El Harb never occur in the Quran or Sunnah. They also reject the tripartite division (by the addition of Dar El Sulh) because it does not cover all the non-Muslim states which are not at war with the Islamic state. On this point al Ghunaimi says:[53]

> "We object to including this division in the Muslim legal theory as one of its principles. As a matter of fact, this division, under the Abbassids, corresponded to factual relations between the Islamic State and non Muslim States."

In my opinion this idea cannot be accepted. Since Muslims insist on creating the Islamic state, a division between Islamic and non-Islamic worlds will appear automatically, because the idea of an integrated Islamic state will not be accepted by the other communities immediately.[54] In addition, in the Quran, the division between the above mentioned two worlds can be deduced from the following text when Allah said:

> "Verily, those who believed, and emigrated and strove hard and fought with their property and their lives in the cause of Allah as well as those who gave (them) asylum and help, those are (all) allies to one another. And as to those who believed but did not emigrate (to you O Muhammad) you owe no duty of protection to them until they emigrate, but if they seek your help in religion, it is your duty to help

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[52] We believed that these divisions have existed as a fact, since the lifetime of the Prophet, when He first created the first Islamic state. But only in the Abbassids era jurists started studying them in order to find out the origin of jihad (holy war) as it is defensive or offensive instrument. More details see Abu Zahrah, Muhammad, *al 'Elaqat ad Dawliyah fi al Islam*, (*International Relations in Islam*), al Qahirah: Dar al Fikr al Arab, [1964] p. 51.

[53] al Ghunaimi, *The Muslim Conception of International Law*, *supra* note 37, p.p. 183-184; also see Schacht, Joseph, *The Origins of Muhammadan Jurisprudence*, Oxford: At The Clarendon Press, (1950) p.p. 204-205.

[54] For further details see El Bakry, Muhammad M. M., *The Legality of War in al Shariah al Islamiyah (Islamic Law) and Contemporary International Law: Comparative Study*, Thesis submitted to the degree of (Ph.D.), University of Glasgow, vol. 1, (1987) p.p. 87-88.

> them except against a people with whom you have a treaty of mutual alliance, and Allah is the All-Seer of what you do. And those who disbelieve are allies to one another, (and) if you (Muslims of the whole world collectively) do not do so, there will be fitnah (wars, battles etc.) and oppression on earth, and a great mischief and corruption. And those who believed, and emigrated and strove hard in the Cause of Allah (jihad) asylum and aid; these are the believers in truth, for them is forgiveness and generous provision. And those who believed afterwards, and emigrated and strove hard along with you (in the Cause of Allah) they are of you. But kindred by blood are nearer to one another regarding inheritance in the decree ordained by Allah. Verily, Allah is the All-Knower of everything."[55]

In Sunnah it is well known that when the Prophet himself created the first Islamic state, He concluded peace treaties with non-Muslims and led Muslims in their jihad. During his life Dar El Islam was in Medina where Muslims resided, whereas Dar El Harb was in Mecca, where polytheists resided.

It is believed that this difference of opinion between modern scholars arises because of the split of the unitary Islamic state into various nations states, and all these states have become members of the UN whose rules differ from the original concept of Muslim international relations. Since then the conception of the Siyar in its old interpretation has become vague. Khadduri has argued in this matter that:

> "Muslim States have shown in recent years eagerness to participate in international organisation and cooperate with other Powers to promote international peace and security. This is a significant phenomenon in the behavior of states whose traditional law of nations is so radically different from the modern law of nations and the principles implied in the United Nations Charter." [56]

In conclusion, it is the duty of modern Muslim scholars to fill the gap between the two systems of Islamic and non-Islamic public international law in

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[55] Quran, 8:72-75.

[56] Khadduri, Majid, Islam and Modern Law of Nations, 50 *AJIL* (1956) p. 358; also see An-Na'im, *Toward an Islamic Reformation*, *supra* note 39, p. 138.

the light of divine sources, Quran and Sunnah, and find answers by applying ijtihad (reasoning) to new views on international relations. Then comparative studies should come in as a second step to promote the security of humanity in the world.[57] Nothing should prevent them from developing their own view regarding new situations as long as they are not adopting any thing that contradicts principles and rules of the Islamic Shariah. Similarly Ramadan argues:[58]

> "The door is wide-open to the adoption of any thing of vitality of whatever origin, so long as it does not go against the text of the Quran and the Sunnah."

4. 3. Sources and Methods of Interpretation of Islamic Shariah

As already mentioned, Art. 38 of the Statute of the ICJ categorises the sources of international law into two groups; international conventions, international custom and general principles of law as primary sources, with judicial decisions and teachings of publicists as secondary sources. It is interesting to note that in the Islamic Shariah, sources are also divided into primary sources based on texts such as the Quran and the Sunnah, and secondary sources based on opinion or human reasoning such as ijtihad.

It has to be mentioned at this point, that all Muslim schools are in agreement about the Quran and Sunnah by considering them as primary sources. They disagree however, on the validity of other sources. Sunni schools consider ijma

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[57] Comparative studies will not lead to any positive results unless recourse is made to and fully understands the history of both Islamic and public international law. For more details see El Kosheri, Ahmed S., History of the Law of Nations Regional Developments: Islam, 2 *EPIL* (1995) p.p. 809-818; Boisard, Marcel A., On the Probable Influence of Islam on Western Public International Law, 11 *IJMES* (1980) p.p. 429-450.

[58] Ramadan, Said, *Islamic Law: Its Scope and Equity*, London: P.R. Macmillan Limited, (1961) p. 61.

(consensus) and qiyas (analogy) also as primary sources in addition to the former sources, whereas Shi'is have their own view on ijma and they refuse to accept qiyas as a source. On the other hand, there is disagreement between Sunni schools themselves on some other approaches, some recognise them as secondary while others do not. These are such sources as istihsan (equity), istislah (considerations of public interest), and istishab (presumption of continuity). In another words, the Sunni schools agree among themselves to consider Quran, Sunnah, ijma, and qiyas as primary sources, but they disagree on the secondary sources. The Shi'i schools agree to recognise only the Quran and Sunnah as primary sources and disagree about the status of the remainder.[59]

By comparing the primary and secondary sources in Islam and the Statute of the ICJ (Art. 38) we see that the primary sources in Islam are not the same as in the Statute.[60] In Islamic legal theory there is no doubt in considering the Quran and Sunnah as primary sources, which have a completely divine nature, while international conventions and custom are considered as secondary sources. As to the secondary sources, in the ICJ Statute or in Islamic Shariah, it appears that in both secondary sources depend on human reason, as ijtihad (reasoning) in Islamic Shariah may be compared with judicial decisions and the teaching of publicists. If

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[59] Mahmassani, Sobhi, *Falsafat at Tashri' fi al Islam*, (*The Philosophy of Jurisprudence in Islam*), Farhat J. Ziadeh (trans.), Netherlands: Leiden E. J. Brill, (1961) p. 63. (Hereinafter cited as: Mahmassani, *The Philosophy*); Tritton, A. S., *Islam: Belief and Practices*, London: Hutchinson University Library, (1966) p.p. 59-61, 63-64; Owsia, Parviz, Sources of Law under English, French, Islamic, and Iranian Law: A Comparative Review of Legal Techniques, 6 *ALQ* (1991) p.p. 36-37; Vesey-Fitzgerald, Seymour, *Muhammadan Law: An Abridgement According to its Various Schools*, London: Oxford University Press, (1931) p.p. 3-9.

[60] Talking about primary sources in Islamic Shariah does not mean where the rules are first to be found or taken, as in the World Court Statute, but the rules themselves which are included in those forms.

we explore the sources, whether primary or secondary as to their divine nature, only the Quran and Sunnah would be regarded as primary sources and all other methods would be secondary sources. On the other hand, if we examine them according to the jurists' views or divisions (Islamic schools) and distinguish between Sunni and Shi'i Schools, we will find agreement on the primary sources among the two schools and disagreement on the secondary.[61]

In the present thesis the division of the sources of Islamic Shariah as primary or secondary will be, according to their divine nature, as follows: primary sources, such as the Quran and Sunnah; secondary sources, such as ijtihad and ijma; and sources specific to Islamic international law, such as treaties; declarations and instructions; and the book of Siyar.[62]

4. 3. 1. The Primary Sources

4. 3. 1. 1. The Quran

All Islamic jurists unanimously agree that the Quran is the most important source in Islamic Shariah, and all the other sources must supplement and not conflict with its legal rules, except the Prophet's Sunnah which is an integral part of it. The Quran is the word of Allah, revealed to His Prophet by inspiration, through the angel Gabriel, in Arabic.[63] This was clearly explained when Allah

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[61] Sultan, Hamed, *Ahkam al Qanun ad Dawli fi al Shariah al Islamiyah*, (*Principles of International Law in the Islamic Shariah*), al Qahirah: Dar an Nahdah al 'Arabiyah, (1986) p.p. 59, 63-64. (hereinafter cited as: Sultan, *International Law in the Islamic Shariah*).

[62] *Cf.* this division with Hamidullah, *Muslim Conduct of State*, *supra* note 30, p. 17; Moinuddin, Hassan, *The Charter of the Islamic Conference, and Legal Framework of Economic Cooperation among its Member States*, Oxford: Clarendon Press, (1987) p.p. 7-8, 15-17. (hereinafter cited as: Moinuddin, *The Charter of the Islamic Conference*).

[63] al Khudari, Muhammad, *Tarikh at Tashri' al Islami*, (*History of Islamic Legislation*), Maser: al Maktabah at Tijariyah al Kubra, (1960) p. 6. (hereinafter cited as : al Khudari, *Tarikh*);

said: "And truly, this (the Quran) is a revelation from the Lord of the Alamin (mankind, jinns and all that exists), which the trustworthy Ruh (Gabriel) has brought down; upon your heart (O Mohammed) that you may be (one) of the warners, in the plain Arabic Language."[64]

Muslims believe that Quran is the last holy book, for the last religion, revealed to the last Messenger as a foundation of the Islamic nation until the last day (the day of judgement).[65] It sets down general rules and provisions, leaving the Prophet's tradition to elucidate and provide details to its judgements.[66] Furthermore, it was laid down intermittently, at different times, to meet the requirements of events and needs in Islamic society, and to allow Allah's Messenger and other Muslims to memorise it correctly and understand its meanings.[67] The Quran comprises eighty five Meccan and twenty nine Medinan Surah (chapters),[68] that were revealed to the Prophet over 22 years. Twelve years

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Mahmassani, *The Philosophy*, *supra* note 59, p. 19; Watt, W. Montgomery, *Introduction to Quran*, Edinburgh: Edinburgh University Press, (1997) p.p. 82-85. (hereinafter cited as: Watt, *Introduction to Quran*). The translation of the Quran into another language is not considered as a part of the original Quran. It is just to give non Arabic speakers a clear meaning of it.

[64] Quran, 26: 192-195. The Quran also calls itself by alternative names, such as: Al Kitab, 2:2; Al Burhan, 4:174; Al Muhaimin, 5:48; An Nur, 7:157; Al Maw'idhah, 10:57; Ash Shifa', 10: 57; Al Hukm, 13:37; Umm al Kitab, 13:39; Al Haqq, 17:81; Adh Dhikr, 15:9; Al Hikmah, 17:39; Ar Rahmah, 17:82; Al Qayyim, 18:2; Al Furqan, 25:1; At Tanzil, 26:192; Ahsan al Hadith, 39:23; Ar Ruh, 42:52; Al Bayan, 55: 7; Al Huda, 72:13. For more details see Watt, *Introduction to Quran*, *supra* note 63, p.p. 135-147.

[65] It could be said Quran presents the best rules which covers most parts of social life. See Mahmood, Tahir, Law In Quran: Draft Code, 7 *Isl. CLQ* (1987) p.p. 1-23. In this Article the author presents the verses of Quran as a Code which directly relates or deals with legal aspects of Muslim life.

[66] In this matter Allah said: "And we have also sent down unto you (O Mohammed) the reminder and the advice (the Quran) that you may explain clearly to men what is sent down to them, and that they may give thought.", Quran, 16:44.

[67] Allah said: "And (it is) a Quran which we have divided (into parts), in order that you might recite it to men at intervals. And we have revealed it by stages.", Quran, 17:106.

[68] Kamali, Muhammad Hashim, *Principles of Islamic Jurisprudence*, Cambridge: Cambridge Islamic Society, (1991) p. 18. (hereinafter cited as: Kamali, *Principles of Islamic Jurisprudence*).

and five months and thirteen days is the time when He was in Mecca before His Hijrah (emigration), and the rest of the revelation was continued in Medina.[69] The Meccan Suras are small and mostly deal with matters relating to religion (belief) at a time when Islam as a religion was still new and a strong relationship had to be developed between believers and the new religion. The Medina Suras mostly deal with Islamic legislation, and regulate the political, social, economic and legal life of the new community (Islamic nation).

Compilation of the Quran: During the life of Allah's Messenger, the Quran was not collected in one book, it was memorised by His companions,[70] but according to the Prophet's order, the revelation writers (kuttab al wahy) wrote it on pieces of cloth, leather, bones and stones.[71] There were two main reasons for not gathering and binding the Quran in one book. The first was to keep the companions memorising it, and the second was because the Prophet, until the last day of His life, was waiting for further revelations, and compilation might have caused an error in the correct arrangement of the verses in the Quran. Later on, after the death of the Prophet and during the first caliphate of Abu Bakir al Siddeeq, Umar bin al Khattab advised the caliph to bind the Quran in one volume. Zaid ibn Thabit was ordered to do so after consultation with other leading companions. After Zaid had finished collecting the contents of the Quran, Abu Bakir kept them until his death. Umar as a second caliph, took those texts which

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[69] Mahmassani, *The Philosophy*, *supra* note 59, p. 66.

[70] Companions are those peoples who lived during the era of the Prophet, they also called Sahabah.

[71] Shalabi, *Introduction to Islamic Jurisprudence*, *supra* note 20, p.p. 229-230.

were collected by Zaid and gave them to his daughter Lady Hafsa (one of the Prophet's wives) until Uthman Ibn Affan became caliph, and ordered the writers Zaid bin Thabit, Abdulla ibn al Zubair, said ibn al Ass, and Abdul Rahman ibn Alharith bin Hisham to write four copies of the Quran from the main copy deposited with Lady Hafsa. When the four copies were prepared, Uthman kept a copy at Medina and sent the remaining three to different Islamic countries (al Kufa, al Basra, and Damascus), as an official Quran, and all other texts which differed from these official ones were collected and burnt.[72]

The Quran comprises 114 chapters (Surah); every Surah is an independent part of the book which comprises 6235 verses (Ayah) in total.[73] Allah said: "And if you (Arab pagans, Jews and Christians) are in doubt concerning that which we have sent down (i.e. the Quran) to Our slave (Mohammed) then produce a Surah (chapter) of the like thereof and call your witnesses (supporters and helpers) besides Allah, if you are truthful. But if you do it not, and you can never do it, then fear the Fire (Hell) whose fuel is men and stones, prepared for the disbelievers."[74] Out of the 6235 verses, there are just 350 verses dealing with legal matters: 140 verses deal with religious matters such as Salah, Zakat, Sawm, Hajj, and so on. Another 140 verses regulate husbands' and wives' relationships

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[72] Kamali, *Principles of Islamic Jurisprudence*, *supra* note 68, p. 17; Burton, John, The Collection of the Quran, 23 *GUOS* (1969) p.p. 42-44; Watt, *Introduction to Quran*, *supra* note 63, p.p. 40-47.

[73] Every Surah has its own title which has taken from a separate subject dealt with in that Surah. The Prophet named every Surah in the Quran. The shortest Surah consists of three Ayah and the longest of 286 Ayah.

[74] Quran, 2:23-24; And He also said: "Say: if the mankind and the jinns were together to produce the like of this Quran, they could not produce the like thereof, even if they helped one another.", Quran, 17:88.

such as marriage, divorce, revocation, the waiting of a woman's monthly period, custody of children. It also regulates other parts of Muslim life by laying down rules concerning commercial transactions such as sales, loans, mortgage and so on. The remaining 70 verses deal with crimes and penalties, murder, highway robbery, equality, evidence, consultation, and the obligations of citizens.[75]

The legal rules of the Quran are of two categories, the definitive (Qat'i) and the speculative (Dhanni). A Qat'i is clear in its meaning and language and does not allow for interpretation or ijtihad. On the other hand, the Dhanni are ambiguous and liable to have more than one meaning and so are open to debate, interpretation and ijtihad. It is unanimously agreed that both kinds of Quranic text bind all Muslims to follow its injunctions;[76] but if any definitive text affirms something and a speculative text negates it at the same time, priority is to be given to the definitive text. When interpreting the speculative Quranic text, Islamic jurists prefer first of all to resort to the Quran itself, that is, by looking at the Quran as a whole in order to find the necessary interpretation. The Prophet's Sunnah is the second step[77] and if jurists do not find any guidance in the Sunnah, they resort to the companions of the Prophet as the most qualified to interpret the speculative Quranic text. Only Allah and His Prophet know the accurate interpretation of Quran. This is stated in the Quran itself when Allah said: "but

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[75] Kamali, *Principles of Islamic Jurisprudence*, *supra* note 68, p.p. 19-20.

[76] Allah said: "It is He Who sent down to You (Muhammad) the Book (this Quran). In it are verses that are entirely clear, they are the foundations of the Book, and others not entirely clear." Quran, 3:7.

[77] It has to be mentioned that Sunnah should always first to be consulted in the matter of speculative Quranic text.

none knows its hidden meanings save Allah".[78] However, this does not mean it is prohibited for Muslim jurists to seek an understanding of the true interpretation of the Quran if a jurist is well qualified and possesses the capacity of ijtihad.

On the other hand, the Quran also recognises the idea of abrogation (Naskh), which is defined as "the suspension or replacement of one Shariah ruling by another, provided that the latter is of a subsequent origin, and that the two rulings are enacted separately from one another."[79] This can be supported by the Quran itself, when Allah said: "Whatever a verse do we abrogate or cause to be forgotten, we bring a better one or similar to it."[80] It is to be noted that there has been no abrogation after the death of the Prophet, and as a general rule, there is no abrogation in matters of belief.

4. 3. 1. 2. The Sunnah

Linguistically, Sunnah means clear path, behaviour, or manner of acting.[81] In its legal meaning it stands for all that is narrated as related to the Prophet; His acts (Afal), His sayings (Aqwal), and whatever He approved (Taqrir), plus all reports which describe His physical attributes and character. His silence in some matters

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[78] Quran, 3:7; and when He also said: "And when we have recited it to you (O Muhammad), then follow you its (the Quran) recital. Then it is for Us (Allah) to make it clear to you", Quran, 75:18-19.

[79] Kamali, *Principles of Islamic Jurisprudence*, *supra* note 68, p. 149; al Khudari, Mohammad, *Usul al Fiqh*, Beirut: Dar Ihia' al Turath al Arabi, (1969) p. 250. (hereinafter cited as: al Khudari, *Usul al Fiqh*); al Shawkani, al Hafidh Mohammad bin Ali, *Irshad al Fuhul ila Tahqeeq al Haq min 'Ilm al Usul*, Maser: Dar al Kutbi, vol. 2, p.p. 71-75. (hereinafter cited as: al Shawkani, *Irshad al Fuhul*); for a comprehensive study see Burton, John, *The Sources of Islamic Law: Theories of Abrogation*, Edinburgh: Edinburgh University Press, (1990).

[80] Quran, 2:106; in another verse Allah said: "And when We change a verse [of the Quran, i.e. cancel (abrogate) its order] in place of another, and Allah knows the best of what He sends down". Quran, 16:101.

[81] *al Mu'jam al Wasit*, *supra* note 17, p. 456.

is deemed to be approval. The opposite of the Sunnah is known as Bid'ah (innovation).[82] It is important to clarify the difference and relation between the terms Sunnah and Hadith. The second is limited only to the sayings of the Prophet, whereas the first refers to acts, sayings and approval by the Prophet. This means that the Sunnah can be divided into three parts: first, al Sunnah al Qawliyh or the traditions of al Hadith, that is the statements and sayings of the Prophet; second, al Sunnah al Fi'liyah (the tradition of deeds); and the third, al Sunnah al Taqririyah (the tradition of tacit approval).[83]

The Sunnah as a second source in the Islamic Shariah comes directly after the Quran and is regarded as complementary to it, because it helps to explain, clarify, and elaborate its injunctions, which means that the Sunnah builds upon the Quran while the Quran is not dependant on the Sunnah. In fact, without the Sunnah, the Shariah itself would be deficient. It consists of rulings on numerous situations on which the Quran is silent. For example, when Abu Hurairah reported that the Prophet said; "No woman shall be married simultaneously with her paternal or maternal aunt";[84] according to the verse in Quran, Allah said; "Forbidden to you

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[82] Al Khudari, *Usul al Fiqh*, *supra* note 79, p. 214. It is important to mention here that, not all the Prophets statements, actions, sanctions, should be taken as Sunnah such as His personal human acts i.e. eating, drinking, sleeping, walking, etc., and also those things which distinguished Him by them from others, like He could marry more than four wives while others could not. For more details see Shalabi, *Introduction to Islamic Jurisprudence*, *supra* note 20, p. 240; Kamali, *Principles of Islamic Jurisprudence*, *supra* note 68, p. 44; al Shawkani, *Irshad al Fuhul*, *supra* note 79, vol. 1, p. 155.

[83] al Khatib, Muhammad A., *Usul al Hadith: Ulumuh wa Mustalahuh*, Beirut: Dar al Fikr lit Tiba'ah wat Tawzi', (1982) p.p. 19-21. (hereinafter cited as: al Khatib, *Usul al Hadith*).

[84] *Sahih al Bukhari*, *supra* note 28, vol. 7, p. 34; Muslim bin al Hjjaj, *Sahih Muslim*, (204-261 A.H.), Abdul Hamid Siddiqi (trans.), vol. 2, Lahore: Sh. Muhammad Ashraf, (1990) p. 347. (hereinafter cited as: *Sahih Muslim*).

(for Marriage) are: Your mothers, your daughters, your sisters, your father's sisters, your mother's sisters..."[85] The Quran states in numerous verses that the Sunnah is an important source of Islamic Shariah when Allah said; "He who obeys the Messenger (Mohammed), has indeed obeyed Allah, but he who turns away, then we have not sent you (O Mohammed) as watcher over them."[86]

It is to be understood that the decisions of the Prophet should be followed as the commandments of Allah. So Allah's Messenger is reported to have said; "I left two things among you. You shall not go astray so long as you hold on to them: The Book of Allah, (Quran) and my Sunnah (Sunnati). Narrated Abu Hurairah, Allah's Messenger said; "whoever obeys me, he obeys Allah, and whoever disobeys me, he disobeys Allah, and whoever obeys the ruler I appoint, he obeys me, and whoever disobeys him, he disobeys me."[87]

Collection of Hadith: The Quran is the word of Allah, and the Sunnah is the word of His Messenger. The second is deemed to be integral to the first, wherewith an important question arises regarding the time of writing of the Sunnah and why the Prophet did not allow His companions to write His Hadith during His life and ordered those who already has written some to rub them out.

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[85] Quran, 4:23. Another example when Allah gave general provisions on inheritance, Quran, 4:11, and the Prophet explained what was not mentioned in that verse when He said; the killer shall not inherit. See 'Armush, Ahmed R. (ed.), *Muwatta' Imam Malik*, narration by al Laythi, Yahya bin Yahya, Beirut: Dar al Nafa's, (1981) p.p. 352-353. (hereinafter cited as: *Muwatta' Imam Malik*).

[86] Quran, 4:80; also in another verse He said; "It is not for a believer, man or woman, when Allah and His Messenger have decreed a matter that they should have any option in their decision. And whoever disobeys Allah and His Messenger, He has indeed strayed in a plain error.", Quran, 33:36.

[87] *Sahih al Bukhari*, *supra* note 28, vol. 9, p. 251.

"Do not write down my sayings. He who has quoted me in writing in other than the Quran should delete what he has written. You are free to quote me orally."[88]

The reason is that writing the Prophet's Hadith at the time when the companions were writing the Quran could have caused some confusion between the two sources. The prohibition was to focus the companions' attention on just the Quran.[89] So during the Messenger's life there was not any formal writing of the Hadith,[90] but after His death there were some attempts to collect the Hadith during the rule of the first four caliphs. These attempts were not successful for different reasons, and the true compilation of the Prophet's Hadith started during the third century (A.H.) with the six great collections of Hadith and the collection of Hadith became a science with its own rules and principles.[91] They produced very strict rules for examining, protecting, and securing the tradition. The relevant rules became a science known as 'mustalah al Hadith'. The jurists in this field

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[88] *Sahih Muslim*, *supra* note 84, vol. 8, p. 261.

[89] This later caused a lot of fabrication of the tradition (false Hadith) in some periods of Islamic history to support some political leaders and political functions. The Prophet said: "He who quotes me in things I have not uttered, let him occupy his seat in hell." So every Hadith is considered false until the contrary is proved. Mahmassani, *The Philosophy*, *supra* note 59, p. 76.

[90] Some of them had his own text of the Prophet's Hadith like the text which belonged to Abdulla bin Amr bin al Ass. It was nominated as the truth (al Sadiqah), he wrote some tradition in it. For more details about collection of Hadith see al Khatib, *Usul al Hadith*, *supra* note 83, p.p. 139-207; Siddiqi, Muhammad Zubayr, *Hadith Literature: Its Origin, Development & Special Features*, Cambridge: The Islamic Texts Society, (1993) p.p. 24-27. (hereinafter cited as: Siddiqi, *Hadith Literature*).

[91] Those great collections are: al Bukhari, Mohammed bin Esmail, (194-256 A.H.) his famous book called Sahih al Bukhari. Muslim, Muslim bin al Hjjaj, (204-261 A.H.) his famous book called Sahih Muslim. al Termidhi, Mohammed bin Eissa, (209-279 A.H.) his famous book called Sunan al Termidhi. al Nisai, Ahmed bin Shuaib bin Ali, (215-303 A.H.), his famous book called al Sunan al Sughra and al Sunan al Kubra. Abu Dawood, Sulayman al Ashath, (202-275 A.H.), his famous book called Sunan Abu Dawood. ibn Majah, Mohammed bin Yazid, (209-273 A.H.), his famous book called Sunan Ibn Majah. Hanbal, Ahmed bin Mohammed, (164-241 A.H.), his famous book called al Musnad. and finally Malik, Malik bin Anas, (39-179 A.H.), his famous book called, Al Muwatta. For more details see al Khatib, *Usul al Hadith*, *supra* note 83, p.p. 308-330; Siddiqi, *Hadith Literature*, *supra* note 90, p.p. 43-75; and in his two Articles, 'Ulum al Hadith, 5 *Stud.Isl.*(1968) p.p. 197-211 and Atraf al Hadith, 8 *Stud.Isl.* (1971) p.p. 17-28.

were known as rijal al jarh wat ta'dil, that is the men who declare traditions valid or void. One of these rules is called the chain of authorities (Sanad). The Sanad went back to the original reporter who had informed about the Hadith, and the process was called backing (Isnad). Also biographical data were collected, dealing with all those who reported the Prophet's Hadith. According to these data all the reporters had been investigated and classified. If any new information is discovered about one of the reporters, the chain of the Hadith may be changed.[92]

Hadith may be classified into two main categories: according to its reporters such as Mutawatir, Mashhur, and Ahad; and according to its acceptance and rejection such as Sahih, Hasan and Dha'if. The Mutawatir is Hadith ensured by many lines of transmission namely, "which is reported by an indefinite number of people related in such a way as to preclude the possibility of their agreement to perpetuate a lie."[93] The Mashhur is a well known Hadith "which is originally reported by one, two or more companions whether directly from the Prophet or from another companions, but has later become well known and transmitted by an indefinite number of people."[94] The Ahad (solitary Hadith) is a Hadith reported by one person or by odd individuals directly from the Prophet.[95]

Sahih (authentic Hadith) is defined as "a Hadith with a continuous Isnad all the way back to the Prophet consisting of honest and reliable persons who possess

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[92] The Hadith is composed of two parts: al Matn (the text) and al Isnad (those who reported the Hadith and collected it). For more details see al Khatib, *Usul al Hadith*, *supra* note 83, p.p. 7-12.

[93] Kamali, *Principles of Islamic Jurisprudence*, *supra* note 68, p. 68; al Shawkani, *Irshad al Fuhul, supra* note 79, vol. 1, p. 200; Mahmassani, *The Philosophy*, *supra* note 59, p.p. 73-74.

[94] Kamali, *Principles of Islamic Jurisprudence*, *supra* note 68, p. 70; al Khatib, *Usul al Hadith*, *supra* note 83, p. 302.

[95] Mahmassani, *The Philosophy*, *supra* note 59, p. 74.

retentive memories and whose narration is free both of obvious and of subtle defects."[96] Hasan (fair or good Hadith) falls between authentic and weak Hadith, and may include among its reporters a person or persons who do not possess the full qualifications to report Hadith such as persons who reported the authentic one.[97] Da'if (weak Hadith) are those whose reporters did not possess the qualifications required for the above mentioned Hadiths.[98]

Disagreements arose between Islamic schools over the Sunnah, between Sunnis themselves and between Sunnis and Shi'is. The Shi'is schools accepted only those Hadiths which were reported by members of the Prophet's family, Ali bin Abi Talib and his adherents, and have their own Hadith which they believe to support their opinion in this matter. The text of this Hadith is "Whatsoever has not emanated from Prophet's family is fictitious". Sunni schools also disagree among Hadith and are divided into two groups: the school of opinion in Iraq, and the school of Hadith in Hijaz. The former rejected numerous Hadiths accepted by the latter.[99] Priority in application is also recognised in Islamic legal theory regarding particular Hadiths, so that when Hadiths are in conflict, the authentic must be given priority; when there is no authentic Hadith involved, then the fair has priority, and after it, the weak. One may not act on a false Hadith because it is not accepted and is considered not binding.

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[96] Kamali, *Principles of Islamic Jurisprudence*, *supra* note 68, p. 81.

[97] *Ibid.*

[98] *Ibid.*

[99] Mahmassani, *The Philosophy*, *supra* note 59, p. 73; Fazlur Rahman, Concepts of Sunnah, Ijtihad, and Ijma in the Early Period, 1 *Isl.Stud.*, (1962) p. 14.

4. 3. 2. The Secondary Sources

4. 3. 2. 1. Ijtihad (Reasoning) [100]

During the lifetime of the Prophet every legal issue in the new Muslim community was settled by Him, because He was the only person apart from Allah to know the real meaning of provisions and injunctions of the divine revelation. After His death, Muslims faced difficulties in finding answers to new legal problems; they would have recourse first to the divine text. If they failed to find a solution they would have then recourse to their personal opinion (ra'y) in order to deliver a decision in accordance with their own independent reasoning (ijtihad). Ijtihad has played very important role in developing Islamic jurisprudence (fiqh) since the life of the Prophet.[101]

Ijtihad literally means expanding effort and exhausting energy.[102] Its legal usage refers to the ability to extract judgment as elements from the sources of legislation. Ijtihad could be defined as "the total expenditure of effort made by a jurist in order to infer, with a degree of probability, the rules of Shariah from their detailed evidence in the sources."[103] A qualified jurist (mujtahid) with the ability

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[100] Generally see al Shafi'i, al Imam Muhammad ibn Idris, *ar Risala fi Usul al Fiqh*, (*Treatise on the Foundations of Islamic Jurisprudence*), Translated with an Introduction, Notes and Appendices by Majid Khadduri, Cambridge: The Islamic Texts Society, (1987) p.p. 295-303.

[101] Some jurists admit that the gate of ijtihad was closed after the third century of Islamic era, others maintain that the gate of ijtihad is never closed, or if it was closed it should be reopened to face present legal problems and to regulate the modern Muslim societies. See Omar, Reasoning in Islamic Law, *supra* note 22, p.p. 354-455; Hallaq, Wael B., Was the Gate of Ijtihad Closed?, 16 *IMES* (1984) p.p. 208-229, and his other Article, On the Origins of Controversy About the Existence of Mujtahids and the Gate of Ijtihad, 63 *Stv.Isl* (1986) p.p. 129-141; Schacht, Joseph, *An Introduction to Islamic Law*, Oxford: Clarendon Press, (1998) p.p. 69-75.

[102] Gibb, *Encyclopaedia of Islam*, *supra* note 17, p. 158.

[103] Kamali, *Principles of Islamic Jurisprudence*, *supra* note 68, p. 367; similarly see Weiss, Bernard, Interpretation in Islamic Law: The Theory of Ijtihad, 26 *AJCL* (1978) p.p. 199-200. (hereinafter cited as: Weiss, Interpretation in Islamic Law); al Shawkani, *Irshad al Fuhul, supra* note 79, vol. 2, p. 295.

to deduce rules from the sources is different from persons called imitates (muqalidun). The latter accept rules not with reference to sources but by following other jurists. Opinions of others are followed without searching for the evidence. Such scholars can understand the main injunctions of Islam well, but do not have the ability to extract conclusions and are therefore not qualified for ijtihad.[104] Ijtihad, as a human activity, is in Muslim theory always considered as a fallible opinion (dhann) but if the result of an individual ijtihad obtains the agreement of all Muslims it will be treated as infallible, as the Prophet declares that "My followers will not [altogether] agree upon error."[105] Some jurists equate ijtihad with reasoning by analogy, others admit that ijtihad has a wider content which covers other methods such as istihsan (equity), istishab (presumption of continuity) and istislah (considerations of public interest).[106]

Ijtihad bases its legality on both the Quran and the Sunnah. In the Quran several verses deal with ijtihad. Allah says: "When there comes to them some matters touching (public) safety or fear, they make it known (among the people), if only they had referred it to the Messenger or to those charged with authority among them, the proper investigators would have understood it from them (directly)."[107] In the Sunnah, it is reported that the Prophet asked Muadh bin Jabal before sending him to Yemen as a judge, what would he do if he failed to find guidance in the Quran or Sunnah in any case brought before him? Muadh

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[104] al Shawkani, *Irshad al Fuhul, supra* note 79, vol. 2, p. 345; Shalabi, *Introduction to Islamic Jurisprudence, supra* note 20, p. 136.

[105] Weiss, Interpretation of Islamic Law, *supra* note 103, p.p. 208-209.

[106] Omar, Reasoning in Islamic Law, *supra* note 22, p. 355.

[107] Quran, 4:83.

answered that he would resort to his own reasoning (ijtihad). The Prophet was pleased when He heard this response.[108]

Ijtihad may be divided into three categories: (1) the absolute ijtihad (al ijtihad al mutlaq); this kind of ijtihad dates from the lifetime of the Prophet until the end of the third century A.H. It refers especially to the companions of the Prophet, their successors, the leading jurists of the four Sunni Schools, and the leading Imams of the Shi'is; (2) limited ijtihad within one school (al ijtihad fi al madhab); it refers to those jurists who enlarge the law within the bounds of a particular school (madhab) while abiding within the principles established by their Imams. They are called the followers or the students; and (3) ijtihad on a special issue (al ijtihad fi al mas'ala); in this kind of ijtihad, jurists are not in disagreement with the leading Imams but their ijtihad is limited to a particular case not settled in the first and second kinds of ijtihad.[109]

As mentioned, the function of ijtihad in Islamic Shariah is to deduce a rule from the divine text. It is important to note that the detailed evidence found in the two sources (the Quran and the Sunnah) is divided into four categories: (1) definite as proof and meaning; (2) definite as proof but speculative in meaning; (3) definite in meaning but with authenticity open to doubt; and (4) speculative in both authenticity and meaning. Ijtihad cannot be exercised in the first category but can be resorted to any of the remaining three categories.[110]

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[108] Hassan, Ahmed (trans.), *Sunan Abu Dawud*, vol. III, Lahore: Sh. Muhammad Ashraf Publishers, (1993) Hadith No. 1348, p. 1019.

[109] For more details see Kamali, *Principles of Islamic Jurisprudence*, *supra* note 68, p.p. 386-391.

[110] Omar, Reasoning in Islamic Law, *supra* note 22, p.p. 356-358.

It could be said that the exercise of ijtihad by the projected ACJ, through its qualified Muslim judges, can play a vital role in developing the principles of Muslim international law to meet the necessities of the members states of the Arab League in their inter-relations, on the one hand, and their external relations with non-Muslim states on the other. The use of ijtihad (reasoning) to develop the Islamic Shariah is similar to what Brierly intended to introduce in international law. He argued:

> "Those who administer law must meet new situations not precisely covered by a formulated rule by resorting to the principles which medieval writers would have called natural law, and which we generally call reason. Reason in this context does not mean the unassisted reasoning power of any intelligent man, but 'judicial' reason, which means that a principle to cover the new situation is discovered by applying methods of reasoning which lawyers every where accept as valid, for example, the consideration of precedents, the finding of analogies, the disengagement for accidental circumstances of the principles underlying rules of law already established."[111]

4. 3. 2. 2. Ijma (Consensus)

The concept of ijma came into existence as a result of the exercise of ijtihad. The first four 'god-guided' and exemplary caliphs and the jurists in their era had resorted to their own opinion (ra'y) when there were no clear rules to be found in the Quran and the Sunnah. Although ijma is not considered as a divine source, most jurists have agreed that once it has been reached on a particular case, the case itself becomes an authoritative precedent upon which a further qiyas (analogy) can be based.[112]

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[111] Brierly, J. L., *The Law of Nations: An Introduction to the International Law of Peace*, Oxford: The Clarendon Press, (1963) p.p. 66-67.

[112] Hallaq, Wael B., On the Authoritativeness of Sunni Consensus, 18 *IJMES* (1986) p. 427.

Although Muslim jurists have differed upon its definition, ijma could be defined as "the agreement of the majority of Muslim jurists of the Islamic community living in a certain period, after the death of the Prophet Mohammed on a specific issue."[113] When some texts in the Quran or Hadith need interpretation, or if a particular legal matter not covered by any text in the Quran or the Sunnah arises, jurists could apply their own reasoning to reach the right solution in the given case. If all scholars accept the result unanimously, it can then be said that ijma has been achieved. Such a kind of ijma was possible during the period of the first two caliphs, Abu Bakir and Umar, because most of the Islamic jurists were still living in Medina, and it was possible to identify them and know what their opinion was on particular issue, but after that, when the territory of the Islamic state became extended, and most of the jurists left Medina as a result of Islamic conquests, the chance of the availability of consensus became more difficult.[114]

Ijma bases its legality on the Quran and Sunnah. There are numerous verses and Hadiths dealing with ijma, some of them are cited *infra*. In the Quran Allah said; "When there comes to them some matter touching (public) safety or fear, they make it known (among the people), if only they had referred it to the Messenger or to those charged with authority among them, the proper investigators would have understood it from them (directly). Had it not been for

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[113] Mahmssani, *The Philosophy*, *supra* note 69, p. 77; Kamali, *Principles of Islamic Jurisprudence*, *supra* note 68, p. 169; al Zarqa, *al Madkhal al Fiqhi*, *supra* note 29, vol. 1, p. 36; al Shawkani, *Irshad al Fuhul*, *supra* note 79, vol. 1, p. 287; *Cf.* this definition with the following one which considers ijma as "the unanimous agreement, after the death of the Prophet, of all Muslim jurists or all the leading personalities having the power of decision-making on any matter of religion or worldly affair". Omar, Reasoning in Islamic Law, *supra* note 22, p. 185.

[114] *Ibid.*

the Grace and Mercy of Allah upon you, you would have followed Satan, save a few of you." Also "And whoever contradicts and opposes the Messenger (Mohammed) after the Right Path has been shown clearly to him, and follows other than the believers way. We shall keep him in the path he has chosen, and burn him in Hell-what an evil destination."[115]

In the Sunnah there are numerous Hadiths which support the ijma. It is reported that the Prophet said; "My community shall never agree on an error." Also He said; "A group of my community (Ummah) shall continue to remain on the right path. They will be the dominant force and will not be harmed by the opposition of opponents." In another Hadith He said; "whatever the Muslims deem to be good is good in the eyes of God.", and "The Hand of Allah is with the group."

Two kinds of ijma should be distinguished: (1) explicit consensus (al ijma al Sarih) that is, the explicit agreement of the majority of Muslim scholars on a particular case, whether by words or action; (2) tacit consensus, (al ijma al Sukuti), namely, when some Muslim scholars agree on an specific issue while others remain silent without expressing their own opinion on the case. It is important to know that both of these categories are treated as the consensus of the community.[116]

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[115] Quran, 4:83, 115; also see other verses gives the same meaning, Quran, 4:59; Quran 3:103; Quran, 3:110; Quran, 2:143; Quran, 9:119.

[116] Shalabi, *Introduction to Islamic Jurisprudence, supra* note 20, p. 248; al Khudari, *Usul al Fiqh, supra* note 79, p.p. 273-275.

Not all Islamic schools accept this source; there is some disagreement between the Islamic schools regarding the acceptability of consensus as a source of Islamic Shariah. Every school has its own view on it. Kharijis reject the idea of consensus as one of the Islamic sources. Shi'is would accept consensus only if it emanates from their infallible Imams. Some Sunni schools have their own ideas as to which given unanimous agreement should be treated as ijma and then bindingly followed. Some Hanbalis limit consensus only to the agreement of companions of the Prophet, whereas Malikis would accept ijma of the companions of the Prophet and the ijma of the two generations who are known as the followers (al Tabi'un), and of those who are known as the followers' followers (Tabi' at Tabi'un).[117]

4. 3. 3. Methods of Interpretation

It became clear during the lifetime of the Prophet that only the Quran, Sunnah, and ijtihad were the sources of Islamic Shariah. Other sources introduced by Muslim jurists have become, in fact, methods of interpretation in order to deduce rules from sources while exercising ijtihad. There is no need to go into detail about them. The ijtihad comprises several methods of deduction and interpretation which are, to varying degrees, accepted by the different Islamic

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[117] al Khudari, *Tarikh*, *supra* note 63, p.p. 207-210; Nasir, Jamal J., *The Islamic Law of Personal Status*, London: Graham & Trotman, (1986) p. 20; Shalabi, *Introduction to Islamic Jurisprudence*, *supra* note 20, p.p. 248-250; al Shawkani, *Irshad al Fuhul*, *supra* note 79, vol. 1, p.p. 292-293; Kamali, *Principles of Islamic Jurisprudence*, *supra* note 68, p.p. 182-185.

Schools. These methods are the qiyas (analogy), the istihsan (equity) istislah (consideration of public interest) and istishab (presumption of continuity).[118]

4. 3. 3. 1. Qiyas (Analogy)

Islamic jurists recognise analogy (qiyas) as another source in Shariah. It means comparison between two or more issues. Jurists define it as a basis for "Constituting the appropriate ruling in one issue to another, because of the similarity in the same peculiarity (reason) upon which the ruling was based."[119] The reason for using analogy is to find out a rule applicable to a particular case which not covered by any divine source, either the Quran or Sunnah, and also when there is not any ijma on it. In other words it means the extension of a Shariah value from an original case (al Asl), which has its own proof whether in the Quran or Sunnah, to the new case (Far') because the latter has the same effective cause ('Illah) as the former. Accordingly, qiyas is based on four basic elements, namely: (1) The original case (Asl) on which a ruling is given; (2) The new case (Far') on which a ruling is required or missing; (3) The rule (Hukm) already used in the original case and which the jurists have to extend to

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[118] It is to be understood that these methods may by grouped under the general heading of reason and equity. Qiyas admitted by the four Sunni schools, istihsan by the Hanafi school, istislah in the Maliki school, and istishab in the Shafi'i, Hanbali, and Ja'fari schools. For more details see Amin, Sayed Hassan, *Islamic Law: Introduction, Glossary, and Bibliography*, Glasgow: Royston Limited, (1985) p.p. 2-8; Makdisi, John, Legal Logic and Equity in Islamic Law, 33 *AJCL* (1985) p. 66. (hereinafter cited as: Makdisi, Legal Logic and Equity); Weiss, Interpretation in Islamic Law, *supra* note 103, p.p. 202-203.

[119] Kamali, *Principles of Islamic Jurisprudence*, *supra* note 68, p. 197; Mahmassani, The Principles of International Law, *supra* note 38, p. 31; Shalabi, *Introduction to Islamic* Jurisprudence, *supra* note 20, p. 251.

the new case; and (4) The effective cause ('Illah), as an attribute (Wasf) of the original (Asl) found to be common between the Asl and Far'.[120]

A simple example for qiyas concerns drinking wine or alcohol in Islamic Shariah, explicitly prohibited in the Quran. If this is the original case (Asl), taking drugs is the new case (Far'). The link between the two cases (Illah) or the effective cause is the intoxicating effect; the ruling (Hukm) or the rule of the new case therefore is a prohibition because taking drugs is like drinking wine. As another example, the Quran forbids selling or buying after the last call for Friday prayer (Salah) until the end of the prayer.[121] By qiyas this prohibition is expanded to cover all kinds of transactions. It is also reported that the Prophet said; "The killer shall not inherit from his victim." By qiyas this ruling is expanded also to bequests.

There is no direct proof in the Quran to support qiyas, but some Muslim jurists (especially of the Sunni schools) have accepted it as an important source in Islamic Shariah, despite some disagreement between Islamic schools about its legitimacy. However, in the Prophet's tradition there are two Hadiths which Sunni jurists constantly refer to as proof of qiyas to demonstrate that the Prophet practised it in several cases submitted to Him. First, when He asked Muadh bin Jabal before sending him to Yemen as a judge, what would he do if he failed to find guidance in the Quran or Sunnah upon any case brought to him, Muadh

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[120] For more details see al Shawkani, *Irshad al Fuhul*, *supra* note 79, vol. 2, p.p. 149-166.
[121] Quran, 62:9.

answered that he would resort to his own reasoning (ijtihad).[122] The Prophet was pleased when He heard this response. Second, a woman known as al Khathamiyyah came to Him and asked about her father, who had died without performing the pilgrimage (Hajj), whether it was possible for her to perform Hajj on his behalf? The Prophet replied "suppose that your father had a debt to pay and you paid it on his behalf, would this benefit him?" She replied yes, the Prophet then replied that the debt owed to God merits even greater consideration.

4. 3. 3. 2. Istihsan (Equity in Islamic Shariah)

Not all Muslim Sunni jurists were in agreement over the legal meaning of istihsan. Their disagreement led to major conflicts over its usage either as a secondary source or method of legal reasoning. Therefore, they disagreed about its definition. Al istihsan literally means considering a thing to be good or preferable; technically, it refers to private judgment, not on the basis of al qiyas, but on the basis of public good or the interest of justice. It could be in other words, defined as "a method of exercising personal opinion in order to avoid any rigidity and unfairness that might result from the literal enforcement of the existing law."[123]

Jurists who follow this method try to support it by quoting the following two verses from Quran. Allah says: "Those who listen to the word and follow the best thereof those are (the ones) whom Allah has guided and those are men of

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[122] Ijtihad means here that he will apply his own opinion using any methods accepted by Muslim jurists including qiyas.

[123] Kamali, *Principles of Islamic Jurisprudence*, *supra* note 68, p. 246.

understanding." And also when He said: "And follow the best of that which is sent down to you from your Lord, before the torment comes on you suddenly while you perceive not!"[124]

4. 3. 3. 3. Istislah (Consideration of Public Interest)

Al istihsan and al istislah have a close relationship, and in most cases are confused. In Arabic maslaha means benefit or interest, and if this interest is not covered by any text in Shariah it is considered as mursala or unrestricted. So maslaha mursalah may be defined as "unrestricted public interest in the sense of its not having been regulated by the law giver insofar as no textual authority can be found on its validity or otherwise."[125] To clarify the idea of this method two examples will be given. First, in the event of war, if the unbelievers shield themselves using Muslim prisoners of war, then maslaha allows the killing of these prisoners in order to fight the unbelievers. The other example is that although it is not specifically required in Islamic Shariah, governments require for the purpose of certainty that all marriage contracts should be authenticated and registered by a qualified public officer to protect husbands' and wives' rights and duties.

4. 3. 3. 4. Istishab (Presumption of Continuity)

Al istishab is more a rule of evidence than a rule of substantive Shariah. Literally it means seeking for a link to something which is known and certain;

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[124] Quran, 39:18, 55.

[125] Kamali, *Principles of Islamic Jurisprudence*, *supra* note 68, p. 267; Mahmassani, *The Philosophy*, *supra* note 59, p. 88.

technically, it refers to a process of settling juristic rules by argument, which means the attempt to link up a later set of circumstances with an earlier or conversely. For example, on account of the long absence of someone, it may be doubtful whether he is alive or dead. By applying the method of istishab, all rules must remain in force which would hold if one knew for certain that he was still alive. Al istishab is based on the assumption that the juristic rules applicable to certain conditions remain valid so long as it is not certain that the conditions have altered.[126]

4. 3. 4. Specific Sources in Islamic International Law

In addition to the aforementioned sources of Islamic Shariah, it is possible to consider the following methods as additional secondary means of Islamic international law: the treaties concluded between Muslims and non-Muslims; the messages of the Prophet as a political leader of the Islamic state and of Muslim caliphs to the leaders of other countries calling them to Islam, and His and their instructions to the Muslim military commanders; and history and the book of Siyar. It is very important to mention here that all treaties, statements, declarations and instructions could be treated as a primary source if they were concluded or made by the Prophet himself or by any other governor during His life and received His approval, because according to the definition of the Sunnah, they would be defined as "the Prophet's acts, sayings, and whatever He has approved, plus all reports which described His physical attributes and character." However if they were made by His successors they must treated as secondary sources.

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[126] Kamali, *Principles of Islamic Jurisprudence*, *supra* note 68, p.p. 297-298.

4. 3. 4. 1. International Treaties

Art. 2 of the Vienna Convention on the Law of Treaties of 1969 provides that " 'treaty' means an international agreement concluded between states in written form and governed by international law" which thus creates legal rights and obligations between the parties. Long before this, Muslims recognised treaties as a method regulating relations between parties and considered them binding.[127] There are many verses in the Quran concerning treaties with non-Muslims. Allah says "How can there be a covenant with Allah and with His Messenger for the Mushrikun (polytheists) except those with whom you made a covenant near al Masjid al Haram (the Holy Mosque in Mecca)? So long, as they are true to you, stand you true to them. Verily, Allah loves al Muttaqun (pious and righteous person)."[128] Normally the caliph or his representative had the power to negotiate and sign treaties; however, in the event of war or under any special authorisation, the army commander could conclude treaties.[129]

During the lifetime of the Prophet many treaties were concluded between Muslims and non-Muslims in order to settle some political conflicts and to establish peaceful relations between the two sides. The very well known treaties that were concluded between the Aws and Khazraj (two Jewish tribes of Medina),

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[127] El Berri, Zakaria, Immunity of Members of Diplomatic Missions in Islamic Law, 41 *Revue Egyptienne* (1985) p.p. 182-184.

[128] Quran, 9:7; also when Allah said in another verse "and fulfil (every) engagement, for every (covenant), will be enquired into (on the Day of Reckoning)." Quran, 17:34; see also Quran, 48:10.

[129] al Ghunaimi, Muhammad Tal'at, *Ahkam al Mu'ahadat fi al Shariah al Islamiyah*, (*The Principles of Treaties in Islamic Shariah*), Alexandria: Munsha'at al Ma'arif, [1977] p. 56. (hereinafter cited as: al Ghunaimi, *Treaties in Islamic Shariah*); Khadduri, *War and Peace in Islam*, *supra* note 36, p.p. 202-203.

and the treaty of al Hudabiyyah created a temporary settlement between the Muslims of Medina and the polytheists of Mecca and was regarded by Muslim jurists as a model for Muslims' subsequent treaties. In addition, there were other treaties concluded with Jews and Christians in residence in the Muslim state (Medina).[130]

Most Muslim jurists admit that treaties must be in written form. Their idea was supported by the practice of the Prophet who wrote down all the treaties He concluded, and according to the commandment of Allah when He said: "O you who believe, when you contract a debt for a fixed period, write it down."[131] Others said, however, that the writing, signing and dating of a treaty are not necessary, and treaties create rights and obligations even without them, because they are just formalities to indicate that an agreement has been reached between the parties.[132] Ratification as a procedure to bring the treaty into force is also recognised by Muslim jurists, whether the treaty was concluded by the head of the state or his representatives or by any of the army commanders; otherwise the treaty is null and void. History has recorded that the Prophet Himself concluded a treaty under the condition that it would be ratified after consulting His companions. Another example was when Khalid ibn al Walid, as a commander of the Muslim army, sent a letter to the Prophet asking for instructions before concluding any

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[130] Pirzada, Syed Sharifuddin, Islam and International Law, in A. Gauhar (ed.) *The Challenge of Islam*, London: Islamic Council of Europe, (1978) p.p. 210-211; Khadduri, *War and Peace in Islam*, *supra* note 36, p. 205.

[131] Quran, 2:282.

[132] al Ghunaimi, *Treaties in Islamic Shariah*, *supra* note 129, p.p. 68-70; Khadduri, *War and Peace in Islam*, *supra* note 36, p. 204.

treaty.[133] Once the treaty enters into force, it becomes binding on Muslim leaders and they have to adhere to its terms. In this matter Allah Says: "Except those of the Mushrikun with whom you have a treaty, and who have not subsequently failed you in aught, nor have supported anyone against you. So fulfil their treaty to them to the end of their term. Surely Allah loves the pious."[134]

The 1969 Vienna Convention on the Law of Treaties provides that good faith and *pacta sunt servanda* are universally recognised.[135] This provision also can be found in the Quran and Sunnah. In the Quran Allah said: "O, you who believe fulfil your obligations."[136] In Islamic theory, however, Allah deems Himself a third party to any treaty concluded by Muslims, and if there is any breach of treaty, it will be a great and unforgivable sin. Allah says: "And fulfil the covenant of Allah when you have covenanted, and break not the oaths after you have confirmed them, and indeed you have appointed Allah your Surety, Verily Allah Knows what you do".[137] In the Sunnah the Prophet expressly stated that "Be faithful in Keeping your contract for God will require an account of such at your hand."

General principles of Muslim treaties: These were brief and provided only general rules. The preamble opened with the name of Allah, and was followed by the names of the parties or their representatives. Treaties ended with the names of

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[133] al Ghunaimi, *Treaties in Islamic Shariah*, *supra* note 129, p.p. 59, 64-65.

[134] Quran, 9:4.

[135] The preamble provides that: "Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognised"; also Art. 26 provides that: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

[136] Quran, 5:1.

[137] Quran, 16:91.

witnesses and the signature of the parties and witnesses. The contents or the body of the treaty which outlined the purpose of the treaty should be set forth in detail. The duration should be specified and if a period was not mentioned, the duration of treaty according to some jurists should not exceed a period of ten years by analogy with the duration of al Hudabiyyah treaty.[138]

4. 3. 4. 2. The Prophet's Instructions

The messages of the Prophet as a political leader and the Muslim caliphs to the leaders of the other countries calling them to Islam, and His and their instructions to Muslim military commanders are another important source in Islamic international law.[139] Briefly, the instructions given to Muslim commanders relating to the conduct of war were that whenever the Prophet sent any sariyah (detachment) or jaysh (armed force) to jihad He usually commanded its commander personally to fear Allah, the most high, and to enjoin the Muslims who were with him to do good. Further, the fighting was to be in the name of Allah and limited to those who do not believe in Allah and are able to fight. It is prohibited to kill children, women, and aged men who are unable to fight. The Muslim commander must first of all invite the enemies to convert to Islam, because Allah said: "And We never punish until We have sent a Messenger (to give warning)".[140] If they accept his invitation he must leave them in peace.

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[138] Khadduri, *War and Peace in Islam*, *supra* note 36, p.p. 218-220; Sultan, *International Law in the Islamic Shariah*, *supra* note 61, p.p. 206-211.

[139] Hamidullah, *Muslim Conduct of State*, *supra* note 30, p. 33.

[140] Quran, 17:15.

Otherwise he must call upon them to pay jizyah (poll tax) and if they refuse he may fight them.[141]

4. 3. 4. 3. The Siyar book

History and Siyar books are also considered to be other important subsidiary sources in Islamic international law, because these books concern the interaction between principles and facts or between the conception and application of Islamic international law. Islamic Shariah is rich in such books, almost all jurists in different schools have discussed the Siyar in detail, they may be excellent references to be used in modern comparative studies.[142]

4. 4. The ACJ and the Application of the Islamic Shariah

In Islam, executing the Islamic Shariah within the territory of Dar El Islam is considered as one of the most important duties that the caliph has to fulfill. Muslims must obey and support him in order to achieve this aim. However, if the caliph, for any reason fails to do so, some Muslim jurists such as al Mawardi, argue that Muslims are entitled to dismiss him from his position.[143] This means that the execution of the Islamic Shariah is a divine obligation on the caliph and he has no choice, religiously, to act against this obligation.

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[141] For more details see Khadduri, *The Islamic Law of Nation*, *supra* note 33, p.p. 75-105; and his *War and Peace in Islam*, *supra* note 36, p.p. 94-101; al Mawardi, Abul Hassan, *al Ahkam as Sultaniyah*, (*The Laws of Islamic Governance*), Asadullah Yate (trans.), London: Ta-Ha Publishers Ltd., (1996) p.p. 60-61, 75-79. (hereinafter cited as: al Mawardi, *The Laws of Islamic Governance*); Hamidullah, The International Law in Islam, *supra* note 31, p.p. 10-11; *Muwatta' Imam Malik*, *supra* note 85, p.p. 296-298.

[142] Moinuddin, *The Charter of the Islamic Conference*, *supra* note 62, p. 16.

[143] al Mawardi, *The Laws of Islamic Governance*, *supra* note 141, p.p. 27-29; see also Khadduri, *War and Peace in Islam*, *supra* note 36, p.p. 10-13.

Since the creation of the first Islamic State in Medina, in the seventh century, the Islamic Shariah was the only system of law to which all Muslims had recourse. However, the matter changed when the Ottoman Empire started to adopt some French codes in order to apply them within its territory, such as for example, the *Penal code* 1858, the code of *Commercial Procedure* 1861, and the code of *Maritime Commerce* 1863.[144] The breaking-up of the Ottoman Empire after the World War I, had the result that the Arab and the Muslim territories which were ruled directly or indirectly by this Empire, became subject to either British or French protection through many different treaties. Accordingly, Muslims and Arabs were subject to increasing Western influence as Britain or France started to introduce their own legal systems. Therefore the legal systems of the Arab states which were based on the Islamic Shariah became largely secularised by the introduction of codes based either on French or British law. Only in matters related to personal status such as marriage, divorce, inheritance, and religious endowment continued to be regulated by the principles of the Islamic Shariah.[145]

During the 1950s -1970s, Arab states started to reiterate that principles and rules of the Islamic Shariah must be re-enforced within their territories. This aim resulted in the adoption of constitutional provisions that provided that the official religion of the state was Islam and Islamic Shariah the main source of legislation,

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[144] Abu-Talib, Sufi Husain, *Tatbeeq al Shariah al Islamiyah fi al Bilad al Arabiyah*, (*The Application of the Islamic Shariah in the Arab States*), 4th edn., al Qahirah: Dar al Nahdah al Arabiyah, (1995) p.p. 3-5; Anderson, Norman D., Islamic Law Today: The Background to Islamic Fundamentalism, 2 *ALQ* (1987) p.p. 345; also see Coulson, N. J., *A History of Islamic Law*, Edinburgh: Edinburgh University Press, (1999) p.p. 149-162; Imber, Colin, *Ebu's-su'ud The Islamic Legal Tradition*, Edinburgh: Edinburgh University Press, (1997) p.p. 40-45.

[145] For further discussion see Brown, Nathan J., *The rule of law in the Arab World: Courts in Egypt and the Gulf*, Cambridge: Cambridge University Press, (1997) p.p. 1-22.

and that any encroachment upon was to be penalised.[146] However, this did not change the true situation, as the Islamic Shariah is still not the only legal system applying within the Arab states, as its application is parallel with a western influenced secular legal system.

To return to the draft Statute of the ACJ regarding the application of the Islamic Shariah, it appears as mentioned above, that this draft Statute is based on the Statute of the ICJ. Particularly regarding the applicable law, the Arab draftsmen have followed the exact formulation of Art. 38 of the Statute of the ICJ, without taking into consideration any suggestions for amending or rewording this Article. From a close reading of Art. 23 of the draft Statute of the ACJ, it appears that nothing new has been enumerated except the addition of the principles of Islamic Shariah as a new primary source to be applied by this projected Court. It is however to be noted that nothing in the present draft Statute makes clear that the Islamic Shariah is considered as a primary source, but it is submitted that this Article can only be interpreted as designating the Islamic Shariah as a primary source and nothing else, because its inclusion appears in the first paragraph of Art. 23. The Article provides:

> "1. The Court shall decide cases submitted to it in accordance with the Arab League Pact, principles of international law, and pursuant to the following legal sources:

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[146] For example see Art. 2 of the Kuwaiti constitution which provides that: "The religion of the State is Islam, and the Islamic Shariah shall be a main source of legislation." For further discussion see al Moqatei, Mohammad, Introducing Islamic Law in the Arab Gulf States: A Case Study of Kuwait, 4 *ALQ* (1989) p.p. 138-148; also see Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life of 'Abd al Razzaq Ahmad al-Sanhuri Egyptian Jurist and Scholar 1895-2971, 3 *ALQ* (1988) p.p. 210-214.

A. The rules approved expressly by parties to a dispute and contained in bilateral or multilateral treaties signed by them;[147]
B. The principles and provisions of Islamic Shariah;
C. The rules of international custom;
D. The established general principles of law.

2. The Court may be guided by the judgments of other Courts and the opinions of senior Shariah and law scholars from various states.
3. The Court may decide a case *ex aequo et bono*, if the parties expressly agree thereto."

It appears that the draftsmen did not specify whether Arab custom is to be followed first or is to be equal in application to the rules of international custom.

Before going into more details and discussing the Islamic Shariah as a source to be applied by the projected ACJ, it is important to distinguish between it and another proposed regional Court which is to decide cases in the light of provisions of Islamic Shariah. This other court is the projected International Islamic Court of Justice (IICJ). Regarding Art. 27 of the draft Statute of the IICJ which deals with the applicable law, it appears that this Article contains two main and different categories of sources. First, Islamic Shariah is the only primary source to be applied by the Court. The second category identifies sources other than Islamic Shariah as secondary means. These are: international conventions; international custom; general principles of law; judgments of the World Court; and teachings of publicists.[148]

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[147] I use the term 'treaty' instead of the term 'convention' in my translation because according to Vienna Convention on the Law of Treaties which was concluded on 22nd May 1969 and which entered into force on 27th January 1980, 'treaty' means: an international agreement concluded between states in written form, creating legal rights and obligations between the parties.

[148] It reads as follows:

"a. A Islamic Shariah shall be the main source on which the International Islamic Court of Justice shall base its cases

b. The Court shall be guided by international law, bilateral or multilateral conventions, international practice accepted as law, general principles of law, judgments rendered by International Court and the teachings of the most highly qualified publicists of the various states."

It appears that the two proposed Courts refer to Islamic Shariah as a primary source. However, in the projected IICJ the Islamic Shariah has been given superiority in application as the only primary source. The other sources are considered only as secondary to guide the Court in deciding cases. This means the IICJ first of all has to have recourse to Islamic Shariah to deduce the rule to be applied in the case and, if it fails to find any rule, it has then the power to refer to the other secondary sources, provided the selected rules do not conflict with the fundamental principles of Islamic Shariah. On the other hand, the parties to disputes cannot agree between themselves to exclude the application of Islamic Shariah because such an agreement would conflict with o*rdre public*[149] and would breach the Statute of the Court according to the explicit wording of para. (a) of Art. 27. Therefore, if such any agreement were made, it would be null and void. In other words, if the parties were to advise the Court to have recourse to sources other than Islamic Shariah, while there may be a rule available in the latter, the Court will have the full power to reject the request; but when there is no rule that can be taken from Islamic Shariah, it becomes the Court's duty, by applying its

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[149] The concept of *ordre public* was extensively clarified in the case *Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants*, (Netherlands v. Sweden), Judgment, *ICJ Rep.*, (1958) p. 55. Judge Badawi made clear in his separate opinion in this case that the concept of laws of *ordre public* "is a common one in private international law. It is universally recognized in national systems of conflicts of laws..." *Ibid.*, p. 74. However, Judge Moreno Quintana in his separate opinion gave clear definition to *ordre public* when he stated:

> "The concept of *ordre public* which is so clear and well defined in the legal systems derived from the so-called *continental* law in the latin countries, does not seem always to be understood in the same way in other legal system. [then he added] I understand *ordre public* to be the whole body of laws and legal instruments whose principles cannot be set at naught either by special conventions or by a conflicting foreign law. Its provisions have retrospective effect and definitively acquired rights cannot be invoked against it." *Ibid.*, 105.

own legal reasoning and without the need of a request by the parties to the dispute, to deduce which source is to be used in such a situation. Thus, in principle, superiority was given to Islamic Shariah in the draft Statute of the IICJ.

These considerations cannot be found in Art. 23 of the draft Statute of the ACJ, because this Article makes the application of Islamic Shariah equivalent to the other sources, without giving it, at least, explicit priority in application. This means, as a result of disappearance of the superiority of the Islamic Shariah, any agreement between parties to a dispute to exclude the application of the Islamic Shariah in their case must be taken into consideration by the projected ACJ, and will not be in conflict with *order public* or breach the draft Statute of the Court (Art. 23). On the other hand, Art. 23 does not seem to be sufficiently clear regarding the application of Islamic Shariah, because it does not mention or solve the foreseeable problem that may arise when the parties agree between themselves to apply a particular source, which may conflict with the general principles of Islamic Shariah. Specifically, some delegations proposed to add another paragraph to this Article in order to give the parties to disputes the power to agree among themselves on the legal source which should be followed. The Lebanese delegation proposed the following paragraph to be added to Art. 23. This proposal reads as follows:[150]

> "states which are parties to the disputes may within the provisions of paragraph one of this article agree among themselves concerning the legal source which should followed."

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[150] See *Unpublished Letter* of the Permanent Mission of Lebanon to the Arab League, Cairo, Doc. 10001/95/J, date, 7/9/1995, p. 4.

Giving the parties to a dispute the power to agree among themselves to which legal source the Court must have recourse is a positivistic characteristic, because every rule of international law is dependent on the consent of states. However the problem with Islamic Shariah as a source before the projected ACJ is different, and needs a special solution, because it must be clear to the Court and parties when and how principles of Islamic Shariah can be applied in a case. We are not submitting that superiority should be conceded to Islamic Shariah in the draft Statute of the ACJ by making the Islamic Shariah the only primary source as the IICJ draft Statute. Our intention is simply to give it priority in application, on the one hand, and to avoid applying any international law source that may conflict with its principles, on the other hand, because if the question of priority is not solved, a legal problem will arise before the Court. This legal problem may be termed a 'conflict of evidences'. In Islamic Shariah a conflict of evidences occurs when "each of two evidences of equal strength requires the opposite of the other, which means that if one of them affirms something, the other would negate it at the same time and place."[151] An example would be conflicts between two texts of the Quran or between two rulings of Hadiths. There is no problem if the conflict arises between two sources of unequal strength, because simply the stronger of the two evidences would then have priority in application, for example, if there would be a conflict between the text of the Quran and a ruling of Hadith or between ijma (consensus) and qiyas (analogy).

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[151] Kamali, *Principles of Islamic Jurisprudence*, *supra* note 68, p. 356; al Shawkani, *Irshad al Fuhul*, *supra* note 79, vol. 2, p.p. 371-372.

The Arab draftsmen seem to have made a considerable mistake when drafting Art. 23. No distinction has been made between principles of the Islamic Shariah and its sources, unlike Art. 38 of the Statute of the ICJ which states that "the Court, whose function is to decide in accordance with international law" and then enumerates several methods to be applied by the Court. These methods are unanimously accepted by international lawyers who consider them as sources of international law. In contrast, the Arab draftsmen have stated that the "Arab Court of Justice shall decide cases submitted to it in accordance with the Arab League Pact, principles of international law, and pursuant to the following sources:", and then principles of Islamic Shariah are enumerated on the same level with the sources of international law. This means that the Arab draftsmen have mixed two different points: principles of Islamic Shariah and its sources of legislation on the one hand, and Islamic Shariah as a divine revelation and independent legal system capable to serve as international law on the other hand.[152]

Lastly, Art. 23 (3) would empower the projected ACJ to decide a case *ex aequo et bono* in any dispute if the parties agree thereto. The power to decide a case *ex aequo et bono* may raise another question, namely, whether it would conflict with principles of the Islamic Shariah or not? It is understood that when deciding a case *ex aequo et bono* the Court is requested to create for the parties

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[152] There is a difference between the term "principle" and the term "source" in international law. Cassese argued that "principles are in the pinnacle of the legal system and are intended to serve as basic guidelines for the life of the whole community; besides imposing general duties and obligations." Cassese, *International Law in a Divided World*, *supra*, note 42, p. 126. On another hand, Corbett argued that: "the sources of international law would thus be the origins of the rules which go to make up the system". see Corbett, Sources of the Law of Nations, *supra* note 6, p. 23.

new law outside the existing law.[153] This would potentially place the concept of *ex aequo et bono* in a situation of conflict with principles of the Islamic Shariah. In Islam, all injunctions are derived from Allah and His Prophet through the Quran and Sunnah, and every rule should be deduced from these twofold divine sources through ijtihad (reasoning) and therefore, no rule could be created outside these sources, or in other words, not related to these two sources. That is why the idea of *ex aequo et bono* is excluded from the draft Statute of the IICJ, because Islamic Shariah is considered to be the only primary source to be applied by the Court.

Since the establishment of the ICJ, no case has been decided *ex aequo et bono*, which means that after more than fifty years since its creation, the parties to cases are still not satisfied to authorise the World Court to apply its own legal reasoning outside the existing law, despite the fact that there is increasing reference to equity in the judgments of the World Court, which means that the Court has accepted equity as an important part of law, especially with reference to maritime boundary delimitation cases.[154] The importance of equity in international law raises an important question as to whether it could be in conflict with the principles of Islamic Shariah, and how the projected ACJ would apply it?

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[153] Lauterpacht, *Administration of International Justice*, *supra* note 13, p. 120.

[154] It is to be noted that the most prominent text mentioning equity is the 1982 Convention on the Law of the Sea. The use of equity appears in different places such as Arts. 69 (1); 70 (1); 74 (1); 82 (4); 83 (1); 160 (2) g; 161 (1) e. This demonstrates that equity has become an important part of international law. For more details see Kwiatkowska, Barbara, The ICJ Doctrine of Equitable Principles Applicable to Maritime Boundary Delimitation and its Impact on the International Law of the Sea in Bloed, A., & Van Dijk, P., (eds.) *Forty Years of the International Court of Justice: jurisdiction, equity and equality*, Utrecht: Europa Institute, (1988) p.p. 121-158.

Some Muslim scholars argue that equity in western law is parallel to istihsan in Islamic Shariah. The two terms have a very close similarity to one another but are not the same. Without going into too much detail over the exact meaning of equity in Islam and the West, the most important point to be clarified is that every system has its own notion of equity. The concept of equity in the West derives its legitimacy from the belief in natural right or justice beyond positive law, or as a law of nature superior to any written or traditional legal rule.[155] This notion of equity is not accepted in Islamic theory, because Islamic Shariah excludes all recourse to natural law which is not based in divine revelation, and istihsan (equity in Islamic Shariah) expresses values and principles from Shariah.[156] Kamali has made clear the distinction between the concept of equity and istihsan when he said:

> "Notwithstanding their different approaches to the question of right and wrong, for example, the values upheld by natural law and the divine law of Islam are substantially concurrent. Briefly, both assume that right and wrong are not a matter of relative convenience for the individuals, but derive form an eternally valid standard which is ultimately independent of human cognizance and adherence. But natural law differs with the divine law in its assumption that right and wrong are inherent in nature."[157]

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[155] Natural law (*jus naturae, jus naturale*) "is a theory, applied alike to international and municipal law, which holds that the rules of international law are drown from the moral law of nature which had its roots in human reason, and which could therefore be discerned without any knowledge of positive law." John P. Grant, Anthony Parry, and Arthur D. Watts (eds.), *Parry and Grant Encyclopaedic Dictionary of International Law*, London: Oceana Publications, Inc., (1986) p. 253; for further discussion of natural law see Weinreb, Lloyd L., *Natural Law and Justice*, London: Harvard University Press, (1987) p.p. 15-96.

[156] See for example, Kunz, Josef L., Natural Law Thinking in the Modern Science of International Law, 55 *AJIL* (1961) p.p. 951-958; Makdisi, Legal Logic and Equity, *supra* note 118, p.p. 63-92; *Cf. North Sea Continental Shelf* case, (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), separate opinion of judge Ammoun, *ICJ Rep.*, (1969) p.p. 139-140.

[157] Kamali, *Principles of Islamic Jurisprudence*, *supra* note 68, p. 245.

Accordingly, if the projected ACJ is from the beginning requested to apply principles of Islamic Shariah, the Court has to have recourse only to the principles and sources of Islamic Shariah, and to disqualify all rules including equity which conflict with Islamic principles. In other words, it is unreasonable to apply principles of Islamic Shariah in such case, and at the same time apply equity in its western conception. On the other hand, if the Court is requested to apply principles of international law, there will be no need to decide whether equity is or is not in conflict with principles of Islamic Shariah.

In conclusion, the application of the Islamic Shariah regarding the agreement of the parties can be summarised in the following points: (1) the parties to the dispute may agree to apply or not to apply the Islamic Shariah which is possible according to our interpretation to Art. 23; (2) the parties may disagree regarding the application of the Islamic Shariah, this would happen when state A, accepts the application of the Islamic Shariah while state B rejects that application and wishes to refer to an international law source; and (3) the parties to the dispute do not express their wish clearly regarding the application of the Islamic Shariah. On these three possibilities, it is submitted that the ACJ will not face any problem if there is an explicit agreement regarding the application of the Islamic Shariah or excluding its application, because the Court in this case has to follow what the parties desire. The same could be said if the parties do not expressly agree on the applicable law leaving the matter to be solved by the ACJ. The only legal problem which the ACJ may be expected to face is limited to the case if the parties are in disagreement on the applicable law as mentioned in point (2) above

or if the parties are in agreement to exclude the application of the Islamic Shariah but, on the other hand, the other source requested by the parties is in conflict with the Islamic Shariah. To avoid this possibility, it would be necessary to redraft Art. 23 of the draft Statute of the ACJ by making two major changes: First, sub paragraph (B) of the existing Article would have to be relocated in paragraph 1, as follows:

> "1. The Court shall decide cases submitted to it in accordance with the Arab League Pact, principles of international law, *principles of Islamic Shariah*, and pursuant to the following legal sources:
> a. The rules approved expressly by parties to a dispute and contained in bilateral or multilateral treaties signed by them;
> b. rules of international custom;
> c. established general principles of law."

According to this proposed change the Court would have to take into consideration principles of Islamic Shariah in all cases submitted to it. Secondly, however, a new Article would have be added stipulating that any rules taken from sources other than Islamic Shariah must at least not conflict with its principles.

Concluding Remarks

1. No doubt that the idea of the establishment of the ACJ may be deemed to be a very positive step in the life of the Arab League. Its creation will assist the adjudication of disputes between its member states and will aid to strengthen the ties and international relations in the Arab world.

2. It appears that the draft Statute of the ACJ, particularly regarding the applicable law, is based on the Statute of the ICJ. The inclusion of the Islamic Shariah as a primary source is considered as the only addition in the Statute of the ACJ. The intention of the draftsmen regarding the Islamic Shariah refers to the branch which regulates the relations of a Muslim state with a non-Muslim state. As such it is Muslim international law.

3. Islamic Shariah as a divine revelation has its own sources of legislation. They differ in nature and a concepts from those of international law. The draftsmen have not paid any attention to the superiority of Islamic Shariah as an independent and divine law, and also have not given any priority to its application before the Arab Court. This means that the member states of the Arab League are in agreement to create an Arab Court applying Islamic Shariah equally with international law.

4. Islamic Shariah is flexible enough to face new circumstances arising in the international relations of Muslim states. Ijtihad (reasoning) is the most appropriate source to be used to develop principles of Islamic Shariah and fill the gaps between the principles of Muslim international law and public international

law. The ACJ, depending on its technical quality, is expected to play a significant role in the presentation, application, and interpretation of the general rules of Islamic Shariah.

The next chapter discusses the most important part in the draft Statute of the ACJ, namely the jurisdiction of this Court. The Arab states' positions since drafting the first proposal of the Court until the present draft Statute will be outlined.

Chapter V
Jurisdiction of the Court

Differences between Arab states on the meaning and scope of the jurisdiction of the ACJ have caused more than 50 years of delay in creating the Court within the Arab League system. After all that delay and as a result of their sensitivities to their sovereignty and independence, they have preferred to create at the end, comparable with the PCIJ and its successor the ICJ, a Court with only optional jurisdiction. This was affirmed when Sudan asked the Secretary-General of the Arab League about the scope of the jurisdiction of the ACJ: whether it was compulsory or optional. The response of the Secretary-General admitted that the ACJ has only optional jurisdiction.[1]

The importance of the jurisdiction of the ACJ leads us to discuss it in four sections. The first will be in the form of introductory remarks dealing with specific and selected points. The second will clarify the jurisdiction of the ACJ *ratione personae* in order to know under which rules of international law will it be possible to appear before the Court. The third will discuss the jurisdiction of the ACJ *ratione materiae*. Lastly, we will study the meaning of the advisory jurisdiction of the ACJ, and how the Court will practise it and which type of cases would be affected by it.

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[1] *Unpublished Letter* of the Permanent Mission of the Republic of the Sudan to the Arab League, Cairo, Doc. B/D/J/5/2/B, dated 17/6/1995, p. 1; *Unpublished Letter* of the Secretary-General, General Department of Legal Affairs, Doc. 3/3697, dated 11/7/1995.

5. 1. Introductory Remarks

In this section four main points will be discussed: (1) the meaning of the term jurisdiction, (2) the difference between legal and political disputes, (3) the concept of domestic jurisdiction: whether the ACJ has competence to deal with disputes relating to domestic jurisdiction, and (4) the necessity to secure consent by states to accept the jurisdiction of the Court and the way in which consent is to be expressed.

5. 1. 1. The Term Jurisdiction

As Rosenne has pointed out, two main meanings may apply to the term jurisdiction: 'mainline jurisdiction' and 'incidental jurisdiction'. 'Mainline jurisdiction' concerns the power of the Court to deliver a binding decision in any case submitted to it. 'Incidental jurisdiction', refers to the authority of the Court to discuss any matter that may arise before it when dealing with a case such as, for example, its competence to decide whether a particular dispute falls under its jurisdiction, its competence to consider third state intervention in a particular case, its competence to control the proceedings and in general, its competence to decree provisional measures of protection. Moreover, this kind of jurisdiction may be invoked even after the delivery of a judgment, if the Court is requested by the parties to the dispute to interpret or revise its judgment under certain circumstances.[2] Furthermore, the jurisdiction of the Court includes competence to enlarge the number of parties to a given case. In other words, the Court is the only

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[2] Rosenne, Shabtai, *The World Court: What it is and how it works*, London: Martinus Nijhoff Publishers, (1995) p. 81. (hereinafter cited as: Rosenne, *The World Court*); see also his *The Law and Practice of the International Court 1920-1996*, vol. II, The Hague: Martinus Nijhoff Publishers, (1997) p.p. 536-537, 839-840. (hereinafter cited as: Rosenne, *The Law and Practice*).

organ which can decide whether a particular party to a dispute has the right to appear before it.[3] This idea was expounded by Daxner, an *ad hoc* judge in the Corfu Channel case, when he said:[4]

> "First, I must point out that it is necessary to make a clear difference [sc. distinction] between two notions:
> 1. Ability to appear before the Court;
> 2. Competence of the Court.
> 'Ability to appear before the Court depends on the fulfilment of two conditions: (a) only States (Article 34 (1) of the Statute) and not other juridical nor physical persons may appear before the Court; (b) such States must be parties to the Statute, i.e. must accept the jurisdiction of the Court.'
> 'In my opinion, the word "jurisdiction" has two fundamental meanings in international law. This word is used:
> (1) to recognize the Court as an organ instituted for the purpose *jus dicere* and in order to acquire the ability to appear before it;
> (2) to determine the competence of the Court, i.e., to invest the Court with the right to solve a concrete case."

It is here submitted that the ACJ will face a great challenge as soon as it is created when the scope of its jurisdiction is disputed by the parties. The Court should then strike a balance between two main points: on the one hand, interpreting and applying the law correctly in order to reach a decision acceptable to the parties, and on the other hand, defining its judicial philosophy for itself as an Arab Court in distinction from other international courts or tribunals. If the ACJ fails in this respect, the number of the cases submitted to it will be decreased because Arab states will definitely seek recourse to the ICJ to settle their justiciable disputes, as a more trusty tribunal than the ACJ.

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[3] Fitzmaurice, Gerald, *The Law and Procedure of the International Court of Justice*, vol. 1, Cambridge: Grotius Publications Limited, (1986) p. 110. (hereinafter cited as: Fitzmaurice, *The Law and Procedure*); Rosenne, *The Law and Practice*, *supra* note 2, p. 538. *Cf. South West Africa* case, (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, Judgment, *ICJ Rep.*, (1966) p. 29, [para. 34]; *Case Concerning Oil Platforms*, (Islamic Republic of Iran v. United States of America), Preliminary Objection, *ICJ Rep.*, (1996) p. 810, [para. 16].

[4] *Corfu Channel* case, (United Kingdom v. Albania), dissenting opinion, *ICJ Rep.*, (1947-48) p.p. 38-39.

5. 1. 2. Difference between Legal and Political Disputes

The practice of the ICJ shows that many contentious as well as advisory proceedings before it have involved also political issues, for example, the Fisheries Jurisdiction case;[5] Nuclear Tests case;[6] Hostages case;[7] Nicaraguan case;[8] the Lockerbie case;[9] the Bosnia-Herzegovina case;[10] as contentious cases; and the Legality of Nuclear Weapons;[11] and Threat of Nuclear Weapons[12] as advisory opinions. For this reason a discussion and clarification of contents of the two terms is here relevant.

As in Art. 36 (2) of the Statute of the ICJ, Art. 22 (3) of the draft Statute of the ACJ refers to the term 'legal disputes' as comprising four categories: (1) interpretation of international treaties; (2) the existence of any fact which, if established, would constitute a breach of an international obligation; (3) the determination of the nature or extent of the reparation to be made for the breach of an international obligation; (4) any question of international law.[13] This means

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[5] *Fisheries Jurisdiction* case, (Federal Republic of Germany v. Iceland), Judgment, *ICJ Rep.*, (1973) p. 49.

[6] *Nuclear Tests* case, (Australia v France), Judgment, *ICJ Rep.*, (1974) p. 253; also see *Nuclear Tests* case, (New Zealand v. France), Judgment, *ICJ Rep.*, (1974) p. 457.

[7] *United States Diplomatic and Consular Staff in Tehran*, Judgment, *ICJ Rep.*, (1980) p. 3.

[8] *Military and Paramilitary Activities in and Against Nicaragua*, (Nicaragua v. United States of America), Merits, Judgment, *ICJ Rep.*, (1986) p. 14.

[9] *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*, (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order, *ICJ Rep.*, (1992) p. 3; and *Question of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*, (Libyan Arab Jamahiriya v. United States of America), Provisional Measures, Order, *ICJ Rep.*, (1992) p. 114.

[10] *Application of the Convention on the Prevention of the Crime of Genocide* case, (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Request for the Indication of Provisional Measures, Order, *ICJ Rep.*, (1993) p. 3.

[11] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, *ICJ Rep.*, (1996) p. 66.

[12] *Legality of the Threat or Use of Nuclear Weapons*, *ICJ Rep.*, (1996) p. 226.

[13] The same list appears in Art. 25 of the draft Statute of the IICJ.

that the four classes mentioned in both Statutes should be treated as representative of classes of legal disputes.[14] However, they do not clarify the distinction between political and legal disputes.[15] The two Articles only make it clear that, any dispute that falls within one or any of these four categories should be considered as having a legal character and *ipso facto* fall within the jurisdiction of the Courts (the ICJ or the ACJ).[16]

It is difficult to define clearly the terms legal and political dispute because such definitions depend on how the nature of international law is understood.[17] One may ask what the difference between a legal and political dispute is, and how the ACJ shall deal with it when a problem arises. It could be said that a legal dispute would be a dispute based on law, whereas a political dispute would not be necessarily based on law. In other words, the classical distinction between legal and political disputes is normally based on the law applied by the Court whether in the case of the ICJ or the projected ACJ. Legal disputes would be disputes where the Court would find a legal basis for its judgment, i.e. applying principles and rules of international law. The political dispute, on the other hand, would suggest

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[14] Williams, John Fischer, The Optional Clause, XI *BYbIL* (1930) p. 68; Hudson, Manley O., *International Tribunals: Past and Future*, Washington: Brookings Institution, (1944) p. 242; and his *The Permanent Court of International Justice 1920-1942: A Treatise*, New York: Macmillan Company, (1943) p.p. 454-460. (hereinafter cited as: Hudson, *The Permanent Court*).

[15] Higgins, Rosalyn, Policy Considerations and the International Judicial Process, 17 *ICLQ* (1968) p. 65. (hereinafter cited as: Higgins, The International Judicial Process).

[16] See dissenting opinion of judge Oda in *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, (Nicaragua v. United States of America), Merits, Judgment, *ICJ Rep.*, (1986) p.p. 220-236; Hudson, *The Permanent Court*, *supra* note 14, p. 545; Rosenne, *The Law and Practice*, *supra* note 2, p. 742; Foda, Ezzeldin, *The Projected Arab Court of Justice: a study in regional jurisdiction with specific reference to the Muslim law of nations*, The Hague: Martinus Nijhoff, (1957) p. 197. (hereinafter cited as: Foda, *The Projected Arab Court*).

[17] Higgins, The International Judicial Process, *supra* note 15, p.p. 74, 83; see also Gordon, Edward, Legal Disputes Under Article 36 (2) of the Statute, in Lori F. Damrosch (ed.), *The International Court of Justice At a Crossroads*, New York: Transnational Publishers, Inc., (1987) p. 183. (hereinafter cited as: Gordon, Legal Disputes).

a solution where no law would apply.[18] For this reason, it would be possible for the Court to decide a political dispute *ex aequo et bono*, with the agreement of the parties agree thereto. Hambro has argued on this point:

> "It seems clear that the Court would not be competent to treat political problems except in order to give a judgment *ex aequo et bono* when the parties request it to do so."[19]

When a dispute is submitted to the ACJ it will be then its duty to decide whether the dispute is political or legal. The practice of the ICJ admits this; in the Customs Régime case, seven judges submitted a joint opinion stating:[20]

> "the Court is not concerned with political considerations nor with political consequences. These lie outside its competence. The Council has asked for the opinion of the Court on a legal question. This is in effect whether the proposals embodied in the Vienna Protocol are or are not compatible with the obligations assumed by Austria in the two other international instruments referred to in the question. That question is purely legal in the sense that it is concerned with the interpretation of treaties."

One may ask, what about disputes which may be based on facts? Are such disputes considered to be legal? It could be said that if facts are used as a basis for the settlement of a dispute, these will necessarily have legal consequences for a

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[18] See *Free Zones of Upper Savoy and the District of Gex*, Order of 6 December 1930, *PCIJ* (1930) Ser. A, No. 24, p.p. 37-43; Hudson, *The Permanent Court*, *supra* note 14, p. 455; for further details see Jennings, Robert Y., The Proper Work and Purposes of the International Court of Justice, in A. S. Muller, D. RaiČ and J. M. Thuránszky (eds.), *The International Court of Justice: Its Future Role After Fifty Years*, The Hague: Martinus Nijhoff Publishers, (1997) p.p. 38-39; and Adede, Andronico O., Judicial Settlement in Perspective, in A. S. Muller, D. RaiČ and J. M. Thuránszky (eds.), *The International Court of Justice: Its Future Role After Fifty Years*, The Hague: Martinus Nijhoff Publishers, (1997) p. 50.

[19] Hambro, Edvard, The Jurisdiction of the International Court of Justice, 76 *Recueil Des Cours*, (1950) p. 171. (hereinafter cited as: Hambro, The Jurisdiction of the ICJ). similarly, Rosenne argued in his *The Law and Practice*, *supra* note 2, p. 588, that:

> "if the parties agree to the dispute being decided according to some other criterion than 'international law' which is the normal discipline for deciding disputes, but by a process which retains the essential features of the international judicial technique as applied in contentious cases, the Court has the power to act."

[20] *Customs Régime between Germany and Austria*, Advisory Opinion, *PCIJ* (1931) Ser. A/B, No. 41, p. 75.

state party to the dispute. Usually, a fact-based dispute would have such an a priori characteristic, and the Court would have to evaluate the facts as well as their legal consequences. The PCIJ, in the Mavrommatis case, was aware of such a distinction, and declared that:

> "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."[21]

Art. 22 (1) of the draft Statute of the ACJ provides that the jurisdiction of the ACJ can include those disputes that states parties agree to submit to the Court. Therefore, what could restrain parties from submitting a case not based on the law to the Court? An inherent inconsistency in the draft Statute of the ACJ appears, on the one hand, to be the statement that states can create through their will the jurisdiction of the Court, but that, on the other hand, the jurisdiction of the Court is limited by treaties or convention just to legal disputes.[22] It is submitted here that it would have to apply a wide interpretation to this Article, and include political disputes within the jurisdiction of the Court, arguing that it should be the agreement of the states which should determine the jurisdiction of the Court. Such an interpretation would be refuted, however, by the practice of the ICJ.

The Asylum case is a good example which supports thus point. On October 3rd a military rebellion broke out in Peru. It was suppressed on the same day and investigations were at once opened. Paul Haya de la Torre, escaped and political

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[21] *Mavrommatis Palestine Concessions* case, Judgment, *PCIJ*, (1924) Ser. A, No. 2, p. 11; similarly Hambro affirmed this idea by stating that: "cases of law also imply questions of fact and it is obviously true that the Court will have to settle matters of fact." See his The Jurisdiction of the ICJ, *supra* note 19, p. 165.

[22] Ben Miled Hela, *La Compétence de la Cour Arabe de Justice: Selon L'Avant-Projet de Statut*, (*The Competence of the Arab Court of Justice: According to the Draft Statute*), Tunisia: Memoire Pour la D.E.A. de Droit International Public, (1982) p. 47. (hereinafter cited as: Ben Miled, *The Competence of the ACJ*).

asylum was granted to him by the Colombian embassy in Lima, but the Colombian government quickly disagreed with Peru. Columbia actually wanted a safe-conduct for the man they qualified as a political refugee, and faced disagreement with Peru. The first decision was taken by the ICJ in this case according to an agreement called the "Act of Lima", which had been signed at Lima in the name of the Colombian Government and of the Peruvian Government to deal with irregularities in political asylum.[23] This decision did not satisfy the Colombian government which decided to submit the case again, arguing that the decision of the Court should have taken due regard to the friendship protocol signed by the two states in 1934.[24] In the decision delivered on June,13th 1951, the ICJ noted that the parties asked the Court to choose between the different ways in which an asylum could end. Such choice should not be based on legal considerations, but on political matters or political opportunities:[25]

> "A choice amongst them could not be based on legal considerations, but only on considerations of practicability or of political expediency; it is not part of the Court's judicial function to take such a choice."

The Court did not want to give any advice because this lay outside its legal function. Therefore, it limited itself, despite the will of the parties, to just defining the legal relations between the parties.[26]

When considering a similar situation in the ACJ, we might ask ourselves whether an Arab judge would be justified in reserving to himself the right to include political disputes in the jurisdiction of the Court. We cannot predict the

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[23] *Asylum* case, (Colombia/Peru), Judgment, *ICJ Rep.*, (1950) p.p. 226-227, 272-273.
[24] *Haya de la Torre* case, (Colombia v. Peru), *ICJ Rep.*, (1951) p.p. 71-72.
[25] *Ibid.*, p. 79.
[26] *Ibid.*, p.p. 82-83.

future, the only thing we can do is to wait till the creation of the ACJ and see how Arab judges will deal with matters concerning legal and political disputes. The only thing we can say is that the draft Statute of the ACJ grants Arab judges the same competence as judges of the ICJ to decide a case *ex aequo et bono* if the parties so agree. This means the judges have the right to decide a political dispute in the absence of applicable law.

5. 1. 3. The Concept of Domestic Jurisdiction

Normally when a state desires to challenge the jurisdiction of the ICJ, it can plead that the dispute submitted to the Court falls under that state's domestic jurisdiction and can thus claim that the Court is incompetent to act. Mostly, when disputes are related to matters falling within the domestic jurisdiction of a state, they are excluded from the jurisdiction of the ICJ as they were from its predecessor the PCIJ.[27] This point is an important topic which deserves discussion in order to uncover the genuine meaning of the term domestic jurisdiction and how it relates to the jurisprudence of the present World Court, the ICJ.

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[27] It is to be noted that there were many cases brought before the PCIJ or ICJ where domestic jurisdiction was claimed by states concerned in order to prevent the Court to decide that case. For example, *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion, *PCIJ* (1923) Ser. B, No. 4; *Exchange of Greek and Turkish Populations*, Advisory Opinion, *PCIJ* (1925) Ser. B, No. 10; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion, *PCIJ* (1932) Ser. A/B, No. 44; *Losinger* case, Order of 27 June 1936, *PCIJ* (1936) Ser. A/B, No. 67; *Electricity Company of Sofia and Bulgaria* case, Judgment, *PCIJ* (1939) Ser. A/B, No. 77; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* case, First Phase, *ICJ Rep.*, (1950) p.p. 65, 70-71; *Anglo-Iranian Oil Company*, (United States of America v. Iran), Preliminary Objection, *ICJ Rep.*, (1952) p. 93; *Certain Norwegian Loans* case, (France v. Norway), Judgment, *ICJ Rep.*, (1957) p. 9; *Right of Passage over Indian Territory*, (Portugal v. India), Judgment, *ICJ Rep.*, (1957) p. 125; *Interhandel* case, (Switzerland v. United States of America), Judgment, *ICJ Rep.*, (1959) p. 6; *Aerial Incident of 27 July 1955*, (Israel v. Bulgaria), Judgment, *ICJ Rep.*, (1959) p. 127.

The term domestic jurisdiction appeared first in Art. 15 (8), of the Covenant of the League of Nations and then in Art. 2 (7), of the Charter of the UN which adopted the same notion with some minor changes.[28] According to Art. 2 (7) of the UN Charter, domestic jurisdiction concerns the sovereignty of a state, legally protected from any intervention, when a given state exercises its authority over its national affairs within its territorial frontiers.[29] This does not mean however, that a state has under international law a sovereign right to exercise jurisdiction in whatever circumstances it chooses, because practising sovereign rights without any limitations or control may affect the rights of other states.[30]

Domestic jurisdiction thus relates to those matters which international law has left for internal regulation by a state.[31] Although the Norwegian Loans case is not the best example to be mentioned here because it involved a self judging reservation, however, it can be cited merely to clarify that the Court can exclude a

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[28] Art. 15 (8) on the one hand, provides that: "if the disputes between the parties is claimed by one of them, and is found by the Council to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement." Art. 2 (7) on the other hand, provides that: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter." For further details about the historical background of these two Articles see *UNCIO*, vol. 3, (1945) p. 14; also see Simma, Bruno, *The Charter of the United Nations*, (a commentary), Oxford: Oxford University Press, (1995) p. 142. (hereinafter cited as: Simma, *The Charter of the United Nations*); and Brierly, J. L., Matters of Domestic Jurisdiction, VI *BYbIL* (1925) p.p. 8-10.

[29] Shaw, Malcolm N., *International Law*, Cambridge: Cambridge University Press, (1997) p. 454. (hereinafter cited as: Shaw, *International Law*); Brownlie, Ian, *Principles of Public International Law*, Oxford: Clarendon Press, (1996) p. 293. (hereinafter cited as: Brownlie, *Public International Law*); Simma, *The Charter of the United Nations*, *supra* note 28, p. 76.

[30] Robert Jennings & Arthur Watt (eds.), *Oppenheim's International Law*, vol. 1, London: Longman, (1996) p. 457. (hereinafter cited as: *Oppenheim's International Law*).

[31] Waldock, Humphrey, The Plea of Domestic Jurisdiction before International Legal Tribunals, XXX *BYbIL* (1954) p.p. 97-98; Kelsen, Hans, Compulsory Adjudication of International Disputes, 37 *AJIL* (1943) p. 405; Arangio-Ruiz, Gaetano, The Plea of Domestic Jurisdiction before the International Court of Justice: Substance or Procedure?, in Vaughan Lowe, and Malgosia Fitzmaurice (eds.), *Fifty Years of the International Court of Justice: Essays in honour of Sir Robert Jennings*, Cambridge: Cambridge University Press, (1996) p.p. 454-455.

dispute falling under national law and thus considers disputes that are related to international law. In this case the ICJ excluded the dispute, as falling under the national law of Norway, from the jurisdiction of the Court. This gives a clear indication that any dispute not related to international law but related to national law should be excluded from the jurisdiction of the Court,[32] but when the Court finds that a particular part of a dispute falls within the domestic jurisdiction of a state, the Court will not be prevented form deciding the rest of the case if other conditions exist. In such a case the Court will exclude only that part of dispute which falls under the domestic jurisdiction and decide the remaining part as falling under its jurisdiction. This may happen if a dispute includes matters related to the value, validity, interpretation or application of an international treaty.[33] Furthermore, when a state claims that a dispute falls under its domestic jurisdiction, this does not mean the Court has to terminate the proceedings and decide that it has no right to continue considering the case. It is the duty of the Court to discuss the matter in depth and then decide either the dispute falls within its jurisdiction or within the domestic jurisdiction of a state. In the Interpretation of Peace Treaties case, the ICJ decided:[34]

> "The interpretation of the terms of a treaty for this purpose could not be considered as a question essentially within the domestic jurisdiction of a State. It is a question of international law which, by its very nature, lies within the competence of the Court."

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[32] *Certain Norwegian Loans*, (France v. Norway), Judgment, *ICJ Rep.*, (1957) p.p. 36-37; also see Fitzmaurice, *The Law and Procedure*, *supra* note 3, p.p. 104-106.

[33] See for example, *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion, *PCIJ* (1923) Ser. B, No. 4, p.p. 28, 29, 30, 31; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* case, *ICJ Rep.*, (1950) p. 70.

[34] *Interpretation of Peace Treaties*, *ICJ Rep.*, (1950) p. 70.

Despite the great importance of the subject of domestic jurisdiction, no provision dealing with it is found in the Pact of the Arab League or in the draft Statute of the ACJ. Consequently, it might be desirable to include this fundamental point in the Pact of the Arab League by adding a new Article dealing with it or including it in the draft Statute, in order to make clear that the power of the ACJ in deciding a dispute does not encroach upon the domestic jurisdiction of states parties to a case.[35] Arab states are very sensitive in matters relating to domestic jurisdiction, especially with respect to matters which affect their independence, sovereignty or territorial integrity. So it might be desirable to prevent Arab states as parties to the Statute of the ACJ from determining themselves whether or not a matter falls within their domestic jurisdiction. The Court itself should tackle this matter explicitly with reference to its Statute.[36] Furthermore, if cases are frequently submitted to the ACJ, Arab states must be made to abstain from making any self judging reservations to the determination of matters which are essentially within their domestic jurisdiction, because such reservations might result in refusal to submit a particular case to the jurisdiction of the Court on the basis that the dispute is claimed to fall within the domestic jurisdiction of a state.[37]

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[35] Art. 22 (4) of the draft Statute of the ACJ provides that: "The Court shall decide in any dispute regarding its jurisdiction", but we do not think this is enough to solve any problem which may appear in the future regarding domestic jurisdiction.

[36] Foda, *The Projected Arab Court*, *supra* note 16, p. 199.

[37] *Ibid.*, p. 200.

5. 1. 4. Necessary Consent of States

Unlike national courts, international courts, including the ACJ, are competent to consider only cases which are submitted to them by the consent of the parties for settlement. In other words, no dispute can be settled by the ACJ without the consent of the parties. Accordingly, when the matter of consent is disputed by one state party to the case, the Court would then have to examine the matter, and if it is satisfied that consent is not available, it would then decide that it has no jurisdiction.[38] This principle is confirmed by international practice. In the Corfu Channel case the ICJ affirmed the necessity of consent by the parties in the dispute and treated it as the basis of its jurisdiction:

> "Under the regime of the Charter, the rule holds good that the jurisdiction of the International Court of Justice, as of the Permanent Court of International Justice before it, depends on the consent of the States parties to a dispute."[39]

Once the consent is given by a state, it has no right to withdraw it while the case is pending, especially if the other state has acted in reliance on that consent.[40] One may then ask, whether the consent of a state is required in contentious cases only or equally in advisory cases. The Peace Treaties case gives us the answer to

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[38] Rosenne, *The Law and Practice*, *supra* note, 2, p. 583; Shahabuddeen, Mohamed, The International Court of Justice: The Integrity of an Idea, 19 *CLB* (1993) p.p. 739-740; Fachiri, Alexander, P., *The Permanent Court of International Justice: Its Constitution, Procedure and Work*, Germany: Fotokop Wilhelm Weihert KG, (1980) p. 70. (hereinafter cited as: Fachiri, *The Permanent Court of Justice*).

[39] *Corfu Channel* case, (United Kingdom v. Albania), Preliminary Objections, *ICJ Rep.*, (1947-48) p. 31; similarly see *Status of Eastern Carelia* case, Advisory Opinion, *PCIJ* (1923) Ser. B, No. 5, p. 27; and *Rights of Minorities in Upper Silesia (Minority Schools)*, Judgment, *PCIJ* (1928) Ser. A, No. 15, p. 22; also see *Ambatielos* case, (Greece v. United Kingdom), Jurisdiction, dissenting opinion of judge Basdevant, *ICJ Rep.*, (1952) p. 66; *Monetary Gold Removed form Rome in 1943*, (Italy v. France, United Kingdom and United States of America), Judgment, *ICJ Rep.*, (1954) p. 32, in which the Court in this case concluded that: "the Court can only exercise jurisdiction over a State with its consent" is "a well established principle of international law embodied in the Court's Statute."; also *Cf.* dissenting opinion of judge Chagla in the *Case Concerning Right of Passage Over Indian Territory*, (Portugal v. India), *ICJ Rep.*, (1957) p. 180.

[40] Rosenne, *The Law and Practice*, *supra* note 2, p. 586.

this question by affirming that the consent is only required in contentious cases but not for advisory opinions. The ICJ drew the distinction between contentious and advisory cases and ruled:[41]

> "Another argument that has been invoked against the power of the Court to answer the questions put to it in this case is based on the opposition of the Governments of Bulgaria, Hungary and Romania to the advisory procedure. The Court cannot, it is said, give the Advisory Opinion requested without violating the well-established principle of international law according to which no judicial proceedings relating to a legal question pending between States can take place without their consent.
> The objection reveals a confusion between the principles governing contentious procedure and those which are applicable to Advisory Opinions.
> The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court's Opinion is given not to the States, but to the Organ which is entitled to request it; the reply of the Court, itself an "organ of the United Nations", requests its participation in the activities of the Organization, and, in principle, should not be refused."

On the other hand, there is no particular form required for a state to express its consent. In the Corfu Channel case the ICJ said:[42]

> "While the consent of the parties confers jurisdiction on the Court, neither the Statute nor the Rules require that this consent should be expressed in any particular form."

5. 2. Jurisdiction *Ratione Personae*

In the present section reference will be made to those entities which have the right to appear before the ACJ. According to general principles of international

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[41] *Interpretation of Peace Treaty with Bulgaria, Hungary and Romania* case, First Phase, *ICJ Rep.*, (1950) p. 71.

[42] *Corfu Channel* case, (United Kingdom v. Albania), Preliminary Objection, *ICJ Rep.*, (1948) p. 27; for further discussion see Rosenne, *The Law and Practice*, *supra* note 2, p.p. 573-575.

law, states, international organisations and individuals are subjects of international law. This leads us to ask whether all such entities have the right to settle their disputes before the ACJ or not.

5. 2. 1. States

As a starting point it is to be understood that the ACJ follows the same provision as that adopted by the ICJ and its predecessor the PCIJ that only states can be parties to contentious cases before the Court.[43] This prevents international organisations, on the one hand, and individuals on the other from being parties to cases.[44] Therefore, before discussing the status of a state in the Pact of the Arab League and the draft Statute of the ACJ, it is important to present some relevant information regarding the UN Charter and the Statute of the ICJ, in order to understand the differences in the position of a state before these two Courts. Accordingly, we will discuss the status of states in the Charter of the UN and the Statute of the ICJ before comparing the same point with the Pact of the Arab League and the draft Statute of the ACJ.

5. 2. 1. 1. The Status of States in the Charter of the UN and the Statute of the ICJ

Basically, the ICJ is open to three kinds of states: (1) states which are members of the UN; (2) states which are not members of the UN, but are parties to the Statute; and (3) states which are not members of the UN, but are not

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[43] Rosenne, *The Law and Practice*, *supra* note 2, p. 605.

[44] Gross, Leo, The International Court of Justice: Consideration of Requirements for Enhancing its Role in the International Legal Order, 65 *AJIL* (1971) p.p. 302-303; Waldock, Humphrey, The International Court of Justice As Seen From Bar and Bench, LIV *BYbIL* (1983) p. 1.

parties to the Statute.[45] The Court cannot accept any other category of states to be parties to a case, if a state does not fall into one of the above mentioned categories. This means the Court has to assure that a particular party to a dispute is deemed to have the attributes of statehood. For example, in the Application of the Convention on the Prevention and Punishment of the Crime of Genocide case, the ICJ had to consider whether either states had a right to appear before the Court in the action as the statehood of both countries was disputed at that time.[46] States that belong to one of the above mentioned categories can appear before the Court according to the stipulations of its Statute.[47]

A. Members of the United Nations

According to Arts. 3 and 4 of the Charter of the UN, membership in the global organisation is of two kinds, original membership and members subsequently admitted. These two kinds of membership can be given only to states.[48] However, only few provisions can be found in the Charter or in the Statute referring to members in connection with the Court, in spite of the strong links between the UN and the ICJ, especially in legal matters.[49] Art. 93 (1) of the

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[45] It is to be noted that the concept of state as a subject of international law is outside our present study. For more details about this matter see Crawford, James, The Criteria for Statehood in International Law, XLVIII *BYbIL* (1976-77) p.p. 107-110; Shaw, *International Law*, *supra* note 29, p. 139; Brownlie, *Public International Law*, *supra* note 29, p. 71; *Oppenheim's International Law*, *supra* note 30, p. 119.

[46] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, (Bosnia and Herzegovina v. Yugoslavia Serbia and Montenegro), Provisional Measures, *ICJ Rep.*, (1993) p. 325.

[47] Rosenne, *The Law and Practice*, *supra* note 2, p. 606.

[48] For further details about membership in the United Nations see White, N. D., *The Law of International Organisations*, Manchester: Manchester University Press, (1996) p.p. 58-62; Simma, *The Charter of the United Nations*, *supra* note 28, p.p. 155-157; Rosenne, *The Law and Practice*, *supra* note 2, p. 614.

[49] About the relations between the ICJ and the UN see Schwebel, Stephen M., *Justice in International Law: Selected Writings of Judge Stephen M. Schwebel*, Cambridge: Cambridge

Charter provides: "All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice." According to Art. 94 (1) "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." Under para. 2 of the same Article it is stipulated that: "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council." No distinction is made, according to this Article, between the states that are parties to a dispute as to whether they are members or non-members of the UN but parties to the Statute, or non-members of the UN and non-parties to the Statute, which means that the Security Council is competent to consider the matter in either situation.[50] On the other hand, Art. 35 (1) of the ICJ Statute explicitly provides that the Court will be open unconditionally only to states that are parties to the Statute.[51]

B. Non-Members of the United Nations, Parties to the Statute

It is possible for states not members of the UN to become parties to the Statute of the ICJ under conditions determined by the General Assembly upon the

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University Press, (1994) p.p. 14-26. (hereinafter cited as: Schwebel, *Justice in International Law*).

[50] Engel, Salo, States Parties to the Statute of the International Court of Justice, in Leo Gross (ed.), *The Future of the International Court of Justice*, vol. 1, New York: Oceana Publications, INC., (1976) p. 288. (hereinafter cited as: Engel, States Parties to the Statute of the ICJ).

[51] This Article, as we mentioned before, was taken from Art. 34 of the 1920 Statute of the PCIJ 'only States or Members of the League of Nations can be parties in cases before the Court', in which the provision of Art. 34 of the 1920 was also obtained from Art. 24 of the 1899 Convention for the Pacific Settlement of International Disputes which refer to "the signatory power" as the parties who may have "recourse to the Permanent Court of Arbitration." For more details see Hudson, *The Permanent Court*, *supra* note 14, p. 392; Fachiri, *The Permanent Court of Justice*, *supra* note 38, p. 62; The International Court of Justice (ed.), *The International Court of Justice: Selected Documents Relating to the Drafting of the Statute*, Washington: United States Government Printing office, (1946) p.p. 8, 32.

recommendation of the Security Council. This permission appears in the wording of Art. 93 (2), of the Charter of the UN which reads as follows:

> "A State which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council."

These conditions were first laid down as a result of a request made by Switzerland, with respect to which the General Assembly adopted Resolution No. 91 (1) that prescribed the required conditions:

> "(a) Acceptance of the provisions of the Statute of the International Court of Justice;
> (b) Acceptance of all the obligations of a Member of the United Nations under Article 94 of the Charter;
> (c) An undertaking to contribute to the expenses of the Court such equitable amount as the General Assembly shall assess from time to time after consultation with the Swiss Government."[52]

As Art. 93 (2) stipulates, the conditions which have to be determined by the General Assembly upon the recommendation of the Security Council are the same in each case.[53] Therefore, in the case of Liechtenstein the General Assembly laid down exactly the same conditions that were laid down in the case of Switzerland.[54] At present, there are just two states that are not UN members but parties to the Statute of the ICJ, namely, Nauru and Switzerland.[55] Such a state is considered to become a party to the Statute on the date it deposits its instrument of acceptance of the above mentioned conditions. The instrument of acceptance is to

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[52] 2 *YBICJ* (1947-48) p.p. 30-31; reprinted in 50 *YBICJ* (1995-96) p. 68.

[53] *UNCIO*, vol. 13, (1945) p. 385. This expression 'in each case' according to Rosenne's interpretation means "in each instance of an application being made by a State wishing to become a party to the Statute, and does not refer to each case which such a State might desire to bring before the Court." see his *The Law and Practice*, *supra* note 2, p. 617.

[54] 4 *YBICJ* (1949-50) p.p. 32-33.

[55] 49 *YBICJ*(1994-95) p. 66; also see Rosenne, *The Law and Practice*, *supra* note 2, p. 617.

be deposited with the Secretary-General of the UN.[56] This however does mean that the Court can refuse such a state the right to appear before it, even if the state has accepted the conditions laid down or even when a recommendation has been made for it from the Security Council. In other words, the final decision to accept a particular UN non-member state to be a party in a case, and to double check whether it fulfils the conditions required by the Charter and the Statute is to be taken by the ICJ itself and not by the General Assembly and Security Council or any other organ of the UN.[57] Rosenne has argued in this regard:

> "(a) each organ of the United Nations has the capacity to recognize a political body as a state within the terms of its own competence as defined in the Charter, and for the purposes of the application of the article out of which the demand for recognition as a 'state' was made;"[58]

The ICJ, as one of the organs of the UN,[59] has, therefore, the capacity within its jurisdiction to decide whether one or both of the parties to a case is a state. This means in other words, the General Assembly and the Security Council are competent to discuss the status of a particular state in matters relating to membership in the UN, while the ICJ is competent to discuss whether the parties

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[56] 49 *YBICJ* (1994-95) p. 65. It is to be clear that as far as a non-member state of the UN becomes party to the Statute of the ICJ it will automatically granted the same privileges and obligations accorded to members of the UN. For example, it will be able to vote for the election of members of the ICJ-Art. 4 (3) of the Statute of the ICJ; participate at the amendment of the Statute of the ICJ-Art. 69 of the Statute of the ICJ.

[57] See case *Concerning Application of the Convention of the Prevention and Punishment of the Crime of Genocide*, (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, *ICJ Rep.*, (1996) p. 611; see also Hambro, The Jurisdiction of the ICJ, *supra* note 19, p. 144.

[58] Rosenne, Shabtai, Recognition of States by the United Nations, XXVI *BYbIL* (1949) p. 439. (hereinafter cited as: Rosenne, Recognition of States) *Cf. Conditions of Admissions of State to Membership in the United Nations* case, *ICJ Rep.*, (1948) p. 62, when the ICJ in its advisory opinion was discussing conditions of membership laid down in Art. 4 (2) of the Charter of the UN in which it declared:

> "All these conditions are subject to the judgment of the Organization. The judgment of the Organization means the judgment of the two organs mentioned in paragraph 2 of Article 4, and, in the last analysis, that of its Members."

[59] Arts. 7 (1) and 92 of the Charter of the UN.

to the case are states or not. This could also be deduced from Art. 36 (6) of the Statute of the ICJ, in which it is said that the Court and the Court alone can decide questions concerning its jurisdiction.[60]

C. Non-Members of the United Nations, not Parties to the Statute

By Art. 35 (2) of the Statute of the ICJ, it is also possible for states which are not members to the UN and not parties to the Statute to submit their disputes to the Court, but under conditions to be observed by the state concerned.[61] The difference between the position of a state not a member of the UN but party to the Statute of the ICJ, and a state not a member of the UN and not party to the Statute is that in the latter case, the Security Council has competence to make a decision, whereas in former case, the Security Council has to make a recommendation and the General Assembly has competence to make a decision regarding to the membership to the UN but not regarding appearance before the Court.[62] On 15 October 1946, the Security Council adopted a resolution in order to implement the provisions of Art. 35 (2). The resolution reads as follows:[63]

> "The Security Council of the United Nations, in virtue of the powers conferred upon it by Article 35, paragraph 2, of the Statute of the International Court of Justice and subject to the provisions of that Article, Resolves that:
> 1. The International Court of Justice shall be open to a State which is not a party to the Statute of the International Court of Justice, upon the following condition, namely, that such State shall previously have

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[60] For further details see Rosenne, Recognition of States, *supra* note 58, p. 439.

[61] Art. 35 (2) of the Statute of the ICJ reads as follows:

> "The conditions under which the Court shall be open to other States [that is States which are not parties to the Statute] shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court."

[62] Art. 39 (2) of the Charter of the UN; also see Rosenne, *The Law and Practice*, *supra* note 2, p.p. 630-632.

[63] Security Council Resolution, No. 9, (1946), S.C.O.R., 1st session, *Resolution and Decisions*, p. 18; reprinted in 49 *YBICJ* (1994-95) p.p. 66-67.

> deposited with the Registrar of the Court a declaration by which it accepts the jurisdiction of the Court, in accordance with the Charter of the United Nations and with the terms and subject to the conditions of the Statute and Rules of the Court, and undertakes to comply in good faith with the decision or decisions of the Court and to accept all the obligations of a Member of the United Nations under Article 94 of the Charter;
> 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, in accordance with Article 36, paragraph 2, of the Statute, recognize as compulsory, *ipso facto* and without special agreement, the jurisdiction of the Court, provided, however, that such acceptance may not, without explicit agreement, be relied upon vis-à-vis States parties to the Statute which have made the declaration in conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice;
> 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 States parties to the Statute of the International Court of Justice, and to such other States as shall have deposited a declaration under the terms of this resolution, and to the Secretary General of the United Nations;
> 4. The Security Council 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."[64]

Rosenne has wondered why this resolution does not contain any provision regarding the authority by whom the declaration should be issued, the form it

[64] According this resolution many states have filed a particular or general declaration. Particular declarations have been filed by Albania (1947) and Italy (1952); general declaration by Cambodia (1952), Ceylon (1952), the Federal Republic of Germany (1955, 1956, 1961, 65 and 1971), Finland (1953 and 1954), Italy (1955), Japan (1951) Laos (1952) and the Republic of Vietnam (1952). See 50 *YBICJ* (1995-96) p. 69.

should take, or if needed any further procedures to bring it into force, such as for example, with respect to ratification.[65]

A state not party to the Statute is obliged to submit a special instrument to confirm that it accepts the jurisdiction of the Court. This obligation appears explicitly in Art. 41 of the 1978 Rules of the ICJ, which provides:

> "The institution of proceedings by a State which is not a party to the Statute but which, under Article 35, paragraph 2, thereof, has accepted the jurisdiction of the Court by a declaration made in accordance with any resolution adopted by Security Council under that Article, shall be accompanied by a deposit of the declaration in question, unless the latter has previously been deposited with the Registrar. If any question of the validity or effect of such declaration arises, the Court shall decide."

The Lotus case between France and Turkey is considered to be the first example dealing with this matter during the lifetime of the PCIJ. The Turkish government deposited a declaration with the Registrar, in the following terms:[66]

> "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 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, 4 1927."

According to a decision delivered by the PCIJ,[67] it is clear that any state not a party to the Statute is not obliged to deposit a special declaration, if it has accepted the jurisdiction of the Court by a provision contained in a convention or treaty in

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[65] Rosenne, *The Law and Practice*, *supra* note 2, p.p. 634-635.

[66] *Lotus* case, *PCIJ*, (1927) Ser. C, No. 13, p. 9.

[67] *Certain German Interests in Polish Upper Silesia*, Merits, Judgment, *PCIJ*, (1926) Ser., A, No. 7, p. 11.

force, as provided for in Art. 36 (1) of the Statute of the PCIJ.[68] It is interesting to state, before referring to the condition of states in the Pact of the Arab League and the draft Statute of the ACJ, that Engel has criticised the tripartite division of states for the purpose of access to the ICJ. He preferred that access to the Court should be limited to two kinds of states instead of three: states members of the UN and parties to the Statute and states not members of the UN but parties to the Statute. As to states non-members of the UN and non-parties to the Statute, they should not be allowed to bring their disputes before the Court. Such states, if they want to have access to the Court, according to Engel, have to become parties to the Statute.[69]

5. 2. 1. 2. The Status of States in the Pact of the Arab League and the Draft Statute of the ACJ

Unlike the situation relating to the Charter of the UN and the Statute of the ICJ, the Pact of the Arab League and the draft Statute of the ACJ allow only independent Arab states that are members to the Arab League to have the right to be parties to the Statute of the Court. This may produce unacceptable and complicated results, because non-Arab states not members of the Arab League are, as a general rule automatically excluded from becoming parties to the Statute. In other words, if a non-Arab state wishes to be party to the Statute of the ACJ its application will be refused because it is not a member of the Arab League. Thus,

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[68] Hambro, The Jurisdiction of the ICJ, *supra* note 19, p. 148; Hudson, *The Permanent Court*, *supra* note 14, p. 391; for more details about the concept of conventions and treaties in force see Fachiri, *The Permanent Court of Justice*, *supra* note 38, p.p. 72-75.

[69] Engel, States Parties to the Statute of the ICJ, *supra* note 50, p.p. 306-307.

according to this limitation, the right of intervention before the ACJ is accorded only to states that are parties to the Statute. It is also important to know what will be the legal position of a state that for some reason has lost its membership of the Arab League. Will such a state still be permitted to have the right to appear before the Court?

A. Limitation for States that can Appear before the ACJ

Membership according to Art. 1, of the Pact of the Arab League is available only for independent Arab states which desire to become members in this regional organisation.[70] Accordingly, every member to the Arab League is *ipso facto* party to the Statute of the ACJ. This provision is laid down in Art. 2 of the draft Statute of the ACJ which reads as follows:

> "Member states of the League of Arab States are *ipso facto* parties to the present Statute."

On the other hand, Art. 21 (1), of the draft Statute of the ACJ considers that only states that are parties to the Statute can be parties to cases, or in other words have the right to submit their disputes to the Court. Art. 21 (1) reads:

> "States which are parties to this Statute have the right to appear before the Court in accordance with the provisions of Article 22 of this Statute."

It is noteworthy that the draft Statute of the ACJ follows the same provisions adopted by the Statute of the ICJ when granting only to states the right to appear before the Court, simply because this Court, like the ICJ, has been established to decide disputes between states and not for other purposes.[71] In addition to states

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[70] For more details see above, chapter I, p.p. 23-27.

[71] Similarly, Rosenne, *The World Court*, *supra* note 2, p. 83; see also Shukri, Muhammad A., Nahwa Mahkamat 'Adl 'Arabiyah Jadidah, (Towards a New Arab Court Justice), 2 *Qadaya Arabiyah*, (1980) p.p. 16-17; Musalhi, Muhammad al Husaine, *Mashru' Mahkamat al 'Adl al*

parties to the draft Statute of the ACJ, by virtue of their membership in the Arab League, it was suggested by some member states of the Arab League, during the discussions of 1979 draft Statute, states that are not members to the Pact of the Arab League should be able to adhere to the ACJ Statute, when they desire to do so. This idea did not satisfy the experts involved in drafting the Statute for two reasons: (1) the ACJ is considered to be an Arab Court, therefore, only Arab states should have the right to be parties to its Statute; (2) the Arab League Council cannot guarantee the enforcement of the decision of the Court with respect to non-member states.[72]

It is submitted that the nature of the ACJ as an Arab Court would not be affected if non-Arab states were permitted to be parties to its Statute. Its Arab characteristics will exist even if non-Arab states were allowed to be parties to its Statute. It is believed that the real reason of excluding non-Arab states from the partnership to the Statute of the ACJ is not because the nature and the character of the Court would be affected, but because Arab states dread that this idea may create more political than legal problems with non-Arab states. Therefore, they thought that the best and safest solution to adopt was to grant only Arab states such a right. Furthermore, according to Shukri's opinion, it would be possible, as an alternative, for both members of the Arab League parties to the Statute as well

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'Arabiyah, (The Projected Arab Court of Justice), Riyadh: Dar an Nashir bi al Markaz al 'Arabi lid Dirasat al Amniyah wat Tadreeb, (1991) p.p. 45-46.

[72] See comments of Experts Committee on the 1979 draft Statute of the ACJ, Documents of Secretary-General of the League of Arab States, Tunis office, (1979) Doc. 3. (hereinafter cited as: comments of Experts Committee); also see Ben Miled, *The Competence of the ACJ*, *supra* note 22, p. 13; Dachraoui Achouak, *La Cour Arabe de Justice: Etude de L'Avant-Projet de Statut*, (Arab Court of Justice: Study of the Draft Statute), Tunisia: Memoire Pour le D.E.A. en Sciences Politiques, (1982) p.p. 82-83. (hereinafter cited as: Dachraoui, *Arab Court of Justice*).

as non-members to the Arab League not parties to the Statute, to be granted a right of recourse to the Security Council of the UN, instead of the Arab League Council, for the enforcement of the decision of the ACJ when one of them does not comply with its decision or not apply it in good faith, simply because Art. 95 of the UN Charter does not prevent members of the UN "from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future", and because the creation of the ACJ does not contradict with the Charter of the UN. It becomes possible then for any parties to a dispute settled by the ACJ to ask for the Security Council's help in the matter of enforcement of a decision of this Court.[73]

On the other hand, non-member states not parties to the draft Statute are permitted to appear before the Court, without being parties to the Statute, if they fulfil the following conditions: (1) the Arab League Council agrees that non-member states may become parties to a particular case; (2) permission is granted for such states only with respect to a dispute pertaining to the interpretation and implementation of bilateral or multilateral treaties signed with any Arab states

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[73] Shukri, Muhammad A., Mahkamat al 'Adl al 'Arabiyah al Murtaqabah, (The Expected Arab Court of Justice), 4 *JAA* (1981) p. 77. It is outside the scope of this study to consider the enforcement of the judgments of the ACJ. However we found it is important to state in brief that this Court will face a serious problem regarding the enforcement of its decisions even if a decision has been delivered for states parties to the draft Statute. No provision can be found in the Pact of the Arab League dealing with this problem. The only reference is in Art. 44 (4) of the draft Statute which permits the party to the case to have recourse to the League Council if the other party refrains from implementing the judgment of the Court. The League Council, according to this Article, has to take the necessary measures capable of implementing the decision. The question which may arise here is does the League Council according to the Pact have enough authority to implement its decision, and therefore how it will treat the problem that may arise regarding the refusal to apply the decision of the ACJ in good faith. If the draftsmen need to solve this problem, they should reform the Pact of the Arab League first and include the necessary provision to deal with this problem. For further details see Foda, *The Projected Arab Court*, *supra* note 16, p.p. 220-223.

parties to the Statute and; (3) the relevant states deposit with the Secretary-General of the Arab League a declaration that they accept the compulsory jurisdiction of the ACJ and shall abide by the implementation of its judgment without any need for a special agreement. Whenever such a state accepts these conditions and decides to refer to the ACJ to settle a dispute, it would then be accorded the same rights and privileges provided for by the Statute regarding states which are parties to it.[74] This means states not members to the Pact of the Arab League, as a general rule, are not permitted to be parties to the Statute of the ACJ, but they are, as an exceptional condition, allowed to be parties in particular cases when the above mentioned conditions are fulfilled.[75]

It is interesting to note that, in addition to their membership of the Arab League, all Arab states, at present, are members of the UN; most of them, because Islam is their official religion, are members in the OIC; some of them, as African states, are members of the OAU; others, the Gulf States, are members of the GCC. What is very important to note is that not a single provision in the present draft Statute pays any attention to such a complicated situation in the Arab region.

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[74] Art. 21 (2, 3) of the draft Statute of the ACJ provides:

> "2. States which are not parties to this Statute may (with the consent of the League Council) resort to the Court to decide disputes pertaining to the interpretation and implementation of bilateral or multilateral treaties signed with any Arab states party to the Statute. Such states shall declare that they accept the Court's compulsory jurisdiction and shall abide by the implementation of its judgments and decisions without the need for a special agreement. The declaration shall be deposited with the Secretary-General of the League of Arab States.
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> 3. States not parties to this Statute when resorting to the Court, shall have the same rights and privileges provided for by this Statute regarding states which are parties to it, and the Court shall determine the expenses to be borne by such states."

[75] It should be said that the ACJ is not the only regional Court to exclude non-parties to its Statute from settling their disputes before it; for example, Art. 21 (a) of the draft Statute of the IICJ provides that: "Member States of the Organization of the Islamic Conference alone have the right to appear before the Court." The same provision has been adopted by the Protocol of the ECHR in

It is expected that Arab draftsmen will include provisions, whether in the Pact or in the draft Statute, to oblige members of the Arab League parties to the Statute to appeal, first of all, to the ACJ, in any justiciable dispute that may arise between them, otherwise how will this Court be activated?

B. Limitation of Intervention before the ACJ

It is clear that the draft Statute has followed the corresponding provisions of the Statute of the ICJ when granting states, and states only, the right to appear before the ACJ. On the other hand, it appears that only two categories of states are authorised to adjudicate before the ACJ. This limitation generates the question as to what is the position of states that are not members of the Arab League and not parties to the Statute; do they possess the right of intervention before the ACJ? In other words, does the restriction on states competent to appear before the ACJ affect the position of states that are not parties to the Statute when they wish to intervene in a given case?[76]

Art. 39 of the draft Statute of the ACJ, comparable with the relevant content of the ICJ Statute, distinguishes between two kinds of intervention:[77] (1) 'discretionary intervention' which can be practised by any particular state

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which Art. 5 provides that: "This Protocol shall be open to signature by Member States of the Council of Europe, signatories to the Convention, who may become parties to it...."

[76] The concept of intervention in inter state arbitral procedure was first proposed by the Netherlands delegations at the 1899 Peace conference and then the idea was adopted when the PCIJ was created (Art. 62 of its Statute) and with minor changes in the ICJ (Art. 62 of its Statute). For general reading about intervention see Hudson, *The Permanent Court*, *supra* note 14, p.p. 419-430; Miller, John T., Intervention in Proceedings Before the International Court of Justice, in Leo Gross (ed.), *The Future of the International Court of Justice*, vol. 2, New York: Oceana Publications, INC., (1976) p.p. 550-571; Rosenne, Shabtai, *Intervention in the International Court of Justice*, London: Martinus Nijhoff Publishers, (1993) p.p. 14-38.

[77] *Cf.* Arts. 62, 63 of the Statute of the ICJ.

believing that it has an interest in a case that may be affected by a decision of the Court; the state in question must submit a request to intervene for consideration by the Court; (2) 'intervention as of right', available for other parties to convention whose construction is issue before the Court.[78] Para. 1 of Art. 39 of the draft Statute of the ACJ deals with discretionary intervention. It states that if a state party to the Statute has an interest which may be affected by the decision of the Court, that state can request to intervene. Art. 39 (1) reads as follows:

> "If a state party to the Statute which is not party to the case considers that it has an interest which may be affected by the decision in the case, it may request the Court to allow it to intervene before the closure of the pleadings. Such an application shall be decided by the Court."

It appears that the Arab draftsmen, when drafting this Article, did not insert the word 'legal' to qualify the relevant interest, as was done in the wording of Art. 62 of the Statute of the ICJ. However, this interest cannot be defined as other than that of a legal nature.[79] Para. 3 of the same Article deals with intervention as of right. It provides:

> "If the subject matter of the case is related to the interpretation of a multilateral agreement to which some of the parties to the agreement are not parties to the case, the Registrar shall, upon the Court's consent, notify these parties of the case and the applications filed with the Court, and such parties have the right to intervene."

When comparing para. 1 of Art. 39 of the draft Statute of the ACJ with Art. 62 of the Statute of the ICJ, it can be seen that intervention in the latter is granted

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[78] For further details about those two kinds of intervention see Chinkin, C. M., Third Party Intervention before the International Court of Justice, 80 *AJIL* (1986) p.p. 496-498. (hereinafter cited as: Chinkin, Third Party Intervention); Ruda, J. M., Intervention before the International Court of Justice, in Vaughan Lowe, and Malgosia Fitzmaurice (eds.), *Fifty Years of the International Court of Justice: Essays in honour of Sir Robert Jennings*, Cambridge: Cambridge University Press, (1996) p.p. 487-490, 498-500.

[79] *Cf.* Art. 23 of the draft Statute of the IICJ in which the text did not ignore the importance of the word 'legal'.

to all states claiming a justification for it, whereas the possibility of intervention in the ACJ is limited just to states parties to the draft Statute. This means, unlike the draft Statute of the ACJ, in the Statute of the ICJ there is no restriction applicable to a state when it desires to intervene in a particular case. In this regard Chinkin argued:[80]

> "The short answer to this question is that only states may request intervention, in line with the rule that only states may be parties to contentious proceedings before the International Court. Furthermore, only those states qualify which satisfy the prerequisites of Article 62 or 63. However, there is no restriction in either article to states that are members of the United Nations or parties to the Statute of the Court."

One may say that this solution is quite logical because it reflects, in a way, the regional characteristics of the ACJ. The main purpose of the creation of the ACJ is to settle disputes arising between Arab states that are members of the Arab League. The context is not same as that for the ICJ, which is considered to be the international court for settling disputes between any states.[81] Some have argued that if non-Arab states are allowed to intervene, especially at the beginning of the operation of the ACJ, delays could be generated in the proceedings, thus affecting the interests of the Arab states parties to the cases. For this reason, it is better for the ACJ first to develop real authority within a limited competence, and thereafter the Statute of the ACJ may benefit by amending the relevant provisions to extend intervention rights to all states.[82]

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[80] Chinkin, Third Party Intervention, *supra* note 78, p.p. 503-504.

[81] Abi-Saab, Georges, The International Court as a World Court, in Vaughan Lowe, and Malgosia Fitzmaurice (eds.), *Fifty Years of the International Court of Justice: Essays in honour of Sir Robert Jennings*, Cambridge: Cambridge University Press, (1996) p.p. 3-4; Hudson, *The Permanent Court*, *supra* note 14, p. 392.

[82] Ben Miled, *The Competence of the ACJ*, *supra* note 22, p.p. 14-15.

Such an approach may not solve, however, the problem which may arise before the ACJ if a non-Arab state not party to the Statute desires to intervene before the Court. The limitation will automatically prevent non-member states to request to intervene in a case before the ACJ, simply because such a request cannot find any legal basis in the Statute of this Court. If we assume that a dispute similar to that of the continental shelf dispute between Tunisia and Libya[83] which was referred to the ICJ, Malta would then be unable to request the ACJ to grant leave to intervene as it did before the ICJ. The ACJ would definitely refuse any request by Malta to intervene, not because it has no legal interest as the ICJ decided but because it was not a party to the Statute.[84] This makes clear how the ACJ could face considerable legal problems should a case similar to the aforementioned continental shelf case arise before it.

The ACJ would in addition, face another legal problem when a third party desires to intervene as a result of the application of the wording of Art. 39 (3) of the draft Statute. Firstly, this paragraph does not clearly provide whether the consent of the League Council is needed for the purpose of intervention. Such consent is necessary when any state not party to the Statute resorts to the Court to decide a dispute pertaining to the interpretation and implementation of treaties

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[83] *Case Concerning the Continental Shelf*, (Tunisia v. Libyan Arab Jamahiriya), Judgment, *ICJ Rep.*, (1982) p. 18.

[84] Case *Concerning the Continental Shelf*, (Tunisia/Libyan Arab Jamahiriya), Application by Malta for Permission to Intervene, *ICJ Rep.*, (1981) p. 19, [para. 33] in which the Court declared:

> "This being so, the very character of the intervention for which Malta seeks permission shows, in the view of the Court, that the interest of a legal nature invoked by Malta cannot be considered to be one which may be affected by the decision in the case within the meaning of Article 62 of the Statute."

signed with any Arab state party to the Statute.[85] It is submitted that the draftsmen did not intend to put a third party in a better position than an original party to the case. It is assumed that if the consent of the League Council is required for the original party, it would be then required also for a third party. Secondly, the ACJ may face a difficulty regarding the notification to states of cases related to the interpretation of a multilateral agreement to which some of the parties to the agreement are not parties to the case. As we know that there are hundreds of treaties and conventions have been concluded between member states of the Arab League, parties to the Statute, with non-Arab states not members to the League not allowed to be parties to the Statute. There is no specific provision in the draft Statute allowing the ACJ to ask international organisations to present relevant information to the Court.[86] This means that when the ACJ realises that a particular third state has not been notified, but that it desires to make a request to the Court for intervention, the Court then would have to allow it to invoke its right even after the closing of the pleadings, which would delay the procedures of the case.[87]

C. Withdrawal from the Arab League, Suspension and Expulsion

What if, for any reason, the membership of the Arab League of an Arab state is withdrawn, suspended or expelled. Would its right of access to the Court continue to exist? Usually, withdrawal, suspension or expulsion of membership

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[85] Art. 21 (2) of the draft Statute of the ACJ.

[86] This provision could be found in Art. 34 of the Statute of the ICJ and Art. 22 (a) of the draft Statute of the IICJ.

[87] It is to be noted that Art. 39 (2) of the draft Statute allows the Court in some exceptional cases even after the closure of the pleadings to accept an application to intervene prior to the hearing oral pleadings. In such event the case shall be opened again for deliberation.

of a particular member state means the end of the relationship between the state and the organisation.[88] Accordingly, it can be concluded that if the draft Statute of the ACJ is signed and ratified as a separate treaty, then losing membership of the Arab League for any reason should not affect the privilege of an Arab state to appear before the Court. In other words, there would be no link between membership in the Arab League and access to the ACJ. On the other hand, however, if the draft Statute is not open for signature and ratification independently but is treated as a part of the Pact, then any Arab state signing the Pact as a member to the Arab League and then losing its membership would also lose its right to appear before the Court. Foda argued in this respect as follows:[89]

> "It seems to us, from the outset, to be more appropriate that the Statute of the Court should be attached a Protocol of Signature which might be signed and ratified as a separate treaty, in order that the rights and membership in the Court should be separated from the membership and the dictates of politics in the Arab League. This would also serve the purpose whereby a Member State of the League and of the Court which contemplates withdrawal from the League, could still remain a party to the Statute of the Court."

5. 2. 2. International Organisations

Disputes may arise not only between states, but in addition between states and organisations, or between two organisations. Therefore, one may ask whether the Arab draftsmen should not also develop the *ratione personae* jurisdiction of the ACJ by allowing Arab intergovernmental organisations to have access to the Court.[90] By Art. 21 (1) of the draft Statute of the ACJ only states can be parties in

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[88] Similarly Rosenne, *The Law and Practice*, *supra* note 2, p.p. 623-628.

[89] Foda, *The Projected Arab Court*, *supra* note 16, p. 194.

[90] It is not our aim to discuss the concept of international organisations as a subject of international law. In this section we will try to clarify how far international organisations should be granted the right to have access to the ACJ. For further details about international organisations as a subject of international law see Amerasinghe, Chittharanjan. F., *Principles of the Institutional Law of International Organisations*, Cambridge: Cambridge University Press, (1996) p. 12; Cassese,

contentious proceedings before this Court. The Article follows the same provision of para. 1, of Art. 34 of the Statute of the ICJ. However, this exclusion does not mean international organisations cannot be parties to cases that may be brought before another *ad hoc* international arbitration tribunal if an organisation has a dispute with a state or with another international organisation.[91]

No doubt the increasing number of international organisations, whether regional or international, and their effective role in settling international disputes leads to a justified claim that they should be granted the right to adjudicate before the ACJ. A comparable suggestion was made by the Institute of International Law in 1954, when it recommended that Art. 34 of the Statute of the ICJ should be amended to keep the Court open, in addition to states, to international organisations. The recommendation reads as follows:[92]

> "it is a matter of urgency to widen the terms of Article 34 of the Statute so as to grant access to the Court to international organizations of States of which at least a majority are Member of the United Nations or Parties to the Statute of the Court."

Antonio, *International Law in a Divided World*, Oxford: Oxford University Press, (1994) p. 85; Van Dervort, Thomas R., *International Law and Organization: An Introduction*, London: SAGE Publications Ltd., (1998) p. 365; Morgenstern, Felice, Legality in International Organisations, XLVIII *BYbIL* (1976-77) p.p. 241-257.

[91] For example, in 1967, an *ad hoc* arbitration was held between the United Kingdom Atomic Energy Authority and the Commission of the European Atomic Energy Authority relating to the liability to income tax of officials of the commission seconded to work on a constructive project in the United Kingdom. For further details see *Commission of the European Atomic Energy Community v. United Kingdom Atomic Energy Authority* case, 44 *ILR* (1972) p. 409. Another example could be mentioned here. Article 20 (Annex VI) of the Statute of the International Tribunals for the Law of the Sea allows other entities than states to appear before the Court. This Article reads as follows: "The Tribunals shall be open to entities other than States parties, in any case expressly provided for in part XI or in any case submitted pursuant to any other agreement conferring jurisdiction of the Tribunals which is accepted by all the parties to that case."

[92] 45 *Annuaire IDI*, (1954-II) p. 298; also some international lawyers supported the same idea, for example, see Sztucki, Jerzy, International Organizations as Parties to Contentious Proceedings before the International Court of Justice, in A. S. Muller, D. RaiČ and J. M. Thuránszky (eds.), *The International Court of Justice: Its Future Role After Fifty Years*, The Hague: Martinus Nijhoff Publishers, (1997) p.p. 148-150.

The question raises, when and how it becomes possible to grant public international organisations the right to access to the Court, whether in the case of the ICJ or the ACJ. The argument in favour of recognising the *ius standi* of international organisations before the ICJ derives from the recognition of their international personality. The Advisory Opinion of the ICJ in the Reparation for Injuries case (1949) is considered as the leading judicial authority on the personality of international organisations. In this case a question arose whether the UN could make a claim for compensation under international law, and therefore, if it had the legal capacity to make such a claim. The question put to the Court was:[93]

> "in the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an organisation, the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him."

The Court answered this legal questions in the affirmative:[94]

> "In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality...
> Accordingly, the Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is a 'super-State', whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does

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[93] *Preparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, *ICJ Rep.*, (1949) p.p. 176-177.

[94] *Ibid.*, p. 179.

> mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims."

It is however to be understood that when states establish an international organisation they have to specify clearly its purposes and therefore, the organisation's legal personality must then be treated as being relative to those purposes. This is affirmed sufficiently in the Preparation advisory opinion of the ICJ when the Court said:[95]

> "Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice."

However, does that mean international organisations can refer to the Court in contentious proceedings as well as advisory proceedings? Hambro has argued as follows:[96]

> "One must conclude that in the present state of international law, international organizations are not admitted as parties before the Court in contentious cases."

It is, however, clear that this right has been granted just to the UN and its specialised agencies. Under the provisions of Art. 34 of the Statute of the ICJ, only the UN and its specialised agencies have the right of access to the Court for advisory opinions: other public international organisations created outside the UN system are excluded from this provision. This means that they have no right to

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[95] *Ibid.*, 180.

[96] Hambro, The Jurisdiction of the ICJ, *supra* note 19, p. 161; similarly see Seidl-Hobenveldern, Ignas, Access of International Organizations to the International Court of Justice, in A. S. Muller, D. RaiČ and J. M. Thuránszky (eds.), *The International Court of Justice: Its Future Role After Fifty Years*, The Hague: Martinus Nijhoff Publishers, (1997) p. 189.

appear before the ICJ in advisory cases. This has led some international lawyers to criticise this provision and consider it as discriminatory.[97]

The failure of many proposals presented at the San Francisco Conference in 1945, in favour of allowing international organisations to have access to the Court, led some delegations in the Committee of Jurists held at Washington in 1945, to recognise the importance of international organisations in international relations. The United States of America consequently proposed adding a new paragraph to Art. 34 of the Statute of the ICJ to grant international organisations some duties in order to help the Court exercise its judicial functions.[98] In the application of Art. 34 of the Statute of the ICJ, international organisations may be asked to give the Court any information deemed necessary to cases before it.[99] Art. 34 provides:

> "2. The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative;
> 3. Whenever the construction of the constituent instrument of public international organization or of an international convention adopted thereunder is in question in a case before the Court, the Registrar shall so notify the public international organization concerned and shall communicate to it copies of all the written proceedings."

It is clear that, according the above mentioned Article, the Court can ask only for relevant information from international organisations. Any other organisation not qualified as a public international organisation is excluded from access to the Court.[100] This happened when the ICJ during the course of the proceedings in the

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[97] *Ibid.*, 192.

[98] *UNCIO*, vol. 14, (1945) p.p. 133, 323; also see Rosenne, *The Law and Practice*, *supra* note 2, p.p. 639-640.

[99] The same provisions were also be found in the Statute of the PCIJ (Art. 26).

[100] *UNCIO*, vol. 14, (1945) p. 134; Hambro, The Jurisdiction of the ICJ, *supra* note 19, p. 162; Rosenne, *The Law and Practice*, *supra* note 2, p.p. 653-654.

Asylum case, refused to accept information from the International League of Rights of Man because it was not considered as public international organisation within the meaning of Art. 34 of the Statute of the ICJ.[101]

It appears that the draft Statute of the ACJ will also grant Arab regional organisations created within the Arab League system the right to request from the Court advisory opinions. This can only mean that such regional organisations will be indirectly excluded from appearing before the ACJ in contentious cases. During the discussion of the draft Statute of the 1979, Bahrain and the United Arab Emirates suggested that at least Arab international organisations created within the Arab League system should be granted the possibility to submit their disputes before the Court in contentious cases. Unfortunately, this suggestion was rejected and the matter remained unfavourable for organisations.[102] No clear reason has been found as to why the suggestion was rejected. If the rejection was made because organisations may irritate states by bringing disputes against them before the Court, extending the *ratione personae* jurisdiction of the ACJ to organisations would not harm the interests of Arab states because most of the relevant organisations are under the direct control of the states parties to the Statute.

5. 2. 3. Individuals

It is generally accepted by international lawyers that individuals are an important subject of international law; however, this does not mean that they

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[101] *Asylum* case, *ICJ Pleadings*, vol. II, p. 227; also see 4 *YBICJ* (1949-50) p. 90.

[102] See comments of Expert Committee, Doc. 3, *supra* note 72; for more discussion see Dachraoui, *Arab Court of Justice*, *supra* note 72, p. 83.

should have the right to sue before the ICJ.[103] This approach has not satisfied all international lawyers who support the idea that individuals should be granted the right to appear before the World Court. This dissatisfaction arose because neither the debates of Advisory Committee of Jurists of 1920 nor the Advisory Committee of Jurists of 1945 permitted individuals to have access to the PCIJ or ICJ alongside states.[104] This negative position towards individuals has been strongly criticised. Janis for example, has argued that:[105]

> "Opening the jurisdiction of the ICJ to individuals is probably the best and perhaps the only means for ensuring its effective utilization. The very reasons that argue against governments and international organizations using the ICJ are turned on their heads when individuals are involved."

He supported his idea by referring to the practice of the European Communities. Their regional Court, the European Court of Justice, is accessible to individuals to appear before it. He suggested that:[106]

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[103] Partsch, Karl Josef, Individuals in International Law, 8 *EPIL* (1985) p. 316; Higgins, Rosalyn, Conceptual Thinking About the Individual in International Law, in Richard Falk [et.al] (eds.), *International Law: A Contemporary Perspective*, London: Westview Press, (1985) p. 478; Mullerson, Rein A., Human Rights and the Individual as Subject of International Law: A Soviet View, 1 *EJIL* (1990) p. 36; Janis, Mark W., Individuals as a Subject of International Law, 17 *CILJ*, (1984) p.p. 61-64; Hambro declared in his The Jurisdiction of the ICJ, *supra* note 19, p.p. 163-164 that:

> "it is clear from the wording of Art. 34 of the Statute that individuals cannot be admitted to plead before the Court. This, however, does not mean that individuals cannot in certain circumstances be subject of international law, neither does it mean that individuals cannot bring claims in other circumstances and before other international tribunals."

[104] See Permanent Court of International Justice, Advisory Committee of Jurists, Procés-verbaury of Proceedings of the Committee, (16 June-24 July, 1920, League of Nations Publication, 1920) p. 206; see also *UNCIO*, vol. 14, (1945) p.p. 132-136.

[105] Janis, Mark W., Individuals and International Court, in A. S. Muller, D. RaiČ and J. M. Thuránszky (eds.), *The International Court of Justice: Its Future Role After Fifty Years*, The Hague: Martinus Nijhoff Publishers, (1997) p. 209.

[106] *Ibid.*, p. 210.

> "the International Court of Justice (should) follow in the wake of the newer European regional international law courts and permit, under some circumstances, individuals suits against States and International Institutions. Although this could be accomplished in many ways, it might be useful if I were to put forward a possible set of amendments to the ICJ Statute in hopes of stimulating debate."

Referring to the draft Statute of the ACJ, we assume it has been thought wise by the Arab draftsmen, at least in this stage, to apply the provision of the ICJ regarding the position of individuals in relation to the Court, because Arab governments do not wish, at least at present, to grant individuals the right to appear before the ACJ. The situation seems to have been the same since the first draft Statute of the ACJ was prepared by the Three-man Committee. Foda has made the following comment on this matter by arguing:[107]

> "It seems impractical to recommend that individuals be given standing as plaintiffs before the projected Arab Court. It could be easily objected to as unwise and premature in the early stages of the work of this Court."

It is important to note that the exclusion of individuals in the present draft Statute may involve a considerable legal problem in case the ACJ succeeds to the functions of the Arab Court of Investment (ACI). Strengthening economic relations has been one of the objectives of the Pact of the Arab League and the Collective Security Treaty. An Economic Council was created within the Arab League system with the aim to facilitate, organise and coordinate Arab states' activities in the economic field.[108] Accordingly, a United Convention for Arab

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[107] Foda, *The Projected Arab Court*, *supra* note 16, p. 202.

[108] See above chapter I, p.p. 12-14.

Capital Investment in Arab Countries was concluded between Arab states and entered into force in 1981.[109]

The United Convention comprises seven chapters and one annex. Chapter six regulates the settlement of disputes relative to investment (Arts. 25-36). According to Art. 25, disputes regarding the interpretation and application of the United Convention are to be resolved either by conciliation, arbitration, or recourse to the ACI. Arts. 28 (1) and 46 explicitly provide that in addition to the creation of the ACI, the United Convention is linked to the expected creation of the ACJ and envisages transferring to it all the competences of the ACI.[110] This means that the drafters of the United Convention have planned to create a temporary judicial organ, namely, the ACI whose functions will terminate as soon as the ACJ is created. The most important provision in this respect in the United Convention appears in the wording of Art. 29 which permits, in addition to states, public companies and private persons to appear before the ACI.

When drafting the 1979 Statute of the ACJ, the expert committee of member states was aware of the problem and suggested the inclusion of a new chapter in the draft Statute of the projected ACJ clarifying its relation to the United Convention.[111] According to this suggestion, it should have been specified that

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[109] Hereinafter cited as: The United Convention. For full text of this convention see League of Arab States (Department of Legal Affairs), *Majmu'at al Mu'ahadat wal Ittifaqiyat*, (Collection of Treaties and Conventions), al Qahirah, (1985) p.p. 598-615.

[110] Art. 28 (1) on the one hand, provides that "till the creation of the Arab Court of Justice, an Arab Court of Investment shall be established." Art. 46 on the other hand, provides that "competence of the Court will revert to the Arab Court of Justice when it is created."

[111] See comments of Experts Committee, Doc. 3, *supra* note 72; also see Ben Miled, *The Competence of the ACJ*, *supra* note 22, p. 25; Dachraoui, *Arab Court of Justice*, *supra* note 72, p. 87.

the competence of the ACI would be transferred to the ACJ which would then make use of the new competence related to individuals and previously accorded to the former ACI under the United Convention. Despite this fact the suggestion was rejected and neither the 1979 draft Statute nor the present draft Statute of 1995 contain any provision relative to the succession from the ACI to the ACJ. Do the provisions which appear in the United Convention oblige the Arab judges in the ACJ to accept public companies or individuals as parties to disputes relative to investment, especially as all parties to the United Convention are members of the Arab League and parties to the Statute of the ACJ?[112] If the Arab judges refuse to allow public companies or individuals to appear before it, they will breach a Convention in force concluded and ratified by the same states that are parties to the Statute of the ACJ. This would be a complicated matter. If the Court accepts its competence to admit individuals to the Court, it will contradict the *ratione personae* jurisdiction of the Statute of the ACJ which only permits states to be parties to a contentious cases. The Arab judges will then have two choices, either to extend the jurisdiction of the ACJ to include any public companies or individuals or require that states must seise the Court on behalf of its own individuals or public companies.[113]

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[112] It is to be understood that there is no problem in accepting any dispute relative to an investment matter by the ACJ. The problem is allowing public companies or individuals (Arab investors) to have access to the Court directly in contentious cases.

[113] This solution was adopted in many cases by the ICJ in which states presented dispute on behalf of its national persons or companies. As examples of cases concerning the interests of individuals, *Ambatielos* case, (Greece v. United Kingdom), Preliminary Objections, *ICJ Rep.*, (1952) p. 28; the *Nottebohm* case, (Liechtenstein v. Guatemala), Preliminary Objections, *ICJ Rep.*, (1953) p. 111; on the other hand, company cases have been numerous and include the *Anglo-Iranian Oil Co.* case, (United Kingdom v. Iran), *ICJ Rep.*, (1952) p. 93; the *Barcelona Traction, Light and Power Company, Limited*, (Belgium v. Spain), Preliminary Objections, *ICJ Rep.*, (1964) p. 6; *and Interhandel* case, (Switzerland v. United States of America), *ICJ Rep.*, (1959) p. 6.

It is not possible to predict which direction the ACJ will adopt; the only persons who will be able to give a clear answer will be the Arab judges. Hopefully Arab states will reach a compromise in this complicated legal problem confronting the ACJ. In the beginning an explicit provision could have been included in the draft Statute for solving the problem. It is submitted here that public companies and individuals should be granted directly the right to appear before the ACJ in contentious cases only in disputes mentioned in the United Convention related to investment matters. This solution would not affect the independence and sovereignty of Arab states. When the Arab draftsmen take into consideration this suggestion, they will repeat an idea supported by most contemporary international lawyers, namely, that individuals should be granted the right to appear before the ICJ. This would not harm the sovereignty of Arab states because, the right which individuals are to be granted will be limited just to disputes relating to matters of investment mentioned in the United Convention.

5. 3. Jurisdiction *Ratione Materiae*

As already mentioned above, the necessity of consent by states in every case submitted to the ACJ, is considered to be an important requirement. However, this does not mean that states parties to a dispute have to express their consent in every case brought before the Court. It would be possible for them to give an *ad hoc* consent in each case as a compromise, or a general consent given in advance when a state becomes party to a bilateral or multilateral treaty which contains a compromissory clause providing for reference to the Court of all disputes that may arise concerning its interpretation or application, or by making a unilateral

declaration known as an optional clause declaration, by which a state would accept the Court's jurisdiction as compulsory.[114] In the present section information will be given about these three ways in which states can submit their disputes to the ACJ.

5. 3. 1. Compromise

This is the first method by which the parties may submit a case to the Court. It consists of a special agreement between two parties who choose to submit a particular case to the Court. The parties accept the Court's jurisdiction relating to an existing dispute, which means the agreement of the parties comes after the beginning of a dispute. Once the compromise is accepted, the Court can consider the case.[115] Rosenne defines this method as "an agreement by which two or more

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[114] Similarly see Fitzmaurice, *The Law and Procedure*, *supra* note 3, p.p. 111-112; Oellers-Frahm, Karin, International Court of Justice, 2 *EPIL* (1995) p. 1089.

[115] Only eleven cases were instituted by special agreement or compromise in the period of the PCIJ while, since 1947 there are around 11 case brought before the ICJ by this method. On the one had, cases submitted to the PCIJ are as follows: *Interpretation of Paragraph 4 of the Annex following Article 169 of the Treaty of Neuilly* case, Chamber of Summary Procedure, *PCIJ* (1924) Ser. A, No. 3; *Lotus* case, Judgment, *PCIJ*, (1927) Ser. A, No. 10; *Serbian Loans* case, Judgment, *PCIJ* (1929) Ser. A, No. 20; B*razilian Loans* case, Judgment, *PCIJ* (1929) Ser. A, No. 21; *Territorial Jurisdiction of the International Commission of the River*, Order, *PCIJ* (1929) Ser. A, No. 23; *Free Zones* of Upper Savoy and the District of Gex case, Order of 6 December 1930, *PCIJ* (1930) Ser. A, No. 24, and *PCIJ* (1932) Ser. A/B, No. 46; *Delimitation of the Territorial Waters Between Castellorozo and Anatolia* case, Order, (discontinued), *PCIJ* (1933) Ser. A/B, No. 51; *Lighthouses case between France and Greece,* Judgment, *PCIJ* (1934) Ser. A/B, No. 62; *Oscar Chinn* case, Judgment, *PCIJ* (1934) Ser. A/B, No. 63; *Lighthouses in Crete and Samos* case, (discontinued), *PCIJ* (1937) Ser. A/B, No. 71; *Borchgrave* case, (discontinued), *PCIJ* (1937) Ser. A/B, No. 72, and (1938) Ser. A/B, No. 73. On the other hand, cases submitted to the ICJ are as follows: *Corfu Channel* case, (United Kingdom v. Albania), *ICJ Rep.*, (1949) p. 4; *Asylum* case, (Colombia v. Peru), *ICJ Rep.*, (1950) p. 226; *Minquiers and Ecrehos* case, (France/United Kingdom), *ICJ Rep.*, (1953) p. 47; *Sovereignty over Certain Frontier Land* case, (Belgium/Netherlands), *ICJ Rep.*, (1959) p. 209; *North Sea Continental Shelf* case, (Federal Republic of Germany/Denmark; Federal republic of Germany/ Netherlands), *ICJ Rep.*, (1969) p. 3; *Continental Shelf* case, (Tunisia/Libyan Arab Jamahiriya), *ICJ Rep.*, (1982) p. 18; *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case, (Canada/United States of America), *ICJ Rep.*, (1982) p. 3, (this case referred to a chamber); *Continental Shelf* case, (Libyan Arab Jamahiriya/Malta), *ICJ Rep.*, (1985) p. 13; *Frontier Dispute* case, (Burkina Faso/ Republic of Mali), *ICJ Rep.*, (1986) p. 554, (this case referred to a chamber); *Land, Island and Maritime Frontier Boundary Dispute* case, (El Salvador/Honduras: Nicaragua intervening), *ICJ Rep.*, (1990)

states agree to refer a particular and defined case or matter to the Court for decision."[116] Some international lawyers consider the jurisdiction of the ICJ based on a special agreement (compromise) to be the most effective method for the settlement of an international dispute. Scott and Carr, for example, have stated in this respect:

> "it seems that the only safe way to get states before the Court is by their agreement *at the time of the actual dispute*. Other methods all carry a reasonable probability of failure."

They further state:

> "It is axiomatic that problems of jurisdiction or compliance rarely arise when states make a special agreement to submit their dispute to the Court."[117]

In a compromise the parties have their respective ideas about their dispute, so that when they refer the case to the ICJ they can explicitly define the dispute which the Court has to consider; when they do so, the ICJ is not competent to go further.[118] In the Continental Shelf case, for example, the ICJ stated that "when proceedings are instituted by special agreement it must not exceed the jurisdiction conferred upon it by the parties, but at the same time, it must also exercise that jurisdiction to its full extent."[119] The consent to submit a case to the ICJ may also be expressed by accepting a recommendation addressed to the states concerned by the Security Council under the provisions of Arts. 33 and 36 of the Charter of the

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p. 92, (this case referred to a chamber); *Territorial Dispute* case, (Libyan Arab Jamahiriya/Chad), *ICJ Rep.*, (1990) p. 149; *Kasikili/Sedudu Island, Order*, *ICJ Rep.*, (1996) p. 63.

[116] Rosenne, *The Law and Practice*, *supra* note 2, p. 663; and his *The World Court*, *supra* note 2, p.p. 85-86.

[117] Scott, Gary L., and Carr, Craig L., The ICJ and Compulsory Jurisdiction: The Case for Closing the Clause, 81 *AJIL* (1987) p. 67. (hereinafter cited as: Scott and Carr, The ICJ and Compulsory Jurisdiction).

[118] Fachiri, *The Permanent Court of Justice*, *supra* note 38, p. 73.

[119] *Continental Shelf* case, (Libyan Arab Jamahiriya/Malta), *ICJ Rep.*, (1985) p. 23.

UN.[120] This does not mean, on the other hand, that consent in this kind of cases (compromise) need be given in any special form. It may be expressed explicitly or implicitly. This was affirmed by the decision of the ICJ in the Corfu Channel case, when the Court stated:[121]

> "While the consent of the parties confers jurisdiction on the Court, neither the Statute nor the Rules require that this consent should be expressed in any particular form...
> Furthermore, there is nothing to prevent the acceptance of jurisdiction, as in the present case, from being effected by two separate and successive acts, instead of jointly and beforehand by a special agreement. As the Permanent Court of International Justice has said in its judgment No. 12, of April 26th 1928, page 23: "The acceptance by a State of the Court's jurisdiction in a particular case is not, under the Statute, subordinated to the observance of certain forms, such as, for instance, the previous conclusion of a special agreement."

In such a case the ICJ exercises jurisdiction by virtue of the principle of *forum prorogatum*. This term was defined by Lauterpacht as follows:

> "Exercise of jurisdiction by virtue of the principle of *forum prorogatum* takes place whenever, after the indication of proceedings by joint or unilateral application, jurisdiction is exercised with regard either to the entire dispute or to some aspects of it as the result of an agreement, express or implied, which is given by either or both parties and without which the Court would not be in the position to exercise jurisdiction."[122]

The agreement of the parties must not be ambiguous, as it appears to have been in the Anglo-Iranian case. There the ICJ made clear that for it to be competent to hear the case, the principle of *forum prorogatum* should be based on

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[120] In the *Corfu Channel* case, Albania declared that it accepted the recommendation of the Security Council to submit the dispute to the ICJ. See *Corfu Channel* case, (United Kingdom v. Albania), *ICJ Rep.*, Order, (1947) p.p. 4-5.

[121] *Ibid.*, p.p. 27-28.

[122] Lauterpacht, Hersch, *The Development of International Law by the International Court*, London: Stevens and Sons Limited, (1958) p. 103. (hereinafter cited as: Lauterpacht, *The Development of International Law*); similarly see individual opinion of Elihu Lauterpacht as a judge *ad hoc* in the *Genocide Convention* case, *ICJ Rep.*, (1993) p. 325; for further definition of the term *forum prorogatum* see Alexandrov, Stanimir A., Reservations in Unilateral Declarations Accepting the Compulsory Jurisdiction of the International Court of Justice, London: Martinus Nijhoff Publishers, (1995) p. 3.

an act or declaration of the Iranian government including an element of agreement regarding the jurisdiction of the Court. This happened when the United Kingdom submitted that the Iranian government had by its actions conferred jurisdiction upon the Court on the basis of the principle of *forum prorogatum.* The Court disagreed by stating:

> "The principle of *forum prorogatum*, if it could be applied to the present case, would have to be based on some conduct or statement of the Government of Iran which involves an element of consent regarding the jurisdiction of the Court. But the Government of Iran has consistently denied the jurisdiction of the Court."[123]

Compromise is mentioned in Art. 22 (1) of the draft Statute of the ACJ which provides:

> "The Court's jurisdiction shall encompass the following disputes:
> 1. Disputes states which are parties to the Statute agree to submit to the Court. These disputes shall include all matters provided for in the Arab League Pact or treaties in force concluded between them."[124]

When this Article is read and compared with the wording of Art. 36 (1) of the Statute of the ICJ, the following points become clear: (1) the Arab draftsmen realised that no case could be considered by the Court without the consent of the parties, so they limited the jurisdiction of the ACJ just to those disputes that states have agreed to submit to the Court. This can be seen clearly as they avoided using the term 'all cases', as the international drafters used in Art. 36 (1) of the Statute of the ICJ.[125] (2) It is to be understood that the expression "treaties in force" used in Art. 22 (1) of the ACJ Statute should be interpreted in the same way as in

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[123] *Anglo-Iranian Oil Co.* case, (United Kingdom v. Iran), *ICJ Rep.*, (1952) p. 114.

[124] *Cf.* Art. 36 (1) of the Statute of the ICJ; also Art. 25 (a) of the draft Statute of the IICJ.

[125] It is worth mentioning here that when drafting Art. 36 of the Statute of the ICJ, disagreement arose between delegations at the Washington Committee of Jurists regarding the jurisdiction of the Court. Was it to be competent in all cases or just to those cases submitted to it by the parties. Those who did not accept using the term 'all cases' were warned that this term may cause some

Art. 36 (1) of the ICJ Statute, to mean that a treaty used as an instrument for accepting the jurisdiction of the Court should be in force at the time when the proceedings are instituted.[126] It is hoped that the ACJ would be as liberal as the ICJ regarding the lack of formality and rigidity within the concept of compromise.[127]

5. 3. 2. The Compromissory Clause

The Compromissory Clause is considered as the second method of conferring jurisdiction under a treaty in force, bilateral or multilateral. Art. 22 (2) of the draft Statute of the ACJ refers to this practice when it provides:

> "The Court's jurisdiction shall encompass the following disputes:
> 2. Disputes arising from bilateral and multilateral agreements which provide for submission to the Court."

This provision also appears in the wording of Art. 36 (1) of the Statute of the ICJ which refers to particular situations provided for the Charter of the UN, or current treaties and conventions in force.[128] In such a situation, where the

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difficulties in interpretation. See *UNCIO*, vol. 14, (1945) p. 841; also see for further discussion Rosenne, *The Law and Practice*, *supra* note 2, p.p. 658-659.

[126] Fachiri, *The Permanent Court of Justice*, *supra* note 38, p.p. 73-74; Hudson, *The Permanent Court*, *supra* note 14, p.p. 435-436; Rosenne, *The Law and Practice*, *supra* note 2, p. 661.

[127] Ben Miled, *The Competence of the ACJ*, *supra* note 22, p. 31.

[128] Since 1946 the following case have been referred to the ICJ on the basis of a compromissory clause: *Protection of French Nationals and Protected Persons in Egypt* case, *ICJ Rep.*, (1950) p. 59, discontinued; *Ambatielos* case, Preliminary Objections, *ICJ Rep.*, (1952) p. 28; *Haya de la Torre* case, Judgment, *ICJ Rep.*, (1951), p. 71; *Electricité de Beyrouth Company* case, *ICJ Rep.*, (1954) p. 107, discontinued; *Barcelona Traction, Light and Power* Company, two cases, *ICJ Rep.*, (1961) p. 9 and *ICJ Rep.*, (1964) p. 6, the first discontinued; *Compagnie du Port, des Quais et des Entrepôts de Beyrouth and the Société Radio-Orient*, *ICJ Rep.*, (1960) p. 186, discontinued; *South West Africa* case, two cases jointed, *ICJ Rep.*, (1961) p. 13 and *ICJ Rep.*, (1966) p. 6; *Northern Cameroons* case, *ICJ Rep.*, (1963) p. 15; *Appeal Relating to the Jurisdiction of the ICAO Council*, *ICJ Rep.*, (1972) p. 46; *Fisheries Jurisdiction* case, two cases, *ICJ Rep.*, (1972) p. 12 and *ICJ Rep.*, (1972) p. 30; *Nuclear Tests* case, in part, two cases, *ICJ Rep.*, (1973) p. 99 and *ICJ Rep.*, (1973) p. 135; *Trial of Pakistani Prisoners of War* case, *ICJ Rep.*, (1973) p. 328, discontinued; *Aegean Sea Continental Shelf* case, *ICJ Rep.*, (1978) p. 3; *United States Diplomatic and Consular Staff in Tehran* case, *ICJ Rep.*, (1980) p. 73, discontinued after judgment on the merits; *Military and Paramilitary Activities in and against Nicaragua*, *ICJ Rep.*, (1986) p. 14, in part, discontinued after judgment on the merits; *Elettronica Sicula S.p.A. (ELSI)* case, *ICJ Rep.*, (1989) p. 15;

jurisdiction of the Court is defined according to the compromissory clause, a unilateral request from one state party to a dispute is enough to give the Court competence to decide the case. It is not necessary that the case be submitted to the Court jointly by the two parties at the same time, as the agreement of the defendant will have been given in advance. In other words, any dispute arising between parties to a treaty relating to its application or interpretation can be referred to the Court by any party to the treaty.[129] The ICJ has affirmed this by stating:

> "The appraisal of the conduct of [the respondent] in the light of [the] relevant provisions of the Treaty pertains to the application of the law rather than to its interpretation, and the Court will therefore undertake this in the context of its general evaluation of the facts established in relation to the applicable law."[130]

The main differences between submitting cases to the ICJ on the basis of a compromise or compromissory clause may be summarised in three points: (1) with a compromise the litigation is commenced as soon as the parties reach the special agreement by which they declare their willingness to accept the

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Border and Tranborder Armed Actions, two cases, *ICJ Rep.*, (1987) p. 182 and *ICJ Rep.*, (1988) p. 69, the first discontinued early, the second discontinued after a Phase of Jurisdiction and Admissibility; *Aerial Incident of 3 July 1988* case, *ICJ Rep.*, (1996) p. 9, discontinued; *Passage through the Great Belt* case, *ICJ Rep.*, (1992) p. 348, in part, discontinued; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie*, two cases, *ICJ Rep.*, (1992) p. 3 and *ICJ Rep.*, (1992) p. 114, pending; *Case Concerning Oil Platforms* case, *ICJ Rep.*, (1996) p. 803, pending, *and Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, *ICJ Rep.*, (1996) p. 595, pending.

[129] Rosenne, *The Law and Practice*, *supra* note 2, p. 665; Charney, Jonathan I, Compromissory Clause and the Jurisdiction of the International Court of Justice, 81 *AJIL* (1978) p.p. 855-856; similarly see Morrison, Fred L., Treaties as a Source of Jurisdiction, Especially in U.S. Practice, in Lori F. Damrosch (ed.), *The International Court of Justice At a Crossroads*, New York: Transnational Publishers, Inc., (1987) p. 58. (hereinafter cited as: Morrison, Treaties as a Source of Jurisdiction); Waldock, C. H. M., Decline of the Optional Clause, XXXII *BYbIL*, (1955-56) p. 245. (hereinafter cited as: Waldock, Decline the Optional Clause).

[130] *Military and Paramilitary Activities in and against Nicaragua* case, (Nicaragua v. United States of America), Merits, *ICJ Rep.*, (1986) p. 117, [para. 225].

jurisdiction of the Court. A compromissory clause initiates proceedings by a unilateral filing of an application;[131] (2) with a compromise, as mentioned above, the parties explicitly define the matter that the ICJ should consider; the Court cannot go further. A compromissory clause involves more flexibility for the Court to deal with the dispute. It has more freedom to define the matter which needs to be considered; and (3) with a compromise, both states parties to the dispute wish to have recourse to the Court in order to resolve their dispute, whereas, concerning a compromissory clause, the defendant state in some circumstances, political or other, may be unhappy to appear before the Court.[132]

5. 3. 3. Optional Clause

Four main points fall under this title and help clarify the system of Optional Clause in the draft Statute of the ACJ. They are: (1) origins and definitions, (2) form of declarations, (3) reservations and conditions that may be made with reference to optional clause, and (4) the condition of reciprocity.

A. Origins and Definitions

It would be desirable if Arab states agreed among themselves to create a Court with a compulsory jurisdiction enshrined in its Statute. However, this cannot be achieved, because strong political influences always object to the establishment of any international court with compulsory jurisdiction. The Arab draftsmen, when drafting the Statute of the ACJ, were aware of this negative factor, and the alternative choice they had was to create a system by which the

[131] See Arts. 38-39 of the 1978 Rules of the ICJ.

[132] Morrison, Treaties as a Source of Jurisdiction, *supra* note 129, p. 59.

jurisdiction of the Court would be optional unless states declared that they accepted it as compulsory. They adopted an optional clause or unilateral declaration approach,[133] which means that "a case can be instituted unilaterally against any other state which has made a similar declaration that is in force on the day the proceedings are instituted." Once this declaration is expressed a state accepts the jurisdiction of the given Court as compulsory.[134] Most international lawyers at present prefer to use the term "optional clause" instead of "unilateral" declaration, because it is optional for states to elect to use it when they make such declaration.[135]

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[133] It is worth mentioning here that the system of Optional Clause has played a considerable role in the settlement of justiciable disputes submitted to the two World Courts, the PCIJ and the ICJ. Since 1946 the following cases have been submitted to the ICJ on the basis of optional clause: *Fisheries Jurisdiction* case, Merits, *ICJ Rep.*, (1974) p. 4; *Anglo-Iranian Oil Co.*, Preliminary Objections, *ICJ Rep.*, (1952) p. 93; *Rights of Nationals of the United States of America in Morocco* case, Judgment, *ICJ Rep.*, (1952) p. 176; *Nottebohm* case, Judgment, *ICJ Rep.*, (1955) p. 4; *Certain Norwegian Loans* case, Judgment, *ICJ Rep.*, (1957) p. 9; *Interhandel* case, Judgment, *ICJ Rep.*, (1959) p. 6; *Application of the Convention of 1902 Governing the Guardianship of Infants* case, Judgment, *ICJ Rep.*, (1958) p. 55; *Right of Passage over Indian Territory* case, Preliminary Objections, *ICJ Rep.*, (1957) p. 125; *Aerial Incident of 27 July 1955*, Judgment, *ICJ Rep.*, (1959) p. 127; *Temple of Preach Vihear* case, Merits, Judgment, *ICJ Rep.*, (1962) p. 6; *Nuclear Tests* case, Judgment, *ICJ Rep.*, (1974) p. 457; *Arbitral Award of 31 July 1989* case, Judgment, *ICJ Rep.*, (1991) p. 53; *Military and Paramilitary Activities in and against Nicaragua* case, discontinued after judgment on merits with compensation phase outstanding, *ICJ Rep.*, (1984) p. 392; *Border and Transborder Armed Actions* case, two cases, one discontinued, the second discontinued after judgment on Preliminary Objections, *ICJ Rep.*, (1988) p. 69; *Maritime Delimitation between Guinea-Bissau and Senegal* case, discontinued, *ICJ Rep.*, (1995) p. 423; *Maritime Delimitation in the Area between Greenland and Jan Mayen* case, Judgment, *ICJ Rep.*, (1993) p. 38; *Certain Phosphate Lands in Nauru* case, discontinued after judgment on preliminary objections, *ICJ Rep.*, (1992) p. 240; *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, *ICJ Rep.*, (1996) p. 595; *Fisheries Jurisdiction* case, *ICJ Rep.*, (1996) p. 58.

[134] Rosenne, *The World Court*, *supra* note 2, p. 90; also see Szafarz, Renata, Changing State Attitudes Towards the Jurisdiction of the International Cour of Justice, in Arie Bloed and Pieter Van Dijk (eds.), *Forty Years International Court of Justice, equity and equality*, Utrecht: Europa Instituut, (1988) p. 8. (hereinafter cited as: Szafarz, States Attitudes Towards Jurisdiction); similarly see Lawson, Ruth C., The Problem of the Compulsory Jurisdiction of the World Court, 46 *AJIL* (1952) p.p. 221-224.

[135] Rosenne, *The World Court*, *supra* note 2, p. 90.

The original idea of the system of the optional clause was tabled at the Hague Peace Conferences of 1899 and 1907.[136] It was tabled again when the Statute of the PCIJ was discussed in 1920, and the question of compulsory jurisdiction over legal disputes was under consideration. Compulsory jurisdiction was strongly rejected by the great powers of that period; an alternative solution was suggested by the Brazilian delegate to make the jurisdiction of the Court, as a general rule, optional unless any state declared it would accept jurisdiction as compulsory. This suggestion was adopted by the Assembly of the League of Nations and inserted in Art. 36 of the Statute of the PCIJ. Since then the system of the optional clause has prevailed.[137] It is interesting to note that the expression 'optional clause' is not expressly used in the PCIJ Statute, and hence the Permanent Court usually used the term compulsory jurisdiction in its decisions.[138]

When the 1920 Statute of the PCIJ was redrafted in 1945, the question of compulsory jurisdiction was raised again. It appears that the majority of delegations in the Washington Committee of Jurists were in favour of the inclusion of the term compulsory jurisdiction in the new Statute of the ICJ, but in the end it was agreed that Art. 36 of the Statute of the PCIJ needed no amendment and the matter remained as it was. The report of the Washington Committee of

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[136] For historical background see Gross Leo, Compulsory Jurisdiction under the Optional Clause: History and Practice, in Lori F. Damrosch (ed.), *The International Court of Justice at a Crossroads*, New York: Transnational Publishers, Inc., (1987) p. 19.

[137] *UNCIO*, vol. 14, (1945) p.p. 840-843; Lloyd, Lorna, A Springboard for the Future: A Historical Examination of Britain's Role in Shaping the Optional Clause of the Permanent Court of International Justice, 79 *AJIL* (1985) p.p. 28-31; Hudson, *The Permanent Court*, *supra* note 14, p. 189; Fachiri, *The Permanent Court of Justice*, *supra* note 38, p.p. 95-97; Hambro, The Jurisdiction of the ICJ, *supra* note 19, p. 135.

[138] For example, see *Phosphates in Morocco* case, Judgment, *PCIJ* (1938) Ser. A/B, No. 74, p. 21; *Panevezys-Saldutiskis Railway* case, Judgment, *PCIJ* (1939) Ser. A/B, No. 76, p. 5; *Electricity Company of Sofia and Bulgaria* case, Judgment, *PCIJ* (1939) Ser. A/B, No. 77, p. 76.

Jurists clarified the problems that prevented the creation of a Court with a compulsory jurisdiction:[139]

> "Judging from the preferences...indicated, it does not seem doubtful that the majority of the Committee was in favour of compulsory jurisdiction, but it has been noted, that, in spite of this predominant sentiment, it did not seem certain, nor even probable, that all the nations whose participation in the proposed international organization appears to be necessary, were now in a position to accept the rule of compulsory jurisdiction, and that the Dumbarton Oaks Proposals did not seem to affirm it; some, while retaining their preferences in this respect, thought that the counsel of prudence was not to go beyond the procedure of the optional clause inserted in Article 36...Placed on this basis, the problem was found to assume a political character and the committee thought that it should defer it to the San Francisco Conference."

So the system of the optional clause has been more or less the same with some development. It is clear that the Arab draftsmen have adopted the same terms and provisions of the system of optional clause of the Statute of the ICJ when drafting Art. 22 (3) of the draft Statute of the ACJ, therefore, the same interpretation of Art. 36 of the ICJ Statute should be applied to Art. 22 (3). The Article reads as follows:[140]

> "The states which are parties to the present Statute may at any time declare that they recognise as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
> A) the interpretation of international treaties;
> B) the existence of any fact which, if established, would constitute a breach of an international obligation;
> C) the determination of the nature or extent of the reparation to be made for the breach of an international obligation;
> D) any question of international law."

This Article can be divided into four parts for a better understanding of its text. Firstly, the phrase '*ipso facto* and without special agreement' was interpreted

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[139] *UNCIO*, vol. 14, (1945) p. 840.

[140] *Cf.* Art. 36 (2 and 3) of the Statute of the ICJ; a similar conception is also adopted by the draft Statute of the IICJ in Art. 26 (A).

in the decision of the ICJ in the Right of Passage case, to mean that as soon as a state deposits its declaration with the Secretary-General in accordance with Art. 36 (4) of the Statute, it becomes, automatically, party to the system of optional clause in relation to other states which declare that they accept the jurisdiction of the Court.[141] In the case of the ACJ, once a state party to the Statute deposits its declaration with the Secretariat-General of the Arab League, that state should become also party to the system of the optional clause. In other words, the optional clause affects both states that at a specific moment are parties to the system; other states that may become party to it at some future date also become included within this network of relations.[142] The logic underpinning this approach appears explicitly in the decision of the ICJ in the Right of Passage. The ICJ ruled:[143]

> "A State accepting the jurisdiction of the Court must expect that an Application may be filed against it before the Court by new declarant State on the same day on which that State deposits with the Secretary-General its Declaration of Acceptance. It is on the very day that the consensual bond, which is the basis of the Optional Clause, comes into being between the State concerned.

Secondly, only states parties to the Statute, whether in the case of the ICJ or in the ACJ, can join the system of the optional clause, because the wording of both Articles, 36 (2) of the ICJ Statute and 22 (3) of the draft ACJ Statute, start by saying "The states parties to the present Statute may at any time declare."[144]

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[141] *Right of Passage over Indian Territory* case, (Portugal v. India), Preliminary Objections, *ICJ Rep.*, (1957) p. 146; also see Rosenne, *The Law and Practice*, *supra* note 2, p. 735.

[142] *Cf. Anglo-Iranian Oil Co.* case, (United Kingdom v. Iran), *ICJ Rep.*, (1952) p. 106; also see Rosenne, *The Law and Practice*, *supra* note 2, p. 735.

[143] *Right of Passage over Indian Territory* case, Preliminary Objections, *ICJ Rep.*, (1957) p. 146.

[144] This is also affirmed by the decision delivered by the ICJ in the *Certain Phosphate Lands in Nauru* case, (Nauru v. Australia), *ICJ Rep.*, (1992) p. 246, when the Court recalled that declarations made according to Art. 36 (2), 'can only relate to disputes between States.'

When states not parties to the draft Statute of the ACJ or the Statute of the ICJ wish to have recourse to the Court, they have to follow the provisions of Art. 21 (2) of the draft Statute of the ACJ, or Art. 35 (2) of the Statute of the ICJ. The term 'any other state' in para. 3, of Art. 22 of the draft Statute, must be interpreted to mean "any other state that itself is a party to the Statute not any other states at large."[145] It further means that states parties to the Statute have no obligation to accept compulsory jurisdiction in relation to states that are not parties to the Statute.[146] No problem will be faced by the ACJ when applying this paragraph, because from the beginning the Court, unlike the ICJ, is just open to the limited number of states which are members of the Arab League. Accordingly, as a logical result non-member states have no right to appear before the Court, and cannot join the system of optional clause.[147] Non-member states, when desiring to accept the jurisdiction of the Court as compulsory, have to conclude an explicit agreement without being party to the optional clause system.[148]

Thirdly, 'accepting the same obligation' was clearly interpreted in the decision of the ICJ in the Right of Passage case, when the Court said:[149]

> "it is not necessary that the 'same obligation' should be irrevocably defined at the time of the deposit of the Declaration of Acceptance for the entire period of its duration. That expression means no more than that, as between States adhering to the Optional Clause, each and all of them are bound by such identical obligations as may exist at any time during which the acceptance is mutually binding."

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[145] Rosenne, *The Law and Practice*, *supra* note 2, p.p. 738-739; Hambro, Edvard, Some Observations on the Compulsory Jurisdiction of the International Court of Justice, XXV *BYbIL* (1948) p. 135. (hereinafter cited as: Hambro, Some Observations on the Jurisdiction of the ICJ).

[146] Rosenne, *The Law and Practice*, *supra* note 2, p. 739.

[147] *Cf.* the *Phosphate Lands in Nauru* case, *ICJ Rep.*, (1992) p. 246.

[148] Rosenne, *The Law and Practice*, *supra* note 2, p. 739.

[149] *The Right of Passage* case, Preliminary Objections, *ICJ Rep.*, (1957) p. 144.

Fourthly, the last phrase of this paragraph is limited to disputes that the optional clause could impose on them with reference to legal disputes only. The ACJ, in the same way the ICJ, is only competent to consider legal disputes. Political disputes lie outside the scope of the jurisdiction of these courts. They may be settled by political methods. Legal disputes in the case of the ACJ could be assumed to include the four categories enumerated in Art. 22 (3) of its draft Statute. The four categorises concern (*a*) the interpretation of international treaties, (*b*) the existence of any fact which, if established, would constitute a breach of an international obligation, (*c*) the determination of the nature or extent of the reparation to be made for the breach of an international obligation, (*d*) any question of international law.[150] Consequently, any disputes falling within one of these categories listed in this paragraph, would *ipso facto* be 'legal'.[151] Therefore, any declaration concerning any dispute not falling under these categorises, will not be a legal dispute. Waldock has argued on this point:[152]

> "The new Statute [*the Statute of the ICJ*] however, appears to exclude the possibility of making a declaration which does not comprise the four listed classes of legal disputes."

B. Form of Declarations

Is there any particular form by which an Arab state has to make its declaration? In the case of the PCIJ and the ICJ, there was and respectively is no specific form required for a declaration. It is left to a state to choose what form it

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[150] *Cf.* Hudson, *The Permanent Court*, *supra* note 14, p.p. 456-460; Fachiri, *The Permanent Court of Justice*, *supra* note 38, p. 97; Rosenne, *The Law and Practice*, *supra* note 2, p. 745.

[151] Oda, Shigeru, The International Court of Justice Viewed From The Bench (1976-1993), 244 *Recueil Des Cours* (1993) p.p. 39-40. (hereinafter cited as: Oda, The International Court of Justice); Gordon, Legal Disputes, *supra* note 17, p.p. 217-218.

[152] Waldock, Decline of the Optional Clause, *supra* note 129, p.p. 247-248.

wishes to use provided its aim is clearly expressed.[153] The only requirement needed is to deposit such a declaration with the Secretary-General of the UN, who has to transmit copies of it to states parties to the Statute and to the Court's Registrar.[154] In addition, there was and is no condition as to the language to use for declarations accepting the compulsory jurisdiction of the two courts. Basically, declarations have been made in either English or French, but sometimes in other languages such as Spanish, Portuguese or Bulgarian, with translation into English or French.[155] In its decision in Temple of Preah Vihear case, the ICJ declared:[156]

> "The only formality required [in the case of an acceptance of the compulsory jurisdiction] is the deposit of the acceptance with the Secretary-General of the United Nations under paragraph 4 of Article 36 of the Statute...for the rest-as regards form-paragraph 2 of Article 36 merely provides that States parties to the Statute "may at any time declare that they recognize a compulsory...the jurisdiction of the Court", etc. The precise form and language in which they do this is left to them; and there is no suggestion that any particular form is required, or that any declarations not in such form will be invalid.
> No doubt custom and tradition have brought it about that a certain pattern of terminology is normally, as a matter of fact and convenience, employed by countries accepting the compulsory jurisdiction of the Court; but there is nothing mandatory about the employment of this language. Nor is there any obligation, notwithstanding paragraphs 2 and 3 of Article 36, to mention such matters as periods of duration, condition or reservations, and there are acceptances which have in one or more, or even in all, of these respects maintained silence."

With reference to the ACJ, it seems that neither the draft Statute nor the draft Rules of the Court provide any condition to regulate the form of declaration.

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[153] Hudson, Manley O., The Twenty-forth Year of the World Court, 40 *AJIL* (1946) p. 34; Rosenne, *The Law and Practice*, *supra* note 2, p.p. 751-752; also see *Right of Passage* case, *ICJ Rep.*, (1957) p. 146.

[154] Art. 36 (4) of the Statute of the ICJ.

[155] For example, see 50 *YBICJ* (1995-96) p.p. 85, 88, 93, 105, 114. It is however to be noted that according to Art. 39 (1) of the Statute of the ICJ the official languages of the Court shall be French and English.

[156] *Temple of Preah Vihear* case, Preliminary Objections, *ICJ Rep.*, (1961) p. 31.

Nevertheless, practically it should be expressed in Arabic because all parties to the Statute are Arab states and Arabic is the official language of the Court.[157] The only condition is in para. 3, of Art. 22 of the draft Statute, which stipulates, similar to the approach in the case of the ICJ, that the declaration has to be deposited with the Secretariat-General of the Arab League. This paragraph, however, does not oblige the Secretariat-General of the Arab League to circulate a declaration to states parties to the Statute and the Registrar of the Court as soon as the declaration is deposited, unlike the procedure laid down in para. 4, of Art. 36 of the Statute of the ICJ:

> "such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court."

It may be assumed that the Arab draftsmen did not include this paragraph because they found it unnecessary. The legal act which to be effected by an Arab state, when making its declaration, is to deposit it with the Secretariat-General, and as soon as it does so, it becomes party to the optional clause system independently from whether the Secretariat-General circulates it to the states parties to the Statute and the Registrar of the Court or not, or whether the other states party to the system know about that declaration or not. Rosenne has noted:[158]

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[157] Art. 24 of the draft Statute of the ACJ provides: "Arabic shall be the official language of the Court."

[158] Rosenne, *The Law and Practice*, *supra* note 2, p. 755; similarly see *Right of Passage over Indian Territory* case, (Portugal v. India), Preliminary Objections, *ICJ Rep.*, (1957) p. 146. It is to be clear that in the case of the PCIJ, there was no similar stipulation obliging the Secretary-General of the League of Nations to transmit the declaration to the states parties and to the Registrar of the Court. It is however to be noted that paragraph 4, was inserted to Art. 36, at the San Francisco Conference without any further interpretation to clarify why delegates adopted this provision. See *UNCIO*, vol. 13, (1945) p. 284. *Cf.* comments of Hudson on this matter in his *The Permanent Court*, *supra* note 14, p. 449.

> "as soon as a State party to the Statute deposits a declaration with the Secretary-General, it may invoke the compulsory jurisdiction against every other States party to the Statute which is likewise bound by its acceptance of the compulsory jurisdiction, and vice versa. It is immaterial whether those states know that the declaration has been deposited."

C. Reservations and Conditions

Before going into further details on conditions or reservations that may be attached to declarations, it is worthwhile to clarify the difference between the two terms "condition" and "reservation" in order to know whether the difference between them may lead to different results. According to the distinction adopted by the ICJ in the Interhandel case and Nicaragua case, the Court recognised a difference between them. A condition, according to the ICJ's definition, refers to the formal aspects of a declaration as an instrument, such as its duration, ratification or other national act. A reservation may refers to the scope of the jurisdiction accepted by the state making the declaration.[159] It is an accepted rule before the ICJ that states can include in their declarations whatever conditions or reservations they wish. In the Nicaragua case, the ICJ clearly determined that:[160]

> "in making the declaration a State is equally free either to do so unconditionally and without limit of time for its duration, or to qualify it with conditions or reservations."

In the case of conditions, the Court has no power to make any further interpretation to conditions on declarations. With reference to reservations, the ICJ has more freedom interpret them, accept or reject any reservation that may affect the system of the optional clause, nevertheless declarations "must be

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[159] *Interhandel case*, (Switzerland v. United States of America), *ICJ Rep.*, (1959) p. 23; *Military and Paramilitary Activities in and against Nicaragua* case, (Nicaragua v. United States of America), *ICJ Rep.*, (1984) p. 418, [para. 60].

[160] *Military and Paramilitary Activities in and against Nicaragua* case, *ICJ Rep.*, (1984) p. 418; also see *UNCIO*, vol. 13, (1945) p. 557.

interpreted as it stands, having regard to words actually used."[161] In other words, the Court can challenge the validity of a reservation and its content and scope in each case when it is included in a particular declaration. This competence of the ICJ has its parallel in the wording of para. 4, of Art. 22 of the draft Statute of the ACJ, which authorises the Court to decide any dispute regarding its jurisdiction.[162] This judicial control covers the power of the Court to interpret declarations together with any reservations attach to them. Rosenne has said:[163]

> "But *lex specialis* governing the jurisdiction of the Court provides for a measure of compulsory judicial control, through the machinery of Article 36, paragraph 6, of the Statute, not merely over the question whether the concrete dispute comes within the terms of the declarations but also over the preliminary question of the validity of reservation included in a declaration accepting the compulsory jurisdiction and its compatibility with the purposes of Article 36, paragraph 2, at all events if such a decision is required for the decision in the case. The existence of this measure of judicial control, coupled with the general power of the Court to interpret the declarations, is an important safeguard against the detrimental effects of reservations."

Since its creation, the ICJ has not declared that a reservation has no legal effect. However, in the opinion of some international lawyers, the Court could do this especially with respect to self judging domestic jurisdiction reservations.[164] According to para. (3/D) of Art. 22 of the draft Statute of the ACJ, states parties to this Statute are free to accept the system of optional clause, and if they accept,

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[161] *Anglo-Iranian* case, *ICJ Rep.*, (1952) p. 105; also see *Norwegian Loans* case, *ICJ Rep.*, (1957) p. 27.

[162] The same provision is also found in Art. 36 (6) of the Statute of the ICJ.

[163] Rosenne, *The Law and Practice*, *supra* note 2, p. 770.

[164] For example, see Briggs, Herbert W., Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice, 93 *Recueil Des Cours*, (1958) p. 311; Waldock, Decline the Optional Clause, *supra* note 129, p. 272; Judge H. Lauterpacht in his dissenting opinion in the *Norwegian Loans* case, *ICJ Rep.*, (1957) p.p. 43-66; and his dissenting opinion in the *Interhandel* case, *ICJ Rep.*, (1959) p.p. 101-119; also see Judge S. Schwebel in his dissenting opinion in the *Nicaragua* case, *ICJ Rep.*, (1984) p. 601.

they also have various choices; they may accept it unconditionally or with reservations or under certain conditions. The relevant paragraph reads as follows:

> "The declarations referred to above may be made unconditionally, or on a condition which limits them to a certain matter or a specific period, or on a condition of reciprocity on the part of several or certain states."

As the ACJ has not yet been created, reference to international practice becomes necessary in order to determine the types of declarations that may be made by states. During the early period of the PCIJ, states parties to its Statute did not recognise the immediate termination of a declaration. They mostly accepted the compulsory jurisdiction of the Court for a fixed time, renewable upon expiration. However, in 1929 the concept of immediate termination of a declaration was introduced when Great Britain included it in its declaration; this practice was adopted by some other states.[165] In the practice of the ICJ, declarations including conditions of duration are normally divided into three types: (1) declarations valid for a fixed period, such as those by Bulgaria, Costa Rica, Denmark, El Salvador, Finland, Mexico, Nauru, Netherlands, New Zealand, Norway, Poland and Sweden; (2) declarations valid until notice of termination is given, as practised by such as Australia, Austria, Barbados, Belgium, Cambodia, Cameron, Cyprus, Gambia, India, Japan, Kenya, Liberia, Malta, Mauritius, Pakistan, Philippines, Portugal, Somalia, Sudan, Swaziland and United Kingdom; (3) declarations which do not contain any reference to duration or are made for an

[165] Oda, The International Court of Justice, *supra* note 151, p. 42.

indefinite or unlimited period, such as by Botswana, Egypt, Honduras, Malawi, Nigeria, Togo, Senegal and Uganda.[166]

It is believed that specifying the entry into force of a declaration is a very important matter every state has to consider, because the entry into force of a declaration determines the specified time or date the obligation of the declaring states begins. Accordingly, as seen above, some states include a particular date in their declarations for their entry into force, others stipulate that the obligation, regarding their declaration, starts from the date of signature, or make the date of the deposit of the declaration to the Secretary-General as the operative date; some others consider their obligation to start from the date of ratification. A problem arises when a particular state does not include in its declaration any specific period or clear statement as to the time of its entry into force. In such a case, the solution is to consider such a declaration as having entered into force from either the moment of signature or ratification or from the moment it has been deposited with the Secretary-General of the UN.[167] Furthermore, states, in addition to their freedom to indicate a specific period for the validity of their declarations, also have full competence to make modifications, or amendments to their declarations. In the Military and Paramilitary Activities in and Against Nicaragua case, the ICJ declared:[168]

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[166] *Cf.* 50 *YBICJ* (1995-96) p.p. 81-121; Szafarz, States Attitudes Towards Jurisdiction, *supra* note 134, p. 17.

[167] Hambro, Some Observations on the Jurisdiction of the ICJ, *supra* note 145, p.p. 140-141; similarly Hudson, *The Permanent Court*, *supra* note 14, p. 450.

[168] *Military and Paramilitary Activities in and against Nicaragua* case, (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, *ICJ Rep.*, (1984) p. 418, [para. 59]; also see *Nuclear Tests* case, (Australia v. France), Judgment, *ICJ Rep.*, (1974) p. 267, [para. 3]; *Nuclear Tests* case, (New Zealand v. France), Judgment, *ICJ Rep.*, (1974) p. 472, [para. 46].

> "However, the unilateral nature of declarations does not signify that the State making the declaration is free to amend its scope and the contents of its solemn commitments as it pleases."

Neither the Statute of the ICJ nor the draft Statute of the ACJ contain any condition obliging states which have made a declaration not to terminate them after a limited time. In other words, a state which accepts the optional clause system by an express declaration, still has full freedom to withdraw from the system at any time it desires. It is here submitted that the notice given in advance by a state is not sufficient or an obligatory, because when a particular state express its wish that it wants to withdraw from the optional clause system it can simply act according to its wish without considering its action as breaching to the Statute or the Rules of the Court. Therewith the possibility is given to criticise the system of the optional clause contained in the draft Statute of the ACJ. It seems that the Arab draftsmen did not realise, when adopting the provision of Art. 36 (2, 3 and 4) of the Statute of the ICJ, that this Article has been strongly criticised by international lawyers. It would be therefore justly expected that they avoid copying the exact wording of this Article, or at least to redraft it by including new provisions to make the system of the optional clause more effective. One of the best known criticisms of the system of the optional clause has been that by Waldock, who said:

> "indeed, the letter of the Statute might be claimed to permit a State to make a declaration today, file an Application in a particular case immediately afterwards, and tomorrow give notice to terminate the declaration."[169]

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[169] Waldock, Decline of the Optional Clause, *supra* note 129, p. 281; he gives an example to support his criticism from the practice of States. He said: "on 19 December 1955, Portugal made a declaration valid for twelve months and thereafter until notice of termination is given, deposited the declaration with the Secretary-General on the same day, and with three days had filed an Application against India in regard to alleged Portuguese rights of passage over Indian territory." *Ibid.*, p. 283.

Similarly, Scott and Carr have criticised the optional clause system by pointing out that "the efficacy of the Court remains threatened as long as the Optional Clause exists."[170] The best solution to the system of the optional clause may be found in the proposal presented by the Institute of International Law, which proposed that Art. 36 (2) of the Statute of the ICJ should be amended:

> "In order to maintain the effectiveness of the engagements undertaken, it is highly desirable that declarations accepting the jurisdiction of the International Court of Justice in virtue of Article 36 paragraph 2, of the Statute of the Court should be valid for a period which, in principle, should not be less than five years. Such declarations should also provide that on the expiration of each such period they will, unless notice of denunciation is given not less than twelve months before the expiration of the current period, be tacitly renewed for a new period of not less than five years."[171]

It is desirable that, at very least, Arab draftsmen should follow this proposal and redraft Art. 22 of the draft Statute of the ACJ to include such an obligation in the system of the optional clause. It worth mentioning here that despite the absence of any provisions obliging states not to terminate their declarations after a limited time, the ICJ in its judgment in the Military and Paramilitary Activities made clear that a reasonable period of notice must be given before the termination of a declaration when it ruled:[172]

> "But the right of immediate termination of declarations with indefinite duration is far from established. It appears from the requirements of good faith that they should be treated, by analogy, according to the law of treaties, which requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity. Since Nicaragua has in fact

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[170] Scott and Carr, The ICJ and Compulsory Jurisdiction, *supra* note 117, p. 66.

[171] 48 *Annuaire IDI* (1959) p. 382; reprinted in English in 54 *AJIL* (1960) p.p. 136-137; similarly, the former Secretary-General of the UN, Boutros Ghali, suggested in his 1992 report 'An Agenda for Peace' that, in order to reinforce the ICJ: "All Member States should accept the general jurisdiction of the International Court under Article 36 of its Statute, without any reservations, before the end of the UN Decade of International Law in the year 2000." DPI/1247, para. 39 (a).

[172] *Military and Paramilitary Activities in and against Nicaragua*, (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, *ICJ Rep.*, (1984) p. 420, [para. 63].

> not manifested any intention to withdraw its own declaration, the question of what reasonable period of notice would legally be required does not need to be further examined: it need only be observed that from 6 to 9 April would not amount to a 'reasonable time'".

D. The Condition of Reciprocity

The concept of the condition of reciprocity appears in the wording of para. 3 (D) of Art. 22 of the draft Statute of the ACJ, which states explicitly that declarations "may be made unconditionally or on condition of reciprocity on the part of several or certain states." When states accept the compulsory jurisdiction of the ICJ they usually use different formulations to include in their acceptance a reference to a condition of reciprocity; they can also exclude this condition if they so wish.[173] This delimits the effect of the system of the optional clause. Therefore, reciprocity may mean that a reservation made by one state party to the dispute may abrogate the effect of the broader declaration made by the other party to the dispute. Thus, the jurisdiction of the Court is reduced to cover only disputes where the declarations of the two parties coincide.[174] In the Interhandel case, the ICJ adopted a similar definition of reciprocity when stated:

> "Reciprocity in the case of Declarations accepting the compulsory jurisdiction of the Court enables a Party to invoke a reservation to that acceptance which it has not expressed in its own Declaration but which the other Party has expressed in its Declaration. For example, Switzerland, which has not expressed in its Declaration any reservation *ratione temporis*, while the United States has accepted the compulsory jurisdiction of the Court only in respect of disputes subsequent to August 26th, 1946, might, if in the position of Respondent, invoke by virtue of reciprocity against the United States the American reservation if the United States attempted to refer to the Court a dispute with Switzerland which had arisen before August 26th,

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[173] Hudson, *The Permanent Court*, *supra* note 14, p. 465; Rosenne, *The Law and Practice*, *supra* note 2, p. 759; Hambro, Some Observations on the Jurisdiction of the ICJ, *supra* note 145, p.p. 133-136; also see his The Jurisdiction of the I CJ, *supra* note 19, p.p. 125, 185.

[174] Eyffinger, Arthur, *The International Court of Justice 1946-1996*, London: Kluwer Law International, (1996) p. 131; Rosenne, *The Law and Practice*, *supra* note 2, p.p. 759-760.

> 1946. This is the effect of reciprocity in this connection. Reciprocity enables the State which has made wider acceptance of the jurisdiction of the Court to rely upon the reservation to the acceptance laid down by the other party. There the effect of reciprocity ends. It cannot justify a State...in relying upon a restriction which the other party...has not included in its own Declaration."[175]

It may be concluded from what has been said above that the optional clause system can be an important tool that states may use under the ACJ with great confidence. However, in the case of the ACJ it is still not possible to know what the situation will be, how states parties to the draft Statute of the ACJ will act, or in other words, to what extent the expected success of the system of optional clause will be realised in the draft Statute of the ACJ. Will Arab states become involved this system as soon as the ACJ is created, or will this optional method not be seen as satisfactory and, therefore, not be used at all? A definite answer about the success of the system of the optional clause in the ACJ draft Statute cannot be yet given, because the recourse to this system by Arab states depends on many circumstances. The only thing that can be said is that Arab states will be very sensitive when considering whether or not to accept this system, and their position on it will not be better than that in the case of the ICJ. Since the creation of the ICJ only three Arab states members of the Arab League, have approved the optional clause system, namely, Egypt, Sudan and Somalia.[176] This may be a clear indication as to the probable position of Arab states and the fears that may motivate them to reject compulsory jurisdiction for the judicial settlement of their disputes.

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[175] *Interhandel* case, *ICJ Rep.*, (1959) p. 23.

[176] 50 *YBICJ* (1995/96) p.p. 90, 114, 115.

5. 4. Advisory Jurisdiction

Beside its function in contentious cases, the ACJ can also give opinions on legal questions when requested to do so by authorised organs of the Arab League. By Art. 50 of the draft Statute, the League Council has the authority to request advisory opinions on legal questions, and at the same time this Article empowers the League Council to confer authority upon other organs of the Arab League to request opinions on legal questions arising within the scope of their activities.[177] This, however, requires us to distinguish between contentious and advisory jurisdiction. With respect to the former, the International Court has to render a binding judgment based on law, whereas concerning the later, the Court gives only non-binding opinions. In contentious cases, only states have the right to appear before the Court, while the situation relating to advisory opinions is not the same.[178] In his dissenting opinion ICJ judge Milovan Zoricic stated:

> "It is clear that any advisory opinion is, in its legal nature, different from a judgment. In a judgment, which is always the result of a contentious case, the Court decides all the issues in dispute, the judgment is unappealable and becomes *res judicata*, so that rights and obligations of the States are legally and definitively established. Advisory opinions, on the other hand, are given at the request of an international organ authorised to ask for them, the Court gives its answer to the question put to it, but the opinion possesses no binding force. This is certainly the difference between a judgment and an

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[177] It is important to note that the original idea of the advisory jurisdiction was found in Art. 14 of the Covenant of the League of Nations and then this idea was transferred to the Charter of the UN and the Statute of the ICJ. For more details see Keith, Kenneth J., *The Extent of the Advisory Jurisdiction of the International Court of Justice*, Leyden: A. W. Sijthoff, (1971) p.p. 13-15. (hereinafter cited as: Keith, *The Extent of the Advisory Opinion*); Pomerance, Michla, *The Advisory Function of the International Court: In the League and U. N. Eras*, London: The Johns Hopkins University Press, (1973) p.p. 5-14; Oda, The International Court of Justice, *supra* note 151, p. 90; Hudson, *The Permanent Court*, *supra* note 14, p.p. 483-484.

[178] *UNCIO*, vol. 13, (1945) p.p. 233-235; and vol. 14, p. 415; also see Rosenne, *The Law and Practice*, *supra* note 2, p. 985; *Status of Eastern Carelia* case, *PCIJ* (1923) Ser. E, No. 4, p. 76; *Interpretation of Peace Treaties*, *ICJ Rep.*, (1950) p. 71; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, *ICJ Rep.*, (1962) 168; *Application of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, *ICJ Rep.*, (1989) p. 188.

> advisory opinion, regarded from a formal and strictly legal point of view."[179]

Four main points will be discussed in order to clarify the concept of advisory jurisdiction in the ACJ draft Statute: (1) bodies authorised to request advisory opinions, (2) subject matter of request, (3) the power of the ACJ regarding advisory opinions and (4) scope of advisory opinions.

5. 4. 1. Bodies Authorised to Request Advisory Opinions

In the fulfilment of its advisory opinion function, the ACJ will not only apply the same sources of law but also the same procedure applicable to contentious cases. This appears in the wording of Art. 50 (3) of the draft Statute which provides that: "the Rules of the Court shall determine the procedural Rules to be followed for requesting advisory opinions." Para. 4 of the same Article provides that "the Court shall, upon exercising the function of issuing advisory opinions, apply whatever it deems fit from the provisions of this Statute and its Rules." As no single provision can be found in the draft Rules of the ACJ regulating the advisory opinion competence, it can be concluded that the procedure which will apply for contentious cases will also be applied for advisory opinions. However, *ratione personae*, the competence of the ACJ with regard to advisory opinions, is different from contentious jurisdiction as states are not allowed to request advisory opinions. It is therefore, important to clarify why states are not competent to request advisory opinions and which organs will be able to request advisory opinions.

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[179] *Interpretation of Peace Treaties* case, *ICJ Rep.*, (1950) p. 101.

A. Exclusion of States from Advisory Opinions

States parties to the draft Statute of the ACJ are denied the right to request any advisory opinion.[180] This is clear from the wording of Art. 50 which defines the entities that can apply for advisory opinions; states are not mentioned. When comparing this point with judgments of the PCIJ or its successor the ICJ, it becomes clear that these two Courts also did not allow states to request advisory opinions. The PCIJ in the Silesia case confirmed that its advisory opinions were destined for international organisations and not for states:[181]

> "It is true that this Article, which is referred to in the Preamble of the Statute of the Permanent Court of Justice, provides that the Court may give advisory opinions at the request of the Council or Assembly of the League of Nations: a request of this kind directly submitted by a State will not be considered. But...it is evident that the applicant State could not have intended to obtain an advisory opinion for which it was not entitled to ask."

The situation remained the same when the ICJ was created. It was affirmed that states were not allowed to ask the Court directly for advisory opinions. The consequence of this was applied in the decision in the Peace Treaties case, which is considered to be the leading case in this respect:[182]

> "It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court's Opinion is given not to the States, but to organ which is entitled to request it; the reply of the Court, itself an "organ of the United Nations", represents its participation in the activities of the Organization, and, in principle should not be refused."

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[180] Similarly in the Statute of the ICJ states also have no right to ask the Court directly for advisory opinions. This right is only granted to international organisations. See Hambro, The Jurisdiction of the ICJ, *supra* note 19, p. 196.

[181] *Certain German Interests in Polish Upper Silesia*, Jurisdiction, Judgment, *PCIJ* (1925) Ser. A, No. 6, p. 21.

[182] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* case, (First Phase), *ICJ Rep.*, (1950) p. 71.

Thus, the ACJ will be able to grant Arab states the right to request advisory opinions.[183] Consequently, it can be said that the Arab draftsmen failed when they adopted the relevant provision of the ICJ by excluding states from asking advisory opinions. It is believed that the exclusion of states from seeking advisory opinion directly from the Court is due to the consideration that opinions are not of practical use for states. If a state wishes to settle a legal dispute, it can have recourse to the contentious procedure of the Court.[184] Furthermore, if states were granted a right to request advisory opinions, especially in the case of the ICJ, this could delay proceedings before this Court as a world Court; the subject matter of an opinion would generate a large amount of questions submitted by states to the ICJ, which result that the Court may not be able to deal with that large amount of questions.

Regarding the ACJ, the matter is rather different. If Arab states were allowed to request the Court for advisory opinions, this would increase the number of opinions generated and be an advantage for the growth of Arab law as special international law more adapted to the regional character of the ACJ.[185] Similarly, Lauterpacht argued:

> "the development of international law by international tribunals is, in the long run, one of the important conditions of their continued successful functioning and of their jurisdiction. For Governments have often manifested an inclination to make the scope of obligatory

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[183] Art. 23 (2) of the draft Statute provides that the ACJ may be guided by the judgment of other Courts when deciding any case. Therefore, it is expected, at least in our opinion, that the ACJ will follow the same jurisprudence of the ICJ or PCIJ in this matter.

[184] Pratap, Dharma, *The Advisory Jurisdiction of the International Court*, Oxford: At the Clarendon Press, (1972) p.p. 84-85. (hereinafter cited as: Pratap, *The Advisory Jurisdiction*).

[185] Ben Miled, *The Competence of the ACJ*, *supra* note 22, p. 68; similarly, see Szasz, Paul C., Enhancing the Advisory Competence of the Word Court, in Leo Gross (ed.), *The Future of the International Court of Justice*, vol. 2, New York: Oceana Publications, INC., (1979) p. 511. (hereinafter cited as: Szasz, Advisory Competence of the World Court).

> jurisdiction conferred upon international tribunals dependent upon the existence of clear rules of international law."[186]

Moreover, cases which may be expected to be brought before the ACJ as a regional court would not be as numerous compared with the ICJ as a World-wide Court. It is therefore submitted that the Arab draftsmen committed a great mistake by denying states the right to request advisory opinions. International lawyers have criticised this exclusion in the ICJ Statute and many proposals have been made to the effect that states should be granted the right to request advisory opinions from the ICJ, but all such proposals have been rejected.[187]

According to the draft Statute of the ACJ, Arab states are not only prevented from requesting advisory opinions, but also are not allowed to participate in advisory cases. In comparison, Art. 66 (2), of the ICJ Statute permits states to submit written and oral arguments when a question is referred to the Court for an advisory opinion. The Arab draftsmen have not paid attention to this important provision, and have therefore not included any corresponding provision which deals with this matter in the draft Statute. Art. 50 (5) of the draft Statute states that the Court has to notify only the Secretary-General and the organ requesting the opinion about the date of the session during which the advisory opinion is to be discussed. Thus, participation in proceedings dealing with an advisory opinion is not available for states.[188]

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[186] Lauterpacht, *The Development of International Law*, *supra* note 122, p.p. 6-7.

[187] For examples see, Pratap, *The Advisory Jurisdiction*, *supra* note 184, p. 511.

[188] *Cf.* para. 1 of Art. 66 of the Statute of the ICJ in which it explicitly provides that "the Registrar shall forthwith give notice of the request for an advisory opinion to all States entitled to appear before the Court." The same provision also to be found in Art. 43 (b) of the draft Statute of the IICJ.

B. Organs Allowed to Request an Advisory Opinion

By Art. 50 (1) of the draft Statute of the ACJ, the League Council is empowered to request the Court to provide advisory opinions on legal questions. Para. 2 enumerates organs that may enjoy a similar right if authorised by the League Council, namely, (1) the Secretary-General, (2) the Specialised Councils of the League including Ministerial Councils and (3) Specialised Arab organisations established within the Arab League system.

By comparison, Art. 65 (1) of the Statute of the ICJ, does not include any reference to councils or agencies that may request the Court for an opinion, but it refers to the Charter of the UN.[189] Para. 1 of Art. 96 of the Charter provides that the General Assembly or the Security Council can ask the Court independently and as of right for advisory opinions. Para. 2 stipulates that other organs of the UN, specialized agencies, if authorised by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.[190] The General Assembly, acting on the basis of the wording of Art. 96 (2) of the UN Charter, has authorised four organs of the UN and sixteen specialised organisations to ask for advisory opinions.[191]

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[189] This Article reads as follows: "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such request."

[190] According to Art. 57 (1) of the Charter of the UN, specialised agencies are defined as those international agencies "established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related field" According to Art. 63 (1) of the Charter, they are linked to the UN through the Economic and Social Council. It is therefore possible for the General Assembly to authorise other international organisations which already exist or are to be created, to ask for advisory opinions. See Resolution of the General Assembly No. 196 (III), of 3 December 1948, p. 28; and No. 957 (X), of 8 November 1955, p. 35.

[191] The four organs of the UN are Economic and Social Council; Trusteeship Council as a principal organ in addition to two non-principal organs such as the Interim Committee of the

The most important point included in para. 2 of Art. 50 of the draft Statute of the ACJ is the right given to the Secretary-General to request the Court to provide an advisory opinion. The Secretary-General in any organisation, whether regional or international, is the chief administrative officer in control of most of its activities.[192] It is noteworthy that the Arab draftsmen have successfully provided, explicitly, that the Secretary-General, but not the Secretariat-General, shall be granted a right to request an advisory opinion even if this right is conditional upon authorisation by the League Council. Undoubtedly, the League Council can be expected to refuse to authorise such a right to the Secretary-General. In comparison, this matter is not as clear within the framework of the UN, because of the lack of an authoritative interpretation of para. 2 of Art. 96 of the UN Charter. In both the UN Charter and the Arab League Pact, the Secretary-General acts as part of the Secretariat-General. The question in the context of the UN Charter is whether to authorise the Secretary-General or the Secretariat to request an opinion.[193] Arab draftsmen, from the beginning, settled this legal question by stating explicitly that the Secretary-General but not the Secretariat-General can be

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General Assembly; Committee on Applications for Review of Administrative Tribunals Judgments. The 16 specialised agencies are the International Labour Organisation (ILO); the Food and Agriculture Organization (FAO); the United Nations Economic, Social and Cultural Organization (UNESCO); the World Health Organization (WHO); the International Bank for Reconstruction and Development (IBRD); the International Finance Corporation (IFC); the International Development Association (IDA); the International Monetary Fund (IMF); the International Civil Aviation Organization (ICAO); the International Telecommunication Union (ITU); the International Fund for Agricultural Development (IFAD); the World Meteorological Organization (WMO); the International Maritime Organization (IMO); the World Intellectual Property Organization (WIPO); the United Nations Industrial Development Organization (UNIDO) and the International Atomic Energy Agency (IAEA). See 50 *YBICJ* (1995-96) p.p. 75-76; 49 *YBICJ* (1994-95) p.p. 71-72; see also Schwebel, *Justice in International Law*, *supra* note 49, p.p. 66-67; and in his Was The Capacity to Request an Advisory Opinion Wider in The Permanent Court of International Justice than in the International Court of Justice, LXII *BYbIL* (1991) p. 113.

[192] Rosenne, *The Law and Practice*, *supra* note 2, p. 333.

[193] Schwebel, *Justice in International Law*, *supra* note 49, p. 867.

authorised to ask for advisory opinions.[194] Many attempts have been made to grant the Secretary-General of the UN the authorisation to request advisory opinions. For instance, when a review of the role of the ICJ took place in the General Assembly in 1971, Iraq declared that:[195]

> "[t]he possibility of authorising the Secretary-General of the United Nations to request the advisory opinion of the Court in certain cases is worth considering."

These attempts have not succeeded and the Secretary-General has not been so authorised.

Under the wording of para. 2 of Art. 50 of the draft Statute of the ACJ, specialised councils, including specialised ministerial councils, are also allowed to apply to the ACJ for advisory opinions, but no further reference to this point is made in the paragraph to clarify the status of councils. These councils find their legal basis in the term of Arts. 2 and 4 of the Pact of the Arab League.

At present about eleven Councils have been established within the Arab League system and they may be authorised by the League Council to request the Court to issue an advisory opinion. Relating to this point the following question may be raised: Could the Councils created under the provisions of the Collective Security Treaty be treated as Councils falling under the provision of para. 2 of Art.

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[194] *Cf.* Rosenne, *The Law and Practice*, *supra* note 2, p. 673; Pratap, *The Advisory Jurisdiction*, *supra* note 184, p.p. 72-73.

[195] Review of the Role of the International Court of Justice, Report of the Secretary-General, UN Doc. A/8382, para. 299 (15 September 1971). Also see the Philippines proposals to amend Art. 96 of the Charter of the UN which was presented to the Special Committee on the Charter of the United Nations and on Strengthening the Role of the Organisation. This proposal read as follows: "The General Assembly, the Security Council, or the Secretary-General may request the International Court of Justice to give an advisory opinion on any legal question." UN Doc. A/32/33, (1976) p. 190; also *Cf.* Szasz, Advisory Competence of the World Court, *supra* note 185, p. 541; Keith, *The Extent of the Advisory Opinion*, *supra* note 177, p. 38; Schwebel, *Justice in International Law*, *supra* note 49, p.p. 75-81.

50 of the draft Statute of the ACJ; if so, could they be authorised to apply to the ACJ for advisory opinions? As the ACJ has not yet been created it is not possible to predict which Specialised Councils, be they under the provisions of the Arab League Pact or the Collective Security Treaty, will be so authorised, but para. 2 of Art. 50 provides that Specialised Ministerial Councils too may authorised by the League Council. It is submitted that the Arab draftsmen did not limit the number of organs that can exercise the right of requesting advisory opinions. Giving specialised ministerial councils such a right may cause, however, some problems, if all of them are authorised by the Arab League Council; the problem may be one of a conflict of jurisdiction between different councils. Regular meetings are now held at the ministerial level to deal with most subjects that may strengthen inter-Arab relations. The ministerial level include interior ministers, information ministers, economic ministers, information ministers etc. It is submitted that if any legal question needs to be submitted to the Court's opinion, it should be submitted to the Court by the Secretary-General, not by the ministerial council involved.

Furthermore, the reference to specialised Arab organisations in the wording of para. 2 of Art. 50 is restricted to organisations created within the Arab League system. This means that other Arab organisations created outside the Arab League are not allowed to request advisory opinions from the Court. Since the creation of the Arab League in 1945, many Arabic regional organisations have been created in order to regulate relations between the Arab states within the framework of the League in different fields, such as the Organisation of Administrative Science;

the Arab Union of Telecommunications; the International Arab Organisation for Social Defence against Crime; the Arab League Educational, Cultural and Scientific Organisation; the Arab Organisation for Health; the Arab Organisation for Agricultural Development; the Arab Satellite Communication Organisation; the Arab Postal Union; the Arab Sates Broadcasting Union; the Arab Labour Organisation and the Organisation of Youth Welfare.[196]

It is to be remembered that the ACJ, when accepting any legal question submitted to it by any of the above mentioned organs or councils, should consider two main points: (1) that an applicant organ or council has an authorisation from the League Council, (2) that the given question falls within the scope of the activities of the authorised body.[197] Therefore, if the Court finds that a given question does not fall within the functions of an authorised body, it is entitled not to respond. For the sake of comparison, the words of the ICJ in case concerning the Legality of the Use by a State of Nuclear Weapons in Armed Conflict, may be cited:[198]

> "For all these reasons, the Court considers that the question raised in the request for advisory opinion submitted to it by the WHO does not arise 'within the scope of [the] activities' of that organization as defined by its constitution....."

5. 4. 2. The Subject-matter of Requests

Art. 50 (1) of the draft Statute of the ACJ limits the subject-matter of requested advisory opinions only to a 'legal question' without giving any further

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[196] For further details about these organisations see Shihab, Mufeed M., *Jami'at ad Dowal al 'Arabiyah: Mithaquha wa Injazatuha*, (The League of Arab States: its Charter and Implementations), al Qahirah: Ma'had al Buhuth wad Dirasat al 'Arabiyah, (1978) p.p. 270-365.

[197] Similarly Rosenne, *The Law and Practice, supra* note 2, p. 986.

[198] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* case, *ICJ Rep.*, (1996) p. 84, [para. 31].

definition: "The League Council may request the Court to provide its advisory opinion on any legal question." Therefore, it becomes necessary to refer to the practice of the ICJ to understand what "legal question" means.

A. Legal and Political Questions

The main reason the draft Statute of the ACJ makes clear that advisory opinions can only be asked on legal questions is to avoid requests for opinions on political questions. In other words, the ACJ can only give an advisory opinion based on law, and hence has no right to give opinions *ex aequo et bono* as in contentious cases.[199] However, a clear distinction between the two notions 'political' and 'legal' is not easy, and in many ways the distinction would depend on the way the request is made. In his separate opinion in the Namibia advisory opinion, Judge Nervo declared:[200]

> "The question put to the Court by the Security Council can be said to intertwined with certain political problems, but the actual wording of such question, asking the Court what are the legal consequences for States of the continued presence of South Africa in Namibia, indicates that the position is in fact a legal one even if it may have a political aspect. In the nature of things it could not be otherwise. The line between political and legal question is often vague. Examining the close inter-relation between the political and legal factors in the development of international law, Dr. Rosenne makes the following comments:
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> 'The interrelation explains the keenness with which elections of member of the Court are conducted...But that interrelation goes further. It explains, the conflict of ideologies prevalent today regarding the Court.' (Rosenne, *The Law and Practice of the International Court*, Vol. I, p. 4.)"

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[199] Greig, D. W., The Advisory Jurisdiction of the International Court and the Settlement of Disputes Between States, 15 *ICLQ* (1966) p. 325; Pratap, *The Advisory Jurisdiction*, *supra* note 184, p. 86.

[200] *Legal, Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, *ICJ Rep.*, (1971) p. 103.

The fact that political motivation is often at the root of requests for opinions is not very important, as long as the Court can answer the question using law, by giving a legal basis to its opinion. This has been shown clearly in the opinion delivered by the ICJ in the Conditions of Admission case, when the Court declared:[201]

> "It has nevertheless been contended that the question put must be regarded as a political one and that, for this reason, it falls outside the jurisdiction of the Court. The Court cannot attribute a political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task, the interpretation of a treaty provision. It is not concerned with the motives which may have inspired this request, nor with the considerations which, in the concrete case submitted for examination to the Security Council, formed the subject of the exchange of views which took place in that body. It is the duty of the Court to envisage the question submitted to it only in the abstract form which has been given to it; nothing which is said in the present opinion refers, either directly or indirectly, to concrete cases or to particular circumstances."

The political background of this request for an opinion is obvious. The General Assembly, asking for this opinion, did not want a clarification on a particular legal question, but was facing a difficult situation with one of its members, the Soviet Union, which as a member of the Security Council systematically used its veto to oppose states asking to become members of the UN. The question regarding application for membership had led then to a real fight between the East and West blocs. A political matter was hidden behind the request for an opinion, but the ICJ did not consider it and gave to its advisory opinion a legal basis with reference to Art. 4 of the Charter of the UN regarding the admission of new members.

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[201] *Conditions of Admission of A State to Membership in the United Nations (Article 4 of the Charter), ICJ Rep.*, (1948) p. 61.

In the case of Expenses of the UN, the ICJ had to answer the question whether member states were legally obliged, under threat of sanction, to give money for UN peace keeping? Should the cost of these operations be considered as an expense of the Organisation as defined by Art. 17 (2) of the Charter of the UN? Some states answered it negatively, but did not oppose the suggestion of consulting the Court, in spite of the fact that the matter appeared to be more political than legal and may not have fallen under its competence. The Court decided expenses were authorised by Resolutions of the GA of the UN as the Organisation's expenses as defined in the Art. 17 (2) of the Charter.[202] The ICJ made a distinction between the 'political character' of a question and its 'political importance'. It has been considered that most of the interpretations of the UN Charter have a political importance, however, a political character could not be attributed to a request regarding a judicial task, such as the interpretation of a conventional obligation.[203]

Most of the questions submitted to the Court for advisory opinions have been born in a political context; but the Court has always distinguished, in the request, between the political background and the topic of the request that has to be legal. Such a distinction between the political motivation and the legal motivation of a request may appear trivial, if reality were not taken into consideration. The jurisprudence of the ICJ is constant on the matter, as confirmed by its advisory

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[202] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), ICJ Rep.*, (1962) p.p. 179-180.

[203] *Ibid.*, p. 155.

opinion on the Interpretation of the Agreement between WHO and Egypt.[204] The facts were simple: the General Manager of WHO referred a question to the Court in order to gain advice as to when the WHO could transfer its Regional Office from the territory of Egypt without regard to the provisions of Section 37 of the Agreement between the WHO and Egypt of 25th March 1951. This transfer would be done without breaching Section 37 of the agreement of 25th March 1951 between the WHO and Egypt. The agreement stated that privileges and immunities would be extended by Egypt to the WHO, and Section 37 refers to potential revision or denunciation of the agreement, which provided that two years' notice would be required for one of the parties to denounce the agreement. When the legal question was referred to the Court for an advisory opinion, the judicial question was: what are the judicial principles and rules applicable to the matter of knowing what conditions of transfer are applicable to take the regional office out of Egypt?[205] The real point was not based on law, but on a political quarrel without any link to health matters. In his separate opinion, Judge Gros said: "Such being the factual situation, the legal 'cause' for the request for transfer of the Alexandria office is a political decision by a group of member States of the WHO."[206]

In this case, a majority of member states of the WHO wished to see the regional office of the organisation transferred to another country.[207] There was a

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[204] *Interpretation of the Agreement of 25 March 1951 between WHO and Egypt, ICJ Rep.*, (1980) p. 73.
[205] *Ibid.*, p. 89, [para. 36].
[206] *Ibid.*, p. 99.
[207] Separate opinion of Judge Lachs, *Ibid.*, p. 108.

major disagreement between the host state, Egypt, and other states in the region which the advisory opinion of the ICJ did not consider. The Court examined whether Section 37 of the agreement was applicable and expounded only the legal principles and rules applicable to a transfer in answering the request: what are the legal consequences of the reciprocal obligations between Egypt and the organisation if one of them wished the office to be transferred?[208] When giving its opinion, the Court identified the legal principles and rules which would impose some obligations on the parties and did not consider the fact that the quarrel was linked to a political dispute which started with the 'Camp David' agreement in 1978 between Egypt and Israel.[209]

B. Legal Questions and Questions of Fact

As already mentioned, the ACJ has only the competence to give opinions on legal questions. One may ask, what if a question of fact appears before the Court; does it have the competence to deal with it? The answer is not known yet, because the ACJ is not yet established, but if it were to follow the practice of the ICJ or its predecessor the PCIJ, it would then refuse to deal with questions of fact in advisory matters. It is to be noted that the jurisprudence of the two world courts, the PCIJ and the ICJ, has been constant on this point.

During the period of the PCIJ, the question of fact referred to it concerned the Status of Eastern Carelia' which was a territory under Soviet control.[210] Despite the peace treaty of Dorpat in 1920 which provided for independence for East

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[208] *Ibid.*, p. 95, [para. 48].
[209] *Ibid.*, p. 97.
[210] *Status of Eastern Carelia*, Advisory Opinion, *PCIJ* (1923) Ser. B, No. 5, p. 7.

Carelia, the Soviet Union put down every efforts of resistance. Finland then applied to the Council of the League of Nations, claiming that the matter should be submitted to the PCIJ for an advisory opinion. Did the peace treaty involve an international engagement between the Soviet Union and Finland as parties? The Soviet government declared that the matter of Eastern Carelia was purely a matter of Soviet domestic jurisdiction and refused to continuance any discussion of it. The PCIJ, invoking legal reasons did not give an opinion. It considered that the lack of essential material information necessary to give an opinion on question of fact was decisive. The refusal of the Soviet government to supply the necessary information prevented it from giving an opinion. The Court did not attempt to discuss the subject, as the Soviet Union as a directly involved party refused to deliver the required factual details. The Court thus refused to reach a decision on a question of fact if this question was the topic of the request.[211] This does not mean that the Court does not attach any importance to the facts of the situation. This was the situation in the opinion of the ICJ on the legal consequences of the presence of South Africa in Namibia:[212]

> "The Reference in this provision [Article 96 of the Charter] to legal questions cannot be interpreted as opposing legal to factual issues. Normally, to enable a court to pronounce on legal questions, it must also be acquainted with, take into account and, if necessary, make findings as to the relevant factual issues."

South Africa argued that the question was not a legal question according to Art. 96 of the Charter of the UN, considering the importance of factual matters

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[211] *Ibid.*, p. 28.

[212] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, ICJ Rep.*, (1971) p. 27; for further details see Keith, *The Extent of the Advisory Opinion, supra* note 177, p. 82.

relevant for the opinion. Before saying that South Africa had breached its obligations in Namibia, the ICJ had to make a concise analysis of the facts, to assess the lack of validity in measures taken by South Africa regarding Namibia. In its opinion regarding Western Sahara, the Court confirmed what it had already said earlier: it had to establish facts in order to evaluate their legal significance.[213] Once the facts are ascertained and analysed the Court can then attach to them a legal significance and then answer the question addressed to it legal terms. In this case, the Court said:[214]

> "The Court therefore considers that the information and evidence before it are sufficient to enable it to arrive at a judicial conclusion concerning the facts which are relevant to its opinion and necessary for replying to the two questions posed in the request."

C. Pending Legal Questions between one or more States

Neither the draft Statute of the ACJ nor its draft Rules mention the particular issue of a pending legal question. Why is it important to discuss this point of pending legal questions in the context of the advisory jurisdiction of the ACJ? It is submitted that the Court cannot give its opinion without the consent of the parties, and it also cannot give its opinion without a request admitted to it from an authorised organ.[215] The PCIJ pointed to this problem in the Status of Eastern Carelia case, when Finland requested the Council of the League of Nations to ask the Court about the dispute between Finland and Russia regarding Carelian independence. The Court concluded that giving an advisory opinion would be comparable with judging a dispute between two states, because the question

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[213] *Western Sahara, ICJ Rep.*, (1975) p.p. 19-20.

[214] *Ibid.*, p. 29.

[215] Similarly see Hudson, *The Permanent Court*, *supra* note 14, p. 486.

addressed to the Court was not of one abstract law. It directly involved the essential point of conflict between Russia and Finland, and could not be answered without a previous inquiry. It declared:[216]

> "The question put to the Court is not one of abstract law, but concerns directly the main point of controversy between Finland and Russia, and can only be decided by an investigation into the facts underlying the case. Answering the question would be substantially equivalent to deciding the dispute between the parties."

In the Interpretation of Peace Treaties advisory opinion, the incompetence of the Court was pointed out, and it was argued that the opinion concerned a dispute between states some of whom had not agreed to the competence of the Court. Bulgaria, Hungary and Romania were not then member states of the UN. However, the Court rejected this argument and affirmed that in an advisory case, its competence was not dependent on the agreement of states as in a contentious case, even if the request of an advisory question concerned a legal question actually pending between states. The Court explained this by the fact that the answer given was only advisory and so could not have any compulsory effect. It did not address its opinion to the states, but to the organisation qualified for asking it. In its opinion, the Court announced:[217]

> "Another argument that has been invoked against the power of the Court to answer Questions put to it in this case is based on the position of the Governments of Bulgaria, Hungary and Romania to the advisory procedure. The Court cannot, it is said, violating the well-established principle of international law according to which no pending between States can take place without their consent. This objection reveals a confusion between the principles governing contentious procedure and those which are applicable to Advisory Opinions."

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[216] *Status of Eastern Carelia*, Advisory Opinion, *PCIJ*, (1923) Ser. B, No. 5, p.p. 28-29.

[217] *Interpretation of Peace Treaties*, *ICJ Rep.*, (1950) p.p. 71-72.

In conclusion, it is expected that the ACJ will follow the practice of the two World Courts, the PCIJ and ICJ, regarding the subject-matter of the request advisory opinions. Only legal questions submitted to the projected ACJ by any authorised entity will engage the consideration of the Court, while political questions will be outside the competence of this Court. The same could be said regarding questions of fact, the ACJ has to refuse to deal with these kind of questions.

5. 4. 3. The Competence of the ACJ Regarding Advisory Opinions

The draft Statute of the ACJ does not give any details on this point. It just states that the Court, when exercising its advisory jurisdiction, will apply whatever it deems suitable among the provisions of the Statute and the Rules of the Court.[218] Therefore, it is meaningful to refer to the precedents set by the judges of the PCIJ and ICJ, all the more as the draft Statute of the ACJ is unclear. It will be the Arab Judge's role to ascertain and define the scope of the ACJ's advisory jurisdiction.[219] Nonetheless at present, the only model available to clarify the matter is found in precedents established by the PCIJ and the ICJ in addition to the interpretations given in the advisory opinions delivered by its judges.

A. Assessment Competence given to the ACJ

Art. 65 (1) of the Statute of the ICJ provides that the Court 'may' not 'must' give an advisory opinion on any legal question. This means the Court has no compulsory obligation to answer a request for advisory opinion. It has discretion

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[218] Art. 50 (4) of the draft Statute of the ACJ.

[219] Ben Miled, *The Competence of the ACJ, supra* note 22, p. 89.

to decide the given points in each case. Despite this freedom allowed by its Statute, the ICJ has announced that decisive reasons would be required for the Court not to give an answer to the requested advice.[220]

The draft Statute of the ACJ is not clear on this point because the wording of Art. 50 refers to the entities that can request the Court for an advisory opinion, but neither this nor any other Article provides clearly for the power of the Court to accept or reject advisory opinion requests. Therefore, with due regard to the fact that the draft Statute of the ACJ is based, concerning most of its Articles, on the provisions of the Statute of the ICJ, Art. 50 of the draft Statute should not be interpreted differently from Art. 65 of the Statute of the ICJ. If the ACJ was obliged to respond to advisory opinion requests, the wording of Art. 50 should have been imperative.

It is believed that the Arab judges will be quite free to receive and accept advisory opinion requests. Even if they were to reject an advisory opinion request, they would have to justify this refusal as ICJ judges have to.[221] The ICJ judges, as mentioned before, have refused to accept a request when it concerned a point mainly relevant to the domestic jurisdiction of states, or when the question asked was not legal in nature, or if the judges would have to evaluate the content of a

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[220] *Interpretation of Peace Treaties* case, *ICJ Rep.*, (1950) p. 71; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* case, *ICJ Rep.*, (1951) p. 19; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, *ICJ Rep.*, (1962) p. 155.

[221] Ben Miled, *The Competence of the ACJ*, *supra* note 22, p. 90.

pending dispute. Although not obliged to answer, the ICJ judges have always justified refusals. Dillard, in his separate opinion declared:[222]

> "Article 65 of the Court's Statute confers on it ample discretion to refuse to render an advisory opinion. There is no logical inconsistency, therefore, in holding that while there was no dispute within the intended meaning and application of Article 32 there may yet be such elements of controversy and complicated factual issues as to warrant the Court in refusing on the ground of propriety from responding to the request for an opinion. The jurisprudence of the Court, especially as revealed in the *Administrative Tribunal* case (*ICJ Reports 1956, p. 86*) and the *Certain Expenses* case (*ICJ Reports 1962, p. 155*) suggests that this discretionary power will not be exercised unless there are "compelling reasons" for doing so. The reasons in this instance are not sufficiently compelling."

The ICJ uses its right of assessment as soon as the request is lodged with the Court. Under Art. 62 (2) of its Statute, the matter on which the advice is sought must be worded clearly. In most cases, however, the Court has had to determine the scope of the question referred to it and sometimes interpret it. In doing so, the ICJ has asserted itself the right to interpret the Charter of the UN, as part of the regular practice of its judicial attributions, because both Art. 65 of the Statute and Art. 96 of the Charter provide that an advisory opinion can be given on any legal matter, and interpreting the UN Charter is definitely a legal matter.[223]

B. Assimilating Contentious and Advisory Procedures

A desire to include such a possibility is clearly found in Art. 50 of the draft Statute of the ACJ. The Article set up a general rule to the effect that the Court

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[222] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), ICJ Rep.*, (1971) p. 156.

[223] In *Conditions of Admission of a State to Membership in the United Nations, (Article 4 of the Charter), ICJ Rep.*, (1948) p. 61, the Court states:

> "it has been maintained that the Court cannot reply to the question put because it involves an interpretation of the Charter. Nowhere is any provision to be found forbidding the Court, 'the principal judicial organ of the United Nations', to exercise in regard to Article 4 of the Charter, a multilateral treaty, an interpretive function which falls within the normal exercise of its judicial powers."

can apply any of provisions of the Statute and the Rules when it exercises its advisory jurisdiction. Does Article 50 allow the Arab judges to apply a rule of contentious procedure in the sphere of advisory jurisdiction? Art. 50 should be interpreted as not being categorical in this respect; it gives the ACJ the possibility to apply or not to apply contentious procedure rules with a large scope of assessment. It is surprising that the draft Rules of the ACJ do not contain a provision to regulate the advisory jurisdiction of the Court. In contrast, Art. 102 (2) of the 1978 Rules of the ICJ, for example, mentions explicitly this point when it provides:

> "the Court shall also be guided by the provisions of the Statute and of these Rules which apply in contentious cases the extent to which recognize them to be applicable. For this purpose, it shall above all consider whether the request for the advisory opinion relates to a legal questions actually pending between two or more States."

5. 4. 4. Scope of Advisory Opinions

Is an advisory opinion binding? Does it impose any obligations upon the parties in the same way as a judgment in contentious case does? Neither the Statute of the ICJ nor the draft Statute of the ACJ include any provisions regarding this question. This is surprising, all the more as both Statutes are very clear about contentious jurisdiction. Art. 44 (2) of the draft Statute of the ACJ provides:[224]

> "The decision of the Court shall be binding upon the parties and within the scope of the resolved dispute."

This means the decision of the ACJ will, in contentious cases have only relative authority, and will be obligatory only upon the parties concerned; but its opinions will have only optional consequences in which the entity which has

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[224] The same provision could be found in Art. 59 of the Statute of the ICJ in which it provides that:
"The decision of the Court has no binding force except between the parties and in respect of the particular case."

requested the opinion has the right to comply with it or not. International lawyers are practically unanimous in their view that advisory opinions are not legally binding.[225] Hudson argued in this regard:

> "Advisory Opinion of 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 it is a decision under Article 59. [Then he added]: Through the authority of the Court is not be lightly disregarded, it gives to the Court's opinion only a moral value. The fact the 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."[226]

On the other hand, it is possible for any body authorised by the UN General Assembly to request an advisory opinion from the ICJ and accept it as binding. This may happen when a particular organisation is one of the parties and a state is another, and both conclude a bilateral treaty or constituent instrument, in which they include their advance acceptance of an advisory opinion.[227] In its opinion in the Administrative Tribunals case, the ICJ declared:

> "Under Article XII of the Statute of the Administrative Tribunals, the Opinion thus requested will be "binding". Such effect of the Opinion goes beyond the scope attributed by the Charter and by the Statute of the Court on advisory opinion. However, the provision in question is nothing but a rule of conduct for Executive Board, a rule determining the action to be taken by it on the Opinion of the Court. It in no wise affects the way in which the Court functions; that continues to be determined by it Statute and Rules. Nor does it affect the reasoning by which the Court forms its opinion or the content of the Opinion itself."[228]

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[225] For example, see Pratap, *Advisory Jurisdiction*, *supra* note 184, p. 227; Ago, Roberto, Binding Advisory Opinion of the International Court of Justice, 85 *AJIL* (1991) p. 440; Hambro, Edvard, The Authority of Advisory Opinions of the International Court of Justice, 8 *ICLQ* (1954) p. 5.

[226] Hudson, *The Permanent Court*, *supra* note 14, p.p. 511-512; *Cf.* Judge Lauterpacht in his separate opinion, in the *Judgment of the Administrative Tribunals of the ILO upon Complaints Made against Unesco* case, *ICJ Rep.*, (1956) p. 47.

[227] Pratap, *The Advisory Jurisdiction*, *supra* note 184, p. 47; Hambro, Some Observations on the Jurisdiction of the ICJ, *supra* note 145, p. 150; Rosenne, *The Law and Practice*, *supra* note 2, p. 683.

[228] *Administrative Tribunals of the International Labour Organisation upon Complain made Against the United Nations Educational, Scientific Cultural Organization*, *ICJ Rep.*, (1956) p.p. 84-85; see also the following advisory opinions dealing with the same point: *Application For*

The ACJ could follow the same precedent set by the ICJ in this regard, all the more so as there are a considerable number of conventions and treaties between different organisations and states concluded within the framework of the Arab League mentioning this point. For example, Art. 10 of the agreement on Civil Aviation between Arab States confers future jurisdiction on the ACJ regarding appeals from a decision made by the Civil Aviation Council, in spite of the fact that this agreement does not say whether the ACJ will have a contentious or advisory jurisdiction. So it would be necessary for the ACJ to give an advice to the parties when they have recourse to it for a solution because the Civil Aviation Council cannot be a party to a contentious case. The opinion could be treated as binding on the basis of the previous acceptance of the parties to the Arab Civil Aviation Agreement.

If advisory opinions were non-binding in character, would the ACJ be obliged to treat its previous opinions as binding in subsequent opinions?. In other words, if an authorised body requests the ACJ to give an opinion on a particular matter, similar to one on which the Court has already issued an earlier opinion, will the Court be guided by its previous answer? As the draft Statute does not mention this point, the only way to find an answer is by referring to existing international practice. In his dissenting opinion, Koretsky stated that the ICJ is bound by its

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Review of Judgment No. 273 of the United Nations Administrative Tribunals, ICJ Rep., (1982) p. 336, [para. 25]; *Application For Review of Judgment No. 333 of the United Nations Administrative Tribunals, ICJ Rep.*, (1987) p. 32, [para. 26].

previous opinions, especially if the same legal conditions re-emerge in a new question referred to it for opinion. He argued:[229]

> "In discussing the meaning of the principle of *res judicata*, and its applicability in international judicial practice, its significance is often limited by the statement that a given judgment could not be considered as binding upon other States or in other disputes. One may sometimes easily fail to take into consideration the fact that *res judicata* has been said to be not only *pro obligatione habetur*, but *pro veritate* as well. And it cannot be said that what today was for the Court a *veritas*, will tomorrow be a *non-veritas*. A decision binds not only the parties to a given case, but the Court itself. One cannot forget that the principle of immutability, of the consistency of final judicial decision, which is so important for national courts, is still more important for international courts. The practice of the Permanent Court and of this Court shows the great attention they pay to former judgments, their reasons and opinions. Consideration must be given even to the question whether an advisory opinion of the Court, which is not binding for the body which requested it, is binding for the Court itself not *vi rationis* but *ratione vis* as well."

It is to be hoped that the ACJ will anchor coherence and logic in its jurisprudence and avoid contradictions from one case to another. It should not ignore its previous advisory opinions and should re-affirm them as long as circumstances remain the same. At the same time it should take into consideration in every single opinion it delivers the current needs for the development of Arab international law and international law.

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[229] *South West Africa* case, (Ethiopia v. South Africa; Liberia v. South Africa), *ICJ Rep.*, (1966) p.p. 240-241.

Concluding Remarks

1. The ACJ, like the ICJ and its predecessor the PCIJ, can decide contentious cases and give advisory opinions on any legal question submitted to it by any authorised organ of the Arab League. It was expected that this Court would have compulsory jurisdiction to decide cases, but this idea was strongly rejected by most states members of the Arab League. Therefore, the optional jurisdiction is the only choice available under the projected ACJ draft Statute. Optional jurisdiction means that no case can be decided by the Court unless the parties to the dispute agree.

2. It seems that the Arab draftsmen have followed the same provisions that regulate the jurisdiction *ratione personae* of the ICJ. This means, only states have *locus standi* and may be party to a contentious case. International organisations and individuals are automatically excluded from such a right. International organisations are only allowed to ask the Court legal questions in advisory opinions while individuals can only become parties to disputes in contentious cases if a dispute is submitted to the Court through their respective governments. Arab states cannot ask the Court for advisory opinions, this right is limited only to the authorised international organisations created within the Arab League system, provided the questions lie within the scope of their activities.

3. As a result of the regional characteristic of the ACJ, its draft Statute has adopted a new provision that governs the states which can be parties to the Statute. It is clear that only states members of the Arab League are *ipso facto* parties to the

Statute. Non-member states cannot become parties to the Statute, a difference from that provided for in ICJ Statute. Non-member states can, under certain conditions, appear before the Court without being parties to the Statute of the ACJ, but only in disputes relating the interpretation or application of a treaty concluded with one or more states that are members of the Arab League.

4. It seems that the Arab draftsmen were similarly influenced in adopting the provision regulating jurisdiction *ratione materiae* of the ICJ. Thus, in three ways Arab states can submit their disputes to the ACJ, (1) by special agreement or compromise, (2) by a compromissory clause in bilateral or multilateral treaty or (3) by accepting the jurisdiction of the Court as compulsory in one or in a number of disputes by using the optional clause system. It cannot be predicted which of the above three possibilities will be primarily used in the case of the ACJ, but the only thing that can be said is: only three Arab states have accepted the optional clause system with respect to the ICJ, namely, Egypt, Sudan and Somalia. It is expected that Arab states will most frequently use the jurisdiction of the Court (ACJ) on the basis of special agreements (compromise), because, as stated earlier, there the parties have a clear picture of the dispute to be referred to the Court. The Court, in turn, will be dependent on the agreement which sets the limits of its jurisdiction for that particular case.

Final Conclusion

I

The League of Arab States created in 1945 by seven independent Arab states, as the first model of regional international organisations in the world, has aimed at strengthening the relations between its member states in various fields and to support other Arab states gain independence from foreign rule. However, its founding states have failed to include in its Pact an effective system for the settlement of disputes. They have chosen only mediation as a political method to be used to a limited extent, in addition to arbitration as a quasi-judicial method. Concerning the creation of an Arab Court of Justice (ACJ), as a judicial organ, the only mention of it in the Pact of the Arab League is in Art. 19 which permits the future establishment of such a Court, if a two-thirds majority vote by member states is obtained.

Subsequently, member states of the Arab League realised that the creation of an ACJ within the League's system was a very important requirement, especially for justiciable disputes that can be solved only by using judicial methods. Accordingly, several attempts were made from the beginning of the 1950s up to the 1990s to create the Court, either by making a major reform to the original Pact of the Arab League or by proposing new Articles to be included in the Pact, in addition to proposed draft Statutes for the projected Court. Unfortunately, different legal and political motives have always caused delays or the shelving of those attempts which have been not found the true support of member states themselves.

The present thesis has concentrated on the last (1995) draft Statute, which has been influenced in most of its Articles by the Statute of the International Court of Justice (ICJ) at The Hague as well as other international courts such as, for example, the European Court of Justice (ECJ). Furthermore, in the draft Statute of the ACJ Islamic Shariah as a foundation for Muslim legal systems has also been included in addition to international law. The inclusion of Islamic Shariah serve two main purposes: (1) its application to the qualification of judges of the ACJ and (2) its application in cases that may be brought before the Court in addition to the sources of international law.

When discussing these two points related to Islamic Shariah, it appears that the draftsmen have not been fully successful in this matter. Their failure relates to the way they included Islamic Shariah in the draft Statute. They did not specify when and how it is to be applied, in addition to other principles and rules of international law. The inclusion of Islamic Shariah in the draft Statute of the ACJ can be a wise proposition if it is well tackled, defined and clarified, because it can be capable to deal in parallel with international law related international disputes.

The Arab draftsmen required that judges of the ACJ should be qualified in Islamic Shariah and international law, without going into any further details. It appears that Muslim jurists have their own views on this matter: the judiciary in Islamic thought is considered to be a religiously inspired matter and, therefore, whoever is appointed as a judge should possess a number of relevant qualifications, otherwise his appointment as well as his decisions may be null and void. The leading Hadith that supports this approach is when the Prophet said:

"Judges are of three types, one of whom will go to Paradise and two to Hell. The one who will go to Paradise is a man who know what is right and gives judgment accordingly; but a man who knows what is right and acts tyrannically in his judgment will go to Hell; and a man who gives judgment for people when he is ignorant will go to Hell."

Eight types of qualifications are needed in judges according Muslim jurists. The possession of the first three is unanimously agreed by jurists and should be present in every person appointed as a judge. They are: Islam, adulthood, and sanity. However, jurists disagree about the other five: Some consider them necessary for a person to be qualified as a judge while others consider them unnecessary. The qualification in question are: freedom, defect-free senses (able bodied), attainment of independent reasoning (ijtihad), manhood and probity. The question that arises here as to what is intended by the draftsmen of the ACJ draft Statute by the term "qualifications". If Muslim views prevail, then the religious nature of the judge's office will play a very important role in appointing judges. This would result in the exclusion of candidates from the appointment to this position in the ACJ because they are, for example, considered to be non-Muslims.

When comparing this approach with the practice that is normally followed when appointing judges of the ICJ, it is seen that political motives always play a role. It is thus not necessary that every candidate elected to this position is suitably qualified. In addition, the lack of the definition of the term 'to be qualified in international law' has led national groups to recommend some candidates for election as judges from acting diplomats or politicians, for example,

as a person qualified to hold the office of judge without having any knowledge of international law.

Again when the Arab draftsmen have included Islamic Shariah as a source to be applied in addition to the other sources of international law, they did not clarify the concept of Islamic Shariah. In particular, they did not specify its scope or how its sources are to be apply alongside other sources of international law. Shall it enjoy any priority in application? All these and other questions were expected to be answered by the draft Statute of the ACJ, but unfortunately, no answers were given.

Islamic Shariah has its own sources of legislation. The Quran is the supreme authority in Islam and is the primary legal source, the second source being the Sunnah of the Prophet, His sayings, deeds and approvals. All application of Islamic Shariah must start from these two divine primary sources. Ijtihad or (reasoning), is exerting one's reason to reach judgments on the basis of the Quran, and the Sunnah. This is another important source that can be invoked by those very specialised qualified jurists to find solutions to legal matters affecting Muslim life. For this reason, it was necessary that Islamic Shariah should have been explicitly defined and distinguished from international law, because each legal system has its own nature and is based on different sources of law.

Despite a progressive proposal nothing new has been included in the ACJ draft Statute regarding its jurisdiction. The Court has only optional jurisdiction depending on the approval of the parties to disputes. The ACJ would deliver binding judgments in contentious cases and has the power to give advisory

opinions on legal questions submitted to it by authorised organs of the Arab League. As in the case of the Statute of the ICJ, only states can appear before the ACJ with respect to contentious cases. The draft Statute of the ACJ includes additional limitations on states qualified to appear before it as it is specified that only Arab states parties to the Statute have this right. Non-member Arab states, which cannot become parties to the Statute, would have a right to recourse to the Court only if they are parties to bilateral or multilateral treaties concluded with one or more Arab states parties to the Statute of the ACJ, in relation to a dispute regarding the interpretation or application of a treaty, provided the treaty provides for such recourse. Arab international organisations and individuals are also excluded from contentious cases. On the other hand, Arab states parties to the draft Statute cannot directly request the Court for an advisory opinions. This right is only granted to some organs and specialised organisations established within the Arab League system, if they are accordingly authorised by the League Council. There is nothing new in the draft Statute of the ACJ which develops the system of *ratione materiae* jurisdiction of the Court. Cases, as with the ICJ, can be submitted to the projected ACJ either by special agreement (compromise), compromissory clause, or by unilateral declaration (optional clause).

II

The Arab League with its projected ACJ can both play a considerable role in the settlement of disputes in the Arab region if they are given the respect and support of the Arab states themselves. It is now time to reconsider not only the creation of the ACJ, but also the whole Pact of the Arab League, because many crucial events have happened since 1945. All the Arab states have become

independent, the international political strategy of Arab states in the League has changed in many fields. Thus, a thorough review of the Pact is more than needed in order to reflect new views and to respond to new needs. A reformed Pact should include a chapter dealing with the projected ACJ, just like the Charter of the United Nations does concerning the ICJ. It would also be important to enumerate explicitly the main organs of the Arab League in order to avoid any lack of misunderstanding in interpreting this point when the League Council wishes to authorise such an organ to request the Court for an advisory opinion.

Concerning the 1995 draft Statute of the ACJ, it appears that it was mostly influenced by the Statute of the ICJ. However, in some matters the Arab draftsmen have not succeeded to produce a suitable system to serve the Arab states needs. One of the most important legal problems ignored by the Arab draftsmen is that of the relationship between the ICJ as a World Court, and the ACJ as a regional Court. Neither the draft Statute nor the draft Rules of the ACJ oblige Arab states to have recourse to the ACJ as a first obligatory choice before they submit the dispute to the World Court (the ICJ). A conflict in jurisdiction between these two Courts may generate legal problems, especially if one Arab state desires to submit its dispute to the ACJ while the other wants to submit it to the ICJ. Furthermore, what would be the reaction of the ICJ if a party to a dispute rejects ICJ's jurisdiction by claiming that the ACJ has competence? How will the ICJ act if such reservation is expressed before it, despite the fact that the two Statutes, the ICJ Statute and the ACJ Statute, each grants its Court the competence to decide any dispute concerning their respective jurisdictions? It is hence

strongly recommended that the ACJ Statute should include a provision obligating Arab states to have recourse to the ACJ as a Court of first instance in order to settle their justiciable disputes. The ICJ could then in some circumstances, be used as a Court of appeal reviewing the decision rendered by the ACJ. If such provision is included, Arab states parties to the Statute of the ACJ will then be obliged to have recourse to this Court to settle their justiciable disputes rather then to refer to any other international court or tribunal. Furthermore, such a provision will settle any expected conflict of jurisdiction that may arise between the ACJ and the ICJ.

It is also recommended that the concept of the qualifications of judges in the draft Statute should be reconsidered. If Arab states decide to keep the present provisions which stipulate that judges of the Court must be qualified in Islamic Shariah, then the redrafting of Art. 6 of the draft Statute must include a deletion of 'and' in order to make it possible for the Court to comprise judges qualified in Islamic Shariah and other judges qualified in international law. This will help solve the legal problem that may arise when interpreting this Article and which results in the following two points:

(1) for those who are qualified in Islamic Shariah, the principles of Islamic Shariah would apply and to those qualified in international law, the practice of the ICJ would apply. This may help to select candidates according to their personal qualifications and not according to political desires. If Arab states can be assured that the personal qualifications of judges have been taken into account in this

matter, then the ACJ will comprise a high quality of members. This should increase the number of cases that may be submitted to it.

(2) making a clear distinction between the role of Islamic Shariah and the role of international law would help avoid clashes when the appointment of judges does not satisfying the requirements in one of the two systems. For example, a non-Muslim person could be appointed as a judge, especially with respect to cases to which principles of Islamic Shariah would apply. This would also be a problem to consider when a non-Muslim *ad hoc* judge is appointed.

Regarding the jurisdiction of the ACJ, reference may be made to the practice of the ICJ enabling a state freely to make any reservations or conditions in its declaration under Art. 36 (2) of the Statute of the ICJ. Therefore, it is expected also that the same thing will happen when the ACJ is created and its states parties decide to use its optional clause system. This is because Art. 22 of the draft Statute of the ACJ permits Arab states to make declarations either unconditionally or with conditions and reservations. It is recommended that the optional clause system of the ACJ is reconsidered, and the League Council authorised to draft a model clause or clauses limiting the freedom of states to invoke reservations and conditions they desire. This should strengthen the effective role of the Court's jurisdiction.

It is also worth reconsidering the scope of *ratione materiae* jurisdiction of the ACJ by granting Arab intergovernmental organisations the right to appear before the Court in contentious cases. It is also recommended to grant Arab intergovernmental organisations created outside the Arab League the right to

request the Court for an advisory opinion, and member states too should be authorised. However, if, for political reasons, this approach is rejected, then an alternative choice could be to include a clear provision in the draft Statute or in the reformed Pact of the Arab League giving the League Council the right to establish a new committee, or authorise one of the existing committees, to request advisory opinions on behalf of states or Arab intergovernmental organisations.

The most important potential problem that has not been discussed comprehensively in this thesis, and which is recommended for effort by future researchers discussing the ACJ as a regional Court, is the enforcement of decisions rendered by this Court. It is clear that the League Council will not be able to enforce a decision delivered by the Court which either party has not accepted. This incapability will remain even if the present Pact of the Arab League is reformed and further powers are granted to the League Council. Political motives always play a role when the matter of the enforcement of decisions by any international court or tribunal arises. So, the best recommended solution would be to follow the practice of the member states of the European Union by including a clear provision in their domestic laws to guarantee the binding nature and reliable enforcement of ACJ decisions.

Additionally, it is important to draft a new Article for the present draft Statute of the ACJ in order to make clear that the right to appear before the Court by states parties to the Statute remains even if that state loses its membership in the Arab League. It is submitted that if the draft Statute is signed and ratified as a separate treaty, Arab states that sign this treaty will remain parties to it, even if

they lose their membership of the Arab League. However, if the draft Statute is not open for signature independently but is treated as a part of the Arab League Pact, then if any state loses its membership of the Arab League, automatically it will lose its participation in the Statute of the ACJ.

It is submitted here that despite all criticisms that might be said on the draft Statute and draft Rules of the ACJ, or to its structure, composition and jurisdiction, the ACJ becomes an important organ that must to be created within the Arab League system. Its creation becomes not only a legal necessity but, in addition, a national requirement of all Arab states members of the Arab League. It is believed, especially according to the present circumstances in the Arab world, that Arab states have no choice but to go forward and with great confidence towards this judicial legal organ, even if it grants only optional jurisdiction. It is further believed that the ACJ which comprises Arab judges will be more capable to interpret the Pact of the Arab League, develop Arab and Muslim international law and fill the gap between the two international legal systems of Islamic international law and public international law. This Court will have more ability to understand Arab disputes and find the suitable legal solution for them.

Pact of the League of Arab States

Article 1

The League of Arab states is composed of the independent Arab states which have signed this Pact.

Any independent Arab state has the right to become a member of the League. If it desires to do so, it shall submit a request which will be deposited with the Permanent Secretariat General and submitted to the Council at the first meeting held after submission of the request.

Article 2

The League has as its purpose the strengthening of the relations between the member states, the coordination of their policies in order to achieve cooperation between them and to safeguard their independence and sovereignty; and a general concern with the affairs and interests of the Arab countries. It has also as its purpose the close cooperation of the member states, with due regard to the organisation and circumstances of each state, on the following matters:

A. Economic and financial affairs, including commercial relations, customs, currency, and questions of agriculture and industry.
B. Communications; this includes railroads, roads, aviation, navigation, telegraphs and posts.
C. Cultural affairs.
D. Nationality, passports, visas, execution of judgments and extradition of criminals.
E. Social affairs.
F. Health affairs.

ميثاق جامعة الدول العربية

المادة الاولى

تتألف جامعة الدول العربية من الدول العربية المستقلة الموقعة على هذا الميثاق. ولكل دولة عربية مستقلة الحق في أن تنضم إلى الجامعة، فإذا رغبت في الانضمام، قدمت طلبا بذلك يودع لدى الأمانة العامة الدائمة، ويعرض على المجلس في أول اجتماع يعقد بعد تقديم الطلب.

المادة الثانية

الغرض من الجامعة توثيق الصلات بين الدول المشتركة فيها، وتنسيق خططها السياسية، تحقيقا للتعاون بينها وصيانة لاستقلالها وسيادتها، والنظر بصفة عامة في شؤون البلاد العربية ومصالحها.

كذلك من أغراضها تعاون الدول المشتركة فيها تعاونا وثيقا بحسب نظم كل دولة منها وأحوالها في الشؤون الآتية:

أ- الشؤون الاقتصادية والمالية، ويدخل في ذلك التبادل التجاري والجمارك، والعملة، وأمور الزراعة والصناعة.

ب- شؤون المواصلات، ويدخل في ذلك السكك الحديدية، والطرق، والطيران، والملاحة، والبرق والبريد.

ج- شؤون الثقافة.

د- شؤون الجنسية، والجوازات،

والتأشيرات، وتنفيذ الأحكام وتسليم المجرمين.

هـ-الشؤون الاجتماعية.

و-الشؤون الصحية.

المادة الثالثة

يكون للجامعة مجلس يتألف من ممثلي الدول المشتركة في الجامعة، ويكون لكل منها صوت واحد مهما يكن عدد ممثليها.

وتكون مهمته القيام على تحقيق أغراض الجامعة، ومراعاة تنفيذ ما تبرمه الدول المشتركة فيها من اتفاقات في الشؤون المشار إليها في المادة السابقة، وفي غيرها.

ويدخل في مهمة المجلس كذلك تقرير وسائل التعاون مع الهيئات الدولية التي قد تنشأ في المستقبل، لكفالة الأمن والسلام، لتنظيم العلاقات الاقتصادية والاجتماعية.

المادة الرابعة

تؤلف لكل من الشؤون المبينة في المادة الثانية لجنة خاصة تمثل فيها الدول المشتركة في الجامعة. وتتولى هذه اللجان وضع قواعد التعاون ومداه، وصياغتها في شكل مشروعات اتفاقات تعرض على المجلس للنظر فيها، تمهيداً لعرضها على الدول المذكورة.

ويجوز أن يشترك في اللجان المتقدم ذكرها أعضاء يمثلون البلاد العربية الأخرى، ويحدد المجلس الأحوال التي يجوز فيها اشتراك أولئك

Article 3

The League shall possess a Council composed of the representatives of the member states of the League; each state shall have a single vote, irrespective of the number of its representatives,

It shall be the task of the Council to achieve the realisation of the objectives of the League and to supervise the execution of agreements which the member states have concluded on the questions enumerated in the preceding Article, or on any other questions.

It likewise shall be the Council task to decide upon the means by which the League is to cooperate with the international bodies to be created in the future in order to guarantee security and peace and regulate economic and social relations.

Article 4

For each of the questions listed in Article 2 there shall be set up a special committee in which the member states of the League shall be represented. These committees shall be charged with the task of laying down the principles and extent of cooperation. Such principles shall be formulated as draft agreements to be presented to the Council for examination preparatory to their submission to the aforesaid states. Representatives of other Arab countries may take part in the work of the aforesaid committees. The Council shall determine the conditions under which these representatives may be

permitted to participate and the rules governing such representation.

المثلين، وقواعد التمثيل.

Article 5

Any resort to force in order to resolve disputes between two or more member states of the League is prohibited. If there should arise among them a difference which does not concern a states' independence, sovereignty, or territorial integrity, and if the parties to the dispute have recourse to the Council for the settlement of this difference, the decision of the Council shall then be enforceable and obligatory.

In such case, the States between whom the difference has arisen shall not participate in the deliberations and decisions of the Council.

The Council shall mediate in all differences which threaten to lead to war between two member states, or a member state and a third state, with a view to bringing about their reconciliation.

Decisions of arbitration and mediation shall be taken by majority vote.

المادة الخامسة

لا يجوز الالتجاء إلى القوة لفض المنازعات بين دولتين أو أكثر من دول الجامعة، فإذا نشب بينهما خلاف لا يتعلق باستقلال الدولة أو سيادتها أو سلامة أراضيها، ولجأ المتنازعون ولجأ المتنازعون إلى المجلس لفض هذا الخلاف، كان قراره عندئذ نافذاً وملزماً.

وفي هذه الحالة لا يكون للدول التي وقع بينها الخلاف الاشتراك في مداولات المجلس وقراراته.

ويتوسط المجلس في الخلاف الذي يخشى منه وقوع حرب بين دولة من دول الجامعة، وبين أية دولة أخرى من دول الجامعة أو غيرها، للتوفيق بينهما.

وتصدر قرارات التحكيم والقرارات الخاصة بالتوسط بأغلبية الآراء.

Article 6

In case of aggression or threat of aggression by one state against a member state, the state which has been attacked or threatened with aggression may demand the immediate convocation of the Council

The Council shall by unanimous decision determine the measures necessary to repulse the aggression. If the aggressor is a member state, his vote shall not be counted in determining unanimity.

If, as a result of the attack, the

المادة السادسة

إذا وقع اعتداء من دولة على دولة من أعضاء الجامعة، أو خشي وقوعه فللدولة المعتدى عليها، أو المهددة بالاعتداء، أن تطلب دعوة المجلس للانعقاد فوراً.

ويقرر المجلس التدابير اللازمة لدفع هذا الاعتداء، ويصدر القرار بالإجماع، فإذا كان الاعتداء من إحدى دول الجامعة، لا يدخل في

government of the State attacked finds itself unable to communicate with the Council, the state's representative in the Council shall request the convocation of the Council for the purpose indicated in the foregoing paragraph. In the event that this representative is unable to communicate with the Council, any member state of the League shall have the right to request the convocation of the Council.

حساب الإجماع رأى الدول المعتدية.

إذا وقع الاعتداء بحيث يجعل حكومة الدولة المعتدى عليها عاجزة عن الاتصال بالمجلس، فلممثل تلك الدولة فيه أن يطلب انعقاده للغاية المبينة في الفقرة السابقة، وإذا تعذر على الممثل الاتصال بمجلس الجامعة، حق لأي دولة من أعضائها أن تطلب انعقاده.

Article 7

Unanimous decisions of the Council shall be binding upon all member states of the League; majority decisions shall be binding only upon those states which have accepted them.

In either case the decisions of the Council shall be enforced in each member state according to its respective laws.

المادة السابعة

ما يقرره المجلس بالإجماع يكون ملزماً لجميع الدول المشتركة في الجامعة، وما يقرره المجلس بالأكثرية يكون ملزماً لمن يقبله.

وفي الحالتين تنفذ قرارات المجلس في كل دولة وفقا لنظمها الأساسية.

Article 8

Each member state shall respect the systems of government established in the other member states and regard them as exclusive concerns of those states. Each shall pledge to abstain from any action calculated to change established systems of government.

المادة الثامنة

تحترم كل دولة من الدول المشتركة في الجامعة نظام الحكم القائم في دول الجامعة الأخرى، وتعتبره حقاً من حقوق تلك الدول، وتتعهد بأن لا تقوم بعمل يرمي إلى تغيير ذلك النظام فيها.

Article 9

States of the Arab League which desire to establish closer cooperation and stronger bonds than are provided for by this Pact may conclude agreements to that end.

Treaties and agreements already concluded or to be concluded in the future between a member state and another state shall not be binding or restrictive upon other members.

المادة التاسعة

لدول الجامعة العربية الراغبة فيما بينها في تعاون أوثق وروابط أقوى مما نص عليه هذا الميثاق، أن تعقد بينها من الاتفاقات ما تشاء لتحقيق هذه الأغراض. والمعاهدات والاتفاقات التي سبق أن عقدتها، أو التي تعقدها فيما بعد

دولة من دول الجامعة مع أيـة دولـة أخـرى، لا تلزم ولا تقيد الأعضاء الآخرين.

المادة العاشرة

تكـون القـاهرة المقـر الدائـم لجامعـة الـدول العربية، ولمجلس الجامعة أن يجتمع في أي مكـان آخر يعينه.

المادة الحادية عشرة

ينعقد مجلس الجامعة انعقاداً عاديـاً مرتـين في العـام في كـل مـن شـهري مـارس وسـبتمبر، وينعقد بصفة غير عادية كلما دعت الحاجة إلى ذلك بناء على طلب دولتين من دول الجامعة.

المادة الثانية عشرة

يكون للجامعة أمانة عامة دائمة تتـألف مـن أمين عام وأمناء مسـاعدين، وعـدد كـاف مـن الموظفين.

ويعـين مجلـس الجامعـة بأكثريـة ثلثـي دول الجامعة الأمين العام، ويعين الأمين العام بموافقـة المجلس، الأمناء المساعدين والموظفـين الرئيسـيين في الجامعة.

ويضع مجلس الجامعة نظاماً داخليـاً لأعمـال الأمانة العامة وشؤون الموظفين، ويكون الأمـين العام في درجـة سـفير، والأمنـاء المسـاعدون في درجـة وزراء مفوضـين، ويعـين في ملحـق لهـذا الميثاق أول أمين عام للجامعة.

Article 10

The permanent seat of the League of Arab States is established in Cairo. The Council may, however, assemble at any other place it may designate.

Article 11

The Council of the League shall convene in ordinary session twice a year, in March and in September. It shall convene in extraordinary session upon the request of two member states of the League whenever the need arises.

Article 12

The League shall have a permanent Secretariat General which shall consist of a Secretary-General, Assistant Secretaries and appropriate number of officials.

The Council of the League shall appoint the Secretary-General by a majority of two thirds of the states of the League. The Secretary-General, with the approval of the Council, shall appoint the Assistant Secretaries and the principal officials of the League.

The Council of the League shall establish an administrative regulation for the functions of the Secretariat General and matters relating to the staff.

The Secretary-General shall have the rank of Ambassador and the Assistant Secretaries that of Ministers Plenipotentiary.

The first Secretary-General of the League is named in an annex to this Pact.

Article 13

The Secretary-General shall prepare the draft of the budget of the League and shall submit it to the Council for approval before the beginning of each fiscal year.

The Council shall fix the share of the expenses to be borne by each state of the League. This may be reconsidered if necessary.

المادة الثالثة عشرة

يعد الأمين العام مشروع ميزانية الجامعة، ويعرضه على المجلس للموافقة عليه قبل بدء كل سنة مالية.

ويحدد المجلس نصيب كل دولة من دول الجامعة في النفقات، ويجوز أن يعيد النظر فيه عند الاقتضاء.

Article 14

The members of the Council of the League as well as the members of the committees and the officials who are to be designated in the administrative regulation shall enjoy diplomatic privileges an immunity when engaged in the exercise of their functions.

The buildings occupied by the organs of the League shall be inviolable.

المادة الرابعة عشرة

يتمتع أعضاء مجلس الجامعة، أعضاء لجانها وموظفوها الذين ينص عليهم في النظام الداخلي، بالامتيازات وبالحصانة الدبلوماسية أثناء قيامهم بعملهم، وتكون مصونة حرمة المباني التي تشغلها هيئات الجامعة.

Article 15

The first meeting of the Council shall be convened at the invitation of the head of the Egyptian Government. Thereafter it shall be convened at the invitation of the Secretary-General.

The representatives of the member states of the League shall alternately assume the presidency of the Council at each of its ordinary sessions

المادة الخامسة عشرة

ينعقد المجلس في المرة الأولى بدعوة من رئيس الحكومة المصرية، وبعد ذلك بدعوة من الأمين العام. ويتناوب ممثلو دول الجامعة رئاسة المجلس ي كل انعقاد عادي.

Article 16

Except in cases specifically indicated in this Pact, a majority vote of the Council shall be sufficient to make enforceable decisions on the following matters:

A. Matters relating to personnel.
B. Adoption of the budget of the League.

المادة السادسة عشرة

فيما عدا الأحوال المنصوص عليها في هذا الميثاق، يكتفى بأغلبية الآراء لاتخاذ المجلس قرارات نافذة في الشؤون الآتية:

أ- شؤون الموظفين.

C. Establishment of the administrative regulations for the Council, the committees and the Secretariat General.
D. Decisions to adjourn the sessions.

ب-إقرار ميزانية الجامعة.

ج-وضع نظام داخلي لكل من المجلس، واللجان، والأمانة العامة.

د- تقرير فض أدوار الاجتماع.

Article 17

Each member state of the League shall deposit with the Secretariat General one copy of treaty or agreement concluded or to be concluded in the future between itself and another member state of the League or a third state.

المادة السابعة عشرة

تودع الدول المشتركة في الجامعة، الأمانة العامة نسخاً من جميع المعاهدات والاتفاقات التي عقدتها أو تعقدها مع أية دولة أخرى من دول الجامعة أو غيرها.

Article 18

If a member state contemplates withdrawal from the League, it shall inform the Council of its intention one year before such withdrawal is to go into effect.

The Council of the League may consider any State which fails to fulfill its obligations under the Pact as having become separated from the League, this to go into effect upon a unanimous decision of the states, not counting the state concerned.

المادة الثامنة عشرة

إذا رأت إحدى، دول الجامعة أن تنسحب منها، أبلغت المجلس عزمها على الانسحاب قبل تنفيذه بسنة.

ولمجلس الجامعة أن يعتبر أية دولة لا تقوم بواجبات هذا الميثاق منفصلة عن الجامعة، وذلك بقرار يصدره بإجماع الدول عدا الدولة المشار إليها.

Article 19

This Pact may be amended with the consent of two thirds of the states belonging to the League, especially in order to make firmer and stronger the ties between the member states, to create an Arab Court of Justice, and to regulate the relations of the League with any international bodies to be created in the future to guarantee security an peace.

Final action on an amendment cannot be taken prior to the session following the session in which the motion was initiated.

المادة التاسعة عشرة

يجوز بموافقة ثلثي دول الجامعة تعديل هذا الميثاق، وعلى الخصوص لجعل الروابط بينها امتن وأوثق ولإنشاء محكمة عدل عربية ولتنظيم صلات الجامعة بالهيئات الدولية التي قد تنشأ في المستقبل لكفالة الأمن والسلام.

ولا يبت في التعديل إلا في دور الانعقاد التالي للدور الذي يقدم فيه الطلب. وللدولة

If a state does not accept such an amendment it may withdraw at such time as the amendment goes into effect, without being bound by the provisions of the preceding Article.

التي لا تقبل التعديل أن تنسحب عند تنفيذه، دون التقيد بأحكام المادة السابقة.

Article 20

This Pact and its annexes shall be ratified according to the basic laws in force among the High contracting parties.

The instruments of ratification shall be deposited with the Secretariat General of the Council and the Pact shall become operative as regards each ratifying State fifteen days after the Secretary-General has received the instruments of ratification from four states.

This Pact has been drawn up in Cairo in the Arabic language on this 8 Rabi' al Thani 1364, A.H. (March 22, 1945), in one copy which shall be deposited in the safe keeping of the Secretariat General.

An identical copy shall be delivered to each state of the League.

المادة العشرون

يصدق على هذا الميثاق وملاحقه وفقاً للنظم الأساسية المرعية في كل من الدول المتعاقدة، وتودع وثائق التصديق لدى الأمانة العامة، ويصبح الميثاق نافذاً من قبل من صدق عليه بعد انقضاء خمسة عشر يوماً من تاريخ استلام الأمين العام وثائق التصديق من أربع دول.

حرر هذا الميثاق باللغة العربية في القاهرة بتاريخ 8 ربيع الثاني سنة 1364 (22 مارس 1945) من نسخة واحدة تحفظ لدى الأمانة العامة.

وتسلم صورة منها مطابقة للأصل لكل دولة من دول الجامعة.

Draft
Statute of the Arab Court of Justice
Chapter One
Organisation of the Court

Article 1

1. The Arab Court of Justice established by the Pact of the League of Arab States shall be the principal judicial organ of the League, and shall function in accordance with the provisions of this Statute and its Rules.
2. The permanent seat of the League of Arab States shall be the permanent seat of the Court.
3. The Court may, when necessary, decide to sit and exercise its functions elsewhere whenever the Court considers it desirable.

Article 2

Member states of the League of Arab States are *ipso facto* parties to the present Statute.

Article 3

The Court shall frame Rules for carrying out its functions, and specify the procedures to be followed. It shall also lay down regulations pertaining to administrative and financial affairs in accordance with the current Rules of the League.

مشروع
النظام الأساسي لمحكمة العدل العربية
الفصل الأول
تنظيم المحكمة

المادة الأولى

1-تكون محكمة العدل العربية المنشأة طبقا "لميثاق جامعة الدول العربية" الجهاز القضائي الرئيسي للجامعة، وتعمل وفقا لأحكام هذا النظام ولأحكام نظامها الداخلي.

2-يكون المقر الدائم لجامعة الدول العربية مقرا دائما للمحكمة.

3-للمحكمة عند الاقتضاء وبقرار منها، عقد جلساتها في مكان آخر خارج مقرها.

المادة الثانية

الدول الأعضاء في جامعة الدول العربية أطراف في هذا النظام.

المادة الثالثة

تضع المحكمة نظاما داخليا يبين طريقة قيامها بوظائفها، ويحدد الإجراءات المتبعة لديها، كما تضع الأنظمة الخاصة بالشئون الإدارية والمالية وفق النظم المعمول بها في الجامعة.

Article 4

1. The Court shall have an independent budget which will be annexed to the budget of the League Secretariat General. Payment from such budget shall be in accordance with the provisions of the Court's financial regulations. Contributions of the member states to the budget of the Court shall be equal to the percentage contributed by each state to the budget of the League.
2. The Court shall make a draft of its budget and submit it to the League Secretary-General, who shall submit it to the League Council, pursuant to the administrative and financial Rules provided for in the League's regulation.

المادة الرابعة

1- تكون للمحكمة موازنة مستقلة تلحق بموازنة الأمانة العامة للجامعة ويتم الصرف منها وفق أحكام النظام المالي للمحكمة، وتكون مساهمة الدول الأعضاء في موازنة المحكمة بنسبة مساهمتها في موازنة الجامعة.

2- تعد المحكمة مشروع موازنتها وتقدمه إلى الأمين العام للجامعة لعرضه على مجلس الجامعة، وذلك وفقا للإجراءات الإدارية والمالية المنصوص عليها في أنظمة الجامعة.

Article 5

1. The Court shall appoint its Registrar and a sufficient number of employees to assist him. The administrative and financial Rules provided for in Article 3 shall specify their rights, duties, positions and remunerations.
2. Before carrying out his duties, the Registrar shall take the following oath before the Court: "I swear by Allah Almighty that I will perform the duties of my office faithfully, honourably and impartially, and observe the confidentiality of the Court's activities".

المادة الخامسة

1- تعين المحكمة مسجلا لها، وعددا كافيا من الموظفين يساعدونه، وتحدد الأنظمة الخاصة بالشئون الإدارية والمالية المنصوص عليها في المادة الثالثة حقوقهم وواجباتهم ومعاملتهم المالية والوظيفية.

2- يؤدي مسجل المحكمة قبل مباشرته مهامه أمام هيئة المحكمة اليمين التالية: " أقسم با لله العظيم أن أؤدي واجبات وظيفتي بصدق وأمانة وحياد وأن أحافظ على سرية أعمال المحكمة".

Chapter Two
Court Judges, their Selection, and Organisation of their Duties

الفصل الثاني
قضاة المحكمة وشروط اختيارهم وتنظيم عملهم

Article 6

The Court shall be composed of a body of independent Judges who are citizens of member states, and are persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial office, or are jurisconsults of recognised competence in Islamic Shariah (*Islamic Law*)[1] and International Law.

المادة السادسة

تتكون هيئة المحكمة من قضاة مستقلين من بين مواطني الدول الأعضاء، ذوي الصفات الخلقية العالية الحائزين في بلادهم للمؤهلات المطلوبة للتعيين في أرفع المناصب القضائية، ومن المشهود لهم بالكفاءة في الشريعة الإسلامية والقانون الدولي.

Article 7

1. The Court shall consist of seven Judges elected from candidates.
2. Each member state shall be entitled, upon the invitation of the League's Secretary-General, to nominate one of its citizens, at least two months before the date of the election.
3. Elections shall be run according to the League's Council decision, by secret ballot, from a list of persons which shall be prepared by the League's Secretary-General containing the names of the candidates in alphabetical order.

المادة السابعة

1- تتألف المحكمة من سبعة قضاة ينتخبون من بين المرشحين.

2- لكل دولة عضو أن ترشح شخصا واحدا من مواطنيها قبل موعد الانتخاب بشهرين على الأقل، بناء على دعوة يوجهها الأمين العام للجامعة.

3- يتم الانتخاب بالاقتراع السري بقرار من مجلس الجامعة، ومن قائمة يعدها الأمين العام للجامعة تضم أسماء المرشحين مرتبة وفق الحروف الهجائية.

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[1] *Italics added.*

Article 8

No more than one Judge of the same nationality may be appointed as a member of the Court. If a nominee is a national of more than one Arab state, he shall be deemed to possess the nationality of the state which nominates him as a candidate.

المادة الثامنة

لا يجوز أن يكون عضوا بالمحكمة أكثر من قاض يحمل جنسية دولة بذاتها، فإذا كان المرشح يحمل جنسية أكثر من دولة عربية، اعتبر حاملا للجنسية التي تم ترشيحه على أساسها.

Article 9

A candidate shall be considered elected if he obtains the greatest number of votes in the ballot. In event of an equality, the eldest shall be considered as elected.

المادة التاسعة

يعتبر المرشح منتخبا إذا حصل على أكثر عدد من الأصوات في الاقتراع وفي حالة التساوي يعتبر منتخبا أكبر المرشحين سنا.

Article 10

1. The Judges shall be elected for a six years' renewable term.
2. The terms of three Judges elected in the first election shall expire at the end of three years.
3. Judges whose term of office is to expire at the end of the above-mentioned period shall be selected by lot drawn after the end of the first election, by the Secretary-General.
4. The Court shall elect its President and Vice-President for a two years' term, renewable for a similar duration.

المادة العاشرة

1- ينتخب القضاة لمدة ست سنوات قابلة للتجديد.

2- تنتهي ولاية ثلاثة من القضاة الذين تم اختيارهم في الانتخاب الأول بعد انقضاء ثلاث سنوات.

3- يحدد هؤلاء القضاة الذين تنتهي ولايتهم بناء على القرعة التي يجريها الأمين العام بعد انتهاء أول انتخاب.

4- تنتخب المحكمة رئيسها ونائبه لمدة سنتين قابلة للتجديد لمدد مماثلة.

Article 11

1. Each Judge shall take the following oath before taking up the duties of his office:
   "I swear by Allah Almighty that I will perform the duties of my office faithfully, honourably and impartially".
2. Oath taking shall be in an open

المادة الحادية عشرة

1- يؤدي كل قاض قبل مباشرة مهام منصبه اليمين التالية:

" أقسم با لله العظيم أن أؤدي مهام منصبي بصدق وأمانة ونزاهة."

session before the Court.

3. Oath taking shall be recorded in a special register, prepared specially for such purpose, which shall deposited with the Secretariat General.

2- يكون أداء اليمين في جلسة علنية، أمام هيئة المحكمة.

3- يثبت أداء اليمين في سجل خاص يعد لهذا الغرض ويودع لدى الأمانة العامة.

Article 12

The President and Registrar shall reside in the state where the seat of the Court is located.

المادة الثانية عشرة

يقيم كل من رئيس المحكمة والمسجل في دولة مقر المحكمة.

Article 13

Judges whose term of office expires shall continue to decide cases in which the pleadings have been closed and is pending judgment.

المادة الثالثة عشرة

يستمر القضاة الذين تنتهي مدة ولايتهم في نظر القضايا التي اختتمت فيها المرافعة وحجزت لإصدار الحكم.

Article 14

1. During his term of office, no Judge may:
   A) exercise any political or administrative function, taking up any duty in his capacity as an agent, counsel or advocate, or engage in any other occupation of a professional nature.
   B) participate in the decision of any case he has previously taken part in as agent, counsel, advocate or expert for one of its parties, or any case which has been previously laid before him in his capacity as a member of a national or international Court or a commission of inquiry or in any other capacity.
2. If doubt is raised regarding the compliance of any Judge with the provisions of the previous paragraph, the matter shall be

المادة الرابعة عشرة

1- لا يجوز للقاضي خلال مدة ولايته:

أ- تولي مناصب سياسية أو إدارية أو مباشرة عمل بصفته وكيلا أو مستشارا أو محاميا أو ممارسة أية مهنة.

ب-المشاركة في النظر في أية قضية سبق له أن كان وكيلا أو مستشارا أو محاميا أو خبيرا لدى أحد أطرافها، أو سبق عرضها عليه بصفته عضوا في محكمة وطنية أو دولية أو لجنة تحقيق أو بأية صفة أخرى.

2- إذا أثير شك حول التزام أحد القضاة بأحكام الفقرة السابقة تفصل المحكمة في الأمر.

settled by the decision of the Court.

3. A Judge whose term of office expires may not, within three years, work with any body that was a principal or intervening party in a case in whose decision that Judge participated. In a case of breach, the issue shall be submitted to the Court to take the appropriate action. However, an exception may be made on the basis of a reasoned decision.

3-لا يجوز للقاضي بعد انتهاء مدة ولايته العمل لدى جهة سبق له أن نظر في نزاع كانت هي طرفا أصليا أو متدخلا فيه وذلك لمدة ثلاث سنوات، وفي حالة المخالفة يعرض الأمر على المحكمة لاتخاذ الإجراء المناسب، ويجوز بقرار مسبب من المحكمة الاستثناء من هذا القيد.

Article 15

Judges of the Court may not be dismissed.

المادة الخامسة عشرة

قضاة المحكمة غير قابلين للعزل.

Article 16

The office of a Judge shall be deemed vacant in each of the following cases:

1. death;
2. resignation;
3. relieved from office.

The Secretary-General of the League shall forthwith inform member states immediately that an office has become vacant and seek nominations according to the provisions of Article 17 of this Statute.

المادة السادسة عشرة

يعتبر منصب القاضي شاغرا في إحدى الحالات التالية:

1-الوفاة

2-الاستقالة

3-الإعفاء

ويبلغ الأمين العام للجامعة الدول الأعضاء، فورا، بشغور المنصب، وفتح باب الترشيح مع مراعاة أحكام المادة السابعة عشرة من هذا النظام.

Article 17

1. If a Judge wishes to resign, he shall submit his resignation in writing to the President, who should inform the League Secretary-General and accordingly this position falls vacant.

المادة السابعة عشرة

1- إذا رغب أحد القضاة في الاستقالة، قدمها كتابة إلى رئيس المحكمة الذي يبلغها إلى الأمين العام للجامعة ويعتبر المنصب شاغرا بهذا الإبلاغ.

2. If a Judge ceases to be able to carry out his duties, he may not be relieved except by the unanimous agreement of the remaining Judges. Upon the issuance of a reasoned decision concerning his releived from his office and its communication to the League Secretary-General, his office shall be deemed vacant.
3. If the office of a Judge becomes vacant prior to the expiry of his term, a successor shall be elected for the remaining period and by the same procedure.

2- إذا فقد أحد قضاة المحكمة صلاحية الاستمرار في مباشرة مهامه، فلا يجوز إعفاؤه من منصبه إلا بإجماع باقي القضاة، ويصدر القرار بالإعفاء مسببا ويبلغ إلى الأمين العام للجامعة ويعتبر المنصب شاغرا بمجرد الإبلاغ.

3- إذا شغر منصب أحد القضاة قبل انتهاء مدة ولايته انتخب من يخلفه للمدة المتبقية، وبالإجراءات ذاتها.

Article 18

1. A Judge of the nationality of each of the parties may not be prevented from examining a case submitted to the Court.
2. If a Judge is a national of a state which is a party to the dispute, all the other parties may select a Judge *ad hoc* to participate in the decision of the case in question.
3. If no Judge in the Court is a national of one of the parties, each party may select a Judge *ad hoc*.
4. Should there be several parties in the same interest, they shall be considered one party with regard to the provisions of paragraphs 2 and 3 of this Article. Any doubt upon this point shall be settled by the decision of the Court.
5. A Judge ad hoc shall fulfil the conditions required by Articles 6, 11 and 14 of this Statute, and may participate in meetings, proceedings and in deciding judgments on an equal footing with the original Judges.

المادة الثامنة عشرة

1- لا يحول دون نظر القاضي في القضية المعروضة على المحكمة، أن يكون منتميا بجنسيته إلى أحد أطراف النزاع.

2- إذا كان أحد قضاة المحكمة منتميا بجنسيته إلى أحد أطراف النزاع، جاز لكل من الأطراف الآخرين أن يختار قاضيا خاصا يجلس للنظر في القضية محل النزاع.

3- إذا لم يكن من بين قضاة المحكمة قاض يحمل جنسية أحد أطراف النزاع، جاز لكل واحد من هذه الأطراف أن يختار قاضيا خاصا من قبله.

4- إذا كان لعدة أطراف نفس المصلحة في موضوع النزاع، اعتبروا طرفا واحدا بالنسبة إلى ما ورد في الفقرتين (2) و (3) من هذه المادة، وعند قيام شك في

هذا الشأن تفصل المحكمة في الأمر.

5- يجب أن تتوفر في القاضي الخاص الشروط المنصوص عليها في المواد السادسة و الحادية عشرة والرابعة عشرة من هذا النظام، ويشترك القاضي الخاص في الجلسات والمداولات وإصدار الأحكام على قدم المساواة مع القضاة الأصليين.

Article 19

1. If, for some special reason, a Judge considers that he should not take part in the decision of a particular case, he shall so inform the President. The President shall accordingly notify the Court.
2. If the President or any of the Judges considers that for some special reason one of the Judges should not take part in the decision of a particular case, the President shall notify the relevant Judge, stating the reasons on which this challenge is based. If the President and the impugned Judge disagree, the Court shall decide in accordance with the majority of the remaining members.
3. If there is a reason to prevent the President or Vice-President from participating in a particular case, the Court shall decide this matter by the unanimous agreement of its remaining members.

المادة التاسعة عشرة

1- إذا قدر أحد القضاة ما يقتضي تنحيه عن الاشتراك في نظر قضية بعينها، يستشعر الحرج بالفصل فيها، أخطر رئيس المحكمة بذلك، ويقوم الرئيس بإخطار هيئة المحكمة.

2- إذا رأى رئيس المحكمة أو أحد قضاتها أنه لا يجوز لقاضي من بينهم الاشتراك في نظر قضية معينة، أخطر رئيس المحكمة القاضي المعني بذلك، مع بيان الأسباب الموجبة لهذا الإجراء، وعند اختلاف الرئيس والقاضي المعنى، تفصل المحكمة بأغلبية باقي أعضائها في الأمر.

3- إذا قام سبب يحول دون اشتراك رئيس المحكمة ونائبه في نظر قضية معينة، فصلت المحكمة في الأمر بإجماع باقي أعضائها.

Article 20

A Judge *ad hoc* who was selected, shall be treated, with regard to remuneration, on the same basis as a Court Judge for the duration in which he exercises his functions.

المادة العشرون

يحدد مجلس الجامعة رواتب ومكافآت وبدلات قضاة المحكمة، ويعامل القاضي الخاص الذي يتم اختياره بذات المعاملة المالية لقضاة المحكمة عن المدة التي يباشر فيها عمله.

Chapter Three
Judicial Competence of the Court

الفصل الثالث
الاختصاص القضائي للمحكمة

Article 21

1. States which are parties to this Statute have the right to appear before the Court in accordance with the provisions of Article 22 of this Statute.
2. States which are not parties to this Statute may (with the consent of the League Council) resort to the Court to decide disputes pertaining to the interpretation and implementation of bilateral or multilateral treaties signed with any Arab states party to the Statute. Such states shall declare that they accept the Court's compulsory jurisdiction and shall abide by the implementation of its judgments and decisions without the need for a special agreement. This declaration shall be deposited with the Secretary-General of the League of Arab States.
3. States not parties to this Statute when resorting to the Court, shall have the same rights and privileges provided for by this Statute regarding states which are parties to it, and the Court shall determine the expenses to

المادة الحادية والعشرون

1- للدول الأعضاء في هذا النظام حق التقاضي أمام المحكمة مع مراعاة أحكام المادة الثانية والعشرين من هذا النظام.

2- للدول غير الأعضاء في هذا النظام (بموافقة مجلس الجامعة) حق اللجوء إلى المحكمة للفصل في النزاعات المتعلقة بتفسير وتطبيق الاتفاقيات الثنائية أو المتعددة الأطراف التي ارتبطت بها مع أي من الدول العربية الأعضاء، وذلك بإقرار منها بقبول الولاية الإلزامية للمحكمة والالتزام بتنفيذ أحكامها وقراراتها دون حاجة إلى اتفاق خاص بذلك، ويودع الإقرار لدى الأمين العام لجامعة الدول العربية.

3- تكون للدول غير الأعضاء، عند لجوئها إلى المحكمة، الحقوق والامتيازات ذاتها المنصوص عليها في هذا النظام بالنسبة

be borne by such states.

إلى الدول الأعضاء، وتقرر المحكمة ما يتعين على هذه الدول تحمله من مصاريف التقاضي.

Article 22

The Court's jurisdiction shall encompass the following disputes:

1. Disputes states which are parties to the Statute agree to submit to the Court. These disputes shall include all matters provided for in the Arab League Pact or treaties in force concluded between them.
2. Disputes arising from bilateral and multilateral agreements which provide for submission to the Court.
3. The states which are parties to the present Statute may at any time declare that they recognise as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

   A) the interpretation of international treaties;
   B) the existence of any fact which, if established, would constitute a breach of an international obligation;
   C) the determination of the nature or extent of the reparation to be made for the breach of an international obligation;
   D) any question of international law.

The declarations referred to

المادة الثانية والعشرون

تحدد ولاية المحكمة بالفصل في المنازعات التالية:

1- المنازعات التي تتفق الدول أطراف هذا النظام على إحالتها إلى المحكمة وتشمل جميع المسائل المنصوص عليها في ميثاق الجامعة العربية أو الاتفاقيات النافذة فيما بينها.

2- المنازعات التي تنص اتفاقيات ثنائية أو متعددة الأطراف على إحالتها إلى المحكمة.

3- للدول أطراف هذا النظام أن تصرح في أي وقت، بأنها بذات تصريحها هذا وبدون حاجة إلى اتفاق خاص تقر للمحكمة بولايتها الإلزامية في نظر جميع المنازعات القانونية التي تقوم بينها وبين دولة تقبل الالتزام نفسه متى كانت هذه المنازعات القانونية تتعلق بالمسائل الآتية:

أ) تفسير الاتفاقيات الدولية.

ب) التحقيق في أي واقعة يعتبر ثبوتها خرقا لالتزام دولي.

ج) تحديد نوع التعويض المترتب على خرق التزام دولي ومدى هذا

التعويض.

د) النظر في أي مسألة من مسائل القانون الدولي.

ويجوز أن تصدر التصريحات المشار إليها طليقة من القيد أو الشرط، أو أن تعلق على شرط أو قيد يحصرها في موضوع معين أو مدة محددة أو بشرط التبادل من جانب عدة دول أو دولة بذاتها ويودع التصريح لدى الأمانة العامة.

4- تفصل المحكمة في أي نزاع يتعلق بولايتها.

above may be made unconditionally, or on a condition which limits them to a certain matter or a specific period, or on a condition of reciprocity on the part of several or certain states. A declaration shall be deposited with the Secretariat General.

4. The Court shall decide in any dispute regarding its jurisdiction.

المادة الثالثة والعشرون

1- تفصل المحكمة في القضايا التي تعرض عليها، وفقا لميثاق الجامعة وقواعد القانون الدولي ومراعاة المصادر القانونية التالية:

أ) القواعد المعترف بها صراحة من قبل الأطراف المتنازعة، والتي تتضمنها الاتفاقيات الثنائية أو المتعددة الأطراف المبرمة فيما بينها.

ب) مبادئ الشريعة الإسلامية وأحكامها.

ج) قواعد العرف الدولي.

د) مبادئ القانون العامة المستقرة.

2- للمحكمة أن تستأنس بأحكام المحاكم

Article 23

1. The Court shall decide cases submitted to it in accordance with the Arab League Pact, principles of international law and pursuant to the following legal sources:
   A) the rules approved expressly by parties to a dispute or contained in bilateral and multilateral treaties signed by them.
   B) the principles and provisions of Islamic Shariah (*Islamic Law*).[2]
   C) the rules of international custom.
   D) the established general principles of law.
2. The Court may be guided by the judgments of other Courts and the opinions of senior Shariah

[2] *Italics added.*

and law scholars from various States.

3. The Court may decide a case *ex aequo et bono*, if the parties expressly agree thereto.

وبآراء كبار فقهاء الشريعة والقانون في مختلف الدول.

3- للمحكمة أن تفصل في النزاعات وفقا لمبادئ العدل والإنصاف بشرط موافقة أطراف النزاع على ذلك صراحة.

Chapter Four
Procedure

الفصل الرابع
الإجراءات

Article 24

1. Arabic shall be the official language of the Court.
2. The Court may allow parties to the dispute to submit memoranda or documents in any other language, provided that they are accompanied by an official translation into Arabic.

المادة الرابعة والعشرون

1- تكون اللغة العربية اللغة الرسمية للمحكمة.

2- للمحكمة أن تسمح لأطراف النزاع بتقديم المذكرات أو المستندات بلغة أخرى، بشرط أن تكون مصحوبة بترجمة رسمية إلى اللغة العربية.

Article 25

1. The full Court shall decide cases brought before it. A quorum of five Judges shall suffice to constitute the Court, provided that the President or whoever represents him participates.
2. The Court may, with the consent of parties to the dispute, form a special Chamber dealing with a particular case because of its technical nature or the need to follow summary procedures.
3. The Chamber shall be formed of at least three Judges and its meetings shall not be valid unless all its members are present.

المادة الخامسة والعشرون

1- تفصل المحكمة بكامل هيئتها في القضايا المعروضة عليها ويكون انعقادها صحيحا بحضور خمسة قضاة على الأقل، على أن يكون من بينهم الرئيس أو من يقوم مقامه.

2- للمحكمة أن تشكل غرفة خاصة للنظر في قضية بعينها بسبب طابعها الفني، أو لما تستدعيه من إتباع إجراءات مختصرة، بموافقة أطراف النزاع.

In all cases a judgment shall be considered as rendered by the Court.

3- تشكل الغرفة الخاصة من ثلاثة قضاة على الأقل، ولا يكون انعقادها صحيحا إلا بحضور كامل أعضائها.

وفي جميع الأحوال يعتبر الحكم صادرا من المحكمة ذاتها.

Article 26

The Court shall issue its judgments and decisions by a majority of the Judges sitting for deciding the case. In the case of an equality of votes, the President or whoever represents him shall have a casting vote, where otherwise provided.

المادة السادسة والعشرون

تصدر المحكمة أحكامها وقراراتها بأغلبية القضاة الجالسين للنظر في القضية، وفي حالة تساوي الأصوات يرجح الجانب الذي فيه الرئيس أو من يقوم مقامه، ما لم يرد نص يخالف ذلك.

Article 27

1. In accordance with the provisions of Article 21 of this Statute, cases shall be brought before the Court:
   A) by all the parties to the dispute when they so agree, or;
   B) by one of the parties, who shall, in such a case, submit a written application to the Court's Registrar.
   C) The Rules of the Court shall state the procedures required for the progress of cases. They shall also designate to the litigants the manner and date of applications and the procedure to be followed.
2. Parties to a dispute shall designate the subject matter of the dispute and its parties.
3. The Registrar shall serve the statement of claims on all the concerned parties in the dispute. He shall communicate it to the League Secretary-General, who

المادة السابعة والعشرون

1- مع مراعاة ما جاء في المادة (21) من هذا النظام، ترفع الدعاوى إلى المحكمة:

أ) من قبل كل أطراف النزاع عند اتفاقهم على ذلك، أو

ب)من قبل أحد الأطراف الذي يتقدم، في هذه الحالة، بطلب مكتوب إلى مسجل المحكمة.ويبين النظام الداخلي للمحكمة الترتيبات اللازمة لسير القضايا وتعين للمتقاضين شكل تقديم الطلبات و ميعاد تقديمها، كما تحدد المنهج الذي يتبع في تلقي البيانات.

2- يتعين على أطراف النزاع أن يحددوا في جميع الحالات موضوع النزاع وأطرافه.

3- يتولى مسجل المحكمة إبلاغ صحيفة

shall transmit it to member states.

الدعوى إلى الأطراف المعنية بالنزاع، ويخطر به الأمين العام للجامعة الذي يتولى إحاطة الدول الأعضاء علما به.

Article 28

1- The respondent state may, with the normal procedure of filing a case or in the first counter-memorial in response to the original case, file a counter-claim against the applicant state.
2- A counter-claim shall not be accepted by the Court unless it is directly related to the original case and within the Court's jurisdiction.

المادة الثامنة والعشرون

1- يجوز للطرف المدعى عليه أن يتقدم بدعوى مقابلة ضد الطرف المدعى، وذلك بالإجراءات المعتادة لرفع الدعوى أو في أول مذكرة يجيب بها على الدعوى الأصلية.

2- يشترط لقبول المحكمة هذه الدعوى، أن تكون ذات صلة مباشرة بالدعوى الأصلية وتدخل في ولاية المحكمة.

Article 29

The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective right of either party. The Registrar shall communicate the decision to the parties of the dispute and the League Secretary-General, who shall notify the member states.

المادة التاسعة والعشرون

للمحكمة أن تقرر التدابير المؤقتة التي يجب اتخاذها لحفظ حقوق كل الأطراف، متى رأت أن الظروف تقتضي ذلك، ويبلغ مسجل المحكمة القرار إلى أطراف النزاع، وإلى الأمين العام للجامعة ليحيط الدول الأعضاء علما بذلك.

Article 30

Parties to the dispute may be represented before the Court by agents and they may be assisted by counsel, advocates and experts.

المادة الثلاثون

يمثل أطراف النزاع، أمام المحكمة، وكلاء عنهم، ولهم أن يستعينوا بمستشارين ومحامين وخبراء.

Article 31

1. Procedures before the Court shall be conducted orally and in writing.
2. The Rules for written procedure

المادة الحادية والثلاثون

1- تكون الإجراءات أمام المحكمة كتابية وشفوية.

shall be as follows:

A) The written proceedings shall consist of the communication to the Court and to the parties of memorials, counter-memorials and, if necessary, replies; also all papers and documents in support.

B) The Court shall, after consultation with the parties to dispute, determine the manner and dates for the submission of written documents in accordance with its Rules.

C) Written documents shall be deposited with the Registrar who shall send a copy of each document submitted by any of the parties to the other parties after certifying that it is a copy of the original.

3. The oral proceedings shall include whatever may be stated by the parties to the dispute in the Court sittings, including explanations, deliberations and the spoken words of witnesses and experts.

2- تكون قواعد الإجراءات الكتابية وفق ما يلي:

أ) تشمل الإجراءات الكتابية ما يقدم للمحكمة، ولأطراف النزاع من المذكرات، والمذكرات الجوابية، ثم الردود، إذا اقتضاها الحال، كنا تشمل جميع الأوراق والمستندات التي تؤيدها.

ب) تقرر المحكمة، بعد التشاور مع أطراف النزاع، طريقة تقديم الوثائق المكتوبة ومواعيدها، وفقا لنظامها الداخلي.

ج) تودع الوثائق المكتوبة لدى مسجل المحكمة وعليه أن يرسل صورة من كل مستند يقدمه طرف من أطراف الدعوى إلى الأطراف الأخرى بعد التصديق على مطابقته للأصل.

3- تشمل الإجراءات الشفوية ما يبديه أطراف النزاع في الجلسات من شروح ومرافعات وكذلك ما يدلى به من الشهود والخبراء من أقوال.

Article 32

The Court shall communicate all matters concerning the dispute to the states which are parties to the present Statute.

المادة الثانية والثلاثون

تبلغ المحكمة الدول الأعضاء في هذا النظام بكل ما يتعلق بالنزاعات.

Article 33

The Court may, at any stage of the case, ask the parties to the dispute to submit any documents, data or answers to any questions put to them.

المادة الثالثة والثلاثون

للمحكمة في أي مرحلة من مراحل الدعوى، أن تطلب من أطراف النزاع تقديم ما تراه من مستندات أو بيانات أو ردود على أسئلة توجهها إليهم.

Article 34

1. The Court may carry out any inquiry it deems necessary and it may entrust some of its members with such inquiry.
2. The Court may entrust an expert, an advisory office or any other organisation to provide expert evidence or submit an opinion on any matter related to the case.
3. If the Court decides to carry out a field inquiry, it shall notify the concerned states or authorities thereof.

المادة الرابعة والثلاثون

1- للمحكمة أن تقوم بإجراء التحقيق الذي تراه لازما، ولها أن تعهد بهذا التحقيق إلى بعض أعضائها.

2- للمحكمة أن تعهد إلى خبير أو مكتب استشاري، أو أية هيئة أخرى، القيام بتقديم خبرة أو إبداء رأي في أي موضوع يتعلق بالدعوى.

3- إذا رأت المحكمة إجراء تحقيق ميداني أخطرت الدول أو الجهات المعنية.

Article 35

The Court shall be entitled not to accept new memoranda or documents submitted by a party to the dispute after the expiration of time-limits determined by the Court. However, the Court may accept such memoranda and documents if the parties to the dispute so agree.

المادة الخامسة والثلاثون

للمحكمة أن لا تقبل المذكرات والمستندات الجديدة التي يتقدم بها أحد أطراف النزاع بعد انقضاء الآجال التي حددتها. ومع ذلك يتعين على المحكمة القبول بتلك المذكرات والمستندات متى وافق أطراف النزاع على ذلك.

Article 36

The applicant state or states may discontinue the proceedings at any stage of examination before the judgment is pronounced, unless any of the parties to the dispute object.

المادة السادسة والثلاثون

للدولة أو الدول المدعية أن تتنازل عن دعواها في أي مرحلة من مراحل النظر فيها على أن يكون ذلك قبل النطق بالحكم ما لم يعترض أحد أطراف النزاع على ذلك.

Article 37

The parties to the dispute may submit an agreement settling the dispute at any stage of the case before judgment is pronounced. Such agreement, which shall be recorded in the minutes of the Court's hearings, shall constitute a judgment for ending the dispute.

المادة السابعة والثلاثون

لأطراف النزاع التقدم باتفاق بالصلح في الدعوى في أي مرحلة كانت عليها قبل النطق بالحكم، وتثبت المحكمة الاتفاق بمحضر الجلسة ويكون بمثابة حكم بإنهاء النزاع.

Article 38

Whenever one of the parties to the dispute does not appear before the Court or fails to defend its case, the other party may request the Court to decide in favour of its claim.

المادة الثامنة والثلاثون

إذا تخلف أحد أطراف النزاع عن الحضور، أو امتنع عن الدفاع، جاز للطرف الآخر أن يطلب من المحكمة الحكم له بطلباته.

Article 39

1. If a state party to the Statute which is not party to the case considers that it has an interest which may be affected by the decision in the case, it may request the Court to allow it to intervene before closure of the pleadings. Such an application shall be decided by the Court.
2. In some exceptional cases and after closing the pleadings, the Court may decide to accept an application to intervene prior to the hearing at which the judgment will be pronounced, and in such event the case shall be opened again for pleadings.
3. If the subject matter of the case is related to the interpretation of a multilateral agreement to which some of the parties to the agreement are not parties to the case, the Registrar shall, upon the Court's consent, notify these parties of the case and the applications filed with the Court, and such parties have the right to

المادة التاسعة والثلاثون

1- إذا رأت إحدى الدول الأعضاء التي ليست طرفا في الدعوى أن لها مصلحة يمكن أن يؤثر فيها الحكم، جاز لها أن تطلب من المحكمة الأذن لها بالتدخل في الدعوى قبل اختتام المرافعات وتفصل المحكمة في الطلب.

2- للمحكمة، بعد قفل باب المرافعة، في بعض الحالات الاستثنائية، أن تقبل، بقرار منها، طلب التدخل إلى ما قبل جلسة النطق بالحكم، وفي هذه الحالة يتعين إعادة القضية للمرافعة.

3- إذا تعلق موضوع الدعوى بتفسير اتفاقية متعددة الأطراف، لم يكن البعض منها طرفا في الدعوى، يقوم المسجل بموافقة المحكمة بإخطار هذه

intervene.

4. If the Court admits an application to intervene, the intervening party shall become a party to the dispute, and the Court's judgment shall be binding upon it to the extent that the judgment is related to the issues causing it to intervene.

الأطراف بالدعوى وبالطلبات المقدمة إلى المحكمة، ولهذه الأطراف حق التدخل في الدعوى.

4- إذا قبلت المحكمة طلب التدخل اعتبر المتدخل طرفا في النزاع، ويكون حكم المحكمة ملزما له بقدر ما يتصل الحكم بالمسائل التي تدخل هذا الطرف بشأنها.

Article 40

1. The hearing in Court shall be public, unless the Court *motu proprio* or upon the request of one of the parties to the dispute decides that it shall be held behind closed doors. 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.
2. Minutes shall be made at each hearing and signed by the Registrar and the President, such minutes alone shall be authentic.

المادة الأربعون

1- تكون جلسات المحكمة علنية، ما لم تقرر المحكمة سريتها من تلقاء نفسها أو بناء على طلب أحد أطراف النزاع، ويتولى الرئيس إدارة الجلسات وعند وجود مانع لديه يتولاها نائبه، فإذا تعذرت رئاستهما للجلسة، تولى أعمال الرئاسة أقدم القضاة الحاضرين.

2- يحرر لكل جلسة محضرا يوقعه المسجل والرئيس ويكون هذا المحضر هو المحضر الرسمي.

Article 41

1. The President shall declare, upon closure of pleadings, that the case is pending judgment.
2. The deliberations of the Court remain secret. Only Judges who have heard the oral pleadings shall take part therein.

المادة الحادية والأربعون

1- يعلن رئيس المحكمة حجز الدعوى للحكم بعد اختتام المرافعات.

2- تكون مداولات المحكمة سرية ولا يشارك فيها إلا القضاة الذين استمعوا للمرافعات الشفوية.

Article 42

1. The judgment shall be delivered at a public sitting on a date decided by the Court.

المادة الثانية والأربعون

1- يصدر الحكم في جلسة علنية في موعد

2. The judgment shall include the date it was issued, the subject matter of the case, the parties to the dispute, their claims, a summary of their defence, the names of the Judges who took part and their signatures and the reasons on which the judgment is based.
3. The draft judgment signed by the bench that has delivered it shall be deposited in the case file. The authentic copy of the judgment shall be signed by the President and Registrar. Copies shall be given to the concerned parties and shall be circulated among member states.

تحدده المحكمة.

2- يتعين أن يشتمل الحكم على تاريخ صدوره وموضوع الدعوى، وأطراف النزاع، وطلباتهم، وملخصا لدفاعهم، وأسماء القضاة الذين شاركوا فيه وتواقيعهم، والأسباب التي بنى الحكم عليها.

3- تودع مسودة الحكم الموقعة من الهيئة التي أصدرته ملف القضية، وتوقع النسخة الأصلية للحكم من رئيس المحكمة ومسجلها وتسلم صورا منها لكل ذي مصلحة فيها وتعمم على الدول الأعضاء.

Article 43

1. If the judgment does not represent in whole or in part the unanimous opinion of the Judges, the dissenting Judge may record his opinion in writing.
2. Judges who support the judgment for reasons other than those contained therein may record their individual opinions in writing.
3. In all events, all dissenting or individual opinions shall be attached to the judgment.

المادة الثالثة والأربعون

1- إذا لم يكن الحكم صادرا كله أو بعضه بإجماع القضاة، كان للقاضي المخالف أن يسجل رأيه كتابة.

2- للقضاة الذين وافقوا على الحكم لغير الأسباب الواردة فيه أن يسجلوا آراءهم الانفرادية كتابة.

3- ترفق، في جميع الأحوال، الآراء المخالفة أو الانفرادية بالحكم.

Article 44

1. Subject to the provisions of Article 45, judgments of the Court shall be final, binding and without appeal.
2. The decision of the Court shall be binding upon the parties and within the scope of the resolved

المادة الرابعة والأربعون

1- أحكام المحكمة نهائية، وملزمة، وغير قابلة للطعن بأي وجه من الوجوه، مع مراعاة أحكام المادة الخامسة والأربعين.

dispute.

3. A judgment shall become binding from the date of its issue and the parties shall implement it in good faith.
4. If one of the parties refrains from implementing the judgment, the other party may have recourse, through the League Secretary-General, to the League Council to take the necessary measures capable of implementing it.

Article 45

An application for revision of a judgment may be made if it is based upon the discovery of some fact of such a nature as 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.

Article 46

1. The application for revision must be made within six months from the date of the discovery of the new fact.
2. Any application for revision made after the lapse of five years from the judgment shall not be accepted.
3. The Court shall, within three months from the date thereof, issue a judgment admitting or dismissing an application for revision, and shall communicate it to the parties concerned.
4. Unless otherwise decided by the Court, the implementation of the judgment may not be suspended as a result of an application for

2- يكون للحكم قوة الإلزام بالنسبة إلى أطرافه وفي حدود النزاع الذي فصل فيه.

3- يكون الحكم نافذا من تاريخ صدوره، وعلى الأطراف تنفيذه بحسن نية.

4- إذا امتنع أحد الأطراف عن تنفيذ الحكم، فللطرف الآخر أن يلجأ عن طريق الأمين العام للجامعة إلى مجلس الجامعة لاتخاذ التدابير الكفيلة بتنفيذه.

المادة الخامسة والأربعون

يجوز التماس إعادة النظر في الحكم إذا تكشفت واقعة حاسمة بالنسبة إلى الدعوى، كان يجهلها حتى صدور الحكم كل من المحكمة والطرف الذي التمس إعادة النظر في الحكم، على أن لا يكون الجهل بها ناشئا عن إهمال من قبل الطرف الملتمس.

المادة السادسة والأربعون

1- يقدم طلب الالتماس خلال ستة أشهر من تاريخ تكشف الواقعة.

2- لا يقبل الالتماس بأي حال بعد انقضاء خمس سنوات من تاريخ صدور الحكم.

3- تبت المحكمة في الالتماس بقبوله أو رفضه خلا ثلاثة أشهر من تاريخ تقديمه، وتبلغ أطراف الدعوى نتيجة حكمها.

4- لا يترتب على رفع الالتماس وقف

revision.

تنفيذ الحكم، ما لم تقرره المحكمة خلاف ذلك.

Article 47

In the event of a dispute regarding the meaning of the judgment and the scope of its implementation, the Court shall interpret it upon the request of one of the parties.

المادة السابعة والأربعون

عند الخلاف على مفهوم الحكم ومدى تنفيذه، تتولى المحكمة تفسيره، بناء على طلب من أحد الأطراف.

Article 48

The Court shall, by its decision or upon the request of any party, rectify such errors as may occur in its judgments.

المادة الثامنة والأربعون

تتولى المحكمة تصحيح ما قد يقع في نص حكمها من أخطاء مادية، وذلك بقرار تصدره من تلقاء نفسها أو بناء على طلب أحد أطراف النزاع.

Article 49

Unless the Court decides otherwise, each party shall bear the costs pertaining to its case.

المادة التاسعة والأربعون

يتحمل كل طرف المصاريف الخاصة بدعواه ما لم تقرر المحكمة خلاف ذلك.

Chapter Five
Advisory Opinions

الفصل الخامس
الاختصاص الاستشاري للمحكمة

Article 50

1. The League Council may request the Court to provide its advisory opinion on any legal question.
2. Upon the approval of the League Council, the Secretary-General and any of the other Specialised Councils of the League, including the Specialised Ministerial Councils and the Specialised Arab Organisations established within the Arab League, may request the Court to provide an advisory opinion

المادة الخمسون

1- لمجلس الجامعة أن يطلب إلى المحكمة إبداء رأيها الاستشاري في أية مسألة قانونية.

2- يجوز، وبعد موافقة مجلس الجامعة، لكل من الأمين العام ولأي من المجالس الأخرى للجامعة ومن بينها المجالس الوزارية المتخصصة، وكذلك المنظمات

concerning legal questions falling within its jurisdiction.

3. The Rules of the Court shall determine the procedural Rules to be followed for requesting advisory opinions.
4. The Court shall, upon exercising the function of issuing advisory opinions, apply whatever it deems fit from the provisions of this Statute and its Rules.
5. The advisory opinions of the Court shall be issued in a public sitting with a majority of the Judges sitting in accordance with the measures stated in Article 26 of this Statute. The organ requesting the advisory opinion and the League Secretary-General must be notified of the date of the sitting.

العربية المتخصصه المنشأة في نطاق الجامعة العربية، أن تطلب من المحكمة إبداء رأي استشاري وذلك بالنسبة لما يعرض عليها من المسائل القانونية الداخلة في نطاق اختصاصها.

3- يحدد النظام الداخلي للمحكمة القواعد الإجرائية الخاصة بطلب الآراء الاستشارية.

4- تطبق المحكمة، عند مباشرة مهمة إصدار الآراء الاستشارية، ما تراه ممكن التطبيق من أحكام هذا النظام ونظامها الداخلي.

5- تصدر المحكمة آراؤها الاستشارية في جلسة علنية بأغلبية القضاة الجالسين وذلك وفقا للإجراءات المبينة في المادة السادسة والعشرين من هذا النظام على أن تخطر طالب الاستشارة والأمين العام للجامعة بموعد انعقاد الجلسة.

Chapter Six
Immunities and Privileges

الفصل السادس
الحصانات والامتيازات

Article 51

1. The Court shall enjoy, in the member states, such immunities and privileges as may be required for achieving its purposes and performing its functions.
2. The Court's Registrar, officers, experts, witnesses and

المادة الحادية والخمسون

1- تتمتع المحكمة، في الدول الأعضاء، بالحصانات والمزايا التي يتطلبها تحقيق أغراضها والقيام بوظائفها.

2- يتمتع مسجل المحكمة وموظفوها

representatives of parties appearing before the Court shall enjoy such immunities and privileges as may be necessary to safeguard their independence and freedom while performing their functions and duties.

3. The Convention on the Privileges and Immunities of the League of Arab states shall apply concerning the implementation of paragraphs 1 and 2 of this Article.

والخبراء والشهود وممثلو الأطراف الماثلة أمام المحكمة بالحصانات والمزايا التي تضمن استقلالهم وحريتهم في أداء وظائفهم وأعمالهم.

3- تطبق اتفاقية مزايا وحصانات جامعة الدول العربية، وذلك فيما يتعلق بتنفيذ الفقرتين (1) و (2) من هذه المادة.

Article 52

1. Judges in the member states shall enjoy the same privileges and diplomatic immunities accorded to diplomatic envoys in accordance with international agreements, particularly the Vienna Convention of 1961.
2. Immunity may be removed from a Judge by a reasoned decision taken by the unanimous opinion of other Judges if sufficient measures for its removal warrant it.

المادة الثانية والخمسون

1- يتمتع القضاة في الدول الأعضاء بذات الامتيازات والحصانات الدبلوماسية المقررة للمبعوثين الدبلوماسيين طبقا للاتفاقيات الدولية وعلى الأخص اتفاقية فيينا لعام 1961.

يجوز رفع الحصانة عن أحد القضاة بقرار مسبب يتخذ بإجماع القضاة الآخرين إذا توافرت بشأنه ضوابط رفعها.

Chapter Seven
Amendment

الفصل السابع
تعديل النظام

Article 53

Member states, the Court and the Secretary-General of the League of Arab States may, if necessary and subject to the provisions of the League Pact, propose amendments to the Statute of the Court.

المادة الثالثة والخمسون

للدول الأعضاء، والمحكمة، وللأمين العام لجامعة الدول العربية عند الاقتضاء اقتراح تعديلات على النظام الأساسي للمحكمة ويتم النظر في كل تعديل وفق أحكام ميثاق الجامعة.

Draft
Rules of the Arab Court of Justice

Part One
Organisation of the Court

Chapter One
Formation of the Court and Its Chambers

Article 1

1. The first annual term of the Court shall commence from the date of the session on which the Court is convened after finalising the method of its constitution to decide cases.
2. Members of the Court shall take up their duties with effect from the first day of the Court's annual term on which the full Court meets. The terms provided for in Article 10 of the Statute shall be calculated with effect from that date.

Article 2

1. Following the first constitution of the Court, the Court's members shall elect for a two-year term, the President and Vice-President, by an absolute majority and in a secret vote conducted during the first meeting of the Court. They shall take up their duties immediately after being elected; they may be re-elected.
2. If the President or Vice-President ceases to be a member

مشروع
النظام الداخلي لمحكمة العدل العربية

الباب الأول
تنظيم المحكمة

الفصل الأول
تشكيل المحكمة ودوائرها

المادة الأولى

1- يبدأ دور الانعقاد السنوي الأول للمحكمة من تاريخ بدء الدورة التي تدعى إليها بعد إتمام إجراءات التشكيل للنظر في الدعاوى.

2- يتسلم أعضاء المحكمة عملهم اعتبارا من اليوم الأول من دور الانعقاد السنوي الذي تجتمع فيه المحكمة بكامل هيئتها، وتحسب من هذا التاريخ المدد المنصوص عليها في المادة العاشرة من النظام الأساسي.

المادة الثانية

1- ينتخب أعضاء المحكمة بالأغلبية المطلقة في تصويت سري في أول انعقاد لها، بعد التشكيل الأول، رئيسا لها ونائبا للرئيس لمدة سنتين، ويباشران عملهما فور انتخابهما ويجوز تجديد انتخابهما.

2- إذا زالت العضوية عن الرئيس أو النائب أو استقال أيهما من منصبه قبل

or if either of them resigns his office before the expiration of his term, the Court shall elect his successor to complete the term of his predecessor. Such resignation shall be effective from the date of its notification to the Secretary-General.

انتهاء مدة عضويته تقوم المحكمة بانتخاب خلف له لاستكمال مدة سلفه وتنفذ الاستقالة من تاريخ إبلاغها إلى الأمين العام.

Article 3

1. The President shall administer the Court's affairs, preside at its meetings, supervise over its secretariat and represent the Court with regard to administrative matters.
2. In the event of the absence of the President, or if he is otherwise unable to attend, the Vice-President shall take up the duties of the presidency. If the President and Vice-President are unable to be present, or if both are absent, the senior Judge shall preside.

المادة الثالثة

1- يدير الرئيس شئون المحكمة ويرأس جلساتها ويشرف على سكرتاريتها ويمثل المحكمة فيما يتعلق بالأمور الإدارية.

2- في حالة غياب الرئيس أو قيام مانع به يتولى النائب مهام الرئاسة، وإذا قام مانع بالرئيس ونائبه معا أو في حالة غيابهما يقوم برئاسة المحكمة أقدم الأعضاء.

Article 4

1. In case of a party to a dispute choosing its Judge in accordance with the provisions of Article 18 of the Statute of the Court, the applicant state shall notify the Registrar thereof prior to the commencement of pleadings. The name of such Judge shall be announced when it so declares wishes or during the time-limit specified by the Court. The Registrar shall notify the other parties to comment on this choice within the period fixed by the President.

   If there is any doubt or objection in this concern, the Court shall decide after hearing explanations.
2. If the Court realises that there are several parties in the same

المادة الرابعة

1- في حالة اختيار أحد الأطراف لقاضيه طبقا لنص المادة 18 من النظام الأساسي للمحكمة، تخطر الدولة الطالبة مسجل المحكمة بذلك قبل بدية المرافعة مع ذكر اسم القاضي الذي، تختاره وقت إعلان رغبتها أو خلال الأجل المحدد الذي تعينه المحكمة، ويقوم المسجل بإخطار الأطراف الأخرى لإبداء رأيهم بشأن هذا الاختيار خلال المهلة التي يحددها رئيس المحكمة.

تقوم المحكمة بالبت في أي شك أو

interest, who have not appointed a Judge holding their nationality, a date shall be designated for them to choose a Judge who represents them all. If the fixed date lapses and they have not declared their choice, the Court shall continue in its composition to decide the case.

3. A Judge so chosen shall take the same oath taken by the original Judges of the Court before the Court in the first sitting following his selection.

اعتراض في هذا الشأن بعد سماع الإيضاحات.

2- إذا وجدت المحكمة أن هناك عدة أطراف لهم ذات المصلحة و لم يعينوا قاض من جنسيتهم تحدد لهم موعدا ليختاروا معا القاضي الممثل لهم فإذا انقضى الأجل المحدد و لم يعلنوا اختيارهم تستمر المحكمة بذات تشكيلها في نظر القضية.

3- يؤدي القاضي الذي يتم اختياره ذات القسم الذي يردده قضاتها أمام المحكمة في أول جلسة بعد اختياره.

Article 5

If a member is deemed incompetent on the grounds of not having the required qualifications, the President shall convene a meeting and the member shall be allowed to defend himself. A vote shall be conducted in his absence but he cannot be removed except by a unanimous vote.

المادة الخامسة

في حالة النظر في عدم صلاحية العضو لافتقاده عناصر الولاية، يدعو رئيس المحكمة لاجتماع ويسمح للعضو بالدفاع عن نفسه ويتم التصويت في غيبته ويشترط الاجتماع لتنحيته.

Article 6

1. If the Court decides to form one or more Chambers, it shall determine the categories of cases which fall within the jurisdiction of such a Chamber, the number of its members, and the duration and date of commencing its functions.
2. The Chamber of Summary Procedures shall be formed annually and shall consist of three Judges and two substitutes who shall be elected by secret ballot and by an absolute majority.

المادة السادسة

1- إذا قررت المحكمة تشكيل دائرة أو أكثر تحدد طائفة القضايا التي تدخل في اختصاص هذه الدائرة وعدد الأعضاء بها ومدة عملها وتاريخ بدء العمل.

2- الدائرة الخاصة بالإجراءات المستعجلة تشكل سنويا وتتكون من ثلاثة قضاة واثنين احتياطيين وذلك بالاقتراع السري وبالأغلبية المطلقة.

Article 7

The Court may decide to disolve any of its Chambers provided the progress of its functions is not affected. The said Chamber shall finish all the cases before it.

Article 8

1. If the Court decides to form a Chamber for deciding a particular case, the President shall consult the concerned parties regarding the composition of such a Chamber. A report in this regard shall be prepared for the Court.
2. This Chamber shall be presided over by the President and, in his absence, by the Vice-President. If neither are present, the senior member shall preside.

Article 9

If the term of office of a Chamber member expires prior to the decision is rendered in a case laid before him, he shall continue his duties until the case is decided, irrespective of the stage of the case.

Article 10

In addition to official holidays the Court shall, by its own decision, determine its members' vication. However, the President may, if necessary, request a member to cut short his leave.

Article 11

If the necessary quorum is not complete, the President shall delay the meeting until the legal quorum is satisfy.

المادة السابعة

للمحكمة أن تقرر حل إحدى دوائرها دون أن يؤثر ذلك على سير العمل بها ويتعين على هذه الدائرة إنهاء جميع القضايا المنظورة أمامها.

المادة الثامنة

1- إذا قررت المحكمة تشكيل دائرة لنظر قضية معينة، يستشير رئيس المحكمة الأطراف المعنية فيما يتعلق بتشكيل هذه الدائرة ويعد تقريرا للمحكمة في هذا الشأن.

2- رئاسة الدائرة للرئيس ثم لنائب الرئيس وفي حالة عدم وجودها يرأس الدائرة أقدم الأعضاء.

المادة التاسعة

إذا انتهت مدة عضوية أحد أعضاء الدائرة في المحكمة قبل الفصل في القضية التي ينظرها يستمر في العمل حتى إتمام الفصل فيها أيا ما كانت المرحلة التي وصلت إليها الدعوى.

المادة العاشرة

بالإضافة إلى-العطلات الرسمية-تحدد المحكمة سائر الإجازات بقرار منها مع جواز أن يقوم رئيس المحكمة باستدعاء العضو من الإجازة إذا دعت الضرورة لذلك.

المادة الحادية عشرة

إذا لم يكتمل نصاب انعقاد المحكمة، أجّل رئيس المحكمة عقد الجلسة لحين اكتمال النصاب القانوني.

Article 12

1. The Court shall delibrate cases and advisory opinions laid before it in special session in which experts may take part if they are asked to. However, such experts will not be entitled to vote during the deliberations.
2. A reasoned note must be stated in writing by each Judge participating during the deliberations.
3. The Court's decision shall be based on the opinions expressed during the final discussions in accordance with the majority. Judges shall vote in inverse of seniority.
4. Deliberations shall be confidential and the details thereof shall not be recorded. Only the subject of discussions, the votes taken, and names of concurring and dissenting members shall be recorded.

المادة الثانية عشرة

1- تتداول المحكمة في الدعاوى المعروضة عليها وكذا في الآراء الاستشارية في جلسات خاصة يشارك فيها الخبراء في حالة الاستعانة بهم دون أن يكون لهم حق التصويت في المداولة.

2- يقوم كل قاض حاضر المداولة بكتابة رأيه مسببا.

3- يؤسس قضاء المحكمة على محصلة الآراء بعد المناقشات الختامية وفقا لما تصل إليه الأغلبية ويقوم القضاة بالتصويت وفقا لأقدمياتهم بدءا بالأحدث فالأقدم.

4- جلسات المداولة سرية، ولا تسجل تفاصيلها، ويقتصر التسجيل على موضوع المناقشات والأصوات التي أخذت مع بيان أسماء الموافقين وأسماء المعارضين.

Article 13

Unless the Court decides otherwise, the foregoing rules shall apply to administrative issues.

المادة الثالثة عشرة

تسرى القواعد السابقة في شأن المسائل الإدارية ما لم تقرر المحكمة خلاف ذلك.

Chapter Two
Court Registrar and Secretariat

الفصل الثاني
مسجل المحكمة وسكرتاريتها

Article 14

The Court shall have a secretariat composed of the Court Registrar and a sufficient number of professional and

المادة الرابعة عشرة

يكون للمحكمة سكرتارية تتكون من

administrative staff and support service employees, who shall carry out their duties under the supervision and direction of the Court President.

مسجل المحكمة يعاونه عدد كاف من الموظفين الفنيين والإداريين والخدمات المعاونة ويؤدون أعمالهم تحت إشراف وتوجيه رئيس المحكمة.

Article 15

1. The Court shall select a Registrar and a Deputy-Registrar from a list of nominees proposed by the members of the Court. This list shall include details of age, nationality, university qualifications, abilities and previous practical experience. They shall be selected by secret ballot and by an absolute majority. Their term of office shall be for a renewable period of two years and may be extended further.
2. If it occurs that the Registrar, before the lapse of his term, is unable to discharge his duties, the Deputy-Registrar shall take up his duties until the Court chooses a new Registrar.
3. If both the Registrar and Deputy-Registrar are absent, the Court President shall appoint someone from among the staff to take up their duties.
4. Before taking up their duties, the Registrar and Deputy-Registrar shall take the oath in accordance with the provisions of Article 5 of the Court Statute.

المادة الخامسة عشرة

1- تختار المحكمة المسجل ونائبه من قائمة تضم المرشحين الذين يقترحهم أعضاء المحكمة، وتتضمن بيانات السن والمؤهل الجامعي، والقدرات والخبرات العملية السابقة. ويتم الاختيار بالاقتراع السري وبالأغلبية المطلقة، وتحدد مدة عمل المسجل ونائبه بسنتين ويجوز تجديدها لمدد أخرى.

2- إذا طرأ مانع للمسجل قبل انتهاء مدته يتولى نائبه أعماله إلى أن تقوم المحكمة باختيار مسجل جديد.

3- في حالة غياب المسجل ونائبه يقوم رئيس المحكمة بتعيين من يتولى عملهما من بين الموظفين.

4- يؤدي المسجل ونائبه القسم قبل مباشرة العمل طبقا لنص المادة الخامسة من النظام الأساسي للمحكمة.

Article 16

1. The Registrar shall be a channel of communications to and from the Court. He shall verify dates of communications and notifications, address the relevant bodies and to deal with any queries related to the Court work.

المادة السادسة عشرة

1- يعتبر المسجل وسيطا بالنسبة للمراسلات الصادرة عن المحكمة أو المرسلة إليها، ويتحقق من تواريخ الإبلاغ والإعلانات ويخاطب الجهات

2. The Registrar shall be present, in person or represented by his Deputy, at the meatings of the Court and of its Chambers, prepare minutes of meetings and make any necessary arrangements for translation into Arabic. He shall sign judgments, advisory opinions and orders issued by the Court and deal with all inquiries concerning the Court and its work.
3. The Registrar shall be responsible for the archives, accounts and all administrative work.
4. The Registrar shall issue instructions and orders related to his office after having them approved by the President.
5. The Registrar shall, under the President's supervision, be responsible for the preparation, printing and publication of the Court judgments, advisory opinions and orders after arranging them in groups.
6. The Court shall approve the annual work plan of the Registrar and Court staff and shall designate their duties in accordance with the President's proposals.

المعنية ويجيب على أية استفسارات تتعلق بعمل المحكمة.

2- يحضر المسجل بشخصه أو نائبه جلسات المحكمة أو دوائرها ويعد محاضرها ويتخذ ما قد يلزم من إجراءات للترجمة إلى اللغة العربية، ويوقع على الأحكام والآراء الاستشارية والأوامر الصادرة عن المحكمة ويرد كل طلبات الاستعلامات المتعلقة بالمحكمة ونشاطها.

3- المسجل مسئول عن الأرشيف والحسابات وجميع الأعمال الإدارية.

4- يصدر المسجل التعليمات والأوامر الخاصة بمكتبه بعد اعتمادها من رئيس المحكمة.

5- يتولى المسجل إعداد وطبع ونشر مجموعات الأحكام والقرارات الاستشارية وكل الأوامر الصادرة من المحكمة بعد تبويبها في مجموعات وذلك تحت إشراف رئيس المحكمة.

6- تعتمد المحكمة الخطة السنوية لعمل المسجل وموظفي المحكمة وتحديد اختصاصاتهم بناء على اقتراح من رئيس المحكمة.

Part Two
Proceedings

Chapter One
Institution of Proceedings

Article 17

Procedures provided for in these Rules, and the general principles of proceedings which are not expressly stated therein shall be applied, provided that the latter do not contravene the provisions of the Statute and Rules of the Court.

The Court may adopt other procedural rules which the parties to the case may propose and the Court may deem more appropriate to the circumstances of the dispute.

Article 18

An application shall include as far as possible the details of the applicant, the subject of the dispute and a statement of its legal grounds, and the Court's jurisdiction regarding the subject of the dispute and its nature whenever it is possible, together with a succinct statement of the facts and grounds on which the claims are based. The necessary supporting documents shall be attached therewith.

Article 19

The original application shall be signed either by the agent of the party submitting it, or by its diplomatic

الباب الثاني
إجراءات التقاضي

الفصل الأول
إجراءات رفع الدعوى

المادة السابعة عشرة

تطبق الإجراءات المنصوص عليها في هذا النظام وكذا الأصول العامة للإجراءات التي لم يرد بشأنها نص صريح وذلك بما لا يتعارض مع أحكام النظامين الأساسي والداخلي للمحكمة.

ويجوز للمحكمة أن تتبنى قواعد إجرائية أخرى يقترحها أطراف الدعوى وتراها المحكمة أكثر ملاءمة لظروف النزاع.

المادة الثامنة عشرة

يجب أن تشتمل عريضة الدعوى على البيانات الخاصة بالمدعي والمدعى عليه وموضوع النزاع وبيان الأساس القانوني له، واختصاص المحكمة بالنزاع كلما أمكن مع بيان طبيعته وكذا تحديد مختصر للوقائع وأساس المطالبة مع إرفاق أوراق الإثبات اللازمة.

المادة التاسعة عشرة

يتم توقيع أصل عريضة الدعوى من وكيل

representative approved by the Court or by any other duly authorised person, and shall be deposited with the Secretariat of the Court accompanied by the number of photocopies specified by the Registrar. The copies must be certified by the Registrar as copies of the original and shall be communicated to the parties.

Article 20

1. A list showing the serial number, date and content of each document shall be attached with the documents submitted to the Court, together with as many photocopies of the list as the number of litigants. The original of the list and the documents shall be kept in the file of the case.
2. Documents may be submitted in a foreign language accompanied by a certified Arabic translation.

Article 21

1. If the case is instituted by means of an application, the Registrar shall, not later than one month from the date thereof, communicate a copy of the application and its enclosures to the respondent.
2. If the case is instituted by a special agreement between the two parties, the Registrar shall notify the other party of the institution of such proceedings.
3. The Registrar shall, notify the parties of the date on which a Court hearing is to take place at least ten days before such date.

رافعها أو من الممثل الدبلوماسي المعتمد أمام المحكمة أو أي شخص يخول هذه الصلاحية بصفة قانونية وتودع سكرتارية المحكمة مصحوبة بعدد الصور التي يحددها المسجل ويصدق المسجل على الصور بأنها طبق الأصل ثم تبلغ الأطراف.

المادة العشرون

1- تقدم المستندات في حافظة يبين فيها تاريخ كل مستند ومضمونه بأرقام متتابعة من أصل وبه المستندات وصور من الحافظة وحدها بقدر عدد الخصوم ويحفظ أصل الحافظة والمستندات بملف الدعوى.

2- يجوز أن تقدم المستندات بلغة أجنبية مصحوبة بترجمة رسمية لها إلى اللغة العربية.

المادة الحادية والعشرون

1- إذا أقيمت الدعوى بطريق الطلب يبلغ مسجل المحكمة المدعى عليه بصورة من عريضة الدعوى ومرفقاتها في ميعاد لا يجاوز شهرا من تاريخ تقديمها.

2- إذا أقيمت الدعوى طبقا للاتفاق بين الطرفين فعلى المسجل أن يحيط الطرف الآخر بإقامة الدعوى.

3- يبلغ مسجل المحكمة تاريخ الجلسة المحددة لنظر الدعوى إلى الأطراف قبل الميعاد المحدد بعشرة أيام على الأقل.

Article 22

The Registrar shall communicate to all members of the Court copies of proceedings instituted, and he shall communicate copies thereof to the General Secretariat of the League of Arab States and any other state entitled to appear before the Court.

Article 23

1. In cases instituted by a special agreement, the deposit of an application must be accompanied by a statement of the names of the agents of the parties. If proceedings are instituted unilaterally by one of the parties, the other party, upon receiving the notice thereof, shall notify the Court as soon as possible of the name of its agent.
2. When proceedings are instituted by an application, such application or the letter attached therewith must contain the name of the agent of the government or the state submitting the application. The party against which the proceedings are instituted shall, as soon as possible after receiving the application, notify the Court of the name of its agent.
3. The statement of the agent's name must contain an address for correspondence at the seat of the Court to which communications may be sent.

Article 24

When proceedings are instituted by a state which is not a party to the Statute of the Court, such state shall have to declare to the Court that it is bound by the terms relating to its acceptance of

المادة الثانية والعشرون

يرسل المسجل إلى جميع أعضاء المحكمة صورا من طلبات الدعوى المقامة، كما يرسل صورا منها إلى الأمانة العامة لجامعة الدول العربية ولأي دولة أخرى لها حق الحضور.

المادة الثالثة والعشرون

1- في الدعاوى التي تقام طبقا لاتفاق الأطراف، يجب أن يصاحب إيداع صحيفة الدعوى بيان أسماء وكلاء الأطراف، فإذا أقام الدعوى أحد الأطراف، يقع على عاتق الطرف الآخر - عند استلامه الإخطار برفع الدعوى - وبأقصى سرعة ممكنة أن يخطر المحكمة باسم وكيله.

2- في الدعاوى التي تقام بطريق الطلب، يجب أن يتضمن هذا الطلب أو خطاب إرساله بيان اسم وكيل الحكومة أو الدولة المتقدمة به، وعلى الطرف المقام عليه الدعوى بعد استلامه للطلب وبأقصى سرعة ممكنة إخطار المحكمة باسم وكيله.

3- يجب أن يتضمن بيان اسم الوكيل تحديد محل مختار للمراسلات في دائرة مقر المحكمة.

المادة الرابعة والعشرون

في حالة قبول التقاضي من دولة غير عضو بالمحكمة أمامها، فيتعين عليها أن تؤكد

the Court's jurisdiction, and shall also submit to the Registrar the documents which prove such declaration when it notifies the Court of the appointment of its agent.

للمحكمة التزامها بالشروط المتعلقة بقبولها ولاية المحكمة، وعليها أن تقدم للمسجل الوثائق التي تؤكد على هذا الالتزام في ذات توقيت قيامها بالإخطار بتعيين وكيل عنها.

Chapter Two
Proceedings and Hearing the Case

الفصل الثاني
في إجراءات الجلسة ونظر الدعوى

Article 25

1. At the start of proceedings in a case, the Court shall ascertain whether the parties and their representatives are entitled to appear before it and, unless they are so entitled the case shall not be prceeded.
2. The President may invite the agents of parties as soon as they are appointed to discuss procedural issues relating to the case.

   In the light of the information obtained from this discussion, the Court shall make the necessary orders to determine the manner and the time-limits of the pleadings. Taking this determination into account, any agreement between the parties may be observed, unless this may result in an unjustified delay in deciding the case.
3. The Court may, upon the request of the relevant party, extend the fixed dates and, after hearing the other party, consider any action taken after such a date as a valid procedure if it is justified. Such powers shall be exercised by the President when the Court is not sitting.

المادة الخامسة والعشرين

1- تتحقق المحكمة عند نظر الدعوى من صفات أطرافها وممثليهم فإذا لم تثبت لهم صفة في الدعوى قررت عدم قبولها.

2- لرئيس المحكمة أن يدعو وكلاء الأطراف بمجرد تعيينهم لمناقشتهم في المسائل الإجرائية المتصلة بالدعوى.

وعلى ضوء المعلومات المتحصلة من هذه المناقشة تصدر المحكمة الأوامر اللازمة لتحديد نظام المرافعة والوقت المسموح به، وفي إطار هذا التحديد يمكن الالتزام بما ورد في اتفاق الأطراف ما لم يكن من شأنه تعطيل الفصل في الدعوى تعطيلا غير مبرر.

3- ويكون للمحكمة، بناء على طلب الطرف المعني، مد المواعيد المقررة وكذا باعتبار الإجراء الذي تم اتخاذه بعد الميعاد إجراء صحيحا إذا وجدت مبرر لذلك، وذلك بعد سماع الطرف

الآخر، ويباشر رئيس المحكمة هذه السلطة في غير أدوار انعقاد المحكمة.

Article 26

1. When the Registrar arranges for the printing of documents for a party at his own expense in order to submit them to the Court, this party shall send the said documents in advance of the fixed date to enable the time-limits to be met. The printing is under the responsibility of the party in question.
2. The correction of errors in documents which have been filed shall be made at any time with the consent of the other party and by leave of the President.

المادة السادسة والعشرون

1- في الحالات التي يقوم فيها المسجل بطبع مستندات لصالح أحد الأطراف وعلى نفقته لإيداعها المحكمة, فإن على هذا الطرف أن يرسل هذه المستندات قبل الموعد المحدد بما يسمح بالالتزام بالمواعيد، ويتم الطبع على مسئولية هذا الطرف.

2- يتم تصحيح الأخطاء الواردة بالمستندات التي تم إيداعها في أي وقت بموافقة الطرف الآخر أو بتصريح من رئيس المحكمة.

Article 27

1. Procedures in a case begun by means of an application shall commence with a memorial submitted by the applicant followed by a Counter-Memorial by the respondent. The Court may authorise that there shall be a Reply by the applicant and a Rejoinder by the respondent.
2. In cases begun with the notification of a special agreement, the number and order of memorials shall be determined by the agreement. If, however, it does not so determine, each party may file a Memorial and a Counter-Memorial simultaneously unless the Court decides otherwise.

المادة السابعة والعشرون

1- تبدأ الإجراءات في الدعاوى المقامة بناء على طلب بمذكرة من المدعى تتبعها مذكرة بالرد من المدعى عليه، ويجوز للمحكمة أن ترخص لكل منهما بالرد على مذكرة الطرف الآخر.

2- في الدعاوى المقامة بالاتفاق يحدد الاتفاق نظام المذكرات وعددها فإذا خلا من تلك البيانات كان لكل طرف أن يقدم مذكرة ومذكرة بالرد في وقت واحد ما لم تقرر المحكمة خلاف ذلك.

Article 28

1. The original Memorial shall contain a statement of the disputed facts and a statement of law and the party's opinion thereon. A Counter-Memorial shall contain an admission or denial of the facts stated in the Memorial, together with a statement of any additional facts or observations concerning the legal questions of the dispute and the party's opinion thereon.
2. The Reply and Rejoinder permitted by the Court shall not repeat the statements previously made but must focus on the issues still in dispute.
3. A pleading shall contain the opinion and proofs of the party filing it. There shall be annexed to every pleading such documents that may be relevant to the dispute which shall be deposited with the Registrar.

المادة الثامنة والعشرون

1- يجب أن تتضمن المذكرة الأصلية بيانات بوقائع المنازعة وحكم القانون والرأي فيها، وأن تتضمن مذكرة الرد قبول الوقائع الواردة بالمذكرة الأصلية أو إنكارها مع عرض أية وقائع أو ملاحظات حول المشاكل القانونية في النزاع والرأي فيها.

2- يراعى عدم التكرار في المذكرات التكميلية بالرد والتعقيب التي تسمح بها المحكمة مع التركيز على المسائل قيد البحث.

3- يجب أن تتضمن مذكرة الطلبات رأي مقدمها وأسانيده في طلبه، وتؤيد المذكرات بأنواعها بملاحق للوثائق المتصلة بالنزاع يتم إيداعها لدى المسجل.

Article 29

Copies of the pleadings and annexes in each case shall be communicated by the Registrar to the Judges and parties; and the Court may authorise the Registrar to make the case documents accessible to any concerned parties.

المادة التاسعة والعشرون

يرسل المسجل صورا من المذكرات والملاحق في كل دعوى إلى القضاة والأطراف. وللمحكمة أن تصرح للمسجل بإطلاع أي ذي شأن على مستندات الدعوى.

Article 30

Upon closure of the written procedures, the case shall be ready for oral pleadings.

المادة الثلاثون

تكون القضية صالحة للمرافعة الشفوية بمجرد الانتهاء من مرحلة الإجراءات الكتابية.

Article 31

Priority in dealing with cases shall be determined on the basis of whether or not the written proceedings are complete and in accordance with its

المادة الواحدة والثلاثون

تتحدد أولوية نظر القضايا حسب استيفائها

order on the General list of cases. However, the Court may decide to depart from this rule.

للإجراءات الكتابية، وتبعا لموقعها في الجدول العام للمحكمة، ويجوز الخروج على هذه القاعدة بقرار من المحكمة.

Article 32

The commencement date of oral pleadings in cases ready for hearing shall, upon the closure of written pleadings, be determined by a Court decision of the Court or by a decision issued by the President when the Court is not sitting.

The Court may decide to postpone hearings in the case if circumstances so require.

المادة الثانية والثلاثون

يتحدد تاريخ بداية إجراءات المرافعة الشفوية في القضايا المهيأة للنظر - بعد انتهاء المرافعة الكتابية - بقرار من المحكمة، أو بقرار من رئيس المحكمة في غير أدوار الانعقاد.

ويجوز بذات الأداة تأجيل نظر القضية إذا حدثت ظروف توجب ذلك.

Article 33

The Court shall, after consultation with the parties, determine the method to be followed in the pleadings, the number of persons who will be pleading and the manner of presenting evidence and the questioning of witnesses and experts.

المادة الثالثة والثلاثون

تحدد المحكمة-بعد مناقشة الأطراف- الأسلوب الذي سيتم إتباعه في المرافعة وعدد المترافعين وكيفية عرض الأدلة ومناقشة الشهود والخبراء.

Article 34

If the case is ready for oral pleadings, the parties may agree to request the postponement of the hearings and the President may so agree. In the event of disagreement, the Court shall decide with regard to the postponement.

المادة الرابعة والثلاثون

إذا كانت القضية جاهزة للمرافعة الشفوية، جاز لأطرافها الاتفاق على طلب تأجيل نظرها ولرئيس المحكمة أن يجيبهم إلى ذلك وفي حالة عدم الاتفاق تقرر المحكمة ما تراه في شأن التأجيل.

Article 35

No new documents may be accepted from a party after the closure of the written proceedings without the consent of the other party. The Court may, after hearing the parties, permit any party to submit new documents. The procedure applied to documents filed within the fixed dates, regarding their deposit, circulation and consideration shall be

المادة الخامسة والثلاثون

لا يجوز قبول مستندات جديدة من أحد الأطراف بعد انتهاء مرحلة الإجراءات الكتابية إلا بموافقة الطرف الآخر، ويتم التعامل مع المستندات الجديدة من حيث إيداعها وتوزيعها

followed with new documents.

والإطلاع عليها بذات الطريقة المتبعة في المستندات السابق تقديمها خلال المواعيد المقررة، كما يجوز للمحكمة بعد سماع الأطراف أن تصرح لأي منهم بتقديم مستندات جديدة.

Article 36

Each party shall, in sufficient time before the commencement of oral pleadings, produce for the Registrar such information as may be relevant to the evidence on which its case is based or the evidence the other party is demanded to produce.

The Court may decide to start the oral pleadings before or after the parties submit their evidence, and the parties may, in all cases, comment on any evidence produced.

المادة السادسة والثلاثون

على كل طرف، قبل بداية مرحلة المرافعات الشفوية بوقت كاف، أن يقدم إلى المسجل معلومات تتعلق بالدليل الذي يستند إليه في دعواه أو الدليل الذي يطلب من الطرف الآخر تقديمه.

وللمحكمة أن تقرر بدء إجراءات المرافعة الشفوية قبل أو بعد تقديم الأطراف لأدلتهم، وفي جميع الحالات يكون للأطراف حق التعقيب على أي دليل يتم تقديمه.

Article 37

Oral pleadings shall, as for as possible and within the permitted time, focus on the substantive issues of the case and ignore details contained within written documents.

The Court may, at any time whether before or during the oral pleadings, specify to the parties any issue to be discussed, and may also put any question or demand any explanation from the agents and advocates.

المادة السابعة والثلاثون

تقتصر المرافعات الشفوية - قدر الإمكان وفي حدود الوقت المتاح - على الأمور الجوهرية في الدعوى وتترك التفصيلات للمذكرات المكتوبة.

وللمحكمة في أي وقت–سواء قبل أو أثناء المرافعة الشفوية–أن تحدد للأطراف أية مسائل ترى مناقشتها، ولها كذلك توجيه أية أسئلة أو طلب إيضاحات من الوكلاء والمحامين.

Article 38

Each Judge may ask questions after making his intentions known to the President presiding over the sitting.

Agents and advocates may answer such questions either immediately or

المادة الثامنة والثلاثون

لكل قاض على حدة حق وضع أسئلة وتوجيهها بعد استطلاع رأي رئيس المحكمة

subsequently in the same sitting or in another hearing but always before the closure of pleadings.

الذي يدير الجلسة.

ويكون للوكلاء والمحامين أن يجيبوا على الأسئلة بمجرد توجيهها أو في وقت لاحق في ذات الجلسة أو في جلسة أخرى بشرط أن يتم ذلك قبل قفل باب المرافعة.

Article 39

Witnesses may be cross-examined and questioned by agents and advocates under the supervision of the President. They may also be questioned by the President and the members of the Court.

المادة التاسعة والثلاثون

للوكلاء والمحامين مناقشة الشهود واستجوابهم تحت إشراف رئيس المحكمة ويمكن توجيه الأسئلة إليهم عن طريق رئيس المحكمة وأعضائها.

Article 40

The parties' discussions, demands, waivers, undertakings or reconciliation shall be recorded in the minutes of the sitting.

المادة الأربعون

يجب أن تثبت في محضر الجلسة ما يصدر من أطراف الدعوى من مناقشات أو طلبات أو تنازل أو إقرار أو صلح.

Article 41

The Court may decide either *proprio motu* or at the request of a party, to issue the requisite interlocutory orders concerning matters such as the appointment of experts, hearing of witnesses, reviewing files and visitation.

It may instruct the parties to produce documents they have in their possession which are required to decide the dispute.

المادة الواحدة والأربعون

للمحكمة من تلقاء نفسها أو بناء على طلب أحد الأطراف أن تصدر ما تراه لازما من قرارات تمهيدية كتعيين الخبراء وسماع الشهود والإطلاع على الملفات والانتقال.

ولها أن تلزم الأطراف بتقديم ما لديهم من مستندات لازمة للفصل في الدعوى.

Article 42

Before taking up his duties, every expert shall take the following oath before the President:

> "I swear by Allah Almighty that I will perform my duty honorably and faithfully".

The Court shall determine the limits of his responsibilities, estimate his

المادة الثانية والأربعون

يؤدي الخبير قبل مباشرة مهمته اليمين التالية أمام رئيس المحكمة:

"أقسم بالله العظيم أن أؤدي مهمتي بالصدق والأمانة."

remuneration and specify the manner to be followed for depositing this remuneration with the Court Treasury to his account.

وعلى المحكمة أن تبين حدود مهمته وتقدر قيمة الأمانة وتحدد الطرق التي يجب عليه إيداعها خزانة المحكمة لحساب مهمته.

Article 43

Before testifying, every witness shall take the following oath:

"I swear by Allah Almighty that I will say the truth and nothing but the truth".

المادة الثالثة والأربعون

على كل شاهد أن يؤدي قبل الإدلاء بشهادته اليمين الآتية:

"أقسم با لله العظيم أن أقول الحق ولا شئ غير الحق."

Article 44

If the Court decides it necessary to conduct an inquiry for the elucidation of certain material points, the Court itself may conduct it or delegate one of its Members to do so.

المادة الرابعة والأربعون

إذا تبين للمحكمة ضرورة إجراء تحقيق لإيضاح نقاط يتوقف عليها الفصل في الدعوى باشرته بنفسها في الجلسة أو قام به من تندبه من أعضائها.

Article 45

Minutes shall be prepared for each Court meeting and signed by the Registrar and the President and shall be treated as an authentic proof of its contents.

المادة الخامسة والأربعون

يحدد لكل جلسة محضر يوقعه المسجل ورئيس المحكمة ويكون لهذا المحضر الحجية الكاملة في إثبات ما دون به.

Chapter Three
Objections, Submissions, Intervention and Counter-Claims

الفصل الثالث
الدفوع والطلبات والتدخل والدعاوى المقابلة

Article 46

1. An objection may be made at any stage of the case before the case is declared pending the passing of judgment as long as it is related to the *ordare public*. The Court may *proprio motu* decide thereon.
2. Any objection to the jurisdiction

المادة السادسة والأربعون

1- يجوز إبداء الدفوع في أية مرحلة تكون عليها الدعوى قبل حجزها لإصدار الحكم فيها طالما تعلقت بالنظام العام الدولي، كما يجوز للمحكمة أن تقضي

of the Court or the admissibility of the application or any other objection shall be made within the time-limit.

3. The Court shall issue a decision regarding the objections laid before it, or the litigants may agree that the objections may be determined with the subject-matter of the case, or that the Court may *proprio motu* so decide.

فيها من تلقاء نفسها.

2- الدفع بعدم الاختصاص أو غيره من دفوع عدم القبول أو أية دفوع أخرى تقدم خلال المواعيد المحددة.

3- تفصل المحكمة في الدفوع المبداه أمامها بحكم منها، ويجوز للخصوم الاتفاق على إرجاء نظر الدفوع مع الموضوع أو أن تقرر المحكمة ذلك من تلقاء نفسها.

Article 47

Counter-claims or objections shall be presented by means of an application and shall be decided by the Court in the light of how closely they are connected to the original proceedings. If they are connected, they shall be included in the original proceedings and the same procedures shall be followed therewith.

المادة السابعة والأربعون

الدعاوى المقابلة أو المعارضة تقدم بطلب وتفصل المحكمة في قبولها في ضوء مدى ارتباطها بالدعوى الأصلية ارتباطا وثيقا، فإذا كانت كذلك تضم إلى الدعوى الأصلية، ويتبع في شأنها ذات إجراءاتها.

Article 48

An application for permission to intervene shall be filed with the Registrar before the commencement of oral proceedings and shall set out the basis of intervention, a submission and a statement of the facts and law. The application shall be communicated to the parties who are entitled to comment upon it.

المادة الثامنة والأربعون

طلب التدخل يقدم للمسجل قبل ابتداء الإجراءات الشفوية ويجب أن يتضمن الطلب أسانيد التدخل وعرض للدعوى وبيان الوقائع والقانون ويعلن الطلب إلى الخصوم الذين لهم حق التعقيب عليه.

Article 49

1. An applicant may not file any incidental applications during the hearing of the case unless they are related to the original application and deal with circumstances which have arisen or were discovered after the

المادة التاسعة والأربعون

1- لايجوز للمدعى تقديم طلبات عارضة خلال نظر الدعوى إلا إذا كانت مرتبطة بالطلب الأصلي وأريد بها مواجهة ظروف طرأت أو تبينت بعد

proceedings were instituted.

2. Interlocutory applications shall be subject to the time-limits specified pursuant to the provisions of these Rules.
3. Interlocutory applications may be filed either by a separate application or orally during a session and in the presence of the other party, and they shall be recorded in the minutes. Such applications shall not be admitted after the closure of proceedings before delivery of the judgment.
4. The Court may admit the addition of a number of cases if they are similar or related and connected with each other in order to produce a single judgment for them all.

رفع الدعوى.

2- وتخضع الطلبات العارضة للمواعيد المقررة وفقا لأحكام هذا النظام.

3- تقدم الطلبات العارضة إما بعريضة مستقلة وإما شفاهه بالجلسة في حضور الطرف الآخر مع إثباتها في محضرها ولا تقبل هذه الطلبات بعد حجز الدعوى لإصدار الحكم فيها.

4- يجوز للمحكمة أن تضم عدة دعاوى إذا قام بينها ارتباط أو تماثل لتصدر فيها حكما واحدا.

Article 50

The Court shall observe such rules of evidence as may be appropriate to the nature of dispute laid before it, and may, in relation to evidence produced by a party to the case, transfer the burden of proof to the other party and estimate the effect arising from its inability to do so.

المادة الخمسون

تتقيد المحكمة بقواعد الإثبات فيما يتعلق مع طبيعة المنازعة المعروضة عليها، ولها بناء على دليل مقدم من أحد طرفي الدعوى نقل عبء الإثبات إلى الطرف الآخر وتقدير الأثر المترتب على عجزه عن القيام بذلك.

Article 51

1. The respondent may, during the proceedings but before the delivery of the judgment, accept the claims of the applicant. Hence, the Court shall decide the end of the litigation.
2. The respondent may also be reconciled with the applicant. In such case the Court shall record this reconciliation in the minutes of the sitting and the reconciliation and its

المادة الواحدة والخمسون

1- يجوز للمدعى عليه أثناء سير الدعوى وقبل حجزها للحكم أن يسلم بطلبات المدعي وعند ذلك تقرر المحكمة بانتهاء الخصومة.

2- كما يجوز للمدعى عليه أن يتصالح مع المدعى وفي هذه الحالة تثبت المحكمة

implications shall have the same effect as the judgment issued by the Court.

3. If the applicant decides to withdraw the case, he shall file a written application to the Registrar and the Court shall order the suspension of the case and remove it from the General List. This is conditional on the other party accepting such withdrawal if he has already responded to the case, and the Court shall fix a date to admit or reject such an application.

الصلح في محضر الجلسة ويكون الصلح فيما تضمنه بمثابة الحكم الصادر من المحكمة.

3- إذا قرر المدعي ترك الدعوى قدم طلبا كتابيا بذلك إلى مسجل المحكمة وتأمر المحكمة بوقف نظر الدعوى واستبعاد القضية من الجدول ويشترط قبول الخصم حالة أن يكون قد باشر الدعوى وتحدد له المحكمة موعدا لقبول الترك أو رفضه.

Article 52

The control and running of a meeting are entrusted to the President. The Court may *proprio motu* order the omission of phrases which are contrary to international customs and norms from any document in the case.

المادة الثانية والخمسون

ضبط الجلسة وإدارتها منوطان برئاستها، وللمحكمة من تلقاء نفسها أن تأمر بمحو العبارات المخالفة للأصول والأعراف الدولية من أية ورقة من أوراق الدعوى.

Chapter Four
Protection and
Interim Measures

الفصل الرابع
في الإجراءات التحفظية والمؤقتة

Article 53

A written request for provisional measures may be filed at any time with the Registrar. The request shall specify the motives and reasons thereof, the possible consequences if they are not granted, and the measures requested by the applicant.

The Registrar shall communicate an authenticated copy of the submitted request to the other party.

المادة الثالثة والخمسون

يجوز تقديم الطلب الخاص بالإجراءات التحفظيه في أي وقت إلى مسجل المحكمة كتابة على أن يتضمن الطلب بيان البواعث، والأسباب التي تبرر تقديمه والنتائج التي تترتب على رفضه مع إيضاح الإجراءات التي يلتمس الطالب اتخاذها.

وعلى مسجل المحكمة إخطار الطرف الآخر بنسخة من الطلب المقدم والتأشير بالإجراءات

التحفظية.

المادة الرابعة والخمسون

تدعى المحكمة فورا للنظر في طلب الإجراءات التحفظية بصفة مستعجلة وله الأولوية على ما عداه من الطلبات وتفصل فيه بصفة مستعجلة.

المادة الخامسة والخمسون

لرئيس المحكمة دعوة الأطراف إلى التصرف بشكل يمكن معه تنفيذ الأمر الذي يمكن أن تصدره المحكمة في طلب الإجراءات التحفظية.

المادة السادسة والخمسون

للمحكمة من تلقاء نفسها دون طلب من الأطراف ممارسة اختصاص اتخاذ الإجراءات التحفظية ولواختلفت مع طلباتهم كليا أو جزئيا، ولها الحق في اتخاذ الإجراءات التحفظية لحماية بعض الأدلة المادية من التلف أو الاختفاء العمدي أو غير العمدي والتي يترتب على اختفائها أو تلفها استحالة إثبات حق أو حقوق أحد طرفي النزاع.

المادة السابعة والخمسون

رفض الطلب بإجراءات تحفظية لا يمنع الطالب من أن يقدم من جديد طلبا جديدا مؤسسا على وقائع جديدة في نفس الدعوى.

المادة الثامنة والخمسون

للمحكمة - بناء على طلب طرف - إذا كان هناك تغيير جوهري يبرر ذلك أن تأمر بإلغاء أو تعديل الإجراءات التحفظية التي سبق

Article 54

The Court shall forthwith be convened for the purpose of deciding upon the measures requested. Such an application shall have priority over all other cases and should be dealt with as a matter of urgency.

Article 55

The President may call upon the parties to act in such a way as to enable any orders the Court may make on the request for provisional measures to have their appropriate effect.

Article 56

The Court may, *proprio motu* and without a request from the parties, exercise its jurisdiction to order provisional measures even if they are in whole or in part contrary to their requests. It shall also be entitled to take provisional measures to protect material evidences from damage or disappearance, whether deliberately or not, if the damage or disappearance thereof may make it impossible to prove the right or rights of a party to the dispute.

Article 57

The rejection of a request for provisional measures shall not prevent the applicant from making a new request in the same case based on new facts.

Article 58

The Court may, at the request of a party, order the revocation or amendment of the provisional measures previously taken if there is a material change which justifies thus. A request for revocation or amendment shall set

out the reasons on which it is based. In all cases, the Court shall enable the parties to the case to present their observations concerning such a request.

إقرارها، ولا بد أن يتضمن طلب الإلغاء أو التعديل بيان الأسباب التي تبرره، وفي كل الأحوال ينبغي على المحكمة تمكين أطراف الدعوى من تقديم ملاحظاتهم بخصوص هذا الطلب.

Article 59

The Court may request such information that may be relevant to the implementation of the provisional measures determined by it.

المادة التاسعة والخمسون

للمحكمة الحق في طلب معلومات بشأن المسائل المتعلقة بتنفيذ الإجراءات التحفظية التي قررتها.

Part Three
Passing Judgments

الباب الثالث
إصدار الأحكام

Article 60

1. Upon completion of the hearings, the President shall declare that the case is pending the delivery of the judgment.

The Court's deliberations shall be secret and must not be disclosed. The Judges shall base their decision on the opinions expressed during the final discussions.

المادة الستون

1- بعد الانتهاء من نظر الدعوى يعلن رئيس الجلسة حجزها لإصدار الحكم فيها.

2- تكون مداولات المحكمة سرية ولا يجوز إفشاؤها، ويؤسس قضاة المحكمة على محصلة الآراء بعد المناقشة الختامية.

Article 61

Judgments shall be made by a majority opinion and Judges shall vote in accordance with their seniority. The judgment shall contain the names of members who took part in deciding it, the names of litigants and their agents, a summary of the proceedings, a statement of facts and the legal reasons in point of law. Any Judge who dissents from the majority may, if he so

المادة الواحدة والستون

تصدر الأحكام بأغلبية الآراء ويقوم القضاة بالتصويت وفقا لأقدمياتهم ويجب أن يشتمل الحكم على أسماء الأعضاء الذين اشتركوا في إصداره وأسماء الخصوم ووكلائهم وملخص الإجراءات وبيان الوقائع والأسباب القانونية.

desires, issue a statement stating his dissenting opinion.

ويمكن للقضاة المعارضين إن شاءوا أن يصدروا بيانا برأيهم المعارض.

Article 62

The draft judgment containing the reasons on which it is based on shall, before the sitting in which the judgment shall be read, be deposited with the President. If it is not so deposited, the judgment shall be void.

المادة الثانية والستون

يجب أن تودع مسودة الحكم المشتملة على أسبابه قبل جلسة النطق به ويتم ذلك بتسليمها إلى رئيس الجلسة، فإذا لم تودع على هذا النحو كان الحكم باطلا.

Article 63

1. The judgment is delivered by reading its operative clause or its operative clause and the grounds on which it is based.
2. The original copy of the judgment containing the proceedings, reasons and operative clause shall be signed by the President and the Registrar and placed in the file of the case. Each of the parties shall be given a copy thereof.

المادة الثالثة والستون

1- يتم إصدار الحكم بتلاوة منطوقة أو بتلاوة منطوقة مع أسبابه.

2- يوقع رئيس الجلسة والمسجل على نسخة الحكم الأصلية المشتملة على وقائع الدعوى والأسباب والمنطوق وتحفظ في ملف الدعوى وتسلم صور منها للأطراف.

Article 64

The Court shall, by a decision issued *proprio motu* or at the request of a party to the case, rectify any material clerical or arithmetical errors. Such rectification shall be recorded by the Registrar on the original copy of the judgment and signed together with the President. Parties who have been previously given a copy of the judgment or the order in which the error occurred shall be notified thereof.

المادة الرابعة والستون

تتولى المحكمة تصحيح ما يقع في أحكامها من أخطاء مادية كتابية أو حسابية وذلك بقرار تصدره من تلقاء نفسها أو بناء على طلب أحد أطراف الدعوى، ويدون المسجل هذا التصحيح على نسخة الحكم الأصلية ويوقعه مع الرئيس، ويجرى التبليغ بالتصحيح إلى الأطراف الذين سبق لهم تسلم صورة الحكم أو القرار الذي وقع الخطأ فيه.

Article 65

Parties to the case may request the Court to construe any ambiguity or vagueness in the text of the judgment. The normal procedures of filing a case

المادة الخامسة والستون

يجوز لأطراف الدعوى أن يطلبوا إلى المحكمة تفسير ما وقع في منطوق حكمها من

shall be followed for submitting such a request. A decision regarding the request for construing a judgment shall be duly taken on the condition that it shall not alter the judgment.

غموض أو إبهام، ويقدم الطلب بالأوضاع المعتادة لرفع الدعوى، وتفصل المحكمة في طلب التفسير بما لا يؤدي إلى تعديل الحكم وذلك وفقا للأصول المقررة في هذا الشأن.

Article 66

The rules governing adjudged issues and the probative effect of judgments among parties shall be applied. A judgment shall be effective and binding upon the parties from the day on which it is read.

المادة السادسة والستون

تسري في شأن الأحكام الصادرة من المحكمة القواعد الخاصة بقوة الشيء المقضى فيه وحجية الأحكام بين الأطراف ويكون الحكم نافذا وملزما للأطراف من يوم تلاوته علنا.

Part Four
Registers, Files and Documents

الباب الرابع
السجلات والملفات والمستندات

Article 67

At the beginning of each Gregorian year the following registers shall be established:

1. A general register (General List) in which cases or advisory opinions shall be recorded with serial numbers according to their filing dates. The following details shall also be recorded: subject-matter of the case, names of parties, submissions, date of depositing applications, date of communication to the respondent, date of meeting, file number in the archive, type of case or application, closure date of pleadings, postponements, and the commencement date of the pleadings.
2. A register for entering the applications with regard to the distrribution of copies of judgments and papers. In such register applications shall be entered and given serial

المادة السابعة والستون

تنشأ بالمحكمة في كل أول سنة ميلادية السجلات الآتية:

1- سجل عام (جدول عام) تغير فيه الدعاوى أو طلبات الرأي الاستشاري بأرقام متتابعة وفقا لتاريخ تقديمها ويبين فيه موضوع الدعوى وأسماء أطرافها والطلبات وتاريخ إيداع العريضة وتاريخ تسليمها للمدعى عليه وتاريخ الجلسة ورقم الملف في الأرشيف - نوع الدعوى أو الطلب- التدخل في الدعوى-طريقة الخضوع لاختصاص المحكمة-تاريخ بداية الإجراءات-تاريخ قفل باب المرافعة- التأجيلات-تاريخ بداية جلسات

numbers. The following details shall also be recorded: the number of the general register, name of applicant, judgments a copy of which is required and the dates thereof, the date on which a copy of the judgment was requested and the date it was delivered and the signature of recipient.

3. A register for filing cases, in which the following details shall be stated: case number, date of filing and names of litigants, date of judgment or the latest procedure undertaken.
The Court may decide to establish other registers.

المرافعة.

2- سجل لقيد طلبات صور الأحكام والأوراق تحصر فيه هذه الطلبات بأرقام متتابعة ويبين فيه رقم السجل العام واسم الطالب والأحكام المطلوب صورتها وتاريخها وتاريخ طلب الصورة وتسليمها لطالبها وتوقيع من تسلم الصوره.

3- سجل لحفظ القضايا يبن فيه رقم القضيه وتاريخ ورودها للحفظ وأسماء الخصوم أو تاريخ الحكم أو آخر إجراء فيها.

ويجوز للمحكمه بقرار منها إنشاء سجلات أخرى.

Article 68

For each case there shall be a file prepared in which every relevant paper must be filed; specifying number of the case, names of its parties, name of the applicant party, date and time of deposit of the application and a statement of the deposited papers showing their serial numbers, and the number of appendices. On the outer cover of the file the following shall be stated: the number of the case in the general register, names of its parties, subject-matter of the case and the stage of its proceedings.

المادة الثامنة والستون

يعد ملف لكل دعوى تودع به كل ورقة يتعين إيداعها ويكون ذلك بمحضر يثبت فيه رقم الدعوى وأسماء أطرافها واسم المودع وصفته وتاريخ الإيداع وساعته وبيان الأوراق المودعة، ويوقع من المودع والموظف المختص ويؤشر على غلاف الملف من الداخل ببيان الأوراق المودعة بأرقام متتابعة وتاريخ إيداعها وعدد ملحقاتها، ويثبت على غلاف الملف من الخارج رقم الدعوى بالسجل العام وأسماء أطرافها وموضوع الدعوى وإجراءات سيرها.

Article 69

The case papers and documents shall be made accessible by the Court official-in-charge to litigants or their representatives, who alone may examine them at the seat of the Court. Original copies of documents, reports and memoranda must not be removed from the seat of the Court.

المادة التاسعة والستون

يتولى الموظف المختص بالمحكمة مهمة إطلاع الخصوم أو ممثليهم على أوراق الدعاوى ومستنداتها في مقر المحكمة، ويقصر الاطلاع على هؤلاء وحدهم، ولا يجوز نقل أصول المستندات والتقارير والمذكرات خارج مقر المحكمة.

Article 70

Documents may, after the delivery of the judgment and the depositing of its draft, not be returned to the parties who have submitted them. If it is necessary to get them back before the delivery of the judgment, they may, by written permission from the President, be given provided that a date shall be fixed for returning them.

المادة السبعون

لا يجوز رد المستندات إلا لمقدميها بعد صدور الحكم وإيداع مسودته، فإذا دعت الضرورة إلى استردادها قبل صدوره جاز ردها بإذن كتابي من رئيس المحكمة على أن يعين ميعادا لإعادتها.

NOTE ON ARTICLE 9 OF THE STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE AND THE POSITION OF THE MOSLEM LEGAL SYSTEM AND THE MOSLEM CIVILISATION AMONG THE MAIN FORMS OF CIVILISATIONS AND PRINCIPAL LEGAL SYSTEMS OF THE WORLD PRESENTED BY THE DELEGATIONS OF THE MOSLEM STATES OF THE NEAR EAST[1]

I

1. The Moslem legal system is a system of unquestionable originality. Its autonomy is evident, as a legal system largely governed by the distinctive character of a social community very different from that in which other legal systems have reached normative maturity.

The International Congress on Comparative Law which was held at The Hague in 1932 decided that Moslem Law is an entirely independent source of comparative law. In 1938 when the question of the relationship between Roman Law and Moslem Law was brought to the consideration of the Second Congress on Comparative Law, the Congress stated explicitly that Moslem Law was an autonomous legal system which did not depend on other established systems. The body of professors representing Egypt at that Congress had submitted to it a memorandum to illustrate this scientific as well as historical data by developing a descriptive research on the scope of the constitutive elements of the Moslem legal system and its creative evolution through the normative activities of its complementary sources.

The following is a summary of the theories developed in the above-mentioned note.

II

2. One must never confuse Moslem religion with Moslem Law. The first period of Islam had barely ended when the advance of the science of Law, as well as the development of legal relations, helped dissociate the intricate elements which composed the general Moslem system; thus, the precepts of faith were isolated from legal rules. Faith, which is the subject of a separate science: Al Kalam is entirely distinct from: Al Fikh, or Law, which contains the precepts of conduct and actions. It is true that Law evolved along the general lines of religion, but however great the influence of religion, Law in the mind of all represented an autonomous discipline of a secular character, in its finality at least.

In order to clearly bring out this character one must distinguish between two periods in the function of Moslem Law; the first one is that in which formal sources of legal rules stem from the divine command, expressed directly in the Koran or indirectly in the tradition of the Prophet "Al Sunna". The second period is that of scientific development of Moslem Law through Cheria's two

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[1] Reprinted from Documents of the United Nations Conference on International Organisation, San Francisco, 1945 vol. 14, United Nations Committee of Jurists, p.p. 375-379.

supplementary sources: The consensus on "al Ijma" and the Analogy or "Al Qiyas"

3. It is incontestable that in the first period the Moslem legal system established by the Koran and "Al Sunna" had been formed independently of any outside influence of other legal systems. Its religious stamp as well as a generality of its principles have clearly distinguished it from all the other legal systems in force in the other countries during this same period. As for its religious stamp it was in the very nature of things. The Koran at first dealt with religion and morals, particularly in the first verses. Later one finds legal rules concerning not only man's actions either in the civil or penal field but also relations between nations. one finds standards on war, peace, family organisation, property, obligations, crimes, repressive, punishment, even on judicial procedure. All these rules are mingled with religious concepts which accounts for the religious or rather moral influence which characterises Moslem Law. Moreover, this religious influence was justified in order to insure the prominence of moral principles which are recommended by religion and which in the final analysis must govern human nature. But this religious influence does not in any way affect the legal character of the rules of the Islamic Law, nor their intrinsic value, considered as a whole as a homogenous and coherent normative system. A large part of these legal rules established by the Koran and Sunna have been enacted to abrogate or modify preislam customs, in other terms they constitute legal reforms realised by Islam to counter balance general tendencies in preislamic law. This part was of purely Arabic formation, while the other was in view of the changing needs of the Moslem community. Thus, Moslem legislation translates in a truly remarkable way all social transformations required by the development and progress of the Moslem community, welcoming certain preislamic institutions, correcting numerous points of the preexisting Law and lastly, formulating new principles in consideration of the needs and aspirations of Islamic society.

4. In the second period of the evolution of Moslem Law, after the Prophet's death, the divine sources cease to inspire the legal system of Islam, but a purely scientific work continued to fill the gaps of the Moslem legal order and to insure the development of Law and its adaptation to social needs through two supplementary sources, the Consensus and the Analogy. These two purely secular sources have enabled Moslem jurists to introduce in the legal system a progressive element of considerable importance; it is through these sources that doctrine and jurisprudence have shown a truly remarkable creative activity and have thus formulated a rather important part of the Islamic legal system.

It is, however, to be noted that the normative activity expressed by the supplementary sources was not of a nature to prepare the Moslem legal system to absorb, at least without restraint, the foreign institutions or civilisations. A certain number of these have crept into the Moslem Law, through the channels of one or the other of the complementary sources; even then, such institutions have not retained their individuality. They blend themselves in the Moslem legal system and lose their own physiognomy to follow exactly the pattern of Moslem technique.

5. In the field of historical and rational data as well, there is no doubt that the Moslem Law is an autonomous legal system. Furthermore, the technical structure of Moslem Law brings forth the fundamental differences which place the Moslem system in a class apart from other legal systems. Let us not go further without noting that the legal technique of Moslem public Law is thoroughly different from that of European or American institutions pertaining to state organisation and to international or domestic relations. In this respect, one has never doubted the originality of this legal system. In fact the Moslem rules concerning the domestic and international activities of the State present no similarity whatsoever to those belonging to codes of Occidental Law. A mere perusal of the Moslem rules dealing with peace, war, or international world organisation will suffice to convince that public law, be it domestic or international, enjoys among Moslem peoples a certain autonomy, characteristic phenomenon of Moslem civilisation. To quote only one of the most typical examples, one can consider the Moslem conception of Unitarian State, this very conception which accounts for the existence of the Moslem world "Dar El Islam" as a political entity, which tends to insure an international organisation of a *sui generis* nature.

6. The Moslem Law, public as well as private, is based on a highly developed and powerful moralising concept which pervades the entire Moslem system. It is true that any legal system which has reached a certain degree of evolution contains a moral element. The moralising concept of the Moslem system, however, is not the result of a slow evolution, it was born with the fundamental principles of the legal order and this constitutes an integral part of it. One can therefore say that it has not assumed a subsidiary character and that it has steadily retained its vigor during the evolution of the legal system. This moralising tendency which pervades the entire Moslem legal system and which is explained by its relation to religion, has enabled the Moslem jurists to elaborate several important theories, such as that pertaining to the abuse of Law as based on the adage "Hadith" of the Prophet asserting that "no one has the right to harm his neighbour" and the theory of imprevision conceived on the provisions of the Koran stating that "no one is held to the impossible". Another Koran text prohibiting all unjust acquisitions contains the seed of a range of theories of public and private Law, a justly recognised prerogative of the free individual, is respected by Moslem Law to the extent of being considered as imprescriptible. There again can be felt the moralising tendency of Law throughout Islam. Should we confine ourselves to ethics, we could not pretend to destroy the rights of the individual for the simple reason that he has not availed himself of or exercised them for a certain period of time. But legal proceedings can be prescribed; and in this way, Moslem jurists are able to conciliate exalted moral principles and the imperious needs of practical life by an original conception tending to separate right from legal proceedings; legal proceedings present themselves form independent in its existence, of the right, the defence of which it insures.

Such a powerful moralising conception will contribute to mitigate the rigor of legal rules; such a system will serve as a regulator capable of furnishing in the settlement of international conflicts theories extremely flexible and evolutive.

III

7. Article 9 of the statute of the Permanent Court of International Justice states:

"At every election, 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 civilisation and the principal legal systems of the world."

The originators of the stature, in the drafting of this article, must certainly have envisaged, among others, the Arabic civilisation and the legal system of Islam.

Accordingly, the government of Near Eastern Moslem States, in Letters addressed in September, 1939, to the Secretary General if the League of Nations, pointed out that "the fact cannot be disputed that Moslem civilisation, owing to its glorious past as well as to its present effulgence, constitutes one of the main forms of civilisation.

"On the other hand, Moslem Law, governing as it does an important part of the peoples of the world, is an autonomous legal system boasting its own sources, structure and conceptions."

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