

ARTICLE 92

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TEXT OF ARTICLE 92

The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.

INTRODUCTORY NOTE

1. In the present study, all material concerning the judicial character of the Court is treated under that heading. Former headings II B, "The judicial character of the Court", and II C, "Limitation imposed on the Court by its judicial character", which appeared in the previous Repertory studies of Article 92, have accordingly been combined. As a result, the heading previously numbered II D becomes II C in this study.

2. In two cases in which the action of the United Nations organ concerned was completed (see paragraphs 10 and 11 below), the period covered by the present study has been extended beyond September 1959.

I. GENERAL SURVEY

3. The first part of Article 92, which provides that the "International Court of Justice shall be the principal judicial organ of the United Nations", was mentioned in a report of the Committee on South West Africa dealing with the legal action open to organs of the United Nations in regard to the obligations assumed by the Union of South

Africa under the Mandate (see paragraph 8 below). It was also referred to 1/ during the discussion of certain proposals in the General Assembly.

4. The provision in Article 92 that the International Court of Justice "shall function in accordance with" its Statute was invoked in one separate opinion and two dissenting opinions appended to the judgements of the Court. In each case, it was stated that the Court should determine its jurisdiction solely in accordance with its Statute, and that a reservation made by a State to its acceptance of the compulsory jurisdiction of the Court should not be considered or applied by the Court in reaching a decision on the question of its jurisdiction. 2/

5. The International Court of Justice repeatedly emphasized the judicial character of the Court in its advisory opinions and judgements (see paragraphs 9 to 11 below).

6. In its resolution 1142 A (XII) of 25 October 1957, the General Assembly once more recalled the passage in the advisory opinion of the International Court of Justice of 11 July 1950 on the international status of South West Africa, to the effect that reference to the Permanent Court of International Justice was to be replaced by reference to the International Court of Justice (see paragraph 13 below). Continuity of the latter Court with the former Court was also given extensive consideration in the joint dissenting opinion appended to the judgement of the International Court of

1/ For instance, several representatives referred to the International Court of Justice as the principal or highest judicial organ in support of a draft resolution which would submit the question of voting on matters relating to Non-Self-Governing Territories to the Court for an advisory opinion. G A (XIII), Plen., 790th mtg., paras. 13, 26, 78 and 91. See also this Supplement, under Article 96.

2/ In his separate opinion in the case of certain Norwegian loans, Judge Lauterpacht, referring to the reservation of France, said:

"... I consider it legally impossible for the Court to act in disregard of its Statute which imposes upon it the duty and confers upon it the right to determine its jurisdiction. That right cannot be exercised by a party to the dispute. The Court cannot, in any circumstances, treat as admissible the claim that the parties have accepted its jurisdiction subject to the condition that they, and not the Court, will decide on its jurisdiction. To do so is in my view contrary to Article 36 (6) of the Statute which, without any qualification, confers upon the Court the right and imposes upon it the duty to determine its jurisdiction. Moreover, it is also contrary to Article I of the Statute of the Court and Article 92 of the Charter of the United Nations which lay down that the Court shall function in accordance with the provisions of its Statute." (I C J, Reports 1957, p. 43).

The same reasoning was advanced in a dissenting opinion in the Interhandel case by the same Judge (I C J, Reports 1959, p. 103).

In a dissenting opinion in the Interhandel case, Judge Klaestad, referring to the reservation made by the United States, said:

"Article I of the Statute provides that the Court 'shall function in accordance with the provisions of the present Statute'. The same provision is inserted in Article 92 of the Charter of the United Nations. The Court is therefore, both by its Statute and by the Charter, prevented from applying that part of the clause which reserves to the United States the determination of the matter. It becomes impossible for the Court to act upon the words: 'as determined by the United States of America'." I C J, Reports 1959, p. 76.)

Justice delivered on 26 May 1959 in the "Case concerning the Aerial Incident of July 27th, 1955 (Israel v. Bulgaria)". 3/

II. ANALYTICAL SUMMARY OF PRACTICE

A. The role of the International Court of Justice as "the principal judicial organ of the United Nations"

7. During the period under review, the provision that the "International Court of Justice shall be the principal judicial organ of the United Nations" was not invoked by any organ of the United Nations as conferring competence on the Court to deal with a question. 4/

B. The judicial character of the Court

8. By resolution 1060 (XI) of 26 February 1957, the General Assembly requested the Committee on South West Africa to study the following question:

"What legal action is open to the organs of the United Nations, or to the Members of the United Nations, or to the former Members of the League of Nations, acting either individually or jointly, to ensure that the Union of South Africa fulfils the obligations assumed by it under the Mandate, pending the placing of the Territory of South West Africa under the International Trusteeship System?"

In a special report to the General Assembly at its twelfth session, the Committee considered that one form of legal action open to the organs of the United Nations was to seek an advisory opinion from the International Court of Justice. The Committee pointed out, however, that the Court might, in certain circumstances, decline to give its opinion. In this connexion, the Committee cited 5/ a previous advisory opinion of the Court, which had stated that the Court was not merely an organ of the United Nations but essentially the principal judicial organ of the Organization and, as such,

3/ The joint dissenting opinion, in dealing with the question whether the Bulgarian Declaration of 1921, accepting the compulsory jurisdiction of the Permanent Court of International Justice, lapsed on the date of dissolution of that Court, stated:

"Although the establishment of the International Court of Justice and the dissolution of the Permanent Court were two separate acts, they were closely linked by the common intention to ensure, as far as possible, the continuity of administration of international justice. In its Resolution of April 18th, 1946, the Assembly of the League of Nations made express reference to Article 92 of the Charter of the United Nations providing for the creation of an International Court of Justice as the principal judicial organ of the United Nations and to the Resolution of the Preparatory Commission of the United Nations of December 18th, 1945, which declared that it would welcome the taking of appropriate steps by the League of Nations for the purpose of dissolving the Permanent Court." (I C J, Reports 1959, p. 158.)

4/ For references by individual representatives to this provision as an enabling provision, see foot-note 1 above. For reference by an organ of the United Nations to this provision in order to stress the judicial character of the Court, see section II B of the present study.

5/ G A (XII), Suppl. No. 12 A (A/3625), para. 20. See also Repertory, vol. V, under Article 92, para. 14.

the Court was empowered to examine whether the circumstances of the case were of such a character as should lead it to decline to answer the request.

9. On 23 October 1956, the International Court of Justice gave an advisory opinion on the "Judgments of the Administrative Tribunal of the International Labour Organisation upon complaints made against the United Nations Educational, Scientific and Cultural Organization". Referring to the procedure laid down in Article XII of the Statute of the Administrative Tribunal, which provided for advisory proceedings in place of contentious proceedings, the Court stated: 6/

"The Court is not called upon to consider the merits of such a procedure or the reasons which led to its adoption. It must consider only the question whether its Statute and its judicial character do or do not stand in the way of its participating in this procedure by complying with the Request for an Advisory Opinion.

"... The judicial character of the Court requires that both sides directly affected by these proceedings should be in a position to submit their views and their arguments to the Court."

In the opinion of the Court, the principle of the equality of the parties had not been impaired in the case by the circumstance that the written statement on behalf of the officials was submitted through the United Nations Educational, Scientific and Cultural Organization (UNESCO). The Court therefore considered that it should comply with the request for an opinion.

10. In the "Case concerning Right of Passage over Indian territory (Portugal v. India)", Portugal invited the International Court of Justice to hold that certain arguments of India were without foundation. In its judgement, delivered on 12 April 1960, the Court stated: 7/

"It goes without saying that the Court would take such arguments into consideration in the reasons for its Judgement if it regarded any of them as likely to assist it in arriving at the decision it is called upon to take. But it is no part of the judicial function of the Court to declare in the operative part of its judgement that any of those arguments is or is not well-founded."

11. In its advisory opinion of 8 June 1960 on the "Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization", 8/ the International Court of Justice said: 9/

"The Statements submitted to the Court have shown that linked with the question put to it, there are others of a political nature. The Court as a judicial body is, however bound, in the exercise of its advisory function, to remain faithful to the requirements of its judicial character."

6/ I C J, Reports 1956, pp. 85-87.

7/ I C J, Reports 1960, p. 32.

8/ See also this Supplement, under Article 96.

9/ I C J, Reports 1960, p. 153.

C. Continuity of the Court with the Permanent Court of
International Justice

12. In its special report to the General Assembly, the Committee on South West Africa discussed the continuity of the International Court of Justice with the Permanent Court of International Justice in the following context.

(a) With respect to the obligations of the Union of South Africa under the Mandate, the Committee reiterated the advisory opinion of the International Court of Justice of 11 July 1950 to the effect that article 7 of the Mandate, which provided for reference of a dispute between the mandatory State and another Member of the League of Nations concerning the interpretation or application of the provisions of the Mandate to the Permanent Court of Justice, was still in force and that, in the light of Article 37 of the Statute of the International Court of Justice and Article 80 (1) of the United Nations Charter, the Union of South Africa was under an obligation to accept the compulsory jurisdiction of the International Court of Justice. 10/

(b) With respect to legal action open to former Members of the League of Nations, the Committee on South West Africa dealt with the possibility of the institution of contentious proceedings before the International Court of Justice and said in part: 11/

"The Court has given its advisory opinion that it has jurisdiction under article 7 of the Mandate. If contentious proceedings were instituted under this article, the jurisdiction of the Court would depend upon Articles 36, paragraph 1, and 37 of the Statute of the Court. Article 36, paragraph 1, provides that the jurisdiction of the Court comprises all matters specially provided for in treaties or conventions in force. As Sir Arnold McNair indicated 'there can be no doubt that the Mandate, which embodies international obligations, belongs to the category of treaty or convention'. According to Article 37 of the Statute, a treaty or convention which provides for the reference of a matter to the Permanent Court shall be construed as if it provided for reference to the present Court."

13. The special report of the Committee on South West Africa was considered by the General Assembly at its twelfth session. By resolution 1142 A (XII) of 25 October 1947, the General Assembly,

"Recalling its resolution 449 A (V) of 13 December 1950, by which the General Assembly accepted the opinion of 11 July 1950 of the International Court of Justice to the effect that:

".....

"(c) The reference to the Permanent Court of International Justice is to be replaced by a reference to the International Court of Justice in accordance with article 7 of the Mandate and Article 37 of the Statute of the International Court of Justice,

".....

10/ G A (XII), Suppl. No. 12 A (A/3625), para. 10. See also Repertory, Supplement No. 1, vol. II, under Article 92, paras. 14 and 15.

11/ G A (XII), Suppl. No. 12 A (A/3625), para. 35.

"3. Draws the attention of Member States to the failure of the Union of South Africa to render annual reports to the United Nations, and to the legal action provided for in article 7 of the Mandate read with Article 37 of the Statute of the International Court of Justice."