

ARTICLE 92

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Text of Article 92

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ARTICLE 92

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 this study of Article 92 the same outline has been maintained as in the corresponding study in *Repertory Supplement No. 2*

2. The judgement delivered on 12 April 1960 in the "Case concerning Right of Passage over Indian Territory (Portugal v. India)" and the advisory opinion of 8 June 1960 on the "Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization", relating to the judicial character of the Court, were dealt with in *Supplement No. 2*.¹ Consequently, the two cases in question are not discussed in this study. Certain questions relating to the judicial function in connexion with advisory opinions are considered in this *Supplement* under Article 96.

¹ See *Repertory Suppl. No. 2*, vol. III, under Article 92, paras. 10 and 11.

I. GENERAL SURVEY

3. In its advisory opinion concerning "Certain expenses of the United Nations,"² the Court invoked its role as "the principal judicial organ of the United Nations" under Article 92 of the Charter, to affirm its competence to interpret an Article of the Charter.

4. In a concurring opinion relating to the "Case concerning the Barcelona Traction, Light and Power Company, Limited,"³ the function of the Court as the principal judicial organ of the United Nations was considered important in developing the reasoning on which the decision of the Court was reached.

5. The role of the Court as the principal judicial organ of the United Nations was also referred to in 1966 in the Special Committee on Principles of International

Law concerning Friendly Relations and Co-operation among States,⁴ in connexion with the consideration of the principle of the peaceful settlement of disputes.

6. In the "Case concerning the Northern Cameroons,"⁵ and in "South West Africa Cases, Second Phase," the Court reiterated⁶ its duty to maintain its judicial character and referred to the inherent limitations that circumscribed the exercise of the judicial function in those cases.

7. In several cases the Court also referred to Article 92 of the Charter as well as Articles 36(5) and 37 of the Statute, in examining the continuity between the Permanent Court and the present Court.

² Advisory Opinion of 20 July 1962. ICJ, *Reports 1962*, p. 151.

³ ICJ, *Reports 1967*, p. 6.

⁴ G A (XXI), Annexes, a.i. 87, A/6230, paras. 211-215.

⁵ Judgement of 2 December 1963. ICJ, *Reports 1963*, p. 15.

⁶ ICJ, *Reports 1966*, p. 6.

II. ANALYTICAL SUMMARY OF PRACTICE

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

8. The role of the Court in interpreting the Charter was discussed in the advisory opinion concerning certain expenses of the United Nations, which was rendered at the request of the General Assembly.

9. By its resolution 1731 (XVI) of 20 December 1961, the General Assembly recognized its "need for authoritative legal guidance", and requested the International Court of Justice to give an advisory opinion as to the meaning of Article 17 (2) of the Charter of the United Nations.

10. Recalling that its reply in an advisory opinion on a legal question represents "its participation in the activities of the Organization", the Court found no "compelling reasons" why it should not render its advice in the present case and, quoting from a previous opinion, stated:⁷

"In its Opinion of 28 May 1948, the Court made it clear that as 'the principal judicial organ of the United Nations', it was entitled to exercise in regard to an article of the Charter, 'a multilateral treaty, an interpretative function which falls within the normal exercise of its judicial powers'."

The Court concluded that it would proceed to give its advisory opinion upon the concrete legal question submitted to it.

11. In the "case concerning the Barcelona Traction, Light and Power Company, Limited", one of the concurring judges made the following comment as to the significance of the reasoning upon which the conclusion was based:⁸

"...The more important function of the Court as the principal judicial organ of the United Nations is to be found not only in the settlement of concrete disputes, but also in its reasoning, through which it may contribute to the development of international law. It seems hardly necessary to say that the real life of a decision should be found in the reasoning rather than in the conclusion."

12. During discussion of the principle of the peaceful settlement of disputes in the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, in 1966, a number of representatives considered that no formulation of such a principle would be complete unless

mention was made of the role of the International Court of Justice. They observed that the Court was a principal organ of the United Nations and all Member States were *ipso facto* parties to its Statute. Other representatives, while recognizing that the Court constituted one of the principal organs of the United Nations and that it played an important role in the development and application of international law, either opposed any specific reference to the International Court of Justice in the enunciation of the principle or did not consider such a reference as useful or appropriate.⁹

B. The judicial character of the Court

1. CASE CONCERNING THE NORTHERN CAMEROONS

13. In the "Case concerning the Northern Cameroons", the Government of Cameroon asked the Court to adjudge and declare that, in the application of the Trusteeship Agreement for the Territory of the Cameroons under British administration approved by the General Assembly of the United Nations on 13 December 1946, the United Kingdom failed, with regard to the Northern Cameroons, to respect certain obligations directly or indirectly flowing from that Agreement. The Court found that the proper limits of its judicial function did not permit it to entertain the claim submitted to it with a view to a decision having the authority of *res judicata* between the Republic of Cameroon and the United Kingdom and that any judgement which the Court might pronounce would be without object.

The Court concluded that it could not adjudicate upon the merits of the claim of the Federal Republic of Cameroon.¹⁰

14. In its judgement the Court made the following references to its judicial function:¹¹

"There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity.

"...

"That function (judicial) is circumscribed by inherent limitations which are none the less imperative because they may be difficult to catalogue, and may

⁷ Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962. ICJ, *Reports 1962*, p. 156.

⁸ Separate opinion of Judge Tanaka. ICJ, *Reports 1964*, pp. 65-66. References to the role of the Court as the principal judicial organ of the United Nations have been made in the following dissenting opinions: Case concerning the Northern Cameroons, Dissenting opinion of Judge Bustamente ICJ, *Reports 1963*, pp. 177-179; South West Africa, Second Phase, Judgement, Dissenting opinion of Judge Padilla Nervo ICJ, *Reports 1966*, p. 468.

⁹ G A (XXI), Annexes, a.i. 87, A/6230, paras. 211-215.

¹⁰ Judgement of 2 December 1963. ICJ, *Reports 1963*, pp. 17 and 38.

¹¹ *Ibid.*, pp. 29 and 30.

not frequently present themselves as a conclusive bar to adjudication in a concrete case. Nevertheless, it is always a matter for the determination of the Court whether its judicial functions are involved."

15. With regard to the merits of the case, the Court further stated:¹²

"The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties. The Court's judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations. No judgment on the merits in this case could satisfy these essentials of the judicial function.

"...

"Throughout these proceedings the contention of the Republic of Cameroon has been that all it seeks is a declaratory judgment of the Court that prior to the termination of the Trusteeship Agreement with respect to the Northern Cameroons, the United Kingdom had breached the provisions of the Agreement, and that, if its Application were admissible and the Court had jurisdiction to proceed to the merits, such a declaratory judgment is not only one the Court could make but one that it should make.

"That the Court may, in an appropriate case, make a declaratory judgment is indisputable. The Court has, however, already indicated that even if, when seized of an Application, the Court finds that it has jurisdiction, it is not obliged to exercise it in all cases. If the Court is satisfied, whatever the nature of the relief claimed, that to adjudicate on the merits of an Application would be inconsistent with its judicial function, it should refuse to do so.

"Moreover the Court observes that if in a declaratory judgment it expounds a rule of customary law or interprets a treaty which remains in force, its judgment has a continuing applicability. But in this case there is a dispute about the interpretation and application of a treaty — the Trusteeship Agreement — which has now been terminated, is no longer in force, and there can be no opportunity for a future act of interpretation or application of that treaty in accordance with any judgment the Court might render."

16. One of the concurring judges made the following comments:¹³

"... It is not the task of an international tribunal to apportion blame *in vacuo*, or to find States guilty of illegalities except as a function of, and relative to a decision that these have been the cause of the consequences complained of, for which the State concerned is accordingly internationally responsible; or except in relation to a still continuing legal situation in which a pronouncement that illegalities have occurred may be legally material and relevant.

"...

"In the general international legal field there is nothing corresponding to the procedures found under most national systems of law, for eliminating at a relatively early stage, before they reach the court which would otherwise hear and decide them, claims that are considered to be objectionable or not entertainable on some *a priori* ground. The absence of any corresponding 'filter' procedures in the Court's jurisdictional field makes it necessary to regard a right to take similar action, on similar grounds, as being part of the inherent powers or jurisdiction of the Court as an international tribunal."

2. SOUTH WEST AFRICA CASES, SECOND PHASE

17. The limits inherent in the functions of a court of law and the bounds of normal judicial action were referred to by the Court in the following comments in "South West Africa Cases, Second Phase:"¹⁴

"If, on a correct legal reading of a given situation, certain alleged rights are found to be non-existent, the consequences of this must be accepted. The Court cannot properly postulate the existence of such rights in order to avert those consequences. This would be to engage in an essentially legislative task, in the service of political ends the promotion of which, however desirable in itself, lies outside the function of a court-of-law.

"...

"It may be urged that the Court is entitled to engage in a process of 'filling in the gaps', in the application of a teleological principle of interpretation, according to which instruments must be given their maximum effect in order to ensure the achievement of their underlying purposes. The Court need not here enquire into the scope of a principle the exact bearing of which is highly controversial, for it is clear that it can have no application in circumstances in which the Court would have to go beyond what can reasonably be regarded as being a process of interpretation, and would have to engage in a process of rectification or revision. Rights cannot be presumed to exist merely because it might seem desirable that they should. On a previous occasion, which had certain affinities with the present one, the Court declined to find that an intended three-member commission could properly be constituted with two members only, despite the (as the Court had held) illegal refusal of one of the parties to the jurisdictional clause to appoint its arbitrator — and although the whole purpose of the jurisdictional clause was thereby frustrated. In so doing, the Court (ICJ Reports 1950, p. 229) said that it was its duty 'to interpret the Treaties, not to revise them'. It continued:

'The principle of interpretation expressed in the maxim: *Ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which, as stated above, would be contrary to their letter and spirit.'

¹² *Ibid.*, pp. 33, 34, 36 and 37.

¹³ Separate opinion of Judge Sir Gerald Fitzmaurice, *ibid.*, pp. 100, 106 and 107.

¹⁴ ICJ, Reports 1966, pp. 36 and 48.

"In other words, the Court cannot remedy a deficiency if, in order to do so, it has to exceed the bounds of normal judicial action."

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

18. The judgement delivered by the Court on 21 December 1962 in the South West Africa Cases contains specific reference to Article 92 of the Charter and the continuity between the Permanent Court of International Justice and the International Court of Justice¹⁵ under Article 92. The question at issue was an important one as it concerned whether South Africa was subject to the compulsory jurisdiction of the International Court. The ruling read as follows:

"The Court finds that, though the League of Nations and the Permanent Court of International Justice have both ceased to exist, the obligation of the Respondent to submit to the compulsory jurisdiction of that Court was effectively transferred to this Court before the dissolution of the League of Nations. By its own resolution of 18 April 1946 the League ceased to exist from the following day, i.e. 19 April 1946. The Charter of the United Nations, in accordance with Article 110 thereof, entered into force on 24 October 1945. South Africa, Ethiopia and Liberia, the three Parties to the present proceedings, deposited their ratifications respectively on 7 November 1945, 2 November 1945 and 13 November 1945, and in accordance with paragraph 4 of the said Article 110 all became original Members of the United Nations from the respective dates. They have since been subjected to the obligations, and entitled to the rights, under the Charter. One of these obligations is embodied in Article 37 of the Statute of this Court, which by Article 92 of the Charter 'forms an integral part of the present Charter', and by Article 93 thereof 'All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice'. By the effect of these provisions the Respondent has bound itself since 7 November 1945, when the League of Nations and the Permanent Court were still in existence and when therefore Article 7 of the Mandate was also in full force, to accept the compulsory jurisdiction of this Court in lieu of that of the Permanent Court, to which it had originally agreed to submit under Article 7 of the Mandate."

19. A number of separate and dissenting opinions in the South West Africa Cases¹⁶ also referred to the continuity between the Permanent Court of International Justice and the International Court of Justice.

20. The Court also discussed the question of continuity under Article 37 of its Statute the "Case concerning the Barcelona Traction, Light and Power Company,

Limited".¹⁷ The Court noted that at the time its Statute was being drafted in the period April-June 1945, there was in existence a very large number of bilateral and multilateral conventions and treaties with jurisdictional clauses providing for recourse to the Permanent Court. The Court added:¹⁸

"It was this situation that Article 37 was designed to meet, and the governing concept evidently was to preserve as many jurisdictional clauses as possible from becoming inoperative by reason of the prospective dissolution of the Permanent Court; and moreover, to do this by a process which would automatically substitute the new Court for the Permanent Court in the jurisdictional treaty relations between all Members of the United Nations and other parties to the Statute, thus avoiding the necessity for piecemeal action by special agreement between the parties to the various instruments. The intention therefore was to create a special régime which, as between the parties to the Statute, would automatically transform references to the Permanent Court in these jurisdictional clauses, into references to the present Court."

21. In the "Case concerning the Temple of Preah Vihear",¹⁹ the Court discussed in some detail the question of continuity between the Permanent Court of International Justice and the International Court of Justice under Article 36, paragraph 5 of its Statute. In particular, the Court referred to the distinction between original parties to the Statute of the International Court and parties who subsequently accepted the Statute.

In this connexion, the Court referred to its judgement in a previous case:²⁰

"In the Israel v. Bulgaria case, however, the Court, interpreting paragraph 5 of Article 36 (of the Statute), came to the conclusion that it did not apply indiscriminately to all States which, having accepted the compulsory jurisdiction of the former Permanent Court, might at any subsequent date become parties to the Statute of the Court, but only to such of those States as were original parties. The Court furthermore came to the conclusion that on 19 April 1946, date when the Permanent Court ceased to exist, all declarations in acceptance of the compulsory jurisdiction of the Permanent Court which had not already, by then, been 'transformed' by the operation of Article 36, paragraph 5, into acceptances of the compulsory jurisdiction of the present Court, lapsed and ceased to be in force, since they would, as from then, have related to a tribunal — the former Permanent Court — which no longer existed. Consequently, so the Court found, all declarations not having been thus transformed by 19 April 1946 ceased as from that date to be susceptible of the process of transformation *ipso jure* provided for by Article 36, paragraph 5.

" ...

¹⁵ South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgement of 21 December 1962. ICJ Reports 1962, pp. 334 and 335.

¹⁶ *Ibid.*, Separate Opinion of Judge Bustamante, p. 376, para. 3; Separate Opinion of Judge Jessup, pp. 415 and 418; ICJ, Reports 1966, Separate Opinion of Judge Van Wijk, p. 93, foot-note 1. See also this Supplement under Article 80, paras. 130-153.

¹⁷ ICJ, Reports 1967, pp. 27-46.

¹⁸ *Ibid.*, p. 31.

¹⁹ Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Preliminary Objections, Judgement of 26 May 1961: ICJ, Reports 1961, pp. 25-35.

²⁰ *Ibid.*, pp. 25, 26 and 28.

“In the present case, Thailand’s first preliminary objection proceeds on the basis that her position is substantially the same as that of Bulgaria. Thailand equally did not, through admission to the United Nations, become a party to the Statute until after the demise of the former Permanent Court on 19 April 1946 — namely not until 16 December 1946.

“... Thailand’s 1940 Declaration was not thus transformed *ipso jure* in the light of the Court’s decision, by the operation of Article 36, paragraph 5,

there would still remain the question whether that Declaration was so transformed in some other manner or whether, irrespective of any transformation of her 1940 Declaration as such, Thailand could be held to have independently accepted the compulsory jurisdiction of the Court. It is clear that the fact that Thailand, by a new and voluntary act, made her Declaration of May 1950, placed her on a different position from Bulgaria which had never taken any new step at all subsequent to her admission to the United Nations.”

