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 this study of Article 92 the same structure has been maintained as in the corresponding study in *Repertory Supplement No. 4.*

I. GENERAL SURVEY

2. During the period under review, the General Assembly, at its twenty-fifth session, continued to discuss the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations. Under the principle that States must settle their international disputes by peaceful means, it was suggested that such disputes might be settled through the International Court of Justice.[1] However, no consensus was reached on that proposal. At its twenty-fifth session, the General Assembly adopted resolution 2625 (XXV) on the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. But the settlement of international disputes through the International Court of Justice was not included in the principle on settlement of international disputes by peaceful means.

3. Under the item regarding "Review of the role of the International Court of Justice" which the General Assembly considered at its twenty-fifth session the need for a review of the role of the International Court of Justice was stressed. It was recalled that the Court was a principal organ of the United Nations.[2] In the discussion the role of the Court as the principal judicial organ of the United Nations was frequently referred to.[3]

4. In its advisory opinion concerning Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),[4] the Court invoked its role as "the principal judicial organ of the United Nations" under Article 92 of the Charter as a legal ground to reply to the request.

5. In its advisory opinion on the Western Sahara[5] as well as in its judgments concerning the Nuclear Tests cases,[6] the Court referred to its judicial function in entertaining the cases before it.

II. ANALYTICAL SUMMARY OF PRACTICE

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

6. At the twenty-fifth session of the General Assembly a number of representatives requested, by a letter dated 14 August 1970,[7] that the item entitled "Review of the role of the International Court of Justice" be included in the agenda of that session. The explanatory memorandum which accompanied this letter stressed an urgent need for a review of the role of the International Court of Justice as the principal judicial organ of the United Nations.

7. At its 1843rd meeting the General Assembly decided to include the item in its agenda and allocated it to the Sixth Committee. During the discussion of the item in the Sixth Committee[8] many representatives considered that the twenty-fifth anniversary of the Organization was an appropriate time to review the role of the Court as the principal judicial organ of the United Nations; they recalled in that respect that all Member States of the United Nations were automatically parties to the Statute of the Court and participated in the election of its judges, and that the role of the Court was thus of interest to all delegations to the General Assembly. A number of them emphasized the need for reviewing the role of the Court in order to eliminate obstacles that decreased its ability to fulfil its role as envisaged by the drafters of the Charter.

8. Conversely some representatives expressed serious doubts about the need for a review of the Court's role. They saw no overwhelming reason to undertake such a review which, in their view, could substantially undermine the Charter. In their opinion, it was for the Court itself to take action in order to improve its functioning and nothing would be gained by attempting to trespass on the Court's authority.

9. Many representatives recalled that, according to Article 92 of the Charter, the Court was the principal judicial organ of the United Nations and had been established in response to a permanent need of the international community. Most of them paid tribute to the outstanding qualities of the judges and underlined the important contributions which the Court had made to the development of international law. Furthermore, it was emphasized that judgments and advisory opinions as well as separate or dissenting opinions of judges had influenced international practice and legal theory to a large extent.

10. Many representatives recalled that, in prohibiting the use of force, the Charter of the United Nations made peaceful solutions to international disputes absolutely necessary. Should such solutions not be reached by means

of negotiation, other means should be used, since leaving a dispute unresolved was tantamount to maintaining the *status quo* and favouring the States which had taken advantage thereof. In the view of some delegations, this made the International Court of Justice an indispensable institution. The Court was thus an essential part of the system of the peaceful settlement of disputes, as shown not only by Article 36(3) of the Charter, which provided that "legal disputes should as a general rule be referred by the parties to the International Court of Justice", but also by the provisions of many important treaties relating to the compulsory jurisdiction of the Court. It was stated that the work accomplished by the Court had been remarkable and justified every effort being made to improve its functioning.

11. Other representatives observed that Article 33 of the Charter listed seven specific means for the settlement of disputes. They underlined that judicial settlement was only one of the various means of peaceful settlement and that its role should not be overestimated. In their opinion, although States had an obligation to settle their disputes by peaceful means, they also had the sovereign right to choose others from those listed in Article 33. It was also stated that the Court had discredited itself with some decisions, such as with its judgment in the South West Africa case. Moreover, both the principle of sovereign equality of States and the principle of the free choice of means had been specifically mentioned in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, which had been adopted earlier at the same session.[9]

12. Some delegations pointed out that judicial settlement, which was binding on the parties, was obviously more important than the other means of peaceful settlement listed in Article 33. In that respect, it was pointed out that the Charter devoted a whole chapter to the Court and that its Statute formed an integral part of the Charter. Others, however, emphasized that, according to Article 95 of the Charter, Member States could submit their disputes to other tribunals than the Court by virtue of agreements already in existence or which might be concluded in the future.

13. By resolution 2723 (XXV) adopted pursuant to a recommendation of the Sixth Committee, the General Assembly invited Member States, States parties to the Statute of the Court and the Court itself to submit views and suggestions concerning the role of the Court and requested the Secretary-General to prepare a comprehensive report in the light of the opinion expressed by States and the Court.

14. At its twenty-sixth session the General Assembly decided to adjourn the debate on the item "Review of the role of the International Court of Justice" until the twenty-seventh session.

15. The item was included in the agenda of both the twenty-seventh and twenty-eighth sessions of the General Assembly. It was not, however, discussed during those sessions.

16. At its twenty-ninth session the General Assembly adopted a resolution on the review of the role of the International Court of Justice[10] which, in its preamble, recalled the role of the International Court of Justice as the principal judicial organ of the United Nations. The operative parts of the resolution read as follows:

"1. *Recognizes* the desirability that States study the possibility of accepting, with as few reservations as possible, the compulsory jurisdiction of the International Court of Justice in accordance with Article 36 of its Statute;

"2. *Draws the attention* of States to the advantage of inserting in treaties, in cases considered possible and appropriate, clauses providing for the submission to the International Court of Justice of disputes which may arise from the interpretation or application of such treaties;

"3. *Calls upon* States to keep under review the possibility of identifying cases in which use can be made of the International Court of Justice;

"4. *Draws the attention* of States to the possibility of making use of chambers as provided in Articles 26 and 29 of the Statute of the International Court of Justice and in the Rules of Court, including those which would deal with particular categories of cases;

"5. *Recommends* that United Nations organs and the specialized agencies should, from time to time, review legal questions within the competence of the International Court of Justice that have arisen or will arise during their activities and should study the advisability of referring them to the Court for an advisory opinion, provided that they are duly authorized to do so;

"6. *Reaffirms* that recourse to judicial settlement of legal disputes, particularly referral to the International Court of Justice, should not be considered an unfriendly act between States."

17. In the case concerning Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970), the South African Government objected that the Court was unable to give the opinion requested by the Security Council because of the political pressure to which the Court had been or might be subjected. The Court replied in stating that:

"It would not be proper for the Court to entertain these observations, bearing as they do on the very nature of the Court as the principal judicial organ of the United Nations, an organ which, in that capacity, acts only on the basis of the law, independently of all outside influence or interventions whatsoever, in the exercise of the judicial function entrusted to it alone by the Charter and its Statute. A court functioning as a court of law can act in no other way.[11]

". . .

"The Court could, of course, acting on its own, exercise the discretion vested in it by Article 65, paragraph 1, of the Statute and decline to accede to the request for an advisory opinion. In considering this possibility the Court must bear in mind that: 'A reply to a request for an Opinion should not, in principle, be refused.' (I.C.J. *Reports 1951*, p. 19). The Court has considered whether there are any 'compelling reasons', as referred to in the past practice of the Court, which would justify such a refusal. It has found no such reasons. Moreover, it feels that by replying to the request it would not only 'remain faithful to the requirements of its judicial character' (I.C.J. *Reports 1960*, p. 153), but also discharge its functions as 'the principal judicial organ of the United Nations'"[12]

B. The judicial character of the Court

1. THE WESTERN SAHARA CASE

18. In the case concerning the Western Sahara, the Court answered the question whether it should exercise its competence to entertain the request in stating:

"Article 65, paragraph 1, of the Statute, which establishes the power of the Court to give an advisory

opinion, is permissive and, under it, that power is of a discretionary character. In exercising this discretion, the International Court of Justice [. . .] has always been guided by the principle that, as a judicial body, it is bound to remain faithful to the requirements of its judicial character even in giving advisory opinions.[13]

". . .

"The Court, it is true, affirmed in this pronouncement that its competence to give an opinion did not depend on the consent of the interested States, even when the case concerned a legal question actually pending between them. However, the Court proceeded not merely to stress its judicial character and the permissive nature of Article 65, paragraph 1, of the Statute but to examine, specifically in relation to the opposition of some of the interested States, the question of the judicial propriety of giving the opinion. Moreover, the Court emphasized the circumstances differentiating the case then under consideration from the *Status of Eastern Carelia* case and explained the particular grounds which led it to conclude that there was no reason requiring the Court to refuse to reply to the request. Thus the Court recognized that lack of consent might constitute a ground for declining to give the opinion requested if, in the circumstances of a given case, considerations of judicial propriety should oblige the Court to refuse an opinion. In short, the consent of an interested State continues to be relevant, not for the Court's competence, but for the appreciation of the propriety of giving an opinion.

"In certain circumstances, therefore, the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent. If such a situation should arise, the powers of the Court under the discretion given to it by Article 65, paragraph 1, of the Statute, would afford sufficient legal means to ensure respect for the fundamental principle of consent to jurisdiction."[14]

2. The Nuclear Tests cases

19. In the cases concerning Nuclear Tests (Australia v. France, New Zealand v. France),[15] the Court faced the question whether the Governments of Australia and New Zealand requested a judgment of the Court which would only state the legal relationship between the Applicant and the Respondent with regard to the matters in issue or a judgment which would require one or both of the Parties to take or refrain from taking action. The Court stated that its duty was to isolate the real issue in the case and to identify the object of the claim. The Court also held that it was entitled to interpret the submissions of the parties and that it was actually bound to do so with respect to the attributes of its judicial functions.[16]

Notes

[1] See *Repertory, Supplements Nos. 3 and 4.*
[2] GA resolution 2723 (XXV).
[3] GA (25), 6th Com., 1210th-1211th and 1215th-1218th mtgs.
[4] ICJ *Reports 1971*, p. 27, para. 41.
[5] ICJ *Reports 1975*, p. 20, para. 20.
[6] ICJ *Reports 1974*, p. 257, para. 15 and p. 461, para. 15.
[7] A/8042 and Add.1 and 2 (mimeographed).
[8] GA (25), 6th Com., 1210th-1211th and 1215th-1218th mtgs.
[9] GA resolution 2625 (XXV).
[10] GA resolution 3232 (XXIX).
[11] ICJ *Reports 1971*, p. 23, para. 29.
[12] *Ibid.*, p. 27, para. 41.
[13] ICJ *Reports 1975*, p. 21, para. 23.
[14] *Ibid.*, pp.24-25, paras. 32, 33.
[15] ICJ *Reports 1974*, p. 253 and p. 457.
[16] *Ibid.*, p. 262, para. 29 and p. 466, para. 30.