

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. 5*.

I. GENERAL SURVEY

2. In the case concerning *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*,¹ the Court invoked its role as "the principal judicial organ of the United Nations", which enables it to resolve any legal questions that may be in issue between parties to a dispute.

3. The role of the Court as the principal judicial organ of the United Nations was also referred to in 1982 by the General Assembly in the Manila Declaration on the Peaceful Settlement of International Disputes.²

4. In the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*,³ the Court referred to its role as "principal judicial organ of the Organization" when addressing the question of the admissibility of the Application of Nicaragua.

5. In two cases,⁴ dissenting judges have referred to Article 92 in connection with the right of a State not party to a dispute to intervene *sub judice* in the contentious proceeding under either Article 62 or Article 63 of the Statute of the Court.

6. In the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*,⁵ the Court examined the purported inability of the judicial function to deal with situations involving ongoing conflict.

7. In the same contentious case, the Court implicitly addressed the continuity between the Permanent Court and itself in examining whether a declaration which did not have binding force at the time of the Permanent Court could be numbered among those to which Article 36, paragraph 5, of the Statute applied.⁶

⁴Case concerning the Continental Shelf (*Libyan Arab Jamahiriya/ Malta*), *Application by Italy for Permission to Intervene*, *I.C.J. Reports 1984*, p. 119, para. 8, and p. 143, para. 28; case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Declaration of Intervention of the Republic of El Salvador, *I.C.J. Reports 1984*, p. 215, p. 240.

⁵*I.C.J. Reports 1984*, p. 436, para. 99.

⁶*Ibid.*, p. 405, para. 29.

¹*I.C.J. Reports 1980*, p. 22, para. 40.

²G A resolution 37/10, annex.

³*I.C.J. Reports 1984*, p. 434, para. 94.

II. ANALYTICAL SUMMARY OF PRACTICE

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

8. In the case concerning the *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*,⁷ the Court addressed the simultaneous exercise of their respective functions by itself and the Security Council. The Court underlined that there was no doubt at all that the Security Council was "actively seized of the matter" when the Court decided unanimously that it was competent to entertain the request by the United States of America for an indication

of provisional measures and proceeded to indicate such measures.⁸ The Court however indicated that it did not seem to have occurred to any member of the Council that there was or could be anything irregular in the simultaneous exercise of their respective functions by both organs. Refusing to view this as "any cause for surprise", the Court explained:⁹

⁷*United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, *Provisional Measures*, Order of 15 December 1979, *I.C.J. Reports 1979*, p. 7.

⁹*I.C.J. Reports 1980*, p. 22, para. 40.

⁷*I.C.J. Reports 1980*, p. 21, para. 40.

"Whereas Article 12 of the Charter expressly forbids the General Assembly to make any recommendation with regard to a dispute or situation while the Security Council is exercising its functions in respect of that dispute or situation, no such restriction is placed on the functioning of the Court by any provision of either the Charter or the Statute of the Court. The reasons are clear. It is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between parties to a dispute; and the resolution of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute. This is indeed recognized by Article 36 of the Charter, paragraph 3 of which specifically provides that:

"In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court."

9. The role of the International Court of Justice as "the principal judicial organ of the United Nations" was strongly emphasized in the Manila Declaration on the Peaceful Settlement of International Disputes, the text of which is annexed to General Assembly resolution 37/10 of 15 November 1982. The idea of preparing a declaration to be adopted by the General Assembly on peaceful settlement of disputes originated in the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization as one topic on which general agreement could be possible.¹⁰ The idea was endorsed by the General Assembly in its resolution 34/102 of 14 December 1979 and reaffirmed in its resolutions 35/160 of 15 December 1980 and 36/110 of 10 December 1981.

10. At its 1982 session, the Special Committee succeeded in finalizing the draft Manila Declaration on the peaceful settlement of international disputes,¹¹ which was adopted by the General Assembly in its resolution 37/10. Regarding the role of the International Court of Justice, the Manila Declaration, in section II, paragraph 5, provides:

"States should be fully aware of the role of the International Court of Justice, which is the principal judicial organ of the United Nations. Their attention is drawn to the facilities offered by the International Court of Justice for the settlement of legal disputes, especially since the revision of the Rules of the Court.

"States may entrust the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.

"States should bear in mind:

(a) That legal disputes should as a general rule be referred by the parties to the International Court of Justice, in accordance with the provisions of the Statute of the Court;

(b) That it is desirable that they:

(i) Consider the possibility of inserting in treaties, whenever 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;

- (ii) Study the possibility of choosing, in the free exercise of their sovereignty, to recognize as compulsory the jurisdiction of the International Court of Justice in accordance with Article 36 of its Statute;
- (iii) Review the possibility of identifying cases in which use may be made of the International Court of Justice.

"The organs of the United Nations and the specialized agencies should study the advisability of making use of the possibility of requesting advisory opinions of the International Court of Justice on legal questions arising within the scope of their activities, provided that they are duly authorized to do so.

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

11. During the debates which took place in the Sixth Committee,¹² several representatives referred to the role of the Court as the principal judicial organ of the United Nations in the peaceful settlement of international disputes between States. One representative stated that a great number of States had had negative experiences with some of the decisions adopted by the Court,¹³ whereas another representative saw a problem in the fact that many States viewed recourse to the Court as the exception rather than the rule.¹⁴ One representative stated that what the Manila Declaration said about the International Court of Justice was in contrast with the most recent international instrument on the settlement of disputes, namely, the United Nations Convention on the Law of the Sea, article 287, paragraph 1, of which placed the Court second on the list of possible organs for compulsory settlement of disputes although the Court was "the principal judicial organ of the United Nations".¹⁵

12. In the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the Court, when dealing with the question of the admissibility of the Application of Nicaragua, referred to its role as "the principal judicial organ of the Organization for peaceful settlement".¹⁶ The United States contended that the dispute between it and Nicaragua, "a case of armed conflict",¹⁷ could be dealt with only by the Security Council and not by the Court, since it was the Council which, under Article 2, paragraph 4, and Chapter VI of the Charter, dealt with the peaceful settlement of all disputes between States Members of the United Nations. The Court dismissed the argument of the United States on the ground that "the complaint of Nicaragua is not about an ongoing armed conflict between it and the United States, but one requiring, and indeed demanding, the peaceful settlement of disputes between the two States. Hence, it is properly brought before the principal judicial organ of the Organization for peaceful settlement".¹⁸ The Court added:¹⁹

¹²G A (37), 6th Comm., 20th-30th mtgs., A/C.6/37/SR.20-30.

¹³Ibid., 23rd mtg., A/C.6/37/SR.23, para. 4.

¹⁴Ibid., 24th mtg., A/C.6/37/SR.24, para. 14.

¹⁵Ibid., 30th mtg., A/C.6/37/SR.30, para. 11.

¹⁶J. C. J. Reports 1984, p. 434, para. 94.

¹⁷Ibid.

¹⁸Ibid.

¹⁹Ibid., pp. 434-435, para. 95.

¹⁰G A (34), Suppl. No. 33 (A/34/33), para. 13.

¹¹G A (37), Suppl. No. 33 (A/37/33), para. 19.

"It is necessary to emphasize that Article 24 of the Charter of the United Nations provides that:

"In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council *primary* responsibility for the maintenance of international peace and security . . ." {emphasis added}

"The Charter accordingly does not confer *exclusive* responsibility upon the Security Council for the purpose. While in Article 12 there is a provision for a clear demarcation of functions between the General Assembly and the Security Council, in respect of any dispute or situation, that the former should not make any recommendation with regard to that dispute or situation unless the Security Council so requires, there is no similar provision anywhere in the Charter with respect to the Security Council and the Court. The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events."

13. During the period under review, Article 92 was invoked by two dissenting judges in relation with the right for a State not party to a dispute *sub judice* to intervene in the contentious proceeding.

14. In the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, *Application by Italy for Permission to Intervene*, Judge Ago referred to Article 92 with respect to the fundamental criterion of the consensual nature of international jurisdiction. He expressed the view that the consent of a State to the jurisdiction of the Court "may arise from a special provision of the Charter of the United Nations, of which the Statute of the Court, under Article 92, forms an integral part".²⁰

In the same case, Judge Schwebel also referred in a dissenting opinion to Article 92. Regarding the sufficient title of jurisdiction for a state to intervene incidentally "in the case," he expressed the view that:²¹

"Paragraph 1 of Article 36 provides that the jurisdiction of the Court 'comprises . . . all matters specially provided for in the Charter of the United Nations . . .' By the terms of Article 92 of the Charter, the Court's Statute 'forms an integral part of the present Charter'. The provision of Article 62 authorizing the Court to permit a State to intervene which shows that it has a legal interest which may be affected by the decision in the cases is one to which all parties to the Statute have consented; on its face, it appears to empower the Court to permit a State to intervene which fulfils only the condition which that article specifies; and thus consent to jurisdiction is in this manner specially provided for in the Charter of the United Nations."

15. In the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Declaration of Intervention of the Republic of El Salvador*, Judge Schwebel in his dissenting opinion invoked Article 92 in connection with Article 63 of the Statute of the Court, which entitles States parties to a convention to intervene in the proceedings whenever the construction of that convention is in question. He expressed the view that:²²

"the Statute affirms that the International Court of Justice is established by the Charter of the United Nations as the principal judicial organ of the United Nations (Art. 1). The Charter provides that the Statute of the Court, which is annexed to the Charter, 'forms an integral part of the present Charter' (Art. 92). If a State has the right to intervene under Article 63 of the Statute on a question of construction of the Charter, does it not follow that it equally has the right to intervene on a question of the construction of that Statute which is an integral part of the Charter?"

B. The judicial character of the Court

16. In the case concerning the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, the Court referred to its "judicial character" and stated:

"The Court points out that, if it is to remain faithful to the requirements of its judicial character in the exercise of its advisory jurisdiction, it must ascertain what are the legal questions really in issue in questions formulated in a request."²³

17. In the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction of the Court and Admissibility of the Application*, the defendant argued²⁴ that the Application should be held inadmissible in consideration of the inability of the judicial function to deal with situations involving ongoing conflict. In particular, the United States supported the view that:

"the resort to force during ongoing armed conflict lacked the attributes necessary for the application of the judicial process, namely a pattern of legally relevant facts discernible by the means available to the adjudicating tribunal, establishable in conformity with applicable norms of evidence and proof, and not subject to the further material evolution during the course of, or subsequent to, the judicial proceedings."

It is for these reasons that ongoing armed conflict, according to the United States, must be entrusted to resolution by political processes.

18. The Court responded to the United States claims by explaining that "a situation of armed conflict is not the only one in which evidence of fact may be difficult to come by".²⁵ Although "a submission may in judgment be rejected as unproved", that is not a reason to rule it out "as inadmissible *in limine* on the basis of anticipated lack of proof". The Court concluded that "it cannot at this stage rule out a priori any judicial contribution to the settlement of the dispute by declaring the Application inadmissible."

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

19. In the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*,²⁶ the Court implicitly addressed the continuity between it and the Permanent Court of International Justice. Specifically, the Court examined whether a declaration which did not have binding force at the time

²⁰*J.C.J. Reports 1984*, p. 119, para. 8.

²¹*Ibid.*, p. 143, para. 28.

²²*Ibid.*, p. 240.

²³*J.C.J. Reports 1980*, p. 88, para. 35.

²⁴*J.C.J. Reports 1984*, p. 436, para. 99.

²⁵*Ibid.*, p. 437, para. 101.

²⁶*Ibid.*, p. 405, paras. 29-47.

of the Permanent Court could be numbered among those to which Article 36, paragraph 5, of the Statute applied.

20. The Court set forth the following reasoning in examining this issue:²⁷

“the logic of a system substituting a new Court for the former one without the cause of compulsory jurisdiction in any way suffering in the process resulted in the ratification of the new Statute having exactly the same effects as the ratification of the Protocol of Signature of the former one would have had, that is to say, in the case of Nicaragua, the step from potential commitment to effective commitment. The general system of devolution from the old Court to the new thus lends support to the interpretation whereby Article 36, paragraph 5, even covers declarations that had not previously acquired binding force. In this connection, it should not be overlooked that Nicaragua was represented at the San Francisco Conference, and duly signed and ratified the

Charter of the United Nations. At that time, the consent which it had given in 1929 to the jurisdiction of the Permanent Court had not become fully effective in the absence of ratification of the Protocol of Signature; but taking into account the interpretation given above, the Court may apply to Nicaragua what it stated in the case of the *Aerial Incident of 27 July 1955*:

“Consent to the transfer to the International Court of Justice of a declaration accepting the jurisdiction of the Permanent Court may be regarded as effectively given by a State which, having been represented at the San Francisco Conference, signed and ratified the Charter and thereby accepted the Statute in which Article 36, paragraph 5, appears (*I.C.J. Reports 1959*, p. 142)”.²⁸

²⁸It may be recalled that by contrast with the present case, the case of the *Aerial Incident of 27 July 1955* dealt with a declaration made by a State which had not been represented at the San Francisco Conference and had not become a party to the Statute of the present Court until long after the extinction of the Permanent Court.

²⁷*Ibid.*, p. 408, para. 35.