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SIXTH COMMITTEE, 1211th MEETING

Thursday, 29 October 1970, at 3.10 p.m.

NEW YORK

Chairman: Mr. Paul Bamela ENGO (Cameroon).

AGENDA ITEM 96

Review of the role of the International Court of Justice *(continued)* (A/8042 and Add.1 and 2)

1. Mr. JAVITS (United States of America) stressed the value of the work done by the various legal organs of the United Nations, the Sixth Committee in particular. His delegation believed that the twenty-fifth anniversary of the United Nations was a particularly appropriate time to consider the part which the International Court of Justice had played in the international community and ways in which its effectiveness could be enhanced. The task was the more urgent in that the necessity of substituting the rule of law for the use of force in international relations was becoming daily more evident.

2. Article 92 of the Charter of the United Nations specified that the International Court of Justice was to be the principal judicial organ of the United Nations and was to function in accordance with a Statute, based upon the Statute of the Permanent Court of International Justice, which was annexed to the Charter and formed an integral part thereof. Every Member of the United Nations was thus automatically a party to the Statute of the Court and participated in the election of the judges of the Court, notwithstanding a favourable or sceptical attitude towards the judicial settlement of international legal disputes. The Statute of the Court differed but little from the 1920 and 1929 versions of the Statute of the Permanent Court of International Justice. It thus seemed the more timely to review the functioning of the Court in that its constitutive instrument was, for all practical purposes, now fifty years old.

3. His delegation firstly drew attention to the positive aspects of the record of the Court. The judgements and advisory opinions which it had given were, on the whole —however critically his delegation had viewed the 1966 Judgment in the *South West Africa* cases[1] —a worthy contribution to the development of international law, and in that connexion a tribute should be paid to the high merit of the members of the Court. The United States also welcomed the interest the Court had recently displayed in the work of the United Nations and, in particular, applauded its decision to submit an annual report on its work to the General Assembly. The third such report (A/8005) had been submitted at the current session. The presence of the President of the Court and three other judges at the General Assembly on the occasion of the Organization's twenty-fifth anniversary was further proof of the Court's awareness of the desirability of making its work more widely known. The Court had furthermore undertaken on its own initiative a review of its Rules, and his delegation hoped that it would be possible to complete that task in the near future.

4. The interest that a number of Member States showed in the Court and its potential was also an encouraging sign, and the United States was particularly pleased that on 29 July 1970 the Security Council had decided (resolution 284 (1970)) on the initiative of Finland to request, for the first time in its history, an advisory opinion of the Court. The Council had asked the Court what were the legal consequences for States of the continued presence of South Africa in Namibia. That would give the Court an opportunity to make a practical contribution to the work of the United Nations and to assist in the settlement of issues of the utmost seriousness, since the opinion it gave could not fail to influence to a large extent the positions adopted by the Governments concerned. In that connexion he drew attention to the fact that his Government had informed the Court that the United States would submit a written statement on the question.

5. The United States noted further that a number of newly independent States had accepted the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute.

6. It nevertheless had to be recognized that the Court was not playing a full role in contemporary international life. The United States found food for thought in the statement of the Secretary-General, in the introduction to his 1970 report on the work of the Organization (see A/8001/Add.1 and Add.1/Corr.1, paras. 142-153), that some of the States which had declared their acceptance of the compulsory jurisdiction of the Court had accompanied that declaration with reservations of such a scope as to make their acceptance largely illusory. The Secretary-General had further noted that States had rarely had recourse to judicial settlement for the solution of their disputes and, drawing attention to the fact that many of the issues which came before the United Nations and the specialized agencies involved legal questions, had pointed out that many of those issues could be more easily resolved if they were decided by advisory opinions of the Court. The United States Government was currently investigating ways of bringing more issues before the Court, and the Secretary of State had directed that wherever a dispute arose between the United States and another country, favourable consideration should be given to the possibility of submitting the case to the Court.

[1] See *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6.

7. His delegation believed that the General Assembly should review the role and functioning of the Court, and had joined with other delegations in preparing a draft resolution to set up a special committee for the purpose. That resolution would be before the Committee shortly. While not wishing to prejudge in any way the results of such a review, the United States nevertheless wished to make a number of points. It would be useful for the Court to decide expeditiously, when a case was brought before it, all questions relating to jurisdiction and other preliminary issues that might be raised by the parties. The practice of reserving decisions on such questions pending consideration of the merits of the case had many drawbacks–and had been sharply criticized recently in the *South West Africa* cases and the *Barcelona Traction, Light and Power Company, Limited* case. Another problem arose from the excessive liberality the Court had shown with reference to requests for extensions of time-limits. The judgement and opinions in the *Barcelona Traction* case made it clear that the Court was itself aware of the fact that too much liberality in that regard could be detrimental to the parties by prolonging the litigation unduly. For the same reasons his delegation thought that the Court might consider speeding up both the written and oral phases of the proceedings. The requirements of Article 43 of the Statute seemed unduly rigid, and the problem was further aggravated by some of the Rules concerning written pleadings which seemed of little value. His delegation considered that an oral phase was not absolutely indispensable and that the Court could suggest to the parties that they dispense with it when the written pleadings seemed adequate. Furthermore, matters might be considerably accelerated if the Court, in certain cases, took the initiative of recommending the parties to take their dispute to the chamber of five judges formed annually by the Court to determine cases by summary procedure. That would also offer the advantages of greater informality and privacy, and the advantage of enabling the chambers to sit elsewhere than at The Hague. Consideration might also be given to the establishment of regional chambers to which States belonging to the same region could submit their disputes; these chambers could also meet elsewhere than at The Hague.

8. The effectiveness of the Court might also be improved by various measures which could render changes in its Statute necessary or desirable. For example, one of the reasons why Governments had not made greater use of the Court was that, in the opinion of many of them, a judgement of the Court cut off diplomatic negotiations for the settlement of a dispute. It would therefore be useful if the parties could, if they so desired, request the Court for an advisory opinion on questions of law arising from their dispute. To enable the Court to develop that aspect of its activity would, in his delegation's view, well serve the interests of the United Nations and would contribute to the development of international law and give to the Court a much more active role than it had played hitherto.

9. His delegation recognized that under Articles 59 and 60 of the Statute, the judgement of the Court had binding force between the parties and was final and without appeal, but it considered that they should be able, in certain cases, to agree to obtain a decision which was advisory to a certain extent; a case in point was that of the *North Sea Continental Shelf*. There was also the possibility of the parties to a dispute asking the General Assembly to request the Court to give an advisory opinion on the issues involved. It would also be desirable to authorize additional intergovernmental, and also regional organizations, to have access to the Court for advisory opinions. Another question was whether the provisions of the Statute which laid down that only States could be parties in contentious cases before the Court were not unduly restrictive, and whether the same right should not be given to international organizations.

10. His delegation hoped that sound recommendations would be formulated in due course so that the International Court of Justice could be made an effective instrument for the establishment and maintenance of world peace.

11. The CHAIRMAN thanked Mr. Javits for coming to state his Government's views on the question under consideration; his presence was an indication of the interest shown in the work of the United Nations in general and its legal bodies in particular.

12. Mr. HOUBEN (Netherlands) said it was unfortunate that since the foundation of the United Nations the Organization's responsibilities for the settlement of international disputes had been eclipsed by its activities concerned with the maintenance of peace. The Charter stated that as a general rule States should refer their legal disputes to the International Court of Justice, the usefulness of which had again been emphasized by the Secretary-General in Chapter X of the introduction to his 1970 report on the work of the Organization. His delegation agreed with the Secretary-General that recourse to the Court would enable a solution to be found to many disputes, the continuance of which was dangerous to the parties themselves. His delegation therefore welcomed the initiative taken by the twelve signatories of the letter circulated as document A/8042 and Add.1 and 2. In proposing that the Sixth Committee should undertake a review of the role of the Court, the authors of the letter had mentioned two principal reasons for their action: the existence of obstacles to the satisfactory functioning of the Court, and the need to explore additional possibilities for use of the Court.

13. As to the first consideration, he felt that there were obstacles of a procedural nature which should be removed. The Court itself was now engaged in a revision of its rules of procedure, which, dating as they did back to 1946, no longer corresponded to the requirements of a modern international tribunal.

14. Among other obstacles, mention should be made of the expense involved in bringing a matter before the Court. That expense might make certain Governments hesitate to submit their disputes to the Court, or even prevent them from doing so. If that was the case, it might be well to encourage a greater use of existing means whereby the parties, by agreement, could limit the legal costs.

15. Excessive attachment to national sovereignty was also an obstacle to more frequent use of the Court. Acceptance of the jurisdiction of the Court had too often been seen in the past as infringing that sovereignty. In that connexion, an encouraging sign could be found in the adoption by the General Assembly of the Declaration on Principles of

International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (resolution 2625 (XXV)) which stated:

> "Recourse to, or acceptance of, a settlement procedure freely agreed to by States with regard to existing or future disputes to which they are parties shall not be regarded as incompatible with sovereign equality."

16. Finally, there was no doubt that much of international law no longer corresponded to the realities of modern life. That was another reason why a certain number of States, especially newly independent States, were reluctant to accept the Court's jurisdiction.

17. As to the second consideration, namely, the additional possibilities for use of the Court, his delegation believed that, first of all, there was need to apply more fully existing means for the settlement of disputes by the Court. In particular, encouragement should be given to more frequent use of chambers composed of a limited number of judges which the Court could form under Article 26 of the Statute, and of summary procedure under Article 29 of the Statute.

18. In that connexion, consideration might be given to the possibility of entrusting the Court with tasks of fact-finding, as distinct from the normal process of finding and applying the law to the facts, once they had been established. Resolution 2329 (XXII), adopted unanimously by the General Assembly, did not seem to exclude the possibility of assigning such a function to chambers formed by the Court under Articles 26-29 of the Statute.

19. In considering what tasks might possibly be entrusted to the Court, useful conclusions could be drawn from the practice of United Nations organs. The Security Council and the General Assembly had only once seen fit to recommend that the parties to a legal dispute should refer the dispute to the Court. It might be possible to develop procedures aimed at strengthening the applicability of Article 11 and Article 36 (3) of the Charter. It might even be possible to consider concluding an international agreement under which States would agree in advance, subject to reciprocity, to be bound by any recommendations which the Security Council might make under Article 36 (3) of the Charter. There was, of course, no question of asking the Court to play the role which the political organs were unable or unwilling to play. It was moreover for that reason that Article 36 (3) referred to "legal disputes" and only to such disputes.

20. As to advisory opinions, it should be remembered that during the twenty-five years which had elapsed since the foundation of the United Nations, the Court had delivered only thirteen such opinions in all. In that connexion, a source of encouragement might be found in Security Council resolution 284 (1970) in which the Council had decided, in accordance with Article 96 (1) of the Charter, to ask the International Court of Justice for an advisory opinion on the legal consequences for States of the continued presence of South Africa in Namibia. The Netherlands delegation attached the utmost importance to the fact that, twenty-five years after the foundation of the Organization, the Security Council had at last made its first request to the Court for an advisory opinion and that it had done so in connexion with a question of vital interest to the international community. The Netherlands Government had already, in accordance with Article 66, paragraph 2, of the Statute of the Court, submitted a written statement concerning the advisory opinion requested.

21. Since the International Court of Justice was fulfilling its role as the principal judicial organ of the United Nations just as much by giving advisory opinions as by delivering judgements, a study should be made of ways of making that procedure more readily available to States, organs and organizations. In addition, within the general context of the proposed review of the role of the Court, use might be made of the documentation prepared by the United Nations Institute for Training and Research on the subject of the peaceful settlement of disputes.

22. The Netherlands delegation agreed that the time had come for a thorough review of the role and the functioning of the Court. It therefore welcomed the initiative which had been taken in the matter and would support the creation of an *ad hoc* committee to undertake such a study, as suggested in the explanatory memorandum (see A/8042).

23. Mr. YASSEEN (Iraq) said that the question was of great importance since it concerned the effectiveness of the principal judicial organ of the United Nations. In his view, the work of an institution should be evaluated as a whole; viewed in that light, the record of the work done by the Court showed a positive balance.

24. In order to throw light on the attitude of States towards the International Court of Justice, a comparison could be drawn between the status of that Court and the status of the Permanent Court of International Justice. While States in general had accepted the compulsory jurisdiction of the Permanent Court, there were many which refused to recognize that of the International Court. The difference lay essentially in the fact that the Permanent Court had been an organ made available to a limited international community composed mainly of European and American States. The differences in the aspirations and standards of those States had been limited. Their various legal systems had been equitably represented within the Permanent Court and the law which that Court had had to apply was the work of those countries themselves.

25. On the other hand, only one third of the States Members of the United Nations accepted the compulsory jurisdiction of the Court. There were various reasons for that; two of the main reasons related to the law to be applied and to the actual composition of the Court. With regard to the law to be applied, there was no doubt that many new States had acceded to independence and that those States had not participated in the elaboration of many of the rules of international law the existence or at least the applicability of which to themselves they disputed. Furthermore, the composition of the Court had not changed sufficiently to correspond to the evolving world situation. A situation therefore existed where an inadequately representative international court was responsible for applying a system of law the existence or the applicability of which to themselves was disputed by many States. Some efforts had, admittedly, been made to remedy

that state of affairs. The United Nations, for instance, was doing significant work in the codification of international law. There were many conventions on codification in the elaboration of which almost all States had participated. On another level, the fact that the composition of the Court had somewhat improved was a cause for satisfaction. But whether from the point of view of the law to be applied or the composition of the Court, the latter was not keeping pace with the development of the international community.

26. The United Nations Charter, in prohibiting the use of force, emphasized the absolute necessity of seeking peaceful solutions to international disputes. However, disputes should not be left unsolved merely because of failure to agree on a solution, for that would be tantamount to maintaining the *status quo* and favouring the States which benefited from it. It was that very deficiency in the international legal system which made an institution such as the International Court of Justice indispensable and led him to conclude that it was necessary to remove the obstacles which were impeding its use.

27. However, a certain degree of caution should be observed. The question had two very different aspects, one of which related to the Court itself and the other to States. Viewed under the second aspect, the question in fact fell within the jurisdiction of the United Nations. The composition of the Court depended on the General Assembly, not on itself, since it was the General Assembly and the Security Council which elected the members of the Court. The same was true of the law to be applied, since it was the General Assembly which had the task of progressively developing and codifying international law. On the other hand, the Court itself was in a better position to consider everything relating to the Statute and Rules of the Court. It should not be forgotten in fact that under Article 96 of the Charter the General Assembly could request the Court to give advisory opinions on legal questions. The General Assembly would therefore be well advised—though it was not bound to do so—to ask the opinion of the Court first on a question relating to the latter's Statute and procedures, since the Court was well placed to know the situation better than anyone.

28. He said that his country had become more and more aware of the importance of the International Court of Justice. It had signed the Optional Protocol concerning the Compulsory Settlement of Disputes[2] annexed to the Vienna Convention on Diplomatic Relations; as far back as 1961 it had proposed that Iran should refer the settlement of certain frontier disputes to the Court, and it had reiterated its proposal regarding the recent dispute concerning the Treaty of Non-aggression of 1937.[3] The Iraqi delegation therefore remained faithful to its Government's consistent attitude in expressing the hope that every endeavour should be made to strengthen the role of the International Court of Justice.

29. Mr. MARTINEZ MORCILLO (Spain) noted that within the United Nations system, one of the purposes of which was to promote the pacific settlement of disputes, the Organization's principal judicial organ was called upon to play an important role. Nevertheless, it had to be clearly recognized that such theoretical importance was not reflected in actual practice. Judging by the criticisms to which it had been continually subjected from all sides, it was even possible to speak of the failure of the International Court of Justice. However, it should be pointed out that such a failure was attributable neither to the Court itself nor to the judges who constituted it.

30. The decisions of the Court formed a corpus of doctrines and principles which had left their mark on the development of the theories of international law and on the practical preparation of its instruments. However, the Court had doubtless played a more important role as a consultative than as a judicial organ. The crisis of the Court, if there was one, was due less to the Court itself than to two series of events in two different fields, namely, the crisis in international law and the inability of the United Nations to find political solutions to certain contemporary problems.

31. Under article 38 of its Statute, the Court exercised its judicial functions by applying international law. It was therefore called upon to apply and interpret a system of law which it had neither made nor promulgated. Furthermore, for several years international law had been undergoing a serious crisis. The criticisms levelled against it were concerned with the fact that certain of its institutions were the juridical expression of a few special political interests, of a particular social structure and of a certain state of international relations; the basic complaint was that they reflected the outlook and interests which had characterized the period of industrial and commercial expansion between the beginning of the eighteenth century and the beginning of the twentieth. The Court was experiencing the consequences of that crisis in conventional international law.

32. In fact, the very Statute of the Court was not entirely above suspicion. Article 38 mentioned, among the sources upon which the Court could draw, "the general principles of law recognized by civilized nations". That differentiation between civilized and uncivilized nations which ran counter to the principle of the equality of States was a vestige of out-of-date juridical concepts. Moreover, that was not the only criticism which could be levelled against the wording of Article 38.

33. Nevertheless, the reasons for the lack of confidence in international law were gradually losing their validity. States were beginning to realize that their distrust had not always been justified and that traditional international law, even if it comprised institutions peculiar to a particular period of history, had been erected on principles which flowed naturally from the structure of an international community consisting of sovereign, free, independent and equal States. Traditional international law therefore seemed the natural and logical way of regulating international relations. It should be added that certain rules of contemporary international law had been established with the participation of all States and with due regard for all currents of opinion. Gradually there had emerged juridical norms which embodied a number of contemporary political principles; thus it was possible to speak of international decolonization law, international development law, and

2 See United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, vol. II (United Nations publication, Sales No. 62.X.1), p. 89.

3 League of Nations, *Treaty Series*, vol. CXC, 1938, No. 4402, p. 21.

international coexistence law. Moreover, the fact that a large number of the States constituting the current international community participated in the preparation of new conventions guaranteed that such conventions reflected the interests of all peoples. It was sufficient to recall the conventions adopted by the General Assembly or by special conferences of plenipotentiaries convened under the auspices of the United Nations.

34. It was therefore apparent that the crisis in international law was moving towards a solution; but that solution would be inadequate unless it was accompanied by a strengthening of the judicial role of the Court. Such a strengthening could take place only if the United Nations overcame its inability to settle, through political decisions, those international conflicts which called for a solution at the political level. By its very nature the Court could not take cognizance of such conflicts and, consequently, could not attempt to solve them, since they arose from the need to change a *de facto* situation which could not be modified by process of law alone, either because no law on the subject existed or because the parties to the dispute had precisely the intention of bringing about a change in a rule of law which was no longer appropriate to the situation. The Court could not settle such disputes because it was not empowered to make, change or adapt law. It followed from Article 59 of the Statute that it was not the function of the Court to make law; that function devolved upon the national courts of the common law countries or was exercised through judicial interpretations in the juridical systems based on Roman law. It was therefore clear that the Court was not in a position to settle satisfactorily an essentially political conflict.

35. Of course, the Court could intervene to settle certain purely juridical aspects of conflicts, but the success of such intervention presupposed the existence of a political solution. Without a political solution, a juridical solution of specific aspects of international conflicts was impossible.

36. To remedy the situation two courses were open. In the first place, States Members of the United Nations could make a concerted effort to give the Organization greater political effectiveness; all Member States, large and small, would have to be willing to make the Organization an efficient institution for the pacific settlement of disputes by means of political solutions when the latter were the only ones possible; also, all parties to a dispute unreservedly would have to be willing to negotiate with a view to seeking realistic and effective solutions of their problems. Secondly, the Charter could be revised. Since the Court was governed by the provisions of Chapter XIV of the Charter and by its own Statute, which, in accordance with Article 92 of the Charter, formed an integral part of the latter, any partial revision which ignored the balance between the organs established by the Charter and their mutual relations would have little chance of success.

37. Those were the two possible courses on which the General Assembly would have to decide. In any case, the choice which it would have to make would be the result of a political decision by Member States. That fact would have to be borne in mind when the draft resolutions to be submitted on the question were voted on.

38. Mr. GHOREISHI (Iran), speaking in exercise of the right of reply, said that his Government's position on the frontier dispute referred to by the Iraqi representative had been stated in the General Assembly (1857th plenary meeting).

39. Mr. YASSEEN (Iraq), also speaking in exercise of the right of reply, explained that the reference which he had made was designed merely to illustrate his country's attitude to the Court. His delegation had stated its position on the substance of the issue during the general debate.

AGENDA ITEM 87

Report of the Special Committee on the Question of Defining Aggression *(continued)** (A/8019, A/C.6/L.799)

40. The CHAIRMAN announced that the Central African Republic, Iran, Kenya, Madagascar, Mali, Tunisia and the United Republic of Tanzania had joined the sponsors of the draft resolution in document A/C.6/L.799.

41. Mr. ROSSIDES (Cyprus), introducing the draft resolution contained in document A/C.6/L.799, said that it took into account the progress made in the Special Committee on the Question of Defining Aggression, and particularly in the Working Group, and was designed to extend the Special Committee's mandate. Referring to the fourth preambular paragraph, he recalled that the Special Committee was the fourth body established by the General Assembly for the purpose of defining aggression and said that the Organization's persistence in that regard proved that world public opinion was determined to arrive at a definition. The fifth preambular paragraph indicated that the urgent need for a definition was not due solely to General Assembly resolutions but also to the actual world situation; the sixth preambular paragraph indicated that the results thus far obtained constituted a sound basis for future work. The three operative paragraphs were sufficiently clear to require no comment.

The meeting rose at 5.10 p.m.

* Resumed from the 1209th meeting.