

**THE DOCTRINE OF IMPLIED POWERS WITH
SPECIAL REFERENCE TO
THE INTERNATIONAL SEA-BED AUTHORITY –II**

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IV) COURTS

Before discussing the theory of implied powers applied by the Permanent Court of International Justice, the International Court of Justice, and the Court of Justice of the European Communities, the jurisdiction and source of law of the Courts must be considered. The Covenant of the League of Nations, the Charter of the United Nations, and Statute of the Permanent Court of International Justice and the International Court of Justice respectively are silent on the question of whether the Permanent Court of International Justice and the International Court of Justice respectively are to have jurisdiction for authoritative interpretation of the constituent documents, unlike the Court of Justice of the European Communities and the Sea-Bed Disputes Chamber. This affects, especially, the application of the implied powers theory to an organ of an international organisation.⁽¹⁾ The Permanent Court of International Justice, the International Court of Justice and the Sea-Bed Disputes Chamber apply rules of international law. On the other hand, the Court of the European Communities applies so-called Community Law. Since the application of the concept of implied powers to cases before these Courts has been done under those conditions governing the jurisdiction of each respective Court, the application of the concept to the Convention on the Law of the Sea 1982, must be considered also in the light of those elements.

A. *The P.C.I.J. and the I.C.J.*

Following the example of the Covenant of the League of Nations and the Statute of the Permanent Court of International Justice, the Charter of the United Nations and the Statute of the International Court of Justice are silent as to provisions for the authoritative interpretation of these basic instruments. During the San Francisco Conference this question was considered from various aspects and it was decided not to include a provision on authoritative interpretation in the Charter. It was stated:

In the course of the operations from day to day of the various organs of the Organization, it is inevitable that each organ will interpret such parts of Charter as are applicable to its particular functions. This process is inherent in the functioning of any body which operates under an instrument defining its functions and powers Accordingly, it is not necessary to include in the Charter a provision either authorizing or approving the normal operation of this principle.⁽²⁾

In contentious cases, access to the Court is limited to States under Article 34, paragraph 1, of the Statute, which provides "Only states may be parties in cases before the Court". Thus international organisations have no access to the Court.⁽³⁾ The jurisdiction of the Court rests on the consent of the parties. As Article 36, paragraph 1, states, it comprises "all cases which

parties refer to it” Thus, as in traditional arbitration, a form of *compromis* might be agreed upon where jurisdiction rests essentially on an ad hoc agreement. However, such consent may well have been given in advance, and Article 36, paragraph 1, continues with the phrase “. . . and all matters specially provide for in the Charter of the United Nations or in treaties and conventions in force.” Jurisdiction may be accepted under Article 36, paragraph 2, of the Statute. It is compulsory once it is accepted, but there is no obligation to make a declaration under Article 36, paragraph 2, of the Statute. In effect, it only differs from the jurisdiction existing under Article 36, paragraph 1 in the degree of consent. The power of the Secretary-General to recommend to Member States that they refer their legal disputes to the Court under Article 36, paragraph 3, of the Charter, was not regarded by the majority of the judges in *The Corfu Channel Case [Preliminary Objection]*⁽⁴⁾ as involving an obligation on the parties to do so.

In respect of an advisory opinion, access to the Court is limited to the organs of the United Nations and other international organisations⁽⁵⁾ as it is limited to States in contentious cases. In contrast to a judgment in a contentious case however, an advisory opinion itself has no binding force; it can not create a *res judicata* and strictly speaking there are no parties.

An advisory opinion has been used as a means of securing interpretation of the Charter provisions, or of provisions of the constituent documents of the specialised agencies: *Admission of a State to the United Nations (Charter Article 4)*,⁽⁶⁾ *Constitution of the Maritime Safety Committee of the Intergovernmental Maritime Consultative Organization*⁽⁷⁾ and the *Certain Expenses Case*⁽⁸⁾ are obvious examples. And it has also been used to secure guidance for various organs in the carrying out of their functions: *Interpretation of Peace Treaties (Second Phase)*,⁽⁹⁾ *Reservations to the Convention on Genocide*,⁽¹⁰⁾ the *Reparation for Injuries Case*,⁽¹¹⁾ *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*,⁽¹²⁾ *South-West Africa – Voting Procedure*,⁽¹³⁾ *Judgements of the Administrative Tribunal of the I.L.O. upon Complaints made against the U.N.E.S.C.O.*⁽¹⁴⁾ and *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*⁽¹⁵⁾ are all opinions of this kind.

It must be noted however, that the Charter has no specific provision regarding settlement of disputes relating to its interpretation nor has the Court been entrusted with any power of judicial review over the legality of the actions of the organs of the United Nations at the request of a Member States.⁽¹⁶⁾ Many of the specialised agencies, although they may stipulate only a few cases for requesting an advisory opinion of the International Court of Justice,⁽¹⁷⁾ will usually refer disputes concerning their constituent documents

to a non-judicial organ such as the Executive Directors,⁽¹⁸⁾ the Board of Governors,⁽¹⁹⁾ the Council,⁽²⁰⁾ the General Conference,⁽²¹⁾ the Assembly,⁽²²⁾ and the Congress.⁽²³⁾

The law applicable by the International Court of Justice is set out in Article 38 of the Statute and constitutes a statement of sources of international law.

Dispite Article 59 which precludes the doctrine of *stare decisis*, the reference to "judicial decisions" as "subsidiary means for determinations of rules of law" under Article 38, paragraph 1, subparagraph d, does not prevent the Court from referring to its decisions and opinions. The consistent reference to its own and predecessor's judicial precedents is a regular feature of both Court's pronouncements. Whether the precedents are regarded as international case law,⁽²⁴⁾ or as evidence of international law,⁽²⁵⁾ neither the Permanent Court of International Justice nor the International Court of Justice has shown any hesitation to cite precedents.⁽²⁶⁾

B. *The Court of Justice of the European Communities*

The origins, powers and objectives of the European Communities are all to be found in international treaties. It is the function of the Court of Justice of the European Communities to ensure the rule of law in the interpretation and application of the basic treaties of each of the three Communities.⁽²⁷⁾ The Communities themselves are international organisations possessing international personality,⁽²⁸⁾ and are the subjects of international law. Parties who may appear before the Court are: States, the High Authority, the Commissions and Councils of Ministers,⁽²⁹⁾ Enterprises, Associations and individuals.⁽³⁰⁾

The Court of Justice of the European Communities has different types of competence as an international court, as a constitutional court and as an administrative tribunal.⁽³¹⁾ It has competence as an international court to hear a case by one Member State against another, when the former considers that the latter has failed to fulfil its obligations under the treaty.⁽³²⁾ It can also decide any dispute between two Member States relating to matters within the Treaty which they have agreed to submit to the Court by way of a *compromis*.⁽³³⁾

More important and of interest to the role of the Court in the discussion here, is the competence of a constitutional court to ensure that the organs of the Communities act only in accordance with the provisions of the treaty. Under the Treaties of the European Communities, the various executive institutions, the Council, the Commission, the European Investment Bank and, to a limited extent, the Assembly, are empowered to pass executive acts known variously as Regulations, Directives, Decisions and Recommendations. The

legal validity of these, but not the political or economic desirability, can be challenged before the Court. The competence of the Court as a constitutional court extends also to some other cases.⁽³⁴⁾

The third area of competence of the Court is as an administrative tribunal. This may occur in connection with claims for damages against the Communities arising out of acts of its organs or its employers,⁽³⁵⁾ in cases between the Community and its employers,⁽³⁶⁾ and as a result of arbitration clauses contained in contracts concluded by or on behalf of the Communities.⁽³⁷⁾

Unlike the Permanent Court of International Justice, the International Court of Justice, and the Sea-Bed Disputes Chamber, the Court of Justice of the European Communities may render no advisory opinion in the sense of an advisory opinion under Article 65 of the Statute of the International Court of Justice.⁽³⁸⁾ And the opinion of the Court of Justice of the European Communities rendered under the ECSC Treaty, Article 95, paragraphs 3 and 4,⁽³⁹⁾ in the procedure the so-called "small" revision must not be considered merely as an advisory opinion.⁽⁴⁰⁾ Similarly an opinion of the Court, pursuant to the EEC Treaty, Article 228, paragraph 1, subparagraph 2,⁽⁴¹⁾ on the compatibility of an international agreement intended to be concluded by the EEC with the non-EEC state or with an international organisation, is not merely advisory. Unlike an advisory opinion, a negative opinion of the Court has far-reaching legal consequences. Such an agreement may enter into force and become effective only if it is accepted in the form of a Treaty amendment under the conditions laid down in Article 236.⁽⁴²⁾

In contrast to the Statute of the International Court of Justice,⁽⁴³⁾ and the Convention on the Law of the Sea 1982,⁽⁴⁴⁾ none of the Community treaties nor the Statute of the Court of the European Communities refer to the sources of law which the Court of Justice of the European Communities must apply. According to both international law and municipal law, the Court may not declare the matter *non liquet* and so dismiss the case.⁽⁴⁵⁾ Although the Communities were brought into being in the form of international treaties, it is suggested that the Court more closely resembles the French *Conseil d'État* and the four grounds of appeal are the same as the grounds which may be raised in the *Conseil d'État* against a French administrative action. The Court applies special international law, somewhere in between traditional international law and municipal law. The Court itself held:

The Court does not possess international jurisdiction, but jurisdiction of the Community created by six States for a federal organisation rather than an international organisation⁽⁴⁶⁾

Many of the legal concepts embodied in the Treaties, such as *facte de service*,

recours en annulation and *détournement de pouvoir*, are borrowed from municipal law. Therefore the Court naturally turns to the jurisprudence of the Member States⁽⁴⁷⁾ when interpreting such concepts. This process of interpretation is called "Community Law". In the broadest sense the term "Community Law" will denote the law contained in the treaties themselves, the regulations of the High Authority, Councils and Commissions, and all the previous decisions and jurisprudence of the Court which are nevertheless not binding. It is to the whole of this repertoire of legal principles that the Court refers when it employs so-called European Community Law to interpret an ambiguous provision.

C. Conclusion

Rules of law applied by the international courts are under the direct influence of the limitations on the courts, viz the structure of the organisation in question, the applicable law, and the jurisdiction of the court. The Permanent Court of International Justice lacked and the International Court of Justice lacks express jurisdiction for the authoritative interpretation of the constituent documents; and the source of law is clearly stipulated under Article 38 of the Statute. On the other hand, the Treaties of the European Communities contain jurisdictional clauses, and the law applied by the Court of Justice of the European Communities is Community Law. Under the Convention on the Law of the Sea 1982, the disputes arising from its interpretation and application are dealt with first by the highest administrative body, the Assembly, by means of rules, regulations and procedures,⁽⁴⁸⁾ and then, by the judicial body, the Sea-Bed Disputes Chamber, by means of decisions and advisory opinions.⁽⁴⁹⁾ The forthcoming discussion on the theory of implied powers defined by the courts must be considered under these distinctions, when it is applied to the Convention on the Law of the Sea 1982.⁽⁵⁰⁾

(1) See text accompanying note 65 of Chapter V and notes 11 – 17 of Chapter VII *infra*.

(2) United Nations Conference on International Organization Doc. 750 IV/2/B/1, of 2 June 1945, on the Interpretation of the Charter, reprinted in *United Nations General Assembly Second Sess., Official Records*, vol II, 1563. It continued (*ibid.* 1563 – 1564):

Difficulties may conceivably arise in the event that there should be a difference of opinion among the organs of the Organization concerning the correct interpretation of a provision of the Charter. Thus two organs may

conceivably hold and may express or even act upon different views. Under unitary forms of national government the final determination of such a question may be vested in the highest court or in some other national authority.

However, the nature of the Organization and of its operation would not seem to be such as to invite the inclusion in the Charter of any provision of this nature. If two member states are at variance concerning the correct interpretation of the Charter, they are of course free to submit the dispute to the International Court of Justice as in the case of any other treaty. Similarly, it would always be open to the General Assembly or to the Security Council, in appropriate circumstances, to ask the International Court of Justice for an advisory opinion concerning the meaning of a provision of the Charter. Should the General Assembly or the Security Council prefer another course, an *ad hoc* committee of jurists might be set up to examine the question and report its views, of recourse might be had to a joint conference. In brief, the members of the organs of the Organization might have recourse to various expedients in order to obtain an appropriate interpretation. It would appear neither necessary nor desirable to list or to describe in the Charter the various possible expedients.

It is to be understood, of course, that if an interpretation made by any organ of the Organization or by a committee of jurists is not generally acceptable it will be without binding force. In such circumstances, or in cases where it is desired to establish an authoritative interpretation as a precedent for the future, it may be necessary to embody the interpretation in an amendment to the Charter. This may always be accomplished by recourse to the procedure provided for amendment.

This principle received endorsement in *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, [Advisory Opinion] [1962] I.C.J. Reports 151 at 168, where the Court said:

As anticipated in 1945 ... each organ must, in the first place at least, determine its own jurisdiction.

See also Resolution 171 (II) of 14 November 1947, *United Nations General Assembly, Second Sess., Official Records*, vol II, 1559, (A/459).

(3) Although Weissberg argues that the United Nations may be regarded as a "State" for the purpose of Art 34. *The International Status of the United Nations* (1961) 195 and 200. Also Eagleton, "International Organizations and the Law of Responsibility" (1950 I) 76 *Receuil des Cours, Academie de Droit International de la Haye* 323 at 418.

(4) [1947 - 1948] I.C.J. Reports 15 at 27-28.

(5) Art 65, para 1, of the Statute provides:

The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.

(6) [Advisory Opinion] [1947 - 1948] I.C.J. Reports 57; [Advisory Opinion] [1950] I.C.J. Reports 4.

(7) [Advisory Opinion] [1960] I.C.J. Reports 150.

(8) [Advisory Opinion] [1962] I.C.J. Reports 151.

(9) [Advisory Opinion] [1950] I.C.J. Reports 221.

(10) [Advisory Opinion] [1951] I.C.J. Reports 15.

(11) [Advisory Opinion] [1949] I.C.J. Reports 174.

(12) [Advisory Opinion] [1954] I.C.J. Reports 47.

(13) [Advisory Opinion] [1955] I.C.J. Reports 67.

(14) [Advisory Opinion] [1956] I.C.J. Reports 77.

(15) [Advisory Opinion] [1971] I.C.J. Reports 16.

(16) An exception is the recourse from the United Nations Administrative Tribunal under Article XI of its Statute.

(17) Constitution of F.A.O., Art 16, para 1; Constitution of I.L.O., Art 37, para 1; Convention on I.M.C.O., Art 55; Constitution of U.N.E.S.C.O. Art 14, para 2; Constitution of W.H.O., Art 73. See generally Jenks, "The States of International Organisations in relation to the International Court of Justice", (1947) 32 Transactions for the Year 1946, The Grotius Society 1.

(18) Articles of Agreement of the I.M.F. (Bretton Woods Agreements) Art XVIII, para a.

(19) *Ibid*, Art XVIII, para b.

(20) Convention on I.C.A.O., Art 84.

(21) Constitution of F.A.O., Art 16, para 1.

(22) Constitution of W.H.O., Art 75.

(23) Convention of W.M.O., Art 29.

(24) Rosenne, in *The Law and Practice of the International Court* (1965), vol 2, 611–612, writes:

The constant accumulation of judicial precedents is creating what has now become a relatively substantial body of international case-law. The effect of this has been the incorporation of a sensible modification into the apparent rigidity of Article 38 (1) (d). The tendency to recognize that judicial decisions have some value as 'precedents' is a natural one for all tribunals, and it can develop without any necessity for artificial doctrines of the binding force of precedents, of difficult theories or judicial legislation. (25) Bowett in *The Law of International Institutions* (4th ed 1982) 274,

says:

The reference in Article 38 (2) [sic]... is also worthy of note in that ... it enables the Court to utilise the advantage of its own permanence by looking to its own previous decisions as evidence of what the law is. It is, of course, not limited to looking at its own decisions, but a certain consistency of special respect for them can not unnaturally, be discerned in its judgements.

(26) President Winiarski in an address delivered on the fortieth anniversary of the inauguration of the Permanent Court of International Justice said ([1961 – 1962] Yearbook 1 at 2):

The present Court has since the beginning been conscious of the need to maintain a continuity of tradition, case law and methods of work ... [W]ithout being bound by *stare decisis* as a principle or rule, it often seeks guidance in the body of decisions of the former Court, and the result is a remarkable unity of precedent, an important factor in the development of international law.

(27) ECSC Treaty, Art 31; EEC Treaty, Art 164; Euratom Treaty, Art 134.

(28) ECSC Treaty, Art 210; EEC Treaty, Art 20; Euratom Treaty, Art 184.

(29) ECSC Treaty Art 33, para 1, provides:

The Court shall have jurisdiction over appeals by a member States or by the Council for the annulment of decisions and recommendations of the High Authority on the grounds of lack of legal competence, substantial procedural violations, violation of the Treaty or of any rule of law relating to its application, or abuse of power.

EEC Treaty, Art 173, para 1; Euratom Treaty Art 146, para 1, provide:

The Court of Justice shall review the lawfulness of acts other than recommendations or opinions of the Council and the Commission. For this purpose, it shall be competent to give judgment on appeals by a Member State, the Council or the Commission, on grounds of incompetence, of errors of substantial form, of infringement of this Treaty or of any legal provision relating to its application, or of abuse of power.

(30) ECSC Treaty, Art 33, para 2 provides:

The enterprises, or the associations referred to in Article 48 shall have the right of appeal on the same grounds against individual decisions and recommendations concerning them, or against general decisions and recommendations which they deem to involve an abuse of power effecting them.

EEC Treaty Art 173, para 2; Euratom Treaty, Art 146, para 2, provide:

Any natural or legal person may under the same conditions, appeal against a decision addressed to him or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and specific concern to him.

(31) Other methods of classification are possible. Valentine in *The Court of Justice of the European Coal and Steel Community* (1955) analyses the competence of the Court in great detail (56–143), and classifies the various type of competence under ten categories (65–69). See also Valentine, *The Court of Justice of the European Communities* (1965), vol 1, 109–369.

(32) ECSC Treaty, Art 89, para 1; EEC Treaty, Art 170, para 1; Euratom Treaty, Art 142, para 1. Though the matter must first be referred to the Commission for its opinion.

(33) ECSC Treaty, Art 89, para 2; EEC Treaty, Art 182; Euratom Treaty, Art 154.

(34) EEC Treaty, Arts 175–177; Euratom Treaty, Arts 148–150.

(35) ECSC Treaty, Arts 34 and 40; EEC Treaty, Arts 178 and 215; Euratom Treaty, Arts 151 and 188.

(36) ECSC Treaty, Art 40, para 1; EEC Treaty, Art 179; Euratom Treaty, Art 152.

(37) ECSC Treaty, Art 42; EEC Treaty, Art 181; Euratom Treaty, Art 153.

(38) The French proposal of 9 November 1950 in Art 26, para 3, provided for an advisory opinion of the Court of Justice of the European Communities.

The High Authority, subject to an approval of the Council, may request the Court an advisory opinion for the interpretation of the present Treaty or Annex thereto.

This proposal was not accepted. Reproduced by Steindorff, *Die Wichtigkeitsklage in Recht der Europäischen Gemeinschaft für Kohl und Stahl* (1952) 166.

Nevertheless it is sometimes maintained that ECSC Treaty, Art 31, EEC Treaty, Art 164 and Euratom Treaty, Art 136 would justify the Court in rendering an advisory opinion when so requested.

(39) ECSC Treaty, Art 95, paras 3 and 4 provides;

3. appropriate modifications may be made provided that they do not modify the provisions of Articles 2, 3 and 4, or the relationship among the powers of the High Authority and the other institutions of the Community.

4. These modifications will be proposed jointly by the High Authority and

the Council acting by a five-sixths majority. They shall then be submitted to the opinion of the Court. In its examination, the Court may look into all elements of law and fact. If the Court should recognize that they conform to the provisions of the preceding paragraph, such proposals shall be transmitted to the Assembly. They will enter into force if they are approved by the Assembly acting by a majority of three-quarters of the members present and voting comprising two-thirds of the total membership.

(40) For example Opinion of the Court (1958–1959) V *Recueil de la Jurisprudence de la Cour* 533, and Opinion of the Court (1960) VI *Recueil de la Jurisprudence de la Cour* 93 on *Amendment Procedure under Article 95, paragraph 3 and 4 of the E.C.S.C Treaty*.

(41) EEC Treaty, Art 228, para 1, subpara 2, provides:

The Council, the Commission of a Member States may, as a preliminary, obtain the opinion of the Court of Justice as to the compatibility of the contemplated agreements with the provisions of this Treaty. As agreement which is the subject of a negative opinion of the Court of Justice may only enter into force under the conditions laid down, according to the case concerned. in Article 236.

(42) EEC Treaty, Art 236 provides;

The Government of any Member State of the Commission may submit to the Council proposals for the revision of this Treaty.

If the Council, after consulting the Assembly and, where appropriate, the Commission, expresses an opinion in favour of the calling of a conference of representatives of the Governments of Member States, such conference be convened by the President of the Council for the purpose of determining in common agreement the amendments to be made to this Treaty.

Such amendments shall enter into force after being ratified by all Member States in accordance with their respective constitutional rules.

(43) Art 38.

(44) Art 293, para 1.

(45) *Fédération Charbonnière de Belgique c. Haute Autorité de la C.E.C.A., Affaire 8/55*, (1955–1956) II *Recueil de la Jurisprudence de la Cour* 199 at 264.

(46) *Ibid*, 263.

(47) The Court in *Gouvernement du Royaume des Pays-Bas c. Haute Autorité de la C.E.C.A., Affaire 6/54*, (1955) I *Recueil de la Jurisprudence de la Cour* 201 at 232. held:

it is necessary to apply the law of different member States because we have to take them into account, within decisive limits, for the purpose of interpretation of Community Law.

(48) Art 160, para 2, subpara (n), of the Convention.

(49) Arts 187, 188, 191 and 288, para 3, of the Convention.

(50) Schermers, however, does not differentiate the implied powers theory applied by the Court of Justice of the European Communities from the one applied by the International Court of Justice. *International Institutional Law* (2nd ed 1980) 208–209.

V) CASE LAW OF THE P.C.I.J. AND THE I.C.J.

In this Chapter criteria for deciding the extent of powers of an international organisation and its organs, ie the doctrine of implied powers, before the Permanent Court of International Justice and the International Court of Justice, are examined by analysing advisory opinions of the two Courts.

A. *Competence of I.L.O. Cases*

In its second and third Advisory Opinions,⁽¹⁾ the Permanent Court of International Justice was concerned with the implied powers of the International Labour Organisation. Several questions concerning agricultural labour were put on the agenda of the Third Session of the International Labour Conference. The French Government had stated that Part XIII of the 1919 Peace Treaty of Versailles, which contained the Constitution of the International Labour Organisation, did not confer on this Organisation any express power with respect to the matter of agricultural labour. At the request of France, the Conference asked the Council of the League of Nations to obtain from the Court an Advisory Opinion on the competence of the Organisation to deal with questions of agricultural labour.

The French Government subsequently expressed the view that the Court should give a further separate Advisory Opinion on the question whether the International Labour Organisation was competent to deal with methods of agricultural production and other matters of the same character. The Conference agreed to ask that an Advisory Opinion also be requested on this point. The Council of the League of Nations, in conformity with Article 14 of the Covenant, requested the Court to give an Advisory Opinion on the following question:

Does the competence of International Labour Organisation extend to international regulation of the conditions of labour of persons employed in agriculture?⁽²⁾

The Court in the first place found:

In considering the question before the Court upon the language of the Treaty, it is obvious that the Treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense.⁽³⁾

The Court found in the Preamble of the International Labour Organisation⁽⁴⁾ a warning that “the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries”.⁽⁵⁾ Taking note of the high percentage of world labour employed in agriculture, the Court felt that the Treaty’s key words “*industrie*” and “*industrielle*” in the French text should encompass

agriculture, although it had to admit that in their ordinary use those terms did not include agriculture.⁽⁶⁾ The Court thus concluded:

the competence of the International Labour Organisation does extend to international regulation of the conditions of labour of persons employed in agriculture⁽⁷⁾

Then the Court was asked:

Does examination of proposals for the organisation and development of methods of agricultural production, and other questions of a like character, fall within the competence of the International Labour Organisation?⁽⁸⁾

In answering this question, the Court noted:

The object for which the International Labour Organisation was founded was the amelioration of the lot of the workers and the adoption of humane conditions⁽⁹⁾

And it held that the improvement of manufacturing processes, with a view toward increasing output or improving the articles produced is not a primary competence of the Organisation.⁽¹⁰⁾ This, however, cannot prevent the Organisation from being competent in areas concerning those problems in an incidental manner, when they directly affect the regulation of working conditions or when they are affected by such a regulation.⁽¹¹⁾ And the Court concluded that, apart from the specific points in respect of which powers are conferred upon the International Labour Organisation by the Treaty, the consideration of the means of production does not fall within the competence of the Organisation.⁽¹²⁾

B. *Personal Work of Employers Case*

In an Advisory Opinion on the *Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer*,⁽¹³⁾ the Permanent Court of International Justice inferred from cautiously elaborated tests that the International Labour Organisation had the power to concern itself incidentally with relevant aspects of work done by employers. During its Sixth Session, the International Labour Conference considered the regulation of work in bakeries. At its Seventh Session, it adopted a Draft Convention which provided for the application of certain of its provisions to the employers themselves. The delegates of employers raised objections to these extensions, but the Conference rejected the amendments put forward by the employers' delegates to the proposed text, which was adopted in its original form. At the same time, the Conference agreed that the Court should be requested to give an Advisory Opinion on whether the Draft Convention was within the competence of the International Labour Organisation.⁽¹⁴⁾

The request to the Court was as follows:

It is within the competence of the International Labour Organization to draw up and to propose labour legislation which, in order to protect certain classes of workers, also regulates incidentally the same work when performed by the employer himself?⁽¹⁵⁾

The Court first paid attention to the argument of the inferences to be drawn from the wide jurisdiction granted to the International Labour Organization in respect of the matter of humane conditions of labour and the protection of workers. The Court held:

It results from the consideration of the provisions of the Treaty that the High Contracting Parties clearly intended to give to the International Labour Organization a very broad power of co-operating with them in respect of measures to be taken in order to assure humane conditions of labour and the protection of workers.⁽¹⁶⁾

The Court, secondly, found it inconceivable that the parties to the 1919 Peace Treaty of Versailles, in setting up the International Labour Organization, intended "to prevent the Organization from drawing up and proposing measures essential to the accomplishment"⁽¹⁷⁾ of the end for which it was created.

The Court, thirdly, considered the relationship between the existing provisions and powers claimed as implied powers. The Court, examining why the Treaty lacked any express provision on the subject,⁽¹⁸⁾ held:

The Organization ... would be so prevented [from fulfilling its purposes expressed in the Treaty] if it were incompetent to propose for the protection of wage earners a regulative measure to the efficacious working of which it was found to be essential to include to some extent work done by employers. If such a limitation of the powers of the International Labour Organization, clearly inconsistent with the aim and the scope of Part XIII, had been intended, it would have been expressed in the Treaty itself. On the other hand, it is not strange that the Treaty does not contain a provision expressly conferring upon the Organization power in such a very special case as the present.⁽¹⁹⁾

Finally, it was found that, irrespective of the possibility of submitting any question or dispute on the interpretation of Part XIII of the 1919 Peace Treaty of Versailles or any convention concluded under it, to the Permanent Court of International Justice,⁽²⁰⁾ in the constitution of the International Labour Organization, the 1919 Peace Treaty of Versailles itself provided international means for effectively voicing objections to the inclusion of any particular matter in the agenda of the General Conference. The Court held:

the Treaty provides the means of checking any attempt on the part of the Organization to exceed its competence. In this way the High Contracting Parties have taken precautions against any undue extension of

the sphere of activity indicated by the Preamble.⁽²¹⁾

Furthermore, it was held that even though it is true that States are bound to submit draft conventions to their Parliaments, it is equally true that their Parliaments are free to reject them.⁽²²⁾

C. *Reparation for Injuries Case*

During the events in Palestine in 1948, several agents in the service of the United Nations suffered various injuries. The United Nations mediator, Count Bernadotte, and a French observer, Colonel Seret, were assassinated. During other incidents injuries were sustained by a number of United Nations officials, guards and observers. The Secretary-General thought it necessary to consult the General Assembly on the policy and procedure of indemnities to be followed. He therefore brought before it the problem of the responsibility of a State to the United Nations, which was examined at the third session of the General Assembly. Differences of view arose as to the answer to be given to the Secretary-General's question. Finally, the Assembly decided in its Resolution 258 (III) of 3 December 1948, to request of the International Court of Justice an Advisory Opinion on the matter. The request to the Court was as follows:

- I. In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations as an Organization the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations (b) to the victim or to the persons entitled through him?
- II. In the event of an affirmative reply on point I (b), how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national?⁽²³⁾

The Court subdivided the first request into two parts:

- (1) the question whether or not the Organisation has the right to present international claims.
- (2) the question of claims against a non-member of the Organisation.

Question (1) is of interest to the argument here. To answer this question, the Court first verified the presence of certain preconditions, and having done so, affirmed the legal personality of the Organisation; and then clarified the concept of international personality, and finally defined the content of international personality, that is, what degree and nature of rights and duties may be asserted by the Organisation through the medium of the concept.

(a) The Preconditions: The Court found that the Charter: (i) did not merely make the Organisation a centre for harmonising actions in the attain-

ment of common ends⁽²⁴⁾; (ii) had equipped that centre with organs; (iii) had given it special tasks; and (iv) had defined the position of the Member States in relation to the Organisation.⁽²⁵⁾

(b) International Personality: Taking into account the preconditions, the Court reached the following conclusions.

In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities have clothed it with the competence required to enable those functions to be effectively discharged.

Accordingly, the Court has come to the conclusion that the Organization is an international person.⁽²⁶⁾

(c) Definition: The Court defined the concept of international personality as follows:

This is no doubt a doctrinal expression, which has sometimes given rise to controversy. But it will be used here to mean that if the Organization is recognized as having that personality, it is an entity capable of availing itself of obligations incumbent upon its Members.⁽²⁷⁾

Furthermore it was held:

That is not the same thing as saying that it is a State, which it certainly not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is "a super-State", whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.⁽²⁸⁾

In other words, international personality of an international organisation is to say that organisation is an entity capable of being a subject of rights and duties independent of the rights and duties of its Members.

(d) Content: As the concept of international personality itself does not imply anything but being an entity on the international plane, the Court applied the theory of implied powers to define the nature and degree of the power that is attributed to the Organisation. The Court first stipulated the theory to be applied.

The next question is whether the sum of the international rights of the Organization comprises the right to bring the kind of international claim described in the Request for this Opinion. That is a claim against a State to obtain reparation in respect of the damage caused by the injury of an agent of the Organization in the course of the performance of his duties. Whereas a State possesses the totality of international rights and duties recognized by international laws, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.⁽²⁹⁾

Then applying the theory of implied powers, the Court concluded that the Organisation has the capacity of bringing international claims, in general.⁽³⁰⁾

Having regard to the foregoing general considerations, the Court investigated the capacity of the Organisation to bring international claims particularly stipulated in the Request, Parts I (a) and (b).

It was common ground that the Charter had not expressly conferred any such power on the United Nations.⁽³¹⁾

On the issue of the reparation of damage caused to the Organisation when one of its agents suffered injury at the same time, which was stipulated in the Request, Part I (a), the Court held:

It cannot be doubted that the Organization has the capacity to bring an international claim against one of the Member which has caused injury to it by a breach of its international obligations towards it.⁽³²⁾

And further:

When the Organization has sustained damage resulting from a breach by a Member of its international obligations, it is impossible to see how it can obtain reparation unless it possesses capacity to bring an international claim. It cannot be supposed that in such an event all the Members of the Organization, save the defendant state, must combine to bring a claim against the defendant for the damage suffered by the Organization.⁽³³⁾

In dealing with the question of law which arose out of the Request, Part I (b), whether, in the course of bringing an international claim of this kind, the Organisation can recover the reparation due in respect of the damage caused to the victim, the Court, after rejecting the analogy of diplomatic protection of nationals, defined the method it would employ:

The Charter does not expressly confer upon the Organization the capacity to include, in its claim for reparation, damage caused to the victim or to persons entitled through him. The Court must therefore begin by enquiring whether the provisions of the Charter concerning the functions of the Organization, and the part played by its agents in the per-

formance of those functions, imply for the Organization power to afford its agents the limited protection that would consist in the bringing of a claim on their behalf for reparation for damage suffered in such circumstances. Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.⁽³⁴⁾

After the Court examined the functions entrusted to the Organisation and the nature of the missions of its agents, it concluded:

the capacity of the Organization to exercise a measure of functional protection of its agents arises by necessary intendment out of the Charter.⁽³⁵⁾

Moreover:

In claiming reparation based on the injury suffered by its agent, the Organization does not represent the agent, but is asserting its own right, the right to secure respect for undertaking entered into towards the Organization.⁽³⁶⁾

Judge Hackworth also took the theory of implied powers approach, although the definition of the theory was different from that of the majority opinion of the Court.

The Dissenting Opinion by Judge Hackworth is often described as an example of the theory of delegated or enumerated powers.⁽³⁷⁾ He said:

There can be no gainsaying the fact that the Organization is one of delegated and enumerated powers. It is to be presumed that such powers as the Member States desired to confer upon it are stated either in the Charter or in complementary agreements concluded by them. Powers not expressed cannot freely be implied.⁽³⁸⁾

Judging from this statement, he seemed to support the doctrine of delegated powers. Yet he concurred with the Court's conclusion that under the theory of implied powers the United Nations has the capacity to bring an international claim with a view to obtaining the reparation due in respect of damage caused to the Organisation. Examining the provisions concerning the legal capacity and privileges and immunities in the Charter and affirming the Organisation's legal personality and capacity to institute legal proceedings from the Convention on Privileges and Immunities of the United Nations 1946, Judge Hackworth said:

It stands to reason that, if the Organization is to institute legal proceedings and to claim the benefits of the privileges and immunities to which it is entitled, it must be able to carry on negotiations with governments as well as with private parties. It must therefore be able to assert claims in its own behalf. No other conclusion consistent with the specified

powers and with the inherent right of self-preservation could possibly be drawn. The Organization must have and does have ample authority to take needful steps for its protection against wrongful acts for which Member States are responsible. Any damage *suffered by the Organization* by reason of wrongful acts committed against an agent, while in the performance of his duties, would likewise be within its competence. This is a proper application of the doctrine of implied powers.⁽³⁹⁾

As to the Request, Part I (b), which is concerned with a claim for reparation due in respect of damage caused to the victim of a wrongful act or to persons entitled through him, Judge Hackworth also applied the theory of implied powers. But he disagreed with the majority opinion of the Court because he considered that the alleged capacity of the Organisation here cannot arise implicitly from the purposes or functions of the Organisation alone. He said:

Implied powers flow from a grant of expressed powers, and are limited to those that are "necessary" to the exercise of powers expressly granted. No necessity for the exercise of the power here in question has been shown to exist. There is no impelling reason, if any at all, why the Organization should become the sponsor of claims on behalf of its employees, even though limited to those arising while the employee is in line of duty. These employees are still nationals of their respective countries, and the customary methods of handling such claims are still available in full vigour. The prestige and efficiency of the Organization will be safeguarded by an exercise of its undoubted right under point I (a) *supra*. Even here it is necessary to imply power, but as stated above, the necessity is self-evident. The exercise of an additional extraordinary power in the field of private claims has not been shown to be necessary to the efficient performance of duty by either the Organization or its agents.⁽⁴⁰⁾

(1) *Competence of the International Labour Organisation in respect of Agricultural Labour*, [1922] P.C.I.J., Series B, No. 2, 9; *Competence of the International Labour Organisation with respect to Agricultural Production*, [1922] P.C.I.J., Series B, No. 3, 46.

(2) *Ibid*, 9. Resolution of 12 May 1922.

(3) *Ibid*, 23.

(4) The 1919 Peace Treaty of Versailles, Part XIII, Section 1.

(5) *Competence of the International Labour Organisation with respect to Agricultural Labour*, *supra* at note 1, at 25.

- (6) *Ibid.*, 33–35.
- (7) *Ibid.*, 43.
- (8) *Competence of the International Labour Organisation with respect to Agricultural Production*, *supra* at note 1, at 49.
- (9) *Ibid.*, 57.
- (10) *Ibid.*, 55.
- (11) *Ibid.*, 57–59.
- (12) *Ibid.*, 59.
- (13) [Advisory Opinion] [1926] P.C.I.J. Series B, No. 13, 1. Henceforth referred to as *Personal Work of Employers Case*.
- (14) *Ibid.*, 7.
- (15) *Ibid.*, 6. Resolution of the Council of the League of Nations on 17 March 1926.
- (16) *Ibid.*, 18.
- (17) *Ibid.*, 18.
- (18) *Ibid.*, 18–20.
- (19) *Ibid.*, 18.
- (20) Art 423 of the 1919 Peace Treaty of Versailles; Art 37 of the I.L.O. Constitution.
- (21) *Personal Work of Employers Case*, *supra* at note 13, at 17–18.
- (22) *Ibid.*, 16–17.
- (23) *Reparation for Injuries Case*, [Advisory Opinion] [1949] I.C.J. Reports 174 at 175. See also McMahon, “The Court of the European Communities Judicial Interpretation and International Organisation” (1961) 37 B.Y.I.L. 320 at 340; Seyersted, “United Nations Forces, Some Legal Problems” (1961) 37 B.Y.I.L. 351 at 454–455; Rama-Montaldo, “International Legal Personality and Implied Powers of International Organizations” (1970) 44 B.Y.I.L. 111 at 124 *et seq.*
- (24) Art 1, para 4.
- (25) *Reparation for Injuries Case*, *supra* at note 23, at 178–179.
- (26) *Ibid.*, 179.
- (27) *Ibid.*, 178.
- (28) *Ibid.*, 179.
- (29) *Ibid.*, 179–180.
- (30) *Ibid.*, 180.
- (31) *Ibid.*, 180 and 182. Art 104 of the Charter of the United Nations concerning legal capacity of the United Nation in the territory of each of its Members, was not regarded as the source of the power to place an international claim for reparation.
- (32) *Ibid.*, 180.
- (33) *Ibid.*, 180–181.
- (34) *Ibid.*, 182. The Court then referred to the *Personal Work of Employers Case* of the Permanent Court of International Justice.
- (35) *Ibid.*, 184.
- (36) *Ibid.*
- (37) Seyersted, *supra* at note 23, at 447–448; Seyersted, *United Nations Forces in the Law of Peace and War* (1963) 143.
- (38) [Advisory Opinion] [1949] I.C.J. Reports 174 at 198.
- (39) *Ibid.*, 196–197. And see also *ibid.*, 198, where Judge Hackworth said that necessity of the implied power for the purpose of claiming reparation suffered by the Organisation itself is self-evident.
- (40) *Ibid.*, 198.