

**THE DOCTRINE OF IMPLIED POWERS WITH
SPECIAL REFERENCE TO
THE INTERNATIONAL SEA-BED AUTHORITY—III**

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D. *Effect of Awards Case*

In 1953, the United Nations Administrative Tribunal awarded indemnities to several staff members whose contracts had been terminated without their assent.

In a report to the General Assembly of the United Nations, the Secretary-General requested a supplementary appropriation for the financial year of 1953 to cover the awards. The Fifth Committee of the General Assembly raised a number of legal problems in this connection. On 9 December 1953, the General Assembly decided to request an *Advisory Opinion of the International Court of Justice*. The request for an advisory opinion reads:

- (1) Having regard to the Statute of the United Nations Administrative Tribunal and to any relevant instruments and to the relevant records, has the General Assembly the right on any grounds to refuse to give effect to an award of compensation made by that Tribunal in favour of a staff member of the United Nations whose contract of service has been terminated without his assent?
- (2) If the answer of the Court to question (1) is in the affirmative, what are the principal grounds upon which the General Assembly could lawfully exercise such a right?⁽⁴¹⁾

In the written statement, the Government of the United States argued the criteria of invoking the implied powers. After examining *travaux préparatoires* at the San Francisco Conference, and in particular a Canadian proposal for Chapter X of the Dumbarton Oaks Proposals, the United States argued that the four important principles contained in the Canadian proposal and now embodied in Articles 97 and 101 of the Charter were (a) the selection of the staff by the Secretary-General as the chief administrative officer; (b) the establishment by the General Assembly of regulations concerning employment; (c) provision for the highest standards of efficiency, competence and integrity, and (d) provision for recruiting staff on as wide a geographical basis as possible. The theory of implied powers was defined from the *Personal Work of Employers Case* and the *Reparation for Injuries Case* as follows: that when the Charter empowers an organ to achieve an objective, it is to be held to imply such capacities, privileges or powers as are necessary for or essential to the attainment of the objective and as are consistent with and not excluded by other provisions of the Chapter.⁽⁴²⁾ Applying this theory, it was concluded that the Administrative Tribunal, whose judgments should be final and without appeal and whose judgments were intended to prevent the General Assembly from reviewing the propriety of the action of the Tribunal, was not necessary for or essential to any of the four important principles.⁽⁴³⁾

The Court recalled its views on the subject of implied powers in its

Advisory Opinion on the *Reparation for Injuries Case*. After enquiring into the provisions of the Charter concerning the relations between the staff members and the organisation, in particular Article 101, paragraph 3, which specifies the paramount consideration of securing the highest standards of efficiency, competence and integrity, it held:

It would . . . hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them.

In these circumstances, the Court finds that the power to establish a tribunal, to do justice as between the Organization and the staff members, was essential to ensure the efficient working of the Secretariat, and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity. Capacity to do this arises by necessary intendment out of the Charter.⁽⁴⁴⁾

The competent organ to exercise it is clearly shown by Article 7, paragraph 2, Article 22, and Article 101, paragraph 1, of the Charter to be the General Assembly.

The existence of express provisions which prohibit the existence of powers or certain exercise of measures or powers of an international organisation was argued by the United States.

It was alleged by the United States Government in this case that an implied power to give binding effect to awards of the Tribunal in the sense discussed above cannot be attributed to the General Assembly or to any organ of the United Nations because no organ is free to honour or obey the purported commands of some other body where such commands are contrary to the provisions of the Charter itself. By virtue of Articles 97 and 101, the Secretary-General is vested with the power to employ and manage the Secretariat. Since this authority is given to the Secretary-General by the Charter itself, it cannot be transferred to the Administrative Tribunal by a resolution which draws the source of the power from the theory of implied powers. To imply a power under which the Administrative Tribunal may bind the General Assembly and the Secretary-General by Tribunal decisions is to permit the assertion of power by the Tribunal to substitute its awards for those of the Secretary-General without a paralled corrective power in the General Assembly or the Secretary-General.⁽⁴⁵⁾

Answering the contention by the Government of the United States, namely that the implied power of the General Assembly to establish a tribunal cannot be carried so far as to enable the Tribunal to intervene in matters falling within the province of the Secretary-General, the Court held:

The General Assembly could at all times limit or control the powers of the Secretary-General in staff matters, by virtue of the provision of Article 101. Acting under powers conferred by the Charter, the General Assembly authorized the intervention of the Tribunal to the extent that such intervention might result from the exercise of jurisdiction conferred upon the Tribunal by its Statute. Accordingly, when the Tribunal decides that particular action by the Secretary-General involves a breach of the contract of service, it is in no sense intervening in a Charter power of the Secretary-General, because the Secretary-General's legal powers in staff matters have already been limited in this respect by the General Assembly.⁽⁴⁶⁾

The existence of express provisions concerning the authority of the General Assembly to set up the Administrative Tribunal was also considered.

Judge Hackworth in his Dissenting Opinion said that the Administrative Tribunal was created by the General Assembly in the exercise of its authority under Article 22. And it was also said:

Nowhere else in the Charter is any authorization to be found. And nowhere else in the Charter can there be found any authorization, express or implied, for the establishment by the General Assembly of any other kind of organ be it judicial, quasi judicial or non-judicial.⁽⁴⁷⁾

Thus it was concluded:

There is . . . no point to saying that the Statute of the Tribunal is based on Article 101 of the Charter, as has been argued, and as so based is relieved of the consequences of Article 22. That argument must be dismissed as without legal jurisdiction.

The reasonable deduction, then, is that the Administrative Tribunal is a *subsidiary* organ of the General Assembly, created by an act of the Assembly, pursuant to the authorization in Article 22.⁽⁴⁸⁾

Consequently he dismissed any application of the theory of implied powers.

The doctrine of implied powers is designed to implement, within reasonable limitations, and not to supplant or vary, expressed powers. The General Assembly was given express authority by Article 22 of the Charter to establish such subsidiary organs as might be necessary for the performance of its functions, whether those functions should relate to Article 101 or to any other article in the Charter. Under this authorization the Assembly may establish any tribunal needed for the implementation of its functions. It is not, therefore, permissible, in the face of this express power, to invoke the doctrine of implied powers to establish a tribunal of a supposedly different kind, nor is there warrant for concluding that such a thing has resulted. It is

of little consequence in the end result whether the Tribunal be described as a judicial, an arbitral or an administrative tribunal. . . . No controlling significance is to be attached to the name or to the functions of the Tribunal.⁽⁴⁹⁾

The Court, on the other hand, held that the Charter contains no express provision for the establishment of judicial bodies or organs and no indication to the contrary.⁽⁵⁰⁾ The Court considered the character of the Administrative Tribunal, that is, whether it was established either as a judicial body, or as an advisory organ or as merely a subordinate committee of the General Assembly. The Court said that the answer to this question depended on the Statute of the Tribunal and the amendments thereon. Analysing Articles 1, 2, paragraph 3, and 10, it was said that these provisions and the terminology used are evidence of the judicial nature of the Tribunal in contrast to an advisory organ such as Joint Appeal Board established under Staff Rules 111.1 of the United Nations. The Statute of the Administrative Tribunal contains no similar provision attributing an advisory character to its functions, nor does it in any way limit the independence of its authority. After examining Article 9 of the original Statute of 1949 and Article 9, paragraph 1, of the amended Statute of 1953, concerning the power of the Tribunal to order the rescinding of a decision contested or the specific performance of the obligation invoked to the Secretary-General, the Court concluded:

the Tribunal is established, not as an advisory organ or a mere subordinate committee of the General Assembly, but as an independent and truly judicial body pronouncing final judgements without appeal within the limit of its functions.⁽⁵¹⁾

The Court could not regard Article 22 as an express provision for the establishment of the Tribunal because it was held to be an independent and judicial body. The Charter does not confer judicial functions on the General Assembly and accordingly cannot establish a judicial organ under Article 22 in which provision an organ is deemed necessary for the performance of the functions of the General Assembly. In the absence of the establishment of an Administrative Tribunal, the function of resolving disputes between United Nations staff and the United Nations could be discharged by the Secretary-General by virtue of the provisions of Articles 97 and 101 and the Court found that this had been done. The General Assembly has the power under the Charter to make regulations under Article 101, paragraph 1, but no power to adjudicate, or otherwise deal with particular instances. Consequently the General Assembly cannot purportedly delegate the performance of its own functions which is not given by the Charter, under Article 22, to a subordinate organ.⁽⁵²⁾

Measures to be taken to realise the object, were held to be a matter of determination by the competent organ. The Court cannot exercise its jurisdiction to determine whether the measure taken is necessary for or essential to achieve the object concerned. It was contended that, although the General Assembly has powers to establish regulations under Article 101 and the implied power to set up an administrative tribunal under the same article, there is no need to go so far. Examining the contention that an implied power can only be exercised to the extent that the particular measure under consideration can be regarded as absolutely essential, the Court held:

There can be no doubt that the General Assembly in the exercise of its power could have set up a tribunal without giving finality to its judgements. In fact, however, it decided, after long deliberation, to invest the Tribunal with power to render judgements which would be "final and without appeal", and which would be binding on the United Nations. The precise nature and scope of the measures by which the power of creating a tribunal was to be exercised, was a matter for determination by the General Assembly alone.⁽⁵³⁾

E. *Certain Expenses Case*

Between 30 October 1956 and 1 November 1956, the Security Council of the United Nations examined the question of the Israeli, French and British intervention in Egypt. On 1 November, it adopted a resolution which, considering that the lack of unanimity among its permanent Members prevented the Security Council from exercising its primary responsibility for the maintenance of international peace and security, ordered the calling of an extraordinary session of the General Assembly in order to make appropriate recommendations. The General Assembly then requested the Secretary-General to submit a plan for the setting up of a United Nations force to secure and supervise the cessation of hostilities. Following the creation of the United Nations Emergency Force (UNEF), made up of national contingents of a number of Member States under United Nations command, the General Assembly adopted a number of resolutions regarding the financing of UNEF. Thereafter discussions arose within the Organisation because of the refusal of certain States to contribute their share.

In 1960, the Security Council had to deal with the situation in the newly independent Congo following a request for military assistance from the country's President and Prime Minister. By its resolution of 13 July 1960, the Security Council authorised the Secretary-General to take the necessary steps, in consultation with the Congolese Government, to provide such military assistance. This led to the creation of international force known as the United Nations Operations in the Congo (ONUC), also made up of

national contingents under United Nations command. As in the case of UNEF, the financing of these operations led to controversy among the Members of the Organisation.

Accordingly, the General Assembly decided, by Resolution 1731 (XVI) of 20 December 1961, to ask the Court for an Advisory Opinion as to whether the expenditure authorised by a number of the General Assembly resolutions relating to the United Nations operations in the Middle East and the Congo undertaken, in pursuance of the General Assembly and the Security Council resolutions respectively, constitute "expenses of the Organization" within the meaning of Article 17, paragraph 2, of the Charter.⁽⁵⁴⁾

It was argued that certain expenses, in particular those relating to operations for the maintenance of international peace and security, fell to be dealt with exclusively by the Security Council, and more especially, through agreements negotiated in accordance with Article 43, and did not as such constitute "expenses of the Organization" within the meaning of Article 17, paragraph 2; in fact, only the Security Council would be authorised to take such action while the General Assembly could only consider, study and recommend and therefore would not have power to impose an obligation to pay the expenses resulting from the implementation of its recommendations.⁽⁵⁵⁾

The Court therefore had to consider the respective functions of the General Assembly and the Security Council, chiefly with regard to matters concerning the maintenance of international peace and security.

The Court first held that the responsibility conferred upon the Security Council by Article 24 of the Charter is primary but not exclusive. Thus, the Security Council alone can order enforcement measures by coercive action against an aggressor. But the Charter at the same time clearly emphasised that the General Assembly is also to be concerned with international peace and security. It said:

The responsibility conferred is "primary", not exclusive. This primary responsibility is conferred upon the Security Council, as stated in Article 24, "in order to ensure prompt and effective action". To this end, it is the Security Council which is given a power to impose an explicit obligation of compliance if for example it issues an order or command to an aggressor under Chapter VII. It is only the Security Council which can require enforcement by coercive action against an aggressor.

The Charter makes it abundantly clear, however, that the General Assembly is also to be concerned with international peace and security. Article 14 authorizes the General Assembly to "recommend measures for the peaceful adjustment of any situation, regardless of origin,

which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the purposes and principles of the United Nations" . . . Thus while it is the Security Council which, exclusively, may order coercive action, the functions and powers conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies and the making of recommendations; they are not merely hortatory.⁽⁵⁶⁾

The Court secondly derived the power from Article 11, paragraph 2.⁽⁵⁷⁾ The Court held:

This paragraph, which applies not merely to general questions relating to peace and security, but also to specific cases brought before the General Assembly by a State under Article 35, in its first sentence empowers the General Assembly, by means of recommendations to States or to the Security Council, or to both, to organize peace-keeping operations, at the request, or with the consent, of the States concerned. This power of the General Assembly is a special power which in no way derogates from its general powers under Article 10 or Article 14, except as limited by the last sentence of Article 11, paragraph 2.⁽⁵⁸⁾

The argument supporting a limitation on the budgetary authority of the General Assembly with respect to the maintenance of international peace and security relied in particular on the last sentence of Article 11, paragraph 2.⁽⁵⁹⁾ The Court held that "action" envisaged in the provision was a coercive action which, under Chapter VII of the Charter, fell within the exclusive competence of the Security Council, but not all action on the part of the General Assembly would do so. The exclusion effected by the sentence quoted did not therefore apply in the case of non-coercive action. It stated:

The word "action" must mean such action as is solely within the province of the Security Council. It cannot refer to recommendations which the Security Council might make, as for instance under Article 38, because the General Assembly under Article 11 has a comparable power. The "action" which is solely within the province of the Security Council is that which is indicated by the title of Chapter VII of the Charter, namely "Action with respect to threats to the peace, breaches of the peace, and acts of aggression". If the word "action" in Article 11, paragraph 2, were interpreted to mean that the General Assembly could make recommendations only of a general character affecting peace and security in the abstract, and not in relation to specific cases, the paragraph would not have provided that the General Assembly may make recommendations on questions brought before

it by States or by the Security Council. Accordingly, the last sentence of Article 11, paragraph 2, has no application where the necessary action is not enforcement action.⁽⁶⁰⁾

After the Court considered the general problem of the interpretation concerning the power of the General Assembly to apportion the expenses of the United Nations under Article 17, paragraph 2, in the light of the general structure of the Charter and the respective functions assigned by the Charter to the General Assembly and Security Council, the Court proceeded to examine the expenditures enumerated in the request for the Advisory Opinion.

With regard to UNEF, the Court recognised both the relevant General Assembly resolutions and the reports of the Secretary-General clearly showed that, far from having been created with a view to an enforcement action, UNEF was indeed created with the consent of the Parties in order to ensure the supervision of the cessation of hostilities, in other words, to help promote a peaceful settlement, which is one of the main objects of the United Nations. The Court derived the power to set up UNEF from both Articles 11 and 14. After examining the resolutions concerned by the General Assembly, the Court held:

The Court notes that these “actions” may be considered “measures” recommended under Article 14, rather than “action” recommended under Article 11. The powers of the General Assembly stated in Article 14 are not made subject to the provisions of Article 11, but only of Article 12. Furthermore, as the Court has already noted, the word “measures” implies some kind of action. So far as concerns the nature of the situations in the Middle East in 1956, they could be described as “likely to impair . . . friendly relations among nations”, just as well as they could be considered to involve “the maintenance of international peace and security”. Since the resolutions of the General Assembly in question do not mention upon which article they are based, and since the language used in most of them might imply reference to either Article 14 or Article 11, it cannot be excluded that they were based upon the former rather than the latter article.⁽⁶¹⁾

As for the ONUC, the Court recalled that the Congo operation was originally authorised by the Security Council resolution for the maintenance of international peace and security and did not involve the use of force against any state. It was however, argued that the application of this resolution violated the Charter which lays down that it is for the Security Council and not for the Secretary-General to effect the choice of the States which are to take part in such operations.⁽⁶²⁾ The power of the Security Council to establish a force for the maintenance of international peace was not dis-

puted at all. The Court did not pay particular attention to the basis of the power in the Charter. It merely said:

It is not necessary for the Court to express an opinion as to which article or articles of the Charter were the basis for the resolutions of the Security Council, but it can be said that the operations of ONUC did not include a use of armed force against a State which the Security Council, under Article 39, determined to have committed an act of aggression or to have breached the peace The operation did not involve "preventive or enforcement measures" against any State under Chapter VII and therefore did not constitute "action" as that term is used in Article 11.⁽⁶³⁾

The Court seems to have been satisfied that the general power of the Security Council to perform the function of maintenance of international peace and security bestowed under the Charter is sufficient to imply the power to set up the force concerned, and delegate to the Secretary-General the power to determine which States are to participate with their armed forces or otherwise. The Court denied the existence of expressed provisions which prohibit the mandate saying:

The Charter does not forbid the Security Council to act through instruments of its own choice: under Article 29 it "may establish such subsidiary organs as it deems necessary for the performance of its functions"; under Article 98 it may entrust "other function" to the Secretary-General.⁽⁶⁴⁾

And also in the context of liability to third parties, the Court held that if the act incurring liability was within the Organisation's ostensible sphere of activity, it was irrelevant to third parties which of the organs of an international organisation had been involved for the responsibility of the organisation. It was held:

When the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization.

If it is agreed that the action in question is within the scope of the functions of the Organization but it is alleged that it has been initiated or carried out in a manner not in conformity with the division of functions among the several organs which the Charter prescribes, one moves to the internal plane, to the internal structure of the Organization. If the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not an expense of the Organization. Both national and international law contemplate cases in which

the body corporate or politic may be bound, as to third parties, by an *ultra vires* act of an agent.

In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. . . . therefore, each organ must, in the first place at least, determine its own jurisdiction.⁽⁶⁵⁾

F. Conclusion

In determining the existence and extent of implied powers of an international organisation, we have to bear in mind considerations on different levels.

(1) Considerations which apply to an international organisation itself, that are primarily concerned with the jurisdiction of the organisation, rather than any of its particular organs.

(2) Considerations which apply to the organs of the organisation.

1) *International Organisations*

In examining the Permanent Court of International Justice and the International Court of Justice cases the present writer is aware of only one case in which the Court has declined to apply the theory of implied powers to an international organisation. That happened in *Competence of the International Labour Organisation with respect to Agricultural Production*.⁽⁶⁶⁾ The Court declined to extend the competence of the International Labour Organisation to examining proposals for the organisation and development of the methods of agricultural production.

In the present writer's view this Opinion should be read in the light of three factors⁽⁶⁷⁾ which are not strictly legal factors, but which go to the essence of the Opinion. Firstly, the International Labour Organisation was one of the early examples of international organisations in contrast to the international administrative unions of the nineteenth century. Secondly, the case was one of the first Advisory Opinions in which the Court dealt with the competence of international organisations in a wide sense, and only the third Advisory Opinion which the Court rendered. Thirdly, the Court, in an Advisory Opinion on the *Competence of the International Labour Organisation with respect to Agricultural Labour*⁽⁶⁸⁾ which was decided together with that on the *Competence of the International Labour Organisation with respect to Agricultural Production*, had just taken a courageous step toward the theory of implied powers by affirming the Organisation's competence in a field not specifically mentioned in its constituent treaty. The combination of these three factors may indicate that the Court's restrictiveness in extending the power of the Organisation, on the ground

that benefits to workers from improved agricultural production were not a primary, but a secondary result and therefore not within the Organisation's competence, seems to have been more a reflection of judicial conservatism than the application of the legal principle. This "secondary competence" test was applied only on this occasion and has never been repeated, either by the Permanent Court of International Justice or the International Court of Justice.

In the *Personal Work of Employers Case*,⁽⁶⁹⁾ the Permanent Court of International Justice dealt with an implied power of the International Labour Organisation. Affirming the competence of the Organisation to regulate certain aspects of work done by employers by its regulation, the Court applied four tests⁽⁷⁰⁾ to the issue of implied powers of an international organisation:

- (1) the existence of broadly expressed powers which allows an interpretation in favour of the existence of further, and implied, powers;
- (2) the non-existence of express provisions or convincing reasons which prohibit the existence of powers or the exercise of certain measures or powers of an international organisation;
- (3) the existence of convincing reasons for the non-inclusion in the constitution of powers claimed as implied powers among those expressly granted in the constitution; and
- (4) the existence of adequate safeguards in the constituent treaty itself against ultra vires action, disguised as the exercise of implied powers.

In the Advisory Opinion given by the International Court of Justice in the *Reparation for Injuries Case*,⁽⁷¹⁾ the power in question was the competence of the United Nations to present an international claim. Here the Court relied expressly on the precedent of the Permanent Court of International Justice in the *Personal Work of Employers Case*.⁽⁷²⁾ The Court applied the first test of the *Personal Work of Employers Case* and also elaborated the test which is applied to determine those powers that are conferred upon an international organisation from the existence of broadly expressed powers.⁽⁷³⁾ The test declares that the international organisation must be deemed to have those powers which, though not expressly provided in the constituent document, are conferred upon it by necessary implication or intendment from its object, principles, competence, rights and obligations as specified or implied, as being essential to the performance of its functions.

Judge Hackworth clearly recognised the theory of implied power, but applying it, he found no necessity to confer implied powers on the United

Nations with regard to the Request, Part I (b).⁽⁷⁴⁾ The theory of implied powers which Judge Hackworth applied says that the Organisation has powers implied from a grant of express powers and are limited to those necessary for the exercise of powers expressly granted. He did not regard specified or implied purposes and functions of the Organisation as the source of implied power. Judge Hackworth thus resorted to the “necessary for the exercise of powers” test, whereas the majority of the Court resorted to the “essential to the performance of its functions” test.

In the Charter of United Nations, as there is no provision concerning the capacity of the Organisation itself or of another entity to place an international claim, the Court applied only the first test and no mention was made of the other three tests.⁽⁷⁵⁾

As to the fourth “safeguards” test, the differences of integration and character of international organisations must be noted. When the Permanent Court of International Justice rendered the Advisory Opinion on the *Personal Work of Employers Case*, the International Labour Organisation was not a separate international organisation but formed merely an autonomous part of the League of Nations.⁽⁷⁶⁾ In contrast, the United Nations was established as a global and general organisation for post 1945 world society. The Organisation created by the Charter is not a “super-State” or anything resembling a world government. But it is first and foremost a collective security system far more centralised than was the League of Nations. Moreover together with its political functions, it is also endowed with administrative and judicial functions. The organs of the United Nations are equipped with wider competence and their powers and functions are more clearly defined than those of the International Labour Organisation. Some of the competence which had been exercised under the sovereignty of states was removed from State Parties to the United Nations and its organs, consequently the exercise of sovereignty is more restricted in the United Nations than in the International Labour Organisation. In view of the pre-eminence of the United Nations compared to the International Labour Organisation with regard to integration, enough justification seems to exist for not having applied the test in this case.⁽⁷⁷⁾

2) *Organs of an International Organisation*

The Court seems to take practically the same approach to the implied powers of an organ of an international organisation as to those of an international organisation itself.

The Court, in its Advisory Opinion on the *Effect of Awards Case*,⁽⁷⁸⁾ in the course of investigating whether the General Assembly has the right on any ground to refuse to give effect to an award of compensation made by the tribunal, dealt with the power of an organ of an international organi-

sation, the General Assembly of the United Nations, to set up a tribunal which adjudicates staff matters with the award binding the General Assembly itself. In this case the Court appears to rely on the first three of the four tests discussed in the Advisory Opinion of the Permanent Court of International Justice in the *Personal Work of Employers Case*.⁽⁷⁹⁾ With regard to the first test, viz the broad powers conferred on the General Assembly, the Court followed the *Personal Work of Employers Case*, explained in detail in the *Reparation for Injuries Case*.⁽⁸⁰⁾ The United States Government's first contention based partly on the "necessary" test stressed by Judge Hackworth in his Dissenting Opinion on the *Reparation for Injuries Case*,⁽⁸¹⁾ was not adopted by the Court. In its second contention the United States argued that the second "non-existence of the expressed prohibitive provision" test was not satisfied.⁽⁸²⁾ The Court held the provision of Article 101 of the Charter does not prohibit the General Assembly from establishing the United Nations Administrative Tribunal.⁽⁸³⁾ Judge Hackworth dissented from the majority decision of the Court because of the third "non-inclusion" test.⁽⁸⁴⁾ He found Article 22 of the Charter was the provision under which the General Assembly established the United Nations Administrative Tribunal.⁽⁸⁵⁾ The Court held that the Charter contains no express provision for the establishment of judicial bodies or organs and no indication to the contrary.⁽⁸⁶⁾

In this case, the Court held that whilst it has jurisdiction to decide the existence of implied powers, it could not decide the mode of exercising those powers, which is a matter for determination by the competent organ.⁽⁸⁷⁾

In the *Certain Expenses Case*,⁽⁸⁸⁾ the International Court of Justice for the second time dealt with the implied powers of the organs, the General Assembly and the Security Council of the United Nations, to set up the peace-keeping forces. The implied powers of the General Assembly concerning UNEF were specifically in question. The Court appears to have relied on the tests of the existence of broadly expressed powers and the non-existence of the expressed prohibitive provision. The third "non-inclusion" test was applied by Judge Moreno Quintana in his Dissenting Opinion.⁽⁸⁸⁾ In this case the broadly expressed powers in question were the powers to discuss questions relating to the maintenance of international peace and security and to make recommendations,⁽⁹⁰⁾ and the power to recommend measures for the peaceful adjustment of any situation.⁽⁹⁰⁾ Because of the character of the broadly expressed powers concerned, that is, the power to discuss questions and to make recommendations, the "essential" test which was developed by the Court in the *Reparation for Injuries Case* and the *Effect of Awards Case* was not invoked.⁽⁹²⁾ The Court did not attempt to apply the "necessary" test. As for the second "non-existence of the expressed

prohibitive provision” test, the Court did not accept the contention that Article 24 or the last sentence of Article 11, paragraph 2, prohibit or limit the power of the General Assembly to discuss and make recommendations when “action” is invoked.⁽⁹³⁾

Moreover the Court held that there is a presumption that actions of the organisation are lawful.⁽⁹⁴⁾ And in the context of liability to third parties, it was held, if the act involving liability was within the Organisation’s authority, it was irrelevant to third parties which of the organs of the international organisation had been involved in the responsibility of the organisation.⁽⁹⁵⁾

(41) *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*, [Advisory Opinion] [1954] I.C.J. Reports 47 at 48. Henceforth referred to as *Effect of Awards Case*. See McMahon, *supra* at note 23, at 340; Seyersted, *supra* at note 23, at 454-455.

(42) [1954] I.C.J. Pleadings, *United Nations Administrative Tribunal*, 139-141.

(43) *Ibid*, 141-143 and 315-317.

(44) *Effect of Awards Case*, *supra* at note 41, at 57.

(45) [1954] I.C.J. Pleadings, *United Nations Administrative Tribunal*, 143.

(46) *Effect of Awards Case*, *supra* at note 41, at 60. As the consequence of this Advisory Opinion, the General Assembly amended the Statute of the Tribunal so as to make the judgements no longer "final and without appeal", but rather subject to a review procedure similar to the Statute of the International Labour Organisation Administrative Tribunal. The new Article XI of the United Nations Administrative Tribunal gives the right to any Member States, the Secretary-General or the individual claimant objecting to a judgement to request that an advisory opinion be sought from the International Court of Justice.

(47) *Ibid*, 78.

(48) *Ibid*, 78-79.

(49) *Ibid*, 80-81.

(50) *Ibid*, 56.

(51) *Ibid*, 53.

(52) *Ibid*, 60-61.

(53) *Ibid*, 58.

(54) *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, [Advisory Opinion] [1962] I.C.J. Reports 151 at 152-153. Henceforth referred to as *Certain Expenses Case*.

(55) *Ibid*, 162.

(56) *Ibid*, 163.

(57) Art 11, para 2, provides:

The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council, or to both.

(58) *Certain Expenses Case*, *supra* at note 54, at 164-165.

(59) The last sentence of Art 11, para 2, provides:

Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.

(60) *Certain Expenses Case*, *supra* at note 54, at 165.

(61) *Ibid*, 172.

(62) *Ibid*, 175.

(63) *Ibid*, 177.

(64) *Ibid*, 177.

(65) *Ibid*, 168. In his Separate Opinion, Judge Morelli, also concurred

with this conclusion of the Court on a different ground, stressing the difference between ultra vires acts in municipal and international law. In national legal systems the requirement of legality, that is, the conformity of the act with the legal rule, and the requirement of certainty according to which the validity of a legal act would not all the times be open to challenge, have been happily reconciled. Absolute nullity operating *ipso jure*, is quite exceptional. Generally, what is involved is simply voidability under the existing means of recourse. (ibid, 221-222) No such means exist in international organisations and the concept of voidability can not therefore apply to their acts. An act of an international organisation is either fully valid or an absolute nullity. (ibid, 222) For this reason - and because of the uncertainty created by this stark alternative - Judge Morelli was inclined to limit as far as possible any finding that would lead to the nullity of institutional acts. He sought to distinguish from a null and void act mere irregularities, not affecting the validity of the act in question. He said (ibid, 233):

If, ignoring the difference between the nature of the invalidity of domestic administrative acts (voidability) and the nature of the invalidity of acts of the United Nations (absolute nullity), the same extension were given to the conditions for the validity of both these classes of act, very serious consequences would result for the certainty of the legal situations arising from the acts of the Organization. The effectiveness of such acts would be laid open to perpetual uncertainty. . . .

This makes it necessary to put a very strict construction on the rules by which the conditions for the validity of acts of the Organization are determined, and hence to regard to a large extent the nonconformity of the act with a legal rule as a mere irregularity having no effect on the validity of the act. It is only in especially serious cases that an act of the Organization could be regarded as invalid, and hence an absolute nullity. He concluded (ibid, 223-224):

the violation of the rules concerning competence by an organ of the United Nations cannot entail the voidability of the act; but the same violation does not have the much more serious effect of the absolute nullity of the act. This means that the failure of the act to conform to the rules concerning competence has no influence on the validity of the act, which amounts to saying that each organ of the United Nations is the judge of its own competence.

(66) [Advisory Opinion] [1922] P.C.I.J., Series B, No. 3, 49. See text, supra at p 65 et seq.

(67) See also Gordon, "The World Court and the Interpretation of Constitutive Treaties" (1965) 59 A.J.I.L. 794 at 820-821.

(68) [Advisory Opinion] [1922] P.C.I.J., Series B, No. 2, 9. See A of this Chapter.

(69) [Advisory Opinion] [1926] P.C.I.J., Series B, No. 13, 1. See B of this Chapter.

(70) See also Schwarzenberger, *International Law as Applied by International Courts and Tribunals* (1976), vol 3, 55.

(71) [Advisory Opinion] [1949] I.C.J. Reports 174. See C of this Chapter.

(72) Ibid, 183. Although Judge Badawi Pasha did not accept the Advisory

Opinion of the Permanent Court of International Justice on the *Personal Work of Employers Case* as authority for implied powers. He found (*ibid*, 214) as follows:

I do not think that Opinion No. 13 of the P.C.I.J. concerning the competence of the International Labour Organization lays down the principle so categorically and absolutely as a principle of international law, as the Court states. . . .

This Opinion . . . laid down no general principle. It only interprets the intention of the Parties as to Part XIII of the Treaty of Versailles in the light of terms generally used therein.

(73) See text accompanying notes 34-36 *supra*.

(74) See text accompanying notes 37-40 *supra*.

(75) See text accompanying notes 32-33 *supra*.

(76) Art 392 of the 1919 Peace Treaty of Versailles.

(77) Schwarzenberger, *supra* at note 70, at 55-56.

(78) [Advisory Opinion] [1954] I.C.J. Reports 47. See D of this Chapter.

(79) *Ibid*, 57. Note that these test were decided on an international organisation. As for the forth "sagegurds" test, see text accompanying notes 76-77 *supra*.

(80) See text accompanying note 44 *supra*.

(81) See text accompanying notes 42-43 *supra*.

(82) See text accompanying note 45 *supra*.

(83) *Effect of Awards Case*, *supra* at note 78, at 60. See text accompanying notes 45-46 *supra*.

(84) See text accompanying notes 47-49 *supra*.

(85) *Effect of Awards Case*, *supra* at note 78, at 78-79 and 80-81.

(86) *Ibid*, 56. See text accompanying notes 50-52.

(87) See text accompanying note 53.

(88) [Advisory Opinion] [1962] I.C.J. Reports 151. See E of this Chapter.

(89) The Judge Moreno Quintana applied the third test and said (*ibid*, 245-246):

The implied powers which may achieve all its purposes are *not* to be invoked when explicit powers provide expressly for the eventualities under consideration. The problem, thus stated, seems to focus on the specific provisions which govern the functioning of the organs . . . and not on those provisions layin down its general purposes.

And he concluded that, in view of the compulsive aspect of the use of armed forces, the financing is beyond the scope of Art 17, para 2, which only concerns current administrative expenses, and the very structure of the Organization demands that the incurred expenses be borne by the Members of the Security Council (*ibid*, 248-249).

(90) The Charter of the United Nations, Art 11, para 2.

(91) The Charter of the United Nations, Art 14.

(92) In his Separate Opinion, Judge Fitzmaurice invoked the dictum of the International Court of Justice in the *Reparation for Injuries Case* that the United Nations must be deemed to have implied powers which are conferred upon it by necessary implication as being essential to the performance of its duties. (*Certain Expenses Case*, *supra* at note 88, at 208 and 213) Thus,

irrespective of Art 17, para 2, of the Charter the Member States would have been legally bound to finance collectively the activities of the United Nations. He said (ibid, 208):

even in the absence of Article 17, paragraph 2, a general obligation for Member States collectively to finance the Organization would have to be read into the Charter, on the basis of the same principle as the Court applied in the *Injuries to United Nations Servants* case, namely "by necessary implication as being essential to the performance of its [i.e. the Organization's] duties" Joining the Organization, in short means accepting the burden and the obligation of contributing to financing it.

Yet he limited this inference of necessary intentment to activities which were mandatory under the Charter, and he distinguished these from others of a permissive character. He said (ibid, 213):

There are broadly two main classes of functions which the Organization performs under the Charter - those which it has a duty to carry out, and those which are more or less permissive in character Expenses incurred in relation to the first set of activities are . . . true expenses, which the Organization has no choice but to incur in order to carry out a duty, and an essential function which it is bound to perform. Therefore the principle enunciated by the Court in the *Injuries to United Nations Servants* case . . . applies

(93) See text accompanying note 59 supra.

(94) *Certain Expenses Case*, supra at note 88, at 168. Tunkin is against this view as this is an example of the application of the theory of "inherent competence". Tunkin, "The Legal Nature of the United Nations" (1966 III) 119 *Recueil des Cours* 1 at 21-22.

(95) Ibid, 168. See text accompanying note 65 supra.