

ANDRZEJ GADKOWSKI

The doctrine of implied powers of international organizations in the case law of international tribunals

Introduction

The concept of implied powers derives from constitutional law, especially that of the United States. It is generally believed to have been formulated by the Chief Justice of the Supreme Court – J. Marshall – in the *McCulloch v. The State of Maryland et al.* case. It was expressed as follows:

[...] we admit, as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.¹

The same view was explicitly stated in the *State of Missouri v. Holland* case, in which the Court held that:

[...] when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most

¹ For the full text cf. H. Wheaton, *Reports of Cases Argued and Adjudged in the Supreme Court of the United States*, Boston 1918, p. 421; for a comment cf. K. Skubiszewski, *Implied Powers of International Organizations*, [in] *International Law at a Time of Perplexity. Essays in Honour of Shabatai Rosenne*, ed. Y. Dinstein, Dordrecht 1989, pp. 855–856.

gifted of its begetters [...] the case before must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.²

If the doctrine of implied powers exists in the law of international organizations today, it could not have been transposed unaltered. Clearly, there is not an obvious analogy between a federal state and an international organization. As noted by K. Skubiszewski, “there is room for some analogy with constitutional law because there exist certain structural similarities between national constitutions and the constitutions of international organizations.”³ In its current form, the doctrine of implied powers was developed through the literature of international law as well as through international practice, particularly the case law of international tribunals.

The literature usually emphasizes that the theory of implied powers serves as a rule of interpretation of the constituent instruments of international organizations. In practice, however, it may sometimes be found in the specific provisions of these instruments. Article 29 of the United Nations Charter provides a good example. In accordance with the provisions of this article and in relation to the provisions of Chapter VII of the UN Charter, the Security Council created the International Criminal Tribunal for the former Yugoslavia. The implied powers of an international organization are, without a doubt, closely connected with the express powers of this organization and serve to supplement them. This is a view frequently presented in the literature and was perhaps most convincingly expressed by K. Skubiszewski in the following sentence:

[...] in international organizations the doctrine of implied powers means that the organization is deemed to have certain powers which are additional to those expressly stipulated in the constituent document. These additional powers are necessary or essential for the fulfilment of the tasks or purposes of the organization, or for the performance of its functions, or for the exercise of the powers explicitly granted.⁴

This connection between express and implied powers was strongly emphasized by Judge G.H. Hackworth in the 1949 *Reparation for injuries* case, in which he held that “powers not expressed cannot freely be implied. 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 powers here in question has been shown to exist.”⁵

2 *Missouri v. Holland*, United States Game Warden, 252 US 416 (1920), p. 433.

3 K. Skubiszewski, *op. cit.*, p. 855.

4 *Ibidem*, p. 856.

5 Dissenting Opinion by Judge G.H. Hackworth, *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion: ICJ Reports 1949, p. 198.

When defining the essence of the implied powers of international organizations, we must not forget that these powers can always be traced back to the constituent instruments of these organizations. Thus, we can say that implied powers are not contrary to the principle of attributed powers of international organizations and, in fact, supplement attributed powers. However, in contrast to the principle of speciality, which is of fundamental importance for the doctrine of attributed powers, the doctrine of implied powers should be considered rather in the context of the principle of effectiveness. We can therefore advance the thesis that the concept of implied powers of international organizations originated from the principle of effectiveness which, for the attainment of the statutory purposes of an organization and proper fulfilment of its functions, requires the use of implied powers as subsidiary to express powers.⁶ The principle of effectiveness attained a special status in the law of some international organizations, particularly the EU, where it is considered one of the fundamental principles of law – the so-called principle of *effet utile*.

Authors concerned with the implied powers of international organizations not only point to the connection between these powers and attributed powers, but also emphasize the differences between the implied powers and customary powers of international organizations. Indeed, we should remember that if implied powers ultimately derive from a constituent instrument and complement attributed powers, then *the basis for customary powers postdates the constitution*.⁷ This means that, in the course of the practice of an organization, its member States may agree to create new powers for it. These powers are not provided for in the constituent instrument and, as far as the purposes and functions of the organization are concerned, do not flow from its attributed powers. K. Skubiszewski stresses that one cannot, within certain limits, deny the possibility of creating a new power of an international organization by usage.⁸ In practice, some powers of international organizations are easier to justify as implied rather than customary. This relates primarily to the essence and nature of a custom in international law. Authors who discuss this issue usually give as an example the creation of peacekeeping forces by the UN General Assembly in 1956. The establishment of these forces was not universally accepted because some States (e.g., France or the Soviet Union as permanent members of the Security Council) expressly rejected that the General Assembly was in possession of the necessary powers. In this case, accepting the powers of the General Assembly as customary was not possible.⁹

6 For more on the principle of efficiency, cf. for example: H. Lauterpacht, *The Development of International Law by the International Court*, Cambridge 1996, p. 168 *et seq.*

7 H.G. Schermers, N.M. Blokker, *International Institutional Law* (5th rev. edition), Leiden 2011, p. 181, § 232.

8 K. Skubiszewski, *op. cit.*, p. 857.

9 H.G. Schermers, N.M. Blokker, *op. cit.*, p. 182, § 233.

Since the implied powers of an international organization, in contrast to its express powers, are not expressly provided for in the constituent instrument of the organization, their exercise in practice raises serious questions. These questions concern, for example, the basis for the implication of powers and the limitation of the implication of such powers by international organizations. The answers to some of these questions can be found in the extensive case law of international courts. Indeed, the case law of international courts forms the theoretical basis for the doctrine of implied powers.

The doctrine of implied powers of international organizations in the case law of the Permanent Court of International Justice

According to a view frequently expressed in the literature, the initial legal and theoretical foundations of the implied powers of international organizations were laid by the International Court of Justice (ICJ) in the aforementioned 1949 *Reparation for injuries* advisory opinion. However, we must not forget that some aspects of implied powers had been highlighted earlier, by the Permanent Court of International Justice. A direct reference to one of these decisions was made by the ICJ in the 1949 *Reparation for injuries* advisory opinion or, more precisely, in a highly significant passage of this opinion which justifies the implied powers of the United Nations. The Court held that:

[...] 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. This principle was applied by the Permanent Court of International Justice to the International Labour Organization in its Advisory Opinion No 13 of July 23rd 1926 [...] and must be applied to the United Nations.¹⁰

The ICJ based this statement on the following view of the PCIJ:

[...] it results from the consideration of the provisions of the Treaty that the High Contracting Parties clearly intended to give 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. It is not conceivable that they intended to prevent the Organization from drawing up and proposing measures essential to the accomplishment of that end.¹¹

¹⁰ G.H. Hackworth, *op. cit.*, pp. 182–183.

¹¹ *Competence of the ILO to Regulate Incidentally the Personal Work of the Employer*, PCIJ Publications 1926, Series B, no. 13, p. 18.

According to J. Makarczyk, this passage of the PCIJ opinion represents the first time a “functional interpretation of the organizations’ competence” was adopted – an interpretation that provides a significant justification of the concept of implied powers.¹² Some authors express reservations over the ICJ’s view, which invokes the 1926 PCIJ advisory opinion. According to them, in this advisory opinion, no powers were found to arise out of the *necessary implication* alone.¹³ Even if the 1926 PCIJ advisory opinion does not reflect the functional implication of international organizations’ competences in the same way as was later demonstrated by the ICJ and the Court of Justice of the European Union (CJEU), the Court’s interpretation doubtless referred to the need to enable the ILO to fulfil its statutory competences. The Court acknowledged that the ILO had very broad powers in respect of measures to be taken to guarantee labour conditions and the protection of workers.¹⁴

Such reservations, however, were not expressed in relation to another advisory opinion of the PCIJ, namely the 1927 *Danube* advisory opinion. Since the Court concluded that the Danube Commission could only work on the basis of “function bestowed upon it”, it seems that this construct stands in opposition to the concept of implied powers. Yet in that same opinion, the Court also emphasized that the Commission “has power to exercise its functions to their full extent.”¹⁵ Following V. Engström, this statement supports the thesis that the powers of an organization should be interpreted in such a way as to ensure “the fullest effect [of its acts – A.G.] also known as the principle of *effet utile*.”¹⁶ The principle of *effet utile* was even more explicitly formulated by the Court in another advisory opinion, namely the 1928 PCIJ *Greco-Turkish Agreement* advisory opinion. In this opinion, the Court held that the Greco-Turkish Mixed Commission, established under the agreement of 1 December 1926, may perform judicial functions and possesses the express power to “take the measures necessitated by the execution of the Convention and to decide all questions to which it

12 J. Makarczyk, *The International Court of Justice on the Implied Powers of International Organizations*, [in] *Essays in International Law in Honour of Judge Manfred Lachs*, ed. J. Makarczyk, The Hague 1984, p. 506.

13 V. Engström, *Understanding Powers of International Organizations. A Study of the Doctrines of Attributed Powers, Implied Powers and Constitutionalism – with a Special Focus on the Human Rights Committee*, Turku 2009, p. 56; J. Klabbers, *An Introduction to International Institutional Law* (2nd edition), Cambridge, 2009, p. 69.

14 R. Bernhardt, *Competences of ILO Concerning Personal Work of the Employer (Advisory Opinion)*, [in] *Encyclopedia of Public International Law. Decisions of International Courts and Tribunals and International Arbitrations*, vol. 2, Amsterdam 1981, p. 56.

15 *Jurisdiction of the European Commission of the Danube between Galatz and Braila*, PCIJ Publications 1927, Series B, no. 14, pp. 65–66.

16 V. Engström, *op. cit.*, p. 48.

may give rise.”¹⁷ The Court further referred to “the spirit of the Convention” and stated that: “any interpretation or measure capable of impeding the work of the Commission in this domain must be regarded as contrary to the spirit of the clauses providing for the creation of this body.”¹⁸ The Court’s position could be considered as the first time an international court recognized the implied powers of international organizations. Obviously, the Mixed Commission itself was not an international organization but a common Greco-Turkish mixed organ that was given the powers of an international judicial body. J. Makarczyk emphasizes in particular that for the first time the competence of States, such as deciding on the applicability of an arbitration procedure and nominating arbitrators, was replaced by the decision of an international judicial organ.¹⁹

The PCIJ advisory opinions presented above marked the beginning of the evolution of international case law as regards the concept of the implied powers of international organizations. In these opinions, the Court was concerned mainly with the attributed powers of international organizations. By emphasizing that international organizations exercise primarily the powers expressly provided for in their constituent instruments, the Court also indicated the possibility of interpreting these powers in the context of the statutory functions and purposes of these organizations. Even if we accept that the 1928 Greco-Turkish advisory opinion represented the first acknowledgement of the implied powers of international organizations, it was still only the beginning of the process leading to recognition of the special position of the doctrine of implied powers in international institutional law. Some authors even claim that the doctrine earned the status of a principle of international law.²⁰ Still, the doctrine of implied powers may be considered a rule for the interpretation of the statutes of international organizations. It allows for a dynamic interpretation of the provisions of the constituent instruments of these organizations and as such refers to their purposes and functions. Similar doubts about accepting implied powers as a principle of international law are voiced by other authors. For instance, J. Klabbers argues that, if anything, it is a product of the doctrine, not a principle.²¹

17 *Interpretation of the Greco-Turkish Agreement of 1 December 1926*, PCIJ Publications 1928, Series B, no. 16, p. 18.

18 *Ibidem*.

19 J. Makarczyk, *op. cit.*, p. 506. This view seems too radical. It would be difficult to accept that, in this case, the powers of States are replaced by decisions of an international judicial organ. The essence of an arbitration procedure is that matters such as the nomination of arbitrators and the choice of a legal basis and procedure are decided on by the parties and not a judicial body.

20 V. Engström, *op. cit.*, p. 49.

21 J. Klabbers, *The paradox of international institutional law*, “International Organizations Law Review” 2008, no. 1, p. 163.

The doctrine of implied powers of international organizations in the case law of the International Court of Justice

A significant milestone in the evolution of the doctrine of implied powers was the case law of the International Court of Justice, and in particular the second advisory opinion in the history of this Court – *Reparation for injuries suffered in the service of the United Nations*. This advisory opinion is without any doubt of fundamental importance not only for the doctrine of implied powers, but also in a much wider context, for the UN legal personality or even the legal personality of international organizations in general. The significance of the ICJ in this process lies in the fact that the UN Charter lacks provisions which the Court could use to build up a theory of implied powers. Consequently, some authors are keen to observe that the United Nations' implied powers are exclusively the product of extensive teleological interpretation of the UN Charter.²²

The UN General Assembly requested an advisory opinion, and the matter in question was related to Count Folke Bernadotte, a UN Mediator in Palestine, who died while on duty. The core question raised before the ICJ was whether the UN possessed the capacity to bring an international claim in respect of damage caused to the UN and to the victim, or to persons entitled through him, in a situation where no such competence had been explicitly attributed to the organization in the UN Charter. The General Assembly phrased the question as follows:

[...] 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 of obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him?²³

In response to this question, the Court stated that in the case of the absence of any express powers, such powers could be implied from the provisions of the UN Charter concerning the functions of the organization. To justify the existence of the implied powers of the United Nations, the Court made a statement which became the most frequently quoted part of this advisory opinion. The Court held that “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 essen-

22 M. Martin Martinez, *National sovereignty and international organizations*, The Hague 1996, p. 82.

23 G.H. Hackworth, *op. cit.*, p. 175.

tial to the performance of its duties.²⁴ The Court deemed these powers indispensable for the organization both to ensure the efficient and independent realization of the UN missions and to provide effective support to its agents. The Court concluded that UN agents must be provided with effective protection by the organization when carrying out their functions. The ICJ's view on the matter is reflected by the following statement:

[...] upon examination of the character of the functions entrusted to the Organization and of the nature of the missions of its agents, it becomes clear that the capacity of the Organization to exercise a measure of functional protection of its agents arises by necessary intendment out of the Charter.²⁵

The view expressed by the ICJ in response to the General Assembly's question was not unanimous – 11 to 4 judges in favour of the UN having the capacity to submit international claims. Judge G.H. Hackworth expressed a very interesting position in his dissenting opinion. He agreed with the conclusion that the UN should have the power to bring claims for damage caused to it as an organization. However, he believed that this view should have a different basis, i.e. it should be based on the express provisions of the UN Charter and the provisions of the 1946 Convention on the Privileges and Immunities of the UN. These are the provisions from which Judge G.H. Hackworth derived the implied powers of the organization. As regards the power to bring claims in respect of damage caused to the victim, however, Judge Hackworth held that no such implied power existed. He expressly stated that there existed no necessity to imply a power in order to maintain the independence and effectiveness of the United Nations and added that agents would be properly protected by customary principles.²⁶

Judge G.H. Hackworth's view demonstrates a more restrictive approach to the UN Charter. It is illustrated by the most well-known and frequently quoted excerpts from his dissenting opinion:

[...] 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. 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.²⁷

²⁴ *Ibidem*, p. 182.

²⁵ *Ibidem*, p. 184.

²⁶ G.H. Hackworth, *op. cit.*, p. 196 *et seq.*

²⁷ *Ibidem*, p. 198.

Another advisory opinion often referred to in discussions of the implied powers of international organizations is the 1954 *Effect of awards* case in which the Court expressed its view regarding the powers of the UN General Assembly. The question raised before the ICJ was whether the UN General Assembly was in the position to create an independent international tribunal competent to render binding judgments on the organization. The reason for this question was the fact that no relevant express provisions could be found in the UN Charter. The question was phrased as follows:

[...] having regard to the Statute of the United Nations Administrative Tribunal and any other relevant instrument [...] has the General Assembly the right on any grounds to refuse the effect to an award of compensation made by the Tribunal?²⁸

In its advisory opinion the Court recognized the power of the General Assembly to form an administrative tribunal. That is, the Court assumed that the UN enjoyed immunity from national courts also in matters relating to its staff. In addition, the Court referred to the purposes of the UN Charter and emphasized that in the light of these purposes, it would be inconsistent not to provide the UN's staff with judicial remedies. Finally, the Court justified the capacity of the UN General Assembly to establish an administrative tribunal on the grounds of the following provisions of the UN Charter: Article 7(7), Article 22 and Article 101(1). In the most important passage of its advisory opinion, the Court concluded that:

[...] 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.²⁹

Again, Judge G.H. Hackworth voiced an interesting reaction to the Court's advisory opinion in his dissenting opinion. He emphasized that the UN General Assembly did not have, nor itself perform, any judicial functions under the UN Charter. Thus the General Assembly could not delegate judicial functions to the administrative tribunal as a subsidiary judicial body. Referring to the doctrine of implied powers, Judge Hackworth stressed that it should be applied within reasonable limitations, i.e. giving priority to express powers. He articulated his view as follows:

²⁸ *Effect of awards of compensation made by the U. N. Administrative Tribunal*, Advisory Opinion of July 13th 1954, ICJ Reports 1954, p. 57.

²⁹ *Ibidem*.

[...] 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 [...] 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 [with authority to make binding decisions – A.G.].³⁰

One can argue that the view of Judge G.H. Hackworth has great merit. In his dissenting opinion, the Judge notes that Article 22 of the UN Charter unequivocally grants the General Assembly express powers to create subsidiary bodies. This means that the General Assembly may also establish “any tribunal needed for the implementation of its functions.” In other words, Judge Hackworth refers directly to functional necessity, which in this case signifies the need to implement the General Assembly’s statutory functions. As far as functional necessity is concerned, the capacity of the General Assembly to exercise implied powers is fairly obvious. However, Judge Hackworth stresses that it is not always permissible to invoke the doctrine of implied powers in the context of the UN express powers (Article 22). Therefore, if we cannot find judicial functions among the statutory functions of the General Assembly provided for in the UN Charter, a legitimate question arises as to whether the General Assembly may delegate judicial powers to its subsidiary body – Administrative Tribunal. These doubts are also justified based on the general principle of law, present in international law, stipulating that *nemo plus iuris ad alium transferre potest quam ipse habet*. In a wider context, this principle should be applied as the rule of interpretation in any discussion of the powers of international organizations in general, including implied powers.

The issue of implied powers was considered by the ICJ in another advisory opinion, namely the 1962 *Certain expenses* case. In this opinion, the Court addressed the question posed by the General Assembly as to whether expenses related to the peacekeeping operations (United Nations Emergency Force – UNEF and United Nations Operation in the Congo – ONUC) may be qualified as expenses of the United Nations [Article 17(2) of the UN Charter]. The question was phrased by the UN General Assembly as follows: “do the expenditures authorized in General Assembly resolutions [related to some of the peacekeeping operations – A.G.] constitute ‘expenses of the Organization’ within the meaning of Article 17, paragraph 2, of the Charter of the United Nations?”³¹

³⁰ *Effect of awards case, op. cit.*, pp. 80–81.

³¹ *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, ICJ Reports 1962, p. 153.

In response to this question, the Court once again relied and elaborated on the doctrine of implied powers, particularly with respect to the powers of the Security Council. Authors concerned with the ICJ's activity note that while in the two previous advisory opinions the ICJ argued that implied powers existed to ensure the effective functioning of the organization, in the *Certain expenses* advisory opinion the Court indicated that the powers would also be legal if they could be related to the statutory purposes of the organization.³² That is, the ICJ stated that in order to determine whether particular expenses can be qualified as expenses of the organization, each case must be considered in view of the purposes of the UN. Thus, the only legitimate test of the legality of the organization's expenses are the purposes of the UN as stipulated in the UN Charter. The ICJ expressed its view as follows:

[...] these purposes are broad indeed, but neither they nor the powers conferred to effectuate them are unlimited. Save as they have entrusted the Organization with the attainment of these common ends, the Member States retain their freedom of action. But 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.³³

In other words, the Court referred to the purposes of the international organization and concluded that the powers of the United Nations may be implied if combined with its statutory purposes. According to J. Klabbers, the concept applied by the Court is very broad and may even inspire some authors to “to launch a concept of inherent powers.”³⁴ A similar view is presented by N. White, who believes that the ICJ opinion in this case is an expression of the idea of inherent powers.³⁵

Similar doubts were voiced by some judges in their dissenting opinions. These opinions reflect a desire for a more strict interpretation of the provisions and statutes of international organizations regarding their purposes. This is very well illustrated by the dissenting opinion of a Polish judge and the President of the Court at the time – B. Winiarski. Judge B. Winiarski pointed out that the Charter described the purposes of the United Nations with little accuracy and precision. Consequently, one cannot claim that the organization may pursue its purposes using any means possible. The fact that a particular organ of the UN is pursuing one of the statutory purposes of the organiza-

32 Cf. e.g. V. Engström, *op. cit.*, p. 58.

33 *Certain expenses case*, *op. cit.*, p. 168.

34 J. Klabbers, *op. cit.*, p. 71.

35 N. White, *The Law of International Organizations* (2nd edition), Manchester 2005, p. 131.

tion does not suffice to deem its acts lawful.³⁶ Similar concerns were expressed by Judge V. Koretsky in his dissenting opinion. He stressed the need for a stricter interpretation of the UN Charter provisions and voiced concerns regarding a method whereby the ends justify the means.³⁷

It should be pointed out that the dissenting opinions of both judges reflecting their distance to the implied powers doctrine were largely related to the position articulated by socialist jurisprudence of international law on the legal personality of international organizations and, in particular, their powers. This view was explicitly expressed by G. Tunkin who claimed that a liberal use of the implied powers of international organizations could lead to non-respect of the treaty provisions. This, in turn, may result in international relations becoming chaotic.³⁸

The Court referred to the 1949 advisory opinion in the 1996 *Legality of the use by a State of nuclear weapons in armed conflict* advisory opinion. This opinion was analysed here in the context of attributed powers. It is seen as defending the concept of attributed powers against the concept of implied powers. In this opinion the ICJ unambiguously held that international organizations are governed by the principle of speciality. It does not mean, however, that the Court fully rejected the doctrine of implied powers. In reference to this doctrine the Court stated that “it is generally accepted that international organizations can exercise such powers, known as implied powers.” Furthermore, the Court referred to the criteria previously accepted in the *Reparation for injuries* case and stressed that implied powers signify “powers which [...] are conferred upon [the Organization] by necessary implication as being essential to the performance of its duties.”³⁹

36 In his dissenting opinion Judge Winiarski stated that “The Charter has set forth the purposes of the United Nations in very wide, and for that reason, too indefinite terms. But [...] it does not follow, far from it, that the Organization is entitled to seek to achieve those purposes by no matter what means. The fact that an organ of the United Nations is seeking to achieve one of those purposes does not suffice to render its action lawful [...]. It is only by such procedures which were clearly defined, that the United Nations can seek to achieve its purposes. It may be that the United Nations is sometimes not in a position to undertake action which would be useful for the maintenance of international peace and security [...], but that is the way in which the Organization was concerned and brought into being.” Dissenting Opinion of President B. Winiarski, *Certain expenses case*, *op. cit.*, p. 230.

37 Dissenting Opinion of Judge V. Koretsky, *Certain expenses case*, *op. cit.*, p. 268.

38 G. Tunkin, *International Law in the International System*, 147 *Recueil des Cours de l'Académie de Droit International*, 1975, vol. IV, p. 187. Accordingly to G. Tunkin “the theory of implied powers [...] implies a refusal to respect international treaties and its practical application would lead to chaos in international relations and aggravation of international tensions.” *Ibidem*.

39 *Legality of Use by a State of Nuclear Weapons in Armed Conflicts*, Advisory Opinion, ICJ Reports 1996, p. 79.

Nevertheless, it should be noted that in this opinion the Court's view on implied powers is more restrictive than in any preceding opinion.⁴⁰

The Court's restrictive view regarding implied powers, which was a departure from its earlier position, was criticized in the literature.⁴¹ According to N.M. Blokker and H.G. Schermers, the Court's restrictive approach to implied powers should be considered in a specific context, i.e. in the light of the other Nuclear weapons advisory opinion, delivered on the same day. In this opinion concerning the *Legality of the threat or use of nuclear weapons*, the Court considered questions similar to those requested in the WHO opinion.⁴²

The Court's restrictive approach to the concept of implied powers does not mean its complete rejection. In its definition of the essence of implied powers, the Court used expressions found in earlier advisory opinions ("powers which [...] are conferred upon it by necessary implication as being essential to the performance of its duties"). However, it appears evident that the Court's position on the matter should be interpreted in the wider context of the crucial question regarding the limits of the theory of implied powers. Awareness of the significance of this question was high in the 1990s, as noted by J. Klabbers who describes this period as "implied powers under fire" and states that:

[...] while it is clear that the doctrine played a useful role when organizations were still in development, and more in particular when the very phenomenon of the international organization was still developing, it would seem that, at least in some of the more settled organizations, the doctrine has passed its heyday.⁴³

Concluding remarks

The PCIJ and ICJ advisory opinions presented above show that both courts made a significant contribution – both theoretical and intellectual – to the development of the doctrine of implied powers of international organizations. The position of both jurisdictions reflects the various tendencies and theoretical concepts regarding the international legal

⁴⁰ This is reflected in the following statement of the Court: "in the opinion of the Court, to ascribe to the WHO the competence to address the legality of the use of nuclear weapons – even in view of their health and environmental effects – would be tantamount to disregarding the principle of speciality; for such competence could not be deemed a necessary implication of the Constitution of the Organization in the light of the purposes assigned to it by member States." Cf. *Legality of Use by a State of Nuclear Weapons in Armed Conflicts*, Advisory Opinion, ICJ Reports 1996, pp. 78–79.

⁴¹ For example: N. White, *The World Court, the WHO, and the UN System*, [in] *Proliferation of International Organizations – Legal Issues*, eds. N.M. Blokker, H.G. Schermers, The Hague 2001, p. 100 *et seq.*

⁴² H.G. Schermers, N.M. Blokker, *op. cit.*, p. 184, § 233A.

⁴³ J. Klabbers, *op. cit.*, p. 79.

personality of international organizations and their powers. It also reflects the evolution of views on the place and role of these organizations in international relations. This indeed has been a very dynamic role, especially since the second half of the 20th century. Unsurprisingly, there has been a noticeable evolution of the ICJ's view on implied powers, too: from a strongly positive attitude expressed in the *Reparation for injuries* case to a more cautious approach adopted in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflicts* case. Without a doubt, the case law of both courts, but particularly of the ICJ, formed and still forms the intellectual basis for the analysis of issues concerning the implied powers of international organizations in the doctrine of international law. Out of the many different commentaries on this case law, it is particularly important to quote K. Skubiszewski who emphasizes that:

[...] in most cases where they have implied powers of an international organization, courts have not looked for support to one single category, but have combined various bases, though emphasis on each of them varied. Moreover, they have often gone beyond the process of implication and found corroboration for their conclusions in other arguments. It has often been a combination of reasons which lead a court to admit the existence of a power.⁴⁴

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⁴⁴ K. Skubiszewski, *op. cit.*, p. 868.

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SUMMARY

The doctrine of implied powers of international organizations in the case law of international tribunals

The aim of this article is to present the contribution of international tribunals to the development of the doctrine of implied powers of international organizations. The author discusses the case law and the position presented by the PCIJ and the ICJ regarding the powers of international organizations. He points to the basis for implication of powers of international organizations and the limitation of such implication and presents a noticeable evolution of the tribunals view on the issue of implied powers.

Keywords: Implied powers, UN Charter, international organizations, International Court of Justice, Permanent Court of International Justice

ANDRZEJ GADKOWSKI, University of Geneva, Faculty of Law, 40 Boulevard du Pont-d’Arve, 1205 Genève, Switzerland, e-mail: andrzej.gadkowski@unige.ch.