

Global Governance before the ICJ: Re-reading the *WHA Opinion*¹

Jan Klabbers

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I. Introduction

It is hardly novel to suggest that conceptually and historically, public international law developed mainly as a private law system regulating relations between public actors, i.e. states. The “public” in public international law then referred, traditionally, not to the character of the system, but to the character of its subjects: these were public entities, hence the name “public” international law seemed fully justified.²

Still, in recent years, there has increasingly been a belief that somehow public international law should do some justice to the term “pub-

¹ An early version of this paper was presented at a meeting in Oslo in June 2008. The author is indebted to his co-panelists on that occasion, Catherine Brölmann and Kirsten Schmalenbach, as well as the audience, for their comments and questions, and to Geir Ulfstein for inviting him to begin with.

² See, classically, T.E. Holland, *The Elements of Jurisprudence*, 1924, 13th edition, 393-394: the analogies of international law “are rather to the private than to the public branch of municipal law ... Just as the parties in private law are two individuals, so in International law are they two States.”

lic” in its name. Sometimes this is reflected in the names of chairs at institutions of higher learning, with probably the best-known example being that Philip Allott is emeritus professor of international public law at Cambridge, rather than emeritus professor of public international law. Trying to infuse public law elements raises one obvious question though: how does one actually infuse public law thinking, public law mechanisms, public law techniques, and public law disciplines, into a system that is essentially based on private law concepts? If public law is about constituting, maintaining and regulating governance, as some contend, then how does this play out on the international level? How can international law (public international law, that is) come to constitute, maintain, and regulate global governance?³

Some renowned international lawyers have been sceptical of the very enterprise of doing so. One can think of Sir Gerald Fitzmaurice, e.g., whose (joint) opinion in the 1962 *South West Africa* cases is often seen as a rejection of anything “public” in the international legal order,⁴ and for whom, tellingly, treaties were at best sources of obligations, not sources of law.⁵ The very statement alone suggests the absence of a public element. One might also think of Prosper Weil, whose rejection of relative normativity in international law⁶ was founded upon the premise that international law was at heart a horizontal system between sovereign equals – and in such a system there can hardly be anything “public”.

And yet, much current writing either advocates or commemorates the coming of a public element in public international law. This applies to those who espouse global constitutionalism in one form or another; this applies to the many who applaud the existence of *jus cogens* norms and *erga omnes* obligations; this applies to those who deplore the *Wer-*

³ This descriptive definition is adapted from M. Loughlin, *The Idea of Public Law*, 2003, 1. Tomkins, in a similar vein, ascribes three tasks to constitutions: to create public institutions; to regulate relations between those institutions; and to regulate relations between those institutions and citizens. See A. Tomkins, *Public Law*, 2003, 3.

⁴ See *South West Africa* cases (*Ethiopia v. South Africa; Liberia v. South Africa*), Preliminary Objections, ICJ Reports 1962, 319 et seq., Judges Fitzmaurice and Spender, Joint Dissenting Opinion, 465 et seq.

⁵ See Sir Gerald Fitzmaurice, “Some Problems Regarding the Formal Sources of International Law”, in: F.M. van Asbeck et al. (eds), *Symbolae Verzijl*, 1958, 153 et seq. (157).

⁶ See P. Weil, “Towards Relative Normativity in International Law?”, *AJIL* 77 (1983), 413 et seq.

degang of the concept of international crimes of states; this applies to those who speak of global administrative law in its various guises. All of this somehow presupposes that international law has been infused with a public element.⁷

The ICJ and some of its individual judges can legitimately be said to have paved part of the way, without, however, applying the finishing touch. Lord McNair's opinion on mandate territories as objective trusts can be seen as an early forerunner,⁸ and most famously, in *Barcelona Traction* the ICJ launched the notion of *erga omnes* obligations,⁹ only to realize a year later in its *Namibia* opinion that the concept would be difficult to apply in a coherent fashion – i.e. without violating the *pacta tertiis* rule.¹⁰ Thereafter, it disappeared for more than a quarter of a century, until it was revived in the *Israeli Wall* opinion – albeit in not exactly the same manner.¹¹

Perhaps the most obvious place to expect some attempts at conceptualizing the idea of “public” in public international law is the case law of the ICJ and its predecessor on international organizations. After all, these can intuitively be seen – and are often seen – as forms of some embryonic world government.

The first few cases reaching the PCIJ were something of a disappointment though for those looking for a systematic and theoretically plausible approach to global governance. Confronted with various questions concerning the powers of the ILO, the Court, in line with the general attitude prevailing at the time, chose to conceptualize the ILO as a treaty entity, and instructed its audience that the proper interpreta-

⁷ For a more general exploration, see J. Klabbers/ A. Peters/ G. Ulfstein, *The Constitutionalization of International Law*, 2009.

⁸ See *International Status of South-West Africa*, Advisory Opinion, ICJ Reports 1950, 128 et seq., Judge McNair, Separate Opinion, 146 et seq.

⁹ See *Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, ICJ Reports 1970, 3 et seq. (83-84, paras 33-34).

¹⁰ See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16 et seq. For discussion, see J. Klabbers, “The Scope of International Law: *Erga Omnes* Obligations and the Turn to Morality”, in: M. Tupamäki (ed.), *Liber Amicorum Bengt Bröms*, 1999, 149 et seq.

¹¹ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 et seq.

tion of the ILO constitution would no doubt reveal the proper scope of the ILO's powers.¹² These cases, then, do not provide much food for ideas concerning awareness on the Court's part of there being anything special about international organizations – much less about these institutions being capable of somehow transmogrifying into a form of world government.

The Court did, however, rapidly start to take international organizations more seriously as actors in their own right. In 1927 it developed the doctrine of attributed powers (or “functions” as it still chose to call them), in the opinion on the case concerning the *Jurisdiction of the European Commission of the Danube*. A little later, and well-nigh inevitably, it applied the federalist doctrine of implied powers to international organizations in the case concerning the *Exchange of Greek and Turkish Populations*.

It expanded on this notion some two decades later in *Reparation for Injuries*, and arguably went a step further still in *Certain Expenses* in fleshing out some independent role for international organizations. But at no point did the Court come up with any thoughts – however rudimentary or embryonic – on world government.¹³

This should not come as a surprise, of course: as long as international affairs could still meaningfully be classified as interactions, including cooperation, between sovereign entities, there was no need to go any further, and it was quite possible that any attempts to dig deeper would have been received with hostility at any rate. In the days when the leading paradigm in international relations scholarship¹⁴ was a steadfast realism conceptualizing states as ever so many billiard balls, and the leading international law paradigm emphasized co-existence between those billiard balls, surely any attempt by the World Court to posit an alternative vision would have met with resistance, and would

¹² See generally J. Klabbers, “The Life and Times of the Law of International Organizations”, *Nord. J. Int'l L.* 70 (2001), 287 et seq.

¹³ For a useful discussion on the attributed and implied powers doctrines, see V. Engström, *Understanding Powers of International Organizations*, Doctoral Dissertation, Åbo Akademi University, 2009.

¹⁴ This somewhat overstates the case, as it is possible to argue that an independent academic discipline for the study of international relations did not yet, as such, exist. Still, some of its pioneering authors began to develop realist doctrines around the same time. One of the classics is E.H. Carr, *The Twenty Years' Crisis 1919-1939: An Introduction to the Study of International Relations*, 1983 (1st edition 1939).

have risked undermining whatever legitimacy the Court may have had to begin with.

Still, post-war reconstruction, the mushrooming of international organizations, the identification of a law of co-operation (as opposed to a law of mere co-existence¹⁵), and the slowly emerging phenomenon of globalization meant that the time would come when the Court would have to re-conceptualize the underpinnings of the global legal order. At some point it would no longer be plausible to picture international law as the law of billiard balls. The ideal occasion arose in 1996, when the Court was confronted with two parallel requests, both stemming from within the United Nations system, to speak out on the legality of the threat or use of nuclear weapons.

To the (fairly limited) extent that international lawyers have started to explore how a public element has been or may be infused into international law and global governance, they have by and large concentrated on the establishment of a framework of analysis.¹⁶

This paper will follow a different track, and investigate what lessons may be learned from the ICJ's boldest attempt to devise global governance law: its opinion in the *WHA* case. This opinion has remained curiously under-illuminated, probably for the reason that many may feel that a decision to reject a request for an Advisory Opinion is bound to be less interesting than a lengthy opinion on the substance of the matter. This maybe so, of course, as far as the legality of nuclear weapons is concerned, but does an injustice to the Court's fascinating attempt to conjure up a world government in its *WHA opinion*.

¹⁵ The *locus classicus* is W. Friedmann, *The Changing Structure of International Law*, 1964.

¹⁶ Promising recent work includes N. Tsagourias (ed.), *Transnational Constitutionalism: International and European Perspectives*, 2007; A. von Bogdandy/ P. Dann/ M. Goldmann, "Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities", *German Law Journal* 9 (2008), 1375 et seq. as well as A. von Bogdandy/ R. Wolfrum/ J. von Bernstorff/ P. Dann/ M. Goldmann (eds), *The Exercise of Public Authority by International Institutions*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht Vol. 210, 2009; and B. Kingsbury, "The Concept of 'Law' in Global Administrative Law", *EJIL* 20 (2009), 23 et seq.

II. The Case

In May 1993, the plenary body of the WHO (i.e., the World Health Assembly – WHA) adopted a resolution asking the ICJ for an Advisory Opinion on whether the use of nuclear weapons by a state would be in contravention of international law, including the WHO Constitution. A number of states submitted written observations, some in support of the request, others claiming that it was misconceived. The Court recalled that a request coming from the WHO could fall, in principle, within the scope of its jurisdiction, provided it met with the two conditions spelled out in Article 96, para. 2, of the UN Charter. First, the request must contain a legal question, and second, the request must fall within the “scope of ... activities” of the organization asking for it. The Court answered the first question in the affirmative, but famously answered the second one in the negative.

The Court’s methodology and reasoning are of great interest. Normally speaking (if there is such a thing as “normally speaking” to begin with in international law) one could have expected the Court to present an interpretation of the WHO Constitution and, most likely, a discussion of the WHO’s practice as well. After all, these are supposed to shed light on the intentions of the drafters and Member States, and those intentions are often held to be decisive.¹⁷ And indeed, to some extent this is what the Court did.

In doing so, one could have expected – again, normally speaking – a discussion of the various ways in which powers or competences can be attributed to international organizations: the doctrine of conferred (or attributed) powers, the doctrine of implied powers, perhaps even, *pace* Seyersted, the doctrine of inherent powers.¹⁸ And again, to some extent, this is what the Court did. But what makes the reasoning of great interest is that the Court took matters a step further, and it is worth following in some detail what exactly it is that the Court did.

¹⁷ As much can be said to be reflected in article 31 of the Vienna Convention on the Law of Treaties, outlining a general rule on interpretation plus contextual factors deemed to be of relevance, including later practice.

¹⁸ For a general discussion, see J. Klabbbers, *An Introduction to International Institutional Law*, 2009, 2nd edition, Chapter 4. Seyersted’s views have recently been comprehensively (if posthumously) presented as F. Seyersted, *Common Law of International Organizations*, 2008.

The Court started its analysis by pointing to the dual nature of constitutions of international organizations.¹⁹ These are not mere treaties; they are, instead, treaties of a particular type, creating “new subjects of law endowed with a certain autonomy (and) to which the parties entrust the task of realizing common goals.” This mixture of convention and institutional document then may warrant a somewhat different emphasis when such treaties come to be interpreted.²⁰

This is still familiar territory: the Court seems to be setting the stage for a traditional analysis in terms of attributed and implied powers. The next paragraphs²¹ still strike the same note: the Court engages in a discussion of the various functions of the WHO as listed in article 2 of the WHO Constitution, and reaches the conclusion that the WHO is undoubtedly competent to occupy itself with the effects of activities (including the use of nuclear weapons) on human health. Still, as the Court itself emphasizes, the competence to discuss health effects does not depend on the legality of those same human activities. Indeed, the Court drives the same point home when it observes that “[w]hether nuclear weapons are used legally or illegally, their effects on health would be the same.”²² And this conclusion is not affected, so the Court noted in a brief and rather terse paragraph, by the circumstance that the WHO itself may have thought that the matter did fall within its competence, as evidenced by the very resolution by which the Court was approached as well as other documents that have met with the approval of the WHO’s membership.²³

This latter observation comes as a surprise, for usually (“normally speaking”, again) the powers of an international organization may well be said to be based at least in part on the organization’s practice:²⁴ if the

¹⁹ See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, 66 et seq., (74-75, para. 19). I shall hereafter refer to this opinion as the *WHA opinion*.

²⁰ The distinction was classically noted by McNair as early as 1930. See Lord McNair, *The Law of Treaties*, 1961, 2nd edition, 743 et seq. (reproducing a short article first published in 1930).

²¹ See *WHA opinion*, see note 19, 75-76, paras 20-21.

²² *Ibid.*, 76-77, para. 22.

²³ *Ibid.*, 78, para. 24.

²⁴ *Ibid.*, Dissenting Opinion Judge Weeramantry, 153, who invokes past practice and the absence of protest thereto as an argument for the finding that the WHO was indeed competent to address legal and political issues related to health.

organization engages in a certain practice or adopts a certain position with some degree of consistency, and its Member States approve or acquiesce, then for all practical – and legal – purposes the organization must be deemed competent to engage in these acts. To the extent that organizations are created by states, those states continue to be regarded as masters of their treaty; if they jointly feel the need to have the organization engaged in activity X, then typically the organization shall indeed be competent to engage in activity X, even if there is no explicit treaty provision to the effect that the organization can engage in activity X.

It is precisely in this manner that NATO has managed, since the end of the Cold War, to expand its mandate on the basis of agreement among its Member States.²⁵ And if a reminder be needed, it was partly on this basis that the ICJ itself reached the conclusion that the United Nations' international legal personality had to be presumed in *Reparation for Injuries*: part of the evidence adduced was the circumstance that the practice of the United Nations, subsequent to the entry into force of the Charter, suggested the conclusion of treaties and engaging in international acts more generally which could not be explained other than on the basis of a certain measure of international legal personality.²⁶ Hence, on the basis of time-honored thinking in international institutional law, there would have been a strong case for arguing that by its actions, and with the general consent or acquiescence of its Member States, the WHO had acquired the competence to address not merely the health effects of the use of nuclear weapons, but also their legality.

III. The Court, Powers, and the Principle of Speciality

As noted, the WHO had a fairly strong case, based on traditional international institutional doctrine, that its request ought to be honored. As a result, in order to deny the WHO's claim, the Court needed to rewrite this traditional international institutional doctrine to some extent,

²⁵ The German Constitutional Court accepted as much in Case 2 B v E 6/99, 22 November 2001, available at <www.bundesverfassungsgericht.de>. A useful discussion is S. Bölingen, *Die Transformation der NATO im Spiegel der Vertragsentwicklung: Zwischen sicherheitspolitischen Herausforderungen und völkerrechtlicher Legitimität*, 2007.

²⁶ See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174 et seq. (179).

and it did so by introducing a highly ambivalent (and hitherto unknown) “principle of speciality”. At its first mention, the Court defines this principle as meaning that international organizations “are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.”²⁷ Leaving the convoluted nature of the sentence aside, this boils down to a re-statement of the doctrine of attribution, and indeed, it is no coincidence that the Court cites the *locus classicus* on attributed powers (the PCIJ’s opinion on the *Jurisdiction of the European Commission of the Danube*) in support. The Court subsequently also refers to the doctrine of implied powers, citing *Reparation for Injuries and Effect of Awards* in support. Hence, somehow the principle of speciality is posited here as the combination of the doctrines of attributed and implied powers.²⁸ It is this principle on which the powers of institutions depend, as the Court makes perfectly clear in the final sentence of the same paragraph,

“to ascribe to the WHO the competence to address the legality of the use of nuclear weapons ... 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 its member States.”²⁹

So far, so good. At this point, one might legitimately conclude that the interpretation of the WHO Constitution, in conjunction with its subsequent practice, is rather strict, but also that this is, in effect, a matter of interpretation – nothing more. The principle of speciality as posited in para. 25 of the opinion remains firmly in control of the Member States, for it is the Member States who decide on the functions, tasks and competences of the organization. This was traditionally held to be the case with respect to both attributed powers and (arguably with less plausibility) implied powers; so as long as speciality is conceptualized as merely the aggregate of these two, there is nothing new here. But, as noted, this particular interpretation of the WHO Constitution would always remain vulnerable to the critique that it is too narrow: if the subsequent practice reveals that the WHO has actually addressed issues of

²⁷ See *WHA opinion*, see note 19, 78-79, para. 25.

²⁸ This is consistent, as will be discussed below, with the Court’s general conceptualization of both conferred and implied powers as arising by necessary intendment, therewith originating in the consent of Member States.

²⁹ See *WHA opinion*, see note 19, 78-79, para. 25.

legality of nuclear weapons, and if such exercise has gone unopposed, then how is it possible for the Court to reach a different conclusion?

So, the opinion takes a turn here and introduces a rather novel element: the Court observes that the WHO is not an ordinary organization, but is embedded in a larger framework. It is one of the specialized agencies of the United Nations, for whose activities the Charter envisaged an elaborate coordination mechanism. As the Court put it, the Charter created something of a system of international cooperation,

“by bringing the United Nations, invested with powers of general scope, into relationship with various autonomous and complementary organizations, invested with sectorial powers.”³⁰

This now is where things get really interesting. The Court proceeds by stating that it follows that the interpretation of the WHO Constitution should take place not only by taking the principle of speciality into account, but also by looking at the general system created by the Charter. Whatever responsibilities the WHO has been given, these “cannot encroach on the responsibilities of other parts of the United Nations system.”³¹ As a consequence, since matters of peace and security belong squarely to the United Nations itself, they must lie outside the competence of the specialized agencies. Indeed, the very notion of specialized agency only makes sense, so the Court suggests, against the background of a division of labor. The Court’s sense of phrasing is interesting enough to be cited,

“it is difficult to imagine what other meaning that notion [i.e., specialized agency – JK] could have if such an organization need only show that the use of certain weapons could affect its objectives in order to be empowered to concern itself with the legality of such use.”³²

In other words, the unexpected move made by the Court boils down to the proposition that the powers of an international organization (or, at a minimum, those of the specialized agencies) do not depend solely on the wishes, desires and intentions of their Member States, but also on their place within the framework of global governance. The powers of the WHO, in this case, depend to some extent on the role the WHO is supposed to play within the larger United Nations family; and

³⁰ Ibid., 79-81, para. 26.

³¹ Ibid.

³² Ibid.

almost by definition, this means that the matter is taken out of the hands of the WHO's own Member States.

Surprisingly perhaps in light of the Court's rather novel approach, the Declarations and Separate and Dissenting Opinions issued by some of the individual judges show the same spirit.³³ Thus, in a Declaration, Judge Ferrari Bravo seems to suggest that the WHO cannot have the power to address the legality of nuclear weapons on the theory that such an issue has been entrusted only to the United Nations – which implies that the scope of powers of the WHO is to be decided not (or not only) by looking at the WHO Constitution, but also (or in particular) by looking at the UN Charter. Indeed, Judge Ferrari Bravo's sense of phrasing carries strong overtones that his vote was predominantly inspired by an interpretation of the UN Charter rather than one of the WHO Constitution, and is worth citing in full,

“The Court is the principal judicial organ of the United Nations, but it is not the judicial organ of other international bodies whose right to seise the Court needs to be carefully restricted if the intention is to maintain a correct division of competences – and hence of effectiveness – among the international organizations, in a bid to prevent those political functions that the logic of the system has entrusted only to the United Nations from being usurped by other organizations which, to say the least, have neither the competence nor the structure to assume them.”³⁴

Clearly, for Judge Ferrari Bravo, the overriding concern is the effectiveness of the entire system, not what the Constitution of the WHO says.

In a Separate Opinion, Judge Oda too highlights the division of competences between the United Nations and the WHO, and does so not so much by pointing to the WHO Constitution, but by tersely remarking that some WHO members have only been interested in nuclear weapons since the early 1990s, despite those weapons having been in existence for half a century.³⁵ Moreover, there was some disagreement within the WHO itself as to whether it could address the legality of nu-

³³ The main exception here is the Dissenting Opinion of Judge Shahabuddeen, who concentrates almost exclusively on the distinction between merits and preliminary issues, holding that the Court is in fact answering the question which it claims it cannot answer.

³⁴ See *WHA opinion*, see note 19, Declaration of Judge Ferrari Bravo, 87 (emphasis deleted – JK).

³⁵ *Ibid.*, Separate Opinion Judge Oda, 90, para. 6.

clear weapons, and more generally “the limited function of the WHO, as one of the specialized agencies, was obviously well known to the Organization.”³⁶ Then again, as Judge Oda also notes, while there may have been disagreement as to whether the legality of nuclear weapons fell within the scope of the WHO’s powers, a US-sponsored motion to determine that the scope of powers excluded the issue was defeated by a healthy majority of 62 against 38, with 3 abstentions.³⁷ Hence, a majority of the WHO’s Member States seemed to think the legality question was within the scope of the WHO’s powers. Hence, Judge Oda changes tactics and ends up placing much faith in the opinion of the Legal Counsel of the WHO. The Legal Counsel had asserted the WHO’s lack of competence and, so Judge Oda seemed to claim, would know better than the Member States what exactly the WHO’s powers would be.³⁸ And to add insult to injury, Judge Oda suggested that the WHA had, in effect, been hijacked by civil society politics: the resolution containing the request to the Court, so he noted with some disdain, “was initiated by a few NGOs which had apparently failed in an earlier attempt to get the United Nations General Assembly to request an advisory opinion on the subject.”³⁹

Judge Weeramantry, while keen to find the WHO competent to request an opinion on the legality of nuclear weapons, nonetheless had worked on the same premise as the Court. To him, the WHO was part of the UN system, and “the agent *par excellence* for co-ordination with other specialized agencies and professional bodies in relation to the medical hazards of nuclear weapons.”⁴⁰ It was precisely to exercise its tasks properly that it was competent to approach the Court; it would not be able to function properly “if it has to act behind a veil of ignorance regarding the legality or otherwise of the greatest of man-made threats to human health.”⁴¹

In other words, while accepting the division of labor so cherished by the majority, he nonetheless held that the WHO had the power to seize the Court. Indeed, he turned the argument on its head: limiting the scope of activities the WHO can engage in will have a “restricting effect also upon the other United Nations agencies who may be guided by

³⁶ Ibid., 90, para. 5.

³⁷ Ibid., 93, para. 10.

³⁸ Ibid., 96, para. 16.

³⁹ Ibid., 96, para. 16.

⁴⁰ Ibid., Dissenting Opinion Judge Weeramantry, 130.

⁴¹ Ibid.

this narrow view of the area of their legitimate concerns.”⁴² Precisely the existence of a coherent system demands a broad interpretation of powers: one would not wish to see issues fall through the cracks between different agencies with limited mandates,⁴³ and would not wish to see the mandates of the specialized agencies unduly limited, therewith undermining the effectiveness of global governance. Hence, even though Judge Weeramantry differed in his opinion on the proper interpretation of the scope of powers of the WHO, he did accept the Court’s point of departure: that there exists a more or less coherent blueprint for global governance involving a division of labor between the United Nations and its various specialized agencies.

Something similar applies to Judge Koroma’s dissent: to Judge Koroma, the division of labor between the United Nations and the WHO (or the other specialized agencies, for that matter) was above all a division in terms of general and specific competence.⁴⁴ Like Judge Weeramantry, he dismisses the idea that the division of competences could have been intended to be exclusive, with the United Nations itself exclusively competent to address matters of peace and security, and the WHO exclusively competent to deal with health. After all, as he reminds us, the UN Charter refers to health on a few occasions (Articles 13 and 62 when it comes to the activities of the General Assembly and the Economic and Social Council, respectively, and Article 55 concerning the United Nations’ aspirations), whereas the WHO would be competent “to deal with every conceivable element in the field of health.”⁴⁵

What is remarkable in the end is that both the majority and the judges in the minority seemed to have fully accepted a basic division of competences as their point of departure. The disagreement between the majority on the one hand, and Judges Koroma and Weeramantry in particular on the other hand, related not to the division of competences *per se*, but to the question whether the competences were exclusive in nature. The majority held that these competences constituted “compartmentalized categories of exclusive activity”, in Judge Weeramantry’s

⁴² Ibid., 134.

⁴³ See also how he embraces the idea of overlap: the agencies deal with human activities “and it is of their very nature that they should have overlapping areas of concern”, *ibid.*, 151.

⁴⁴ Ibid., Dissenting Opinion Judge Koroma, 194-196.

⁴⁵ Ibid., 196.

somewhat disdainful phrase;⁴⁶ Judges Koroma and Weeramantry held that instead, competences were best seen as fluid and overlapping.

1. A Brief Genealogy of the Principle of Speciality

One of the more surprising elements of the case, as highlighted above, is that the Court discussed the division of powers in terms of a principle of “speciality”. This is surprising, in that the term “speciality” has never been the usual way to discuss competences of international organizations.⁴⁷ The ICJ itself (and before it the PCIJ) never used the term, and it is not the standard term in the literature either.

The PCIJ’s first encounters with international organizations (to wit, the ILO) did not yet give rise to much systematic thought about powers or competences. The closest the Court came in its first few cases was a brief, somewhat inconclusive, discussion of the question whether powers should be regarded as delegated or not. Instead of theoretical classifications, so the Court seemed to suggest, what matters was what the Member States had actually agreed on: “the province of the Court is to ascertain what it was the Contracting Parties agreed to.”⁴⁸

The Court first started to engage in systematic thinking about the powers of international organizations in its opinion on the *Jurisdiction of the European Commission of the Danube*. Prompted by Romania’s insistence that the Commission had been invested with technical powers but not juridical powers (i.e., decision-making powers), the Court discussed this distinction at length, only to find that it was not plausible in the case at hand – and perhaps, we may surmise, not plausible in any

⁴⁶ Ibid., Dissenting Opinion Judge Weeramantry, 170.

⁴⁷ So also as undisputed an authority as Amerasinghe, noting that by referring to speciality “the Court referred to a principle which has apparently not been discussed before.” See C.F. Amerasinghe, “The Advisory Opinion of the International Court of Justice in the WHO Nuclear Weapons Case: A Critique”, *LJIL* 10 (1997), 525 et seq. (535).

⁴⁸ See *Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer*, Advisory Opinion, 1926, PCIJ, Series B, No. 13, 1 et seq. (23). Note also that the Court does not yet speak of Member States but rather of contracting parties, a term more appropriate when discussing non-institutional treaties.

case, as the exercise of a technical power need necessarily involve some decision-making power.⁴⁹

More to the point though, the Court also laid down the idea that powers are somehow conferred or attributed to international organizations without, however, using these terms. Instead, it spoke of “functions” being “bestowed” on an organization: since the *European Commission of the Danube* “is not a State, but an international institution with a special purpose, it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfillment of that purpose, but it has power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it.”⁵⁰

Less than a year later, in August 1928, the Court launched the implied powers doctrine in its opinion on the competences of the *Mixed Commission for the Exchange of Greek and Turkish Populations* set up to monitor the implementation of a series of treaties on the exchange of Greek and Turkish populations. By now, the Court’s thinking on the competences of international bodies had taken on systematic features, and one of those was the consistent use of the verb “to confer”. Powers, so the Court stated time and again, are “conferred” on international organizations.⁵¹

This then was to become the standard theory about the powers of international organizations, and other entities as well – such as territories placed under some form of international authority. Thus, the Governor of the Memel Territory had been “given” certain rights or powers,⁵² with “to give” being used as a synonym of “to confer”.⁵³ The theory would culminate in the classic *Reparation for Injuries* opinion: powers of international bodies, whether explicitly contained in their

⁴⁹ See *Jurisdiction of the European Commission of the Danube between Galatz and Braila*, Advisory Opinion, 1927, PCIJ, Series B, No. 14, 6 et seq. (46).

⁵⁰ *Ibid.*, 64. The Definitive Statute was the Commission’s constituent document. A useful discussion of the connection between functions and powers is Engström, see note 13.

⁵¹ See *Interpretation of the Greco-Turkish Agreement of December 1st, 1926 (Final Protocol, Article IV)*, Advisory Opinion, 1928, PCIJ, Series B, No. 16, 5 et seq. (18, 19).

⁵² See *Interpretation of the Statute of the Memel Territory (UK, France, Italy and Japan v. Lithuania)*, 1932, PCIJ, Series A/B, No. 49, 294 et seq. (312 and 319).

⁵³ *Ibid.*, 317.

constituent documents or implied, have been given to the body in question. *In casu*, the United Nations was said to have been “charged” with certain tasks; the UN Member States have “entrusted” certain functions to the United Nations; they have “clothed” the United Nations with competences,⁵⁴ and have “endowed” it with the capacity to bring certain claims.⁵⁵

What is more, the capacity to bring certain claims arose “by necessary intendment out of the Charter”,⁵⁶ despite not being explicitly mentioned in the Charter. *Reparation for Injuries* therewith completes the reasoning first pioneered by the PCIJ in the mid-1920s. Organizations (and other international bodies or entities) derive their powers from their Member States. Powers are given, conferred, or endowed; whichever verb is used, the conclusion must be that competences flow from Member States to organizations. This makes perfect dogmatic sense: in a world made up of sovereign states, it could hardly be otherwise. Sovereign states create entities to which they entrust certain tasks and confer certain powers. Any other construction would have been incoherent in light of the general conception of the nature of international law as state-based. While there was some controversy concerning the precise scope of the United Nations’ implied powers,⁵⁷ the underlying construction has dominated the discipline ever since.⁵⁸

The Court would confirm its theory in subsequent opinions, most notably perhaps *Effect of Awards* and, arguably, *Certain Expenses*. In *Effect of Awards*, the Court reiterated the view that implied powers, although unwritten, nevertheless could be traced back to the intentions of the organization’s Member States: citing *Reparation for Injuries*, such powers arise “by necessary intendment out of the Charter.”⁵⁹ And in *Certain Expenses*, the Court went so far as to say that actions must typically be presumed to be within the competence of an international

⁵⁴ See *Reparation for Injuries*, see note 26, all verbs at 179.

⁵⁵ *Ibid.*, 180. At 182, the verb “to confer” is used.

⁵⁶ *Ibid.*, 184.

⁵⁷ See *ibid.*, Dissenting Opinion Judge Hackworth, 198.

⁵⁸ Also explicitly by Judge Hackworth: “There can be no gainsaying the fact that the Organization is one of delegated and enumerated powers.” *Ibid.*, 198.

⁵⁹ See *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports 1954, 47 et seq. (57). Note also that the Court consistently speaks of powers having been “conferred.”

organization, a statement which sometimes has given rise to the idea that the Court actually applied a doctrine of inherent powers.⁶⁰ Be that as it may, the underlying theory of powers stemming from Member States remained unaffected: even in *Certain Expenses*, the Court consistently spoke of powers having been “conferred” on the United Nations.⁶¹

Hence, the introduction of a principle of speciality in the *WHA opinion* had no firm basis in precedent, neither under that very name nor conceptually. As far as the name goes, the Court, prior to the *WHA opinion*, consistently spoke of “to confer” or, on occasion, used synonyms, sometimes quite a few at once. But in all cases the underlying notion remained that of a conferral of powers: Member States giving powers to their organizations.⁶²

The term “speciality”, however, carries a rather different connotation. If normally the discussion about powers of organizations is conducted in terms of the relationship – however precarious – between the organization and its Member States, the term “speciality” places another consideration in the picture: that of the relationship between the regular and the exceptional. As the Oxford English Dictionary explains, one of the uses of “speciality” is to distinguish something separate from something usual and common, with an example being a gallery of speciality counters within a larger supermarket.⁶³ And this is indeed, it may be presumed, the association the Court tried to evoke: “speciality” does not, ordinarily, refer to how an organization relates to its members, but refers to relations between organizations *inter se* or, in this case, between the United Nations and the specialized agencies.

In light of the circumstance that the Court never seems to have used the term before, its use in the *WHA opinion* appears artificial, and on one level it is used, however strained, as synonymous to “conferred powers”. When the Court formally defines the principle of speciality, it is to say that the principle entails that organizations “are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to

⁶⁰ See in particular Seyersted, see note 18.

⁶¹ See *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, ICJ Reports 1962, 151 et seq. (168).

⁶² A useful conceptual study of the different forms such conferrals can take, see D. Sarooshi, *International Organizations and their Exercise of Sovereign Powers*, 2005.

⁶³ See <<http://dictionary.oed.com>>.

them.”⁶⁴ As if to bolster the point, the Court immediately refers to the PCIJ’s opinion on the *Jurisdiction of the European Commission of the Danube*, which does attribute a “special purpose” to this Commission.⁶⁵

The Court then continues by applying this principle of speciality to the case at hand – or so it seems at first. It reminds the reader that certain powers can be implied; it quotes *Reparation for Injuries* to this effect, and then, without any argument, states that the WHO lacks the implied power to ask for an opinion on the legality of nuclear weapons. The entire discussion of the existence of such an implied power takes up a single sentence, six lines in the published version,

“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 its member States.”⁶⁶

The Court could have stopped here: it concludes that an implied power to address the legality of the use of nuclear weapons is lacking, and even though there is a distinct lack of argument substantiating the conclusion, the conclusion itself could well be justifiable.⁶⁷

But instead of stopping, the Court continues by discussing the position of the WHO as a specialized agency, affiliated with the United Na-

⁶⁴ See *WHA opinion*, see note 19, 78-79, para. 25.

⁶⁵ It will remain speculation, but perhaps the reference to “special purpose” prompted the Court to think of the term “speciality”. Lauterpacht suggests that the term derives from French legal thought, noting that the authoritative language of the opinion is French. See E. Lauterpacht, “Judicial Review of the Acts of International Organisations”, in: L. Boisson de Chazournes/P. Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons*, 1999, 92 et seq. (98-99). Be that as it may, it would seem that also in French, the term has never been used before by the World Court.

⁶⁶ See *WHA opinion*, see note 19, 78-79, para. 25.

⁶⁷ Klein, e.g., finds that the conclusions the Court reaches concerning the scope of the WHO’s powers “ne sont pas déraisonnables”. See P. Klein, “Quelques réflexions sur le principe de spécialité et la ‘politisation’ des institutions spécialisées”, in: Boisson de Chazournes/ Sands, see note 65, 79 et seq. (83).

tions – and it is this circumstance which renders the Court’s formal definition of speciality as synonymous to conferral rather implausible. The Court posits the thesis “that the WHO Constitution can only be interpreted, as far as the powers conferred upon that organization are concerned, by taking due account not only of the general principle of speciality, but also of the logic of the overall system contemplated by the Charter.” Nominally, this would still equate speciality with attribution or conferral. Practically, however, the Court here introduces an association to the far more natural meaning of the term “speciality”: that of the division of labor between the United Nations and its specialized agencies.⁶⁸ It is no coincidence, surely, that the term taps into sentiments associated with those specialized agencies to begin with, and it would have been decidedly odd – and unconvincing – to refer to speciality without discussing specialized agencies.⁶⁹ Difficult as it may be to prove a counterfactual, it might be a useful intellectual exercise to imagine the Court’s discussion of implied powers in terms of a principle of speciality without any reference to the position of the WHO as a specialized agency: what if the Court had never referred to the relationship between the WHO and the United Nations? In that case, use of the term “speciality” to describe the doctrine of conferred powers would have seemed a serious misnomer.

2. Difficulties

As demonstrated above, both the Court’s majority and the judges in the minority seemed to have accepted as their fundamental point of departure the idea that somehow the powers of the WHO must be seen not just in light of the WHO’s Constitution, but also in light of the place of the WHO within the UN family. Still, attractive as that idea may be, it encounters at least two problems. One of these is historical; the other is related to deep-rooted conceptions about the effects of treaties generally.

Historically, it is difficult to suggest that the scope of competences of the WHO can depend on any concerns related to the United Na-

⁶⁸ This is also how the term is understood by Klein: as referring both to conferral and to a division of labor among the members of the UN family. See Klein, see note 67.

⁶⁹ And by the same token, words like “special” are usually juxtaposed against “general”; think only of *lex generalis* and *lex specialis*.

tions. The WHO was created in 1946, and while this would seem to suggest that it was established after the creation of the United Nations (which would make it easier to see a global governance blueprint), the WHO is to some extent to be regarded as the successor to the earlier Office International d'Hygiène Public (OIHP).⁷⁰ This OIHP itself was established in 1907, and thus preceded not only the United Nations by some four decades, but also preceded the League of Nations, sometimes regarded as the United Nations' predecessor.

The continued relationship between the two organizations would seem to be undisputed.⁷¹ Thus, the WHO continued paying pensions to former staff members of the OIHP and even increased them in accordance with rising costs of living;⁷² it accepted OIHP responsibilities with respect to its assets,⁷³ and partially collected the arrears owed by Member States to the OIHP.⁷⁴ Moreover, the establishment of the WHO carried extra difficulties, as highlighted earlier by the Court in its 1980 Advisory Opinion concerning the WHO's regional offices.⁷⁵ These, to some extent, preceded the WHO as well, and the WHO Constitution specifically provided for these pre-existing regional offices to be integrated "through common action based on mutual consent."⁷⁶ Whether that implies that the integration of pre-existing offices must be regarded as instances of succession properly speaking is unclear, but at least it suggests that the WHO did not come out of the blue.⁷⁷

⁷⁰ See, e.g., H.J. Hahn, "Continuity in the Law of International Organization", *Österreichische Zeitschrift für öffentliches Recht* 13 (1964), 167 et seq. (178-179).

⁷¹ Sands and Klein, e.g., write that the WHO was established in 1946 "assuming the functions of the International Office of Public Health." See P. Sands/ P. Klein, *Bowett's Law of International Institutions*, 5th edition 2001, 97.

⁷² See H.G. Schermers/ N.M. Blokker, *International Institutional Law*, 2003, 4th edition, § 1667.

⁷³ *Ibid.*, § 1674.

⁷⁴ *Ibid.*, § 1675.

⁷⁵ See *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, ICJ Reports 1980, 73 et seq. (76-77, paras 11-12).

⁷⁶ WHO Constitution, article 54.

⁷⁷ See also Burci's comment to the effect that the creation of the WHO marked "the centralization into a single universal agency of the functions previously exercised by a number of international bureaux." See G.L.

Yet, none of this is reflected in the *WHA opinion*. All there is concerning the WHO's history is a terse, one-sentence statement,

“The WHO Constitution was adopted and opened for signature on 22 July 1946; it entered into force on 7 April 1948 and was amended in 1960, 1975, 1977, 1984 and 1994.”⁷⁸

In other words, the Court does create the impression that the WHO was created out of nothing or, more accurately perhaps, as part of a blueprint for global governance involving the United Nations and the other specialized agencies. Historically, however, it would seem that a rival thesis may be at least equally plausible: the United Nations, upon its creation, found itself surrounded by a number of existing entities, and tried to provide the patchwork of agencies and institutions with some cohesion. In this scenario, it is not a matter of working according to an abstract blueprint but rather a matter of coping with the existing set-up in the hope of providing the patchwork with at least the semblance of a pattern. And one ramification of such coping might well be to try and coordinate the activities of various organizations with partly overlapping mandates and powers – precisely as provided for in para. 2 of Article 63 of the UN Charter.⁷⁹

The second problem attached to the Court's proposition that the WHO Constitution be read in conjunction with the system of governance set up under United Nations auspices is the traditional third party problem.⁸⁰ Several founding members of the WHO were not among the founding members of the United Nations: these include Finland, Italy, and Portugal. Conversely, Saudi Arabia is among the founding members of the United Nations, but not of the WHO. Adopting the Court's proposition would imply that Saudi Arabia, as a United Nations Member State from the start, would have been able to help create a legal regime applicable to states such as Finland, Italy or Portugal, without the latter's consent. Surely, in a legal order where the notion of sovereign equality reigns supreme (as confirmed in the UN Charter itself), such a construction runs into problems: in such an order, the scope of powers of the WHO cannot depend on the intentions of states that were not

Burci, “Health and Infectious Disease”, in: T.G. Weiss/ S. Daws (eds), *The Oxford Handbook on the United Nations*, 2007, 582 et seq. (583).

⁷⁸ See *WHA opinion*, see note 19, para. 20.

⁷⁹ Indeed, hypothetically there would perhaps not be all that much to coordinate if the system had been designed following a well-crafted blueprint.

⁸⁰ The seminal study remains C. Chinkin, *Third Parties in International Law*, 1993.

involved in the drafting of the WHO Constitution (such as Saudi Arabia), while bypassing those states that actually were involved in the drafting (such as Finland, Italy and Portugal).

And even if membership had been completely overlapping in 1946 when the WHO was created, even then there would be room for the argument that the powers of the WHO cannot be made to depend on external factors. If every single treaty is to be considered as a thing between the parties (*res inter alios acta*), as is often suggested, then it would seem to follow that this also applies to the UN Charter and the WHO Constitution.⁸¹ While admittedly the conclusion of agreements between the two organizations will help to mitigate some of the worst effects of their “splendid isolation”, it will still be difficult to maintain that the one organization was set up so as to give effect to the desires of the other, at least not in the absence of a specific clause to this effect.

3. Significance

Why now did the Court launch the proposition that the scope of powers of the WHO is partly dependent on the position of the WHO within the system of organizations functioning under auspices of the United Nations, and ended up rejecting the WHO’s request? Several possible answers present themselves. First, it may have wanted to further develop the law of international organizations precisely in light of the circumstance, that usually, there are few limits to what the members can make the organization do. The combined outcome of the doctrines of attributed and implied powers, at least on the generous interpretation prevailing since *Reparation for Injuries*, is that the organization can engage in any activity it pleases as long as the Member States see the point of the activity. In this light, the *ultra vires* doctrine (holding that organizations cannot act beyond their competences) has always remained weak.⁸² It is not impossible that the Court spotted a possibility, in the *WHA opinion*, to further develop the law on control of organizational

⁸¹ In *Reparation for Injuries*, Judge Badawi Pasha made essentially the same point: while the specialized agencies may show a certain resemblance to each other “each of these persons depends, as regards its objects, principles, organization, competence, rights and obligations, on the terms of its constitution, and is deemed to exist only for the benefit of States which have signed and ratified, or which have acceded to that instrument.” See *Reparation for Injuries*, see note 26, Dissenting Opinion Judge Badawi Pasha, 205.

⁸² See further Klabbers, see note 18, 218-219.

expansion. And it is by no means eccentric to suggest that the time was ripe to do so, in the aftermath of the *International Tin Council* litigation, the *Westland Helicopters affair*, and while leading academics, united in the Institut de Droit International, were addressing the responsibility of organizations and their Member States under international law.⁸³

The second possibility is more tantalizing still: confronted with a similar request emanating from the UN General Assembly, the Court may have seen a golden opportunity to posit something along the lines of a structure for global governance. After all, having two similar requests before it meant that the Court could pragmatically decide to answer only one of them,⁸⁴ but that would work only on the basis of a theory as to why that particular one should be addressed but not the other one. Why answer the General Assembly, but not the WHO? The obvious answer could well reside in a division of labor between the two.⁸⁵ But in order to get there the Court first had to find a way to dismiss the WHO's request, and that dismissal would demand a rethinking of the basis of the powers of international organizations.

If the above is even marginally plausible, the question presents itself as to what the *WHA opinion* signifies. At the very least, it would seem to mark the Court's general dissatisfaction about its existing theory concerning the powers of international organizations. This has traditionally proven to be a difficult topic for the Court, not surprisingly perhaps in light of the difficult fit of organizations in an essentially horizontal legal order.⁸⁶

Those problems were clearly visible in the first cases involving the ILO, and even in the celebrated *Reparation for Injuries* case. In the latter, the Court curiously discussed a convention benefitting the United

⁸³ See J. Klabbers, "The Changing Image of International Organizations", in: J.M. Coicaud/ V. Heiskanen (eds), *The Legitimacy of International Organizations*, 2001, 221 et seq.

⁸⁴ It might also have been possible for the Court to join the two requests had it wished to do so.

⁸⁵ Hints to this effect were contained in the pleadings and written comments made before the Court. Thus, the US Written Comments referred to "other fora which have an express mandate" to discuss nuclear weapons (page 2). Available at the Court's website: <www.icj-cij.org>.

⁸⁶ For an intelligent exploration of this theme, see C. Brölmann, *The Institutional Veil in Public International Law: International Organisations & the Law of Treaties*, 2007.

Nations (the 1946 Convention on the Privileges and Immunities of the United Nations) as an example of the practice of the UN itself,⁸⁷ and arguably read a lot more in one of the PCIJ's opinions on the ILO than was warranted – as Judge Badawi Pasha, dissenting, was keen to point out.⁸⁸

But more generally, the various doctrines concerning the powers of international organizations have proved troublesome. There is, for instance, the awkward circumstance that both conferred and implied powers must be deemed to have arisen by necessary intendment; if so, then they are well-nigh indistinguishable from each other, the only difference being that some are written down and some are not. More importantly perhaps, the broad construction favored in *Reparation for Injuries* (and criticized by Judge Hackworth) has had the result that nearly everything can possibly be justified in terms of implied powers. One need only be able to connect an activity to the purposes of the organization in order to find a power to be implied, and given the broad nature, typically, of the purposes of international organizations, there is eventually not much that organizations would clearly not be competent to do. In this light, it is no surprise that some have suggested that “inherent powers” might be a more appropriate term,⁸⁹ and it is no surprise that in the *WHA opinion*, the Court's finding that the WHA has no implied powers to address the legality of the use of nuclear weapons is devoid of argument: the possibility of serious argument has been ren-

⁸⁷ The Court noted, referring to this convention and arguing in favor of the international legal personality of the United Nations, that it was “difficult to see how such a convention could operate except upon the international plane and as between parties possessing international personality.” See *Reparation for Injuries*, see note 26, 179.

⁸⁸ “I do not think that Opinion No. 13 of the PCIJ concerning the competence of the International Labour Organization lays down the principle [of implied powers – JK] 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 the terms generally used therein.” See *Reparation for Injuries*, see note 26, Dissenting Opinion Judge Badawi Pasha, 214.

⁸⁹ See Seyersted, see note 18. For a discussion of his work and the role of the inherent powers doctrine, see J. Klabbbers, “On Seyersted and his *Common Law of International Organizations*”, *International Organizations Law Review* 5 (2008), 381 et seq.

dered illusory precisely by the broad approach adopted in *Reparation for Injuries* and nurtured ever since.

It is perhaps not too far-fetched to posit that the Court saw in the WHA request the perfect opportunity to kill two birds with one and the same stone. The fact that there was a parallel request from the General Assembly of the United Nations meant that the Court could with impunity deny the WHA its day in court, and that might have been an attractive way to tone down the scope of the implied powers a bit. The *WHA opinion* can, after all, be read as an attempt to limit the unbridled scope of the implied powers doctrine: it was only the second time the Court denied a request for an Advisory Opinion,⁹⁰ and the first time the Court reached the conclusion that an organization before it lacks the power to do what it proposes to do.⁹¹

But perhaps the most relevant consideration may have been to adapt international law to changing circumstances, and to do so in two distinct ways. First, by holding that the powers of the WHO are dependent, at least in part, on the WHO's place within the greater UN family, the Court severs the traditional link between sovereign statehood and international law. In the Court's opinion, after all, it turned out that the powers of the WHO did not depend solely on its constitution; yet its constitution is the only instrument directly traceable to the intentions of its sovereign Member States. Short and good: the *WHA opinion* is an attempt to somehow lay the foundations for a more "developed", perhaps more "progressive", conceptual framework for international law. It is often thought that the protection of community interests, perhaps even the very survival of mankind, requires that traditional notions of consent be overcome; state sovereignty, as Louis Henkin so famously put it, is seen by many as a "bad word".⁹² The *WHA opinion* marks an attempt to escape from the clutches of sovereign statehood by unraveling the close connection between sovereignty and the making of international law.

Second, the Court also tried to suggest an alternative vision on global law, one revolving around the only international organization of

⁹⁰ The first was the *Eastern Carelia* case, request for an Advisory Opinion, 1923, PCIJ Series B, No. 5, 6 et seq.

⁹¹ For a more general discussion that the political climate may have been ripe for such a toning down of the implied powers doctrine, see Klabbers, see note 83.

⁹² See L. Henkin, "International Law: Politics, Values and Functions", *RdC* 216 (1989/IV), 9 et seq. (24).

general jurisdiction and practically universal membership (the United Nations) and a number of more functionally oriented specialized agencies. The vision the Court endorses is straightforward, and eminently recognizable as modeled upon domestic forms of political organization: a ministry of general affairs (or a president's or prime minister's office) seconded by functional ministries with more limited, specialized tasks.

If it was the Court's intention to spark discussion, the *WHA opinion* may well be regarded as a failure: it has provoked very few comments in the literature, and those that have come out tended to focus on such issues as the proper limits of the Court's advisory jurisdiction⁹³ or whether the Court's handling of the implied powers doctrine was not overly restrictive.⁹⁴

And if it was the Court's intention to infuse a public law element into public international law, the opinion was not very successful either. Then again, the Court was by no means helped by the circumstance that fragmentation "broke out" around the same time: since the mid or late 1990s there has been a widespread recognition that international law has become fragmented, which has the effect of locking existing international institutions ever more into their own positions, at the expense of a coherent overall approach.⁹⁵ Far from realizing a blueprint for global governance, the fragmented international legal order is often regarded as possibly messier than ever.

The Court, of course, cannot be blamed for all this, but in retrospect it could be suggested that its attempt in the *WHA opinion* backfired in at least one important respect: by limiting the possibilities for international organizations to ask for Advisory Opinions, it also made it more difficult for itself to function as a harmonizing entity.⁹⁶ It is no coincidence perhaps that for many, an increased advisory jurisdiction of the ICJ is one of the possible ways to mitigate the worst effects of fragmen-

⁹³ See, e.g., M. Matheson, "The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons", *AJIL* 91 (1997), 417 et seq.

⁹⁴ See, e.g., D. Akande, "The Competence of International Organizations and the Advisory Jurisdiction of the International Court of Justice", *EJIL* 9 (1998), 437 et seq.

⁹⁵ See generally M. Koskenniemi/ P. Leino, "Fragmentation of International Law? Postmodern Anxieties", *LJIL* 15 (2002), 553 et seq.

⁹⁶ For a general discussion, see P.M. Dupuy, "The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice", *N. Y. U. J. Int'l L. & Pol.* 31 (1999), 791 et seq.

tation; it is not without irony that the Court itself has placed obstacles on this route.

And maybe, just maybe, the effort was doomed right from the start. The effort to infuse a public law element (a vertical element) into the horizontal legal order inevitably came to stumble over the circumstance that vertical authorities too end up competing with one another, as every student of bureaucracy realizes; and the same applies to functional regimes.⁹⁷ Administrative agencies engage in turf battles regardless of divisions of labor and circumscribed competences, and it would have been unrealistic to expect the international legal order to remain immune from this. Indeed, in yet another irony, the very circumstance of the WHA's request already suggested that competition between entities could not be avoided: it was only possible for the ICJ to deny the WHO's request by virtue of the existence of a request by another, competing agency: the General Assembly of the United Nations. Had the General Assembly not presented its own request, chances are that the Court would have felt compelled to address the WHA's request and thus uphold the earlier broad doctrine of implied powers without any hint of "speciality".

IV. By Way of Conclusion

In the literature, the *WHA opinion* has been overshadowed by the more famous opinion rendered by the Court following the request of the General Assembly to say something about the legality of nuclear weapons. That is a pity, as the *WHA opinion* shows the Court creatively aiming to come to terms with the effect of a globalizing and fragmenting world. Where the opinion concerning the General Assembly focuses, unsatisfactorily, on substance, and is therewith eventually of little constitutional relevance, the *WHA opinion* self-consciously aims to help reconceptualize international law.

As noted above, the Court's attempt was, in the end, not very successful, nor could it have been reasonably expected to be so. Yet, in an important sense, it is the thought that counts. While international law still may need to be infused with a public element, what has become clear is that a transplantation of domestic governance models alone may

⁹⁷ As is implicitly recognized in the need for communication between regimes. See A. Fischer-Lescano/ G. Teubner, *Regime-Kollisionen: Zur Fragmentierung des globalen Rechts*, 2006.

not work. And part of the problem is no doubt that any new structure has to be framed in harmony with the old; one cannot just superimpose a new structure on the existing old structure comprising sovereign states and international organizations with consensually granted powers without running into problems of fit.

With this in mind, the *WHA opinion* is best regarded as a valiant, if ultimately unsuccessful, attempt by the Court to help international law transform into a legal order better able to deal with an increasingly complex and globalizing world. And constitutional design by definition being a matter of trial and error, and possibly “reculer pour mieux sauter”, things could hardly have been otherwise.