

AN EMERGING DOCTRINE OF THE INTERPRETATIVE FRAMEWORK OF CONSTITUENT INSTRUMENTS AS THE CONSTITUTIONS OF INTERNATIONAL ORGANIZATIONS*

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I. INTRODUCTION

1. *Problem:* Methodology of the interpretation of the constituent instruments of international organizations¹ has been one of the central issues in the disputes concerning structures and activities of international organizations. This is primarily because international organ-

¹ See, for the introduction of the principal doctrines from the viewpoint of the notion “caractère constitutionnel,” my article *Constituent Instruments of International Organizations and Their Interpretative Framework*, 14 HITOTSUBASHI J. L. & POLITICS 1, 2-10 (1986). See also, Pollux, *The Interpretation of the Charter*, 23 BRIT. Y. B. INT’L L. 54 (1946); Hexner, *Teleological Interpretation of Basic Instruments of Public International Organizations*, in LAW, STATE, AND INTERNATIONAL ORDER, ESSAYS IN HONOR OF HANS Kelsen 119 (S. Engel ed. 1964); Schachter, *Interpretation of the Charter in the Political Organs of the United Nations*, *idem* at 269; Lang, *Les règles d’interprétation codifiées par la Convention de Vienne sur le Droit des Traités et les divers types de traités*, 24 ÖSTERREICHISCHE ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 113 (1973); Ciobanu, *Impact of the Characteristics of the Charter upon Its Interpretation*, in CURRENT PROBLEMS OF INTERNATIONAL LAW: ESSAYS ON U.N. LAW AND THE LAW OF ARMED CONFLICT 3 (A. Cassese ed. 1975); D. SIMON, *L’INTERPRÉTATION JUDICIAIRE DES TRAITÉS D’ORGANISATIONS INTERNATIONALES* (1981); Skubiszewski, *Remarks on the Interpretation of the United Nations Charter*, in VÖLKERRECHT ALS RECHTSORDNUNG, INTERNATIONALE GERICHTSBARKEIT, MENSCHENRECHTE: Festschrift für Herman Mosler 891 (1983); Macdonald, *The United Nations Charter: Constitution or Contract?*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 889 (R. St. J. Macdonald & D. M. Johnston eds. 1983); E. McWHINNEY, *The UN Charter: Treaty or Constitution?*, in CONFLICT AND COMPROMISE: INTERNATIONAL LAW AND WORLD ORDER IN A REVOLUTIONARY AGE 53 (1981); CH. ROSENNE, *Is the Constituent Instrument of an International Organization an International Treaty?*, in DEVELOPMENTS IN THE LAW OF TREATIES 1945-1986 181 (1989) [The original edition of this article was published in 12 COMUNICAZIONI E STUDI 21 (1966).]; Skubiszewski, *Implied Powers of the International Organizations*, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY, ESSAYS IN HONOUR OF SHABTAI ROSENNE 855 (Y. Dinstein & M. Tabory eds. 1989).

izations are functional entities established by States on the basis of agreements (constituent instruments).² Since the purposes, functions, powers and competences, organizational structures, activities and all other important matters of international organizations are, in essence, to be provided in their constituent instruments, legal analyses of their structures and activities are to start, as is clear from a logical viewpoint, from the analyses or interpretations of constituent instruments. In fact, many of the disagreements and disputes concerning their structures and activities, when discussed in international organizations or referred to the International Court of Justice (hereinafter cited as the Court), have been argued on the level of the interpretation of their constituent instruments.³

Significance of the problem of methodology on this level of the interpretation of constituent instruments could be analyzed in the following manner. On the one hand, international organizations are, as above explained, to be established on the basis of agreements which provide for their purposes, functions, and all other important matters; on the other hand, international organizations are required to efficiently function and effectively perform the given purposes and functions in changing circumstances of the world.⁴ Thus the point of issue is how to reconcile or harmonize *two conflicting demands*:⁵ that of *stability* inherent

² For the definition of international organizations, see, e.g., Virally, *Definition and Classification of International Organizations: a Legal Approach*, in *THE CONCEPT OF INTERNATIONAL ORGANIZATION* 50, 51 (G. Abi-Saab ed. 1981). The present article deals mainly with the United Nations and other universal international organizations.

³ See, in this connection, e.g., Gordon, *The World Court and the Interpretation of Constitutive Treaties*, 59 AM. J. INT'L L. 794 (1965).

⁴ For example, the Court, in the *Reparation* case (1949), confirmed the existence of the following famous legal principle:

"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."

Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations*, [1949] I. C. J. 182. This principle of implied powers enunciated by the Court symbolizes the favorable attitude of the Court which has been shown in a series of later advisory opinions toward effectiveness of international organizations. The concept of "necessity" indicated in this principle is a key criterion which could be applied, not only to the matter of powers, but also to all aspects of international organizations, in the interpretation of their constituent instruments.

⁵ A prominent scholar, de Visscher, in this connection, reached the following three conclusions based upon the analysis of the jurisprudence of the Court:

1) Il existe, dès à présent, un certain droit jurisprudentiel relatif à l'interprétation des traités d'organisation internationale; droit que l'on peut considérer généralement comme tenant un juste milieu entre la tendance institutionnelle et l'interprétation contractuelle. . . .

2) La notion qui a été le mieux dégagée par nos décisions est celle du but, de l'objet, de la mission de l'Organisation elle-même et de ses organes en tant qu'elle transcende l'ordre de simple coordination ou juxtaposition entre Etats.

3) Le problème essentiel que doit résoudre toute jurisprudence progressiste est celui d'une conciliation inéluctable entre les origines contractuelles de l'Organisation et son orientation irrésistiblement institutionnelle.

de Visscher, *L'interprétation judiciaire des traités d'organisation internationale*, 41 RIVISTA DI DIRITTO INTERNAZIONALE 177, 187 (1958). ("1) It now exists a certain law of jurisprudence relating to the interpretation of treaties establishing international organizations; law which one can generally consider as occupying the exact middle between the institutional tendency and the contractual interpretation. . . . 2) The notion which has been best drawn by our decisions is that of purpose, of the objective, of the mission of the Organization itself and of its organs as far as it transcends the level of simple coordination or juxtaposition among States. . . . 3) The essential problem that every progressive jurisprudence must solve is that of inescapable conciliation between the contractual origins of the Organization and its irresistibly institutional orientation." [translation by the author]). See also DITTO, *PROBLÈME D'INTERPRÉTATION JUDICIAIRE EN DROIT INTERNATIONAL PUBLIC* 140-53 (1963); DITTO, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 260-61 (Rev. ed. P. E. Corbett trans. 1968). *THÉORIES ET RÉALITÉS EN DROIT INTERNATIONAL PUBLIC* 283-84 (4e éd. 1970); DITTO, *LES EFFETIVITÉS DU DROIT INTERNATIONAL PUBLIC* 53-60, 159 (1967).

in constituent instruments as agreements and that of *dynamism* inherent in the nature of international organizations. This point of issue has a profound importance giving direct or indirect influences upon almost all aspects of structures and activities of international organizations. In fact, this inherent confrontation between stability of agreements and dynamism of international organizations corresponds, essentially, to the phenomena of a series of "crises" in international organizations which could be presented, essentially, as a confrontation between resistance and control by member States on the one hand and autonomy and dynamism of international organizations on the other hand.⁶

2. Doctrines: This problem has been tackled, on the legal level, by some scholars, although perceived by many. I have already surveyed elsewhere⁷ the development among doctrines of the notion "caractère constitutionnel" of constituent instruments of international organizations. It could be concluded that the doctrines rest relatively elementary in the sense that, although they begin to recognize the double aspects (treaty and constitution) of constituent instruments,⁸ they are far from presenting an interpretative framework.⁹ To the contrary, there still seems to be a tendency, among doctrines in general, to consider that the interpretation of constituent instruments could be explained, despite their constitutional aspect, within the interpretative framework in the law of treaties. One can summarize the current doctrinal level by citing the following passage of Monaco which is one of the best description on this problem, but which still remains introductory. This is *the starting point of the present article*. Monaco contended as follows:

"[L]’acte institutif d’une Organisation déterminée est bien un traité international, fondé, en tant que tel, sur la volonté des contractants et donc soumis, au moment de sa formation, à leur volonté, mais il est par ailleurs destiné à devenir la constitution, c’est-à-dire l’acte de fondation de l’Organisation, auquel celle-ci se rattache tout au long de son existence. On pourrait dire, par conséquent, que l’acte institutif revêt la forme du pacte mais possède la substance de la constitution: né sur la base d’une convention, il dépasse, avec le temps, son origine formelle, jusqu’à devenir une constitution de durée indéterminée dont le développement déborde le cadre à l’intérieur duquel elle avait été

⁶ See, e.g., Jacqué, *Rapport général: Le Consta*, in LES ORGANISATIONS INTERNATIONALES CONTEMPORAINES 3, 8 (1988); Simon, *Organisations internationales et politiques des Etats*, *id.* at 107, 113.

⁷ Sato, *supra* note 1, at 2-10.

⁸ It is generally admitted in France that constituent instruments have a double nature of treaty and constitution. See, e.g., H. THIERRY, J. COMBACAU, S. SUR & CH. VALLÉE, *DRIT INTERNATIONAL PUBLIC* 703 (5e éd. 1986); N. Q. DINH, P. DAILLIER & A. PELLET, *DRIT INTERNATIONAL PUBLIC* 518 (3e éd. 1987); M. BETTATI, *LE DROIT DES ORGANISATIONS INTERNATIONALES* 61-62 (QUE SAIS-JE?, 1987).

⁹ The importance of this question with respect to interpretation is pointed out, but not developed, by Goodrich as follows:

"The Charter, it is often stated, is not only a treaty but also a constitution. The importance of this characterization lies in the fact that, as a treaty to which two or more states are parties, it might be thought of as an instrument defining the rights and obligations of the parties and therefore subject to restrictive interpretation. As a constitutional document, on the other hand, the Charter not only defines the rights and duties of members but also determines the functions, powers, and responsibilities of organs which are established for the purpose of giving effect to the aims of the Organization. In this respect, the Charter is similar to the constitution of a state, and particularly of a federal state such as the United States, which defines the functions and powers of organs and provides the legal basis for the development of the powers of the central government to meet the demands which changing circumstances may create. *Its interpretation raises questions that do not arise in the case of an ordinary treaty.*" [Emphasis added]

Goodrich, *The Changing United Nations*, in TRANSNATIONAL LAW IN A CHANGING SOCIETY, ESSAYS IN HONOR OF PHILIP C. JESSUP 259, 260 (W. Friedmann et al. eds. 1972).

initialement conçue."¹⁰

3. *The purpose of the present article* is to analyze and clarify the law-creating process of the interpretation of constituent instruments, and to advocate an emerging doctrine of the interpretative framework of constituent instruments as the constitutions of international organizations.¹¹ The present writer argues that, under the influences of the inherent dynamism of international organizations, the interpretative framework of the constituent instruments of international organizations is not the same as that of ordinary treaties, and that the interpretation of the constituent instruments of international organizations deviates from the interpretative framework regulated by the law of treaties as codified by the Vienna Convention on the Law of Treaties. He advocates, as the alternative interpretative framework to that of ordinary treaties, a doctrine of constituent instruments as the constitutions of international organizations rather than as the (founding) treaties. In advocating this new doctrine of the interpretative framework, it is quite important not to attempt to construct a house of cards. Given the present situation of doctrines and practices of States and international organizations which do not support such a construction, the best way is to construct a *moderate but solid theory* which could be sufficiently justified by the actual practices and which could be further improved and refined; and even this effort has yet to be made.

In section II of this article, the present writer will explain the concept and characteristics of constitutions, and point out that the interpretative framework as constitutions differs from that as treaties in two aspects: (1) on the quantitative aspect of teleological extent admitted, (2) on the qualitative aspect of legal significance possessed by the practice of the organs of international organizations. Certainly each of these two aspects has sometimes been referred to in different contexts by other writers. These two, however, have never been, with sufficient development and refinement, synthesized in this new doctrine of constituent instruments as the constitutions of international organizations. The writer will prove these

¹⁰ Monaco, *Le caractère constitutionnel des acts institutifs d'Organisations internationales*, in LA COMMUNAUTÉ INTERNATIONALE: MÉLANGES OFFERTS À CHARLES ROUSSEAU 153, 154 (1974). ("The institutive act of a given Organization is indeed an international treaty founded as such on the will of the participants and therefore subject, at the moment of its formation, to their will, but it is in other respects destined to become the constitution, namely the act of foundation of the Organization, with which the Organization is connected throughout its existence. One could say that the institutive act is clothed with the form of a pact but possesses the substance of a constitution: born on the basis of a convention, it exceeds, with time, its formal origin until it becomes a constitution of indeterminate duration the development of which oversteps the bounds within which the Organization has been initially conceived." [translation by the author])

See also J. RIDEAU, JURIDICTIONS INTERNATIONALES ET CONTRÔLE DU RESPECT DES TRAITÉS CONSTITUTIFS DES ORGANISATIONS INTERNATIONALES 2-39 (1969).

¹¹ In the sphere of international law and the law of international organizations, the expressions "constitution" and "constitutional (constitutionnel)" have often been used but in different meanings. For these usages, see, e.g., Opsahl, *An 'International Constitutional Law'?*, 10 INT'L & COMP. L. Q. 760 (1961); Ganshof van der Meersch, *L'ordre juridique des Communautés européennes et le droit international*, 148 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE (hereinafter cited as RECUEIL DES COURS) 21-23 (1975).

Here in this article, we define the expression "constitution" as those provisions that provide for the legal foundations and frameworks for structures and activities of international organizations, as is pointed out later in the text. It differs, for example, from the usage of Friedmann in his "constitutional approach" (in the sense of providing the legal and institutional framework which will be competent to deal with the various aspects of the organized life of mankind) in contrast to "functional approach." W. FRIEDMANN, CHANGING STRUCTURE OF INTERNATIONAL LAW 275-77 (1964).

differences in the two aspects by contrasting the interpretative framework as constitutions and that as treaties, respectively, (1) the quantitative difference in terms of the extent of teleological reasoning employed in these two interpretative frameworks, in section III, (2) the qualitative difference in terms of the legal significance given, in these frameworks, to the subsequent practice of State parties and of the organs of international organizations, in section IV. Finally, in section V, he will seek, in the various legal theories and materials, the theoretical foundations of this emerging doctrine of the interpretative framework of the constituent instruments as the constitutions of international organizations. These legal theories and materials, although sometimes mentioned by different writers, have never been systematically analyzed and appreciated. The writer will also attempt to point out some important elements for establishing this new interpretative framework.

4. *Possible Contributions for the Future:* It was already pointed out in 1958 that a large number of the provisions of the United Nations Charter were, more or less, transformed from the original meaning in the actual operation of the Organization.¹² We also know, for example, that a series of arguments have been presented with regard to the legal foundations of peace-keeping operations, and that the Court acknowledged in 1971 that Article 27 (3) with respect to the procedure of the Security Council had been transformed as a result of "a general practice" of the United Nations. It will be quite reasonable to expect that similar phenomena will occur to these and other provisions as the United Nations continues to adapt itself to the ever changing international political environment.

In the field of international organizations where amendments of their constituent instruments are exceptional, as in the case of the United Nations, it is through the process of interpretation and application of constituent instruments that the political evolutions and changes will be transformed into legal arguments. In this sense interpretation could be qualified as the "*concept charnière (hinging concept)*" between politics and the law.¹³

In fact, for a typical example, since the 1980s the Soviet Union has drastically changed and finally dissolved, and in 1989 all the east European communist States have abandoned their ideological and political positions. In correspondence to this dramatic change, their attitude toward international organizations will inevitably change.¹³ We have already seen that military enforcement measures have been applied to Iraq in 1991 in the manner closer to, if not the same as that expected by the Charter, but never before experienced. We have

¹² Robinson, *Metamorphosis of the United Nations*, 94 RECUEIL DES COURS 493 (1958).

¹³ S. SUR, L'INTERPRÉTATION EN DROIT INTERNATIONAL PUBLIC 85, 130 (1974).

From a global viewpoint, the attitudes of various States to the interpretation of constituent instruments could be briefly summarized as follows: (1) The attitude of the western States, which was initially favorable to the institutional evolution when they occupied the majority, changed to a reserved and consensus-oriented one as they lost their advantaged position; (2) The attitude of Afro-Asian States is, with their majority position, fundamentally favorable to the institutional evolution; (3) The attitude of the socialist States was, with their constantly minority position, always negative to the institutional evolution, but became more flexible since the 1960s with a change of international political configuration and with a policy of peaceful coexistence; After the 1980s it is expected that their attitude will become closer to that of the western States. See, e.g., THE CONCEPT OF INTERNATIONAL ORGANIZATION 20-23, 171-245 (G. Abi-Saab ed. 1981).

The significance of this global analysis is, of course, limited because of the recent phenomenon of international political multipolarization (see for example the critique of Simon, *supra* note 6, at 111-13). However, it certainly signifies the important status that methodology of the interpretation of constituent instruments has occupied in the history of international organizations.

¹³ See for example the following article and the others cited there: Ghebali, *L'URSS de Gorbatchev et les Nations Unies*, INT'L GENEVA Y. B. 26 (1989).

already seen various arguments presented concerning the interpretation of chapter 7 of the Charter and, in the light of these provisions, the relevant resolutions of the Security Council (for example in connection with the legality of the various military operations of the United States with respect to Iraq).

The emerging doctrine of the interpretative framework of constituent instruments as the constitutions of international organizations, which has been gradually formed since the 1950s and are now more or less established, will give a useful perspective in understanding the possible evolution of international organizations in the present and in the future.

II. CONSTITUENT INSTRUMENTS AS THE CONSTITUTIONS OF INTERNATIONAL ORGANIZATIONS

1. *Concept of Constitutions*

1. *On a formal level*, constituent instruments are agreements (treaties). Constituent instruments come into existence by being negotiated, signed, and ratified by States in the same manner as in the case of ordinary treaties. Constituent instruments are, therefore, treaties from the viewpoint of formal sources of international law. This means that constituent instruments are, in principle, governed by the law of treaties.¹⁴

2. *On a substantive level*, the constituent instruments of international organizations contain their *constitutions defined as those provisions that provide for the legal foundations and frameworks for the structures and activities of international organizations*. Among the various provisions, a distinction can be drawn between organizational provisions which "essentially relate, as their name implies, to the structure and operation of the institution" and substantive provisions which "are independent, in the sense that they would have a legal content even if the organization did not exist (albeit that the organization may have an important role to play in securing their observance)."¹⁵

According to the above definition of constitutions, organizational provisions in the constituent instruments are certainly their core provisions as the constitutions of international organizations. But it must also be pointed out that "not all provisions contained in these treaties are constitutional in nature, nor need all constitutional rules relating to an international institution be contained in such a document."¹⁶

The question of whether, among the various provisions in the constituent instruments, only organizational provisions are constitutional or some of the substantive provisions having a close relationship with the organizations are also constitutional is a difficult one. The answer would depend upon the exact meaning given to the term "constitutions." In

¹⁴ The relevant provision, in this connection, in the Vienna Convention on the Law of Treaties is Article 5 (cited later in the text of VI, B, 3). The point in this article is the content of "relevant rules of the organization." It is only outside the content and scope reserved by the relevant rules of the organization that the constituent instrument is governed by this Convention on the law of treaties.

¹⁵ Mendelson, *Reservations to the Constitutions of International Organizations*, 45 BRIT. Y. B. INT'L. L. 137, 145-46 (1971).

¹⁶ Hahn, *Constitutional Limitations in the Law of the European Organizations*, 108 RECUEIL DES COURS 196 (1963).

this article, we are attempting to clarify the interpretative framework of the constituent instruments of international organizations characterized as their constitutions from the viewpoint of "caractère constitutionnel (constitutional nature)." If so, the answer could be given only in the manner relative to what this constitutional nature is and whether a provision concerned has such a nature. It would be better, therefore, to reserve the possibility that some of the substantive provisions could be constitutional.

2. "Caractère Constitutionnel (Constitutional Nature)" of Constituent Instruments

The task of constituent instruments as the constitutions of international organizations is to provide for the legal foundations and frameworks for their structures and activities. Various characteristics have been pointed out as constitutional nature possessed by constituent instruments.¹⁷ The core of constitutional nature of constituent instruments, however, is the fact that constituent instruments provide for the legal foundations and framework for the structures and activities of international organizations *on the basis of their evolutionary and teleological interpretations so that, despite the changing international relations, international organizations could continue to efficiently function and effectively perform the given purposes and functions*. International organizations have been created because their purposes and functions cannot be achieved by the creation of simple norms of conduct by means of treaties, including multilateral law-making treaties. Their purposes and functions can be achieved only by the permanent operation of organizational entities. This implies that constituent instruments are always requested to be adapted to the changing circumstances for the purposes of efficient functioning and effective activities of international organizations.¹⁸ Simon pointed out, quite accurately, that it is the evolutionary nature of consti-

¹⁷ Monaco, for example, points out the following characteristics as constitutional nature possessed by the constituent instruments: (1) Unlimited Continuity: Their objectives pursued are not only of continual nature but also able to be attained only by means of a common action carried on for an indefinite time; (2) Necessity and Capacity of Adaptation: The unlimited continuity exposes constituent instruments to the erosive factors accompanying the lapse of time during which the constituent instruments are intended to be applied, thus subjecting them to the necessity of adaptation to an evolution of circumstances; (3) Necessity of Uniform Interpretation: The organs of international organizations as well as the contracting States interpret and apply, and at the same time are obliged to respect their constituent instruments; here it is necessary to establish a uniform interpretation; (4) Interpretation Method: One must reconcile the conventional origin of international organizations with their irresistible institutional tendency and, as a result, make reference to their purposes; (5) Superior Position: Constituent instruments tend to have a superior position to other treaties as are exemplified by Article 20 of the Pact of the League of Nations and Article 103 of the Charter of the United Nations. Monaco, *supra* note 10. See also the bibliography mentioned in *supra* note 8.

¹⁸ It is submitted that this point of the core of constitutional nature of constituent instruments is generally supported by the scholars mentioned in note 1, except Skubiszewski who is more cautious and says:

"[The similarities to the national constitutions] do not suffice to make it possible to approach the interpretation of the Charter along the lines and according to the patterns of national constitutions. *The Charter remains a treaty concluded by States, and what pertains to its interpretation is governed by the law of treaties*, unless the Charter itself lays down rules that deviate from that law. Analogies . . . call for great caution. The United Nations is composed of States which represent various views on the function of the constitution in their national spheres, in particular *the adaptation, through interpretation, of the constitutional framework to the changing circumstances and exigencies of life*. . . . The meaning of the word 'constitution' changes when transposed from the domestic to the international scene; it does not automatically carry with it the introduction of domestic patterns into the interpretation of the law of international organization." [Emphasis added]

tuent instruments which determines most clearly the irreducible specificity of constituent instruments and that the function of interpretation is to promote the institutional growth inscribed in the very logic of the organization.¹⁹

3. *Interpretative Framework of Constituent Instruments as the Constitutions of International Organizations*

1. Constituent instruments are, on a formal level, to be understood as treaties and, therefore, to be interpreted within the interpretative framework regulated by the law of treaties as codified by the Vienna Convention on the Law of Treaties (Articles 31 and 32). On the other hand, constituent instruments are, on a substantive level, the constitutions of international organizations and, therefore, subject to the influences of their dynamism. These two different interpretative frameworks could be contrasted in the following way.

2. *Within the interpretative framework as treaties*, the interpretation of constituent instruments understood as treaties have two characteristics. First, constituent instruments are interpreted as treaties within *the textual framework embodied by Articles 31 and 32*. Here the teleological approach can be used only within the four corners of the text. Secondly, the meanings of constituent instruments interpreted in such a manner will provide the foundations of, and control the structures and activities of, international organizations. Here is a *one-way relationship* from the constituent instruments toward the international organizations.

3. *Within the interpretative framework as the constitutions of international organizations*, on the other hand, the interpretation of constituent instruments understood as constitutions have two characteristics in contrast to those mentioned above. First, taking into consideration the structures and activities of international organizations understood as autonomous and dynamic entities of international law, constituent instruments are interpreted within the teleological framework so that their efficient functioning and effective activities could be assured and promoted. Here a predominant consideration is given to "efficiency" and "effectiveness" of international organizations to the extent that *the teleological reasoning deviates from the textual interpretative framework in the law of treaties*. It will have a harmful effect of destroying the regulating functions for legal stability which the textual interpretative framework now possesses for ordinary treaties to pretend that those teleological interpretations are still within the textual framework. We should frankly admit that those teleological interpretations deviate quantitatively from the framework of "interpretation"

Skubiszewski, *supra* note 1, at 892-93.

It is *the argument of the present author* that the practice of States, international organizations and the Court is *gradually* drifting away from such a conservative and State-centric position of Skubiszewski, which is quite similar to that of Tunkin referred to later in the text, and that it is now necessary to modify the interpretative framework of constituent instruments so that the dynamic operations of international organizations could be fully explained and controlled within it, although he does not intend to underestimate the fundamental role and importance of member States, as has been clearly indicated by the recent "crises" in several international organizations.

¹⁹ Simon, *supra* note 1, at 157-66. Despite his excellent analysis on the constitutional nature of constituent instruments based upon the various doctrines, Simon attempted to construct a sweeping doctrine which he calls "interprétation systématique." For its brief introduction, see my article, *supra* note 1, at 9-10. See also note 158.

and rather belong to the realm of "modification."

Secondly, there is a *two-way relationship* between the constituent instruments and the international organizations. On the one hand, the meanings of constituent instruments interpreted in such a teleological manner will certainly provide for the foundations of, and control the structures and activities of, international organizations. On the other hand, however, the practice of international organizations affects, by feed-back, the interpretations of constituent instruments, thus giving them an evolutionary nature. The practice of international organizations (particularly that of the political organs) which is to be based upon their constituent instruments will, to the contrary, have a legal value to be taken into consideration in their very interpretations. "Subsequent practice" of the organs of international organizations is given the legal value which deviates qualitatively from the textual interpretative framework in the law of treaties; on the one hand, "subsequent practice" admitted in the law of treaties is one which is clearly based upon the understanding of all the parties; on the other hand, however, in the operation of constituent instruments, weight is given not to the consent of all the member States but to the practice (activities) of international organizations. And this unilateral practice of international organizations will be gradually given the status of criterion in the evolutionary interpretation of their constituent instruments and, later, form "the rules of the organization" considered to be part of the constitutions. It will also have a harmful effect of bringing "modification" into the framework of "interpretation" and of destroying the regulating functions for legal stability which the interpretative framework now possesses for ordinary treaties to pretend that such a legal value given to the practice of the organs of international organizations is the same as that admitted in the law of treaties.

4. The constitutional nature of constituent instruments will be realized by means of the mechanism which combines the two characteristics explained above. In other words, the doctrine of constituent instruments as the constitutions of international organizations will, by means of teleological and evolutionary interpretations derived from the two characteristics, gradually actualize the dynamism inherent in international organizations.

III. TELEOLOGICAL REASONING IN THE INTERPRETATIVE FRAMEWORK OF CONSTITUENT INSTRUMENTS AS THE CONSTITUTIONS OF INTERNATIONAL ORGANIZATIONS

A. *"Principle of Effectiveness" within the Interpretative Framework in the Law of Treaties*

1. *General Rule of Interpretation*

1. As is quite well known, there are today three main schools of thought on the theory of interpretation,²⁰ which are the intentions of the parties approach, the textual approach and the teleological approach. These three approaches are not necessarily exclusive of one

another, and theories of treaty interpretation are normally compounded of all three. However, each tends to confer the primacy on one particular aspect of treaty interpretation, if not to the exclusion, certainly to the subordination of the others.²¹

2. The traditional controversies have been fought between the intentions of the parties approach and the textual approach. No one seriously denies that the aim of treaty interpretation is to give effect to the intentions of the parties, and the question is how is the desired end to be achieved and where is the authentic expression of these intentions primarily to be looked for. In other words, the question is a choice between what meaning is to be attributed to the text *in the light of the intentions of the parties* or what the intentions of the parties must be presumed to have been *in the light of the meaning of the text* they drew up.²²

The predominant place has been occupied by the textual approach.²³ This is, in fact, proved by the fact that Article 32 containing the recourse to the preparatory work of the treaty and other circumstances occupies, and is entitled "supplementary means of interpretation." The word "supplementary" emphasizes that Article 32 does not provide for alternative, autonomous, means of interpretation but only for means to aid an interpretation

²⁰ Among the vast literature on treaty interpretation, see, e.g., Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, 28 BRIT. Y. B. INT'L L. 1 (1951) (hereinafter cited as Fitzmaurice, 1951); ditto, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*, 33 BRIT. Y. B. INT'L L. 203 (1957) (hereinafter cited as Fitzmaurice, 1957); Jacobs, *Varieties of Approach to Treaty Interpretation: with Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference*, 18 INT'L & COMP. L. Q. 318 (1969); Report of the International Law Commission to the General Assembly, [1966] 2 Y. B. INT'L L. COMM'N 169, 218, U.N. Doc. A/6309/Rev. 1 (hereinafter cited as ILC Report (1966)).

²¹ Fitzmaurice, 1951, *supra* note 20, at 1. See also V. D. DEGAN L'INTERPRÉTATION DES ACCORDS EN DROIT INTERNATIONAL 67-148 (1963).

On the one hand, the teleological approach might be reduced to a variant of one of the two approaches. In so far as it relies on the objects and purposes of the treaty as they are expressed in the text (the preamble or the treaty as a whole), it could be a variant of the textual approach. In so far as it goes beyond the text and seeks to ascertain the original aims of the parties by reference to the entire course of negotiations and the other circumstances, it could be that of the subjective approach. It is said that recent developments in the teleological approach, particularly with respect to the constituent instruments of international organizations, would justify its inclusion as a separate category. Jacobs, *supra* note 20, at 319-20. See also I. VOICU, *DE L'INTERPRÉTATION AUTHENTIQUE DES TRAITÉS INTERNATIONAUX* 32 (1968).

On the other hand, a dominant approach in the United States has been such a teleological approach as to give much discretion to an interpreter in concrete cases by listing various sources of interpretation without establishing any order of priority among them (for example, the Draft Convention on the Law of Treaties prepared in 1935 as part of the Harvard Research in International Law, the Restatement of the Foreign Relations Law of the United States (1965), and the amendment submitted by the U.S.A. (Mr. McDougal) in the U.N. Conference on the Law of Treaties (1968)). This kind of teleological approach could easily lead to the justification of what an interpreter would regard as "objects and purposes" in his subjective judgment, which is quite convenient for a powerful State like the U.S.A. This approach is not accepted in the current international society as is shown by the fact that the amendment was rejected by an overwhelming majority. See, for this approach, McDougal, *The International Law Commission's Draft Articles upon Interpretation: Textuality redivivus*, 61 AM. J. INT'L L. 992 (1967); Rosenne, *Interpretation of Treaties in the Restatement and the International Law Commission's Draft Articles: A Comparison*, 5 COLUM. J. TRANSNAT'L L. 205, 229 (1966).

²² Fitzmaurice, 1957, *supra* note 20, at 204-07. See also G. HARASZTI, *SOME FUNDAMENTAL PROBLEMS OF THE LAW OF TREATIES* 28 (1973).

²³ In the International Law Commission (hereinafter cited as the Commission), [for example, the majority emphasized the primacy of the text as the basis for the interpretation of a treaty, while at the same time giving a certain place to extrinsic evidence of the intentions of the parties and to the objects and purposes of the treaty as means of interpretation. See ILC Report (1966), *supra* note 20, at 220, para. 11.

governed by the principles contained in Article 31.²⁴

3. Article 31 Paragraph 1 stipulates as follows:

“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

This paragraph is understood to include three principles: (1) Interpretation in good faith which flows directly from the rule *pacta sunt servanda*; (2) The parties are to be presumed to have that intention which appears from the ordinary meaning of the terms used by them; (3) The ordinary meaning of a term is not to be determined in the abstract but in the context of the treaty and in the light of its object and purpose.²⁵

2. Principle of Effectiveness

1. *In general:* Apart from an extreme teleological interpretation, methods of more or less teleological interpretations have been called by various names such as liberal interpretation, extensive interpretation, principle of effectiveness (l'effet utile, l'efficacité), *ut res magis valeat quam pereat*. These names do not seem to have been clearly defined and distinguished from one another.²⁶

In the first place, liberal or extensive interpretation could be analyzed in relation to the corresponding strict or restrictive interpretation. On a superficial level, it could be pointed out that neither extensive nor restrictive interpretation can be admitted; because the purpose of interpretation of treaties is the elucidation of the intentions of the contracting parties and their authentic expression is the text of treaties, it cannot be permitted *by definition* either to extend nor to restrict the text of treaties; extensive or restrictive interpretation is only the outcome of the interpreters' activities applying the various methods of interpretation.²⁷ However, it is on those occasions when various methods do not lead to the confirmed common will of the parties, leaving two or more interpretations of similar reasonableness that the principle of extensive or restrictive interpretation is put forward. In other words, these principles are important as a guiding principle for selection on these occasions.²⁸

Secondly, it could be argued that principle of effectiveness or *ut res magis valeat quam pereat* simply means that treaties have to be interpreted so that they become effective in

²⁴ The arguments on treaty interpretation in the Commission and the diplomatic conferences were mainly concerned with the status to be given to the preparatory work as means of treaty interpretation. As a consequence, criticisms against the Commission's draft articles are mainly on the adequacy of the status given to the preparatory work in Articles 31 and 32. See, e.g., Sharma, *The ILC Draft and Treaty Interpretation with Special Reference to Preparatory Works*, 8 INDIAN J. INT'L L. 367 (1968); Mehrish, *Travaux Préparatoires as an Element in the Interpretation of Treaties*, 11 INDIAN J. INT'L L. 39 (1971).

²⁵ ILC Report (1966), *supra* note 20, at 221, para. 12.

²⁶ Gutiérrez Posse, *La maxime ut res magis valeat quam pereat (Interprétation en fonction de l'effet utile)*, *Les Interprétation 'extensives' et 'restrictives'*, 23 ÖSTERREICHISCHE ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 229 (1972); LORD MCNAIR, *THE LAW OF TREATIES* 383 (1961).

²⁷ CH. DE VISSCHER, *PROBLÈME D'INTERPRÉTATION JUDICIAIRE EN DROIT INTERNATIONAL PUBLIC* 87–88 (1963); Haraszti, *supra* note 22, at 151–53.

²⁸ See, e.g., Haraszti, *id.* at 154–55.

practice rather than invalid or null and are, therefore, nothing more than an interpretation in good faith.²⁹ However, the choice is not between full effectiveness and utter frustration of the purpose of the treaty, but usually between a higher and a lower degree of effectiveness.³⁰ These principles suggest, it is understood, that as far as not clearly incompatible with the text of treaty provisions, an interpretation giving a higher degree of effectiveness should be chosen.

In sum, teleological interpretations such as extensive interpretation or principle of effectiveness should be understood as suggesting that, if the intentions of parties cannot be clearly confirmed and leave different reasonable interpretations, that interpretation giving a higher degree of effectiveness to the treaty provisions concerned should be chosen.

2. *The relationship between the principle of restrictive interpretation and the principle of effectiveness* has been exhaustively analyzed by Lauterpacht. On the one hand, the main explanation of the prominence of the rule of restrictive interpretation is that, because States are sovereign, restrictions upon the sovereignty of States cannot reasonably be presumed. On the other hand, however, Lauterpacht contended that the purpose of treaties is to limit the sovereignty of States in the particular sphere concerned and to lay down rules regulating conduct by restricting the freedom of action of States. If the parties, in a freely accepted treaty, go to the length of inserting a provision, it must be presumed that they intended that provision to be fully effective and its operation unhampered by restrictive rules.³¹

Scholars in ex-socialist countries had generally taken a stand in favor of the absolute priority of a restrictive interpretation from the viewpoint of respecting the sovereignty of States.³²

The jurisprudence of the Court might not necessarily have been clear on this point. However, it is said, the combination of the recognition of the principle of restrictive interpretation with the refusal to apply it in individual cases on the ground that the treaty is clear or that restrictive interpretation can be resorted to only if all other methods of interpretation have failed is a frequent feature of the jurisprudence of the Court.³³

²⁹ *Id.* at 166-67. In the same way, Degan explained as follows:

"Effective interpretation is not the same as extensive interpretation or construction. The opposite of an extensive interpretation is a restrictive one; and the opposite of effectiveness is non-effectiveness. The two ideas are quite different. Non-effectiveness is much more dangerous to the basic principle *pacta sunt servanda* than an extensive interpretation.

To give full effect to a treaty provision does not mean its broad interpretation. It means respect for the rights and obligations of the contracting parties, and consequently respect for the principle, *pacta sunt servanda*."

Degan, *Attempts to Codify Principles of Treaty Interpretation and the South-West Africa Case*, 8 INDIAN J. INT'L L. 9, 21 (1968).

³⁰ Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 BRIT. Y. B. INT'L L. 48, 69-70 (1949).

³¹ *Id.* at 57-58, 60-61. In the same way, Bernhardt contended as follows:

"The restrictive interpretation of treaty obligations with regard to State sovereignty is, in my opinion, even now no longer a generally accepted principle, and so it is rightly not to be found among the primary rules of interpretation."

Bernhardt, *Interpretation and Implied (Tacit) Modification of Treaties, Comments on Arts. 27, 28, 29 and 38 of the ILC's 1966 Draft Articles on the Law of Treaties*, 27 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHTS UND VÖLKERRECHT 491, 504 (1967).

³² Haraszti, *supra* note 22, at 156-57, 163-64.

³³ Lauterpacht, *supra* note 30, at 61.

See, for the argument supporting the application of the restrictive interpretation, the speech by M. de

3. *The problem in the present article is the degree of teleological reasoning in applying the principle of effectiveness which has been explicitly or implicitly resorted to in treaty interpretation. In other words, what is the relationship between the principle of effectiveness and the textual approach adopted as the general rule of interpretation? The answer is that a teleological reasoning could be used only within the four corners of the text interpreted by the textual approach.*

This problem can be clarified through the analysis of the drafting process of the relevant provision of the *Vienna Convention on the Law of Treaties*. Here, the special rapporteur, Waldock, contrary to the preceding rapporteurs, always kept in mind the problems posed by constituent instruments, and made reference to them in a suggestive manner. In his third report, Waldock proposed the following article.³⁴

“Article 72. Effective interpretation of the terms
(ut res magis valeat quam pereat)

In the application of articles 70 and 71 [the general rules of interpretation based upon the textual approach] a term of a treaty shall be so interpreted as to give it the fullest weight and effect consistent:

(a) with its natural and ordinary meaning and that of the other terms of the treaty;
and

(b) with the objects and purposes of the treaty.”

Waldock explains, in the commentary, that he hesitated for two reasons to propose the inclusion of the principle of “effective” interpretation among the general rules. First, there is some tendency to equate and confuse “effective” with “extensive” or “teleological” interpretation, and to give it too large a scope. Secondly, “effective” interpretation, correctly understood, may be said to be implied in interpretation made in good faith. Properly limited, it does not call for “extensive” or “liberal” interpretation in the sense of an interpretation going beyond what is expressed or necessarily implied in the terms.³⁵

On balance, however, Waldock thought it desirable to include the principle, properly limited, in the draft articles. He thought it desirable for two reasons to formulate it in a separate article.

“The first is that the principle has special significance as the basis upon which it is justifiable to imply terms in a treaty for the purpose of giving efficacy to an intention necessarily to be inferred from the express provisions of the treaty. The second is that in this sphere—the sphere of implied terms—there is a particular need to indicate the proper limits of the application of the principle if too wide a door is not to be opened to purely teleological interpretations. *The point is of particular consequence in the inter-*

Lapradelle, Advisory Opinion on Competence of the International Labour Organization in the Matter of the Regulation of Conditions of Work of Persons Employed in Agriculture, [1922] P.C.I.J., ser. C, No. 1, at 174–75; The S. S. “Wimbledon,” [1923] P.C.I.J., ser. A, No. 1, at 37; The S. S. “Lotus,” [1927] P.C.I.J., ser. A, No. 10, at 18.

See, for the argument cautious in applying this approach, The S. S. “Wimbledon,” [1929] P.C.I.J., ser. A, No. 1, at 24–25; Territorial Jurisdiction of the International Commission of the River Oder, [1929] P.C.I.J., ser. A, No. 23, at 26.

³⁴ Waldock, *Third Report on the Law of Treaties*, [1964] 2 Y. B. INT’L L. COMM’N 52–53, U.N. Doc. A/CN.4/167 and Add. 1–3.

³⁵ *Id.* at 60, para. 27.

pretation of constituent treaties of international organizations and although those treaties, by their functional nature, may legitimately be more subject to teleological interpretations, there is evidently some limit to what may be deduced from them and still be considered 'interpretation.'"³⁶ [Emphasis added]

It was in the light of these considerations that draft article 72 had been formulated so as to make the principle of effectiveness subject to (a) the natural and ordinary meaning of the terms and (b) the objects and purposes of the treaty. This formulation, Waldock thought, while containing the principle of effectiveness within the four corners of the treaty, still leaves room for such measure of teleological interpretation as can legitimately be considered to fall within the legal boundaries of interpretation.³⁷

Draft article 72 was unpopular with the members of the Commission and was ultimately deleted.³⁸ It seems, therefore, that Waldock's intention indicated in the commentary was not well appreciated by the members. The final draft articles contained the expression "in the light of its object and purpose" in the article of general rule of interpretation. The attitude of the Commission on this point can be found in the commentary of the final draft articles:

"Properly limited and applied, the maxim does not call for an 'extensive' or 'liberal' interpretation in the sense of an interpretation going beyond what is expressed or necessarily to be implied in the terms of the treaty. Accordingly, it did not seem to the Commission that there was any need to include a separate provision on this point. Moreover, to do so might encourage attempts to extend the meaning of treaties illegitimately on the basis of the so-called principle of 'effective interpretation.'" ³⁹

4. This status of the principle of effectiveness—the degree of its teleological reasoning and the relationship with the textual approach—indicated in the above analysis is fundamentally confirmed by the *jurisprudence of the Court*. It seems that the Court has subordinated the principle of effectiveness to that of the textual and natural meaning, in the sense that it is never legitimate, even with the object of giving maximum effect to a text, to interpret it in a manner actually contrary to, or not consistent with, its plain meaning.⁴⁰

³⁶ *Id.* at 61, para. 29.

³⁷ *Id.* at para. 30.

³⁸ Summary Records of the 766th Meeting, [1964] 1 Y. B. INT'L L. COMM'N 288-91, paras. 69-120.

³⁹ ILC Report (1966), *supra* note 20, at 219, para. 6.

It is quite natural, in this connection, that Schreuer mentioned the "preponderant inclination towards the objective method" of the Vienna Convention and pointed out as follows:

"[The effect of the 'object and purpose' doctrine is] very much restricted by their being linked with the provision concerning the ordinary meaning of the terms in their context, which is then defined in the subsequent paragraph very narrowly."

Schreuer, *The Interpretation of Treaties by Domestic Courts*, 45 BRIT. Y. B. INT'L L. 255, 274, 279 (1971).

⁴⁰ Fitzmaurice, 1957, *supra* note 20, at 223. He specifically pointed out as follows:

"The main problem with regard to the principle of effectiveness is to keep it within bounds, to prevent it from leading to judicial legislation (its natural tendency being teleological), and to preserve a due proportion between it and the textual principle. The Court has shown itself aware of this necessity, and has indicated the limits of the principle of effectiveness, and its subordination, in case of conflict, to that of the natural meaning." [Emphasis added]

Fitzmaurice, 1951, *supra* note 20, at 19.

It was in the *Peace Treaties* case (2nd Phase) that the Court, after stating that it was "the duty of the Court to interpret the Treaties, not to revise them," went on:

"The principle of interpretation expressed in the maxim: *ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which . . . would be contrary to their letter and spirit."⁴¹

Judge Read did not think that the interpretation he favored would do violence to the terms of the Peace Treaties, and argued in his dissenting opinion that, of the two technically possible constructions, that one should be adopted which would give the treaty its maximum effect, or at any rate prevent it from being deprived of due effect.⁴² It was, however, by an overwhelming majority of eleven votes to two that the Court rejected the contention by Judge Read.

B. Teleological Reasoning in the Interpretative Framework of Constituent Instruments as the Constitutions of International Organizations

*1. An Overview of Principal Doctrines of the Interpretative Framework of Constituent Instruments*⁴³

1. Current principal doctrines upon the interpretative framework of the constituent instruments of international organizations could, for analytical convenience, be classified into

⁴¹ Advisory Opinion on Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase), [1950] I. C. J. 229.

⁴² *Id.* at 236-45.

In this connection, the following opinion of McNair is suggestive as indicating that the application of the principle of effectiveness is limited within the framework of the general rule of interpretation mainly based upon the textual approach.

"Many treaties fail—and rightly fail—in their object by reason of the words used, and tribunals are properly reluctant to step in and modify or supplement the language of the treaty. . . .

No doubt the general object of the parties to these treaties was to provide some arbitral machinery for the solution of disputes but—either inadvertently or because the parties were unable to agree—they had not inserted in the treaties the provision which would have been necessary to make the arbitration obligatory."

LORD MCNAIR, *THE LAW OF TREATIES* 383-84 (1961).

It should be pointed out in this connection that even Lauterpacht who emphasized the importance of the principle of effectiveness recognized in the same way the limit of application of this principle by saying:

"[The principle of effectiveness] is a principle which can give life and vigour to an intention which is controversial, hesitant, or obscure. It cannot be a substitute for intention; it certainly cannot claim to replace it."

Lauterpacht, *supra* note 30, at 83-84.

⁴³ See, for the introduction of the principal doctrines from the viewpoint of the principle of implied powers, my article *Constituent Instruments of International Organizations and Their Interpretative Framework*, 14 HITOTSUBASHI J. L. & POLITICS 1, 11-21 (1986).

the following *three categories*.⁴⁴ Various doctrines would be located upon the continuum between the extreme first position and the extreme third position. The majority of scholars in western countries seem to be in the second category.

2. The first category could be named *Strict Framework of the Law of Treaties*. Doctrines in this category would, focusing upon the constituent instruments as treaties, understand the functions and powers of international organizations restrictively as only being deduced from the treaties (constituent instruments) within the strict framework of textual treaty interpretation. Here included are most of the scholars in the ex-socialist countries (probably up to the 1970s or 1980s) such as Tunkin, Prandler⁴⁵ and Haraszti,⁴⁶ as well as Kelsen⁴⁷ and Hackworth.⁴⁸

Tunkin, for example, based upon the understanding that a constituent instrument is "the result and an expression of the coordinated wills of participating States," criticized the Court's formulation of the legal principle of implied powers as alleging a rule of international law to the effect that additional powers "essential" for the performance of the duties of an international organization are always implied. Tunkin contended:

"[T]he 'implied competence' of an international organization may be admitted in each particular case only to the extent to which it may be considered as actually implied in the provisions of the statute of the organization but not on the basis of a specific rule of international law on the implied competence."⁴⁹

3. The third category could be named *Liberal Position Free from the Law of Treaties*. Doctrines in this category would, focusing upon the evolutionary aspect of international organizations, understand their functions and powers only from the viewpoint of their efficient and effective functioning rather than from that of their being controlled by their constituent instruments. Here included are Alvarez and Seyersted, and not many others.

Alvarez, in his individual opinion in the advisory opinions with respect to the *Conditions of Admission* case (1948) and the *Competence of the General Assembly* case (1950), developed his idea of "New International Law"⁵⁰ and contrasted "New System of Interpretation" with "Old System of Interpretation."⁵¹ From these considerations, the legal nature of international organizations was presented as follows:

"[A]n institution, once established, acquires a life of its own, independent of the ele-

⁴⁴ See also Fitzmaurice, *The Law and Procedure of the International Court of Justice: International Organizations and Tribunals*, 29 BRIT. Y. B. INT'L L. 1, 6 (1952).

⁴⁵ Prandler, *Competence of the Security Council and the General Assembly*, in QUESTIONS OF INTERNATIONAL LAW 153 (G. Haraszti ed. 1977).

⁴⁶ Haraszti, *supra* note 22, at 171-73.

⁴⁷ H. Kelsen, *THE LAW OF THE UNITED NATIONS, A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS* 329-30 (1950). But see DITTO, *RECENT TRENDS IN THE LAW OF THE UNITED NATIONS* 911-12 (1951).

⁴⁸ See *infra* note 67.

⁴⁹ Tunkin, *The Legal Nature of the United Nations*, 119 RECUEIL DES COURS 25 (1966). See also G. TUNKIN, *THEORY OF INTERNATIONAL LAW* 325 (W. E. Butler trans. 1974).

⁵⁰ Advisory Opinion on Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), [1948] I. C. J. 69-70. See also A. ALVAREZ, *LE DROIT INTERNATIONAL NOUVEAU DANS SES RAPPORTS AVEC LA VIE ACTUELLE DES PEUPLES* (1959); Johnson, *Review of Books: Le Droit international nouveau dans ses rapports avec la vie actuelle des peuples*. By Alejandro Alvarez, 35 BRIT. Y. B. INT'L L. 274 (1959).

⁵¹ Advisory Opinion on Competence of the General Assembly for the Admission of a State to the United Nations, [1950] I. C. J. 16-18.

ments which have given birth to it, and it must develop, not in accordance with the views of those who created it, but in accordance with the requirements of international life."⁵²

Seyersted, on the other hand, advocated the theory of inherent powers of international organizations based upon the various kinds of their practice such as organic jurisdiction, capacity to conclude treaties, territorial jurisdiction and other international acts.⁵³ He contended:

"[I]ntergovernmental organizations, like States, have an inherent legal capacity to perform any 'sovereign' or international acts which they are in a practical position to perform."⁵⁴

4. The second category could be named *Functional Framework Based upon the Law of Treaties*. Most of the current doctrines in the western countries would belong to this category. While basing the functions and powers of international organizations upon their constituent instruments, they give a great role to the functional necessity caused by the inherent dynamism of international organizations. Bowett, for example, contended:

"It was a fairly common view during the early tentative days of the United Nations, that it could only exercise powers specifically granted to it under its constitution. The constitution was a finite instrument which contained the full total of powers delegated by the founding sovereign States to the international organization. While this static view has been persisted in by a minority of jurists, it has generally come to be acknowledged that international constitutional instruments are to be interpreted dynamically, and that the powers of an international organization may go beyond those specifically allocated to it."⁵⁵

The guiding principle in interpreting the Charter of the United Nations has evolved from the static to the dynamic (at least in the western countries). It is noted, however, that there are still different groups in terms of level of flexibility in this category—the question whether one can imply only such powers as arise by necessary intendment from the constitutional provisions or whether a more liberal approach is permissible so that powers relating to the purposes and functions specified in the constitution can be implied.⁵⁶

⁵² *Conditions of Admission case*, *supra* note 50, at 68.

⁵³ Seyersted, *United Nations Forces, Some Legal Problems*, 37 BRIT. Y. B. INT'L L. 351, 448–53 (1961).

⁵⁴ Seyersted, *Objective International Personality of Intergovernmental Organizations, Do Their Capacities Really Depend upon the Conventions Establishing Them?*, 34 NORDISK TIDSSKRIFT FOR INTERNATIONAL RET, ACTA SCANDINAVICA JURIS GENTIUM 1, 28 (1964).

⁵⁵ D. BOWETT, UNITED NATIONS FORCES, A LEGAL STUDY OF UNITED NATIONS PRACTICE 307–08 (1964). See also L. GOODRICH, THE UNITED NATIONS 68–74 (1960); DITTO, THE UNITED NATIONS IN A CHANGING WORLD 36 (1974).

⁵⁶ D. BOWETT, THE LAW OF INTERNATIONAL INSTITUTIONS 337–38 (4th ed. 1982).

Some of the various doctrines could be classified in the following way.

(1) Those scholars who base themselves upon the reasoning of "logical presupposition" would be relatively closer to the strict position: H. SCHERMERS, INTERNATIONAL INSTITUTIONAL LAW 208–09 (1980); McMahon, *The Court of the European Communities Judicial Interpretation and International Organizations*, 37 BRIT. Y. B. INT'L L. 320 (1961).

(2) Many scholars would be content with reiterating the reasoning and framework used by the Court in the *Reparation case*: R. KAHN, IMPLIED POWERS OF THE UNITED NATIONS 33 (1970); see also G. WEISSBERG,

5. Now *some comments upon these doctrines* could be presented as follows.

The first comment is with respect to the *Liberal Position*. Alvarez's argument based upon "New International Law" is, although suggestive on the level of idea, unable to be applied to actual cases as an argument *lex lata*. In the *Competence of the General Assembly* case (1950), Alvarez claimed that the General Assembly may still determine whether or not the right of veto has been abused and, if the answer is in the affirmative, it can proceed with the admission without any recommendation by the Security Council. This view was, however, specifically criticized by the Court.⁵⁷ Thus, his argument is, in its concrete application, more an argument *de lege ferenda*, or, in Samore's stern expression, "a house of cards."⁵⁸

The theory of inherent powers advocated by Seyersted cannot be accepted without reservation either. It is, among others, because constituent instruments are drawn not only in terms of purposes but also of functions, and States thereby establish a principle of the limitation of the functional means.⁵⁹ This is what the Court has pronounced in several cases.

6. The second comment is with respect to the *Strict Framework*. It is certainly not easy to ignore the following statement based upon the realistic recognition of the actual political structure.

"It was clear from the beginning that the United Nations as an inter-State organization and as an organization of peaceful coexistence of States belonging to different social and economic systems might be effective and might successfully develop only on the basis of consensus among member States and first of all that of the great powers.

The tendency to impose upon the United Nations certain practices in violation of the basic provisions of the Charter . . . have caused great tensions and brought the Organization to the verge of a breakdown."⁶⁰

On the other hand, the position of this category has some room to be criticized.⁶¹ Among others, it is not evident to what extent Tunkin would accept as constitutional the various kinds of practice of international organizations which Seyersted mentioned above. In any way, those scholars in the ex-socialist countries are expected, in accordance with the changing attitude of their countries toward international organizations, to come close to the position of the second category.

THE INTERNATIONAL STATUS OF THE UNITED NATIONS 24 (1961), and B. ROUYER-HAMERAY, *LES COMPÉTENCES IMPLICITES DES ORGANISATIONS INTERNATIONALES* 68 (1962).

(3) Those scholars who give more considerations to the practice of international organizations would be closer to the liberal position: Vallat, *The Competence of the United Nations General Assembly*, 97 *RECUEIL DES COURS* 203, 249-50 (1959); Bowett, *supra* note 56, at 338; ditto, *supra* note 55, at 309.

⁵⁷ *Competence of the General Assembly* case, *supra* note 51, at 9.

⁵⁸ Samore, *The New International Law of Alejandro Alvarez*, 52 *AM. J. INT'L L.* 41, 54 (1958).

⁵⁹ See, e.g., *Reparation* case, *supra* note 4, at 180; Advisory Opinion on Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), [1962] *I. C. J.* 168 (1962); Rama-Montaldo, *International Legal Personality and Implied Powers of International Organizations*, 44 *BRIT. Y. B. INT'L L.* 111, 119-20 (1970); Seidl-Hohenveldern, *The Legal Personality of International and Supranational Organizations*, 21 *REVUE ÉGYPTIENNE DE DROIT INTERNATIONAL* 35, 41-42 (1965).

⁶⁰ Tunkin, *supra* note 49, at 28.

⁶¹ Kelsen's argument, for example, has been criticized by Schachter. Schachter, *Review, The Law of the United Nations*, 60 *YALE L. J.* 189, 192-93 (1951).

7. The third comment is with respect to the *Functional Framework*. As was pointed out, the doctrines in this category are also divided among themselves in terms of the level of flexibility. This would originate in the different judgments with respect to the relative weights to be assigned respectively to the treaty aspect and the constitutional aspect of constituent instruments.⁶² It seems, however, fair on the whole to conclude that these doctrines in this category of the functional framework would, in contrast to the doctrines in the strict framework, deviate from the textual interpretative framework of the law of treaties, which subordinates the principle of effectiveness to that of the textual and natural meaning by restricting the scope of the principle of effectiveness within the four corners of the text. The doctrines in the strict framework represented by Tunkin now occupies a small minority in the world, and the United Nations and other universal organizations are operated, based upon the voting rule of the majority, although modified by the recent practice of consensus, in the functional interpretative framework.

2. *An Analysis of the Jurisprudence of the International Court of Justice*⁶³

1. The examination of the relevant judgments and advisory opinions of the Court indicates *certain fundamental features* if not a systematic theory. Some of them will be concisely pointed out below.

The first point is *the primary importance of the treaty (constituent instrument) text*. If the treaty text is sufficiently clear at all, then, in most cases, it would not cause a controversy or dispute among States. Even if a dispute has arisen, the Court would only apply a textual approach. In the *Competence of the General Assembly* case (1950), for example, because of the clarity of the relevant text (Article 4, Paragraph 2 of the Charter), the Court applied the textual approach quasi-unanimously except for two judges who developed arguments *de lege ferenda*. It was all the more impressive because the six judges who, in the *Conditions of Admission* case (1948), dissented and criticized the textual approach of the majority, joined the textual approach of the majority in the present case. Thus, when the treaty text is sufficiently clear on an inter-subjective basis, respect of the treaty text would

⁶² The Commission, in its commentary attached to the draft articles on the law of treaties, pointed out the importance of this judgment by saying:

“[Principles and maxims of treaty interpretation] are, for the most part, principles of logic and good sense valuable only as guides to assist in appreciating the meaning which the parties may have intended to attach to the expressions that they employed in a document. Their suitability for use in any given case hinges on a variety of considerations which have first to be appreciated by the interpreter of the document. . . . Even when a possible occasion for their application may appear to exist, their application is not automatic but depends on the conviction of the interpreter that it is appropriate in the particular circumstances of the case. In other words, recourse to many of these principles is discretionary rather than obligatory and the interpretation of documents is to some extent an art, not an exact science.”

ILC Report 218, para. 4 (1966).

⁶³ The present author has attempted, in another article, a systematic analysis of the 16 relevant judgments and advisory opinions of the Court. The jurisprudence was examined for the purpose of clarification of the characteristics in the reasoning of judges by means of comparison between the majority opinion and the separate opinion (separate and dissenting opinions). Only the main conclusions reached there will be reproduced here in the text. See my article, *Interpretation Process of Constituent Instruments of International Organizations (II)* [in Japanese], 19 HOGAKU KENKYU (HITOTSUBASHI UNIVERSITY) [LAW & POLITICS] 3, 164–79 (1989).

become a dominant factor irrespective of whether the consequence of the textual approach would promote the efficient functioning and the effective activity of international organizations.⁶⁴

2. The second point is related to *the guiding principle and the various concrete methods of interpretation*. The guiding principle, under the reservation of the primary importance of the treaty text mentioned above, is to promote the effectiveness of international organizations. The Court reasoned in such a way with respect to the following issues among others: (1) the capacity to exercise a measure of functional protection of the agents in the *Reparation* case (1949); (2) the power to establish a judicial tribunal competent to render judgments binding on the United Nations in the *Effect of Awards* case (1954); (3) the budgetary authority of the General Assembly with respect to the development of the peace-keeping operations in the *Certain Expenses* case (1962); (4) the competence of the General Assembly to exercise the supervisory functions with regard to mandated territories in the *Status of South-West Africa* cases (1950, 1955, 1956); (5) the support of the Court for the good functioning of the ICAO in the *ICAO* case (1973); (6) the obligation for the WHO and the host State to co-operate in good faith to promote the objectives and purposes of the WHO in the *WHO* case (1980); (7) the task of assisting international organizations for their stability and efficiency in the *Review of Judgment (No. 273)* case (1982).

On the other hand, the variety of interpretation methods used in concrete cases must be pointed out. The Court, under the guiding principle of promoting the effectiveness of international organizations, applied either the teleological approach or the textual approach whenever the occasion required. For example, it relied on the textual in the *Conditions of Admission* case (1948), but on the teleological in the *Reparation* case (1949); in

⁶⁴ Rosenne takes a similar position in this regard. According to Rosenne, examination of the major cases of interpretation of the constituent instrument in the International Court since 1945 shows that two broad categories of interpretative problems have been encountered, namely those which did not, and which did turn upon the issue of the attribution of competences, whether between the individual States and the organization, or as between organs of the organization. In the first type of case, relating to subjective rights of States, the issue with which the Court is seen to have been confronted was one which, in the last analysis, related to the subsumed treaty element of the constituent instrument and turned on the Court's interpretation of the intentions of the negotiating States. Here the Court has proceeded in a fairly conservative manner and based itself on the ascertainable or presumed intentions of those States as expressed in the text or derived from it. In the second class of case, the Court has completely passed over any subsumed treaty element (and therefore disregarded as irrelevant the intentions of the parties to that treaty, assuming those intentions to be ascertainable), and has proceeded directly to an interpretation of the constituent instrument as it stands at the time of the interpretation. What is important here is that, before doing this, a preliminary question is set whether an answer is provided directly by the constituent instrument itself, that instrument being 'interpreted' by application of the usual exegetical techniques if necessary. If this preliminary question is answered in the affirmative, the substantive conclusion will follow logically and that is the end of the matter. But if the answer is in the negative, resort is legitimately had to all the resources of the interpretative—and not merely exegetical—techniques. Rosenne pointed out three major characteristic elements in this connection: (1) lack of interest in the intentions of the original members with corresponding disinterest in the *travaux préparatoires*; (2) analysis of the function of the provision in question in the context of the constituent instrument as a whole, with particular stress on the relations between the different organs of the organization according to the constituent instrument, and on the practice of those different organs; (3) a powerful—yet politically highly controversial—teleological approach which reflects more the 'ought' than the 'is' of the constituent instrument. He seems a bit critical on this last point when he says that, unless (as in the *Reparation* case) it is backed by a unanimous or virtually unanimous Court, this last factor is the most controversial and, as experience has shown, the most unproductive in the political sense and the most prejudicial to the authority of the Court. Rosenne, *supra* note 1, at 234–37.

the *Effect of Awards* case (1954), on the textual for finding the judicial nature of the Administrative Tribunal, but on the teleological for the competence of the General Assembly to establish it; in the *Status of South-West Africa* cases, on the teleological for the competence to exercise the supervisory functions (1950), but on the textual in the *Voting Procedure* case (1955) and on the teleological in the *Admissibility of Hearings* case (1956); partly on the textual in the *South-West Africa* case (1962), but on the teleological in the *Namibia* case (1971).

It is, therefore, wrong to connect the constituent instruments of international organizations with the teleological approach of interpretation in a simplified manner. It is noted here that the textual approach could lead to the promotion of the effectiveness of international organizations depending on the content of the text itself.

3. The third point is related to *the existence of the confrontation with respect to the interpretative framework of constituent instruments*. It can be concluded that the same confrontation with that mentioned in the doctrines appeared among the judges in the Court. On the one hand, those judges who hold to the liberal position free from the law of treaties have been few (such as Alvarez and Azevedo) and had little effect upon the jurisprudence. On the other hand, the confrontation between the strict framework of the law of treaties and the functional framework based upon the law of treaties has appeared in most of the issues presented to the Court. Some typical examples are given as follows: (1) the majority opinion against the dissenting opinions (such as Hackworth) in the *Reparation* case (1949); (2) the majority opinion against the dissenting opinions (such as Hackworth) in the *Effect of Awards* case (1954); (3) the majority opinion against the separate opinions (McNair and Read) with respect to the competence of the General Assembly to exercise the supervisory functions in the *Status of South-West Africa* case (1950); (4) the majority opinion against the dissenting opinions (such as de Visscher) in the same case; (5) the majority opinion against the dissenting opinions (such as Fitzmaurice) in the *Namibia* case (1971); (6) Those claiming the application of, and those claiming the non-application of, Article 37 in the *WHO* case (1980).

The fact that these and other similar confrontations have appeared in regard to the interpretative framework of constituent instruments in the Court, and that the functional framework has been applied by the majority in most cases,⁶⁵ clearly demonstrates the following point; in those cases, the question was whether to apply such "interpretations" of the relevant provision(s) which were nothing but the modification of their texts in the light of the textual interpretative framework in the law of treaties; and the victory of the func-

⁶⁵ An exception is the confrontation over the existence of the obligation to take part in negotiations with a view to concluding an agreement in the *Status of South-Africa* case (1950). In his dissenting opinion, de Visscher, although he conceded that the relevant Charter provisions do not impose the Union of South Africa a legal obligation to conclude an agreement, did recognize the existence of the obligation mentioned above. By referring to the interpretation of the text of a treaty of a constitutional character like the United Nations Charter, he contended as follows:

"[O]ne must bear in mind that in the interpretation of a great international constitutional instrument, like the United Nations Charter, the individualistic concepts which are generally adequate in the interpretation of ordinary treaties, do not suffice."

Advisory Opinion on International Status of South-West Africa, [1950] I. C. J. 189.

The majority opinion responded by applying a textual approach (*Id.* at 139-40). It is to be noted that the Court refrained from stepping out of the textual approach by a slight majority of eight votes to six.

tional framework indicates that the interpretation of constituent instruments has begun to be governed by the interpretative framework which allows such degree of teleological reasoning as to deviate from that of ordinary treaties.^{66,67}

⁶⁶ In the opinion of Gross, the Court has the duality of the function: the advisory or United Nations function corresponding to its role of a principal organ, and the contentious function corresponding to its role of organ of international law, to which also corresponds the duality of the approach shown by the Court's behaviour in the application of international law. In the latter capacity the Court seems to have accepted and even fortified the consensual nature of customary international law and, following the positivist theory, applied international law as it found it. In the former capacity the Court, particularly when applying and interpreting the Charter or instruments closely related to the United Nations such as the Mandate for South West Africa, the Court appears to have adopted a dynamic or progressive, if not a frankly teleological, approach. This statement seems to correspond to the distinction between the textual interpretative framework of ordinary treaties and the functional interpretative framework of constituent instruments as the constitutions of international organizations developed in the present article. The point in his statement, however, seems to be to indicate that most of the judgments based on positive international law have been respected and accepted, and that many of the advisory opinions where the Court has displayed judicial boldness amounting to judicial legislation have been remarkably less successful. In other words, the application of the principle of effectiveness in legal interpretation leads to the paradoxical consequence of the ineffectiveness in the actual political settlement of disputes. Therefore, Gross emphasizes the importance of State parties' consent in the current decentralized international society, and is critical on the teleological tendency in the reasoning of the Court. Gross, *The International Court of Justice and the United Nations*, 120 RECUEIL DES COURS 313, 320-22, 370-71, 413 (1967), *reprinted in* L. GROSS, *ESSAYS ON INTERNATIONAL LAW AND ORGANIZATION* 845 (1984). The fact that advisory opinions based upon the teleological approach tend to lack political effectiveness certainly warns us against a hasty conclusion in appreciating to what extent the functional framework of constituent instruments distinguished from the textual framework of ordinary treaties has been accepted by States as *lex lata*.

⁶⁷ This point could be clarified by introducing some typical criticisms of the dissenting or separate opinions (the textual approach) against the majority opinions (the teleological approach).

In the *Reparation* case (1949), it was Hackworth who criticized the teleological approach of the majority opinion from the textual viewpoint by saying:

"There can be no gainsaying the fact that the Organization is one of delegated and enumerated powers. It is to be presumed that such powers as the Member States desired to confer upon it are stated either in the Charter or in complementary agreements concluded by them. Powers not expressed cannot freely be implied. Implied powers flow from a grant of expressed powers, and are limited to those that are 'necessary' to the exercise of powers expressly granted. . . ."

Reparation case, *supra* note 4, at 198.

In the *Certain Expenses* case (1962), Winiarski criticized the teleological approach of the majority opinion by saying:

"The Charter, a multilateral treaty which was the result of prolonged and laborious negotiations, carefully created organs and determined their competence and means of action.

The intention of those who drafted it was clearly to abandon the possibility of useful action rather than to sacrifice the balance of carefully established fields of competence. . . .

The same reasoning applies to the rule of construction known as the rule of effectiveness (*ut res magis valeat quam pereat*) and, perhaps less strictly, to the doctrine of implied powers."

Certain Expenses case, *supra* note 59, at 230.

In the *Namibia* case (1971), it was Fitzmaurice who criticized the teleological approach of the majority both in this case and in the *Status of South-West Africa* case (1950) by saying:

"[The reasoning of the Court in 1950 was characterized by an ellipsis.] Holding that the reporting obligation was an essential part of the mandates system, and must survive if the system itself survived, the Court went on to hold that *therefore* it survived as an obligation to report specifically to the Assembly of the United Nations. This last leg of the argument not only lacked all logical rigour and necessity but involved an obvious fallacy,—which was the reason for the dissenting views expressed by Judges Sir Arnold McMillar... and Read—dissenting views with which I agree."

Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), [1971] I. C. J. 234.

VI. LEGAL SIGNIFICANCE OF THE PRACTICE OF INTERNATIONAL ORGANIZATIONS IN THE INTERPRETATIVE FRAMEWORK OF CONSTITUENT INSTRUMENTS AS THE CONSTITUTIONS OF INTERNATIONAL ORGANIZATIONS

A. "Subsequent practice" of State Parties in the Interpretative Framework in the Law of Treaties

1. It is widely recognized that subsequent practice of the parties in the application of the treaty has an importance as an element of interpretation because it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty.⁶⁸ This point is well recognized by the Court as well.⁶⁹

The probative value of subsequent practice varies according as it shows the *common* understanding of the parties as to the meaning of the terms. It is said, however, that the practice of an individual State may have special cogency when it relates to the performance of an obligation which particularly concerns that State.⁷⁰

2. Waldock kept in mind the constituent instruments of international organizations in connection with this principle. Waldock drew attention to the problem although he did not attempt to analyze it as this is a question outside the law of treaties. He stated:

"Certain of the cases in which the Court has had recourse to subsequent practice have concerned the interpretation of the constitutions of international organizations. The most notable is its recent Opinion on Certain Expenses of the United Nations, in which the Court made a large use of the subsequent practice of organs of the United Nations as a basis for its findings on a number of points. The problem of the effect of the practice of organs of an international organization upon the interpretation of its constituent instrument raises an important constitutional issue as to how far individual Member States are bound by the practice. Although the practice of the organs as such may be consistent, it may have been opposed by individual Members or by a group of Members which have been outvoted. This special problem appears to relate to the law of international organizations rather than to the general law of treaties. . . ."⁷¹

⁶⁸ See, e.g., McMair, *supra* note 42, at 424; Harvard Law School, *Research in International Law*, 29 AM. J. INT'L L., SUPPLEMENT 966 (1935); de Visscher, *supra* note 27, at 121-27; 46 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 359, 365 (1956).

⁶⁹ See, e.g., Advisory Opinion on Competence of the International Labour Organization in Regard to International Regulation of the Condition of Labour of Persons Employed in Agriculture, [1922] P.C.I.J., ser. B, No. 2, at 39; Corfu Channel case, [1949] I. C. J. 25.

⁷⁰ Waldock, *supra* note 34, at 59, para. 24. See Advisory Opinion on International Status of South-West Africa [1950] I. C. J. 135-36.

⁷¹ Waldock, *supra* note 34, at 59-60, para. 24a.

It is Waldock's idea, therefore, that, in the interpretation of the constituent instruments of international organizations, the subsequent practice of *State parties* has probative value in relation to them, whereas the relationship between the subsequent practice of the *organs* and the constituent instruments will not be prejudiced by the Convention on the Law of Treaties.⁷²

3. The process of amendment through subsequent practice is legally quite different from that of interpretation although the line between them may be sometimes blurred. As is pointed out by Waldock,⁷³ however, subsequent practice when it is consistent and embraces all the parties would appear to be decisive of the meaning to be attached to the treaty. Here subsequent practice as an element of treaty interpretation and that as an element in the formation of a tacit agreement overlap and the meaning derived from the practice becomes an authentic interpretation established by agreement. Furthermore, if the interpretation adopted by the parties diverges from the natural and ordinary meaning of the terms, there may be a blurring of the line between the interpretation and the amendment of a treaty by subsequent practice.⁷⁴

Waldock dealt with the interpretation in his draft article 71 and the amendment in article 73, as he thought that these two should be distinguished. In the discussion of the Commission, most of the members thought that article 73 dealt with the modification of treaties and should not be placed in the section concerning the interpretation of treaties.⁷⁵ This provision was redrafted as such and adopted in the final draft articles as "Article 38. Modification of treaties by subsequent practice"⁷⁶ which stipulated as follows:

"A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions."⁷⁷

In the diplomatic conference in 1968, however, this draft article was deleted after some

⁷² Some members emphasized that, in the interpretation of constituent instruments, subsequent practice, if not of the organs but of the individual member States, has a great importance. For de Luna, see Summary Records of the 766th Meeting, *supra* note 38, at 285, para. 39. Lachs stated:

"[I]n international organizations, changes could be brought about by way of practice and interpretation in such a manner as to give certain provisions of the constituent instrument a meaning which was very remote from that envisaged by the parties at the time of signature. . . . It was also worth remembering that the original parties to the Charter were now outnumbered by the States that had acceded to the Charter since 1945. It would be going too far to claim that the original signatories had a greater say in the interpretation of the Charter than the majority. The burden of the operation of a treaty, in the light of the realities of international relations, fell upon all its signatories; there was therefore no reason for giving a higher standing to the intentions of the original parties in the matter of interpretation."

Id. at 286, para. 46.

⁷³ Waldock, *supra* note 34, at 60, para. 25.

⁷⁴ See Decision of the Arbitration Tribunal Established Pursuant to the Arbitration Agreement Signed on January 22, 1963, between the United States of America and France, Decided at Geneva on December 22, 1963, 3 INT'L LEGAL MATERIALS 668, 713 (1964). Here the Tribunal found that the Agreement had been modified in a certain respect by the subsequent practice.

⁷⁵ Summary Records of the 766th Meeting, *supra* note 38, at 291, 296-98, paras. 121-22, 134-59.

⁷⁶ *Id.* at 309, para. 3, and 318, para. 49.

⁷⁷ ILC Report (1966), *supra* note 20, at 236.

discussion⁷⁸ which does not seem to give any clear idea on this point.⁷⁹

4. Based upon these considerations, some comments could be added.

The first point is related to the nature of subsequent practice. The subsequent practice in Paragraph 3 (b) of Article 31 (General Rule of Interpretation) is "concordant subsequent practice common to all the parties,"⁸⁰ in other words, an implied consent.⁸¹ The subsequent practice which does not fall within this narrow definition would constitute a supplementary means of interpretation within the meaning of Article 32.

The second point is whether the intention of the parties clarified through their subsequent practice is that at the time of the conclusion of the treaty, in other words whether subsequent practice could be relied upon only in so far as it reflects the original intention of the parties at the conclusion of the treaty or not.

An affirmative answer might be presented.⁸² In fact, the Permanent Court, in the *Interpretation of the Treaty of Lausanne* case (1925), stated:

"The facts subsequent to the conclusion of the Treaty of Lausanne can only concern the Court in so far as they are calculated to throw light on the intention of the parties at the time of the conclusion of that treaty."⁸³

In this regard, however, it is pointed out that the school which would search for the original intention of the parties, considering that all that the negotiators concluded is found in the treaty and that the function of the interpreter is limited to the elucidation of the original intention of the parties, is now in regression, and that the jurisprudence relating to the subsequent practice refers to the original meaning only as lip service.⁸⁴ It is at least to

⁷⁸ UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES, FIRST SESSION, VIENNA, 26 MARCH—24 MAY 1968, UNOR 207-15, 215, para. 60 (1969).

⁷⁹ Jacobs, in this connection, contended as follows:

"[W]hile the failure to give subsequent practice a prominent position in the rules of interpretation would effectively have precluded its use in a case to which the Convention applies, the omission of an article providing for modification by subsequent practice will not preclude a party from relying on a general rule of international customary law recognizing such modification, as evidenced by State practice and the decisions of international tribunals."

Jacobs, *supra* note 20, at 332. See also Yasseen, *L'interprétation des traités d'après la Convention de Vienne sur le droit des traités*, 151 RECUEIL DES COURS I, 51 (1976).

⁸⁰ I. SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 138 (2nd ed. 1984).

⁸¹ Yasseen, who was a member of the Commission, stated that subsequent practice in Paragraph 3 (b) of Article 31 means "a tacit authentic interpretation" and that it includes, as element of the general rule of interpretation, not subsequent practice in general, but only those subsequent practices which are not only concordant, but also common to all the parties and of a certain constance.

Yasseen, *supra* note 79, at 48, 52. This is supported by the following Commentary:

"The text provisionally adopted in 1964 spoke of a practice which 'establishes the understanding of all the parties.' By omitting the word 'all' the Commission did not intend to change the rule. It considered that the phrase 'the understanding of the parties' necessarily means 'the parties as a whole.' It omitted the word 'all' merely to avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice."

ILC Report (1966), *supra* note 20, at 222, para. 15.

⁸² Haraszti, *supra* 22, at 143-44.

⁸³ Advisory Opinion on Interpretation of Article 3 (2) of the Treaty of Lausanne, [1925] P.C.I.J., ser. B, No. 12, at 24.

⁸⁴ Cot, *La conduite subséquente des parties à un traité*, 70 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC (hereinafter cited as R.G.D.I.P.) 632, 647, 651-53 (1966). See also Jacobs, *supra* note 20, at 329.

be noted that subsequent practice mentioned in Paragraph 3 (b) of Article 31 (General Rule of Interpretation) includes only such practice as to signify an implied consent above mentioned, and that, to that extent, it will not be relevant to the question of the possible legal effect of this practice whether the implied consent concerned would be the same with the original intention of the parties or not. In case that this implied consent signified in subsequent practice would not be compatible with the text, it goes out of "interpretation" and into "modification" through subsequent practice provided in the draft article 38. At any rate, the existence of an implied consent will be a conclusive element in the determination of a meaning given to the provision concerned.

Thirdly, there remains a question of what effect would belong to the subsequent practice which does not signify an implied consent of the parties as a whole. This will become an important problem in the interpretation of constituent instruments particularly in relation to the appreciation of subsequent practice of the organs.

In this connection, Fitzmaurice has proposed the theory of 'emergent purpose.'⁸⁵ According to this theory, the notion of object or purpose is itself not a fixed and static one, but is liable to change, or rather develop as experience is gained in the operation and working of the convention. At any given moment, the convention is to be interpreted not so much, or not merely, with reference to what its object was when entered into, but with reference to what that object has since become and now appears to be. It is important, however, that this is a question of modification through subsequent practice, rather than of interpretation.⁸⁶

B. "Subsequent Practice" of the Organs of International Organizations in the Interpretative Framework of Constituent Instruments as the Constitutions of International Organizations

The interpretative framework of constituent instruments as the constitutions of international organizations recognizes that subsequent practice of their organs affects by feedback the interpretation of their constituent instruments and has a legal value to be taken into consideration. The legal value given to the subsequent practice of the organs is qualitatively different from that given to the subsequent practice of State parties in the interpretative framework in the law of treaties analyzed above. The practice of the organs is given a legal value which is more than an auxiliary means in the interpretation, and is not necessarily confined to those which signify an implied consent of all the State parties

⁸⁵ Fitzmaurice, 1957, *supra* note 20, at 208. See also Fitzmaurice, 1951, *supra* note 20, at 8, n. 2.

⁸⁶ Fitzmaurice stated as follows:

"[I]f . . . it is, in the language of the Court, the duty of a tribunal 'to interpret treaties, not to revise them,' it is equally the duty of a tribunal to interpret them *as revised*, and to give effect to any revision arrived at by the parties. In the last analysis, it seems to be a matter chiefly of the nature and weight of the evidence required to establish the existence of such a revision, whether it results from writing or from practice. Looked at in this way, a legitimate place can be found for the doctrine of 'emergent purpose' . . . not as a theory of interpretation, but as a substantive rule of treaty law affecting the revision of treaties"

Id. at 225.

of the constituent instruments.

Here in this part, we will first examine to what extent this phenomenon can be explained under general international law. Secondly, we will analyze some cases in which the status of criterion in the interpretation of constituent instruments has been given to the practice of the organs. Thirdly, we will see some law-making treaties in which the practice of the organs forms "the rules of the organization" considered to be part of the constitution. Finally, procedural rules of the interpretation provided in constituent instruments will be examined to see what role the practice of the organs could actually have in the determination of their meanings.

1. Analysis under General International Law

1. In some economic international organizations,⁸⁷ as is analyzed below, the competence of authoritative interpretation of their constituent instruments is expressly given to the internal political organs. In these cases, therefore, the mechanism that the practice of the organs would determine the meaning of their constituent instruments is furnished in advance. In other words, it is legally recognized by the member States that the practice of the organs affects their constituent instruments.

2. The problem remains for the cases where, as is in most international organizations, the competence of authoritative interpretation is not given to an internal organ political or judicial, and the practice of the organs does not constitute an implied agreement nor form a customary international law within international organizations. Some useful elements, although insufficient, could be suggested in these cases.

The first point is the presumption of validity of the practice (resolutions) of the organs. The Court, in the *Certain Expenses* case, stated:

"[W]hen the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the Organization, the presumption is that such action is not *ultra vires* the Organization."⁸⁸

Similarly, the Court, in the *Namibia* case, stated:

"A resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ's rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted."⁸⁹

The legal foundation for this position might not be clear and rather only "purely jurisprudential."⁹⁰ In the activities of international organizations, however, this presump-

⁸⁷ See, e.g., Gold, *The Interpretation by the International Monetary Fund of Its Articles of Agreement*, 3 INT'L & COMP. L. Q. 256 (1954); Hexner, *Interpretation by Public International Organization of Their Basic Instruments*, 53 AM. J. INT'L L. 341 (1959); Fawcett, *The Place of Law in an International Organization*, 36 BRIT. Y. B. INT'L L. 321 (1960); Gold, *Interpretation by the International Monetary Fund of Its Articles of Agreement—II*, 16 INT'L & COMP. L. Q. 289 (1967); Mann, *The 'Interpretation' of the Constitutions of International Financial Organizations*, 43 BRIT. Y. B. INT'L L. 1 (1968-69).

⁸⁸ *Certain Expenses* case, *supra* note 59, at 168.

⁸⁹ *Namibia* case, *supra* note 67, at 22.

⁹⁰ Thierry, *Les résolutions des organes internationaux dans la jurisprudence de la Cour internationale de Justice*, 167 RECUEIL DES COURS 385, 422 (1980).

tion of validity will play a great role in their smooth operation.

The second point is the relevance of judicial review. Where there is a compulsory and exclusive machinery of review, the practice of the organs should be treated as legal by all the member States.⁹¹ Because any State which considers otherwise is competent to have recourse to the court, it is reasonable to regard non-recourse as the recognition of validity of the practice concerned. Where there is no such machinery, however, the situation will remain at the presumption of validity above mentioned.

The third point is acquiescence, estoppel and lapse of time.⁹² These are not the same concepts but they all work in such a way as to prevent dissenting member States from submitting objections to the validity of the practice concerned. Acquiescence and lapse of time, in particular, would play a great role in those cases where controversies are not serious enough to cause a dispute among member States.

By means of these factors, such practice of the organs as not to constitute an agreement or a customary rule among the member States will have certain legal significance in the determination of meanings of constituent instruments. This means, on the contrary, that there still remains the problem in those cases where the practice is adopted against some member States which submit objections and protest if not withdraw from the organization.

2. *Practice of the Organs of International Organizations as Criterion in the Interpretation of their Constituent Instruments*

1. The growing value attached to the actual practice of the organs of international organizations has been a point of issue in the *Certain Expenses* case. In this Advisory Opinion, the majority opinion relied upon the practice of the United Nations in interpreting such concepts as "budget," "expenses" and "action." Judge Spender, in his separate opinion, criticized this reference:

"[I]t is not possible to equate 'subsequent conduct' with the practice of an organ of the United Nations. Not only is such an organ not a party to the Charter but the inescapable reality is that both the General Assembly and the Security Council are but the mechanisms through which the Members of the United Nations express their views and act. The fact that they act through such an organ, where a majority rule prevails and so determines the practice, cannot, it seems to me, give any greater probative value to the practice established within that organ than it would have as conduct of the Members that comprise the majority if pursued outside of that organ."⁹³

2. It is E. Lauterpacht who analyzed the jurisprudence of the Court on this point. Based upon an exhaustive analysis of the jurisprudence,⁹⁴ Lauterpacht reached the following conclusion:

⁹¹ Lauterpacht, *The Legal Effect of Illegal Acts of International Organizations*, in CAMBRIDGE ESSAYS IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF LORD MCNAIR 88, 115 (1965).

⁹² *Id.* at 117-20.

⁹³ *Certain Expenses* case, *supra* note 59, at 192.

⁹⁴ The relevant parts of the jurisprudence of the Court which Lauterpacht mentioned are, in addition to some statements in the *Certain Expenses* case (1962) referred to in the text, and several other less important cases omitted here, the following: the *Conditions of Admission* case, [1948] I. C. J. 63; the *Reparation* case, [1949] I. C. J. 179; the *Competence of the General Assembly* case, [1950] I. C. J. 9; the *Judgment of the ILO Administrative Tribunal* case, [1956] I. C. J. 91; the *IMCO* case, [1960] I. C. J. 167-70; the *Namibia* case, [1971] I. C. J. 22.

"It is probably necessary to recognize that recourse to the practice of international organizations now stands on an independent legal basis; that is to say, that there exists a specific rule of the law of international organization to the effect that recourse to such practice is admissible and that States, on joining international organizations, impliedly accept the permissibility of constitutional development in this manner."⁹⁵

It is said that this proposition rests on two grounds. The first is the fact that the courts and the organizations themselves accept practice in this way. The second ground is that consideration of the traditional bases such as subsequent practice, particular modes of change (agreement, acquiescence and estoppel) and general modes of change (development of a customary law of the organization) on which reference to such practice might otherwise be justified produces no satisfactory answer. This being so, Lauterpacht says, one arrives in a situation in which one must conclude either—as does Judge Spender—that there is no legal basis for reference to the practice of organs of an organization; or that such reference rests on an independent legal basis.⁹⁶

3. This question, in the opinion of the present writer, must be approached with caution by examining the nature of the practice concerned; first, what is the nature of the competence which the organ concerned has with regard to the content of the practice concerned; secondly, whether the practice concerned is a collective practice of the organ itself or can it be reduced to the sum of individual practice of the member States of the organ.

With respect to the first point, it is widely recognized that resolutions concerned with the internal working of international organizations have legally binding or other full legal effects.⁹⁷ Therefore, as to the sphere of internal working, the legal value attached to the practice of the organs could be based upon the competence of the organs to make legally binding decisions.

With respect to the second point,⁹⁸ the examples of the jurisprudence concerned need a careful examination.

In some cases, the Court seems to emphasize the aspect of individual practice of the member States. In the relevant part of the *Namibia* case, the Court stated that members of the Council, in particular its permanent members, "have consistently and uniformly

⁹⁵ Lauterpacht, *The Development of the Law of International Organization by the Decisions of International Tribunals*, 152 RECUEIL DES COURS 379, 460 (1976).

⁹⁶ *Id.* at 460–64.

⁹⁷ Virally, *La valeur juridique des recommandations des organisations internationales*, 2 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL (hereinafter cited as A.F.D.I.) 66, 70–77 (1956); Skubiszewski, *Enactment of Law by International Organizations*, 41 BRIT. Y. B. INT'L L. 198, 226–32 (1965–66); DI QUAL, LES EFFETS DES RÉOLUTIONS DES NATIONS UNIES 62–70 (1967); J. CASTAÑEDA, LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS 22–69, esp. 30–48 (A. Amoia trans. 1969).

⁹⁸ In this connection, Charpentier admits the formation of a customary rule in the institutional framework which is different from that of an interstate customary rule. Because States intervene here, says Charpentier, as component of the competent organ and not as subjects of interstate juridical order, it would be to misunderstand the logic of the organization to regard the custom formed by the precedents coming from organs of the organization as being interstate. However, he also admits that, so far as the customary rule formed in such a manner is in contradiction with the constituent instrument, the consent of the member States must be sought, although the scope of them will be loosened to that of Article 108 of the Charter. Charpentier, *Tendances de l'élaboration du droit international public coutumier*, in L'ÉLABORATION DU DROIT INTERNATIONAL PUBLIC 105, 119–23 (1975). See also Ferrari Bravo, *Méthodes de recherche de la coutume internationale dans la pratique des Etats*, 192 RECUEIL DES COURS 233, 297–99 (1985).

interpreted . . .” and that “[t]his procedure . . . has been generally accepted by Members of the United Nations and evidences a general practice of that Organization.” These expressions would suggest that the Court, in recognizing the existence of a customary rule in the Organization, based its finding upon the individual practice of member States of the United Nations, in particular the permanent members of the Council rather than upon the practice of the Council as a collective practice of an organ.⁹⁹

Even in the *Certain Expenses* case, there are certain cases where the distinction is not clear between a collective practice of an organ and an individual practice of member States. As is shown by such expressions as the Financial Regulations of the United Nations “adopted by unanimous vote,” a statement “adopted without opposition,” a resolution “adopted without a dissenting vote” and a description of the functions of UNEF concurred in by the General Assembly “without a dissenting vote,” the Court seems to emphasize the support of all the member States as far as possible.

On the other hand, there are certainly other cases where it is impossible to reduce the practice of the organs to that of member States. In such cases as adoption of rules of procedure, conclusion of conventions by the United Nations, decisions by the organs in matters of admission, a document submitted under the authority of, and a statement made by the Director-General with respect to the contract of employment, election of two Council members by the Assembly upon registered tonnage and adoption of the budget including various items and expenses, these various practices could only be regarded as a collective practice of the organs.

It is important in this connection, however, that most of these practices are concerned with the internal working of the organizations concerned. In the last analysis, the controversial cases among these are those in the *Certain Expenses* case.¹⁰⁰ This is why Judge Spender

⁹⁹ See also Reuter, *Quelques réflexions sur la notion de 'pratique internationale,' spécialement en matière d'organisations internationales*, in *STUDI IN ONORE GIUSEPPE SPERDUTI* 187, 203 (1984).

¹⁰⁰ How should one appreciate the practice of the organs in the *Certain Expenses* case. The majority opinion is presumed to have considered that the United Nations has, by Article 17 of the Charter, the competence to assign the expenses that it regards to be those of the U.N. to the member States. With regard to the scope of “expenses” as well, it seems to have recognized the competence of the General Assembly for their decision because it seems to have judged the legality of PKO (and of their expenses) in the light of the will of the General Assembly. The following criticism will be useful here.

“If the brilliant reasoning of the Court does not convince one fully, this may be explained by the fact that in order to find an answer to the Assembly’s question, the Court relied heavily on the words used by the Assembly in the resolutions which were put in question by the request for the advisory opinion. The impression seems inescapable that the Court’s reasoning was addressed not primarily to the question put to it but to another question which, to make the point clear, might be formulated as follows: Do the expenses authorized in a number of General Assembly resolutions relating to UN operations in the Congo . . . and . . . to operations of the UN Emergency Force . . . constitute in the view of the General Assembly expenses of the Organization? This question, however, was not before the Court; yet a great deal of the Court’s reasoning and of the argument by governments appears to have been addressed to it.” [Emphasis original]

Gross, *Expenses of the United Nations for Peace-Keeping Operations: The Advisory Opinion of the International Court of Justice*, 17 *INT’L ORGANIZATION* 1, 17–18 (1963).

“In relying on the ‘practice’ of the Assembly the Court assumed that both budget and expenses can be defined generally and *ad hoc* by a two-third majority of the Assembly with binding effect for all members. The Assembly could thus require all Members to pay for the execution of resolutions which, as was recognized by the Court, were themselves lacking binding force. . . .

[However i]t is the consensus of the membership which determines what is the budget and what are

criticized the majority opinion with so much severity.

If the phenomenon is accepted that the legal value as criterion in the interpretation of constituent instruments is given to the collective practice of the organs in the sphere outside the internal working of the organizations, as seems to be the case in the *Certain Expenses* case, this will lead to the existence of a customary rule inherent to international organizations, which recognizes a constitutional development in such a manner. Although this has become a central issue in the Court, the Court and the organizations themselves seem to accept this manner of reasoning.

3. *Evolutionary Practice of International Organizations Reflected upon Some Law-Making Treaties*
—with particular reference to the notion
“relevant rules of the organization”—

1. It has been gradually recognized in the law-making treaties with regard to international organizations that subsequent practice of the organs of international organizations could affect by feed-back the interpretation of their constituent instruments and has a legal value to be taken into consideration. Here, it is not merely a constituent instrument which constitutes the legal foundation of an international organization, but a “constitution” comprising the rules in force in the organization. And “relevant rules of the organization” which form part of the constitution have been considered to include an evolutionary practice of the international organization. Some examples will be briefly analyzed below because the author has already dealt with this problem elsewhere¹⁰¹ in depth.

2. *The Vienna Convention on the Law of Treaties* (1969) contains Article 5 (Treaties constituting international organizations and treaties adopted within an international organization) which provides as follows:

“The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.”

the expenses of a particular organization at any given time, and not the majority vote of a representative body.”

Gross, *supra* note 66, at 391–92.

The situation developed after this Advisory Opinion in the following way. Those States which had refused the assignment of the expenses concerned by the Assembly refused to accept the Advisory Opinion and continued to refuse to make the payment. While, as a result, the application of sanction provided in Article 19 became possible, the Assembly took an exceptional step of deciding not to take votes in the 19th session from political considerations. The problem was “solved” only when, in the Special Committee on Peace-keeping Operations, an agreement was reached that the question of the applicability of Article 19 would not be raised with regard to the UNEF and the ONUC, and others. This series of developments seems to indicate that the criticism of Gross cannot be easily rejected. See UNITED NATIONS, *REPERTORY OF PRACTICE OF UNITED NATIONS ORGANS*, SUPPLEMENT NO. 3, VOLUME 1, ARTICLES 1–22 OF THE CHARTER 395–99 (1972). See also Castañeda, *supra* note 97, at 48; T. M. FRANCK, *NATION AGAINST NATION* 259 (1985). But see Zoller, *The ‘Corporate Will’ of the United Nations and the Right of the Minority*, 81 AM. J. INT’L L. 610, 615–20 (1987).

¹⁰¹ Sato, *Status of Constituent Instruments of International Organizations in the Law of Treaties—With Particular Reference to the Notion ‘Relevant Rules of the Organization’*—, 16 HITOTSUBASHI J. L. & POLITICS 25 (1988).

The commentary attached to this article in the final draft articles adopted by the International Law Commission succinctly explains the *raison-d'être* of this article as follows:

"The draft articles, as provisionally adopted . . . , contained a number of specific reservations with regard to the application of the established rules of an international organization. . . . [The Commission considered that insertion of a general reservation provision of the same sense in the present place] was desirable in case the possible impact of rules of international organizations in any particular context of the law of treaties should have been inadvertently overlooked."¹⁰²

In the Vienna diplomatic conference, it was emphasized by the observers of some international organizations that "relevant rules" should include "the practice" or "the established practices." Waldock (Expert Consultant), in a related discussion, stated that the Commission had considered that the words "any relevant rules" were intended to include both rules laid down in the constituent instrument and rules established in the practice of the organization as binding.¹⁰³ This position was accepted by the conference.

3. *The Vienna Convention on the Representation of States in their Relationship with International Organizations of a Universal Character* (1975) contains Article 3 (Relationship between the present articles and the relevant rules of international organizations) which provides as follows:

"The application of the present articles is without prejudice to any relevant rules of the organization."

In the Vienna diplomatic conference, El-Erian (Expert Consultant) explained the *raison-d'être* of this article by stating that the Commission was concerned not to hamper in any way the development of their own rules by international organizations, bearing in mind that the law of international organizations was in constant evolution.¹⁰⁴ Furthermore, at the final stage of the conference, it was decided that an express definition should be given to the term "rules of the Organization." Article 1, (34) of the Convention provides as follows:

"['R]ules of the Organization' means, in particular, the constituent instruments, relevant decisions and resolutions, and established practice of the Organization."

4. *The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations* (1986)¹⁰⁵ contains Article 6 (Capacity of inter-

¹⁰² Report on the International Law Commission to the General Assembly, U.N. Doc. A/6309/Rev. 1, [1966] 2 Y. B. INT'L L. COMM'N 169, 191.

¹⁰³ Summary Records of the 10th meeting, at 57, para. 40, in UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES, OFFICIAL RECORDS, FIRST SESSION, 1968.

¹⁰⁴ Summary Records of the 3rd meeting, at 81, para. 62, in 1 UNITED NATIONS CONFERENCE ON THE REPRESENTATION OF STATES IN THEIR RELATIONS WITH INTERNATIONAL ORGANIZATIONS, OFFICIAL RECORDS, 1976.

¹⁰⁵ Some of the bibliography concerning this convention are the following: Zemanek, *The United Nations Conference on the Law of Treaties Between States and International Organizations or Between International Organizations: The unrecorded history of the 'general agreement,'* in VÖLKERRECHT, RECHT DER INTERNATIONALEN ORGANISATIONEN, WELTWIRTSCHAFTSRECHT, FESTCHRIFT FÜR IGNAZ SEIDL-HOHENVELDERN 665 (K.-H. Böckstiegel, H.-E. Folz, J.M. Mössner, K. Zemanek eds. 1988); Reuter, *La conférence de Vienne sur*

national organizations to conclude treaties) which provides as follows:

“The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization.”

The commentary attached to this article in the final draft articles explains the *raison-d'être* of this article as follows:

“It should be clearly understood that the question of how far practice can play a creative part, particularly in the matter of international organization's capacity to conclude treaties, cannot be answered uniformly for all international organizations. This question, too, depends on the ‘rules of the organization’. . . . [I]t must be admitted that international organizations differ greatly from one another as regards the part played by practice and the form which it takes, *inter alia* in the matter of their capacity to conclude international agreements. . . . For these reasons, practice as such was not specifically mentioned in article 6; practice finds its place in the development of each organization in and through the ‘rules of the organization,’ as defined in article 2, subparagraph 1 (j), and that place varies from one organization to another.

. . . In matters such as the capacity to conclude treaties, which are governed by the rules of each organization, there can be no question of fixing those rules as they stand at the time when the codification undertaken becomes enforceable against each organization. In reserving the practice of each organization in so far as it is recognized by the organization itself, what is reserved is not the practice established at the time of entry into force of the codification but the very faculty of modifying or supplementing the organization's rules by practice to the extent permitted by those rules. Thus, without imposing on the organizations the constraint of a uniform rule which is ill-suited to them, article 6 recognizes the right of each of them to have its own legal image.”¹⁰⁶

The term “rules of the organization” was defined in Article 2, para. 1, (j) as follows: “‘rules of the organization’ means, in particular, the constituent instruments, relevant decisions and resolutions, and established practice of the organization.” The commentary adds a following explanation concerning the significance of practice.

“[B]y referring to ‘established’ practice, the Commission seeks only to rule out uncertain disputed practice; it is not its wish to freeze practice at a particular moment in an organization's history.”¹⁰⁷

In the Vienna diplomatic conference,¹⁰⁸ the conflict between the socialist countries which

les traités des organisations internationales et la sécurité des engagements conventionnels, in DU DROIT INTERNATIONAL AU DROIT DE L'INTEGRATION, LIBER AMICORUM PIERRE PESCATORE 545 (F. Capotorti, C.-D. Ehlermann, J. Frowein, F. Jacobs, R. Joliet, T. Koopmans, R. Kovar eds. 1987); Riphagen, *The Second Round of Treaty Law*, *id.* at 565; Morgenstern, *The Convention on the Law of Treaties between States and International Organizations or between International Organizations*, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY, ESSAYS IN HONOUR OF SHABTAI ROSENNE 435 (Y. Dinstein & M. Tabori eds. 1989); do Nascimento e Silva, *The 1969 and the 1986 Conventions on the Law of Treaties: A Comparison*, *id.* at 461.

¹⁰⁶ Report of the International Law Commission on the Work of Its Thirty-Fourth Session (3 May–23 July 1982), [1982] 2–2 Y. B. INT'L L. COMM'N 1, 24 U.N. Doc. A/37/10.

¹⁰⁷ *Id.* at 21.

¹⁰⁸ See Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, U.N. Doc. A/CONF. 129/15.

revealed their distrust of international organizations and the western countries led to the compromise based upon two amendments: inserting in the preamble the following statement; and adding, in the definition of "rules of the organization" of Article 2, para 1, (j), "adopted in accordance with the constituent instruments" after "decisions and resolutions."¹⁰⁹

"Recognizing that the practice of international organizations in concluding treaties with States or between themselves should be in accordance with their constituent instruments."

5. With respect to these conventions, two observations could be made. First, in drafting conventions regulating the status and activities of international organizations, the necessity has been consistently recognized that the relevant rules of the organization should be taken into account and that they should prevail over the general rules to be adopted. The *raison-d'être* of those provisions explained above was to safeguard the relevant rules of the organization and to avoid hampering the development of the rules by each organization, keeping in mind that the law of international organization is in constant evolution.

Secondly, the focus in the present context is on whether "relevant rules of the organization" can include practice in the process of being established, in other words the very faculty of supplementing the organization's rules by practice. In contrast to the 1969 Convention and the 1975 Convention which do not seem to be clear on this point, the 1986 Convention could be considered to give a positive reply. The Commission made it clear that it was not its wish to freeze practice at a particular moment in an organization's history. This position seems to have been basically maintained in the diplomatic conference.

4. *Interpretative Procedures of Constituent Instruments* —Organs of International Organizations as Principal Interpreters of Constituent Instruments—

1. The norm system that presents itself as a legal order, says Kelsen, has essentially a dynamic character. A legal norm is not valid because it has a certain content, that is, because its content is logically deducible from a presupposed basic norm, but because it is created in a certain way—ultimately in a way determined by a presupposed basic norm.¹¹⁰ If so, problems of who is to interpret, and how to interpret and apply a norm is inevitably combined with a substantive problem of the content of the norm concerned. The interpretation of law always leaves some room, more or less, for discretion and involves a value judgment of the interpreter in selecting one of several meanings possible within the frame set by a norm concerned. Equally in the interpretation of treaty, who is to interpret it is an important factor in determining the meaning of a treaty provision.

The effects of treaty interpretation could be arranged, from the viewpoint of inter-

¹⁰⁹ Yachi, *United Nations Conference on the Law of Treaties between States and International Organizations* (in Japanese), 84–85 KOKUSAIHO GAIKO ZASSI (THE JOURNAL OF INTERNATIONAL LAW AND DIPLOMACY) 374, 376 (1986).

¹¹⁰ H. Kelsen, *PURE THEORY OF LAW* 198 (2nd ed. M. Knight trans. 1967).

preters, in the following way. Treaties are generally interpreted and applied by the State parties themselves. As a result of sovereign equality, a unilateral interpretation by a State party will not bind the other State parties. It is of course possible that this State party might be bound for the future because of the effect of estoppel and otherwise based upon the unilateral interpretation concerned. At any rate, unilateral interpretations could lead to a confrontation of interpretations or a dispute among States. It is only when there exists an agreement in advance or later among the States concerned that a single meaning is legally established by the interpretation of an international tribunal.

Authentic interpretation will come into existence when a unilateral interpretation is accepted by the other State parties or when all the State parties adopt the same interpretation in common. Authentic interpretation signifies an existence of agreement among the State parties, and, based upon the principle of *ejus est interpretari cujus est condore*, the distinction between interpretation and modification tends to be blurred.

In the case of constituent instruments, the organs of international organizations will also interpret and apply those provisions related to their activities as an indispensable process of their operation. In these circumstances, it is necessary to analyze the legal effects attributed to these interpretations by the organs and the institutional mechanism through which different and conflicting interpretations are to be unified. These cannot be analyzed in abstract but only upon the examination of specific relevant provisions of various constituent instruments and the actual operation of these provisions. Because of the limited space, only major conclusions are pointed out here.¹¹¹

2. Variety in Interpretative Procedures: The examination of specific relevant provisions of various constituent instruments indicates that the procedures stipulated by these provisions are various. In other words, the interpretative procedures are different in accordance with the functions and nature of each international organization, and do not permit a single conclusion. It is necessary, therefore, to analyze, from one organization to another, the possible influence exerted by the interpreters.

In the United Nations,¹¹² there is no provision related to interpretation of the Charter.

¹¹¹ The present author has attempted, in another article, a systematic analysis of specific relevant provisions of various constituent instruments and the actual operation of these provisions. As is indicated by the following notes, there is a large bibliography on this problem. However, they concern more or less individual organizations and a comprehensive and synthetic analysis has never been attempted. See my article, *Interpretation Process of Constituent Instruments of International Organizations (III)* [in Japanese], 21 HOGAKU KENKYU (HITOTSUBASHI UNIVERSITY) [LAW & POLITICS] 73-180 (1990).

¹¹² Some of the useful bibliography are the following: Pollux, *supra* note 1; L. KOPELMANAS, L'ORGANISATION DES NATIONS UNIES 253-78 (1947); Vallat, *The Competence of the United Nations General Assembly* 97 RECUEIL DES COURS 203, 207-13 (1959); D. NINČIĆ, THE PROBLEM OF SOVEREIGNTY IN THE CHARTER AND IN THE PRACTICE OF THE UNITED NATIONS 322-26 (1970); Conforti, *Le rôle de l'accord dans le système des Nations Unies*, 142 RECUEIL DES COURS 203 (1974); D. CIOBANU, PRELIMINARY OBJECTIONS RELATING TO THE JURISDICTION OF THE UNITED NATIONS POLITICAL ORGANS 153-79 (1975).

From the viewpoint of problems of *ultra vires*, see also Osieke, *The Legal Validity of Ultra Vires Decisions of International Organizations*, 77 AM. J. INT'L L. 239 (1983); ditto, 'Ultra-Vires' Acts in International Organizations—The Experience of the International Labour Organization, 48 BRIT. Y. B. INT'L L. 259 (1976-77); ditto, *The Exercise of the Judicial Function with Respect to the International Labour Organization*, 47 BRIT. Y. B. INT'L L. 315 (1974-75); ditto, *Unconstitutional Acts in International Organizations: The Law and Practice of the International Civil Aviation Organization (ICAO)*, 28 INT'L & COMP. L. Q. 1 (1979); ditto, *Admission to Membership in International Organizations: The Case of Namibia*, 51 BRIT. Y. B. INT'L L. 189 (1980).

However, the final report in the San Francisco Conference¹¹³ indicates that the competence of authoritative interpretation was not given to any member State nor any organ, and that the procedure to assure an unified interpretation of the Charter was left unresolved. This situation has not been changed in actual practice and is to be entrusted to the procedures under general international law, namely agreement and acquiescence.¹¹⁴

In the Specialized Agencies and IAEA¹¹⁵ (excluding economic international organizations), an institutional procedure has been adopted whereby interpretation or conflict resolution with regard to the constituent instruments is first attempted by the internal political organs and only secondarily referred to an external judicial organ.¹¹⁶ A compulsory jurisdiction is imposed upon the member States in some cases,¹¹⁷ but recourse to advisory opinion by the Court is available in all of them except UPU.

In economic international organizations,¹¹⁸ in particular universal ones, some features could be pointed out. First, the legal or *de facto* competence to make a binding de-

¹¹³ Report of the Rapporteur of Committee IV/2, as Approved by the Committee, Doc. 933 IV/2/42(2), 13 U.N.C.I.O. Docs. 709-10 (1945). See also Doc. 843, IV/2/37, 13 U.N.C.I.O. Docs. 645 (1945); Doc. 2, G/7(K)(I), 3 U.N.C.I.O. Docs. 339 (1945). For the evaluation of this report, see, e.g., Pollux, *supra* note 1, at 73-74; Kopelmanas, *supra* note 112, at 303; Ciobanu, *supra* note 112, at 154; Ninčič, *supra* note 112, at 322-26; Goodrich, *supra* note 9, 262-63; Tunkin, *supra* note 49, at 35-36; but see ditto, *International Law in the International System*, 147 RECUEIL DES COURS 150-51; Castañeda, *supra* note 97, at 218; Schachter, *The Relation of Law, Politics and Action in the United Nations*, 109 RECUEIL DES COURS 165, 186 (1963).

¹¹⁴ See, e.g., Conforti, *supra* note 112, at 222, 236.

¹¹⁵ Some of the useful bibliography are the following: Colliard, *Le règlement des différends dans les organisations intergouvernementales de caractère non politique*, in HOMMAGE D'UNE GÉNÉRATION DE JURISTES AU PRÉSIDENT BASDEVANT 152 (1960); Bindschedler, *Le règlement des différends relatifs au statut d'un organisme international*, 124 RECUEIL DES COURS 453 (1968); Audéoud, *La Cour internationale de justice et le règlement des différends au sein des organisations internationales*, 81 R.G.D.I.P. 945 (1977); H. G. SCHERMERS, INTERNATIONAL INSTITUTIONAL LAW 658-82 (1980); D. W. BOWETT, THE LAW OF INTERNATIONAL INSTITUTIONS 147-51 (4th ed. 1982).

¹¹⁶ The relevant provisions are the following: ILO=Articles 26 et seq. and 37; FAO=Article 17; UNESCO=Article 14; WHO=Articles 75 and 76; ICAO=Articles 84 and 85; UPU=Article 32; ITU=Article 50; WMO=Article 29; IMO=Articles 65 and 66; WIPO=no provision; IAEA=Article 17.

¹¹⁷ Judging from the texts of the relevant provisions, they are ILO, FAO, UNESCO, WHO, ICAO and IAEA.

¹¹⁸ Some of the useful bibliography are the following: Metzger, *Settlement of International Disputes by Non-Judicial Methods*, 48 AM. J. INT'L L. 408 (1954); Lambrinidis, *The Emergence of Quasi Judicial Quasi Administrative Organs and Methods for the Settlement of International Disputes*, 16 REVUE HELLÉNIQUE DE DROIT INTERNATIONAL 78 (1963); G. MALINVERNI, LE RÈGLEMENT DES DIFFÉREND DANS LES ORGANISATIONS INTERNATIONALES ÉCONOMIQUES (1974); P. T. B. KOHANA, THE REGULATION OF INTERNATIONAL ECONOMIC RELATIONS THROUGH LAW (1985). For GATT, see Jackson, *GATT as an Instrument for the Settlement of Trade Disputes*, 61 PROC. AM. SOC'Y INT'L L. 144 (1967); J. H. JACKSON, WORLD TRADE AND THE LAW OF GATT 163-89 (1969); Hudec, *The GATT Legal System: A Diplomat's Jurisprudence*, 4 J. WORLD TRADE L. 615 (1970); Flory, *Les Accords du Tokyo Round du G.A.T.T. et la réforme des procédures de règlement des différends dans le système commercial interétatique*, 86 R.G.D.I.P. 235 (1982); McGovern, *Disputes Settlement in the GATT—Adjudication or Negotiation?*, in THE EUROPEAN COMMUNITY AND GATT 73 (M. Hilf et al. eds. 1986). For EFTA, see J. LAMBRINIDIS, THE STRUCTURE, FUNCTION, AND LAW OF A FREE TRADE AREA, THE EUROPEAN FREE TRADE ASSOCIATION 202-38 (1965); Szokoloczy-Syllaba, *EFTA: The Settlement of Disputes*, 20 INT'L & COMP. L. Q. 519 (1971). For international commodity agreements, see Fischer, *Le mode de règlement des différends adopté par l'accord international sur le blé*, 1 A.F.D.I. 208 (1955); Fawcett, *The Function of Law in International Commodity Agreements*, 44 BRIT. Y. B. INT'L L. 157 (1971); Clariana, *Settlement of Disputes in International Commodity Agreements, 1949-1979*, 63 RIVISTA DI DIRITTO INTERNAZIONALE 392 (1980); K.-R. KHAN, THE LAW AND ORGANIZATION OF INTERNATIONAL COMMODITY AGREEMENTS 373-77 (1982); P. M. EISEMANN, L'ORGANISATION INTERNATIONALE DU COMMERCE DES PRODUITS DE BASE 342-57 (1982).

cision upon interpretation or conflict resolution with regard to the constituent instruments is attributed to the internal political (executive) organs. Secondly, they tend to assure a quasi-judicial interpretation by utilizing an independent impartial committee composed of expert members well experienced with the relevant problems and acting in their individual capacities.

In other international organizations, the procedures are quite diverse. In many of the regional organizations,¹¹⁹ constituent instruments are generally concise and only define their purposes and fundamental structures. In international satellite organizations,¹²⁰ an arbitration procedure (compulsory or voluntary) is provided in some but not in others. In the International Sea-Bed Authority,¹²¹ a unified interpretation by a judicial organ is provided in the Convention.

3. Non-Recourse to Judicial Organs and Superiority of Political Organs: The interpretative procedures provided in constituent instruments are, as is summarized above, different in accordance with the functions and nature of each organization. When the actual operation of these procedures are analyzed, however, one common feature becomes clear: non-recourse to judicial organs in this process¹²² and a phenomenon of the superiority of political organs.

In the United Nations, as was pointed out, unification of the Charter interpretation is not institutionally assured. Their resolutions have, in principle, only recommendatory effect except in internal matters. Furthermore, dissenting member States, in many cases, submit objections and use a variety of devices of protest against the decisions of the organs. In these circumstances, it is certainly impossible from a strictly legal viewpoint to attribute a status of authoritative interpretation of the Charter to the interpretation involved in those decisions to which objections and protests are attached.

In spite of this legal situation, it must be emphasized that the interpretation and application of the Charter by the organs continue to be made in the operation of the United Nations as if the interpretation had an authoritative effect at least within the United Nations. Judicial judgment or restraint by the advisory opinion of the Court has been hardly utilized. Therefore, the practice of the organs tends to have full effect within the United Nations except in those circumstances where the positive cooperation of the dissenting member States is indispensable for its implementation. This means that, in most cases of the actual operation of the United Nations, the problem of the legal validity would be

¹¹⁹ See, e.g., Elias, *The Charter of the Organization of African Unity*, 59 AM. J. INT'L L. 243 (1965); ditto, *The Commission of Mediation, Conciliation and Arbitration of the Organization of African Unity*, 40 BRIT. Y. B. INT'L L. 336 (1964).

See in general MANUAL ON SPACE LAW, 2 Vols. (N. Jasentuliyana & R. S. K. Lee eds. 1979); Courteix, *Organisations internationales à vocation mondiale ou régionale dans le domaine des télécommunications par satellites*, in 1 JURIS-CLASSEUR DE DROIT INTERNATIONAL (1985) Fascicule 141.

¹²¹ See, e.g., Sohn, *Settlement of International Disputes relating to Deep Sea-Bed Mining*, in Festschrift FÜR RUDOLF BINDSCHEDLER 443 (E. Diez et al. eds. 1980); Cafisch, *The Settlement of Disputes relating to Activities in the International Seabed Area*, in THE NEW LAW OF THE SEA 303 (C. L. Rozakis and C. A. Stephanou eds. 1983); Paolillo, *The Institutional Arrangements for the International Sea-Bed and Their Impact on the Evolution of International Organizations*, 188 RECUEIL DES COURS 134 (1984).

¹²² Gross, *Underutilization of the International Court of Justice*, 27 HARVARD INT'L L. J. 571 (1986); Rosenne, *On the Non-Use of the Advisory Competence of the International Court of Justice*, 39 BRIT. Y. B. INT'L L. 1 (1963); Weissberg, *The Role of the International Court of Justice in the United Nations System: the First Quarter Century*, in THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE 131 (L. Gross ed. 1976).

replaced by the problem of to what extent the will and capacity of the dissenting member States could be maintained. In a rare case, as a result, their will and capacity might cause a crisis in the United Nations. In most cases, however, the practice of the organs continues to be adopted, implemented and accumulated by overcoming the objections of minority member States. In the ordinary treaties, interpretative confrontations would destabilize or obstruct the application of the treaties. The interpretation and application of the Charter, however, continues to be made at least within the United Nations. This means that, in the actual operation of the Charter, the interpretation by the internal political organs will occupy a dominant and superior position.¹²³

In the Specialized Agencies and IAEA (excluding economic international organizations), judicial procedures are, although institutionally provided to a certain extent, hardly utilized in practice. The interpretation and conflict resolution with regard to their constituent instruments are deemed to have been dealt with, in most cases, in their internal political organs and are rarely referred to outside judicial organ. In fact, it is asserted that recourse to an outside judicial organ would be harmful to the effective activity and efficient functioning of the organization because of the delay involved, undue reliance upon the legal elements, insensitiveness to the internal requirement for effective operation and lack of understanding of the necessity for compromise and flexibility.¹²⁴ There are certainly legal advisors and quasi-judicial committees in many organizations so that legal aspects should be institutionally taken into consideration in the activities of political organs. These procedures do not seem, however, to sufficiently control the superiority of political considerations in political organs.¹²⁵

In many economic international organizations, the above tendency is conspicuous.¹²⁶ Recourse to judicial organs is fundamentally excluded even on the institutional level provided in the constituent instruments. There is certainly a tendency, as was pointed out, to assure a quasi-judicial interpretation by utilizing quasi-judicial committees (Committee on Interpretation, panel, advisory panel, Examining Committee and others). However, the status of, and recourse to, these committees are, in principle, secondary. Furthermore, adjustment of interests through consultation and conciliation is given great importance in the operation of the political organs. As is shown by the fact that a breach of treaty by a State is not a condition for a procedure of the organ to be started or that the competence to make a legally binding decision is given to an internal political organ, the emphasis

¹²³ Rosenne, in this connection, pointed out that a majority vote in effect controls the application of the Charter, rendering abstract interpretation of it of little real interest, and added as follows:

"[I]n the absence of special stipulations providing for some sort of recourse to a disinterested third party, [the] emphasis on the political factors in the interpretation, and hence in the application, of the constituent instrument of an international organization reflects the fact that here the process of interpretation is a different kind of process from that encountered daily in the interpretation of treaties, whether bilateral or multilateral, including multilateral treaties of universal scope."

Rosenne, *supra* note 1, at 230.

¹²⁴ See, e.g., *LEGAL ADVISERS AND INTERNATIONAL ORGANIZATIONS*, 10-11 (H. Merillat ed. 1966); Audéoud, *supra* note 115, at 1005-06.

¹²⁵ See for example the criticism of FitzGerald with regard to ICAO: FitzGerald, *The Judgment of the International Court of Justice in the Appeal Relating to the Jurisdiction of the ICAO Council*, 12 *CANADIAN Y. B. INT'L L.* 153, 168-69 (1974).

¹²⁶ For the view that recourse to judicial procedures is inappropriate for economic international organizations, see, e.g., Metzger, *supra* note 118; Lambrinidis, *supra* note 118; Malinverni, *supra* 118, at 23-101.

is placed not upon the legally appropriate interpretation from the strictly judicial viewpoint, but upon restoration of the balance of benefits and promotion of compromise.

In other international organizations as well, recourse to judicial procedures are hardly utilized. In many regional organizations, however, disputes regarding interpretation and application of the constituent instruments are expected to be resolved by negotiations or conciliations as part of the general procedure of conflict resolution, and, as a result of voting procedures aiming at unanimity or agreement among all the member States, the individual will of member States will come forward rather than the superiority of political organs.

4. As is clear from the foregoing analysis, judicial procedures are hardly utilized and have little actual significance in the interpretation of constituent instruments. This situation would support the following statement by Morgenstern.

"[T]he most important reason why there has not been greater recourse to judicial interpretation probably is that such interpretation could inhibit, rather than advance, the growth of the law. The amendment of the constituent instruments of the various organizations, except for such matters as the enlargement of elected organs, is difficult; if every issue of legality were submitted for judicial determination, there could be a risk of serious stultification. As Professor Ciobanu puts it: 'The broad majority of Members of the United Nations . . . share the opinion of Judge Hudson that "no great international instrument could be completely self-explanatory, and meaning should be given to its provisions, not so much by the rulings of judges on the bench of the Court, as by the experience of those who have the responsibility of making the instrument work." ' " ¹²⁷

As a result of this situation, the practice (and the interpretation implied in it) of the internal political organs will have, *de facto* or legally as the case may be, a *decisive influence upon the determination of the meanings to be given to the provisions concerned in the constituent instruments*. This means, on the other hand, that, if recourse to judicial procedures are not provided or sufficiently utilized, the operation and activities of most of the universal international organizations where a majority rule of voting procedure is adopted will not be sufficiently controlled by a minority of member States and will be continued by the decisions of the organs which are governed by a majority of member States. In other words, *the legal rights and interests of minority States guaranteed by the constituent instruments will not necessarily be respected by their operation and activities*. In this connection, Rosenne made a suggestive statement.

"[I]nstances of deliberate and isolated interpretation by the organ declared competent are rare, and it is ensemble of the action of the organ in question, or indeed of the Organization as a whole, rather than a series of deliberate interpretative decisions, that constitutes the living interpretation of the constituent instrument, the 'established practice of the organization' in the words of the 1986 Vienna Convention. . . .

. . . [M]ost interpretation of the constituent instruments of international organizations is, on the international plane, performed by political organs and is, in con-

¹²⁷ Morgenstern, *Legality in International Organizations*, 48 BRIT. Y. B. INT'L L. 241, 254-55 (1976-77). See also Campbell, *The Attitudes and Practices of the Specialized Agencies and U. N. Organs and the Interpretation of Their Basic Constitutions*, THE JURIDICAL REVIEW 177, 181 (1986).

sequence, a reflection of the views of the majority in the organ in question at the given moment . . . [Fundamental changes from the conceptions believed to have been in the minds of the authors of the Charter] may be defended as reflecting political realities and the real nature of the process of interpreting the constituent instrument of an animated international organization."¹²⁸

The present writer does not contend that the previous conclusion is desirable.¹²⁹ To the contrary, it is a matter of *raison-d'être* for the constituent instruments which provide for the legal foundations and frameworks for the structures and activities of international organizations that these instruments will be interpreted and applied in a more or less unified manner and not in accordance with political whims. Several proposals attempting revitalization of judicial procedures were made in 1950s with respect to the interpretation of the U.N. Charter.¹³⁰ It is notorious that international organizations have a multiplying tendency in terms of both finance and institution as organizations generally have.

The writer only asserts that the previous conclusion is obtained from the examination of relevant provisions and their actual operation, and that this conclusion means that *the practice of the organs will affect, and is necessary to be taken into consideration when one is to interpret, the meaning of provisions in the constituent instruments*. It might be trite, but still, an important point in the present context is that the interpretation based upon the text of constituent instruments could be different from that given to it in their actual operation. In the light of the fact that the practice developed by the organs without being subject to judicial control in the interpretation will, in most cases, be directed to the effective performance of the purposes and functions of the organizations rather than to the strict conformity with the constituent instruments, the previous conclusion indicates that *the purpose-oriented practice of the organs will bring an evolutionary tendency into the interpretation of the constituent instruments*.

¹²⁸ Rosenne, *supra* note 1, at 241-42.

¹²⁹ In this connection, Rosenne lamented as follows:

"The overall picture of interpretation of the Charter of the United Nations and of the constituent instruments of international organizations which do not contain special provisions, or where there are not established practices for interpretation, is an unhappy one. Provisions of the Charter itself, let alone the rules of procedure, are 'established' or 'destablished' at the behest of the majority of the day or at the whim of a politically determined President confident that a challenge to any ruling of his will be rebuffed. . . .

. . . The way in which the Charter of the United Nations and many other comparable constituent instruments deal with interpretation has the effect of excluding two of the most essential features of interpretation, namely consistency and predictability. A constituent instrument which deliberately excludes or minimizes the role of these factors cannot, in terms of legal science, be equated with an international agreement for which some measure of control over the interpretative process to ensure consistency of application, such as a treaty, is inherent in the nature of things."

Rosenne, *supra* note 1, at 244-45.

¹³⁰ See, e.g., Report of Special Committee on Reference to the International Court of Justice of Questions of United Nations Competence, 44 PROC. AM. SOC'Y INT'L L. 256-69 (1950) (This was reported by Louis B. Sohn (Chairman), Joseph P. Chamberlain and Lester H. Woolsey); Gros, *The Problem of Redress against the Decisions of International Organizations*, 36 TRANSACTIONS OF THE GROTIUS SOCIETY OF INTERNATIONAL LAW 30-48 (1950); Wengler, *Recours judiciaire à instituer contre les décisions d'organes internationaux*, 44-1 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL (hereinafter cited as A.I.D.I.) 224-360 (1952). See also 45-1 A.I.D.I. 265-309 (1954); 47-1 A.I.D.I. 5-33 (1957); 47-11 A.I.D.I. 274-327, 488-91 (1957); Schwarzenberger, *Review of the Charter of the United Nations*, 47 THE INTERNATIONAL LAW ASSOCIATION viii (1956). See also Ciobanu, *supra* note 112, at 193-201.

V. IN SEARCH OF THEORETICAL FOUNDATIONS OF THE INTERPRETATIVE FRAMEWORK AS THE CONSTITUTIONS OF INTERNATIONAL ORGANIZATIONS

The two characteristics explained above in detail which correspond to the teleological and evolutionary interpretations are the important elements of the constitutional nature of constituent instruments. In advocating an emerging doctrine of the interpretative framework of constituent instruments as the constitutions of international organizations, the most important point is to clarify the limit of this framework within which this doctrine can be developed in accordance with the dynamism inherent in international organizations. Because the doctrine will set the constituent instruments free from the regulating restrictions of the interpretative framework in the law of treaties, it is indispensable to present an alternative framework which will put the constituent instruments under its clear control.

The writer will, in the first section, seek the theoretical foundations of this doctrine in the four theories which have been referred to by various scholars in this connection: (1) theory of interpretation in the European Communities, (2) theory of interpretation in the federal constitution of the U.S.A., (3) theory of institution developed in France, (4) theory of inter-temporal law. Then, in the second section, he will present several important elements in clarifying the interpretative framework of the doctrine of constituent instruments as the constitutions of international organizations.

A. *Possible Theoretical Foundations of the Constitutional Nature of Constituent Instruments*

1. *Theory of Interpretation in the European Communities*

1. *Introduction:* In the interpretation of the constituent instruments of the European Communities (hereinafter cited as the EC) by the Court of Justice of the EC, the teleological and dynamic approach of interpretation has been, it is submitted, often used to promote the purpose of integration. It is generally understood that the EC is an organization promoting integration which differs from an ordinary organization promoting cooperation,¹³¹ and this difference of structure is said to influence to a certain degree the methods of interpretation.¹³² If so, the characteristics of constituent instruments as the constitutions might

¹³¹ Virally, *supra* note 2, at 54.

¹³² CH. DE VISSCHER, *PROBLÈMES D'INTERPRÉTATION JUDICIAIRE EN DROIT INTERNATIONAL PUBLIC* 154 (1963).

For some useful bibliography with regard to the interpretation in the Court of Justice of the EC, see Monaco *Les principes d'interprétation suivis par la Cour de Justice des Communautés européennes*, in *MÉLANGES OFFERTS À HENRI ROLIN, PROBLÈMES DE DROIT DES GENS* 217 (1964); Chevallier, *Methods and Reasoning of the European Court in Its Interpretation of Community Law*, 1 *COMM'N MKT L. REV.* 21 (1964); Degan, *Procédés d'interprétation tirés de la jurisprudence de la Cour de Justice des Communautés européennes*, 2 *REVUE TRIMESTRIELLE DE DROIT EUROPÉEN* 189 (1966); A. GREEN, *POLITICAL INTEGRATION BY JURISPRUDENCE* 416-33

present themselves more clearly in the case of the EC.

2. Factors for the Dynamism: As Degan pointed out, the nature of the treaties interpreted and the nature of the court interpreting them seem to determine the methods used in their interpretation.¹³³ These two should be examined below.

The first is the nature of the constituent instruments of the EC. The constituent instruments of the EC are, on a formal level, inter-state treaties, but, on a substantive level, the constitutions of the EC, international organizations for integration. In analyzing the reasons why the objectives given the EC have become an extremely fertile directive of interpretation, Pescatore pointed out first, that their constituent instruments are entirely full of teleology, that is, they are entirely founded upon the notion of objectives to be attained; secondly, that, on the level of the means of realization, the implementation of the objectives thus defined is entrusted to the institutions which operate in a large measure of independence and autonomy in the formation of their will. In his opinion, the teleological method is particularly appropriate to the characteristics proper to the treaties instituting the EC.¹³⁴

The second is the nature of the interpretative organs. It is quite important, in this connection, that the competence of authoritative interpretation is exclusively given to the Court of Justice. By means of the preliminary rulings, the Court of Justice has a final and exclusive competence of interpretation and guarantees the uniformity of the EC's legal order. As a result, the Court of Justice is expected to exercise various functions such as those of an international tribunal, of a constitutional tribunal and of an administrative tribunal.¹³⁵

3. Development of the Dynamism in the Interpretation: The problem of the treaty-making power is taken up here as a typical example in this connection.¹³⁶ The criteria in recogniz-

(1969); Pescatore, *Les objectifs de la Communauté européenne comme principes d'interprétation dans la jurisprudence de la Cour de Justice*, 2 MISCELLANEA W. J. GANSHOF VAN DER MEERSCH 325 (1972); A. BREDIMAS, *METHODS OF INTERPRETATION AND COMMUNITY LAW* (1978).

¹³³ V. DEGAN, *L'INTERPRÉTATION DES ACCORDS EN DROIT INTERNATIONAL* 160-62 (1963). See also Degan, *supra* note 132, at 190-91.

¹³⁴ Pescatore, *supra* note 132, at 327-28.

¹³⁵ See, e.g., W. FELD, *THE COURT OF THE EUROPEAN COMMUNITIES* (1964); Bogaert, *Le caractère juridique de la Cour de Justice des Communautés européennes*, in *MÉLANGES OFFERTS À HENRI ROLIN, PROBLÈMES DE DROIT DES GENS* 449 (1964); Bebr, *Judicial Policy of the Court of Justice in Developing the Legal Order of the European Communities*, in *TOWARD WORLD ORDER AND HUMAN DIGNITY* 293, 294 (W. Reisman & B. Weston eds. 1976).

Chevallier stated as follows:

"[The] Court is beginning to decide cases in the spirit of a national court and no longer of an international court. In other words, the Court, instead of confining itself to noting in a mechanical way the wishes of the authors of the Treaties, seems now to consider the Common Market as a fact, of the existence of which it takes judicial notice and from which observation it draws the necessary consequences."

Chevallier, *supra* note 132, at 34.

¹³⁶ Pescatore, *Les relations extérieures des Communautés européennes*, 103 *RECUEIL DES COURS* 1 (1961); Costonis, *The Treaty-Making Power of the European Economic Community: The Perspectives of a Decade*, 5 *COMM'N MKT L. REV.* 421 (1968); Malawer, *Treaty-Making Competence of the European Communities*, 7 *J. WORLD TRADE L.* 169 (1973); Leopold, *External Relations Power of EEC in Theory and in Practice*, 26 *INT'L & COMP. L. Q.* 54 (1977); Boulouis, *La jurisprudence de la Cour de Justice des Communautés européennes relative aux relations extérieures des Communautés*, 160 *RECUEIL DES COURS* 335 (1978); Pescatore, *External Relations in the Case-Law of the Court of Justice of the European Communities*, 16 *COMM'N MKT L. REV.* 615 (1979); *DIVISION OF POWERS BETWEEN THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES IN THE FIELD OF EXTERNAL RELATIONS* (C. Timmermans & E. Völker eds. 1981); Kovar, *La contribution de la Cour de justice au développement de la condition internationale de la Communauté européenne*, *CAHIER DE DROIT EUROPÉENNE* 527 (1978).

ing treaty-making powers of the EC have drastically evolved in the past from a restrictive to a flexible understanding.¹³⁷

In the early years up to the 1960s, the jurisprudence of the Court of Justice with respect to the treaty-making powers indicated a restrictive understanding¹³⁸ which could be based upon the following two factors. (1) The "principe de l'attribution des compétences," which means that the EC cannot exercise any authority, substantive or functional, except where and to the extent that such authority has been expressly conferred on it; and the method of defining general tasks, which is primarily analytical: taking the problem one by one and laying down in each case *ad hoc* what are the powers of the EC or, rather, of its institutions.¹³⁹ (2) Those provisions such as EEC Article 235, EURATOM Article 203 and ECSC Article 95 (1)¹⁴⁰ were said to grant the power to act in a case where such action is necessary to attain, within the framework of the common market, one of the objectives of the EC, but this power is lacking. Here a new, independent "pouvoir d'action" is created alongside the existing ones. On the other hand, the theory of implied powers can only relate to existing "pouvoir d'action", and cannot fill a gap in the totality of the specific powers conferred on the institutions for the activities of the EC.¹⁴¹

It was in the *AETR* case (1971) that the Court of Justice changed its attitude to a more flexible one. The Court showed an understanding of the broad notion of implied treaty-making powers by stating:

"To determine in a particular case the Community's authority to enter into international agreements, regard must be had to the whole scheme of the Treaty no less than to its substantive provisions.

¹³⁷ Giardina, *The Rule of Law and Implied Powers in the European Communities*, 1 ITALIAN Y. B. INT'L L. 99, 103-04 (1975).

¹³⁸ The Court, in the *Fédération Charbonnière de Belgique* case (1956), stated:

"The Court considers that without having recourse to a wide interpretation it is possible to apply a rule of interpretation generally accepted in both international and national law, according to which rules laid down by an international treaty or a law presuppose the rules without which that treaty or law would have no meaning or could not be reasonably and usefully applied."

Case 8/55, [1955-56] ECR 292, at 299. See also Case 20/59, [1960] ECR 325, at 336.

McMahon made a following comment on this case:

"It will be noticed that the Court here is formulating a limited and severely circumscribed doctrine of implied powers. There in no attempt to impute a new power to the Organization. Powers will only be implied to implement a power already expressed in the Treaty and then only to achieve the limited purpose of that express power and to permit it a reasonable and useful application. In two recent cases [Case 20/59 and Case 25/59] the Court has again referred to the above view and it is submitted that the attitude of the Court is to be welcomed. Subject to and within the above limitations, the doctrine of implied powers will always be necessary for the effective functioning of any international organization."

McMahon, *The Court of the European Communities Judicial Interpretation and International Organization*, 37 BRIT. Y. B. INT'L L. 320, 342 (1961). See also P. HAY, *FEDERALISM AND SUPRANATIONAL ORGANIZATIONS* 190-91 (1966); Bredimas, *supra* note 132, at 117-18; C. MANN, *THE FUNCTION OF JUDICIAL DECISION IN EUROPEAN ECONOMIC INTEGRATION* 293-94 (1972).

¹³⁹ P. PESCATORE, *THE LAW OF INTEGRATION* 37-38 (trans. C. Dwyer 1974).

¹⁴⁰ See, e.g., Marengo, *Les conditions d'application de l'article 235 du Traité C.E.E.*, 13 REVUE DE MARCHÉ COMMUN 147 (1970); Lesguillons, *L'extension des compétences de la C.E.E. par l'article 235 du Traité de Rome*, 20 A.F.D.I. 886 (1974); Schwartz, *Article 235 and Law-Making Powers in the European Community*, 27 INT'L & COMP. L. Q. 614 (1978); *Article 235*, in 6 *THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY, A COMMENTARY ON THE EEC TREATY* 6-269 (H. Smit & P. Herzog eds. 1981).

¹⁴¹ P. KAPTAYN & P. VAN THEMAAT, *INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES* 73 (1973).

Such authority may arise not only from an explicit conferment by the Treaty—as is the case with Articles 113 and 114 for tariff and trade agreements and with Article 238 for association agreements—but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions.

In particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations towards third countries which affect those rules. . . .

With regard to the implementation of the provisions of the Treaty the system of internal Community measures may not therefore be separated from that of external relations.”¹⁴²

The reasoning based upon in the *AETR* case has been developed in a series of later cases. The conditions for the implied treaty-making powers have been loosened from the prior institution of internal rules on matters coming within the scope of the agreement (the *AETR* case) to the adoption of measures on the basis of which internal rules could be instituted (the *Kramer* case),¹⁴³ and finally to the parallelism of internal and external Community powers (the *Rhine* case).

The Court, in the *Rhine* case, stated as follows:

“[T]he power to bind the Community *vis-à-vis* third countries nevertheless flows by implication from the provisions of the Treaty creating the internal power and in so far as the participation of the Community in the international agreement is, as here, necessary for the attainment of one of the objectives of the Community.”¹⁴⁴

4. *Some Comments:* The dynamic development of the EC powers has not been limited to the area of treaty-making powers but has been realized in most other areas. Based upon the thirty years' development, Tizzano referred to a considerable expansion of the EC powers by virtue of an extremely dynamic practice, and pointed out two ways for this to occur: (1) by developing principles and techniques of interpretation (symbolized by the doctrine of implied powers), especially judicial, that made clear the full potential of the rules known as Community law; (2) by making continually wider and more frequent use of the clauses in the Treaties which lay down formal procedures to supplement the powers of the Community institutions (such as EEC Article 235). Although formally and logically distinct, these two ways are in reality closely connected at a functional level, in the sense that both tend toward the development of the EC powers.¹⁴⁵

¹⁴² Case 22/70, [1971] ECR 263, at 274. See also Kovar, *L'affaire de l'A.E.T.R. devant la Cour de Justice des Communautés européennes et la compétence internationale de la C.E.E.*, 17 A.F.D.I. 386 (1971).

¹⁴³ See Joined Cases 3, 4 and 6/76, [1976] ECR 1279, at 1309. See also Koers, *The External Authority of the EEC in Regard to Marine Fisheries*, 14 COMM'N MKT L. REV. 269 (1977).

¹⁴⁴ Opinion 1/76, [1977] ECR 741, at 755. See also Hardy, *Opinion 1/76 of the Court of Justice: The Rhine and the Treaty-Making Powers of the Community*, 14 COMM'N MKT L. REV. 561 (1977); Groux, *Le parallélisme des compétences internes et externes de la Communauté économique européenne*, CAHIER DE DROIT EUROPÉEN 3 (1978).

¹⁴⁵ Tizzano, *Chapter III—The Powers of the Community*, in THIRTY YEARS OF COMMUNITY LAW 43, 46 (The Commission of the European Communities ed. 1981).

It is certainly true that both the Court of Justice¹⁴⁶ and articles such as EEC Article 235¹⁴⁷ have played a great role in the dynamic development of the EC powers. These elements do not, however, exist in the ordinary constituent instruments of international organizations for cooperation.

It is rather the teleological nature of the constituent instruments of the EC which is common to the ordinary constituent instruments. Although the EC is an organization for integration rather than cooperation, the fact is that essential parts of the provisions are dedicated to the definition of the purposes and the structures and procedures for their implementation which can provide the foundations of the dynamism for integration. This common feature suggests that constituent instruments for both integration and cooperation have a similar constitutional nature for dynamism although they might be a bit different in terms of degree.¹⁴⁸

2. *Theory of Interpretation in the Federal Constitution of the U.S.A.*

1. *Introduction:* Influential among international lawyers in the U.S.A. in connection with the interpretation of constituent instruments is the theory of interpretation in the federal constitution of the U.S.A.¹⁴⁹ Cohen, for example, explains it as follows:

"The Charter, like our Constitution, sets forth a few basic principles and leaves to those who will live under it the responsibility of finding suitable means of carrying out those principles. Some means are specified in the Charter but these are not necessarily exclusive. The Charter is not a code of legal procedure to be strictly construed. I know no better canon of construction to be used in determining charter power than that laid down by Chief Justice Marshall in *McCulloch v. Maryland* for determining constitutional power: '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.' Member States have the right and responsibility to find means which are appropriate, which are not prohibited but consist with the letter and spirit of the Charter, to carry

¹⁴⁶ Rasmussen, *Chapter VII—The Court of Justice*, in *THIRTY YEARS OF COMMUNITY LAW* 151, 190 (The Commission of the European Communities ed. 1981).

¹⁴⁷ Tizzano, *supra* note 145, at 50 et seq.

¹⁴⁸ The following statement of Pescatore seems to support this point:

"The technique used by the drafters of the European Treaties in a number of areas is to establish more or less precisely defined objectives as opposed to specific ends. This technique calls in its turn for a process of interpretation which may be called dynamic because it is primarily a function of the common objectives set by the member States, of a particular vision of the future—a 'prospective' approach to use a current term."

Pescatore, *International Law and Community Law—A Comparative Analysis*, 7 *COMM'N MKT L. REV.* 167, 173 (1970).

¹⁴⁹ Vallat, *The Competence of the United Nations General Assembly*, 97 *RECUEIL DES COURS* 203, 248–50 (1959); W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 154 (1964); C. W. JENKS, *THE PROSPECTS OF INTERNATIONAL ADJUDICATION* 461 (1964); Engel, *'Living' International Constitutions and the World Court (The Subsequent Practice of International Organs Under Their Constituent Instruments)*, 16 *INT'L & COMP. L. Q.* 865, 909 (1967); ditto, *The Changing Charter of the United Nations*, *Y. B. WORLD AFFAIRS* 71 (1953); Schick, *Towards a Living Constitution of the United Nations*, 2 *INT'L L. Q.* 1 (1948).

out the purpose of the Charter."¹⁵⁰

2. *Marshall and Holmes*: The concept of "implied power" mentioned in the constitutional law of the U.S.A. is generally understood to date back to *McCulloch v. Maryland* (1819),¹⁵¹ in which Chief Justice Marshall stated as follows:

"[The nature of a constitution requires] that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. . . . In considering [the present] question, then, we must never forget that it is a constitution we are expounding."¹⁵²

It was in *Missouri v. Holland* (1920) that Justice Holmes made the following statement which is, again, frequently referred to in connection with the interpretation of constituent instruments.

"[W]hen 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 gifted of its begetters. . . . The case before us must be considered in the light of our whole experience, and not merely in that of what was said a hundred years ago."¹⁵³

3. *Recent Arguments*: The problem of constitutional interpretation has been debated, in particular, since 1970s in the U.S.A. This has taken the form of controversy between the "originalists" and "non-originalists."¹⁵⁴ The originalists argue that the Court must confine itself to norms clearly stated or implied in the language of the Constitution and that constitutional language, understood in the light of the substantive intentions or values behind its enactment, is the sole proper source for constitutional interpretation. On the other

¹⁵⁰ B. COHEN, *THE UNITED NATIONS, CONSTITUTIONAL DEVELOPMENTS, GROWTH, AND POSSIBILITIES* 6 (1961).

Goodrich, in referring to the formula made by Marshall, also stated that it "provides a reasonable standard for determining the powers of United Nations organs." L. GOODRICH, *THE UNITED NATIONS IN A CHANGING WORLD* 36 (1974). See also L. GOODRICH, E. HAMBRO, and A. SIMONS, *CHARTER OF THE UNITED NATIONS, COMMENTARY AND DOCUMENTS* 25, n. 25 (3rd & rev. ed. 1969).

The American oral statement in the *Certain Expenses* case referred to the passages of Chief Justice Marshall and Justice Holmes quoted in the text and contended that the same idea should be applied to the interpretation of the Charter. Oral Statement of Mr. Chayes, Advisory Opinion on Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), I. C. J. Pleadings 413, 425-27 (1962). Reference to Chief Justice Marshall is found in the dissenting opinion of Judge Jessup in the *South West Africa* cases (1966). *South West Africa Cases, Second Phase*, [1966] I. C. J. 353, n. 1. It was already contended in 1923 that the previous idea of Marshall concerning interpretation should be applied to the interpretation of the Covenant of the League of Nations. Gregory, *The Neutralization of the Aaland Islands*, 17 AM. J. INT'L L. 63, 75 (1923).

¹⁵¹ See, e.g., R. CHANDLER, R. ENSLEN AND P. RENSTROM, 1 *THE CONSTITUTIONAL LAW DICTIONARY* 424 (1985).

¹⁵² *McCulloch v. Maryland*, 4 Wheat. 316 (1819). See also Plous and Baker, *McCulloch v. Maryland, Right Principle, Wrong Case*, 9 STANFORD L. REV. 710 (1957); Dodd, *Implied Powers and Implied Limitations in Constitutional Law*, 29 YALE L. J. 137 (1919); Kruse, *Implied Powers und Implied Limitations*, 4 ARCHIV DES VÖLKERRECHTS 169 (1953-54).

¹⁵³ *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

¹⁵⁴ See, e.g., the following bibliography and others listed there: Sandalow, *Constitutional Interpretation*, 79 MICHIGAN L. REV. 1033 (1981); Bennett, *Objectivity in Constitutional Law*, 132 UNIV. PENNSYLVANIA L. REV. 445 (1984); Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CALIFORNIA L. REV. 1482 (1985); E. CHERMERINSKY, *INTERPRETING THE CONSTITUTION* (1987).

hand, the non-originalists argue that the Court may protect norms not mentioned in the Constitution's text or its pre-ratification history and that it is legitimate for judges to look beyond text and original intention in interpreting constitutional language.

It is not necessary here to further explain these controversies but to indicate a point which a series of these arguments have abundantly clarified up to the present. This is that constitutional interpretation needs a substantive theory of interpretation; unlike the case of contract or will in which the drafter's intention is supreme and binding, constitutional interpretation needs a substantive theory of interpretation accompanied by rational reasons with regard to "why the drafter's intention must be considered binding," or if not "why other methods of interpretation included in the non-originalist's approach should be adopted." It is only in the light of this substantive theory of interpretation that the propriety of an interpretation can be judged.

4. *Criticism:* There is certainly a criticism against the analogy of the theory of constitutional interpretation. The toughest critic is Gross, who presented the following contention: the Charter of the United Nations is not a constitution in the sense of the American Constitution; the U.N. is not like the United States even in its infancy. The possibility, of course, cannot be excluded that after a century, the U.N. will acquire the degree of integration which will make the comparison with the federalism of the United States more tenable. However, if the Constitution of the United States is very flexible, even its ends must be achieved in *conformity with its letter and spirit* as was pointed out by Chief Justice Marshall. Great and dynamic as the principle of effectiveness may be as a method of interpretation, effectiveness is in general a principle of good faith.¹⁵⁵

5. *Some Comments:* The basic idea underlying the analogy is that both the Constitution of the United States as a constituent act and the Charter of the United Nations as a constituent instrument have created an organism; as the expression "constituent" common to them indicates, they have created an institution capable of life and growth the development of which could not be completely foreseen. It is, therefore, pointed out that they must be interpreted in the light of our whole experience, and not merely in the light of what

¹⁵⁵ Thus, Gross contended:

"The Court's jurisprudence leaves no doubt that as an organ of the United Nations and as an interpreter of its Charter it will carry forward the purposes and principles of the Organization. But there are limits to what a Court can expect to, and what can legitimately be expected that it should, accomplish and these are set by its role as a Court and the environment in which it, as well as the United Nations, functions.

Methods of interpretation, by whatever designation they go, are but tools in the hand of the interpreter. . . . Rules of interpretation are not so much 'roads to right legal solutions' as 'footholds for struggling for these solutions.' "

Gross, *supra* note 66, at 401-04.

This anxiety based upon the realistic understanding of the power structure in the international society is to some extent shared by those invoking the analogy. Friedmann, for example, stated as follows:

"It is, of course, always uncertain how far the court's judicial interpretation will stand the strains of political tension. Like the constitutional courts of federal states, the court has a certain policy function in trying to move forward but not so fast as to break up the United Nations in its formative phase. In the mixture of legal and policy considerations, the court only reflects the typical dilemma of any constitutional court. But its task, and the scope of its moulding powers, is far more severely circumscribed by the fragility of the society which has set it up."

Friedmann, *supra* note 149, at 158.

was said two hundred years ago (the U.S. Constitution) or fifty years ago (the U.N. Charter). Furthermore, as a constitution provides great outlines and important objects, other minor ingredients being deduced from the nature of the objects, constitutional interpretation, they claim, should be flexible in accordance with the formula indicated by Marshall.

The validity of the analogy seems to be related to two elements. The first is the fact that, in international law, there are rules of interpretation accepted as positive law, whereas, in the American constitutional law, any method of constitutional interpretation must be justified by a substantive theory of interpretation as was clarified by the recent controversy. To the extent that the constituent instruments of international organizations deviate from the interpretative framework in the law of treaties, a substantive theory of interpretation needs to be constructed.

The second element is related to the appreciation of the difference between the national foundation for the U.S. Federal Constitution and the international foundation for the U.N. Charter. There is presumed to be some difference in terms of effectiveness which the interpretations by the court and the organs (of a State and an international organization) can have in the national integration on the one hand and in the international organization which depends on the voluntary cooperation of sovereign States on the other hand. This difference ultimately depends upon how one would appreciate the fragility of the international society where, these days, international law has developed from the law of coexistence to the law of cooperation and the society is gradually getting transformed to the community, but where the members are still sovereign States. And this appreciation could be attempted only in parallel with the comprehensive appreciation of the effectiveness of international organizations.

3. *Theory of Institution*

1. Introduction: Influential among the international lawyers in France is the theory of institution established around 1930s by M. Hauriou and G. Renard in France.¹⁵⁶ Lesguillons, for example, stated as follows:

“[L]’analyse formelle d’un acte constitutif est insuffisante pour le caractériser: de ce point de vue, un contrat, un traité laisseraient apparaître en première place l’autonomie et l’accord des volontés, alors que dans l’institution c’est la cause qui l’emporte et la cause n’est pas révélée par l’analyse formelle de l’acte. L’origine conventionnelle d’une institution n’est pas déterminante pour son développement: c’est que d’autres éléments le sont. ‘Toutes les fois,’ écrit le doyen Hauriou, ‘que d’un contrat, d’un pacte, d’un traité, résulte la création d’un corps constitué quelconque, il convient d’admettre qu’une opération de fondation s’est mêlée à l’opération contractuelle.’”¹⁵⁷

¹⁵⁶ The theory of institution is said to have been created by Hauriou and developed by Renard and later adopted by Desqueyrat (see, e.g., DESQUEYRAT, *LE DROIT OBJECTIF ET LA TECHNIQUE POSITIVE* (1933)) and Delos (see, e.g., J. DELOS, *LA SOCIÉTÉ INTERNATIONALE ET LES PRINCIPES DU DROIT PUBLIC* (2e éd. 1950)) in France, and Romano (see, e.g., S. ROMANO, *L’ORDINAMENTO GIURIDICO* (3 ed. 1977)) in Italy.

¹⁵⁷ H. LESGUILLONS, *L’APPLICATION D’UN TRAITÉ-FONDATION: LE TRAITÉ INSTITUANT LA C.E.E.* 65–66 (1968), (“The formal analysis of a constitutive act is not sufficient to characterize it: from this viewpoint, a contract, a treaty will allow to appear in the first place the autonomy and the agreement of the intentions, although,

In an indirect manner, Pescatore, among others, referred to a similar idea when he stated:

"En effet, le statut constitutif de toutes les organisations internationales est représenté, à l'origine, par une convention multilatérale; dans la suite, à partir de la mise en place des institutions, ce caractère contractuel s'estompe et c'est désormais le caractère institutionnel qui prime. La convention multilatérale se mue alors, pour ainsi dire, en constitution."¹⁵⁸

2. *Theory of Institution:* Hauriou, one of the founding fathers, defined the concept of institution as follows:

"[U]ne institution est une idée d'oeuvre ou d'entreprise qui se réalise et dure juridiquement dans un milieu social; pour la réalisation de cette idée, un pouvoir s'organise qui lui procure des organes; d'autre part, entre les membres du groupe social intéressé à la réalisation de l'idée, il se produit des manifestations de communion dirigées par les organes du pouvoir et réglées par des procédures."¹⁵⁹

in the institution, it is the cause which prevails and the cause will not be revealed by the formal analysis of the act. The conventional origin is not determinant for its development: it is other elements which are determinant. Hauriou writes, 'Every time that a creation of some corporate body results from a contract, a pact or a treaty, it should be admitted that a founding operation was mixed with a conventional operation.'¹⁵⁸ [translation by the author]

¹⁵⁸ Pescatore, *Les relations extérieures des Communautés européennes*, 103 RECUEIL DES COURS 1, 152-53 (1961). ("In fact, the constitutive statute of all the international organizations is, in the beginning, represented by a multilateral convention; subsequently, as soon as the institutions are established, this contractual nature shades off and it is from now on the institutional nature that prevails. The multilateral convention will then be transformed into constitution." [translation by the author])

The basic idea of the theory of institution seems to have, more or less, influenced a wide range of scholars. Focsaneanu, for example, stated as follows in connection with the internal law of the United Nations:

"Ce n'est qu'en prenant comme fondement ces idées empruntées à la théorie de l'institution que l'on peut atteindre à une compréhension exhaustive et systématique du droit interne des organisations internationales, en général, et du droit interne de l'O.N.U., en particulier, pour arriver à une explication qui embrasse le phénomène dans toute son ampleur et le situe correctement dans l'ensemble de la réalité juridique."

Focsaneanu, *Le droit interne de l'organisation des Nations Unies*, 3 A.F.D.I. 315, 320 (1957). ("It is only by taking as foundation these ideas borrowed from the theory of institution that one can reach an exhaustive and systematic comprehension of the internal law of international organizations, in general, and the U.N., in particular, in order to arrive at the explanation which covers the phenomenon in all its width and places it correctly in the entirety of juridical reality." [translation by the author])

With regard to the reference to the theory of institution, see also Monaco, *Les principes régissant la structure et le fonctionnement des organisations internationales*, 156 RECUEIL DES COURS 79, 196, n. 10 (1977), reprinted in R. MONACO, SCRITTI DI DIRITTO DELLE ORGANIZZAZIONI INTERNAZIONALI 459, 478, n. 10 (1981); Lachs, *Le rôle des organisations internationales dans la formation du droit international*, in MÉLANGES OFFERTS À HENRI ROLIN, PROBLÈMES DE DROIT DES GENS, 161, n. 9, 10 (1964); Mestre, *Les traités et le droit interne*, 38 RECUEIL DES COURS 233, 301-02 (1931).

Dupuy, in explaining the transformation of international society and the nature of international organizations, used the concepts of "le droit relationnel" and "le droit institutionnel." Dupuy, *Communauté internationale et disparités de développement*, 165 RECUEIL DES COURS 9, 45-114 (1979). Based upon these concepts, Simon attempted to apply the theory of institution to the interpretation of constituent instruments in his original manner. Simon, *supra* note 1, at 473-89. For a criticism, see the review by Combacau (109 JOURNAL DU DROIT INTERNATIONAL 752, 754-55 (1982)).

¹⁵⁹ M. HAURIOU, *La théorie de l'institution et de la fondation (Essai de vitalisme social)* (originally appeared in 1925), in AUX SOURCES DU DROIT 89-128 (1933). ("[A]n institution is an idea of a work or enterprise that is realized and endures juridically in a social milieu; for the realization of this idea, a power is organized that

Therefore, the three elements of every institution are (1) the idea of the work or enterprise to be realized in a social group; (2) the organized power put at the service of this idea for its realization; (3) the manifestations of communion that occur within the social group with respect to the idea and its realization.

Renard, another founding father, did not develop his doctrine in a systematic manner and is difficult to understand. However, with respect to the concept of institution, he made the following statement:

"La *fondation*, c'est l'acte de la personnalité humaine qui donne naissance à une *institution*. . . . Fonder une famille, fonder un Etat, fonder une religion, fonder un établissement charitable ou une entreprise,—c'est d'abord porter en soi-même une *Idee*, et puis c'est vouloir ne pas l'emporter avec soi dans la tombe; c'est l'envelopper de *Voies et Moyens* appropriés à un perpétuel renouvellement. . . . Fonder, c'est enfermer dans une oeuvre l'étincelle—presque d'une vie—d'un développement qui se poursuivra longtemps après que le fondateur ne sera plus."¹⁶⁰

According to Renard, institution is contrasted with contract in various points.¹⁶¹ In contract, what is supreme is the accord of wills, whereas, in the institution, it is the cause. Contract is static, immobile; it will be executed as it has been concluded. The institution operates by a constant readaptation of the means to the purposes pursued, and the purposes pursued to the variations of social milieu; without such a development, there is no continuity.

3. *Some Comments:* It was Bastid who analyzed the theory of institution from the viewpoint of international organizations. She reached a negative conclusion with regard to both Hauriou and Renard for respective reasons which will not be discussed here. However, based upon the concept of institution two principal elements of which are the nature of continuity and the organic nature, Bastid thought the theory of institution useful and reached the following conclusion.

"La notion d'institution juridique permet de rendre compte de ce complexe de règles inhérent à toute organisation internationale et du développement organique et normatif qui se greffe ou surgit du mécanisme primitif. Mais sous peine de méconnaître les bases fondamentales de la société internationale, il convient de ne pas oublier la place du contractuelle et pour la définition des pouvoirs des organes, soit pour apprécier la

equips it with organs; on the other hand, among the members of the social group interested in the realization of the idea, manifestations of communion occur that are directed by the organs of the power and regulated by procedures." [translation cited from *THE FRENCH INSTITUTIONALISTS* 99 (A. Broderick ed., M. Welling trans. 1970)]

¹⁶⁰ G. RENARD, *L'INSTITUTION, FONDEMENT D'UNE RÉNOVATION DE L'ORDRE SOCIAL* 45-46 (1933). ("The *foundation*, it is the act of a human personality which gives birth to an *institution*. . . . To found a family, to found a State, to found a religion, to found a charitable institution or an enterprise,—it is first of all to carry an *idea* within oneself, and then to intend not to bring it with oneself to the tomb; it is to clothe it with the *ways and means* appropriate to a perpetual renewal. . . . To found, it is to keep in the work the spark—almost of the life—of a development which continues for a long time after the founder will no longer exist." [translation by the author])

¹⁶¹ *Id.* at 147-90. See also G. RENARD, *LA THÉORIE DE L'INSTITUTION, ESSAI D'ONTOLOGIE JURIDIQUE* 360 et seq. (1930); *Id.*, *LA PHILOSOPHIE DE L'INSTITUTION* (1939); *Id.*, *Les bases philosophiques du droit international et la doctrine du "Bien commun,"* 3-4 *ARCHIVES DE PHILOSOPHIE DU DROIT ET DE SOCIOLOGIE JURIDIQUE* 465 (1931).

nécessité de l'assentiment permanent et agissant des Etats participants. . . .

Dans ces limites et en se gardant de vouloir forcer les analogies . . . la notion d'institution juridique peut aider à construire une théorie générale des organisations internationales."¹⁶²

In the final analysis, the theory of institution is directed to the theory of society rather than to the theory of law as the sub-titles indicate such as "Essai de vitalisme social" (Essay of social vitalism) attached to Hauriou's article and "Essai d'ontologie juridique" (Essay of juridical ontology) attached to Renard's book. Stone made the following suggestive comment:

"The French institutionalists thought that the very existence of an institution imports the existence of constitutional principles of a 'juridical' nature concerning its organisation and operation, principles which emerge from its activities. . . . [T]he sense in which personality and constitutional law necessarily spring from institutions, is not that of positive law, but rather the sense that these results are warranted by the 'nature of social life'.⁵. . . Their personality and the norms which spring from them are (for the natural lawyer) part of *le droit*, whether they are part of *la loi* or not; though from the positive lawyers' standpoint this is merely a demand that this *droit* should be made into *la loi*."¹⁶³

From this viewpoint, the *raison-d'être* of the theory of institution consists in indicating the existence of the dynamism inherent in the institutional phenomenon and the necessity for law to take this dynamism into consideration. This is suggestive because, as international organizations are established and regulated by constituent instruments, they tend to be appreciated in the light of constituent instruments understood in the law of treaties without sufficiently taking the inherent dynamism and stability into consideration.

On the other hand, the theory of institution has an inherent limitation in appreciating legally the phenomenon of international organizations because it is not a theory of positive law. First, because of the decentralized structure of the international society, the conventional basis among the member States of international organizations must be duly emphasized in the legal appreciation of their structures and operation as was indicated by Bastid.

Secondly, the problem is how to make an appropriate balance in the legal appreciation between the importance of the conventional basis and the necessity of taking into consideration the inherent dynamism as an institution. The answer to this delicate question does not seem to be given by the theory of institution.

¹⁶² Bastid, *Place de la notion d'institution dans une théorie générale des organisations internationales*, in *ETUDES EN L'HONNEUR D'A. MESTRE* 50-51 (1956). ("The notion of juridical institution allows to account for the complex of rules inherent in every international organization and for the organic and normative development which will be grafted on or will appear from the original mechanism.

But in order not to disregard the fundamental basis of the international society, one should not forget the place of the contractual for the definition of the powers of the organs, or for appreciating the necessity of the permanent and effective consent of the participating States. . . . Within these limits and by taking care not to force the analogies . . . the notion of juridical institution can help construct a general theory of the international organizations." [translation by the author]

¹⁶³ J. STONE, *SOCIAL DIMENSIONS OF LAW AND JUSTICE* 525 (1966). See also Stone, *Two Theories of 'The Institution'*, in *ESSAYS IN JURISPRUDENCE IN HONOUR OF ROSCOE POUND* 296-338 (R. A. Newman ed. 1962); W. RRIEDMANN, *LEGAL THEORY* 239 (5th ed. 1967).

4. *Theory of Inter-Temporal Law*¹⁶⁴

1. *Introduction:* In the *Namibia* case (1971), there was a difference of opinion between the majority of judges and Judge Fitzmaurice over the applicability of inter-temporal law. The majority opinion, in applying Article 22 of the Covenant of the League of Nations and the mandate, stated:

"All these considerations [such as events subsequent to the adoption of the instruments in question and the subsequent development of international law in regard to non-self-governing territories] are germane to the Court's evaluation of the present case. Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant . . . were not static, but were by definition evolutionary. . . . The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law. . . . Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation."¹⁶⁵

On the other hand, Judge Fitzmaurice contended that what must be sought is the original intention of the parties at the time of the conclusion of the Covenant and the mandate, and stated:

"My reading of the situation is based—in orthodox fashion—on what appears to have been the intentions of those concerned at the time. The Court's view, the outcome of a different, and to me alien philosophy, is based on what has become the intentions of new and different entities and organs fifty years later."¹⁶⁶

The point at issue here is how the legal nature of Article 22 of the Covenant and the mandate should be understood: Judge Fitzmaurice relied on their conventional (contractual) aspect, whereas the majority opinion relied on their institutional aspect. The inter-temporal law applied by the majority opinion in this way seems to have a useful suggestion in finding the theoretical foundations of the constitutional nature of constituent instruments.

2. *Article 31, Paragraph 3, (c) of the Vienna Convention on the Law of Treaties:* Third report submitted to the International Law Commission by Waldock in 1964 contained the

¹⁶⁴ For some of the useful bibliography, see Yasseen, *L'interprétation des traités d'après la convention de Vienne sur le droit des traités*, 151 RECUEIL DES COURS 1, 62-70 (1976); do Nascimento e Silva, *Le facteur temps et les traités*, 154 RECUEIL DES COURS 215, 265-70 (1977); Elias, *The Doctrine of Intertemporal Law*, 74 AM. J. INT'L L. 285 (1980); I. SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 124-26, 138-40 (2nd ed. 1984); P. REUTER, *INTRODUCTION AU DROIT DES TRAITÉS* 87-88 (2e éd. 1985); P. TAVERNIER, *RECHERCHES SUR L'APPLICATION DANS LE TEMPS DES ACTES ET DES RÈGLES EN DROIT INTERNATIONAL PUBLIC (PROBLÈMES DE DROIT INTERTEMPOREL OU DE DROIT TRANSITOIRE)* 205-07 (1970).

¹⁶⁵ *Namibia* case, *supra* note 67, at 31.

¹⁶⁶ *Id.* at 223.

following draft article entitled "The inter-temporal law"¹⁶⁷:

- "1. A treaty is to be interpreted in the light of the law in force at the time when the treaty was drawn up.
2. Subject to paragraph 1, the application of a treaty shall be governed by the rules of international law in force at the time when the treaty is applied."

Waldock, in drafting this article, relied heavily upon the formulation by Judge Huber in the *Island of Palmas* arbitration (1928), which was as follows:

"[A] juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled. . . .

As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law."¹⁶⁸

Therefore, in corresponding to the distinction between the creation and the continuation of rights, Waldock set the distinction between the interpretation which is to be made in the light of the law in force at the time of the conclusion and the application which is to be governed by the law in force at the time of the application.¹⁶⁹

This manner of drafting was supported by the majority of the members in the Commission. The majority considered that whether a change in the law will have this effect depends on the initial intention of the parties in using the terms and that the effect of the change in the law should be regarded as a matter of the application of the law rather than of a rule of interpretation. They preferred to confine the statement of the rules of interpretation to those dealing with the establishment of the initial meaning of the terms.¹⁷⁰ However, this manner of drafting was re-examined in 1966 partly because of the critical comments submitted by governments.¹⁷¹ The Commission seemed generally disinclined to deal with the problem of inter-temporal law in the draft articles. It was understood that the question of whether the terms used were intended to have a fixed content or to change in meaning with the evolution of the law could be decided only by interpreting the intention of the parties.¹⁷² Thus, the Commission, in the final draft articles of 1966, referred to "(c) Any relevant rules of international law applicable in the relation between the parties" as to be taken into consideration, together with the context in paragraph 3 of the draft article 27, which became

¹⁶⁷ Waldock, Third Report on the Law of Treaties, [1964] 2 Y. B. INT'L L. COMM'N 5, 8-9, U.N. Doc. A/CN. 4/167 and Add. 1-3.

¹⁶⁸ *Island of Palmas Case* (Netherlands, United States), 2 R. INT'L ARBITRAL AWARDS 831, 845.

¹⁶⁹ Waldock, *supra* note 167, at 9.

¹⁷⁰ Report of the Commission to the General Assembly, [1964] 2 Y. B. INT'L L. COMM'N 173, 202-03, U.N. Doc. A/5809. See the arguments in the 765th and the 769th meetings, [1964] 1 Y. B. INT'L L. COMM'N 275 et seq. and 308 et seq.

¹⁷¹ Especially the Netherlands. See Waldock, Sixth Report on the Law of Treaties, [1966] 2 Y. B. INT'L L. COMM'N 51, 92 U.N. Doc. A/CN. 4/186 and Add. 1-7.

¹⁷² Statement of Waldock in the 872nd meeting, [1966] 1 Y. B. INT'L L. COMM'N 199, para. 9.

Article 31 of the present Convention on the Law of Treaties by being adopted without change in the diplomatic conference in 1968 and 1969.

The attitude of the Commission on this point is explained as follows in the commentary:

"[The Commission] considered that . . . the relevance of rules of international law for the interpretation of treaties in any given case was dependent on the intentions of the parties, and that to attempt to formulate a rule covering comprehensively the temporal element would present difficulties. It further considered that correct application of the temporal element would normally be indicated by interpretation of the term in good faith. The Commission therefore concluded that it should omit the temporal element and revise the reference to international law so as to make it read 'any relevant rules of international law.'"¹⁷³

3. *Resolution Adopted by l'Institut de Droit International:* L'Institut adopted a resolution entitled "The Intertemporal Problem in Public International Law" in 1975¹⁷⁴ after consideration of the reports submitted by Sørensen since 1968.¹⁷⁵ This resolution consists of a preamble and six articles:

The preamble refers, among others, to the necessity that any solution of an inter-temporal problem in the international field must take account of the dual requirement of promoting the development of the international legal system and preserving the principle of legal stability which is an essential part of any juridical system. Article 1 indicates a fundamental principle: unless otherwise indicated, the temporal sphere of application of any norm of public international law shall be determined in accordance with the general principle of law by which any fact, action or situation must be assessed in the light of the rules that are contemporaneous with it. Article 3 provides the freedom of States to make this indication: States and other subjects of international law shall have the power to determine by common consent the temporal sphere of application of norms. Article 4 refers to the significance of interpretation: wherever a provision of a treaty refers to a legal or other concept without defining it, it is appropriate to have recourse to the usual methods of interpretation in order to determine whether the concept concerned is to be interpreted as understood at the time when the provision was drawn up or as understood at the time of its application.

Based upon the three reports by Sørensen and the comments by the members concerned, it is possible to emphasize the important role given to the interpretation in the actual, concrete application of the theory of inter-temporal law. In the final report, Sørensen states that an international legal norm, conventional or customary, very frequently employs expressions and notions whose meanings and scopes are not defined by the norm itself, and that the question of whether to take the meaning which the notion or the term had at the time when the norm was established is related to whether the norm concerned contains "un renvoi à contenu fixe ou un renvoi mobile" (reference to a fixed content or mobile reference).¹⁷⁶ From this viewpoint, Sørensen reached the following conclusion:

¹⁷³ Report of the Commission to the General Assembly, [1966] 2 Y. B. INT'L L. COMM'N 169, 222, U.S. Doc. A/6309/Rev. 1. See also the similar statement of Yasseen, a member of the Commission at that time. Yasseen, *supra* note 164, at 66-67.

¹⁷⁴ 56 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 36 (1975).

¹⁷⁵ Sørensen, *Le problème dit du droit intertemporel dans l'ordre international*, 55 A.I.D.I. 1 (1973).

¹⁷⁶ *Id.* at 90.

"De l'avis du rapporteur, il résulte de la pratique judiciaire et arbitrale internationale . . . qu'il n'est pas possible de répondre à cette question par une formule générale qui en toute circonstance donnerait la préférence soit au sens originaire, soit au sens ultérieur. Au contraire, la nature de la réponse dépend des circonstances de l'espèce. C'est à la suite d'une interprétation de la norme qu'il faut trancher la question dans le cas d'espèce et cette opération d'interprétation particulière doit porter plus précisément sur le choix entre les deux possibilités. En ce qui concerne une disposition conventionnelle, quelle était l'intention des parties contractantes? A-t-on voulu un renvoi fixe ou un renvoi mobile? Si l'intention des parties à cet égard ne peut pas être établie, quelle est la solution qui s'impose par l'objet et le but du traité?"¹⁷⁷

4. *Some Comments:* From the above analyses, it is possible to give the following comments to the theory of inter-temporal law.

First, the fundamental principle of the theory of inter-temporal law is that a juridical fact must be appreciated in the light of the law contemporary with it. Secondly, despite this principle, State parties have the power to decide the law to be applied to the fact concerned, and consequently, the problem becomes a matter of interpretation in search of the intentions of the parties. Thirdly, when the applicable law is a treaty, the nature of a treaty indicated in its object and purpose could have a certain effect of presumption in the interpretation in search of whether the intentions of the parties were reference to a fixed content or mobile reference.

The comments would lead us to the following conclusions with regard to the interpretation of constituent instruments. First, because constituent instruments are reasonably considered to contain many concepts and provisions of mobile reference, the provisions concerned will, unless the intentions of the parties are proved to be reference to a fixed content upon the examination, be regarded as based upon mobile reference and will be so interpreted. To this extent, the evolutionary nature of constituent instruments will be supported by the theory of inter-temporal law and their evolutionary and teleological interpretation will have a legitimacy. Secondly, we could consider in the same way with regard to the phenomenon that subsequent practice of the organs of international organizations has an influence upon the determination of the content of provisions of constituent instruments and also functions as criterion of interpretation. The theory of inter-temporal law would give a legitimacy to this phenomenon by attributing a legal foundation to the mechanism of mobile reference regarded to be contained in the many provisions of constituent instruments.¹⁷⁸

¹⁷⁷ *Id.* at 90-91. ("In the opinion of the rapporteur, it results from the international judicial and arbitral practice . . . that it is not possible to respond to this question by a general formula which would in any circumstances give preference either to the original meaning or the subsequent meaning. To the contrary, the nature of the response depends upon the circumstances of the case. It is as a result of an interpretation of the norm that one must solve the question in individual cases and this individual operation of interpretation must precisely bear on the choice between the two possibilities. With regard to a conventional provision, what was the intention of the contracting parties? If the intention of the parties in this regard cannot be established, what is the solution which is imposed by the object and purpose of the treaty?" [translation by the author])

¹⁷⁸ de Visscher seems to support this idea based upon the theory of inter-temporal law. CH. DE VISSCHER, *THÉORIES ET RÉALITÉS EN DROIT INTERNATIONAL PUBLIC* 321-22 (3e éd. 1960); DITTO, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 261 (rev. ed. P. E. Corbett trans. 1968).

B. Toward the Determination of the Interpretative Framework as the Constitutions of International Organizations

Some of the important elements in clarifying the doctrine of the interpretative framework of constituent instruments as the constitutions of international organizations will be developed here.

1. With Regard to the Criterion of "Necessity"

1. The interpretative framework of constituent instruments as the constitutions, as has been developed above in detail, exceeds the interpretative framework in the law of treaties in two aspects: (1) in the quantitative aspect of teleological extent admitted, and (2) in the qualitative aspect of legal significance possessed by the practice of the organs of international organizations. These two aspects are, although theoretically distinct, intertwined in the actual activities of international organizations. The following two views are worth citing as pointing out, respectively, these two aspects.

As to the first aspect, Bindschedler explained:

"Dans son application, le principe d'interprétation de l'effet utile aboutit à reconnaître aux organisations internationales des *compétences tacites ou implicites* ("implied powers"). Qui veut la fin veut les moyens: dans la mesure où des moyens indispensables à la réalisation d'un but ne sont pas prévus par le statut, ils doivent être déduits¹⁷⁹. . . ."

As to the second aspect, Higgins stated:

"[T]he point I wish to make is that U.N. political organs have at least an initial discretion to decide what actions are necessary to carry out their functions—whether it be an Interim Committee, a Peace Observation Committee, the right to hold prisoners of war, or whatever—and upon that practice its implied powers will be built."¹⁸⁰

The actual activities of international organizations are considered to be the synthesis of these two aspects. The implied powers founded on the principle of effectiveness will be built upon the practice of international organizations, but will, at the same time, legitimize their new practice. Thus these two in combination would actualize the evolutionary nature of international organizations.

2. In determining the inherently evolutionary interpretative framework as the constitutions of international organizations as is pointed out by the two views mentioned above, it is important to make some clarifications with regard to the criterion "necessity."

¹⁷⁹ Bindschedler, *La délimitation des compétences des Nations Unies*, 108 RECUEIL DES COURS 307, 327-30 (1963). ("In its application, the principle of interpretation called effectiveness leads to recognizing to the international organizations 'implied powers.' Who wants the end wants the means: insofar as the means indispensable for the achievement of the purpose are not provided for by the statute, they must be deduced" [translation by the author])

¹⁸⁰ Higgins, *The Development of International Law by the Political Organs of the United Nations*, 59 PROC. AM. SOC'Y INT'L L. 116, 123 (1965).

First, as was pointed out by the Court in the *Reparation* case, the organization must be deemed to have those powers which are conferred upon it "by necessary implication as being essential to the performance of its duties." The criterion, "necessary" or "essential" indicated here signifies not only that such powers are conferred upon the organization, but also that the powers conferred upon it are limited to only such powers. International organizations have, unless expressly provided, only those powers necessary or essential to the performance of their duties.¹⁸¹

Secondly, the following points could be made by the comparison between the majority opinion and that of Judge Hackworth in the advisory opinions by the Court in the *Reparation* case and the *Effect of Awards* case. "Essential" is something more than "important" but it does not mean "absolutely essential" or "indispensable." The existence of an alternative mode of achieving the objective envisaged in the attribution of the basic power does not, by itself, diminish the essential need for the implied power,¹⁸² nor does it exclude its exercise in the manner of restricting the express powers of other organs.

Thirdly, the significance of the presence of express powers in the constituent instruments must be taken into consideration. On the one hand, the implied powers contradictory to express provisions can not in principle be admitted even if they prove to be necessary. Otherwise, the *raison-d'être* of the constituent instruments will be questioned. But it does not mean that a contradictory practice will not be made. If the express provisions get ignored and do not bring about a protest by other member States, an implicit consent—*de facto* modification—could be considered to exist with regard to those provisions concerned. On the other hand, when the relevant provisions do not exist or only partially exist, could it be considered to exclude the relevant implied powers? The principle *expressio unius est exclusio alterius* will not necessarily be applied as is shown by the practices concerning treaty-making capacities and legislating capacities of internal law, although this point could be an issue (for example, Judge Hackworth applied this principle by referring to Article 22 of the Charter in the *Effect of Awards* case.).

¹⁸¹ This concept of "necessity" will play a great role in practice since constituent instruments establish only the fundamental structures of international organizations and reserve room for continual developments in accordance with the appearance of new functional needs. Because the *raison d'être* of an organization is the function to perform which it has been established, the concept of "necessity" is to be applied in connection with the function. Virally, for example, pointed out:

"[L]a fonction ne confère pas seulement une habilitation, elle impose une mesure: c'est seulement ce qui lui est 'nécessaire' qui peut être fait. La théorie des pouvoirs impliqués, consacrée par la Cour internationale de Justice dans son avis consultatif du 11 avril 1949 (*Rec.*, p. 174) et qui représente la meilleure systématisation du caractère normatif de la finalité fonctionnelle, en retient ces deux aspects."

Virally, *La notion de fonction dans la théorie de l'organisation internationale*, in *LA COMMUNAUTÉ INTERNATIONALE: MÉLANGES OFFERTS À CHARLES ROUSSEAU* 277, 293 (1974). ("[T]he function not only confers a qualification but it imposes a limit. It is only that which is 'necessary' for it which can be done. The theory of implied powers recognized by the International Court of Justice in its advisory opinion of 11 April 1949 (*Rep.*, p. 174) and which represent the best systematization of normative nature of functional finality, retains these two aspects." [translation by the author])

¹⁸² Lauterpacht, *The Development of the Law of International Organization by the Decisions of International Tribunals*, 152 *RECUEIL DES COURS* 379, 430-32, 434-36 (1976).

2. *With Regard to the Nature of Provisions in the Constituent Instruments*

1. The interpretative framework as the constitution applied to a concrete case of activities of an international organization will inevitably be influenced by the specific nature of the relevant provisions in the constituent instrument. In this sense, the distinction between organizational provisions and substantive provisions can not be, although useful to understand the constitutional nature as a whole, sufficient to clarify the interpretative framework as the constitution applied to a concrete case. A case-by-case examination of the specific nature of relevant provisions will be indispensable for this purpose.

From this viewpoint, Schachter has justly emphasized that it is essential in considering the criteria of interpretation to bear in mind the great differences that exist in the various provisions in regard to their degree of generality and the nature of the choices they require. He introduced, for convenience, four categories: "rules," "principles," "standards" and "doctrine" (or "general theory"). They are worth briefly citing.¹⁸³

"Rules" refer to the norms which have relatively precise and explicit terms and which are generally intended to be applied without discrimination as to individual characteristics. In these "rules" such as those concerning procedures and organizational activities, key terms and expressions have generally accepted definitions taken for granted in almost all cases which arise.

"Principles," such as the broadly stated precepts of Article 2 of the Charter, have much greater generality, and their key terms are often highly abstract, [thus leading to the clash with each other in specific cases. The opposition and indeterminacy of the principles call for a frame of reference that is quite different from that required in deciding the issues presented by specific rules. Here emphasis shifts from a dictionary and ordinary meaning to an assessment of a complex factual situation and a consideration of the consequences of a decision in the light of more basic values that are regarded as implicit in the constituent instruments.

"Standards," such as "good faith," "peace-loving" and "with due regard to equitable geographical distribution," refer to highly general prescriptions which involve evaluating the individual features of events, in contrast to "rules" (and to some degree "principles") which assume a relatively uniform application irrespective of individual characteristics. They are used to judge conduct of a kind which does not seem susceptible of treatment under more specific criteria and requires that each case be judged largely on its own facts. Their application necessarily requires consideration of the basic aims of the constituent instruments and of the felt necessities of time and place.

"Doctrine" or "general theory," such as those in the great constitutional debates in the United Nations in 1950s and 1960s, comes into play particularly in cases of conflict between competing principles and in giving concrete meaning to broad concepts. Constitutions are generally considered to have certain underlying and implicit premises, which are literally extra-constitutional since they are not formulated in the constituent instruments,

¹⁸³ Schachter, *The Relation of Law, Politics and Action in the United Nations*, 109 RECUEIL DES COURS 165, 188-96 (1963). See also Dillard, *Some Aspects of Law and Diplomacy*, 91 RECUEIL DES COURS 445, 477 (1947).

but which provide a higher-law rationale to justify choices between competing principles.

These four categories of legal provisions could be refined by further logical and syntactical analysis and replaced by more precise classification. But they clearly demonstrate that it is essential for the clarification of the interpretative framework as the constitution applied to a concrete case to examine the specific nature of relevant provisions in the constituent instruments.

2. Based upon the previous analyses in the present article, several points could be added to the case-by-case examination of the specific nature of relevant provisions explained above.

First, practices of member States and of the organs of international organizations which could contain their interpretation of relevant provisions must also be analyzed in this examination. As was previously analyzed, the nature of relevant provisions will be influenced by these practices.

Secondly, the applicability of the theory of inter-temporal law requires that the intentions of the member States crystallized in the relevant provisions should be clarified: Have the member States embodied in the relevant provisions such concepts or norms which anticipate various changes and developments and intend their adaptations to them after the establishment of the organization?

Thirdly, the relevancy of the provisions to the restriction of State sovereignty of member States must be analyzed. It is said that a pole in the general theory of international organizations is State sovereignty and that their development will always constitute a dynamic equilibrium between the exigencies of their functions which find their source in the recognition on the part of their member States of certain common interests on the one hand and the resistance of certain member States with a view to protecting their other interests on the other hand.¹⁸⁴ Consequently, it will be necessary to distinguish between the provisions which could enhance the autonomy and efficiency of international organizations without directly involving the restriction of State sovereignty of member States and those which could promote their effectiveness only with the restriction and sacrifice of State sovereignty.

Fourthly, the purpose-oriented nature of organizational provisions should be duly taken into consideration. Because international organizations are considered as instruments, all of their structures are designed with a view to enable them to achieve their functions most effectively and efficiently. Consequently, it will be reasonable to assume that organizational provisions have, in contrast to substantive provisions or ordinary treaties, a strong purpose-oriented nature which plays an important role in the constitutional interpretation.¹⁸⁵

3. With Regard to the Determination of Guiding Principles in the Interpretative Framework as the Constitutions

It has been made clear that the constitutional nature of constituent instruments and the interpretative framework as the constitutions have been, to a considerable extent, accepted both by the doctrines and the Court. On the other hand, however, it should be

¹⁸⁴ Virally, *supra* note 181, at 296.

¹⁸⁵ *Id.* at 291-92.

also pointed out that they are not generally accepted by all of the member States, particularly some great powers.¹⁸⁶ In such a situation, how should the applicability of the interpretative framework as the constitutions to a concrete case be appreciated? The following points should be taken into consideration.

First, the question will be to reconcile the need to allow international organizations to evolve in adaptation to the constant changes with the need to safeguard individual States against having completely novel obligations imposed upon them merely as a result of being outvoted.¹⁸⁷ The *raison-d'être* of the constituent instruments consists not only of establishing international organizations but also of protecting the reserved legal rights and interests of minority States by putting the activities of international organizations under their proper control. The general applicability as law requires that any interpretation of constituent instruments could be applicable even in other cases where the majority States and the minority States change their places: prohibition of double standards. Satisfaction of this necessity demands a high statesmanship based upon the perspective for long term development of international organizations on the part of the political organs as principal interpreters of the constituent instruments.¹⁸⁸

Secondly, it is indispensable to pay due attention to the inherent fragility proper to international organizations in the present international society. In the present state of the organized international society, cooperation on the part of member States will be necessary for the implementation of most of the resolutions. It might be possible to argue that such a consideration on the level of fact should be excluded from the legal analysis of constitutional interpretation. However, so far as there is some room left to discretion in the interpretation process, it would be reasonable and legitimate to take into consideration as legally relevant the element of whether international organizations could have an actual effectiveness. De Visscher referred to this point as follows:

“Cette recherche de l'effectivité comporte une limite évidente. Si enclin que l'on soit à envisager les organisations internationales dans leurs perspectives d'avenir, dans ce qu'on appelle parfois leur ‘dynamique,’ rien de solide ne peut se faire si, dans cette voie, on dépasse ce qu'autorise le degré de solidarité, réelle entre les Etats qui les ont instituées. Du maintien de cette solidarité, de l'assentiment continu qui en est l'ex-

¹⁸⁶ See *supra* notes 6 and 13.

¹⁸⁷ Waldock, *General Course on Public International Law*, 106 RECUEIL DES COURS 1, 34–35 (1962).

¹⁸⁸ Rosenne stated this point as follows:

“[E]specially for questions involving the interpretation of a constituent instrument, there frequently occurs an inversion of what is often thought to be the process of interpretation, since the question is not so much one of textual exegesis for the purpose of applying the text in a concrete case, but rather one of the concrete circumstances to be carefully and comprehensively analysed, appraised and understood before determining how the constituent instrument as a whole, or some individual provision in it, is to be applied (or whether it was correctly applied in the past). This is an operation calling for the highest qualities of statesmanship and judicial and legal skill. . . .

Unlike the interpretation of treaties where the fine-tuning has been supplied by a plethora of judicial decisions and arbitral awards extending over a long period of time, the development of any comprehensive and coherent pattern for the methodology of the interpretation of the constituent instrument is, on the whole, the outcome . . . the intended outcome—of political and not of judicial or arbitral action.”

CH. ROSENNE, *Is the Constituent Instrument of an International Organization an International Treaty?*, in DEVELOPMENTS IN THE LAW OF TREATIES 1945–1986, 181, 233 (1989). See also Gross, *On the Degradation of the Constitutional Environment of the United Nations*, 77 AM. J. INT'L L. 569 (1983), reprinted in L. GROSS, 2 ESSAYS ON INTERNATIONAL LAW AND ORGANIZATION 661 (1984).

pression, dépendent l'effectivité et finalement le sort de toute organisation internationale."¹⁸⁹

VI. CONCLUDING REMARKS

The present writer has demonstrated, as the interpretative framework of constituent instruments, an emerging doctrine of "the constitutions of international organizations," which differs from that of ordinary treaties in two aspects: (1) in the quantitative aspect of teleological extent admitted, (2) in the qualitative aspect of legal significance possessed by the practice of the organs of international organizations. The analysis of various legal theories and materials in which he searched for the possible theoretical foundations of this emerging doctrine, revealed that although each of them contains *a useful suggestion* (for example, that the constituent instruments contain teleological elements sufficient for the evolution of dynamism inherent in the international organizations; that they are considered to create an organism capable of life and growth, the development of which cannot be foreseen completely by the begetters; that they are to be considered to contain the dynamism and stability inherent in the institutional phenomena; that they are considered to contain many concepts and provisions of mobile reference to the temporal elements), none of them would be satisfactory for the refined and systematic construction of this emerging doctrine. It should be, however, also pointed out that they clearly demonstrated that *it has always been an important preoccupation, irrespective of time and place, that collective organisms could only be legally regulated by giving an appropriate place to their inherent dynamism.*

Contrary to the interpretative framework of treaties which is based upon a large number of judicial decisions and arbitral awards extending over a long period of time, this doctrine of constituent instruments as the constitutions is a product of *recent phenomena* mainly in the universal international organizations. As the present article has analyzed, the present level of doctrines and actual practices seems to allow only the construction of *a solid but basic framework of interpretation*. In the operation of international organizations, much seems to depend upon the high statesmanship based upon the perspective for their long term development on the part of member States constituting the political organs as principal interpreters of the constituent instruments. However, in spite of these limitations the writer is convinced that *this doctrine could provide a useful perspective for the present and future evolution of international organizations in the area of dynamically changing international relations.*

The present article has left some problems unanswered. The doctrine of the constitutions of international organizations as the interpretative framework of their constituent instruments needs to be further re-examined, modified and improved by the concrete anal-

¹⁸⁹ CH. DE VISSCHER, *LES EFFECTIVITÉS DU DROIT INTERNATIONAL PUBLIC* 159 (1967). ("This search for the effectiveness comprises an evident limit. How inclined one may be to envisage the international organizations in their perspective of the future, in what one sometimes calls their 'dynamism,' nothing solid can be created if, in this way, one exceeds what the degree of actual solidarity among the States which have established them authorizes. Upon the maintenance of this solidarity, the continuous consent which is its expression, depends the effectiveness and ultimately the destiny of every international organization." [translation by the author]) See also a similar statement of Robinson. Robinson, *Metamorphosis of the United Nations*, 94 *RECUEIL DES COURS* 493, 580 (1958).

yses of the structures and activities of different organizations. These analyses must include the examinations with regard to, among others, (1) to what extent this doctrine has actually been accepted by member States of various international organizations, (2) in what manner this doctrine has been applied to the different constituent instruments, (3) what is the criterion to distinguish those provisions to which this doctrine could be applied from other provisions.

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