

STATUS OF CONSTITUENT INSTRUMENTS OF
INTERNATIONAL ORGANIZATIONS
IN THE LAW OF TREATIES
— WITH PARTICULAR REFERENCE TO THE NOTION
“RELEVANT RULES OF THE ORGANIZATION” —

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Introduction

The purpose of the present paper is to clarify the status of constituent instruments of international organizations in the law of treaties, that is to say, the relationship between constituent instruments of international organizations and the law of treaties.

I have already attempted to analyze the differences between constituent instruments of international organizations and ordinary treaties both in the light of the notion "caractère constitutionnel" of constituent instruments and of their interpretative framework with particular regard to the principle of implied powers.¹ I intend to analyze the interpretative framework of the law of treaties embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, and compare it with that of constituent instruments to clarify the possible differences between them. In this connection, however, a related but more general question is the status of constituent instruments in the law of treaties. Here we have concrete material—Article 5 of the Vienna Convention on the Law of Treaties.

Article 5 (Treaties Constituting International Organizations and Treaties Adopted within an International Organization) provides:

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

In approaching the general problem of the status of constituent instruments in the law of treaties, this Article 5 offers interesting material to analyze. Even in recently published books on the law of treaties,² Article 5 had not been dealt with sufficiently, presumably not

¹ Tetsuo Sato, *Constituent Instruments of International Organizations and Their Interpretative Framework—Introduction to the Principal Doctrines and Bibliography—*, 14 HITOTSUBASHI JOURNAL OF LAW AND POLITICS 1–22 (1986).

² I. SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 36, 95, 108 (2nd ed. 1984); S. BASTID, *LES TRAITÉS DANS LA VIE INTERNATIONALE—CONCLUSION ET EFFETS* —5, 28, 59, 222 (1985); P. REUTER, *INTRODUCTION AU DROIT DES TRAITÉS* (2ème ed. 1985). It will be useful to point out, as Reuter did (at 127), that "[l]es effets d'un acte constitutif à l'égard de l'organisation ne sont pas régis par la [Convention de Vienna sur le droit des traités] (la CV ne concerne que les États) ni par le projet d'article sur les traités des organisations internationales (les actes constitutifs sont régis par la CV)."

because it is not an important provision, but rather because it belongs to the law of international organizations.

In analyzing Article 5, therefore, I will trace its legislative history both in the international Law Commission and in the Vienna Diplomatic Conference. I will also focus upon the role played by the notion "relevant rules of the organization." This notion was adopted and later developed in two conventions: the Vienna Convention on the Representation of States in Their Relationship with International Organizations of a Universal Character and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. These conventions should be analyzed in the same manner.

I. *Analysis of Article 5 of the Vienna Convention on the Law of Treaties*

1: Drafting in the International Law Commission

(1) Draft Articles by Waldock

References to constituent instruments or international organizations in the draft articles submitted by the fourth Special Rapporteur, Sir Humphrey Waldock ranged from simply mentioning them to entrusting important functions to the organizations.³ Some of these were, after discussions in the Commission, incorporated in the provisional draft articles reported to the General Assembly. For example, with respect to reservations, "[a] State may . . . formulate a reservation unless: (a) The making of reservations is prohibited . . . by the established rules of an international organization"⁴; with respect to modification of treaties, such expressions as "[u]nless otherwise provided . . . by the established rules of an international organization" were included in the articles.⁵

(2) 1963 Report of the Commission to the General Assembly

Although a preference for a general provision concerning the constituent instruments had already been expressed in the discussions of "Termination or Suspension of A Treaty Following upon Its Breach,"⁶ it was not until the 718th meeting in 1963 that the Drafting

³ Some examples are as follows: draft articles 17-19 (First Report) concerning reservations; draft article 14 (Second Report) concerning conflict with a prior treaty; draft article 17 (same) concerning treaties containing no provisions regarding their duration or termination; draft article 20 (same) concerning termination or suspension of a treaty following upon its breach; draft article 22 (same) concerning the doctrine of *rebus sic stantibus*. On these points, see Waldock, First Report on the Law of Treaties [1962] 2 Y. B. INT'L L. COMM'N 27, U. N. DOC. A/CN.4/144; Second Report on the Law of Treaties [1963] 2 Y. B. INT'L L. COMM'N 36, U. N. DOC. A/CN.4/156 and Add. 1-3; Third Report on the Law of Treaties [1964] 2 Y. B. INT'L L. COMM'N 5, U. N. DOC. A/CN.4/167 and Add. 1-3.

⁴ See Report of the International Law Commission to the General Assembly, [1962] 2 Y. B. INT'L L. COMM'N 157, 175-182, U. N. DOC. A/5209.

⁵ See Report of the International Law Commission to the General Assembly, [1964] 2 Y. B. INT'L L. COMM'N 173, 193-197, U. N. DOC. A/5809.

⁶ Summary Records of the 692nd meeting (para. 2) and the 693rd meeting (paras. 39-40), [1963] 1 Y. B. INT'L L. COMM'N 122 and 132. In tracing the legislative history, the following book is useful: S. ROSENNE, THE LAW OF TREATIES A GUIDE TO THE LEGISLATIVE HISTORY OF THE VIENNA CONVENTION (1970).

Committee submitted one.⁷ This provision was, finally, adopted as Article 48:⁸ “Where a treaty is a constituent instrument of an international organization, or has been drawn up within an international organization, the application of the provisions of part II, section III, shall be subject to the established rules of the organization concerned.” The commentary in the 1963 Report to the General Assembly explains as follows:

“(1) The application of the law of treaties to the constituent instruments of international organizations and to treaties drawn up within an organization inevitably has to take account also of *the law governing each organization*. Thus, in formulating the rules governing *the conclusion of treaties* in part I, *the Commission found it necessary in certain contexts to draw a distinction between these and other kinds of multilateral treaties*. . . . In the present part the Commission did *not* think it necessary to make any particular provision for these special categories of treaties with regard to the articles contained in section II which deal with *the grounds of the invalidity of treaties*. . . .

(2) On the other hand, it appeared to the Commission that certain of the articles in section III concerning *the termination or suspension of the operation of treaties and withdrawal from multilateral treaties* might encroach upon the internal law of international organizations to a certain extent. . . . Accordingly, the present article provides that the application of the provisions of section III to constituent instruments and to treaties drawn up “within” an organization shall be *subject to the “established rules” of the organization concerned*. The term “established rules of the organization” is intended here . . . to embrace not only the provisions of the constituent instruments of the organization but also *the customary rules developed in its practice*.”⁹ (Italics mine)

(3) Fourth Report by Waldock

Taking into consideration the comments of governments, Waldock submitted, in 1965, the fourth report, in which the previous Article 48 had been transferred to Article 3 (bis). The Special Rapporteur explains the reason for this transfer as follows:

“[W]hen dealing with the termination of treaties in part II, section III, it made a general reservation . . . in article 48 covering all the articles of that section. *There are some articles, however, where such a reservation might be necessary or prudent but with regard to which the Commission has not made the reservation*; for example, article 9, concerning *the participation of additional States in treaties*, and articles 65–68, concerning *the modification of treaties*. The Special Rapporteur suggests that the reservation in article 48 should be transferred to the “General Provisions” part and made to cover, in principle, the draft articles as a whole.”¹⁰ (Italics mine)

This new Article 3 (bis) was introduced in the 780th meeting,¹¹ postponed and adopted without much discussion by 16 votes to none in the 820th meeting.¹²

⁷ Summary Records of the 718th meeting, *id.*, at 307, para. 89–94.

⁸ Summary Records of the 720th meeting, *id.*, at 318, para. 68.

⁹ Report of the International Law Commission to the General Assembly, [1963] 2 Y. B. INT'L L. COMM'N' 187, 213, U. N. DOC. A/5509.

¹⁰ Waldock, Fourth Report on the Law of Treaties [1964] 2 Y. B. INT'L L. COMM'N 3, 18, U. N. DOC. A/CN.4/177 and Add. 1 and 2.

¹¹ Summary Records of the 780th meeting, [1965] 1 Y. B. INT'L L. COMM'N 31–2, paras. 17–26.

¹² Summary Records of the 820th meeting, *id.*, at 308, para. 28.

(4) Final Draft Articles Adopted by the Commission

The Article 3 (bis) was finally adopted as Article 4:¹³ Treaties which are constituent instruments of international organizations or which are adopted within international organizations—"The application of the present articles to treaties which are constituent instruments of an international organization or are adopted within an international organization shall be subject to any relevant rules of the organization." The commentary succinctly summarized the drafting history we have traced above, as follows:

"(1) The draft articles, as provisionally adopted at the fourteenth, fifteenth and sixteenth sessions, contained a number of specific reservations with regard to the application of *the established rules of an international organization*. In addition, in what was then part II of the draft articles and which dealt with the invalidity and termination of treaties, the Commission had inserted an article (article 48 of that draft) making a broad reservation in the same sense with regard to all the articles on termination of treaties. On beginning its re-examination of the draft articles at its seventeenth session, the Commission concluded that the article in question should be transferred to its present place in the introduction and should be reformulated as a general reservation covering the draft articles as a whole. It considered that this would enable it *to simplify the drafting* of the articles containing specific reservations. It also considered that *such a general reservation 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.*"¹⁴ (Italics mine)

2: Drafting in the Vienna Diplomatic Conference

(1) Introduction

The International Law Commission unanimously adopted the final draft articles on the law of treaties at its eighteenth session in 1966. In the same year, the United Nations General Assembly by resolution 2166 (XXI) decided to convene an international conference of plenipotentiaries in 1968 and 1969. The first session of the United Nations Conference on the Law of Treaties was held in Vienna in 1968 and was attended by representatives of 103 countries and observers from thirteen specialized and inter-governmental agencies. The second session was held in Vienna in 1969 and was attended by representatives of 110 countries and observers from fifteen agencies. The Conference adopted the Vienna Convention on the Law of Treaties on 23 May 1969.

¹³ Summary Records of the 887th meeting (paras. 79 and 80) and 892nd meeting (para. 75), [1966] 1 Y. B. INT'L L. COMM'N 294 and 325.

¹⁴ Report on the International Law Commission to the General Assembly, [1966] 2 Y. B. INT'L L. COMM'N 169, 191, U. N. DOC. A/6309/Rev. 1.

The Commentary also stated as follows:

"[T]he Commission revised the formulation of the reservation at its present session so as to make it cover only "constituent instruments" and treaties which are "*adopted within an international organization.*" This phrase is intended to exclude treaties merely drawn up under the auspices of an organization or through use of its facilities and to confine the reservation to treaties the text of which is drawn up and adopted within an organ of the organization." *Id.*

(2) First Session—Grouping of the States on the Point Concerned

In the first session draft article 4 was discussed by the Committee of the Whole in the 8th–10th and 28th meetings. Representatives of 34 countries and observers for eight international organizations and Waldock (Expert Consultant) expressed their opinions, which could be, for convenience, grouped in the following way:

(i) States demanding the deletion of Article 4

A: Opposed to the purpose of Article 4—Congo (Brazzaville), Ukrainian Soviet Socialist Republic, Czechoslovakia, Bulgaria

B: Preferring exceptions in individual articles rather than a general provision—United States of America, Netherlands, Federal Republic of Germany

C: Others—Japan, Sweden, Philippines

(ii) States supporting Article 4

Most of the remaining countries, eight international organizations and Waldock

(3) States Demanding the Deletion of Article 4

The Congo (Brazzaville) delegate stated that he saw no reason to make a special category of treaties which were constituent instruments because they were treaties concluded between States.¹⁵ The Ukrainian delegation submitted an amendment replacing the words “shall be subject to any relevant rules” with the words “shall take into account the relevant rules.”¹⁶

Mr. McDougal (U.S.A.) stated that while the exclusion of two such important types of treaty from the scope of the convention would greatly undermine its authority and reduce its significance, the flexibility and security needed by international organizations could be safeguarded by including suitable exceptions to Articles 6, 8, 13, 16, 17, 37 and 72, and submitted an amendment to that effect.¹⁷

Mr. Blix (Sweden) submitted an amendment to delete Article 4, not because he was dissatisfied with the idea expressed in that Article, but because he thought the principle did not need to be stated. He explained that if States could derogate from the rules of the draft convention by agreement between themselves, they should also be able to do so by adopting certain rules or practices within an international organization and that it did not seem necessary to say so.¹⁸ Mr. Golsong (Observer for the Council of Europe) objected to this view by stating as follows: “Deletion of Article 4 might be acceptable if all the delegations shared the views of the Swedish delegation, but that was by no means the case; it was significant that the United States amendment to delete Article 4 was based on the

¹⁵ United Nations Conference on the Law of Treaties, Official Records, First Session, 1968, Summary Records of the 9th meeting, at 47, para. 9.

¹⁶ A/CONF.39/C.1/L.12. For the amendments submitted to Article 4, see United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference, at 114–6.

¹⁷ *Supra* note 13, 8th meeting, at 43, paras. 15–8. He also made the following interesting statement:

“The arguments so far advanced did not distinguish between the internal affairs of an organization, such as the procedure for the formation of agreements, which should be subject to its own rule-making, and treaty relations between States, which involved matters such as the principles relating to invalidity and were beyond the rule-making competence of international organizations. Nor had a proper distinction been made between participation in the framing of a constituent instrument of an international organization and admission to membership of an organization, or between withdrawal from membership and the termination of the constituent instrument.” *Id.*, at para. 20.

¹⁸ *Id.*, 8th meeting, at 45, paras. 33–6.

totally different argument that States should not evade the rules embodied in the draft articles by concluding their treaties within international organizations."¹⁹

The amendments of the United States of America, Sweden, and the Congo, which proposed the deletion of Article 4 for different reasons, were put to the vote and rejected by 84 votes to 10, with 2 abstentions.²⁰

(4) Explication of Assertions Supporting Article 4

Most of the statements made by representatives of States and by observers of international organizations fundamentally supported the purpose of Article 4 and they can be explicated in the following manner.

(i) Importance of Article 4: It should be noted that two representatives—Sir Francis Vallat (United Kingdom)²¹ and Mr. Virally (France)²²—who were thoroughly familiar with international organizations, as well as all the observers for international organizations,²³ emphasized that Article 4 was one of the most important and significant articles in the draft convention.

(ii) Desirability of A General Provision: As was already explained, the International Law Commission had originally taken an individual approach, but had abandoned this in 1963, on finding that it would create considerable difficulties. Mr. Meron (Israel) pointed out the following four reasons for preferring a general provision.²⁴

- A: It was better not to complicate the text of the convention by detailed amendments to specific articles.
- B: It was doubtful whether the Conference could undertake an exhaustive examination of the draft, taking great care not to omit any necessary amendment.
- C: Proper latitude must be left for future developments in international law and international organizations, and the Article provided the necessary flexibility.
- D: The needs of some international organizations were different from those of the United Nations, and it would be difficult to provide for those needs by the method of specific amendments.

It would also be difficult to reach consensus upon which articles need the amendments. For example, Mr. Broches (Observer for the I.B.R.D.) suggested Articles 14(1), 37, 41, 57, 59 and 62 for constituent instruments, and Articles 6, 8, 9, 10, 11, 12, 14, 17, 53, 71 and 74 for treaties adopted within international organizations.²⁵ Mr. Golsong stated that the experience of the Council of Europe showed that there were no less than twenty-seven ar-

¹⁹ *Id.*, 9th meeting, at 47, paras. 15–6.

²⁰ *Id.*, 10th meeting, at 57, para. 41.

²¹ *Id.*, 8th meeting, at 44, para. 31.

²² *Id.*, 8th meeting, at 45, para. 40.

²³ Mr. Golsong (Observer for the Council of Europe) referred to an important point when he stated: "The basic rule embodied in article 4 was not the result of the work of international secretariats; it had emerged from the decisions taken and the attitudes adopted by States. *It thus reflected a development of State practice based on the interests of States.* The fact that an increasing number of multilateral treaties were concluded within international organizations showed that the flexibility of that procedure was in the interest of States." (Italics mine) *Id.*, 9th meeting, at 47, para. 13.

²⁴ *Id.*, 9th meeting, at 50–1, paras. 55–6.

²⁵ *Id.*, 9th meeting, at 48–9, paras. 30–42.

ticles which would have to be amended.²⁶ Mr. Jenks (Observer for the I.L.O.), in the discussions of Article 3, referred to the importance of Article 4 and stated that the questions at issue were too complex to be dealt with by detailed amendments to the draft articles and could only be properly covered by a broad and comprehensive provision. He specifically pointed out Articles 8, 9, 12, 16–20, 28, 36, 37, 57 and 62–64.²⁷

(iii) Whether “Relevant Rules of the Organization” would include practice in the organization: That “relevant rules” should include “the practice” or “the established practices” was emphasized by observers for such organizations as the Food and Agriculture Organization, the Council of Europe, and the World Health Organization. Furthermore, in order to clarify this point, amendments to add “or decisions” (Ceylon) or “and established practices” (United Kingdom) were submitted.²⁸ Waldock responded to these by stating that *the International Law 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.*²⁹

(5) A Comment by Mr. Yasseen, Chairman of the Drafting Committee

In the 28th meeting, Mr. Yasseen, Chairman of the Drafting Committee, introduced the text of Article 4 adopted by that Committee and stated as follows:

“The Drafting Committee had not thought it advisable to alter the International Law Commission’s text, or to accept the proposed amendments. It should be explained, however, that *it had taken the view that the term “rules” in article 4 applied both to written rules and to unwritten customary rules.* That being so, the United Kingdom representative had agreed to withdraw his delegation’s amendment on the understanding that *the term in question applied only to legal rules and could not be extended to rules*

²⁶ *Id.*, 9th meeting, at 47, para. 17.

²⁷ *Id.*, 7th meeting, at 36–7, paras. 2–19.

²⁸ They were A/CONF.39/C.1/L.53, and A/CONF.39/C.1/L.39.

²⁹ *Id.*, 10th meeting, at 57, para. 40.

Another very important question, although not directly relevant in the present context, relates to *the difference between “treaties which are constituent instruments of international organizations” and “treaties which are adopted within international organizations.”* This is a most difficult question, to which several representatives referred. For example, Mr. Virally (France) made the following statement:

“A treaty which was the constituent instrument of an organization could be identified by its object. At the conclusion stage it was comparable to any treaty, but *the position changed when it entered into force.* Ordinary treaties were applied by the States parties to them through their executive, legislative and judicial organs. *A treaty which was the constituent instrument of an organization was applied both by the parties as members of the organization and by the organs of the organization. That produced a whole series of consequences which the draft convention could not cover.* The inclusion of constituent instruments of international organizations in article 4 was therefore justified.

Treaties concluded within an organization did not have the same unity. Some treaties were adopted merely for reasons of convenience, and there would be no justification for trying to infer legal consequences from that fact. . . .

The question therefore arose in what cases the application of a special legal régime was justified for treaties whose adoption constituted the actual function of the organization—*treaties which were inseparable from its constituent instrument and from its very existence.* The observer for the ILO had explained the part played in that connexion by the international labour conventions in achieving the aims of that organization. *Treaties of that kind should be governed by special rules as to their interpretation, validity and application.* The purpose of the French amendment was to restrict the application of article 4 to agreements concluded under a treaty which was the constituent instrument of an international organ-

that did not have the character of legal rules. Consequently, article 4 did not apply to procedures which had not reached the stage of mandatory legal rules."³⁰ (Italics mine)

This text of Article 4 was put to the vote and adopted by 84 votes to none, with 7 abstentions.³¹

(6) Second Session—Statement by Mr. Ago, President of the Conference

In the second session (1969), Article 4 was discussed in the 7th plenary meeting. Without much discussion, it was adopted by 102 votes to none, with 1 abstention.³² Subsequently, this provision has become the present Article 5. Preceding the vote, Mr. Ago, President of the Conference, in response to a comment by a representative of Union of Soviet Socialist Republics, made the following noteworthy statement:

"The convention on the law of treaties related not only to the creation of treaties, but also to their life in the future. *The constituent instrument of an international organization might conceivably contain rules of interpretation which were at variance with those laid down in the convention, and the last phrase of article 4 ("without prejudice to any relevant rules of the organization") would then apply to the constituent instrument and not merely to any treaty subsequently adopted within the organization.* The proposed

ization. The amendment stressed the need for a direct link between the treaty adopted by the organization and the constituent instrument of the organization, because it was that link which justified the special régime." (Italics mine) *Id.*, 8th meeting, at 45-6, paras. 41-3.

Mr. Meron (Israel) also stated that the decision whether a treaty was adopted within the international organization or under its auspices was a matter of diplomatic convenience, affected by financial and technical considerations, and was not a good basis for a legal distinction. He emphasized that a more material criterion should be sought in the actual connexion of the treaty with the organization within which it had been drawn up, so that the treaty had a material link with the constitution of the organization. *Id.*, 9th meeting, at 50, paras. 53-4.

According to the Belgian delegation, the phrase "adopted within an international organization" referred to a *de facto* situation which might not necessarily be legally justified by the rules of the organization in question, and an element of law was essential for the application of the exception. *Id.*, 10th meeting, at 53, para. 3.

Thus, the following amendments were submitted: "an agreement concluded in virtue of [a constituent instrument]" (France); "treaties which . . . are adopted within the competence of an international organization" (Peru); restricting the application of Article 4 only to "treaties which are constituent instruments of international organizations" (Jamaica and Trinidad-Tobago, and Ceylon). *Supra* note 16.

On the other hand, although recognizing that the Commission's draft article 4 was imperfect, the Israel delegation pointed out that those amendments by France or Peru would also cause similar difficulties and that it would be better to retain the Commission's draft article 4. *Id.*, 9th meeting, at 51, paras. 58-9. The delegation of Federal Republic of Germany stated that the difficulty lay less in the wording than in the variety of the practice of different organizations. *Id.*, 9th meeting, at 51, para. 64.

Consequently, the amendment of Jamaica and Trinidad-Tobago was withdrawn. *Id.*, 10th meeting, at 58, para. 46. The amendment of Ceylon was rejected by 70 votes to 5, with 5 abstentions. *Id.*, at para. 48. The amendments of France and Peru were referred to the Drafting Committee as a matter of a drafting character without being put to the vote. *Id.*, at para. 59.

³⁰ *Id.*, 28th meeting, at 147, para. 15.

³¹ *Id.*, at 148, para. 28.

³² United Nations Conference on the Law of Treaties, Official Records, Second Session, 1969, Seventh plenary meeting, at 4-6, paras. 22-33.

text was therefore flexible enough to apply to all possible cases, and it might be undesirable to make it more precise.”³³ (Italics mine)

II. *Some Developments Subsequent to the Vienna Convention on the Law of Treaties*

The concept of “relevant rules of the organization” has been adopted by two other conventions related to international organization. We will look at the drafting history of those provisions concerned and some of their implications.

1: Vienna Convention on the Representation of States in Their Relationship with International Organizations of a Universal Character

(a) Drafting in the International Law Commission

(1) Third Report by Mr. A. El-Erian

The Third Report on Relations between States and Inter-Governmental Organizations submitted in 1968 by the Special Rapporteur, Mr. Abdullah El-Erian, contained the following article:³⁴

“Article 4. Nature of the present articles; relationship with the particular rules of international organizations.

The application of the present articles to permanent missions of States to international organizations and other related subjects regulated in the present articles shall be subject to any particular rules which may be in force in the organization concerned.”

This draft article was mainly discussed in the 947th and 948th meetings. At first there was a conflict over the desirability of its inclusion. Mr. Ushakov was against it, stating that he saw no need for a general reservation to the effect that all the rules in the draft were subject to the particular rules of organizations and that if those rules were to be subject, automatically and from the outset, to the particular rules of organizations, their scope would be extremely limited.³⁵

The legal significance of this draft article was explained by Mr. Bartos as follows:

“[T]he Commission was on the horns of a dilemma: either it must lay down uniform rules and reject any idea of organizations being able to follow particular rules on the privileges and immunities of permanent missions, or it must accept the existing situation, in other words, the diversity of systems in force.”³⁶ (Italics mine)

He also added that the Commission would be wrong to reject Mr. Ushakov’s views completely, but that it should not disregard practice either, since that might give rise to serious difficulties.

³³ *Id.*, at 5, para. 29.

³⁴ El-Erian, Third Report on Relations between States and Inter-Governmental Organizations, [1968] 2 Y. B. INT’L L. COMM’N 119, 128, U. N. DOC. A/CN.4/203 and Add. 1-5.

³⁵ Summary Records of the 947th meeting, [1968] 1 Y. B. INT’L L. COMM’N 28, para. 27.

³⁶ *Id.*, at 29, para. 38.

Mr. Yasseen thought that the article presented a real problem, and stated:

“The Commission was drafting articles concerning the status of representatives to international organizations. It was, however, an indisputable fact that those organizations had drawn up their own rules on the matter. It was therefore necessary to determine whether the general rule enunciated in the draft would prevail over the particular rule of the organization or *vice versa*.³⁷ *The Commission had to decide whether it wished to adopt the same position as in its draft on the law of treaties, in which it had given precedence to the rules established by international organizations.*

He himself had no firm opinion on that point, but since the rules adopted by international organizations were the outcome of long practice and valuable experience, he was inclined to think that they should prevail over the general rules formulated in the draft.”³⁷ (Italics mine, except †)

After the explanation by the Special Rapporteur responding to the comments and some further discussion, it was agreed that draft article 4 should be referred to the Drafting Committee.

The Drafting Committee later proposed a new draft article 4, which was, with a small amendment, adopted unanimously.³⁸ Subsequently, the Report of the Commission to the General Assembly in 1968 contained the following draft article:³⁹

“Article 3: Relationship between the present articles and the relevant rules of international organizations. The application of the present articles is without prejudice to any relevant rules of the organization.”

(2) Sixth Report by Mr. A. El-Erian

The Sixth Report on Relation between States and International Organizations was submitted by Mr. El-Erian in 1971, and it contained the above quoted Article 3, with some comments by Governments and international organizations.⁴⁰ The scope of this article was expanded to “any relevant rules of procedure of the conference,”⁴¹ but this is not relevant in the present context.

There was, however, some interesting discussions in connection with the following article submitted by the Drafting Committee:

Article 52: Establishment of permanent observer missions

1. Non-member States may, if the rules of the Organization so admit, establish permanent observer missions for the performance of the functions mentioned in article 53.

Two interesting statements, *inter alia*, in the Commission are worth citing at some length here. Sir Humphrey Waldock referred to the law of treaties by stating as follows:

“During its work on the law of treaties, *the Commission had considered whether it*

³⁷ Summary Records of the 948th meeting, *id.*, at 31, paras. 21–2.

³⁸ Summary Records of the 974th meeting, *id.*, at 176, para. 33.

³⁹ Report of the Commission to the General Assembly, [1968] 2 Y. B. INT'L L. COMM'N 191, 197–8, U. N. DOC. A/7209/Rev. 1.

⁴⁰ El-Erian, Sixth Report on Relations between States and Inter-Governmental Organizations, [1971] 2 Y. B. INT'L L. COMM'N 1, 24–6, U. N. DOC. A/CN.4/241 and Add. 1–6.

⁴¹ Summary Records of the 1132nd meeting, [1971] 1 Y. B. INT'L L. COMM'N 303–4, paras. 41–53.

should include some definition of the rules of an organization; but it had reacted the conclusion that that was not desirable, as the question seemed to belong rather to the law of international organizations.

The Commission was now making its first major attempt to codify the law of international organizations, and in that context there was perhaps less objection to the inclusion of such a definition. . . . What was important was that it should be made clear in the commentary that *the term "rules" covered not only the constituent instruments of the organization concerned, but also such of its practice as constituted established customs binding on members so long as they were not altered by the organization.*"⁴² (Italics mine)

Mr. Reuter responded to this by stating as follows:

"[I]t was not for the Commission to determine what were the rules of the organization; that was a matter for each organization to decide for itself. In some organizations the rules would be statutory written rules alone, in others they would be the statutory written rules and certain rules derived from duly adopted resolutions of certain organs—which could change—and in yet others they would be not only the constitutional rules and the written rules drawn up by the organization itself, but also customary rules. There was no law of international organizations from which an exact definition of the expression "rules of the Organization" could be derived. If the Commission attempted such a definition it would be advancing a claim—never before asserted and against which he himself strongly protested—to establish a general law of international organizations which would decide, for all the organization concerned, what were the legal sources of the law of the organization; and that was quite impossible. He was content with the expression "rules of the Organization," precisely because it was a reference which granted a certain autonomy to each organization. In any event, he did not see by what legal instrument the Commission could produce a system of law which would be supra-constitutional and would have to be respected by all the organizations to which the draft articles applied."⁴³ (Italics mine)

The Commission provisionally approved article 52 as proposed by the Drafting Committee. It was later moved to the present Article 5, paragraph 2.

(3) 1971 Report of the Commission to the General Assembly

The 1971 Report of the Commission to the General Assembly contained the above-quoted Article 3 with the following commentary, which was taken from the corresponding part of the Third Report submitted by Mr. El-Erian in 1968, and maintained without much change.

"(2) The purpose of this article is twofold. First, given the diversity of international organizations and their heterogeneous character, in contradistinction to that of States, the draft articles are designed to establish a common denominator and to provide general rules to regulate the diplomatic law of relations between States and international organizations in the absence of regulations on any particular point by an individual international organization.

⁴² Summary Records of the 1118th meeting, *id.*, at 212, paras. 16–7.

⁴³ *Id.*, at 212–3, para. 18.

(3) *Secondly, article 3 seeks to safeguard the particular rules which may be applied by a given international organization. An example of the particular rules which may prevail in an organization concerns membership. . . .*

In order to avoid having to include a specific reservation in each article in respect of which it was necessary to safeguard the particular rules prevailing in an organization or a conference, the Commission decided to formulate a general reservation in part I of the draft articles."⁴⁴ (Italics mine)

It is important to note that the following statement which apparently reflects the discussions in the Commission was inserted anew in the commentary.

"(5) *The expression "relevant rules of the Organization" is broad enough to include all relevant rules whatever their nature: constituent instruments, certain decisions and resolutions of the organization concerned or a well-established practice prevailing in that organization.*"⁴⁵ (Italics mine)

(b) Drafting in the Vienna Diplomatic Conference

(1) Draft Article 3

Draft article 3 was discussed in the 3rd and 5th meetings of the Committee of the Whole, and without much argument adopted by 59 votes to none, with 4 abstentions.⁴⁶ Two points should be mentioned here. First, the meaning of the expression "relevant rules of the Organization" was confirmed by a few of representatives of Governments.⁴⁷ Secondly, the *raison d'être* of the this draft article was clearly explained by Mr. El-Erian (Expert Consultant), who stated that while the ILC was fully aware of the usefulness of unification in the matter, *it was equally 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.*⁴⁸

(2) Article 1, (34)

At the final stage—in the 46th meeting—, it was decided that an express definition should be given to the term "rules of the Organization." The present formula given to the term is the following:

Article 1, (34) "rules of the Organization" means, *in particular*, the constituent instruments, relevant decisions and resolutions, and established practice of the Organization. (Italics mine)

The French representative, who proposed a new subparagraph to the above effect, explained that it was because the term "rules of the Organization" appeared in several provisions of the draft convention. He also admitted that the proposed definition introduced

⁴⁴ Report of the Commission to the General Assembly, [1971] 2 Y. B. INT'L L. COMM'N 275, 287-8, U. N. DOC. A/8410/Rev. 1.

⁴⁵ *Id.*, at 288.

⁴⁶ UNITED NATIONS CONFERENCE ON THE REPRESENTATION OF STATES IN THEIR RELATIONS WITH INTERNATIONAL ORGANIZATIONS, Official Records, Vol. I, Summary Records of the 5th meeting, at 90, para. 26.

⁴⁷ German Democratic Republic (Summary Records of the 3rd meeting, at 80, para. 46) and Peru (*Id.*, para. 53)

⁴⁸ *Id.*, at 81, para. 62.

no innovation and that it was taken from paragraph 5 of the Commission's commentary to article 3 cited above.⁴⁹ This French amendment was adopted with small changes.⁵⁰

2: Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations

(a) Drafting in the International Law Commission

(1) First Report by Mr. P. Reuter

Problems related to the notion "relevant rules of the Organization" were excellently analyzed in the Reports on the Question of Treaties Concluded between States and International Organizations or between Two or More International Organizations submitted by Mr. Paul Reuter, Special Rapporteur. I will cite below some of the relevant portions of his Reports.

In his First Report, which was mainly based upon the analysis of the Vienna Convention on the Law of Treaties, comments submitted by international organizations in connection with that convention were analyzed as follows:

"The international organizations had in mind two contradictory concerns: on the one hand, a strong desire to see the same juridical régime applied to treaties between States and to agreements concluded by international organizations, and on the other hand *the desire to avoid confining the creative freedom of international organizations within rules which would not be fully adapted to their needs as those needs became progressively clearer with the development of their activities.* . . . [T]he dominant feeling was *one of fear lest a process of change essential for the future of the organizations be interrupted.* This last concern was forcefully revealed in connexion with a question which the Conference settled by deciding to make the draft article under discussion applicable to the constituent treaties of an international organization and treaties concluded within such an organization. As is known, the rules drawn up [by] the International Law Commission and confirmed by the Conference apply to such treaties only in so far as that is possible "without prejudice to any relevant rules of the organization."

The representatives of the international organizations showed keen concern about this matter. They either tried to make the wording less restrictive, or specified that they interpreted it very liberally, or else declared that the reservation would be very hard to apply. Their efforts were above all directed towards determining what were the relevant rules of the organization: *in their view the phrase applied not only to the existing rules, but also to those which might be established in the future.* For some the main difficulty was to determine what constituted the "practice" of international organizations; was "practice" contained in the notion of "relevant rules of the organization"? There was no doubt about the reply in respect of "established practice," i.e. "practice" which had given rise to a customary rule which thereby became one of the "relevant rules of the organization." However, there was likewise no doubt that the representatives of the organizations also wished to reserve *their right to institute new practices, i.e. to follow certain procedures which to their acceptance as custom, were not "established*

⁴⁹ Summary Records of the 46th meeting, at 336-7, paras. 18-9.

⁵⁰ *Id.*, at 338, para. 36.

rules" but would mean that the organization had departed from the terms of the proposed articles. To refuse to accord this last concession to the organization would lead to a distressing situation where the provisions of the 1969 Convention could be set aside by a formal legal act in written form constituting a "relevant rule of the organization," but not by a customary process."⁵¹ (Italics mine)

This matter was discussed in depth again later in the same Report as follows:

"(89) Another more important problem relates to the content of the notion of "relevant rules of the organization." It obviously includes the constituent instrument of the organization and the various unilateral regulations which the organizations [sic] draws up if it has obtained authority to do so. As regards the "practice of the organization," *the International Law Commission, in the course of its previous work, had taken the view that only an "established practice" was part of the "relevant rules of the organization."* This clarification would certainly seem to suggest that the "practice" thus recognized must be the subject of a rule, either because it is considered that in this case the rule is the subject of a *tacit agreement*, or because the practice has become consolidated as a *customary rule*. *But if this so, there is room for "practices" which are not sufficiently "established" to constitute a "relevant rule of the organization."* If general rules are in any way established which will be valid for the agreements of organizations, reserving only the "relevant rules of the organization," these general rules will take precedence over "unestablished practices"; in other words, *the organization will lose the right to seek, by new practices, to change the law applicable to it when the matter has been the subject of a formal rule*; as to the rules which would be established by draft articles on the law of the treaties of international organizations, *the organization will have lost the right to change them by a customary process, but will still be free to amend them by a legal process in writing*. It may be desired to preclude such a consequence and to decide, as some organizations have requested, that the practice to be included in the notion of "relevant rules of the organization" should comprise *any practice, even if it is not "established."* It may indeed, be preferred to keep intact in all its forms the creative power of the international organizations with respect to the legal rules relating to them. But the consequences of this choice must be carefully weighed: it means that *even as residuary rules the provisions of a draft of articles would no longer be in any way mandatory for international organizations; they would merely be guidelines for the organizations or, at best, principles so general that their binding force would be very limited in practice*. But draft articles thus conceived would still be very valuable because they would help, although by a very flexible process, to bring a little clarity (and perhaps order) into a sphere where they are lacking. This is the alternative which must be clearly understood today; both possibilities are equally worthy of consideration; moreover, they are valid for the whole of the law of international organizations, and any preferences which may be felt for either of them should be based on practical considerations; it may change according to the subject-matter to be covered in draft

⁵¹ Reuter, First Report on the Question of Treaties Concluded between States And International Organizations or between Two or More International Organizations [1972] 2 Y. B. INT'L L. COMM'N 171, 186-7, U. N. DOC. A/CN.4/258.

articles. *Thus, for the representation of States in their relations with international organizations, a subject which is covered by precise and detailed provisions in the proposals of the International Law Commission, the possibility of subsequent development through mere practice has been ruled out, although a reservation has been made not only for already established practices, but also for the possibility of subsequent change by a legal process in writing (express conventions, other relevant rules of the organization); this really means that after an attempt at codification such as that represented by these draft articles, the subject should be regarded as having gone beyond an experimental stage of tentative effort and spontaneous creation by way of "practice."* It is not certain that the same solution is needed for draft articles on the treaties of international organizations."⁵² (Italics mine, except ‡)

(2) Third Report by Mr. P. Reuter

After presenting the general legal consideration as above, Mr. Reuter submitted his Third Report in 1974, which contained the following article:

"Article 6. Capacity of international organizations to conclude treaties

In the case of international organizations, capacity to conclude treaties is determined by the relevant rules of each organization."

In the commentary attached to this draft article, Mr. Reuter presented his opinion as to the exact scope of the formula "relevant rules of each organization" as follows:

"The most important point is to bear constantly in mind that these terms do not necessarily cover the same sources for each organization; this is a basic constitutional fact which in itself derives from the law of each organization. . . . It should be understood that *the expression "the relevant rules of each organization" is as neutral as possible: it imposes nothing but excludes nothing, and leaves the question of determining the solution chosen for a given organization to the principles and procedures of each organization.* (27) The sources of the capacity of international organizations which are not excluded by the expression "the relevant rules of each organization" include the *practices* of international organizations. This is an idea which must be developed briefly. The concern of international organizations regarding the scope of their *practices* had already been noted. The statements made at the United Nations Conference on the Law of Treaties show clearly that "the relevant rules of international organizations" include "established practices," that is, the practice which must be considered equivalent to legal rules. However, *in the context of the 1969 Convention, although the question was not formally settled, it may be wondered whether a practice which is in the process of being established, that is, which is not yet established, is or is not covered by article 5 of the 1969 Convention. This is a very serious question.* If it is assumed that that Convention is binding on international organizations and that only "established" practices can derogate from its rules with regard to the constituent instruments of international organizations and the treaties adopted within an international organization (article 5 of the 1969 Convention), it would follow that *the entry into force of the 1969 Convention would prohibit any new customary development of the law of international organizations that was contrary to the 1969 Convention.*

⁵² *Id.*, at 198-9.

(28) It is the view of the Special Rapporteur that—*without infringing in any way upon the interpretation of other conventions, such as the 1969 Convention*—it must be acknowledged without hesitation that *the expression “the relevant rules of each organization” covers practices which are not yet established but are liable to become so.* This expression basically reserves the constitutional régime of each organization: it is this régime, and not the draft articles, which will determine the scope of the “practice.” If, therefore, under this régime, the constitution of the organization is partly customary in origin and *practice may in that connexion play a role going beyond that provided for in article 31, paragraph 3 (b) of the 1969 Convention,* it is this régime which will be applicable. To adopt any other solution would be to give written conventional law precedence over unwritten law as a source of the law peculiar to each organization, prevent the progressive development of the law of each organization and give rise to an unacceptable infringement of the constitutional autonomy of each organization; this, in the final analysis, is the meaning of draft article 6.⁵³ (Italics mine, except †)

(3) Discussion in the Commission

Draft article 6 was one of the most debated articles in the Commission. In the present context, however, it should be sufficient only to point out that the following explanation was made by the Special Rapporteur in discussion in 1974.

“The term “practice” of international organizations should not be used in the text. . . . *That rather flexible term covered both established practice, which was to say customary rules, and practice in the process of formation.* To secure the assent of the international organizations, the Commission would have to respect *their faculty of developing a practice,* to which they attached great importance. That was why he had pointed out in his commentary that the relevant rules of an international organization included, where applicable, the practice of that organization. The use of the word “practice” would suggest that there might be a customary element in the constitution of an international organization. That was possible, but not necessary so. Governments might very well establish an international organization and give it an inflexible constitution, rejecting the possibilities of adaptation afforded by recourse to practice. The idea of practice should not be imposed on international organization; it should follow implicitly from the rules of the organization, as it follows from the internal organization of States in the case of the Vienna Convention.”⁵⁴ (Italics mine)

More important is the following fact. The Fourth Report contained draft article 27 (Internal law of a State, rules of an international organization and observance of treaties) and the commentary referred to the meaning of the expression “rules of the organization.”

⁵³ Reuter, Third Report on the Question of Treaties Concluded between States And International Organizations or between Two or More International Organizations [1974] 2-1 Y. B. INT'L L. COMM'N 135, 151-2, U. N. DOC. A/CN.4/279.

Article 6 involves a difficult question concerning the basis of treaty-making capacity of international organizations, which is not dealt with here. See, for example, Seyersted, *Treaty-Making Capacity of International Organizations: Article 6 of the International Law Commission's Draft Articles on the Law of Treaties between States and International Organizations or between International Organizations*, 34 ÖSTERREICHISCHE ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT UND VÖLKERRECHT 261 (1983).

⁵⁴ Summary Records of the 1278th meeting, [1974] 1 Y. B. INT'L L. COMM'N 163, para. 61.

In the discussion of this draft article in 1977, the Chairman (Sir Francis Vallat) suggested an express definition of this expression by stating:

“Although he was convinced that a reference to “the rules of the organization” should be included in the article, he was not sure whether a definition of those words was necessary, particularly in the light of developments which had taken place since 1969, when no definition of the meaning of the words “rules of the organization” had been included in the Vienna Convention. In 1975, a definition of those words had been given in article 1, paragraph 1 (34), of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. He therefore suggested that the Drafting Committee might consider the possibility of preparing a definition on the lines of that contained in the 1975 Vienna Convention.”⁵⁵ (Italics mine)

The 1977 Report of the Commission to the General Assembly, as a result, contained the following provision:⁵⁶

Article 2. Use of terms

1. For the purposes of the present article:

....

(j) “rules of the organization” means, in particular, the constituent instruments, relevant decisions and resolutions, and established practice of the organization.”

(4) Final Draft Articles by the Commission

The Final Draft Articles were approved by the Commission in 1982. Although the expression of “rules of the organization” or similar ones appear in such articles as 2, 5, 6, 27, 35, 36, 37, 39, 46, it will be, in the light of the above explanation, appropriate to cite some of the relevant portions out of the commentaries attached to Article 2. para. 1. (j) and Article 6.

With respect to Article 2. para. 1. (j), the text of which is given above, the commentary includes the following explanation:

“(24) *Subparagraph 1j* (j) is a new provision by comparison with the Vienna Convention. In the light of a number of references which appear in the present draft articles to the rules of an international organization, it was thought useful to provide a definition for the term “rules of the organization.” *Reference was made in particular to the definition that had recently been given in the Convention on the Representation of States. The Commission accordingly adopted the present subparagraph, which reproduces verbatim the definition given in that Convention.*

... [As to the terms referring to the organization’s own law, the Commission has not adopted the expression “the internal law.”] There would have been problems in referring to the “internal law” of an organization, for while it has an internal aspect, this law also has in other respects an international aspect. The definition itself would have been incomplete without a reference to “the constituent instruments . . . of the organi-

⁵⁵ Summary Records of the 1436th meeting, [1977] 1 Y. B. INT’L L. COMM’N 112-3, para. 29. See also Summary Records of the 1459th meeting, *id.*, at 238-40, paras. 6-32.

⁵⁶ Report of the International Law Commission on the Work of Its Twenty-Ninth Session, 9 May-29 July 1977, [1977] 2-II Y. B. INT’L L. COMM’N 1, 118, U. N. DOC. A/32/10.

zation"; it also had to mention the precepts established by the organization itself, but the terminology used to denote such precepts varies from organization to organization. Hence, while the precepts might have been designated by a general formula through the use of some abstract theoretical expression, the Commission, opting for a descriptive approach, has employed the words "decisions" and "resolutions"; *the adverbial phrase "in particular" shows that the adoption of a "decision" or of a "resolution" is only one example of the kind of formal act that can give rise to "rules of the organization."* . . . Lastly, reference is made to established practice. . . . However, the reference in question is in no way intended to suggest that practice [has the same standing in all organizations; on the contrary, each organization has its own characteristics in that respect. Similarly, *by referring to "established" practice, the Commission seeks only to rule out uncertain or disputed practice; it is not its wish to freeze practice at a particular moment in an organization's history.*"⁵⁷ (Italics mine)

With respect to Article 6, the text finally adopted was as follows:

"Article 6. Capacity of international organizations to conclude treaties

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

The commentary includes the following important statement:

"(5) It should be clearly understood that *the question 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"; indeed, it depends on the highest category of those rules—those which form, in some degree, the constitutional law of the organization and which govern in particular the sources of the organization's rules. . . . [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."⁵⁸ (Italics mine, except †)

⁵⁷ Report of the International Law Commission on the Work of Its Thirty-Fourth Session (3 May–23 July 1982), [1982] 2-II Y. B. INT'L L. COMM'N 1, 21, U. N. DOC. A/37/10.

⁵⁸ *Id.*, at 24.

(b) Drafting in the Vienna Diplomatic Conference⁵⁹

(1) Introduction

The United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations was convened in Vienna from 18 February to 21 March 1986. The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations was adopted at the Plenary Conference on March 20 by 67 votes (including Japan) to 1 (France), with 23 abstentions (including socialist countries). I have not, at the time of writing this article, been able to go through the proceedings of the Conference yet. But the text adopted and some of the main discussions have been reported as follows.

(2) Amendment to the Preamble

The socialist countries including the Soviet Union and East Germany revealed their distrust of international organizations by claiming that the differences between States and international organizations should be stipulated in each article and by attempting to expressly stipulate that international organizations should act *in accordance with* their internal rules (*their constituent instruments* in particular).

The western countries including Japan opposed these claims, asserting that treaties are to be concluded between legally equal parties and that, since international organizations are recognized to have the capacity to conclude treaties, it was not only meaningless but also harmful to expressly stipulate some differences between States and international organizations.

Subsequently, the conflict was solved by inserting in the preamble the following statement, which embodies the claims of the socialist countries.

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

(3) Amendment to Article 2, paragraph 1, (j)

With respect to Article 2, paragraph 1, (j), the socialist countries, again including the Soviet Union, presented their opinion that decisions, etc. should be expressly provided to be based upon the constituent instruments, deleting the expression “in particular.” Countries such as Austria and Switzerland, on the other hand, asked that the expression “established” be deleted because it could freeze or frustrate practice in the process of formation.

This question was considered in informal consultations under the chairmanship of Mr. Zemanek (President of the Conference) and it was agreed, as a mini-package including some other problems, that “adopted in accordance with the constituent instruments” be placed after “decisions and resolutions.” Thus the text adopted was as follows:

⁵⁹ For the sources of the present section, see Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, U. N. DOC. A/CONF. 129/15, and Yachi, *United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations* (in Japanese), 85-4 KOKUSAIHO GAIKO ZASSI (THE JOURNAL OF INTERNATIONAL LAW AND DIPLOMACY) 374 (1986).

““rules of the organization” means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization.”

(4) Draft article 6 was adopted as it stood.

III. *Concluding Remarks*

From the foregoing explication, several 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 drafted. The *raison d'être* of such provisions as Article 5 of the Vienna Convention on the Law of Treaties or Article 3 of the Vienna Convention on the Representation of States, both of which were adopted almost unanimously, 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 organizations is in constant evolution.

Secondly, the uniform position of international organization has also consistently been “to avoid confining the creative freedom of international organizations within rules which would not be fully adapted to their needs as those needs become progressively clearer with the development of their activities.”

Thirdly, the question dealt with in the present article seems, in the final analysis, to depend upon the scope of the notion “relevant rules of the organization.” As for the scope of substantive matters to be covered by the general reservation provision of Article 5 in the 1969 Convention on the Law of Treaties, there were differences of opinion, on the one hand between Waldock and the Commission, and on the other hand among Mr. McDougal, Mr. Broches, Mr. Golsong, and Mr. Jenks. It was because of these differences and the difficulty in reaching consensus upon which articles need the reservation, and for fear that a necessary reservation might be inadvertently overlooked, that a general reservation provision covering the whole convention was inserted.

As for the scope of the kinds of act that can give rise to “rules of the organization,” the question does not seem necessarily settled. The 1969 Convention on the Law of Treaties includes no definition on this point, as the Commission had considered that the question seemed to belong rather to the law of international organizations. However, several points were confirmed in the drafting process, such as “not only the provisions of the constituent instruments of the organization but also the customary rules developed in the practice” (ILC), “both rules laid down in the constituent instrument and rules established in the practice of the organization as binding” (Waldock), or “both to written rules and to unwritten customary rules” but “the term in question applied only to legal rules and could not be extended to rules that did not have the character of legal rules. . . . which had not reached the stage of mandatory legal rules” (Yasseen).

In this connection, however, it could still be claimed, as Reuter does, that there is no law of international organizations from which an exact definition of the expression “rules of the organization” can be derived, as this expression is as neutral as possible, leaving the

content for each organization, and that, in the context of the 1969 Convention, the question has not been formally settled.

The focus seems to be on whether "relevant rules of the organization" can include practices in the process of being established. If the 1969 Convention were binding on international organizations,⁶⁰ and if the reply were negative, the 1969 Convention would prohibit any new customary development of the law of international organizations, and organizations would lose the right to change, by new practices—by a customary process, the law applicable to it when the matter has been the subject of a formal rule. The very faculty of developing a practice is at issue here. The representatives of international organizations have claimed a positive reply to this question, wishing to reserve their right to institute new practices which, until their acceptance as custom, are not "established rules" but will mean that the organization has departed from the terms of the Convention. A negative reply would mean that the 1969 Convention could be set aside only by a formal legal act in written form, but not by a customary process. A well-balanced judgment, however, should also take into consideration the fact that a positive reply would mean that the Convention would merely be a guideline for the organization and that its binding force would be very limited in practice. In any case, it might be wondered whether all these implications were appreciated in their exact sense in the drafting of the 1969 Convention.

In the case of the Vienna Convention on the Representation of States, Reuter states, in the light of the express definition, that the possibility of subsequent development through mere practice has been ruled out as the subject was regarded as having gone beyond an experimental stage of tentative effort and spontaneous creation by way of practice, although a reservation has been made for already established practices and legal processes in writing. This conclusion, however, seems to be still debatable in the light of the foregoing explication.

In the case of the Vienna Convention on the Law of Treaties of International Organizations, the draft convention by the Commission gave a positive reply. It was not its wish to freeze practice at a particular moment in an organization's history; it reserved the faculty of modifying or supplementing the organization's rules by practice to the extent permitted by those rules. In the light of the amendments adopted at the Vienna Diplomatic Conference, it might be claimed that the scope and direction of customary development through practice has now been restricted within and in accordance with the constituent instrument. However, when we take into consideration the fact that constituent instruments, in most cases, provide only the general framework and leave the details for later developments, it would be appropriate to conclude that the question was left to be determined in concrete cases as they occur by the process of interpretation of constituent instruments.

If the question was not formally settled, as was pointed out by Mr. Reuter, in the case of the Vienna Convention on the Law of Treaties, and since this Convention is not formally binding on international organizations, it should be decided by each organization.

⁶⁰ The 1969 Convention relates only to treaties among States, and the question here is *practices of the organization, not of the member States*. This distinction might seem negligible at first, since decisions of the organization are ultimately made by the member States. However, it carries an important implication for development of the law of international organizations, which I intend to write about on another occasion. See for example Reuter, *Quelques réflexions sur la notion de "pratique internationale," spécialement en matière d'organisations internationales*, STUDI IN ONORE DI GIUSEPPE SPERDUTI 187 (1984); Lauterpacht, *The Development of the Law of International Organization by the Decisions of International Tribunals*, 152 RECUEIL DES COURS 379 (1976-IV).

Finally, with respect to the interpretative framework mentioned in *Introduction*, the possibilities seem to have been confirmed that special rules of interpretation applicable to constituent instruments of international organizations be developed in the practices of organizations, that these rules be included in the “relevant rules of the organization,” and that, therefore, there be differences between the interpretative framework of the law of treaties and that of constituent instruments of international organizations.

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