

CONSTITUENT INSTRUMENTS OF INTERNATIONAL
ORGANIZATIONS AND THEIR INTERPRETATIVE
FRAMEWORK
—INTRODUCTION TO THE PRINCIPAL
DOCTRINES AND BIBLIOGRAPHY—*

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Introduction

The purpose of the present article is, first, to trace, in brief, the development of the notion “caractère constitutionnel” of constituent instruments of international organizations, particularly among doctrines, and second, to survey the principal doctrines in this regard, specifically in terms of the interpretative framework, with some comments added. This problem is getting more attention as international organizations — particularly the United Nations — have important powers and fulfil sometimes delicate and controversial functions. Since the structures, powers, functions, etc. are all provided in the constituent instruments of international organizations, every dispute would, in principle, be reduced to that of interpretation of constituent instruments. And these conflicting interpretations frequently refer

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to the legal nature of constituent instruments as constitutions of international organizations or as treaties among sovereign States.¹

I. *Development of the Notion "Caractère Constitutionnel"* *of Constituent Instruments*

1. Classification of treaties has long occupied the minds of scholars.² If there is any strain between the diversity of objects to be regulated and the identity of methods to regulate with — treaties —, the problem whether various kinds of treaties can be governed by the same system of "law of treaties" will continue to be at the root of different interpretations.

It seems to be Lord McNair who first pointed out and attempted to deal systematically with this problem. In his article, "The Functions and Differing Legal Character of Treaties" in 1930,³ McNair classified treaties into four categories — (1) treaties having the character of conveyances, (2) treaties having the character of contracts, (3) law-making treaties (i. treaties creating constitutional international law, ii. treaties creating or declaring ordinary international law, or pure law-making treaties), (4) treaties akin to charters of incorporation. This attempt was based upon such criteria as effect of war, use of *travaux préparatoires* as a means of interpretation,⁴ opposability to non-parties, lack of unanimity in their operations.

McNair concluded as follows:

"My submission is that the task of deciding [disputes arising upon treaties] will be made easier if we free ourselves from the traditional notion that the instrument known as the treaty is governed by a single set of rules, however inadequate, and set ourselves to study the greatly different legal character of the several kinds of treaties and to frame rules appropriate to the character of each kinds."⁵

2. The establishment of "the supreme type of international organization"⁶ — the United Nations — provoked a large concern among scholars with respect to the method of interpretation of the Charter.

Pollux (E. Hambro), at the head of his article "The Interpretation of the Charter"⁷ which is an excellent treatment of this problem, pointed out succinctly the essential position:

"The Charter, like every written Constitution, will be a living instrument. It will be applied daily; and every application of the Charter, every use of an Article, implies an

¹ Almost all of the cases concerning international organizations in the International Court of Justice are related to the interpretation of constituent instruments, and references to the legal nature of constituent instruments can be found in many of the dissenting and separate opinions.

² See, e.g., Rapisardi-Mirabelli, *La classification des traités internationaux*, 4 REVUE DE DROIT INTERNATIONAL ET DE LEGISLATION COMPARÉE 653 (1923), Kraus, *Système et fonction des traités internationaux*, 50 RECUEIL DES COURS 311 (1934-IV).

³ 11 BRIT. Y.B INT'L L. 100 (1930), reprinted in LORD MCNAIR, *THE LAW OF TREATIES* 739 (1961).

⁴ In this regard, McNair made an affirmative reference to the use or non-use of *travaux préparatoires* in accordance with whether a treaty concerned belongs to (2) or (3), which had been proposed by Q. Wright (*The Interpretation of Multilateral Treaties*, 23 AM. J. INT'L L. 94 (1929)). But see LORD MCNAIR, *THE LAW OF TREATIES* 366.

⁵ LORD MCNAIR, *THE LAW OF TREATIES* 754 (1961).

⁶ *Reparation for Injuries Suffered in the Service of the United Nations*, [1949] I. C. J. 179.

⁷ 23 BRIT. Y.B. INT'L L. 54 (1946).

interpretation; on each occasion a decision is involved which may change the existing law and start a new constitutional development. A constitutional customary law will grow up and the Charter itself will merely form the framework of the Organization which will be filled in by the practice of the different organs.⁸

It must be noted, however, that this kind of dynamic understanding of constituent instruments is contrasted with a still persistent and not negligible traditional opinion favoring the State sovereignty. L. Kopelmanas, for example, stated:

“Les limitations que [les dispositions de la Charte des Nations Unies] apportent à la souveraineté des Etats membres, sont en effet établies au profit des compétences de l’Organisation. Ainsi en cas de doute sur leur signification, il n’y aura pas lieu de choisir entre deux interprétations, favorisant chacune une souveraineté étatique différente et par conséquent équivalentes en droit, mais entre l’interprétation favorable à la liberté de l’Etat et l’interprétation extensive des compétences de l’Organisation. Devant un tel choix, aucune hésitation ne semble possible. Les clauses portant limitation de la souveraineté étatique en faveur d’un organisme international, devront faire l’objet d’une interprétation stricte, de sorte que le manque de précision de leur termes jouerait automatiquement à l’encontre des compétences concédées à l’organisme international.”⁹

The practice in the United Nations has apparently been different from what Kopelmanas expected. But it must also be admitted that this realistic understanding of States’ attitudes toward the United Nations is supported, clearly on some occasions, by the actual power politics among States.

3. Characteristics of the Charter, particularly in its interpretative framework,¹⁰ were the issues *inter alia* in several early advisory opinions of the ICJ — *Reparation* case (1949), *International Status of South West Africa* case (1950), *Effect of Awards* case (1954).

Based upon the analysis of the jurisprudence of the ICJ, Charles de Visscher acknowledged, although very cautiously, the speciality of interpretation method of constituent instruments.¹¹ Starting from the position that “C’est du traité international que procèdent donc les organisations internationales. C’est un accord de volontés étatiques qui leur donne naissance. Jusqu’à quel point l’institution, qui celle-ci est née pour durer, peut-elle se détacher de la manifestation des volontés dont le text est l’expression momentanée?”, de Visscher reached the following three conclusions:

⁸ *Id.*

⁹ L. KOPELMANAS, 1 L’ORGANISATION DES NATIONS UNIES 294-95 (1947).

¹⁰ This problem has thus drawn the attention of many scholars. See, e.g., Engel, *the Changing Charter of the United Nations*, Y.B. WORLD AFFAIRS 71 (1953); Lachs, *Les conventions multilatérales et les organisations internationales contemporaines*, 2 ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 334 (1956); Lachs, *Le développement et les fonctions des traités multilatéraux*, 92 RECUEIL DES COURS 229 (1957-II); 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; 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 (1967).

¹¹ *L’interprétation judiciaire des traités d’organisation internationale*, 41 RIVISTA DI DIRITTO INTERNAZIONALE 177 (1958).

"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 droit résoudre toute jurisprudence progressiste est celui d'une conciliation inéluctable entre les origines contractuelle de l'Organisation et son orientation irrésistiblement institutionnelle. Si enclin que l'on soit à envisager l'Organisation dans sa perspective d'avenir, dans sa dynamique, rien de solide ne peut se faire si, dans cette voie, on dépasse ce qu'autorise le degré de solidarité effective entre les Etats qui l'ont instituée. De cette solidarité, qui trouve son expression dans l'assentiment permanent des participants, dépend le sort de toute organisation internationale.¹²"

It should be noted that de Visscher, who held a realistic judgement towards effectiveness of international organizations¹³ (as is well shown in 3) above), nevertheless, recognized the problem of conciliation between the contractual origin of the Organization and its institutional orientation to be ineluctable.¹⁴

4. Whether constituent instruments of international organizations deserve a separate treatment, and, if so, what the characteristics are, were also studied to some extent by the fourth Special Rapporteur H. Waldock in his Report on the Law of Treaties.¹⁵ References to constituent instruments and international organizations in the draft articles ranged from simply mentioning them to entrusting important functions to their decisions. The International Law Commission, in its discussions,¹⁶ decided, however, that these problems should be dealt with by the general reservation clause Article 5, which provides:

"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."

Rosenne, who was a member of the International Law Commission supported Waldock's treatment of these problems most strongly, and developed his observation in his article

¹² *Id.* at 187. See also CH. DE VISSCHER, *PROBLÈMES D'INTERPRÉTATION JUDICIAIRE EN DROIT INTERNATIONAL PUBLIC* 140-53 (1963).

¹³ See also, CH. DE VISSCHER, *LES EFFECTIVITÉS DU DROIT INTERNATIONAL PUBLIC* 53-60, 159 (1967).

¹⁴ See also, CH. DE VISSCHER, *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 (4th ed. 1970).

¹⁵ First report (A/CN. 4/144 and Add. 1) (1962); Second report (A/CN. 4/156 and Add. 1-3) (1963); Third report (A/CN. 4/167 and Add. 1-3) (1964); Fourth report (A/CN. 4/177 and Add. 1-2) (1965); Fifth report (A/CN. 4/183 and Add. 1-4) (1966); Sixth report (A/CN. 4/186 and Add. 1-7) (1966).

¹⁶ Since the draft articles of Waldock dealt, to some extent, with the problem of treaty classification, the arguments in the Commission has drawn the attention of several scholars. See, e.g., Dehaussy, *Le problème de la classification des traités et le projet de convention établi par la Commission du Droit international des Nations Unies* in *RECUEIL D'ÉTUDES DE DROIT INTERNATIONAL EN HOMMAGE À PAUL GUGGENHEIM* 305 (1968); Virally, *Sur la classification des traités à propos du projet d'articles de la Commission du droit international*, 13 *COMMUNICAZIONI E STUDI* 15 (1969). With respect to the rules of interpretation, see also 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).

with a very controversial title: "Is the Constitution of an International Organization an International Treaty? Reflections on the Codification of the Law of Treaties."¹⁷

The international treaty had its origins in the juristic conception of "contract" and the growth of the international law of treaties was closely influenced by private law theories of contract. With the invention of the multilateral treaty simultaneously performing a number of functions, however, it is becoming a matter of increasing urgency, says Rosenne, to liberate international legal theory from the restraints imposed by the historical background of the general notion of contract, and especially from experiences and concepts originating in domestic private law.

Analyzing the various exceptions in the application of the law of treaties to constituent instruments, Rosenne states:

"The fact that so many cardinal aspects relating to the very essence of the legal relationships created by membership in an international organization and participation in its constituent instrument are in practice governed by principles and rules fundamentally different from those applicable to the corresponding aspects of participation in multilateral treaties must raise serious doubts as to whether the constituent instruments of international organizations are of the same *genus*, in international law, as multilateral treaties."¹⁸

He also states that the problems of the interpretation of international constituent instruments are "of a different order" from those normally found in the interpretation and application of treaties.

In answering to the question which is the title of his article, Rosenne comes to a cautious conclusion that the question does not permit of an unqualified answer, the reply depending on the circumstances in which the question is raised. For us, however, it is significant that Rosenne admitted the difference to be "one of kind, not of degree." He concluded his article with the following statement:

"Since the law governing the constituent instruments of international organizations is developing along lines peculiar and appropriate to those instruments, and to them alone, without more than a superficial similarity with the law of treaties, and since the application of those instruments is dominated by the institutional element provided by the Organization, an element entirely missing for bilateral and multilateral treaties, it is deceptive to see in diplomatic and legal incidents concerning the constituent instruments «precedents» for the general law of treaties, and *vice versa*."¹⁹

5. It was R. Monaco who attempted to analyze the "caractère constitutionnel" itself of constituent instruments of international organization.²⁰ At the beginning, he presents the essence of his understanding:

¹⁷ 12 COMUNICAZIONI E STUDI 21 (1966).

¹⁸ *Id.* at 66.

¹⁹ *Id.* at 88.

²⁰ Monaco, *Le caractère constitutionnel des actes institutifs d'Organisations internationales* in LA COMMUNAUTÉ INTERNATIONALE: MÉLANGES OFFERTS À CHARLES ROUSSEAU 153 (1974). See also J. RIDEAU, JURIDICTIONS INTERNATIONALES ET CONTRÔLE DU RESPECT DES TRAITÉS CONSTITUTIFS DES ORGANISATIONS INTERNATIONALES 2-39 (1969).

“[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 initialement conçue.²¹”

According to Monaco, the first characteristic of constituent instruments is “leur durée illimitée dans le temps.” This is connected not only with a particular determination of contracting parties that abstained from fixing a limitation upon the duration, but also with the expression of an essential character of constituent instruments. It is a primordial demand which can be defined as “constitutionnel” in the sense that it is necessarily inherent in constituent instruments.

Secondly, this unlimited duration of constituent instruments would expose the latter to all the consequences and all the factors of erosion in their application for a long time, which makes constituent instruments more subject than in the case of treaties of limited duration to the necessity of adaptation to evolving circumstances. Thus comes the importance of amendment clauses,²² which are becoming more unilateral-oriented.

Thirdly, the organs of international organizations as well as States members are subject to the respect of norms and obligations provided in constituent instruments. Thus comes the necessity to establish an uniform interpretation of constituent instruments by the organs. In this connection, the speciality of interpretation method of constituent instruments is also pointed out.

Fourthly, the superior position of constituent instruments (e.g. Art. 103 of the Charter, Art. 20 of the Pact of the League of Nations) is emphasized in connection with other treaties. Constituent instruments are expected to have in the orders of the international organizations the same or similar function with that given to the constitutions in the national orders.

These are the summarized points of “caractère constitutionnel” of constituent instruments, and, on a practical level, the relationship between these and other points and the interpretation method which is thought to be influenced by the former points becomes the central issue in the controversy.²³

6. The interpretation method of constituent instruments has been one of the issues which

²¹ *Id.* at 154.

²² See also, Giraud, *La révision de la Charte des Nations Unies*, 90 RECUEIL DES COURS 307, 340 et seq. (1956); R. ZACKLIN, *THE AMENDMENT OF THE CONSTITUTIVE INSTRUMENTS OF THE UNITED NATIONS AND SPECIALIZED AGENCIES* 7 et seq. (1968).

²³ See also, Monaco, *Les principes régissant la structure et le fonctionnement des organisations internationales*, 156 RECUEIL DES COURS 81 (1977-III).

attracted attention of, and was studied by various scholars²⁴ as well as those mentioned above. It was D. Ciobanu who attempted to analyze most systematically the interpretation process of constituent instruments — here the Charter of the United Nations — in connection with their legal characteristics.

Ciobanu, in his article "Impact of the Characteristics of the Charter upon Its Interpretation"²⁵ in 1975, tackled with the question "whether the methods, principles and rules usually applied in the process of treaty interpretation can without qualification be used for the interpretation of the Charter." After general observations upon the relationship between the Charter on the one hand, and general international law, other international agreements, and *jus cogens* on the other hand, he sheds light upon the following aspects of the Charter as a treaty.

- (1) The Charter is the broadest general multilateral treaty.
- (2) The Charter is theoretically a *traité fermé*, but it has actually become a *traité ouvert*.
- (3) The Charter is at the same time a *traité-contrat* and a *traité-loi*. In this connection, the characteristic of the Charter consists, in his view, in the fact that "the contractual bond among the Members of the Organization is of such a nature that the infringement of one or more provisions of the Charter by a Member cannot be an excuse for the infringement of the same or other of its provisions by other members."
- (4) The Charter is the constituent instrument of the most important international political organization. The double character of the Charter — as a general multilateral treaty and as a constitution of an international organization — has important consequences, such as the existence of the law which presents "un particularisme irréductible au droit interne ou droit international," the voting procedure by which "in certain defired situations member States will be bound by a rule adopted by a specified majority even though they may have voted in the minority," and the amendment procedure — Article 108 and 109 — which does not need the consent of all the member states. However, referring to the provision that the two-thirds majority required for the formal modification of the Charter must include all the permanent members of the Security Council, Ciobanu adds a caution that "it would be legally inadmissible and politically inadvisable to give the provisions of the Charter interpretations which amount to disguised modifications considered as such by a permanent Member."
- (5) The Charter is the most comprehensive political treaty with the largest participation. Its eminently political nature is apparent both in the purposes and the legislative history of the Charter. The text of the Charter was to provide a framework for the peaceful settlement of the inescapable political conflicts. Thus Ciobanu concludes: "It is this characteristic which appears to me to have the strongest impact upon the interpretation of the Chater . . ."

²⁴ See e.g., B.V. COHEN, *THE UNITED NATIONS: CONSTITUTIONAL DEVELOPMENTS, GROWTH, AND POSSIBILITIES* (1961); Mushkat, *De quelques problèmes relatifs à l'interprétation de la Charte et aux transformations de structure des Nations-Unies*, 17 *REVUE HELLÉNIQUE DE DROIT INTERNATIONAL* 240 (1964); Gordon, *The World Court and the Interpretation of Constitutive Treaties: Some Observations on the Development of an International Constitutional Law*, 59 *AM. J. INT'L L.* 794 (1965); Morawiecki, *Les fonctions des Nations Unies et leur efficacité*, 4 *POLISH Y.B. INT'L L.* 69 (1971); for an excellent analysis of the decisions of international tribunals, see Lauterpacht, *The Development of the Law of International Organization by the Decisions of International Tribunals*, 152 *RECUEIL DES COURS* 379 (1976-IV).

²⁵ *CURRENT PROBLEMS OF INTERNATIONAL LAW: ESSAYS ON U.N. LAW AND THE LAW OF ARMED CONFLICT* 3 (A. Cassese, ed. 1975).

Next, Ciobanu analyzed the impact of the characteristics of the Charter according to the three main school of interpretation. After confirming the essentially political nature of the interpretation, as pointed out by Kelsen, he proceeded to the first — “Intentions of the Parties” — school. Here the question is “whether the above characteristics of the Charter impose on the interpreter a limited recourse to the *travaux préparatoires* of the San Francisco Conference. Referring to several factors — both for and against —, Ciobanu suggests its selective use, agreeing with Kopelmanas: “En tant que la volonté des Membres originaires restera prédominante dans la structure de l’Organisation, on ne voit aucune raison de ne pas employer le procédé qui permet le mieux d’en dégager les tendances générales.”

With respect to the second — “Textual” — school, “the fundamental political question is that of whether one has to read the Charter as it was written in 1945.” Ciobanu thinks that “the political character of the Charter requires not only strict observance of the fundamental principles set out by the San Francisco Conference, but also permanent adaptation of the Charter to the changing conditions of the world.” Thus, “[t]o what extent one can depart when interpreting the Charter from the principle of contemporaneity and give the text a contemporary reading is primarily a political question,” and “apparently the question is not susceptible of a general answer.”

With respect to the third — “Teleological” — school, Ciobanu is rather cautious and critical of the prevalent tendency for the liberal (or dynamic) interpretation in the practice of the United Nations organs, pointing out that constitutional majorities could prove only that the procedural requirements for the adoption of resolutions were fulfilled, and that they could hardly be evidence for the correctness of the interpretation given the Charter.

In the light of these considerations, Ciobanu reaches a conclusion that “the existence of multiple characteristics of the Charter necessitates that a choice: (a) be made on political grounds, and (b) be generally acceptable. Then and only then can one have valid restatements of the provisions of the Charter which may, in the eyes of the law, change their original meaning.²⁶”

Finally, the problem of organs of interpretation is analyzed. Starting from the famous report on interpretation by Committee IV/2 (Legal Problems) of the San Francisco Conference, Ciobanu examines “whether the procedures recommended by the Committee for the interpretation of the Charter can be accommodated with the various characteristics of the Charter, and, generally speaking, with its *sui generis* character.” That is to say, judicial determination at the request of member states, advisory jurisdiction of the International Court of Justice, recourse to *ad hoc* committee of jurists or joint conference, interpretation by political organs, and interpretation by member states. It becomes clear that, in either case, a difference of opinion concerning the interpretation of the Charter is not institutionalized to get ultimately resolved.

In connection with the above conclusion, it should be pointed out that the situation is quite different in international economic organizations (such as the International Monetary Fund, the International Finance Corporation, and the International Bank for Reconstruction and Development). In these organizations, the power to adopt final interpretation of their

²⁶ *Id.* at 51.

own constituent instruments is conferred upon certain organs inside the organizations. Thus, the problem of interpretation process might be approached from a different angle.²⁷

7. The problem of interpretation process from the viewpoint of legal nature of constituent instruments has been getting more attention in the past several years.

D. Simon's *L'INTERPRÉTATION JUDICIAIRE DES TRAITÉS D'ORGANISATIONS INTERNATIONALES* is, although its analysis is limited to the jurisprudence — judgments and advisory opinions — of international courts, the most detailed study up to the present. The theme of this voluminous book which exceeds 900 pages is described as "d'examiner si la méthode d'interprétation est influencée par les caractéristiques propres des traités créateurs de structures d'organisation."

Based upon the comprehensive analysis of the jurisprudence in the first part, Simon reaches a conclusion that the judge seems to base its reasoning on the same fundamental principle:

"[I]l s'agit, dans tous les cas, de donner aux stipulations conventionnelles relatives aux compétences de l'organisation, ou aux pouvoirs des organes, la signification la plus favorable à l'élargissement des attributions des institution mises en place par la charte.²⁸"

But at the same time,

"pour déterminer le sens et la portée des conventions 'constitutionnelles,' le juge international fait preuve d'un remarquable éclectisme quant au choix des moyens d'interprétation qu'il est appelé à utiliser, et n'hésite pas à mêler méthodes extensives et restrictives, les différents procédés à sa disposition étant sélectionnés et combinés en fonction du résultat qu'il se propose d'atteindre.²⁹"

According to Simon, "s'il est vrai que les chartes constitutives, malgré leur contenu constitutionnel, restent fortemen teintée d'interétatique, il arrive également que les traités qualifiés d'ordinaires comporte, au-delà d'un échange synallagmatique de prestations, certain germes d'institutionnalisation," and this "interpénétration réciproque" is expressed by the "éclectisme" of interpretation methods.

From these considerations, Simon deduces the following observations:

"[L]'interprétation des conventions 'constitutionnelles' presente, par rapport à celle des conventions 'ordinaires,' une difference de degré et non de nature, ou si l'on préfère, une spécificité d'ordre quantitatif plus que qualitatif.³⁰"

²⁷ 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 Organizations 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).

²⁸ D. SIMON, *L'INTERPRÉTATION JUDICIAIRE DES TRAITÉS D'ORGANISATIONS INTERNATIONALES—MORPHOLOGIE DES CONVENTIONS ET FONCTION JURIDICTIONNELLE* 308 (1981).

²⁹ *Id.* at 456.

³⁰ *Id.* at 477.

“[L]e critère décisif dans le choix des méthodes d’interprétation n’est pas en réalité un critère ‘organique,’ opposant les conventions créant une organisation internationale et les conventions dites ordinaires, mais un critère complexe, que nous proposons d’appeler le degré d’intégration du système conventionnel en cause, étant entendu que ce critère ne conduit pas à une classification rigide des traités, mais à une gradation continue des instruments conventionnelle, selon la part restrictive de l’institution et du contrat dans l’économie d’ensemble de l’accord.³¹”

The second part of the book is devoted to the proof of these observations. Referring to the original definition of the notion of “institution” — système juridique autonome —, Simon suggests “interprétation systématique,” which can be summarized as follows:

“C’est donc bien la ‘structure’ du système juridique découlant de la convention qui détermine les principes dominant l’opération d’interprétation à laquelle se livrent les juridictions internationales. En termes plus dynamiques, le choix des méthodes d’interprétation effectué par le juge dépendra directement du degré de structuration de l’ordre juridique engendré par le traité: il est clair en effet que les conventions internationales présentent une gamme de systèmes juridiques extrêmement diversifiés, plus ou moins autonomes, plus ou moins hiérarchisés, plus ou moins complexes, dont le degré d’intégration normative impose une gradation corrélative dans le dosage des procédés interprétatifs employés par le juge.³²”

It is also pointed out that “la définition de la fonction juridictionnelle elle-même dans les différents ordres juridiques concernées” is the second factor in this regard, which conditions “la marge de manoeuvre dont [le juge] dispose dans le choix de ses méthodes d’interprétation.”

It is submitted that, in contrast to the mostly persuasive analysis in the first part, Simon’s systematization in light of the notion “institution” and that of “interprétation systématique” seems to be controversial.³³ This might suggest that the problems in this regard are too diverse and complexed to be clarified and analyzed from a single perspective.

This entangled situation has also been confirmed by the recent other articles, such as K. Skubiszewski’s “Remarks on the Interpretation of the United Nations Charter,³⁴” R. St. J. Macdonald’s “The United Nations Charter: Constitution or Contract?,³⁵” and E. McWhinney’s CONFLICT AND COMPROMISE (Chapter 4: The UN Charter: Treaty or Constitution?³⁶).

³¹ *Id.* at 478.

³² *Id.* at 490–91.

³³ See the review by J. Combacau (109 JOURNAL DU DROIT INTERNATIONAL 752, 754–55 (1982)); see also the review (in Japanese) by the present writer (83 KOKUSAIHO GAIKO ZASSHI (THE JOURNAL OF INTERNATIONAL LAW AND DIPLOMACY) 610, 614 (1984)).

³⁴ VÖLKERRECHT ALS RECHTSORDNUNG, INTERNATIONALE GERICHTSBARKEIT, MENSCHENRECHTE: FESTSCHRIFT FÜR HERMAN MOSLER 891 (1983).

³⁵ THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 889 (R. St. J. Macdonald & D. M. Johnston, eds. 1983).

³⁶ E. McWHINNEY, CONFLICT AND COMPROMISE: INTERNATIONAL LAW AND WORLD ORDER IN A REVOLUTIONARY AGE 53 (1981).

II. *Principal Doctrines upon the Interpretative Framework* —particularly with regard to the principle of *implied powers*³⁷—

8. Current principal doctrines upon the interpretative framework of constituent instruments of international organizations could, for analytical convenience, be classified into the following three categories in accordance with Fitzmaurice.³⁸

(i) International organizations *prima facie* have the powers expressly conferred on them by their constituent instruments, and only have such additional or implied powers as are necessary for the accomplishment of these expressed powers and no others.

(ii) International organizations must, in addition to the powers mentioned under (i), be deemed by implication to have the ancillary powers necessary to enable them to carry out their functions and fulfil their objects and purposes as laid down in their constituent instruments.

(iii) International organizations are not limited to what is expressed in or follows by implication from their constituent instruments, but must be regarded as having all such powers as are necessary to enable them to 'develop' in accordance with the requirements of international life.

Various doctrines would be located upon the continuum between the extreme (i)'s position and the extreme (iii)'s position.

Reference should also be made to the problem of legal personality since powers of international organizations — e.g., treaty-making power — have sometimes been discussed from the viewpoint of legal personality.³⁹ According to Rama-Montaldo,⁴⁰ concerning the method of determining whether or not an organization possesses international personality, there are the inductive and the objective approaches; concerning the legal consequences attaching

³⁷ Answering the question by the General Assembly whether, in the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, the United Nations, as an Organization, has the capacity to bring an international claim against the responsible government, the Court, in the advisory opinion in the *Reparation* case, recognized the capacity of the United Nations to exercise a measure of functional protection of its agents for bringing an international claim on their behalf in spite of the fact that there is no express provision to that effect in the Charter. On that occasion the Court, in order to justify the existence of that capacity from the comprehensive viewpoint of the functioning and purpose of the United Nations instead of its specific provisions, confirmed the existence of the following 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. (*Supra* note 6, at 182.)

This principle of implied powers enunciated by the Court seems to symbolize the favorable attitude of the Court which has been shown in a series of later advisory opinions toward effectiveness of international organizations. *See also*, in general, R. KAHN, *IMPLIED POWERS OF THE UNITED NATIONS* (1970); B. ROUYER-HAMERAY, *LES COMPÉTENCES IMPLICITES DES ORGANISATIONS INTERNATIONALES* (1962).

³⁸ 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).

³⁹ *See*, for convenience, Selected Bibliography on the Question of Treaties Concluded between States and International Organizations or between Two or More International Organizations [1974] 2-II *Y.B. INT'L L. COMM'N* 3, U.N. Doc. A/CN. 4/277.

⁴⁰ Rama-Montaldo, *International Legal Personality and Implied Powers of International Organizations*, 44 *BRIT. Y.B. INT'L L.* 111, 111-22 (1970).

to the concept of personality, there are the formal and the material approaches. In the present article, however, it would suffice to point out the statement by the International Court of Justice.

“[International personality] is no doubt a doctrinal expression, which has sometimes given rise to controversy. But it will be used here to mean that if the Organization is recognized as having that personality, it is an entity capable of availing itself of obligations incumbent upon its Members.⁴¹”

“What [the conclusion that the Organization is an international person] does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.⁴²”

9. *Strict Framework of the Law of Treaties*

Doctrines in this category would, focusing upon the aspect of 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 treaty interpretation.

(A) *Tunkin*

In the Soviet doctrines with regard to the question of international legal personality of international organizations, a dominant position is occupied by the affirmative.⁴³ As the fact that international organizations have certain rights and obligations under international law is generally recognized, such a controversy would be correctly described as a terminological one.⁴⁴

The emphasis, however, upon the secondary and derivative character of international organizations in contrast with the primary and original subject of international law (i.e., States) is connected with the following way of viewing constituent instruments:

“A treaty creating an international organization, usually called charter, statute, etc., like any other international treaty, is the result and an expression of the coordinated wills of participating States.⁴⁵”

Criticizing the views of, *inter alia*, Rosenne mentioned above, Tunkin describes the legal nature of constituent instruments as treaties *sui generis*.

“The charters of international organizations are international treaties having certain peculiarities, treaties *sui generis*. The statute of an international organization, in contrast to the usual multilateral international treaty, creates a permanent international entity which functions on its basis. It defines not only the rights and duties of states-

⁴¹ *Supra* note 6, at 178.

⁴² *Id.* at 179.

⁴³ Osakwe, *Contemporary Soviet Doctrine on the Juridical Nature of Universal International Organizations*, 65 AM. J. INT'L L. 502, 504 (1971).

⁴⁴ I. SEIDL-HOHENVELDERN, *DAS RECHT DER INTERNATIONALEN ORGANISATIONEN EINSCHLIEßLICH DER SUPRANATIONALEN GEMEINSCHAFTEN* 36 (4th ed. 1984).

⁴⁵ Tunkin, *The Legal Nature of the United Nations*, 119 RECUEIL DES COURS 1, 7 (1966-III).

parties to the treaty, but also the purposes and tasks of the organization, being an international organism distinct from states, the functions and jurisdiction of organs of the organization, the mutual relations between the organization and the member-states, and so forth. In other words, the statute of an international organization is a more complex phenomenon than the ordinary multilateral treaty.

It is natural, therefore, that the conclusion, and especially the operation of an international treaty such as the charter of an international organization, has certain peculiarities. However, all the basic provisions of the law of treaties are applicable to the charters of international organizations, in a number of instances with insignificant changes. In particular, the following provisions of the law of treaties are applicable to them: the conclusion and entry into force of multilateral treaties, except for certain provisions relating to reservations; the invalidity of treaties; the amendment and interpretation of treaties; the operation of international treaties; and above all the basic principle of this section of the law of treaties — *pacta sunt servanda*; the significance of treaties for third states; and so forth.⁴⁶

In accordance with this position, Tunkin criticizes 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.

"As the problem of implied competence of international organization is a problem of interpretation of constituent treaties and supplementary agreements, generally accepted rules on interpretation of international treaties should apply in a case where the question of implied competence arises.⁴⁷"

"[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.⁴⁸"

This fundamental position is coherent with regard to the relationship between the practice of international organizations on the one hand and the modification and development of constituent instruments on the other hand.

"[T]he amendment through custom of certain provisions of the charter of an international organization which are not basic is possible in those instances when: (a) a practice has been formed in a given international organization with which all members of this organization have agreed; (b) this practice is evidence of an agreement of members of the organization to amend the respective provisions of its charter.

The basic element is that the charter of an international organization, being an international treaty, can be amended only by states-parties to this treaty, and not by the international organization itself, created by the treaty.⁴⁹"

⁴⁶ G.I. TUNKIN, *THEORY OF INTERNATIONAL LAW* 325 (W.E. Butler trans. 1974).

⁴⁷ Tunkin, *supra* note 45, at 24.

⁴⁸ *Id.* at 25.

⁴⁹ Tunkin, *supra* note 46, at 339.

(B) *Kelsen*

Kelsen states that the United Nations possesses international juridical personality defined as the capacity of being a subject of legal duties and legal rights, of performing legal transactions and of suing and being sued at law, and that the constituent treaty need not expressly confer upon international community juridical personality, which is — or is not — implied in the substantial provisions of the constituent treaty.

“However, if the constituent treaty does not contain a provision conferring expressly upon the community international juridical personality, that is to say unrestricted legal capacity under international law, the community has only those special capacities as conferred upon it by particular provisions.⁵⁰”

Kelsen is well aware of the discrepancy between his position and the actual practice of the United Nations (e.g., treaty-making, and active and passive legation), and expresses his doubt over the constitutionality of treaties not authorised by the Charter.

In this regard the following statement in the supplement: RECENT TRENDS IN THE LAW OF THE UNITED NATIONS is quite suggestive.

“The actions analyzed in this Supplement are all attempts to find a way out of the impasse in which the unfortunate rule of unanimity has led the United Nations. Viewed retrospectively with regard to the Charter, these actions may, in some of their aspects, be considered unconstitutional. But directing our view towards the future, we may see them as the first steps in the development of a new law of the United Nations.

. . . [T]he principle *ex injuria jus non oritur* — law cannot originate in an illegal act — has important exceptions. There are certainly cases where a new law originates in the violation of an old law. If and in so far as [these actions] are inconsistent with the old law of the United Nations, they, perhaps, constitute one of these cases of which we may say *ex injuria jus oritur*.⁵¹”

(C) We could also mention such scholars as Prandler,⁵² Haraszti⁵³ and Hackworth.⁵⁴ These are all critical of the Court’s formulation of implied powers and delimit the functions and powers of international organizations to those deduced from the constituent instruments interpreted within the strict framework of the law of treaties.

10. *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 from their efficient and effective functioning rather than from controlling by their constituent instruments.

(A) *Alvarez*

Starting from his own characterization of the international society, Alvarez developed

⁵⁰ H. Kelsen, *THE LAW OF THE UNITED NATIONS, A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS* 329–30 (1950).

⁵¹ H. Kelsen, *RECENT TRENDS IN THE LAW OF THE UNITED NATIONS* 911–12 (1951).

⁵² Prandler, *Competence of the Security Council and the General Assembly*, *QUESTIONS OF INTERNATIONAL LAW* 153 (G. Haraszti, ed. 1977).

⁵³ G. Haraszti, *SOME FUNDAMENTAL PROBLEMS OF THE LAW OF TREATIES* 171–73 (1973).

⁵⁴ *Supra* note 6, at 198.

the concept of the "New International Law,⁵⁵" which would lead to the original way of interpreting constituent instruments.

In his individual opinion in the advisory opinion with respect to the *Conditions of Admission* case, Alvarez described the character of the international society as a veritable one which comprises all states throughout the world, without there being any need for consent on their part or on that of other states. Here the traditional distinction between what is legal and what is political, and between law and politics, has been profoundly modified, and there are no more strictly legal issues.

"A new conception of law in general, and particularly of international law, has also emerged. The traditionally *juridical* and *individualistic* conception of law is being progressively superseded by the following conception: in the first place, international law is not strictly juridical; it is also political, economic, social and psychological; . . . In the next place, strictly individualistic international law is being more and more superseded by what may be termed the *law of social interdependence*. The latter is the outcome, not of theory, but of the realities of international life and of the juridical conscience of the nations.⁵⁶"

This "New International Law" proposes to interpret treaties in such a way as to ensure that institutions and rules of law should continue to be in harmony with the new conditions in the life of the peoples. Alvarez, pointing out the necessity to establish a new theory of interpretation, contrasted the old and the new system of interpretation as follows⁵⁷:

(1) Old System of Interpretation

- (i) No distinction was made between treaties: the same rules of interpretation were applied in all cases.
- (ii) Those who interpreted the treaties were slaves, so to speak, of the wording. When the wording was clear, it had to be applied literally, without taking into account the possible consequences.
- (iii) When a text was not clear, recourse was had to the *travaux préparatoires*.
- (iv) The interpretation of a given text, notably of a treaty, was, so to speak, immutable. No change could be made, even if the matter considered had undergone modifications.

(2) New System of Interpretation

- (i) Distinctions must be made between different kinds of treaties. Three categories of treaties — peace treaties, in particular those affecting world peace; treaties creating principles of international law; and treaties creating international organizations, notably the world organization — possess both a political and a psychological character, and are not to be interpreted literally, but primarily having regard to their purposes.
- (ii) Even the clear provisions of a treaty must not be given effect, or must receive appropriate interpretation, when, as a result of modifications in international life, their application would lead to manifest injustice or to results contrary to the aims of the institution. Thus,

⁵⁵ See 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).

⁵⁶ Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), [1948] I.C.J. 69.

⁵⁷ Competence of the General Assembly for the Admission of a State to the United Nations, [1950] I.C.J. 16-18.

it is possible, by way of interpretation, to attribute to an institution rights which it does not possess according to the provisions by which it was created, provided that these rights are in harmony with the nature and objects of the said institution (e.g. the *Reparation* case).

(iii) When interpreting treaties, even those which are obscure, and especially those relating to international organizations, it will be necessary to exclude the consideration of the *travaux préparatoires* for different reasons:

(a) they contain opinions of all kinds; (b) when States decide to sign a treaty, their decision is not influenced by the *travaux préparatoires*, with which, in many cases, they are unacquainted; (c) the increasing dynamism of international life makes it essential that the text should continue to be in harmony with the new conditions of social life. It is therefore necessary, when interpreting treaties — in particular, the Charter of the United Nations — to look ahead, that is to have regard to the new conditions, and not to look back, or have recourse to *travaux préparatoires*.

(iv) The interpretation of treaties must not remain immutable. It will have to be modified if important changes take place in the matter to which it relates.

From these considerations, the legal nature of international organizations would be understood as follows:

“[A]n institution, once established, acquires a life of its own, independent of the elements 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.⁵⁸”

(B) *Seyersted*

The theory of inherent powers of international organizations proposed by Seyersted is based upon the various kinds of practice of international organizations. Seyersted draws attention to the fact that expressly authorizing provisions for the following practice would not always be found in the constituent instruments.⁵⁹

(i) Organic Jurisdiction. All international organizations — no matter how small and technical they are or how limited their field of activity may be — exercise exclusive jurisdiction over their organs. They enact regulations which govern procedure, rights and duties of the staff *vis-à-vis* the organizations, and other relations within and between the several organs of the organizations.

(ii) Capacity to Conclude Treaties. Limited number of provisions in the Charter (e.g., Arts. 43, 57(1), 63(1), 77, 79, 105) have not estopped the United Nations from concluding a great number of other treaties, both with States and with other international organizations. Only a small fraction of the treaties concluded by the United Nations fall within the categories authorized in the Charter, and the same applies to a number of other organizations.

(iii) Territorial Jurisdiction. The League of Nations, which in the Covenant was only authorized to exercise limited territorial powers in respect of mandates, acting through mandatory States, exercised full powers of government in the Saar, through a Governing Commission appointed by it; and limited powers in respect of Danzig, through a High Commissioner appointed by it. The United Nations, although never exercised territorial jurisdiction to that extent, decided to assume limited governmental functions in disputed

⁵⁸ *Supra* note 56, at 68.

⁵⁹ Seyersted, *United Nations Forces, Some Legal Problems*, 37 BRIT. Y.B. INT'L L. 351, 448-53 (1961).

territories (e.g., the proposed Free Territory of Trieste, the City of Jerusalem), despite the fact that the Charter only authorizes it to exercise territorial powers in respect of trust territories.

(iv) Other International Acts. International organizations receive (and even send) "diplomatic" representatives, convene intergovernmental conferences, present international claims on behalf of themselves and their officials, undertake to settle disputes with States by international arbitration, etc.

These and other examples would, says Seyersted, probably sufficiently demonstrate that the capacity of international organizations is not confined to such acts or rights as are specified in their constituent instruments, and that this is a well-established principle of the customary law of international organizations.

"[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.⁶⁰"

"It is not the provisions of the constitution or the intention of its framers which establish the international personality of a State or an intergovernmental organization, but the objective fact of its existence. The international capacities are *inherent* in intergovernmental organizations as they are in States, and not *delegated* by (or *implied* in) the provisions of their constitutions.⁶¹"

What, then, is the significance of constituent instruments? The constituent instruments are important since they may authorize international organizations to make decisions binding upon the Member States or to exercise jurisdiction over their territory, nationals or organs. No organization can exercise such powers — extended jurisdiction — without special legal basis. Outside the field of such extended jurisdiction, they have legal significance only in a *negative* sense: (1) They may preclude the exercise of certain capacities which otherwise are inherent in international organizations as well as in States. (2) Many constituent instruments contain rules on the distribution of competences between the various organs and on the procedures under which these shall act, and violation of these may entail the internal invalidity of their decisions.

This principle of inherent capacities is claimed by Seyersted to reflect more adequately the position as it is in practice.

11. *Functional Framework Based upon the Law of Treaties*

(A) *With Respect to the Guiding Principle*

Most of the current doctrines in the western world 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. Goodrich, for example, states:

"The Charter . . . provided the legal basis for an international organization devoted

⁶⁰ 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).

⁶¹ *Id.* at 45.

to important common purposes. The United Nations was brought to life in a rapidly changing world. . . . [B]y the time the Charter entered into force . . . , the world political situation had seriously deteriorated and a major assumption on which the effectiveness of the Organization had been based seemed increasingly devoid of reality. If the infant Organization was to survive and become a factor of importance in the life of the world it was necessary from the beginning that it show a capacity to adapt itself to changing conditions and to develop roles and activities which might not even have been envisaged by its founders. To meet the needs of a rapidly changing world and to find a place of importance in this world, adaptation and growth were the alternatives to death and oblivion.⁶²

Among the various techniques of “adaptation and growth” (e.g., amendment, interpretation, non-application, and supplementary agreements), interpretation has occupied a very important role, particularly in those organizations where amendment is almost impossible for political reasons. Thus, in the interpretation of the Charter, the members of the United Nations are said to have tended to adopt one of two competing principles of interpretation, depending upon which better serves their particular purposes: restrictive interpretation and liberal interpretation. This certainly reflects differences with respect to the significance to be attached to the fact that the Charter is the constitution of an international organization in addition to being a treaty between States.⁶³ The evolution in this regard is explained by Bowett as follows:

“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.⁶⁴”

The guiding principle in interpreting the Charter has evolved from the static to the dynamic (at least in the western world). 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.⁶⁵

(B) *Various Doctrines*

(i) Schermers and McMahon⁶⁶ would be relatively closer to the first — strict — category as they seem to be based upon the reasoning of “logical presupposition.” Schermers, for example, states:

⁶² L.M. GOODRICH, *THE UNITED NATIONS* 62 (1960).

⁶³ L.M. GOODRICH, *THE UNITED NATIONS IN A CHANGING WORLD* 36 (1974).

⁶⁴ D.W. BOWETT, *UNITED NATIONS FORCES, A LEGAL STUDY OF UNITED NATIONS PRACTICE* 307–8 (1964).

⁶⁵ D.W. BOWETT, *THE LAW OF INTERNATIONAL INSTITUTIONS* 301 (3rd ed. 1975).

⁶⁶ McMahon, *The Court of the European Communities Judicial Interpretation and International Organizations*, 37 *BRIT. Y.B. INT'L L.* 320 (1961).

“Many powers can only be exercised on the basis that other powers exist. Thus would it be impossible to apply sanctions against a Member, unless a right exists officially to recognize a violation of obligations. The right of sanction implies a right to recognize violations. Often the task and structure of organs imply certain powers for those organs. . . .

. . . .

We may suppose that tasks attributed to a particular organization imply a competence without which those tasks could not be performed in a reasonable and useful manner.⁶⁷”

(ii) Many scholars would be content with reiterating the reasoning and framework used by the Court in the *Reparation* case.⁶⁸ Weissberg, however, while based upon the reasoning of the Court, presents a realistic view:

“While it is not suggested that personality permits an entity to enter into areas for which it was not created, and while theoretically the exercise of substantive powers does not clothe the organization with new functions, but merely concerns the administration of the original ones, realistically this is far from the case. The interpretation or detailed application of a particular function is frequently more significant than the original power itself, and often leads to the assumption of new, additional or unforeseen functions, although it may be said that basically these are derived from the initial one.⁶⁹”

(iii) Those scholars who give more considerations to the practice of international organizations (e.g., Vallat⁷⁰ and Bowett) would be closer to the second — liberal — category. Bowett, for example, states:

“There would seem little doubt that, in practice, organizations take [a more liberal] view and instances abound of organizations acting in a manner which is neither specifically envisaged in their constitutions nor *necessary* to give effect to them.⁷¹”

“The position is therefore more accurately stated by saying that the United Nations may perform any action which is not specifically forbidden under the Charter, provided that it is within the Principles and Purposes of the Charter.⁷²”

12. *Some Comments*

(A) *With Respect to the Liberal Position*

While the theory of inherent powers proposed by Seyersted seems to involve a great sacrifice of State sovereignty at a glance, it claims much less. In fact it is admitted that special legal basis is needed to make decisions binding upon the member States. On the

⁶⁷ H.G. SCHERMERS, *INTERNATIONAL INSTITUTIONAL LAW* 208–9 (1980).

⁶⁸ See e.g., Kahn, *supra* note 37, at 33.

⁶⁹ G. WEISSBERG, *THE INTERNATIONAL STATUS OF THE UNITED NATIONS* 24 (1961).

⁷⁰ Vallat, *The Competence of the United Nations General Assembly*, 97 *RECUEIL DES COURS* 203, 249–50 (1959-II).

⁷¹ Bowett, *supra* note 65, at 301.

⁷² Bowett, *supra* note 64, at 309.

other hand, the theory of implied powers might be claimed to be little different in its actual application from the theory of inherent powers. Seyersted claims:

“While the formula applied by the majority of the International Court of Justice may, in its point of departure, theoretically appear more closely related to the doctrine of delegated powers, there is probably little or no difference as to the practical results between this formula and the doctrine of inherent powers. . . , provided that the criteria ‘necessary implication’ and ‘essential to the performance of its duties’ continue to be applied in the same liberal way as hitherto.⁷³”

The theory of inherent powers, however, has been criticized on the following points.

- (i) Rama-Montaldo points out the inadequacy of proof in this respect.

“[Seyersted] tries to find in the practice of international organization a clear equation of organizations to States, but makes no attempt to determine whether all those ‘international acts and capacities,’ all those activities of international organizations, really form a common category which may be considered as a necessary consequence of personality.⁷⁴”

- (ii) The 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.⁷⁵ The Court, for example, pronounced in the *Reparation* case as follows:

“Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.⁷⁶”

- (iii) There can be no doubt for the derivative character of international organizations. As Seidl-Hohenveldern observes,

“[Seyersted] rejects the prevailing view, which considers [international organizations] to be merely ‘derived subjects’ *i.e.* subjects deriving their personality from a grant by the only original subjects of international law, *i.e.* by the States. However, without an act to that effect by the founding States, no organization will ever come into existence. On the other hand, by unanimous decision, the member States at any moment can modify at will or even terminate the existence of the organization against the latter’s will and even against specific provisions in the latter’s charter — without committing an international delinquency.⁷⁷”

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, Alvarez claimed that the General Assembly may still

⁷³ Seyersted, *supra* note 59, at 458.

⁷⁴ Rama-Montaldo, *supra* note 40, at 119–20.

⁷⁵ *Id.* at 121. See also Seidl-Hohenveldern, *The Legal Personality of International and Supranational Organizations*, 21 *REVUE ÉGYPTIENNE DE DROIT INTERNATIONAL* 35, 41–42 (1965).

⁷⁶ *Supra* note 6, at 180; see also *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, [1962] I.C.J. 168.

⁷⁷ Seidl-Hohenveldern, *supra* note 75, at 61.

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 specifically criticized by the Court:

“[This view] would be to deprive the Security Council of an important power which has been entrusted to it by the Charter. It would almost nullify the role of the Security Council in the exercise of one of the essential functions of the Organization. It would mean that the Security Council would merely to study the case, present a report, give advice, and express an opinion. This is not what Article 4, paragraph 2, says.⁷⁸”

Thus, his argument is, in its concrete application, more an argument *de lege ferenda*, or, in Samore's stern expression, “a house of cards.”⁷⁹

(B) *With Respect to the Strict Framework*

Kelsen's argument has been criticized by Schachter. Kelsen, despite his claim that he would present “all possible interpretations,” fails, says Schachter, even to present the interpretations which have, in fact, been advanced by member states and in some cases adopted by the competent organs of the United Nations. Giving several examples, Schachter states:

“They reveal, it seems to me, the logical (as well as the empirical) weakness of Kelsen's analysis. For there is nothing in the ‘laws of logic’ to warrant Kelsen's rejection of these other interpretations; indeed, in some cases, his narrow interpretation may be attributed to a failure to use logical analysis. . . .

Kelsen's apparent use of ‘logic’ to support restrictive interpretation results largely from his tendency to give the concept of the Charter fixed and limited meanings, almost as though they were precisely defined mathematical symbols. . . .

But there are certainly no ‘logical’ reasons why the admittedly vague and imprecise language of the Charter must be restricted in meaning.⁸⁰”

It is not evident to what extent Tunkin would accept as constitutional the various kinds of practice Seyersted explained. The following statement, however, based upon the realistic recognition of the actual political structure cannot be easily ignored:

“It may be argued that the principles we have stated . . . are too rigid and prevent the adaptation of the Charter to changing international life.

However, those are not only express legal requirements but also the requirements dictated by the very nature of the United Nations.

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.⁸¹”

⁷⁸ *Supra* note 57, at 9.

⁷⁹ Samore, *The New International Law of Alejandro Alvarez*, 52 AM. J. INT'L L. 41, 54 (1958).

⁸⁰ Schachter, *Reviews, The Law of the United Nations*, 60 YALE L.J. 189, 192-93 (1951).

⁸¹ Tunkin, *supra* note 45, at 28.

III. *Concluding Remarks*

The development of the notion "caractère constitutionnel" of constituent instruments of international organizations has been briefly traced by introducing some of the important works up to the present. It is submitted that this notion will draw more attention and become more important as international organizations will increasingly develop and step into delicate and controversial fields. The controversies in this regard would be mostly fought on the level of how certain provisions or a structure of constituent instruments should be interpreted. It is from this viewpoint that the bird's-eye view of principal doctrines of interpretative framework, especially with regard to the legal principle of implied powers, has been given.

The criticism against the doctrines in the functional framework by those in the strict framework cannot be easily brushed aside as their arguments are based upon the power structure of the international society. Some of the controversial activities of the United Nations which the Soviet Union and other States claim to be unconstitutional still continue to be problematical.⁸²

On the other hand, the doctrines in the functional framework are also divided among themselves in terms of the extent and character of the implied powers. 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. If, and so far as a treaty interpretation "is to some extent an art, not an exact science,"⁸³ and involves a practical judgment of the interpreter, the analysis must be attempted to go deep enough to the level of value judgments with respect to the treaty aspect and the constitutional aspect of constituent instruments. Furthermore, if this judgment is not to be arbitrary, we should seek some regulatory elements in such materials as rules of treaty interpretation, and analysis of the jurisprudence of the International Court of Justice in terms of the guiding principle in its reasoning. So far as the interpretation of constituent instruments is related to the mechanism proper to international organizations in contrast with ordinary treaties, this mechanism must also be analyzed and taken into consideration.⁸⁴ It is expected that the interpretative framework of constituent instruments will not be the same as that of ordinary treaties, but that it will not be simple enough to be set out conveniently with a single formulation.

⁸² The typical example is the financial crisis caused by the disagreement among great power members over the peace-keeping operations of the United Nations Emergency Force (UNEF) and the United Nations Operation in Congo (ONUC). Although the United Nations has survived the crisis by issuing the UN bonds, it simply postponed the solution only to make it more difficult and complex. Those which refused to pay for UNEF and ONUC simply withheld the part of their contributions which constituted the reimbursement of the UN bonds. Many developing countries object to the repayment being included in the regular budget.

⁸³ Draft Articles on the Law of Treaties with Commentaries, Adopted by the International Law Commission at Its Eighteenth Session, [1966] 2 Y.B. INT'L L. COMM'N 218, para. 4.

⁸⁴ The present writer attempts to analyze these and other points in the rest of the article cited above.