

7^{ème} Commission

Are there Limits to the Dynamic Interpretation of the Constitution and Statutes of International Organizations by the Internal Organs of such Organizations (with Particular Reference to the UN System)?

Y a-t-il des limites à l'interprétation dynamique de la Constitution ou du statut des organisations internationales par les organes de celles-ci, avec une référence particulière au système des Nations Unies ?

Rapporteur : Mahnoush Arsanjani

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La commission est composée de MM. Georges Abi-Saab, Jean Michel Arrighi, Olufemi Elias, Giorgio Gaja, Dame Rosalyn Higgins, M. Edward Kwakwa, Mme Vanda E. Lamm, MM. Roy S. Lee, Václav Mikulka, Rafael Nieto-Navia, Dražen Petrović, Pemmaraju Sreenivasa Rao, Nicolaas Schrijver, Budislav Vukas.

Introductory Note

A comprehensive Report together with a Draft Resolution was submitted to the *Institut* at its session in 2019 in The Hague. The discussions there centered on the Draft Resolution and culminated in requesting the Rapporteur and the Seventh Commission to submit a revised Draft Resolution for consideration at the Beijing Session in 2021.

As the Report is large, a few observations may serve to sharpen the focus for this phase of the *Institut's* deliberation.

While the topic requires an extensive examination of the practice of international organizations, it is essentially narrow in its scope; whether there are limits to the “dynamic interpretation” of the constituent instruments of international organizations by the internal organs of these organizations. The topic requires examination of the practice of these organizations in performing their functions to identify if it reveals a trend of dynamic interpretation of constituent instruments and, if so, its extent. But the topic is not about the rules of interpretation as applied to the constituent instruments of international organizations. Those rules are already set forth by Articles 31-33 of the Vienna Convention on the Law of Treaties with the caveat provided specifically for constituent instruments of international organization in Article 5 of that Convention.

The title of the topic refers generally to “international organizations”, then it specifies that it is “with particular reference to the UN system”. Not all international organizations are the same; they are not established the same way nor do they operate the same way. Indeed, the concept itself of what an “international organization” is has evolved. The United Nations and its Specialized Agencies, as “international organizations”, are “intergovernmental organizations”, established by treaty, have States as their members and they are the product of a particular period in international relations where States were the predominant actors. Outside the UN system, other intergovernmental organizations also established by treaties have mandates specific to particular matters and or specific regions. But the term “international organizations” now includes organizations not necessarily established by “treaties” and/or with entities other than States as their

members and have different operative rules and practices than the organizations within the UN system.

In view of the diversity among the numerous contemporary international organizations, it is neither practical nor useful to try to treat all international organizations under the same umbrella for the purposes of this project. For these reasons, the Report has limited its enquiry to the practice of the United Nations and its Specialized Agencies as an identifiable and coherent group of international organizations under a single system. Hence the modification of the title of the topic: “Limits to the Dynamic Interpretation of their Constituent Instruments by the Organs of the United Nations and International Organization within the United Nations System”.

A study of the practice of international organizations’ dynamic interpretation of their constituent instruments perforce requires a thorough examination of their actual practice since their inception and, with regard, to the Charter since its adoption in 1945.

The interpretation of its constituent instrument is a “workaday task” of an international organization presented in an endless stream of novel legal issues. These interpretations are not theoretical exercises nor are they identified as legal acts of “interpretation”. In practice, the constituent instruments of international organizations are interpreted almost on a daily basis, by their organs, for the performance of their functions. The instruments being applied are largely drafted in general terms allowing considerable scope for interpretation and adaptation to the changing circumstances which the organizations may encounter. Because of the daily application of their constituent instruments, international organizations are in fact in a continuous process of interpretation, some of which may lead to *de facto*, or informal, modification of their instruments.

The review of the practice of the United Nations demonstrates that highly significant activities of the United Nations in the past seventy five years owed their existence to the dynamic interpretation of relevant provisions of the Charter, including, but not limited to, the establishment of peacekeeping missions, the principle of self-determination, the residual power of the Security Council, the establishment of the ICTR and ICTY, and the Security Council taking action even when a Permanent Member has not cast an affirmative vote, but has abstained, or voluntarily abstained from attending the meeting of the Security Council.

Overall, international organizations have been cautious in interpreting their constituent instruments, relying on the instruments and taking account of the fundamental principles of international law, often reaffirmed, initiated and promoted by the organizations themselves. For example, the General Assembly relied on its Universal Declaration of Human Rights in interpreting and elaborating the concept and content of the principle of self-determination in Article 1(2) of the Charter and, in this regard, in determining the United Nations' responsibility under Charter Articles 55, 73 and 76. Similarly, the Security Council has relied on the obligation to protect civilians in expanding the scope of "threat to the peace, breach of the peace, or act of aggression" in Article 39, and the measures it is authorized to take under Charter Article 41.

As multilateral treaties, these constituent instruments also include amendment procedures. But amendments to multilateral treaties, in general, and to constituent instruments of international organizations, in particular, are cumbersome. This is even more relevant in the current stage of international law, where States are less and less inclined to draft multilateral treaties and to become parties to them, bearing in mind, in particular, the often lengthy internal constitutional requirement for ratification.

The dynamic interpretive practice of international organizations has been compelled and facilitated by the general language of many of the provisions of their constituent instruments. Permissive language allows the organizations to fill organizational gaps, to fulfill the intentions of their drafters, and to remain relevant in the face of the challenges they confront.

A review of the legislative history of the constituent instruments of many of these organizations and by their practice reveals the understanding that international organizations can only function if there is general agreement among the members of these organizations on their direction and operation. International organizations are established on the basis of what Goodrich and Hambro referred to as "the principle of voluntary cooperation between states in the promotion of common objectives." It is presumed that if international organizations fail to interpret their constituent instruments consistent with principles of justice and international law, as provided in Article 1(1) of the Charter, and in the absence of support and cooperation among their membership, it will lead to their dissolution. The essential requirement of cooperation embedded in the structure and manner in which these international organizations operate provides an internal control mechanism

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which addresses their interpretative needs and provides for such corrective steps as may be necessary.

DRAFT RESOLUTION
Limits to the Dynamic Interpretation of their Constituent Instruments
by the Organs of the United Nations and International Organizations
within the United Nations System

The Institute of International Law,

Noting that international organizations are established by multilateral agreements or by decisions of other international organizations,

Noting that organs of international organizations routinely interpret their constituent instruments in the course of their operations and may sometimes have to adjust quickly to the new challenges in their changing environments in order to remain relevant and perform their assigned functions,

Noting also that interpretation may be necessary when the constituent instrument of an international organization is ambiguous or silent on a specific issue,

Noting further that it has been uncertain whether dynamic interpretation may only take place if an existing text of a constituent instrument is ambiguous, or whether it may also take place in the absence of any relevant text addressing the issue at hand,

Recognizing that, in principle, the appropriate use of amendment procedures of constituent instruments of international organization is conducive to maintaining the integrity and coherence of those instruments,

Recognizing further that amendment procedures for the modification of constituent instruments of international organizations may, however, be cumbersome and that there are situations in which amendment procedures may impede timely change and be deemed inappropriate by the organization,

Whereas this Resolution, and the Report¹ on which it is based, employs the term dynamic interpretation to refer to interpretation of constituent instruments in order to achieve perceived needs of an international organization that are compatible with its object, purpose and functions,

¹ “Are there Limits to the Dynamic Interpretation of the Constitution and Statutes of International Organizations by the Internal Organs of such Organizations (with Particular Reference to the UN System)?”, *Annuaire de l’Institut de Droit international*, Session de La Haye, vol. 80, 2019.

Recalling that the legislative history of the constituent instruments of certain international organizations shows that these organizations were allowed to interpret their own constituent instruments, in certain cases without external oversight,

Whereas it has been uncertain as to whether there are limits to the entitlement of international organizations to engage in dynamic interpretation; and if so, what those limits might be,

Whereas these legal issues assume great importance, because highly significant activities of some international organizations have owed their existence to the dynamic interpretation by these organizations of their constituent instruments,

Having considered the Report of the Seventh Commission;²

1. *Notes* that international organizations may interpret their constituent instruments dynamically to address current challenges and fill unforeseen gaps;
2. *Considers* that Articles 31-33 of the Vienna Convention on the Law of Treaties which reflect customary international law should be applied in the interpretation of the constituent instruments of international organizations, taking into account any relevant rules of the organizations as provided in Article 5 of the aforesaid Convention;
3. *Affirms accordingly* that the dynamic interpretation by international organizations of their constituent instruments shall be consistent with those instruments and in particular with their object, purpose and functions;
4. *Further affirms* that the dynamic interpretation by international organizations of their constituent instruments shall take account of the fundamental principles of international law, often reaffirmed, initiated and promoted by these organizations themselves;
5. *Emphasizes* that the dynamic interpretation by international organizations of their constituent instruments may not violate *jus cogens* or internationally protected fundamental human rights;
6. *Is of the opinion* that since no international organization is an island unto itself, but is a part of an ensemble of institutions sharing a broad common interest in world order, international organizations, in exercising their competence to interpret their constituent instruments, shall pay due regard to the functions assigned to other international organizations;

² *Id.*

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7. *Finds* that, unless otherwise provided in the constituent instrument of the international organization, when there is a general agreement among the membership of the international organization as to an interpretation, the interpretation should be presumed to be lawful and *intra vires*.

PROJET DE RÉSOLUTION
Limites à l'interprétation dynamique des actes constitutifs par
les organes des Nations Unies et des organisations internationales
au sein du système des Nations Unies

L'Institut de Droit international,

Considérant que les organisations internationales sont établies par accords multilatéraux ou par décisions d'autres organisations internationales,

Considérant que les organes des organisations internationales interprètent régulièrement leurs actes constitutifs au cours de leurs opérations et peuvent parfois devoir s'adapter rapidement aux nouveaux défis de leur environnement changeant afin de rester pertinents et de s'acquitter des fonctions qui leur sont confiées,

Notant également que l'interprétation peut être nécessaire lorsque l'acte constitutif d'une organisation internationale est ambigu ou muet sur une question spécifique,

Notant en outre qu'il n'est pas certain que l'interprétation dynamique ne puisse avoir lieu que si un texte existant d'un acte constitutif est ambigu, ou si elle peut également avoir lieu en l'absence de tout texte pertinent traitant de la question en cause,

Reconnaissant qu'en principe, l'utilisation appropriée des procédures d'amendement des actes constitutifs d'une organisation internationale est propice au maintien de l'intégrité et de la cohérence de ces instruments,

Reconnaissant en outre que les procédures d'amendement pour la modification des actes constitutifs des organisations internationales peuvent cependant être lourdes et qu'il existe des situations dans lesquelles les procédures d'amendement peuvent empêcher des changements en temps opportun et être jugées inappropriées par l'organisation,

Considérant que la présente résolution, et le rapport sur lequel elle se fonde, emploie le terme d'interprétation dynamique pour se référer à l'interprétation des actes constitutifs afin de répondre aux besoins perçus d'une organisation internationale qui sont compatibles avec son objet, son but et ses fonctions,

Rappelant que l'historique législatif des actes constitutifs de certaines organisations internationales montre que ces organisations étaient autorisées à interpréter leurs propres actes constitutifs, dans certains cas sans contrôle externe,

Vu qu'il n'est pas certain qu'il existe des limites au droit des organisations internationales de s'engager dans une interprétation dynamique ; et si oui, quelles pourraient être ces limites,

Vu que ces questions juridiques revêtent une grande importance, car les activités très importantes de certaines organisations internationales ont dû leur existence à l'interprétation dynamique par ces organisations de leurs actes constitutifs,

Ayant examiné le Rapport de la 7^{ème} Commission ;

1. *Note* que les organisations internationales peuvent interpréter leurs actes constitutifs de manière dynamique pour relever les défis actuels et combler des lacunes imprévues ;
2. *Considère* que les articles 31 à 33 de la Convention de Vienne sur le droit des traités, qui reflètent le droit international coutumier, devraient être appliqués dans l'interprétation des actes constitutifs des organisations internationales, en tenant compte de toutes règles pertinentes des organisations prévues à l'article 5 de la Convention précitée ;
3. *Affirme* en conséquence que l'interprétation dynamique par les organisations internationales de leurs actes constitutifs doit être compatible avec ces instruments et en particulier avec leur objet, leur but et leurs fonctions ;
4. *Affirme en outre* que l'interprétation dynamique par les organisations internationales de leurs actes constitutifs tiendra compte des principes fondamentaux du droit international, souvent réaffirmés, initiés et promus par ces organisations elles-mêmes ;
5. *Souligne* que l'interprétation dynamique par les organisations internationales de leurs actes constitutifs ne saurait enfreindre les normes de *jus cogens* ou les droits humains protégés au niveau international ;
6. *Est d'avis* qu'aucune organisation internationale n'est une île en soi, mais fait partie d'un ensemble d'institutions partageant un large intérêt commun pour l'ordre mondial, les organisations internationales, dans l'exercice de leur compétence pour interpréter leurs actes constitutifs,

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doivent tenir dûment compte aux fonctions attribuées à d'autres organisations internationales ;

7. *Dit* que, sauf disposition contraire de l'acte constitutif de l'organisation internationale, lorsqu'il existe un accord général entre les membres de l'organisation internationale sur une interprétation, celle-ci doit être présumée licite et intra vires.
